The American Antitrust Institute

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Comments of the American Antitrust Institute on the Federal Trade Commission's Proposed Information Request to Patent Assertion Entities PAE Reports: Paperwork Comment; Project No. P131203

I. Introduction

The American Antitrust Institute (AAI) appreciates the opportunity to comment on the Federal Trade Commission's proposed investigation into the activities of patent assertion entities (PAEs). The AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of approximately 130 prominent antitrust lawyers, law professors, economists, and business experts.[1] AAI has long been involved in issues at the intersection between competition and intellectual property law regimes.[2]

The AAI commends the FTC for proposing to use its Section 6(b) authority to investigate PAEs, more popularly known as "patent trolls." PAEs neither develop technology nor manufacture products. Instead, their business model is focused on purchasing and enforcing patents. PAEs can, in theory, create a more liquid market for patents and allow individual inventors to monetize their intellectual property, helping stimulate technological advances. They can, however, also harm competition, innovation, and consumers through abusive enforcement and by exploiting flaws in the patent system. PAEs have sometimes postponed the enforcement of patents until the relevant product is commercialized. Once the technology is widely available on the market, they have sent demand letters and filed complaints against manufacturers and users of the allegedly infringing product and exploited the "holdup" value of patent litigation. Aware of the high costs of patent litigation and the potential disruption to their businesses, parties that receive demand letters and complaints often acquiesce to the PAE's demands. In short, PAEs may be engaging in rent seeking instead of promoting innovation.[3]

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[1] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

[2] For a description of AAI activities, research, and analysis, see American Antitrust Institute, *see* www.antitrustinstitute.org.

[3] Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking and Patent Law Reform*, 25 BERKELEY TECH. L.J. 1583, 1584 (2009).

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While PAE conduct rests in large part on deficiencies in the patent system, it may also be a violation or the product of a violation of the antitrust laws. Simple enforcement of patents is ordinarily not an antitrust violation. PAE behavior, however, may run afoul of the antitrust laws in multiple ways. A PAE that seeks or threatens to seek injunctions or exclusion orders for infringement of a standard essential patent (SEP), subject to a reasonable and non-discriminatory (RAND)[4] licensing commitment, may be in violation of Section 2 and Section 5. PAE acquisition of patents and patent portfolios may violate Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition. If a PAE enforces patents in collaboration with multiple firms against competitors, this behavior may violate Section 1 of the Sherman Act. A PAE that sends demand letters to alleged infringers without disclosing the patent or technology at issue may violate Section 5.

AAI believes that the FTC and Department of Justice (DOJ) (collectively "the antitrust agencies") should bring enforcement actions against PAEs based on these antitrust theories whenever the evidence to support them is in hand. The antitrust agencies have examined the antitrust-intellectual property interface over the past twenty years. The FTC has published multiple landmark reports[5] and brought enforcement actions in the area.[6] In 2008, the FTC brought an enforcement action against N-Data, a PAE, for repudiating an ex ante licensing commitment on SEPs it had acquired.[7]

Even with the large body of evidence that currently exists on abusive PAEs, the FTC's proposed 6(b) investigation would be an important step forward. The modern information and communication technology (ICT) sector, which is where most PAE activity has occurred, features a diverse set of actors. These include manufacturing companies, pure technology development entities, and PAEs. The FTC's investigation would illuminate the extent of abusive PAE conduct and uncover behavior that has so far gone undetected. The FTC's proposed information request is detailed and would reveal to what extent PAE behavior may violate the antitrust laws. Further refinements to the information request would help the FTC develop a more comprehensive empirical record to support further competition advocacy and enforcement against abusive behavior.

II. Antitrust Theories of Harm Relating to PAEs

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[4] "Fair, reasonable, and non-discriminatory" (FRAND) is sometimes used instead of RAND, especially in Europe. For the sake of clarity, RAND will be used throughout these comments.

[5] *See, e.g.*, THE EVOLVING MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION, FED. TRADE COMM'N (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf; TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, FED. TRADE COMM'N (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[6] See, e.g., Dell Computer Corp., 121 F.T.C. 616 (1995) (Consent Order); Union Oil Co. of Cal., FTC Docket No. 9305 (Aug. 2, 2005) (Decision and Order); Robert Bosch GmbH, FTC Docket No. C-4377 (Nov. 26, 2012) (Complaint & Decision); Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (Jan. 3, 2013) (Decision and Order).

[7] Negotiated Data Solutions LLC, FTC Docket No. C-4234, 2008 FTC LEXIS 120 (Sept. 22, 2008) (Decision and Order).

PAE enforcement practices can harm competition, innovation, and consumers by raising rivals' costs, erecting barriers to entry, and subverting collaborative standard setting. The rise of aggressive PAEs reflects, at least in part, deficiencies in the patent system. These defects include the issuance of low-quality patents, often vague and overlapping patent rights, the lack of an independent invention defense, and unduly strong remedies for infringement.[8]

Regardless of whether the patent system is reformed and to what extent, the antitrust laws have played and should continue to play an essential role in addressing abusive PAE behavior. The mere enforcement of patents, without anything more, does not ordinarily violate the antitrust laws. PAE enforcement of patents may, however, reflect one or more violations of the antitrust laws. PAEs that acquire SEPs and disown relevant pre-existing RAND licensing commitments may be in violation of Section 2 and/or Section 5. The acquisition of patents and patent portfolios by PAEs can violate Section 7. When PAEs act as "privateers" in collaboration with firms seeking to weaken or eliminate a competitor through joint patent enforcement, they may violate Section 1. PAEs that send demand letters to alleged infringers without disclosing the specific patent(s) infringed may run afoul of Section 5.

While it is unclear how many PAE-owned patents are essential to a standard, PAEs with large patent portfolios are very likely to own some SEPs. Once a standard is adopted and commercialized, owners of SEPs have the ability and incentive to demand royalties that greatly exceed the value of their technology. Due to sunk costs and the need for interoperability, firms that implement a standard generally cannot switch to alternatives and are thus vulnerable to holdup.[9] To protect against this opportunistic behavior, many SSOs have required technology companies that contribute patents to a standard to commit to RAND licensing terms.[10] RAND commitments have been criticized for lacking substantive content.[11] But it is widely agreed that a RAND commitment prohibits a patent holder from seeking injunctions and exclusion orders against willing licensees.[12]

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[8] Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809 (2007).

[9] Jonathan L. Rubin, *Patents, Antitrust, and Rivalry in Standard-Setting*, 38 RUTGERS L.J. 509, 520-21 (2007).

[10] Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 314 (3d Cir. 2007)

[11] Mark A. Lemley, *Intellectual Property Rights and Standard Setting Organizations*, 90 CAL. L. REV. 1889, 1964-65 (2002).

[12] *See, e.g.*, Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012) (Posner, J.) ("To begin with Motorola's injunctive claims, I don't see how, given [RAND], I would be justified in enjoining Apple from infringing the '898 unless Apple refuses to pay a royalty that meets the [RAND] requirement. By committing to license its patents on [RAND] terms, Motorola committed to license the '898 to anyone willing to pay a [RAND] royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent."); Fiona M. Scott Morton, Deputy Assistant Att'y Gen. for Economic Analysis, Antitrust Div., U.S. Dep't of Justice, The Role of Standards in the Current Patent Wars 8, Presented at Charles River Associates Annual Brussels Conference:Economic Developments in European Competition Policy (Dec. 5, 2012), *available at* http://www.justice.gov/atr/public/speeches/289708.pdf ("[W]hen the SEP owner makes a [RAND] commitment, it is explicitly agreeing that users of its IP may compensate the owner with money."); Joseph Scott Miller, *Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm*, 40 IND. L. REV. 351, 358 (2007) ("[B]y making [a RAND] promise all the participants who own patents in the resulting standard grant the adopter community an irrevocable right to use its patented technology to comply with the standard in exchange for a reasonable royalty and other reasonable terms, the details of which are negotiated later without any possible of a court injunction.").

Even with their shortcomings, RAND commitments can protect standard setting participants and standards users from abusive behavior and thereby encourage greater participation in SSOs.

A PAE (or any other owner of a SEP) that repudiates a RAND commitment may violate Sections 2 or 5. Allowing assignees to disown prior licensing commitments would eviscerate the value of a RAND commitment and create a "potentially fatal loophole."[13] If RAND licensing promises did not run with a patent, SEPs could be transferred to a third party who would be free to seek monopolistic royalties (and even share the proceeds with the original owner). The FTC in enforcement actions has held that RAND and other ex ante licensing commitments run with a patent. *In the Matter of Negotiated Data Solutions LLC*, for instance, the FTC required a PAE, which acquired SEPs, to honor its assignor's licensing commitment.[14] PAEs that repudiate pre-existing licensing commitments – by, for example, threatening to seek injunctions and exclusion orders against willing licensees that do not agree to extortionate royalty demands – may violate the antitrust laws.

The transfer of patents from operating companies to PAEs can lead to a radical change in patent enforcement strategy. Manufacturing companies and PAEs have different incentives for enforcing intellectual property. Manufacturing companies that file infringement suits against competitors face the risk of counterclaims alleging that their products infringe on the defendant's patents. Companies are also unlikely to threaten the users of competing products with patent infringement suits. The loss of goodwill and future sales are likely to be substantial. Even as Apple and Samsung are locked in a protracted patent war,[15] Apple, for example, is unlikely to file patent infringement suits against purchasers of Samsung smartphones. In addition to the negative public press, a potential future customer may be lost forever with this strategy. Operating companies also frequently participate in standard setting organizations (SSOs) and other collaborative ventures. A reputation for overzealous patent enforcement could lead to their exclusion from future collaborative activities or, at the very least, reduce the likelihood that their patented technologies would be incorporated into future standards.

In contrast, PAEs appear to have a greater incentive to enforce patents aggressively and indiscriminately than a manufacturing company. PAEs do not manufacture products and, as a result, do not face the risk of patent infringement counterclaims or onerous discovery requests.[16] They are also not constrained by reputational concerns. Since they do not make or sell anything, they do not fear a consumer backlash from targeting end users with demand letters and patent infringement suits. They also do not participate in SSOs and so are not concerned with maintaining a reputation for fair dealing. In light of this reality, PAEs may be less constrained in disregarding RAND

[13] Michael A. Carrier, *Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take*, 1 CPI ANTITRUST CHRONICLE, Winter 2013, at 5.
[14] Negotiated Data Solutions LLC, FTC Docket No. C-4234, 2008 FTC LEXIS 120 (Sept. 22, 2008) (Decision and Order).
[15] Steve Lohr, *Apple v. Samsung Electronics: The Patent War Claims, Uncut*, N.Y. TIMES, July 25, 2012, *available at* http://bits.blogs.nytimes.com/2012/07/25/apple-v-samsung-electronics-the-patent-war-claims-uncut/.
[16] Eon-Net LP v. Flagstar Bancorp, 653 F.3d 1314, 1327-28 (Fed Cir. 2011).

obligations. In fact, reputational considerations for PAEs are likely to push in the opposite direction. A PAE known for "scorched earth" enforcement practices is more likely to maximize royalties from manufacturers and users than a more restrained peer.

The acquisition of patents by PAEs can violate Section 7. The 2010 Horizontal Merger Guidelines state that the antitrust agencies will challenge acquisitions that are likely to increase the ability or incentive to exercise market power unilaterally.[17] Because of their structure and business model, PAEs often have a greater incentive than operating companies to exercise the market power associated with patents. A transfer of patents from an operating company to a PAE could thus run afoul of Section 7, particularly when there are successive acquisitions that may encompass technology substitutes and that result in massive patent aggregations under ownership single firm.[18]

PAEs have assumed enforcement responsibilities on behalf of operating companies against their competitors. The so-called "privateering" model has become more prevalent in recent years.[19] Manufacturing companies have formed consortiums to acquire patent portfolios jointly. The acquired patents have sometimes been transferred to PAEs who are entrusted to enforce them against competitors outside the consortium. By outsourcing enforcement to a PAE, the operating companies may not have to reveal themselves to the targets of demand letters and lawsuits and risk counterclaims and reputational injury. Even if the PAE's commercial history and relationships are in the open, operating companies can still assert that the PAE is acting "independently" in its patent enforcement campaign against their competitors.

The formal relationship between operating companies and a PAE may mask the functional realities of a privateering arrangement. A PAE that acquires a patent portfolio from a consortium of operating companies may be legally independent of the consortium and its members following the transfer. Yet, the incentives of the PAE and the consortium may still be aligned. The PAE seeks to maximize royalty revenues through vigorous patent enforcement, and the operating companies stand to benefit when their competitors are weakened or excluded from the market by PAE-initiated patent infringement suits.

Two recent transfers of patent portfolios from operating companies to PAEs have received significant attention. In 2012, Rockstar Bidco, comprised of Apple, Microsoft, Research in Motion, and others, outbid Google to acquire the patent portfolio of the bankrupt Nortel Networks.[20] About two-thirds of this portfolio was soon transferred to a PAE.[21] The PAE, called Rockstar Consortium,

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[17] U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010) (Hereafter "HORIZONTAL MERGER GUIDELINES").

[18] Fiona M. Scott Morton, Deputy Assistant Att'y Gen. for Economic Analysis, Antitrust Div., U.S. Dep't of Justice, Patent Portfolio Acquisitions: An Economic Analysis 3-4, Presented at Fifth Annual Searle Conference on Antitrust Economics and Competition Policy (Sep. 21, 2012), *available at* http://www.justice.gov/atr/public/speeches/288072.pdf.

[19] Carrier, *supra* 13, at 4.

[20] Robert McMillan, *How Apple and Microsoft Armed 4,000 Patent Warheads*, WIRED, May 21, 2012, http://www.wired.com/wiredenterprise/2012/05/rockstar/.

[21] *Id.*

has publicly asserted that it is not bound by prior RAND licensing promises,[22] and it has initiated litigation against Google and multiple users of Google technologies for alleged patent infringement.[23] In 2011, Nokia, which manufactures Windows Phone handsets and whose mobile unit is now being acquired by Microsoft,[24] transferred 2,000 patents to the PAE Mosaid. Microsoft, Nokia, and Mosaid agreed to split the licensing revenues equally.[25] Mosaid's CEO stated that the portfolio includes over 1,200 SEPs essential to wireless standards,[26] and pledged to "go[] after some global revenues of some very large companies."[27] As promised, a Mosaid subsidiary filed a patent infringement suit against Apple, alleging that the iPad and iPhone infringe its SEPs.[28]

The Supreme Court in *United States v. Singer Manufacturing Co.* held that the joint enforcement of patents against competitors could violate Section 1.[29] Under most circumstances, a single firm is legally entitled to enforce its patents against competitors.[30] A concerted enforcement strategy among competitors, however, may reflect a "common purpose" and violate Section 1.[31]

PAEs have sent demand letters to manufacturers and downstream users of allegedly infringing technology without listing and describing the patent(s) at issue.[32] In these situations, the targets are not informed of the scope of the violation or their potential legal liabilities.[33] The alleged infringement could be significant or trivial. Targets cannot determine what an appropriate licensing arrangement and royalty might be.[34] PAEs can exploit information asymmetries between themselves and targets to extract royalties far in excess of the value of the patent allegedly infringed. The omission of relevant information further enhances the leverage of PAEs and often compels parties to comply with the terms of the demand letter.

PAEs that send materially incomplete demand letters may violate Section 5. *In the Matter of International Harvester Co.*, the FTC held that omissions of material facts could violate Section 5's

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[22] *Id.*
[23] Dan Levine, *Google, Samsung, Huawei Sued over Nortel Patents*, REUTERS, Oct. 31, 2013, *available at* http://www.reuters.com/article/2013/10/31/us-google-rockstar-lawsuit-idUSBRE99U1EN20131031.
[24] Ritsuko Ando & Bill Rigby, *Microsoft Swallows Nokia's Phone Business for $7.2 Billion*, REUTERS, Sep. 3, 2013, *available at* http://uk.reuters.com/article/2013/09/03/uk-microsoft-nokia-idUKBRE98202X20130903.
[25] Alastair Sharp, *Mosaid Sees Rescue in Its Nokia-Microsoft Deal*, REUTERS, Sep. 1, 2011, *available at* http://www.reuters.com/article/2011/09/01/us-mosaid-idUSTRE7803O920110901.
[26] Diana ben-Aaron, *Nokia Transfers Part of Patent Portfolio to Canada's Mosaid*, BLOOMBERG, Sep. 1, 2011, *available at* http://www.bloomberg.com/news/2011-09-01/mosaid-acquires-portfolio-of-nokia-patents-for-undisclosed-sum.html.
[27] Jameson Berkow, *Mosaid Acquires 2,000 Nokia Patents*, FINANCIAL POST, Sep. 1, 2011, *available at* http://business.financialpost.com/2011/09/01/mosaid-arms-for-wireless-patent-war-acquires-2000-nokia-patents/?__lsa=b4fe-c2c4.
[28] Steven Musil, *Apple Sued by Company in Patent Deal with Microsoft*, CNET, March 5, 2013*, available at* http://news.cnet.com/8301-1023_3-57391184-93/apple-sued-by-company-in-patent-deal-with-microsoft/.
[29] 374 U.S. 174 (1963).
[30] *Id.* at 189.
[31] *Id.* at 194-95.
[32] *Comments of the American Antitrust Institute on Patent Assertion Entities*, AM. ANTITRUST INST., *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20PAE%20Comments%202.21.pdf.
[33] *Id.* at 8.
[34] *Id.*

prohibition on unfair acts or practices.[35] PAEs that do not disclose the infringed patent or the nature of the infringement in their demand letters may similarly be liable under Section 5 for material omissions.

III. The FTC's Proposed Information Request Would Further Illuminate the Relationship Between PAE Conduct and the Antitrust Laws

The FTC's proposed information request would shed more light on the extent to which PAE enforcement methods violate or are a product of violating the antitrust laws. With the resulting empirical record, the antitrust agencies would have an even stronger basis for preventing and remedying abusive PAE behavior.

The information request would help the FTC determine whether PAEs have acquired SEPs and disclaimed existing RAND commitments. It asks PAEs to list patents that are subject to RAND licensing commitments.[36] PAEs are also requested to identify patents that have been enforced through demand letters and lawsuits,[37] communications relating to demands and licensing agreements,[38] and indicate what remedies were sought.[39] These requests, taken together, would reveal whether a PAE sought or threatened to seek an injunction or exclusion order against willing licensees of RAND-encumbered patents. A PAE that enforced a SEP in this manner may have violated the RAND commitment and Sections 2 or 5.

The request asks for information on the economic and legal relationship between PAEs and operating companies. It asks whether other entities have an economic interest or exercise legal control in the PAE or particular patents belonging to the PAE.[40] Furthermore, it requests PAEs to disclose licensees and targets of patent demand letters and litigation.[41] By dissecting the relationship between PAEs and operating companies, these requests would show whether operating companies have jointly entrusted PAEs to enforce patents against their competitors. This type of conduct may be a violation of Section 1.

The information request seeks to determine whether PAEs have engaged in deception or material omissions in drafting and sending demand letters to alleged infringers. PAEs are asked to provide every demand letter that they sent as part of their enforcement efforts.[42] This request would show whether PAEs failed to disclose the relevant patents to the targets of their enforcement campaigns. A PAE that sent demand letters without disclosing the relevant patent(s) may have violated Section 5.

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[35] 1014 F.T.C. 949, 950-51 (1984).
[36] Federal Trade Commission, Agency Information Collection Activities; Proposed Collection; Comment Request, 78 Fed. Reg. 61,352, 61,354 (Oct. 3, 2013).
[37] *Id.*
[38] *Id.* at 61,355-56.
[39] *Id.* at 61,355.
[40] *Id.* at 61,354.
[41] *Id.* at 61,356.
[42] *Id.* at 61,355.

IV. Suggested Refinements to the Information Request

The information request can be expanded and refined in ways that will allow the FTC to understand more fully whether PAEs and other related entities have violated the antitrust laws. The request should explicitly ask for Hart-Scott-Rodino (HSR) notifications pertaining to patent acquisitions and meaningful explanations for the PAE's determinations that such acquisitions were not subject to HSR notification requirements. The information request should also seek information on the representations that PAEs made to potential investors. The information request should be sent to parties that have sold or transferred a large number of patents to the PAEs being examined. The FTC should also send an abbreviated information request to SSOs seeking information on their current and past patent policies.

a. Whether Hart-Scott-Rodino (HSR) Notification Was Filed

The information request should explicitly ask for HSR notifications that were filed on patent acquisitions. The proposed information request seeks "disclosures required by the Securities and Exchange Commission or any other Person."[43] This request likely covers HSR notifications. Nonetheless, to eliminate any ambiguity, the request should expressly state that recipients must file relevant HSR notifications. The request should also call for meaningful explanations of determinations that such acquisitions did not require HSR notification.

By requesting HSR notifications, the FTC can determine whether PAEs have been meeting their reporting obligations and whether the HSR rules require modifications for patent acquisitions. A failure to file an HSR notification can impede or even prevent the FTC from reviewing the transaction's likely competitive effects. If a patent portfolio acquisition that exceeded the size-of-person and size-of-transaction thresholds was not accompanied by an HSR notification, the parties involved may have violated the HSR rules. If patent transactions were structured in a manner intended to evade HSR notification requirements, this may also be a violation of HSR rules. At the same time, the FTC may learn through its investigation that parties involved with large patent transfers were not required to file HSR notifications. This finding may suggest that the HSR rules need to be modified to account for the peculiarities of patent transactions.

b. Representations Made by PAEs to Investors

The information request should ask PAEs to provide formal and informal representations that they made to potential investors. PAEs have often relied on external financing for their operations.[44] A few PAEs have even issued stock that is publicly traded.[45] As part of obtaining outside funding, PAEs likely had to describe their business model and projected future revenue

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[43] *Id.* at 61,354.

[44] Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 316 (2010).

[45] *Id.* at 328-29.

streams. By requiring the submissions of these investor representations, the FTC would acquire a better understanding of a PAE's business model and how its patent enforcement strategy differs from that of other non-practicing entities and operating companies.

c. The Information Request Should Be Sent to Leading Sources of Patents for the 25 Selected PAEs

The proposed investigation could show whether PAEs and operating companies pursue different patent enforcement strategies. Theory and anecdotal evidence suggest that PAEs likely enforce patents more aggressively than operating companies. The investigation could confirm the theory and perception that PAEs are more zealous enforcers of intellectual property rights. Ideally, the responses to the information request would allow the FTC to examine the enforcement of particular patents and patent portfolios over time, under both operating company and PAE ownership.

The findings of the investigation could show that a particular patent or patent portfolio generated more demand letters and lawsuits, particularly against downstream users, when under PAE ownership vis-à-vis operating companies. Given the incipiency standard for Section 7, the antitrust agencies do not need conclusive evidence to challenge anticompetitive transactions.[46] Yet, with a robust empirical record, the antitrust agencies would have an even stronger basis to challenge potentially anticompetitive patent transfers from operating companies to PAEs.

To track the enforcement of patents over time, the information request should be sent to both leading PAEs and the leading sources of patents for the selected PAEs. The sources of patents could be operating companies, universities, or individual inventors (collectively "non-PAEs"). The FTC has proposed to send the information request to 25 PAEs, and also to 15 non-PAE entities in the wireless industry.[47] The 15 non-PAEs selected by the FTC should include the principal sellers of patents to the 25 selected PAEs. With the myriad sources of patents for PAEs, the FTC should not restrict its focus to non-PAEs in the wireless industry and should look at other sectors, as well. And, if the principal contributors of patents to the 25 PAEs number more than 15, the information request should be sent to additional non-PAEs.[48]

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[46] Section 7 prohibits transactions whose effect "*may* be substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). The Horizontal Merger Guidelines "reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." HORIZONTAL MERGER GUIDELINES § 1.

[47] *Id.* at 61,353.

[48] At the same time, some of the non-PAEs, which have been the source of patents for PAEs, may have gone through bankruptcy and liquidation. The AAI recognizes the practical limitations on fully tracking enforcement practices over time across different owners. *See, e.g.*, Randall Chase, *Patents Held by Bankrupt Nortel to be Sold*, ASSOC. PRESS, July 11, 2011, available at http://www.csmonitor.com/Business/Latest-News-Wires/2011/0711/Patents-held-by-bankrupt-Nortel-to-be-sold.

d. Narrowly Tailored Information Request to SSOs

SSOs can and should play an important role in constraining the power of SEP owners. If they establish robust patent policies, they can encourage wide participation in the development, adoption, and commercialization of standards by preventing opportunistic conduct by SEP owners. If they, however, fail to establish limits on how SEPs can be enforced and licensed, they may enable SEP owners to engage in anticompetitive behavior, which can discourage socially beneficial standard setting activity.[49] For example, under ill-defined patent policies, PAEs may acquire RAND-encumbered SEPs and assert that they are not bound by the pre-existing licensing commitment. They may demand monopolistic royalties and seek injunctions and exclusion orders against manufacturers of standard-compliant products that do not acquiesce.

In light of the anticompetitive risks of collaborations among actual and potential competitors, the Supreme Court in two important decisions has stated that SSO owners have an obligation to police their processes.[50] SSOs that fail to institute and enforce procedural safeguards may violate the antitrust laws. If SSOs fail to provide substantive content to RAND commitments or stipulate that ex ante licensing commitments run with an SEP, they may be in violation of the antitrust laws.[51]

The FTC should send a limited information request to SSOs concerning their current and historical patent policies. The request should seek documents that pertain to the obligations imposed on owners of SEPs. It should cover both official documents establishing an SSO's patent policies and less formal documents, like slide shows at working group meetings listing the obligations that contributors of SEPs agreed to assume.

This information can show whether SSOs have established effective restrictions on how SEPs are enforced and whether they have safeguarded their process from anticompetitive abuse. A strong patent policy would, among other things, define a RAND royalty conceptually, restrict the ability of SEP owners to obtain injunctions and exclusion orders against willing licensees, and mandate that ex ante licensing commitments run with a patent.[52] If an SSO has not implemented sound patent policies by, for example, failing to articulate the specific obligations arising under a

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[49] *Request for Joint Enforcement Guidelines on the Patent Policies of Standard Setting Organizations* at 7, AM. ANTITRUST INST., available at http://www.antitrustinstitute.org/~antitrust/sites/default/files/Request%20for%20Joint%20Enforcement%20Guidelines%20on%20the%20Patent%20Policies%20of%20Standard%20Setting%20Organizations.pdf. (hereafter "AAI Request for Joint Enforcement Guidelines").

[50] The SSO "is best situated to prevent antitrust violations through the abuse of its reputation." American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 574 (1982). Imposing antitrust liability on SSOs would ensure "[Pressure] [will be] brought on [the SSO] to see to it that [its] agents abide by the law." Id. at 572. *See also* Allied Tube & Conduit Corp. v. Indian Head Inc., 486 U.S. 492, 509 (1988) ("[The] "hope of procompetitive benefits [from standard setting activity] depends upon the existence of safeguards sufficient to preven the standard-setting process from being biased by members with economic restraints in restraining competition.").

[51] AAI Request for Joint Enforcement Guidelines, *supra* note 49, at 8-9.

[52] *Id.* at 12-17.

RAND commitment, it may have enabled abusive and anticompetitive conduct by PAEs and thereby violated the antitrust laws.

V. Conclusion

The AAI applauds the FTC for proposing to use its Section 6(b) authority to investigate the activities of PAEs. We believe that the antitrust agencies already have sufficient evidence to challenge abusive and anticompetitive behavior under established antitrust theories. Nonetheless, this proposed investigation would yield important findings about PAEs and provide the basis for a more comprehensive competition policy response.

Respectfully,

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