

Commissioner Julie Brill
Keynote Address
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Thank you, Bert Foer, for that kind introduction, and thank you Bert, AAI and CCIA for inviting me to speak this afternoon.

We have been celebrating our centennial at the FTC this year, taking some time to reflect on the people and the times that shaped our agency. In the process, we've been marveling at how much the world has changed since 1914. What would President Wilson, Louis Brandeis, and the other Progressive-era leaders who designed the FTC make of their agency today? I can imagine they would take one look at our tech-heavy agenda and think we had taken to doing our business in a foreign language: cybersecurity, mobile cramming, patent assertion entities, robocalls, the Internet of Things, and, a personal favorite, caffeine-infused shapewear (the FTC recently settled charges of fraudulent weight loss claims with that product's producer). Those august reformers might also take a look at the roster of sitting commissioners – four out of five of us are women – and think they had mistakenly picked up the roll for one of Carrie Chapman Catt's suffragette rallies. U.S. women would not win the right to vote until six years after the FTC Act was signed.

But on closer look, I think our founders would find, as I have found in studying our history, that Shakespeare got it right: what's past is prologue.¹

Yes, it is true, for the first time, a majority of the FTC's commissioners are female – at a time when the agency's work is concentrated on fostering innovation in the market for high tech, considered by many to be a male-dominated world. But I would challenge that assumption. From its very beginnings, one finds women at key pivot points of high tech history.

Ada Lovelace, born exactly 199 years ago today, in her extensive writings on Charles Babbage's Analytical Engine, was the first to conceptualize a general computer that could do anything given the right program and inputs.² In the mid-twentieth century, Alan Turing, the father of computer science, developed the notion of artificial intelligence in direct response to Ada Lovelace's work.³

Hedy Lamarr, the film star of the '30s and '40s, was another trailblazing high tech innovator. Though she is best known for her sultry eyes and serial matrimony, she discovered that varying the frequencies at which radio signals are transmitted can protect them from being jammed. This so-called "frequency hopping" underlies modern wireless communication

¹ William Shakespeare, *The Tempest*, Act 2, Scene 1.

² <http://findingada.com/book/ada-lovelace-victorian-computing-visionary/>.

³ <http://www.2machines.com/articles/179463.html>.

technologies like WiFi and is used to prevent cellphone conversations from crisscrossing.⁴

But perhaps my favorite in the muster of female high tech innovators is Rear Admiral Grace Hopper, a U.S. Navy computer scientist who served forty-three years, a Navy record. Known as the “Grand Lady of Software,” she was one of the original programmers of the Mark I, the first digital computer that could calculate and print mathematical tables,⁵ and she developed the first programming language expressed in English words rather than numerical series.⁶ That innovation turned computers from a tool for scientists only into something accessible today by everyone from Warren Buffet to my neighbor’s three-year-old daughter. For her service to her country – and to every one of us who has ever interacted with a piece of software, which is every one of us – the Navy named the destroyer “Amazing Grace” after her.⁷

Admiral Hopper remains a role model for high tech innovators to this day. In his book, *The Steve Jobs Way*, Jay Elliot describes her as appearing, on the face of it, “all Navy,” but, when you looked inside, you saw “a pirate dying to be released.”⁸ She coined what has become the battle cry of every high tech pioneer – sometimes to the chagrin of regulators and law enforcers like me. She said: “If it’s a good idea, go ahead and do it. It’s much easier to apologize than it is to get permission.”⁹ Sound familiar?

So maybe the Progressive Era leaders who built the FTC wouldn’t blink at the current gender balance on the commission. It was, after all, Louis Brandeis who said, “My own conversion to suffrage came through experience – through finding that in the public work in which I took part, the aid of women was not only most effective, but at times indispensable.”¹⁰

And these Progressive Era reformers certainly wouldn’t be surprised that the Commission has influenced, and will continue to influence, the development of law and policy relating to high tech innovation, such as patent law and the role of patent assertion entities. Our founders set us up as an agency with a unique mix of policy-making, enforcement, research, and education tools and a laser focus on protecting competition and consumers throughout the marketplace. Competition fosters innovation and all the benefits innovation bestows on consumers, businesses, and the greater economy. At the FTC, we believe – or I should say, still believe – that focusing on patent issues is key to our mission to nurture competition and innovation.

The Progressives constructed the FTC to work by consensus, based not on political fervor, but on dispassionate facts and reasoned analysis. The 1914 Senate report on the FTC Act described an agency “competent to deal with [complex antitrust matters] by reason of information, experience, and careful study of the business and economic conditions of the

⁴ <http://www.cnet.com/news/happy-100th-birthday-hedy-lamarr-movie-star-and-wi-fi-inventor/>.

⁵ http://en.wikipedia.org/wiki/Harvard_Mark_I.

⁶ <http://www.pbs.org/wgbh/aso/databank/entries/btmurr.html>.

⁷ <http://www.latimes.com/nation/shareitnow/la-sh-grace-hopper-google-doodle-20131209-story.html>.

⁸ Jay Elliott & William L. Simon, *The Steve Jobs Way: iLeadership for a New Generation* 71 (2011).

⁹ <http://www.doncio.navy.mil/Chips/ArticleDetails.aspx?ID=2389.htm>.

¹⁰ <http://www.law.louisville.edu/library/collections/brandeis/node/271>.

industry affected.”¹¹

I chose to quote that particular line because I believe it highlights the duality that our founders infused into the FTC’s very foundation. Yes, devotees of the then-new social sciences that the Progressives were, they wanted us to think and analyze and study – and we do, with our workshops and our reports and our research authority. But they also wanted us to act, which is why they gave us law enforcement powers, policy advocacy responsibilities, and an education mission.

Thinking and acting is exactly how the FTC has approached, and will continue to approach, patent assertion entities (or “PAEs”). We first began looking at PAE activity in workshops leading up to our 2011 Report on the IP marketplace.¹² We followed that up by focusing exclusively on PAEs through a joint workshop with the Department of Justice Antitrust Division in 2012.¹³ Because of the many complex issues surrounding PAEs, we are currently in the midst of an extensive review of PAE activity, a so-called 6(b) study, named after the statutory provision that gives us authority to undertake the project.¹⁴

As most of you know, PAEs attempt to generate profits by purchasing patents, then either licensing them to companies already using the patented technology or litigating against those businesses. All reports indicate that PAE-initiated lawsuits are on the increase,¹⁵ with one study claiming PAEs accounted for 62 percent of all infringement suits in 2012.¹⁶ Some find this trend a positive one. They argue PAEs make the market for intellectual property more robust - by compensating small inventors who might not otherwise have the resources to enforce their patents - by acting as a ready buyer for the patents of failed start-ups thus reducing the investment risks associated with early stage technologies¹⁷ - and by allowing operating companies to monetize intellectual property.

Others disagree. PAEs, they contend, impose unnecessary costs without promoting the dissemination of technological know-how. Also, because PAEs do not manufacture products, they are not subject to countersuit, and therefore have little or no incentive to cross-license

¹¹ S. Rep. No. 597, 63d Cong., 2d Sess. 9 (1914).

¹² FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf> [hereinafter 2011 Patent Report].

¹³ The workshop materials are available at the following link: <http://www.ftc.gov/opp/workshops/pae/>.

¹⁴ Federal Trade Commission Act, 15 U.S.C. § 46(b).

¹⁵ U.S. Gov’t Accountability Office, GAO-13-465, Intellectual Property: Assessing Factors that Affect Patent Infringement Litigation Could Help Improve Patent Quality (2013) at 17, available at <http://www.gao.gov/products/GAO-13-465> (finding that the share of patent litigation filed by “patent monetization entities” increased 7 percent between 2007 and 2011).

¹⁶ Executive Office of the President, Patent Assertion and U.S. Innovation, June 2013, prepared by the President’s Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy, available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force> [hereinafter Presidents PAE Report]; Fiona Scott Morton, Carl Shapiro, Strategic Patent Acquisitions, Haas School of Business, University of California at Berkeley, working paper, 2 July 2013, available at <http://faculty.haas.berkeley.edu>.

¹⁷ 2011 Patent Report, *supra* note 12, at 52-53.

patents.¹⁸ This is in contrast to the more traditional case of rival producers, each with its own patents, settling competing infringement cases by cross-licensing rather than engaging in expensive legal battles.¹⁹ Moreover, the FTC has found that PAEs also have few of the reputational concerns that might deter a manufacturing company.²⁰ The FTC has also noted concerns with “privateering,” which occurs when a PAE with legal or economic ties to a manufacturing firm may have incentives to assert patents against the rivals of the manufacturer, in ways that ultimately burden competition in the targeted markets.²¹

While panelists and commenters at our 2012 PAE workshop provided anecdotal evidence of these and other potential costs and benefits of PAE activity, many stressed the lack of more comprehensive empirical evidence. For example, most of the data describing the types of patents acquired by PAEs and their assertion strategies as compared to other patent holders has been unavailable because it is confidential.²²

Our 6(b) study will allow us to shed light on some of these questions. We’ve sent information requests to approximately 25 PAEs engaged in a variety of market sectors, and to approximately 15 non-practicing entities and manufacturing firms in the wireless chipset sector. Our goal is a broad descriptive examination of the PAE business model, including their organization and structure, their economic relationships, and their actions in terms of patent acquisition, assertion, litigation, and licensing.²³

The data is coming in as I speak. We hope to be able to complete a report relatively quickly – by the end of next year – which we are sure policy makers at all levels and branches of government will put to good use.²⁴ Forty-two State Attorneys General and the Department of Justice Antitrust Division expressed strong support for our study.²⁵

¹⁸ They also have lower discovery costs. The President’s PAE Report indicates that the success of the PAE business model is due in part to the combination of these various attributes. President’s PAE Report, *supra* note 16.

¹⁹ See Henry C. Su, Invention Is Not Innovation and Intellectual Property Is Not Just Like Any Other Form of Property: Competition Themes from the FTC’s March 2011 Patent Report, the Antitrust Source, August 2011, available at <http://www.antitrustsource.com>.

²⁰ Evidence suggests that the majority of litigated patent infringement claims are against inadvertent infringers. 2011 Patent Report, *supra* note 12, at 131 n.337.

²¹ FTC Supporting Statement for Paperwork Reduction Act Submission to OMB, FTC Study of Patent Assertion Entities at 4 (May 15, 2014), available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201405-3084-002.

²² The workshop materials are available at the following link: <http://www.ftc.gov/opp/workshops/pae/>.

²³ Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 26, 2013), available at <http://www.ftc.gov/opa/2013/09/paestudy.shtm>.

²⁴ See, e.g., “FTC’s Brill Voices Support for Broad ‘Patent Troll’ Probe”, LAW 360, July 31, 2013, available at <http://www.law360.com/articles/461432/ftc-s-brill-voices-support-for-broad-patent-troll-probe>; Chairwoman Ramirez, Opening Remarks at the CCIA and AAI Program: Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do (June 20, 2013), available at <http://ftc.gov/speeches/ramirez/130620paespeech.pdf>.

²⁵ Letter from National Association of Attorneys General to Donald S. Clark, Secretary, Federal Trade Commission, dated Dec. 16, 2013, re: Comment by State Attorneys General on FTC’s Proposed Information Requests to Patent Assertion Entities, available at http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00065-87873.pdf; Renata Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, The

That said, there is no need to wait for completion of our 6(b) study to resolve some of the most pressing problems surrounding PAEs. The Supreme Court has been doing its part by grappling over the past year with some key patent problems that the FTC’s IP Reports had identified as fostering an environment conducive to problematic PAE activities.²⁶ But despite these recent cases, there still are important issues for Congress to address.

First, let’s talk about the three Supreme Court cases decided earlier this year. In *Nautilus, Inc. v. Biosig Instruments, Inc.*,²⁷ the Supreme Court spelled out with some more specificity how clear a patent must be to satisfy the patent statute’s requirement of definiteness. Biosig sued Nautilus for infringing Biosig’s patents regarding technology for heart rate monitors used in exercise equipment. Biosig’s patent purports to cover heart rate monitors where two electrodes are “mounted . . . in spaced relationship with each other.” Nautilus argued that the phrase “in spaced relationship with each other” was so imprecise that the claim failed to meet the definiteness requirement. The Federal Circuit had previously found that the claims were not indefinite, holding that a patent is definite so long as its claims are not “insolubly ambiguous.”²⁸ The Supreme Court rejected that standard, finding that a patent is indefinite if its claims, read in light of the language of the patent itself, as well as its prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.²⁹ The Court found that while absolute precision may be unattainable, the definiteness requirement in the current statute “mandates clarity.”³⁰ The Court said that to have a less rigorous standard would “diminish the definiteness requirement’s public-notice function and foster the innovation-discouraging “zone of uncertainty.”³¹

The FTC has long advocated for patent reforms like this. Our 2011 Patent Report called on patent holders to “give public notice of the subject matter that is protected” and “apprise the public of what is still open to them.”³² We said that clear notice “promote[s] the invention, development, and commercialization of innovative products” by helping patentees and third parties avoid uncertainty as to the scope of their rights.³³ Policy makers need to do more in this area to reduce the uncertainty innovators face with respect to what they can and cannot do. Quickly changing industries, such as the consumer electronics industry, may particularly benefit

Art of Persuasion, Competition Advocacy at the Intersection of Antitrust and Intellectual Property, *available at* <http://www.justice.gov/atr/public/speeches/301596.pdf>.

²⁶ FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), *available at* <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>; 2011 Patent Report, *supra* note 12.

²⁷ *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

²⁸ *Biosig Instruments, Inc. v. Nautilus*, 715 F.3d 891, 898-99 (Fed. Cir. 2013) (citing, *inter alia*, *Exxon Research & Eng’g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001)).

²⁹ 134 S.Ct. at 2122.

³⁰ *Id.* at 2129.

³¹ *Id.* at 2123 (citing *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)).

³² 2011 IP Report, *supra* note 12, at 75 (citing 35 U.S.C. § 112 and *Univ. of Rochester v. G.D. Searle & Co.*, 358 F.3d 916, 922 n.5 (Fed. Cir. 2004)).

³³ *Id.*

from stronger patent notice requirements, as they would help innovators be less fearful of an infringement claim based on an ambiguous patent. Such changes would lead to increased efficiencies in the necessary licensing and cross licensing of the thousands of patents applicable to consumer electronics devices, with more clearly identifiable patents.³⁴

In another case decided this year – *Alice v. CLS Bank*³⁵ -- the Supreme Court held that a computer-implemented escrow service for facilitating financial transactions was ineligible for patent protection. An *en banc* panel of ten Federal Circuit judges produced seven different opinions to address the same issue. The Supreme Court’s unanimous opinion clarified that abstract ideas could not be patented, and implementing an abstract idea on a computer was not enough to transform the idea into a patentable invention. While it remains to be seen how the U.S. Patent and Trademark Office and federal courts interpret the decision over the long term, lower courts have already relied on the *Alice* decision to invalidate software patent claims that merely implement an abstract idea using a computer.³⁶

I imagine Admiral Hopper, whose life’s work was to make computers and software more accessible and available, would give a 21-gun salute for the *Alice* decision and its potential to slow down those PAEs who have tried to pass off old abstract ideas as inventions merely by implementing them using a computer, at least for parties willing and able to go to battle with PAEs all the way to the end in court.

Finally, in *Octane*,³⁷ the Supreme Court clarified when attorneys’ fees should be awarded in patent infringement cases. Section 285 of the Patent Act allows district courts to “award reasonable attorney fees to the prevailing party,” including defendants, with the sole, undefined qualification that the case is “exceptional.”³⁸ The Supreme Court struck down the Federal Circuit court’s test for meeting the “exceptional” standard, finding it “unduly rigid,” as it “impermissibly encumbers” district courts’ discretion on fees.³⁹ The Court directed district courts to exercise their full discretion and consider the totality of the circumstances when evaluating whether a case was “exceptional.”⁴⁰ *Octane* and its companion case, *Highmark*⁴¹ are certainly a step in the right

³⁴ See Edith Ramirez and Lisa Kimmel, A Competition Policy Perspective on Patent Law: The Federal Trade Commission’s Report on the Evolving IP Marketplace, the Antitrust Source, August 2011, *available at* <http://www.antitrustsource.com>. Some have estimated that the number of patents in a smartphone is as high as 250,000. See David Drummond, Google Senior Vice President and Chief Legal Officer, When Patents Attack Android, August 3, 2011, *available at* <http://googleblog.blogspot.com/2011/08/when-patents-attack-andriod.html#!/2011/08/when-patents-attack-andriod.html>.

³⁵ *Alice Corp. Pty. Ltd v. CLS Bank Intern.*, 134 S.Ct. 2347 (2014).

³⁶ Brian McCall, Lessons from 4 Months of Post-Alice Decisions, *available at* <http://www.law360.com/articles/590465/lessons-from-4-months-of-post-alice-decisions>. Of 18 court decisions, 14, or 78 percent, have invalidated software patents.³⁶

³⁷ *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).

³⁸ 35 U.S.C.A. § 285.

³⁹ *Id.* at 1755.

⁴⁰ *Id.* at 1758.

⁴¹ *Highmark* clarified further that the Federal Circuit should not exercise a de novo standard of review of a district court’s decision on Section 285 attorney’s fees, as “the determination whether a case is “exceptional” under § 285 is a matter of discretion.” *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S.Ct. 1744, 1748 (2014). The Court directed the Federal Circuit to review such cases under an abuse of discretion standard, giving freedom to district courts to consider whether individual cases warrant an award.

direction towards reducing unfounded PAE lawsuits by allowing defendants to recover attorney's fees in a somewhat broader range of cases.

The courts are not the only ones taking action with respect to PAEs ahead of our 6(b) study. In our recent case against *MPHJ Technology Investments*,⁴² the FTC took action against this PAE for violating the FTC Act's prohibition against deceptive acts and practices. Our complaint alleges that MPHJ sent out a series of more than 9,000 letters to more than 4,800 small businesses across the country, warning that MPHJ would file a patent infringement lawsuit against the recipient if it did not respond to the letter. We believed the letters falsely stated that many companies had responded and were paying a license, and that the recipient had two-weeks to respond. The letters even attached a purported complaint for patent infringement. The patents MPHJ holds relate to widely used computer-scanning equipment. In reality, we believed that MPHJ had no intention to initiate lawsuits against the small businesses that did not respond to the letters – no such lawsuits were ever filed, and MPHJ made no preparations to file lawsuits. To settle the FTC's case, MPHJ agreed to refrain from making deceptive representations when asserting patent rights and misrepresenting the imminence of any lawsuits. I should add that the states have also been active, bringing enforcement actions against MPHJ under their "mini-FTC acts."⁴³

It is important to note that nothing in our MPHJ case prevents patent holders from asserting their intellectual property rights, as long as it is not done in a deceptive manner. In fact, the disconcerting conduct in the case really was not so much about patents – the patents were just the input in a deceptive scheme very familiar to the consumer protection side of the FTC's house. But monetization of the patents was the motive behind the scheme: MPHJ purchased the patents from another PAE just prior to beginning its illegal letter campaign.

These developments in Supreme Court case law and law enforcement actions challenging abusive PAE activity are promising. But further reforms to the patent litigation system are clearly warranted to make it more difficult for PAEs and others that seek to profit by bringing and threatening to bring frivolous patent infringement lawsuits. Clear patent notice is a critical

⁴² *In the Matter of MPHJ Technology Investments, LLC*, FTC File No. 142 3003, Consent, Nov. 13, 2014, available at <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

⁴³ MPHJ has been the subject of unfair-trade-practice actions in several states, including Minnesota, Nebraska, New York, and Vermont. Vermont alleges that MPHJ engaged in unfair and deceptive trade practices by making false and misleading representations regarding the value of their license and threats of imminent litigation, violating the Vermont Consumer Protection Act. The case is ongoing. Complaint, Vermont v. MPHJ Tech. Inv., LLC, No. 282-5-13 (Vt. Super. Ct., May 8, 2013). In a parallel case in Nebraska, the state Attorney General sent a cease and desist letter to the Texas firm representing MPHJ, ordering counsel to stop sending letters threatening litigation to Nebraska businesses. The District of Nebraska found that the state law claims were preempted by federal law, and that the state infringed on the defendant's First Amendment right of choice of attorneys' rights and entered an injunction enjoining Nebraska from further pursuing any action against MPHJ as to the patents and any patent enforcement activity unless it could show bad faith. *Activision TV, Inc. v. Bruning*, No. 8:13-cv-00215 (D. Neb. Sept. 2, 2014). Both Minnesota and New York have entered settlements with MPHJ. *See State of Minnesota v. MPHJ Technology Investments, LLC*, 62-CV-13-6080 (Minn. Second Dist. Aug. 20, 2013); *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of MPHJ Technology Investments, LLC, Assurance of Discontinuance*, No. 14-015, January 14, 2014, available at <http://ag.ny.gov/pdfs/FINALAODMPHJ.pdf>.

component of our patent system, as it promotes the development and commercialization of innovative products by helping third parties and patentees avoid uncertainty as to their rights. The importance of clear notice, however, is not limited to drafting patents, as the Supreme Court dealt with in *Nautilus*. Too often in patent litigation, a plaintiff files a bare bones complaint that leaves the defendant scratching its head as to how the plaintiff thinks there has been an infringement. Specific theories of infringement do not emerge until long into expensive discovery. An important part of patent reform should be to require that complaints provide specific allegations of what infringes a patent's claims and how the defendant infringes them. And more should be done to ensure that victims of frivolous patent cases are made whole, including allowing them to recover their costs for attorneys' fees and discovery costs, or to ensure that the likelihood of having to make such large expenditures in the first place are reduced through streamlined discovery processes.

Congress is currently considering several proposals along these lines. Last Friday, Rep. Issa said that he will target PAEs as the new head of the House Intellectual Property Subcommittee.⁴⁴ Last year, by a large, bipartisan margin, the U.S. House of Representatives passed House Judiciary Chairman Bob Goodlatte's Innovation Act,⁴⁵ and the Senate Judiciary Committee held a hearing on Senate Judiciary Chairman Patrick Leahy's companion bill.⁴⁶ These federal bills are aimed at PAEs that assert weak or vague patents, and are designed to make it difficult for PAEs to use the threat of costly patent litigation to secure unjustifiable settlements.

Chairman Goodlatte's bill would limit remedies when a patent complainant's infringement letters fail to list which patents are being infringed or name the offending products or processes.⁴⁷ The Leahy bill, among other things, seeks to enhance the FTC's authority to police false or misleading PAE demand letters.⁴⁸

There is no need to wait for completion of our 6(b) study to act on these and other key legislative patent reform proposals. Various provisions in the bills will most certainly further discourage frivolous lawsuits and improve patent quality, actions which are needed now. I am hopeful that Congress will act in the very near future to pass a bill implementing these important

⁴⁴ See http://www.law360.com/ip/articles/601952?nl_pk=c6646393-1445-4e9c-9c1c-e481049a7dfe&utm_source=newsletter&utm_medium=email&utm_campaign=ip.

⁴⁵ H.R. 3309, Congressman Goodlatte's bill. The bill requires the loser in patent litigation to pay the other side's litigation fees, requires more up-front technical detail in support of infringement claims, and halts most discovery until after the court interprets the patent claims.

⁴⁶ Senator Leahy's proposed legislation is S. 1720, the Patent Transparency and Improvements Act of 2013. See "Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse," Senate Judiciary Committee full committee hearing, December 17, 2013, available at <http://www.judiciary.senate.gov/hearings.hearing.cfm?id=32caee808f9297f0e7df6280b03ff1f>.

⁴⁷ See http://goodlatte.house.gov/press_releases/476.

⁴⁸ See <http://www.leahy.senate.gov/press/patent-trolls-leahy-introduces-bipartisan-bill-to-protect-vt-businesses-from-patent-lawsuit-abuse->. Several other legislative proposals have also been put forward in the Senate, by, for example, Senators Orrin Hatch, John Cornyn, and Charles Schumer, with varying provisions. The states have also taken legislative action against PAEs. My home state of Vermont recently passed a law that provides recourse for individuals targeted with bad faith patent assertions. 9 V.S.A. § 4195 *et seq.*, available at <http://www.leg.state.vt.us/docs/2014/Acts/Act044.PDF>.

reforms.

Similarly, the fact that we are still in the middle of our study should in no way prevent appropriate law enforcement action. If the law enforcement agencies – the FTC and DOJ, as well as the states – uncover PAE activity that is in violation of current law, they should act expeditiously to take whatever enforcement actions are warranted to stop inappropriate PAE abuse.

One hundred years ago, the FTC’s founders built an agency that could both think and act, and placed us at the center of the nation’s efforts to protect competition and consumers. I believe our founders would thoroughly approve of our efforts on PAEs. We are studying carefully PAEs’ impact on innovation and markets, but we are not just studying. We are acting when it is clear PAEs are behaving in ways that are illegal and detrimental to competition, and we are applauding when other agencies or courts do the same. I am calling on other branches of government to do more, too.

I would like to think Admiral Hopper would endorse this strategy. She was fond of quoting the motto: “A ship in harbor is safe, but that is not what ships are made for.”⁴⁹

Well, an FTC or Congress parked waiting for the PAE 6(b) study to conclude is not what we were made for. For the FTC, we should use all the tools our founders gave us to pursue our mission of protecting competition as it shapes the economy and consumers as they navigate the markets. They expected us to think and act, and when it comes to PAEs, or any of the other myriad of competition issues under our jurisdiction, that is exactly what you can count on us to do.

⁴⁹ John Augustus Shedd, *Salt from My Attic* (1928), cited in *The Yale Book of Quotations* 705 (Fred R. Shapiro ed., 2006).