

Commissioner Julie Brill
Promoting Innovation Through Consumer Protections and Competition Enforcement
Remarks at the Computer & Communications Industry Association (CCIA)
Washington Caucus
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Thank you, Ed, for that kind introduction. And thank you to CCIA for inviting me to address the Caucus. It is a pleasure to be able to discuss with you three issues that are central to continuing innovation in the information economy: consumer privacy, data security, and patents.

Protecting consumer privacy is one of the FTC's top priorities. Before I go into some detail about how we protect consumer privacy, I'd like to spend a moment explaining why privacy is an important area of our focus.

The amount of data that companies collect, retain, use, combine, and disclose has grown exponentially over the past few decades. Data about each of us and our activities – our personal information – is an increasingly important part of the U.S. economy. The flow of personal information goes hand-in-hand with many of the innovations that allow us to connect with friends, find our way around cities that we've never visited before, and collaborate with colleagues around the world.

Privacy and data security protections are essential to maintaining consumers' confidence in this expanding and innovative digital economy. Privacy also has become inescapable subject of dialogue with our international trade partners.

As technology has evolved, companies have become much more sophisticated about collecting, analyzing, and using data about consumers. Big data – the massive and growing amount of personal information available to companies – fuels this analysis. These developments can give rise to privacy harms that can be concrete, or can be intangible and harder to quantify but nonetheless real. Big data analytics allows companies to sort and segment consumers according to sensitive characteristics like health condition, financial status, religion, and sexual orientation, sometimes based on inferences from innocuous data.¹ Security breaches involving such sensitive information can be devastating to consumers. In addition, consumers believe they are exposed and vulnerable in an environment in which they are tracked and their information is collected and used for purposes outside the context of their online transactions. In some cases, consumers avoid companies that they do not believe they can trust with their

¹ See Joseph Walker, *Data Mining to Recruit Sick People*, WALL ST. J. (Dec. 17, 2013), available at <http://online.wsj.com/news/articles/SB10001424052702303722104579240140554518458>; Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAGAZINE (Feb. 16, 2012), available at <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>.

personal information.² But in many cases, consumers do not really know what these non-consumer facing companies do with their data, what choices consumers may have about this data use, and what protections are in place for consumers' privacy interests.

In our policy work, the FTC has developed best practices and recommendations regarding how companies can be transparent about their practices and help consumers make meaningful choices about the use of their personal information. Working toward these goals helps to ensure that consumers have confidence in the dynamic and ever-changing marketplace for personal information.³ In addition, we hope to issue our report about the collection and use practices of nine data brokers – companies that collect online and offline information and create rich profiles about consumers – to help provide a deeper understanding about the practices of some of these companies.

In our enforcement work, we pay particularly close attention to children's online privacy, as mandated by Congress in the Children's Online Privacy Protection Act.⁴ We also enforce the Fair Credit Reporting Act.⁵ Enacted in 1970, the FCRA has proven to be a durable source of consumer protections where traditional credit reports are concerned. Moreover, FCRA protections apply to uses of information, rather than specific technologies. As a result, the FCRA is a valuable source of consumer protections as consumer reporting activities draw information from more diverse sources⁶ and become available through mobile devices.⁷

The bulk of our enforcement cases – brought over the past decade, under both Republican and Democratic leadership – have challenged deceptive and unfair data security and privacy practices under Section 5 of the FTC Act. In that time period, we have brought more than 50 cases against companies that, we believe, failed to reasonably secure consumers' information, and more than 40 cases relating to the privacy of consumer data. Some of these cases involve household names, such as Google and Facebook.⁸ But we have also brought myriad cases

² See Tim Peterson, *Customers Becoming Less Trusting of Google, Warier of Facebook, Twitter*, AD AGE DIGITAL (Jan. 9, 2014), available at <http://adage.com/article/consumer-electronics-show/consumers-trusting-google-warier-facebook-twitter/290992/> (reporting on consumers' "eroding" trust in Facebook, Twitter, and Google).

³ Fed. Trade Comm'n, *Mobile Privacy Disclosures: Building Trust Through Transparency* (Feb. 1, 2013), available at <http://www.ftc.gov/os/2013/02/130201mobileprivacyreport.pdf> (staff report); Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change* (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

⁴ Children's Online Privacy Protection Act, 15 U.S.C. § 6801 et seq.

⁵ Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2006).

⁶ *United States v. Spokeo*, Case CV-12-05001 (C.D. Cal. June 7, 2012) (consent decree and order for civil penalties).

⁷ *In the Matter of Filiquarian Publishing, LLC et al.*, Case C-4401 (Apr. 13, 2013) (consent order); Fed. Trade Comm'n, *FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), <http://www.ftc.gov/news-events/press-releases/2012/02/ftc-warns-marketers-mobile-apps-may-violate-fair-credit-reporting>.

⁸ *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Oct. 13, 2011), available at <http://ftc.gov/os/caselist/1023136/111024googlebuzzdo.pdf> (decision and order); *In the Matter of Facebook, Inc.*,

against less well-known companies, alleging that they spammed consumers,⁹ violated commitments in their privacy policies,¹⁰ installed spyware on consumers' computers,¹¹ or otherwise crossed the lines of deception or unfairness in their data collection and use practices.

With respect to data security, the FTC uses its Section 5 unfairness and deception authority to ensure that companies provide reasonable security for personal information. We are all too familiar with the potential for harm from financial information falling into the wrong hands. The FTC has alleged in numerous actions that companies violated Section 5 by failing to reasonably protect consumers' financial information.¹² We received a vivid reminder about the importance of data security during the height of the holiday shopping season, when Target acknowledged that 40 million consumers' credit card and debit card information, as well as contact information about some 70 million consumers, had been stolen.¹³ The movement toward innovative other forms of payment from mobile devices may create new challenges to securing financial information, and the FTC is watching these developments closely.¹⁴

From my perspective, there is no data privacy without data security. Inadequate data security can expose information that consumers never meant to put on public display.¹⁵ Security lapses can leave our children exposed in alarming ways.¹⁶ And inadequate security in one link can weaken the security in the whole chain of software and hardware in our devices and apps.¹⁷

The technologies that consumers use to shop, chat, and work online are undoubtedly complex and rapidly changing. However, we also know that it is more effective for companies

FTC File No. 092 3184 (July 27, 2012), available at <http://www.ftc.gov/os/caselist/0923184/120810facebookdo.pdf> (decision and order).

⁹ See, e.g., *United States v. ValueClick, Inc.*, Case No. CV08-01711 (C.D. Cal., Mar. 17, 2008), available at <http://www.ftc.gov/os/caselist/0723111/080317judgment.pdf> (stipulated final judgment).

¹⁰ See *In the Matter of Chitika, Inc.*, FTC Docket No. C-4324 (June 7, 2011), available at <http://ftc.gov/os/caselist/1023087/110617chitikado.pdf> (decision and order).

¹¹ See, e.g., *FTC v. CyberSpy Software, LLC*, Case No. 6:08-cv-01872-GAP-GJK (M.D. Fla., Apr. 22, 2010), available at <http://www.ftc.gov/os/caselist/0823160/100602cyberspystip.pdf>.

¹² See *In the Matter of the TJX Cos., Inc.*, No. C-4227 (F.T.C. July 29, 2008) (consent order); *CardSystems Solutions, Inc.*, No. C-4168, 2006 WL 2709787 (F.T.C. Sept. 5, 2006) (consent order); *DSW, Inc.*, No. C-4157, 2006 WL 752215 (F.T.C. Mar. 7, 2006) (consent order); *United States v. ChoicePoint Inc.*, Case No. 1:06-cv-00198-GET (N.D. Ga. Jan. 30, 2006) (stipulated final order); *BJ's Wholesale Club, Inc.*, 140 F.T.C. 465 (2005) (consent order).

¹³ *MSN Money*, Target: Data Breach Caught up to 70M Customers (Jan. 10, 2014), <http://money.msn.com/business-news/article.aspx?feed=AP&date=20140110&id=17248581&ocid=ansmony11>.

¹⁴ See generally Fed. Trade Comm'n, *Paper, Plastic . . . , or Mobile? An FTC Workshop on Mobile Payments* (Mar. 8, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-report-examines-growing-use-mobile-payments>.

¹⁵ See *In the Matter of Twitter, Inc.*, Case C-4316 (F.T.C. Mar. 2, 2011) (decision and order) (alleging that a failure to provide reasonable security measures led to unauthorized disclosure of nonpublic communications and personal information).

¹⁶ See *In the Matter of TRENDNet, Inc.*, FTC File No. 122 3090 (Sept. 2013) (consent order).

¹⁷ See, e.g., *In the Matter of HTC America Inc.*, Case C-4406 (F.T.C. June 25, 2013) (decision and order).

to protect consumer information through reasonable policies and procedures that span the entire product lifecycle, rather than waiting until after a breach. As more and more devices become networked, with a greater volume and variety of personal information flows, the costs of security failures only stand to increase. I support legislation that would require companies to adopt and implement reasonable data security practices. I believe it would be very useful for this Working Group to consider proposals that would lead to adoption of data security legislation.

Let me turn very briefly to some emerging privacy issues that the FTC is currently addressing. In November, we held a workshop on the Internet of Things, to explore data security and privacy issues related to connected devices.¹⁸ Both Commissioner Ohlhausen and I attended the Consumer Electronic Show in January, where we saw first-hand the incredible growth in the connected devices sector, including smart cars, smart clothing and wearable accessories, smart appliances, and more. I expect that in the coming months we will issue a report on some of the privacy and security issues that arise with respect to connected devices. Also in the past two months, the FTC held seminars on two cutting-edge issues:

- mobile device tracking in retail and other business ; and
- alternative scoring products that use predictive scoring to determine consumers' access to products and offers.

And on May 9, we will hold a third seminar on consumer-generated health information provided to entities that are not covered by HIPAA, including health information from wearable devices.¹⁹

Finally, let me shift gears and spend a few minutes discussing the need for patent reform. Focusing on these issues – the intersection of patents, antitrust, and innovation – is built into the FTC's DNA. The person most directly responsible for conceiving of the FTC – Louis Brandeis – was deeply concerned about the role of technology in society. So it is only fitting that various aspects of the patent system, including patent assertion entities (or patent trolls, as some call them), have caught our attention.

In just the last two years, lawsuits brought by PAEs have tripled, rising from 29 percent of all infringement suits to 62 percent. Some evidence suggests that PAEs may have threatened over 100,000 companies with patent infringement in 2012 alone. Supporters of the PAE business model say that it facilitates the transfer of patent rights, rewards inventors, and funds ongoing research and development efforts. Critics say the PAE business model can sometimes amount to a tax on product development, with adverse effects on competition and innovation that ultimately hurts consumers as well as industry.

¹⁸ Fed. Trade Comm'n, Internet of Things: Privacy and Security in an Interconnected World (Nov. 19, 2013), <http://www.ftc.gov/bcp/workshops/internet-of-things/>.

¹⁹ Fed. Trade Comm'n, FTC to Host Spring Seminars on Emerging Consumer Privacy Issues (Dec. 2, 2013), <http://www.ftc.gov/news-events/press-releases/2013/12/ftc-host-spring-seminars-emerging-consumer-privacy-issues>.

Over the past decade, the FTC has closely examined the intersection of patent and antitrust laws. Our extensive work has included numerous workshops and hearings, with input from a wide spectrum of stakeholders – business representatives from large and small firms, the independent inventor community, leading patent and antitrust organizations and practitioners, consumer groups, and scholars. The resulting reports and guidelines, spanning across various administrations, have represented the views of Commissioners of all political stripes.

Some progress has been made to reform the patent system to address some of these concerns. The Supreme Court has played an important role, by eliminating the presumption that had led to nearly automatic injunctive relief as an infringement remedy in 2006²⁰ and by refining the standards for patent “obviousness” the following year.²¹ Congress’s 2011 Patent Reform Bill, the America Invents Act, was another significant reform effort. It adopted several of our policy recommendations²² – most notably, incorporating a new post-grant review process that will provide a less expensive means short of litigation to allow third parties to challenge trivial or overbroad patents.²³

But there is more that can and should be done. Congress is currently considering several legislative proposals aimed at addressing other perceived flaws in the patent and litigation systems that PAEs may be exploiting. In December, the U.S. House of Representatives overwhelmingly passed the Innovation Act,²⁴ introduced by House Judiciary Committee Chairman Goodlatte, with a bi-partisan vote of 325-91; and the Senate Judiciary Committee is poised to consider legislation sponsored by Chairman Leahy and Senator Lee.²⁵ The federal

²⁰ *eBay v. MercExchange*, 547 U.S. 338, 394 (2006). Justice Kennedy cited the FTC’s 2003 Patent Report in his concurrence, noting that firms primarily engaged in IP licensing can use the threat of injunctive relief to demand higher royalties or more costly licensing terms after the standard is implemented than they could have before their IP was included in the standard.

²¹ *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 415 (2007).

²² The National Academies of Science issued a patent report in 2004, not long after the FTC’s 2003 Patent Report, making numerous similar recommendations, including our recommendation to broaden the ability to invalidate patents for obviousness. National Research Council of the National Academies, *A Patent System for the 21st Century* (2004), available at <http://www.nap.edu/html/patentsystem/0309089107.pdf>.

²³ Leahy-Smith America Invents Act, Pub. L. No. 112-29 Ch. 29 125 Stat. 305, 305-313. Congressman Smith described our 2003 Patent Report as an “authoritative report on patent reform” in his 2011 report on the AIA. See Report on the America Invents Act, H.R. Rep. No. 112-98, pt. 1 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt98/pdf/CRPT-112hrpt98-pt1.pdf>.

²⁴ H.R. 3309, available at <http://beta.congress.gov/bill/113th-congress/house-bill/3309/text/163075> (engrossed in House Dec. 5, 2013). 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. H.R. 3309 was introduced by Rep. Bob Goodlatte.

²⁵ 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>.

bills are aimed at PAEs who 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.

For example, the Goodlatte bill would raise the bar for sending infringement letters by limiting remedies when a patent complainant fails to list which patents are being infringed or name the offending products or processes. The Goodlatte bill also would delay some of the most potentially expensive portions of the discovery process until after a court has interpreted the patent claims. And it would require the plaintiff to pay litigation costs if it loses, thus raising the stakes for filing a frivolous infringement action.²⁶ The Leahy bill, among other things, addresses the FTC's authority to police false or misleading PAE demand letters.²⁷

The House and Senate are actively working on these reforms right now. In addition to the comprehensive bills I just mentioned, Senator McCaskill has introduced legislation addressing patent demand letters, and yesterday House Energy and Commerce Subcommittee Chairman Terry held a hearing on patent demand letters and indicated he is drafting new legislation to address the issue.

Of course there are many more complex issues associated with PAEs worthy of study. PAEs argue that they serve a vital role in the patent system, whether by compensating inventors who might not otherwise have the resources to enforce their patents or by reducing the investment risks associated with early stage technologies by acting as a ready buyer for the patents of failed start-ups.²⁸

In October of last year, the FTC began the process of studying these more complex issues in depth. Our 6(b) study – named after the statutory provision that gives us authority to undertake the project²⁹ – will gather qualitative and quantitative information on PAE acquisition, litigation, assertion, and licensing practices.³⁰ In particular, we will examine how PAE patent assertion behavior may differ from other patent owners in the wireless industry.

²⁶ See http://goodlatte.house.gov/press_releases/476.

²⁷ 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 filed the first lawsuit against a patent troll alleging a violation of Vermont's law prohibiting unfair and deceptive trade practices. See *State of Vermont v. MPHJ Technology Investments, LLC*, Consumer Protection Complaint, Docket No. 282-543Wncv, available at <http://www.atg.state.vt.us/assets/files/Vermont%20v%20MPHJ%20Technologies%20Complaint.pdf>. Additionally, the Vermont state legislature 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>.

²⁸ 2011 Patent Report, *supra* note 4, at 52-53.

²⁹ Federal Trade Commission Act, 15 U.S.C. § 46(b).

³⁰ 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>. The study is the follow-up from a joint workshop we held in December 2012 with the Department of Justice to discuss the activities of PAEs. While workshop panelists and commenters provided anecdotal evidence of potential harms and efficiencies of PAE activity, many stressed the lack of more comprehensive empirical evidence. For example, there is little systematic publicly available information describing the types of patents acquired by PAEs and their assertion strategies as

We hope the eventual report that we issue based on our 6(b) study will provide a fuller and more accurate picture of PAE activity, which we can then share with Congress, other government agencies, academics, and industry. We anticipate that, as in the past, our study, once it is done, will be put to good use by Congress and others who examine closely the activities of PAEs.³¹ Notably, 42 State Attorneys General and the Department of Justice Antitrust Division have expressed strong support for our study.³²

But Congress need not wait for the FTC's 6(b) study before acting on patent bills currently under consideration. Further reforms to the patent litigation system are clearly warranted. With regard to the legislation under consideration, various provisions in the bills may help to discourage frivolous lawsuits and improve patent quality, actions the FTC has long encouraged. I believe Congress should act as soon as possible to implement those proposed reforms that will further these goals.³³ And if, after our PAE 6(b) study is completed, it appears that additional reforms are warranted, Congress can consider further action at that time.

Similarly, the FTC's study should present no barrier to 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.

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As our past work and our planned initiatives for the coming year show, the FTC has a strong record of identifying emerging issues, collecting input from all stakeholders representing a variety of perspectives, and proceeding carefully to develop recommendations for policymakers and best practices for industry and consumers.

compared to other patent holders. The workshop materials are available at the following link:
<http://www.ftc.gov/opp/workshops/pae/>.

³¹ 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>.

³² 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 Art of Persuasion, Competition Advocacy at the Intersection of Antitrust and Intellectual Property, available at: <http://www.justice.gov/atr/public/speeches/301596.pdf>.

³³ Last June, the Executive Office of the President issued a set of legislative recommendations and executive actions aimed at PAE activity. President's PAE Report, *supra* note 2. FTC Chairwoman Edith Ramirez has also urged continuing effort on patent reform. See Remarks of Chairwoman Edith Ramirez, FTC, Fall Networking Event, ABA Antitrust Section's Intellectual Property Committee, available at <http://www.ftc.gov/public-statements/2013/11/remarks-chairwoman-edith-ramirez-fall-networking-event-aba-antitrust>.

I look forward to discussing these issues with you today, and with you and your colleagues in industry, civil society, academia and consumer groups in the coming months.

Thank you.