

Before the
Federal Trade Commission
Washington, DC

In re

PAE Reports: Paperwork Comment

Project No. P131203

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the Federal Trade Commission ('FTC' or 'the Commission') and published in the Federal Register at 79 Fed. Reg. 28,715 (May 19, 2014), the Computer & Communications Industry Association ('CCIA')¹ submits the following comments regarding the proposed collection.

CCIA applauds the FTC's proposed collection. Patent Assertion Entities ('PAEs') have increasingly targeted small businesses,² and one prominent study estimated that PAEs cost the U.S. economy over \$29 billion a year.³ A recent study commissioned by CCIA showed a strong link between increased PAE litigation and reduced venture capital investment.⁴ But, as FTC Chairwoman Edith Ramirez recently testified before the House

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA's members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA members is available at <http://www.ccianet.org/members>.

² PatentFreedom, *The Growing Use of Business Method Patents in NPE Litigation*, Sept. 4, 2013, available at <https://www.patentfreedom.com/about-npes/blog/the-growing-use-of-business-method-patents-in-npe-litigation/>.

³ James Bessen & Michael Meurer, *The Direct Costs from NPE Disputes* (Boston Univ. Sch. of Law Working Paper No. 12-34 June 28, 2012), available at http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BessenJ_MeurerM062512rev062812.pdf.

⁴ Catherine E. Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity* (June 2014), available at <http://www.ccianet.org/wp-content/uploads/2014/06/Tucker-Report.pdf>.

Judiciary Committee, there is a lack of “comprehensive empirical evidence” regarding PAE practices.⁵

CCIA strongly supports the FTC’s efforts to gather such evidence. We also appreciate FTC Chairwoman Ramirez’s testimony that she is “supportive of efforts to reform the patent system to weed out weak [intellectual property] and efforts to allow companies to defend themselves against frivolous” lawsuits.⁶

CCIA does suggest some minor modifications to the proposed collection. These modifications would enable the FTC to gather important information regarding patent privateering, patent pledges that are not made through a Standards Setting Organization, and the use of patent assertion entities to facilitate improper bundling of patents.

I. The Burden on Questionnaire Recipients is Reasonable Relative to the Value of the Information Requested

With respect to the particulars of the proposed collection, CCIA feels that the set of questions that the FTC has prepared is thorough and properly directed towards information that should shed light on the heretofore-mysterious PAE business model. The parameters of the proposed collection are also well chosen.

The FTC has narrowly targeted its questions in order to reduce the burden on recipients. For example, the time frame of five years is necessary to understand the evolution of the PAE industry. PAE litigation has increased sharply in the last five years,⁷ but the causes of that increase are not well understood. And CCIA supports the FTC’s decision to include operating companies in its sample; the practices of PAEs can be best examined in comparison to those of operating companies using the patent system properly.

The burden on questionnaire recipients is small in comparison with the importance of the information being collected. Patent assertion entities drained over \$80

⁵ *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary* (Nov. 15, 2013) (statement of Edith Ramirez, Federal Trade Commission), available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-oversight-enforcement-antitrust-laws-presented/131115antitrustlawtestimony.pdf, at 15.

⁶ Kate Tummarello, *FTC chief supports patent system update*, THE HILL, Nov. 15, 2013, available at <http://thehill.com/blogs/hillicon-valley/190415-ftc-chief-supports-patent-system-update>.

⁷ Robin Feldman, et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. & TECH. REV. 357 (2012), available at <http://scholarship.law.duke.edu/dltr/vol11/iss2/6>.

billion from the economy in 2011.⁸ Even using the FTC's most conservative time estimates (and assuming a \$250/hour average rate for labor costs), the combined labor cost of the companies being surveyed would be \$7.4 million. This is a tiny fraction of the annual cost of patent assertion entities (less than .01%). And there is good reason to believe that the cost to the surveyed companies will be substantially lower.

In the case of questions directed to PAEs, all or nearly all of the information requested should be readily accessible. This is because the business of a PAE, by definition, is patent litigation. All of the requested information is the sort that the PAE would be required to produce as part of a litigation. As an example, the questions in Section H are directed to information regarding assertion of patents, including demands made, litigations filed, and licenses signed. All of these are typical subjects for interrogatories, document requests, and deposition questions in any patent litigation.

Similarly, a defendant in a patent lawsuit normally requests information regarding corporate structure, including parties with financial interests in the patents-in-suit. And because ownership of the patents-in-suit is required to have standing to sue in the first place, an accused infringer will always request information regarding any assignments or exclusive licenses of those patents.

Accordingly, nearly all of the information sought by the FTC from PAEs should already be collected. For this reason, we believe that the burden of the FTC's questionnaire on a PAE will likely be much closer to its original estimate of 90–400 hours than its current, more conservative estimate of 425–845 hours.

With respect to manufacturing firms, the FTC has limited its questions to the wireless communications sector. This industry is vital to the U.S., and it is valued by one industry group at \$185 billion.⁹ The number of U.S. patent lawsuits per company in this sector, however, is unlikely to be a large number. For example, a quick search of U.S. district court dockets using Justia found about a dozen patent lawsuits with Apple named as the plaintiff. Not all of those lawsuits involve wireless technology. And, as described above, the bulk of the requested information is similar or identical to the information that would be requested as part of litigation discovery. Accordingly, much of this information will already have been collected. The burden to manufacturers is therefore unlikely to exceed the FTC's estimates.

⁸ James Bessen, et al., *The Private and Social Costs of Patent Trolls* (Boston Univ. Sch. of Law, Law & Econ. Research Paper No. 11-45 Sept. 19, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272, at 2.

⁹ CTIA-The Wireless Association, *Wireless Quick Facts*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts>.

II. Minor Modifications To the Proposed Study Would Provide The Commission With Important Information On Privateering, Patent Pledges, and Patent Tying

Although the Commission’s revised requests improve the proposed 6(b) study, we urge the Commission to consider a handful of further modifications. These proposals will provide the Commission with information to analyze issues of importance to the information technology community. Adopting these proposals, moreover, will not impose a material burden on recipients of the Commission’s information requests.

1. Privateering

Numerous scholars and commentators have described concerns regarding “privateering,” in which operating companies outsource patent enforcement to PAEs, often while retaining an interest in enforcement of the transferred patents. Privateering can pose significant concerns for competition because operating companies can enlist PAE privateers to hinder rivals through cost-raising strategies.¹⁰

The Commission’s revised proposed study contains a number of requests designed to uncover the scope of privateering and the costs such arrangements impose. Specifically, the FTC intends to gather data regarding the corporate structure and legal organization of PAEs to understand PAEs’ use of shell companies, as well as PAEs’ economic and legal ties to manufacturing firms. We believe that adding the following further requests would aid the Commission’s objective of understanding the nature and extent of these relationships with minimal additional burden:

First, we propose that the FTC add a targeted request for certain categories of communications between a PAE and its investors or potential investors. Specifically, we propose that the Commission request communications in which the investor and PAE discuss the PAE’s patent enforcement strategy or the investors’ potential rivals. The Commission’s initial proposal would have captured such information because it requested “all documents Relating to any communication . . . between the firm and investor or potential investor, financial or otherwise” relating to the PAE’s patents. The Commission’s Revised Requests contain no such request and therefore may fail to uncover such communications that fall outside the definition of an “agreement” or a “Report.” An information request targeting specific and narrowly described investor communications would enable the FTC to uncover more useful data on privateering while also avoiding the burden of “all document” and similar broad requests.

¹⁰ Prior CCIA comments to the FTC discuss the risks of PAEs acting in the interests of operating companies. *Patent Assertion Entities Activities Workshop*, Department of Justice & Federal Trade Commission, Comments of the Computer & Communications Industry Association, File No. PAEW-65, Apr. 3, 2013, *available at* <http://www.justice.gov/atr/public/workshops/pae/comments/paew-0065.pdf>.

Second, we urge the Commission to include an information request aimed at identifying the organizers and advisors that assisted the PAE in establishing its business or participate in its patent enforcement efforts. Based on public reports filed by the publicly-traded PAEs, it appears that several hedge funds and patent monetization advisors have been involved as repeat players in establishing and organizing PAEs. Publicly-traded PAEs at times share the same advisor, with IP Navigation Group serving in that role for three recently formed public PAEs (Marathon Patent Group, Document Security Systems, and GlobalOptions). Similarly, lawyers that act as PAE licensing agents may exercise control over patent assertion activities. The Commission’s revised requests may not fully capture these arrangements. For example, Revised Information Request B.4 requires PAEs to identify “each Person(s) with a contractual or legal right or obligation to a share of revenues, profits, costs or other Economic Interest in the Firm.” A recipient that narrowly construes this request may decline to disclose entities that influence enforcement efforts or assisted in the PAE’s formation. The Commission accordingly should clarify that recipients must disclose entities or individuals that helped establish the PAE’s business or secure funding for the PAE. Relatedly, we urge the FTC to require PAEs to disclose the identity of any entity or person that exercises supervision or control over the PAE’s patent enforcement decisions. Requiring such disclosure will not impose a material burden. Such information is readily available to PAEs and could be provided in the form of a short narrative response.

2. Evasion of Non-SSO Patent Commitments¹¹

Operating companies at times may engage in privateering to evade patent commitments. Among other deleterious effects, evasion of patent pledges may result in economically harmful royalty stacking. Privateering and other arrangements between operating companies and PAEs can serve as devices to evade patent pledges. The Commission’s study recognizes this concern by seeking information relating to commitments made to standard-setting organizations (“SSOs”). Revised Information Requests D and M, for example, require PAEs, manufacturing firms, and non-practicing entities to disclose such commitments.

The patent pledges subject to PAE abuse, however, are not limited to commitments made to SSOs. Firms seeking to induce widespread use of a particular technology increasingly have made voluntary patent commitments outside the SSO standard-setting process. Such obligations can be broader than F/RAND and take many forms, including non-assertion pledges, promises to license royalty-free, and commitments to set maximum royalties. Although these pledges are made outside the SSO context, they can serve a similar function by ensuring interoperability and compatibility among products. However, reliance on such commitments can lock firms into using proprietary technologies and create the conditions for opportunistic behavior, including by dominant firms against upstart rivals.

¹¹ Prior CCIA comments to the FTC discuss non-SSO patent pledges. *Id.*

Breaches of non-SSO pledges thus can inflict the same or even greater harms as firms that evade commitments made to SSOs. Indeed, the Department of Justice has recognized that patent hold-up and related competitive harms “may also arise in situations outside of the SSO context where a patent holder’s prior actions, such as open source commitments, lead others to make complementary investments.”

Accordingly, the Commission should revise its information requests to require recipients to identify industry-wide patents commitments made outside the SSO context. Revised Information Requests D and M require respondents to identify only patent commitments to SSOs, therefore excluding a wide range of relevant commitments subject to abuse. We propose that the Commission modify these requests so that they obtain information on commitments made to potential licensees at large (in addition to SSO commitments). Merely listing such commitments will not impose a material burden on respondents. Moreover, confining this additional category of information to commitments made to prospective licensees at large (*e.g.*, outside of individualized licensing negotiations) will further reduce compliance burden.

3. Employing PAE Proxies To Further Patent Tying Strategies

The bundling of patents can serve as a cost raising strategy. There are particular concerns that firms in the information technology sector at times tie patents not encumbered by patent pledges to patents subject to F/RAND or other licensing obligations, thereby increasing the licensees’ total costs. Outsourcing of patent enforcement by operating companies to PAEs that bundle patents can serve as a device to mask such strategies.

We accordingly urge the Commission to revise its proposed 6(b) study to include targeted requests to uncover patent bundling. Because the FTC’s proposal no longer requires respondents to link each patent to a patent pledge, it may be difficult to determine whether PAE patent portfolios contain encumbered patents and whether PAEs permit licensees realistically to license encumbered patents separately from unencumbered patents. For similar reasons, the Commission may not obtain information necessary to assess whether PAE patent portfolios are priced to comply with F/RAND and other patent obligations.

We therefore believe that it is important for the Commission to clarify that its requests seek limited additional information on bundling strategies. In particular, we propose that the Commission clarify that Revised Information Request E.1.d, which requires PAEs to disclose the “reasons or business strategy for organizing” specific patent portfolios, includes the strategy of bundling encumbered and unencumbered patents in a single portfolio. In addition, we propose that the Commission seek correspondence between PAEs and entities from which a PAE obtains patents that discuss the strategy of bundling encumbered and unencumbered patents. This targeted document request avoids the Commission’s concern with the burden of linking particular patents to particular pledges.

III. Conclusion

We applaud the Commission for initiating this important 6(b) study. The FTC's Revised Requests will enable the antitrust enforcement agencies and the public to obtain empirical data on PAEs' operations, economic relationships, and patent enforcement activities. At the same time, the Revised Requests can be strengthened through the addition of further requests aimed at uncovering additional information relating to privateering. The handful of modifications we propose will further the Commission's objective of obtaining a rich set of information through which to assess the competitive impact of PAE activities.

In conclusion, we believe that the FTC's proposed collection will provide extremely valuable data regarding the PAE business model at a very reasonable cost relative to the value of the data. We look forward to seeing the results in the future.

Respectfully submitted,

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