March 9, 2013
To: United States Federal Trade Commission and United States Department of Justice
From: Michael Risch, Villanova University School of Law[1]
risch@law.villanova.edu

Re: Request for Comments on Patent Assertion Entities Activities

I respectfully submit my comments in response to the above request for comments.

Patent aggregation has become far more prominent in recent years, and further examination into anti-competitive aspects of aggregation is warranted, especially to the extent that such aggregation leads to individual instances of anti-competitive behavior. As such, I have little to add to other comments relating to potential for such harm, except to say that I am skeptical that this is a marketwide problem as opposed to an individual actor problem.

Thus, I want to focus on two aspects of aggregation that I believe are underrepresented in academic debate, and certainly in the popular press. First, aggregation and harm from it is not limited to non-practicing entities. Second, aggregation can bring efficiencies that are unavailable for diversely owned patents.

1. Aggregation is Not Limited to Specialized Patent Assertion Companies.

Part I of my forthcoming article, The Securitization of Patents, 63 Duke L.J. ___ (2013), explores the growth of patent aggregation. The argument is straightforward: aggregation is everywhere. It is not limited to NPEs, PAEs, technology houses, privateers, licensors, or any other non-producing company. Product making companies – big ones – are also aggregating. First, they aggregate simply by having employees that assign their inventions. Second, they aggregate in the same way that NPEs do: by buying from others. There is no clear normative or descriptive reason why one type of aggregation is better than others from a competitive viewpoint. We should not draw the line between good activities and bad activities simply based on who is aggregating. Instead, it is the behavior that should be the focus. The article is available at http://papers.ssrn.com/abstract=2227103.

A good example is Cisco's case against Innovatio. If the facts alleged in Cisco's complaint are true, then Innovatio's acts may have anti-competitive effects. It is important to note two things, however. First, the nature of those acts would not be less anti-competitive if Broadcom, the original patent owner, acted in the same way. Second, Innovatio owned and asserted around 40 patents, a small fraction of Broadcom's aggregated portfolio. The harm from aggregation, if any, is due to the behavior, and not the nature of the actor. Even then, there are complexities, such as the potential unavailability of contributory infringement liability against Cisco, which means that the only remedy Innovatio might have is against end users.

I have read the comments (and other works) relating to market definition and other issues relating to non-practicing entities. While I agree with many of those comments, they are only helpful as far as they

[1] University affiliation is provided for identification only. These comments reflect the views of the author and no others, including Villanova University.

go in a world where patents are alienable. Focusing on the actor instead of the acts will miss several important points. First, rather than spinning portfolios out to separate companies, product-making companies will simply assert patents in-house. This brings its own inefficiencies. Second, NPEs might simply start making some products. This, too, would be inefficient if that is not their expertise. Third, financiers will simply find another way to enforce individual patents, such as using individuals as nominal plaintiffs; this is hardly an efficient solution. Fourth, leaving product companies out of the consideration allows for unchecked anti-competitive behavior.

Any policy considerations should be owner neutral, and focused on wrongful acts.

2. Aggregation is not Synonymous with Inefficiency

The remainder of The Securitization of Patents considers the nature of aggregation and its costs and benefits. There is no doubt that aggregation can lead to hold-up problems, and the article suggests one solution that might limit such problems. As noted in part one, those hold-up problems, when and if they occur, are not limited to PAEs. Jack Lu has researched licensing fees, and finds that NPEs do not obtain licensing fees that are higher than practicing companies obtain.

That said, my article focuses on some misconceptions I have read in prior comments and the literature. First, aggregation among product companies is no bargain for competition. Big companies hate NPEs because they cannot get a cross-license. But cross-licenses have their own downsides. By cross-licensing, companies are able to effectively lock out start-ups and other disruptive technology that does not have a sufficient patent portfolio to offer in exchange. Ted Sichelman explores one example in *The Vonage Trilogy: A Case Study in 'Patent Bullying'*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856703.

Another misconception is that it must necessarily be a bad thing that portfolios are valued based on their size rather than the quality of their constituent patents. As I argue (and Wagner and Parchomovsky argue in Patent Portfolios), a focus on the portfolio can bring great efficiency. Their article is here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582201.

Licensing single patents is very expensive. A great deal of debate about patent validity and patent infringement takes place, and disputes often result in very expensive litigation. Furthermore, when patents are not aggregated, potential licensees line up and debate each patent – one by one – with each potential infringer. This is no way to run a patent market, if there is going to be one. Instead, aggregated portfolios allow the parties to look at the forest instead of the trees. A single license might resolve 1000 or even 10000 disputed patents.

To be sure, many of the patents in a portfolio will be invalid or noninfringed. But this is an issue of pricing. No plaintiff is going to bring a case for 1000 patents. Those that have tried bringing many patent claims have wound up with limited ability to assert claims, and lost because of it (See, e.g., In re Katz, where the court affirmed a limited number of claims that could be asserted). At most four, five, or maybe ten patents could be litigated at once. No aggregator would look to litigation as a primary way to monetize patents.

In practice, companies licensing large portfolios consider a few of the "lead" patents relating to the technology, and may even hotly debate those patents. Having done so, however, it is better to have a resulting license of a large portfolio than just those few patents. The issue, of course, is pricing. Efforts should be made to reduce hold-up, determine better pricing, and reduce litigation likelihood. But this is true of all cases, not just those where there is aggregation.

Third, it is not clear that aggregation leads to royalty stacking. In fact, it may lead to "unstacking" in two different ways. First, by bundling patents, the parties can negotiate a single price realistically based on the value of the potentially infringing product. Second, and perhaps more subtle, a license with a sophisticated aggregator may set realistic expectations for later non-aggregated patent owners. Once a license for some group of patents has been secured, it will be difficult for future patentees to argue that they should be paid the same amount for a single patent. In other words, the aggregator license can improve transparency and set a baseline for future licensing that minimizes stacking risk.

A fourth misconception, or rather omission, is the role of individuals and small companies. As I document in my article Patent Troll Myths, most patents owned and asserted by NPEs come from individuals and small, product-making companies. Colleen Chien has verified this in her work. There are exceptions, of course, such as IP enforcement spin-offs from major companies. The article is located here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792442.

This country has a long ethos of individual patenting, documented in many studies. Aggregation by NPEs provides perhaps the best outlet for enforcement of individually obtained patents. However, before NPEs, individuals were active litigants. How one views NPEs will depend greatly on how one views individual inventors. I do not have a strong position in these comments, but I urge that any policy considerations take into account the effect on individual inventors. Furthermore, it is not clear that reverting to a world where individuals approach companies with their patents one at a time is more efficient than aggregation.

Similarly, to the extent that patents come from small companies, they may represent investment in disruptive research and development that the patent system ought to encourage. We might prefer, of course, for small businesses to enforce their own patents, but if they did so they would be more likely to seek injunctions than simply payment of a license fee.

In sum, there may be times when patent aggregators behave in a way that the FTC and DOJ should investigate. But such investigation should not be based solely on who the aggregator happens to be, nor should such investigation be based on the mere fact of aggregation.

Please do not hesitate to contact me with questions or comments.

Very truly yours,
/s/
Michael Risch