

Evaluating the Potential Anti-Competitive Effects of Patent Assertion Entities

EXECUTIVE SUMMARY

The Patent Assertion Entity (PAE) generates revenue by purchasing patents and asserting them against operating companies. Significant debate has focused on the effects the PAE exerts on innovation and industry.¹ Unfortunately, reasoned analysis of these effects has been stifled by a lack of information and transparency within the PAE arena. A significant portion of PAE activity is performed through shell corporations and is subject to extensive non-disclosure agreements between the PAE and operating company targets. Furthermore, a large majority of patent assertions settle either before a complaint is filed or before trial. Therefore, quantitative information on the true frequency and cost of PAE patent assertions within the United States is unavailable. The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) have tools to facilitate the disclosure of this information for the benefit of the public. Through use of the FTC's subpoena power, quantitative data could be collected and released to the public. This data could then be analyzed by the public at large to evaluate any pro- and anti-competitive effects of PAE activity.

PARTICIPATING COMPANIES

SAS Institute Inc. | Acushnet Company | Limelight Networks
Newegg Inc. | Safeway Inc. | Sensus USA, Inc.
ABBYY USA Software House, Inc.

BACKGROUND

The PAE (also referred to as a non-practicing entity or "NPE") generates revenue by purchasing patents and asserting them against solvent potential infringers without manufacturing the goods or providing the services protected by the patents themselves.² In recent years, PAE activities have reached an unprecedented scale, with 2,150 companies defending against 5,842 PAE lawsuits in 2011 alone.³ In 2011, these *in-court* patent assertions alone (without including

¹ See, e.g., James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes* (Boston University School of Law, Working Paper No. 12-34, 2012), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/2012.html> (arguing that PAEs are economically harmful to both large and small businesses). For a contrary position, see Spencer Hosie, *Patent Trolls and the New Tort Reform: A Practitioner's Perspective*, A JOURNAL OF LAW & POLICY FOR THE INFORMATION SOCIETY (2008), available at http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Hosie-Formatted-3_6.pdf.

² Bessen & Meurer, *supra* note 1, at 3.

³ *Id.* at 4.

informal pre-litigation claims) cost an estimated \$29 billion dollars.⁴ Despite the massive cost of these actions, there is little substantive evidence by which to evaluate their pro- or anti-competitive impact. The undersigned are operating companies in the high technology, software, and retail businesses. Some of the undersigned attended the joint FTC/DOJ seminar on this topic, where the recurring theme was that the data necessary to determine the extent of the impact of PAE behavior on operating companies does not exist. However, it can be collected and analyzed by the FTC and DOJ.

ACTION NECESSARY TO EVALUATE THE TRUE IMPACT OF THE PAE

There are several roadblocks that prevent reasoned analysis of the PAE's economic impact. First, the scope of the PAE's activities and the breadth of its patent portfolio are often hidden beneath an elaborate network of shell corporations.⁵ Furthermore, extensive non-disclosure and confidentiality agreements prevent patent holders from revealing most aspects of PAE activity.⁶ Patent assertions may be settled in private negotiations subject to non-disclosure agreements, meaning only the PAE and the alleged infringer have knowledge of defenses against the patent(s) asserted or the settlement amount. Assertions that reach the courts are frequently settled for undisclosed amounts.

The most comprehensive data set on PAE activities was provided by the patent aggregation company, RPX.⁷ However, the RPX information is itself limited, including data on lawsuits collected from only 82 companies and data on non-litigation claims collected from only 46 of those companies.⁸ This secrecy benefits only the PAE and deprives the public of the ability to assess the economic impact of PAE activity.

A comprehensive approach will be required to properly evaluate the scope and effect of PAE activity. The FTC and DOJ are uniquely suited to address this problem in that the FTC may subpoena documents necessary to prepare special reports pursuant to Section 9 of the FTC Act⁹ and analyze the collected data in conjunction with the DOJ. In order to investigate potentially anti-competitive aspects of PAE activity, the following information should be collected:

- Structure of each PAE, including structure of any shell companies;
- Financing structure of each PAE, including identity of shareholders;
- Number and identity of patent holders participating in the PAE's portfolio;

⁴ *Id.* at 19.

⁵ Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 5 (2012).

⁶ *Id.* at 2.

⁷ Bessen & Meurer, *supra* note 1, at 4, 7.

⁸ *Id.* at 8.

⁹ 15 U.S.C. § 49 (2012) (“[T]he Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.”).

- Copies of service contracts and non-disclosure agreements between the PAE and patent holders;
- Number and identity of patents in the PAE's portfolio;
- Purchase price and chain of title of patents in the PAE's portfolio;
- Number and list of times each patent has been asserted against a third party in private negotiations;
- Number and list of times each patent has been asserted against a third party in court proceedings;
- List of settlement amounts for each individual patent assertion action (whether privately negotiated or during court proceedings), and;
- Copies of settlement and non-disclosure agreements with alleged infringers.

To conserve resources, investigatory efforts could initially focus on the following PAEs with nearly 1,000 known patent holdings:¹⁰

- Intellectual Ventures
- Round Rock Research LLC
- Rockstar Consortium LLC
- Interdigital
- Mosaid Technologies Inc.
- Rambus
- Tessera Technologies Inc.
- Acacia Technologies
- IPG Healthcare 501 Limited
- Walker Digital LLC
- Wi-Lan
- Global OLED Technology LLC
- Alcatel-Lucent

Through this study and with the information it would collect, the FTC and DOJ could better understand and analyze the competitive implications of patent transfers in various industries. After collection, this data could be reviewed, made anonymous where necessary, and released to the public. The public could then evaluate the pro- and anti-competitive effects of PAE activity and assess the need or desirability and contours of corrective legislation, regulation and reform.

CONCLUSION

¹⁰ *Largest NPE Patent Holding*, PATENT FREEDOM, (January 18, 2013), <http://www.patentfreedom.com/about-npes/holdings/>.

In 2011 alone, PAE activities resulted in 5,842 lawsuits against 2,150 companies at an estimated cost of \$29 billion dollars, and lawsuits of this type are on the rise.¹¹ The FTC and DOJ are uniquely empowered to collect the data necessary to evaluate the market effects of PAE activities. With this information collected and confidentiality addressed, the gathered data could then be released to the public for analysis of PAE market effects.

Dated: April 3, 2013

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¹¹ See generally Besson & Muerer, *supra* note 1.