

December 8, 2014

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
Suite CC-5610 (Annex D)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: MPHJ Technology Investments, LLC, et al. – Consent Agreement;  
File No. 142 3003**

Dear Secretary Clark:

The American Intellectual Property Law Association (“AIPLA”) respectfully submits this comment in response to the Federal Trade Commission’s Federal Register Notice (“the Notice”), dated November 13, 2014, regarding a proposed consent agreement in the above-referenced matter, settling alleged violations of federal law prohibiting unfair or deceptive acts or practices. 79 Fed. Reg. 67435.

AIPLA is a national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, as well as those who litigate intellectual property matters and prosecute before patent and trademark offices, giving AIPLA a unique perspective on patent enforcement practices.

We understand the case to involve an attempt by a patent assertion entity (“PAE”) to sell licenses for certain U.S. patents (allegedly covering networked photocopiers) through multiple waves of demand letters from shell entities and counsel to thousands of small businesses across the United States, making representations about their prior successes and their current intent to sue, and demanding payments less than the recipient’s likely cost for legal appraisal. In keeping with the Commission’s Section 5 jurisdiction, the Complaint and the proposed consent agreement aim to remedy specific deceptive practices employed by the respondents in this case. Subject to the comments below, AIPLA supports the proposed consent agreement.

AIPLA and its membership have been engaged for some time in the vigorous debate regarding PAEs and patent licensing companies. While AIPLA in general supports economically efficient licensing of patents and intellectual property assets in general, and has cautioned against

overbroad reactions to new market entrants and licensing models, we have expressed appropriate concerns about indiscriminate demand letters sent in bad faith. In this case, AIPLA supports the FTC consent agreement, especially considering the allegations that the Respondents had no intent to go forward with any threatened litigation, but instead relied upon an expectation that the recipients of their letters would take a license to avoid the cost of appraising such threats. Here, the Respondents apparently asserted that “litigation will ensue” if the recipients of the letter did not respond. In fact, Respondents did not initiate a single legal action for infringement against any of the small businesses to whom draft complaints were sent.

AIPLA believes that the initiation of the FTC action and the proposed settlement are appropriate under the FTC’s mandate to stop violations of federal law prohibiting unfair or deceptive acts or practices. However, we do suggest the following underscored additions to and stricken deletions from the draft settlement, at Subpart I.D.:

IT IS ORDERED that the Respondents, and their officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, shall not

....

D. Make any representation in a Patent Assertion Communication, expressly or by implication, that Respondents or an Affiliate will take any action with respect to the filing of a Lawsuit, including

1. that they will initiate a Lawsuit;
2. that they will initiate a Lawsuit if the recipient of a Patent Assertion Communication does not agree to a license, pay compensation, or otherwise respond to the Patent Assertion Communication as requested;
3. that they will initiate a Lawsuit imminently or within a specified time; or
4. that they will initiate a Lawsuit imminently or within a specified period of time if the recipient of a Patent Assertion Communication does not agree to a license, pay compensation, or otherwise respond to the Patent Assertion Communication as requested;

unless at the time such representation is made, Respondents have decided to take such action and possess and rely upon competent and reliable evidence sufficient to substantiate that they are prepared to and able to take the action against the particular recipient of the Patent Assertion Communication necessary to make the representation true. Evidence that an action was not taken because of ~~a~~ material changes in circumstances or information obtained subsequent to making a representation covered by this Subpart I.D, ~~including a change in the decision by a client on whose behalf a representation was~~

~~made on whether to initiate a lawsuit,~~ shall be considered in determining whether a representation was substantiated at the time it was made...

The proposed addition of the underscored language above would close a potential loophole, in that the Respondents could assert that, even if they were not ready to sue this particular recipient, they were ready to sue others who had been sent the same Patent Assertion Communication. While not precedential, requiring that they be able to take action against the particular recipient may discourage similar bad faith approaches to asserting patents without unduly impeding appropriate licensing overtures and demand letters made in good faith.

The passage above marked as stricken is sufficiently ambiguous that respondents and other patent assertion entities who will study this consent decree will rely upon the vague “change in circumstances” carve-out. AIPLA respectfully suggests deletion of the stricken comment. It is the patent assertion entities’ belief at the time the demand letter is sent that should determine whether or not the actor has engaged in an unfair or deceptive practice.

AIPLA commends the FTC for this enforcement and the opportunity to comment, as well as its engaging in a study examining how PAEs do business and developing a better understanding of how they impact innovation and competition. We would welcome the opportunity to further assist the Commission in this matter.

Respectfully,

✓ Sharon A. Israel  
President  
American Intellectual Property Law Association