



April 5, 2013

To Whom It May Concern:

The Innovation Alliance appreciates the opportunity to submit its views to be considered as part of the record for the December 10, 2012 FTC/DOJ Patent Assertion Entity Activities Workshop.

The Innovation Alliance represents innovators, patent owners, and stakeholders from diverse industries. Innovation Alliance members believe in the critical importance of maintaining a strong patent system that supports innovative enterprises across the country, helps fuel the innovation pipeline, creates high-wage, high-skill technology jobs, and ultimately drives the 21st century U.S. economy.

For purposes of commenting, we submit this brief cover letter and attach two more substantial letters the Innovation Alliance submitted to the General Accountability Office ("GAO") in connection with that agency's study of patent litigation by so-called non-practicing entities ("NPEs") under Section 34 of the America Invents Act ("AIA"). These GAO submissions set forth the views of the Innovation Alliance in fine detail.

Moreover, they are consistent with much of the discussion at the FTC/DOJ workshop. A central and recurring theme of both our comments and those at the workshop is that it has not proved possible to define "NPEs" so as to avoid including entities in the disfavored group that no one desires to target, such as highly innovative, research and development-intensive companies. We appreciate the agencies' recognition of this fact and the workshop's narrower focus on so-called patent assertion entities ("PAEs"). However, even with respect to PAEs, many experts at the workshop emphasized that policymakers cannot assume that patent aggregators are inherently abusive or anti-competitive. The innovation ecosystem is necessarily complex, dynamic, and dependent on the pro-competitive efficiencies of specialization and a liquid secondary market. Rather than focusing on trying to define and then disadvantage certain actors, we should focus on trying to define and then deter certain actions.

Another central theme of our GAO submissions and of the workshop is that there is a dearth of empirical data and reliable studies to guide policymakers as they consider issues surrounding patent litigation. In that regard, we commend the FTC and DOJ for undertaking this workshop in an effort to develop an evidence-driven approach to the PAE issue. Significantly, a number of participants, including Professors Shapiro and Chien, agreed that additional evidence and empirical work is needed before any conclusions can be reached.

With respect to the PAE litigation data discussed at the workshop, the Innovation Alliance is concerned that the relevant studies (by Chien, Bessen & Meurer, and Jeruss, Feldman & Walker) may be methodologically flawed. The lack of a rigorous peer review process allows seemingly biased and politically-motivated studies to be published and cited without challenge. Good policymaking demands better and more reliable data of the pro- and anti-competitive effects of “NPEs” and “PAEs.”

What hard evidence there is suggests that patent litigation rates have remained relatively constant over time, despite periodic surges during periods of intense technological development. Further, there is no evidence of any market failure or anticompetitive effects in the smartphone sector. By all empirical measures, the smartphone market is both highly competitive and highly innovative.

At bottom, the Innovation Alliance opposes attempts to change the law based upon anecdotes and assumptions that certain business models are harmful or anti-competitive. We believe that policymaking should be based upon evidence and data, and that there is a lack of sufficient evidence and data to support making the major changes to the law that some are proposing. The Innovation Alliance, however, supports measures to curb the assertion of frivolous claims and defenses in patent litigation, provided such measures are based upon sound data and narrowly targeted at frivolous activity so that highly innovative, job-creating entities are not inadvertently harmed.

Thank you for your consideration of the views of the Innovation Alliance

Sincerely,

A handwritten signature in black ink that reads "Brian Pomper". The signature is written in a cursive, flowing style.

Brian Pomper
Executive Director
The Innovation Alliance

Attachments