RETAIL INDUSTRY LEADERS ASSOCIATION
Educate. Innovate. Advocate.

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Via ATR.LPS-PAEPublicComments@usdoj.gov

April 5, 2013

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Renata Hesse
Deputy Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Impact of Patent Assertion Entities on Retailers

Dear Chairman Leibowitz and Deputy Assistant Attorney General Hesse:

The Retail Industry Leaders Association ("RILA") appreciates this opportunity to submit comments to the Federal Trade Commission ("FTC") and U. S. Department of Justice ("DOJ") on the activities of Patent Assertion Entities ("PAEs") or "patent trolls" particularly explaining the impact that this activity has on end users, such as retailers.

I. Interest and Experience of RILA

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, as well as product manufacturers and service companies, which together account for more than $1.5 trillion in annual sales and millions of American jobs. RILA members have more than 100,000 stores, manufacturing facilities, and distribution centers in the U.S. and other countries.

Much of the analysis and discussion concerning the activities of PAEs has focused on technology companies. While this is to some extent understandable, it overlooks the ongoing outpouring of PAE litigation and litigation threats against technology ***users***, such as RILA's members. As technology users RILA's members become front-line combatants in the patent-troll wars.

As described below, the effects PAE litigation tactics are having on retailers are in many respects distinct from, and more pernicious than, those being suffered by technology companies. And the retailers' problems are only getting worse, as one PAE after the next sees that retailers are ripe for plucking.

Patented technology is essential to modern retailing. It is found not only at store level, in applications well known and visible to consumers, but throughout the supply chain in countless unseen (to consumers) but critical functions. For example, patented technology plays an important role in payments, data transmission and security, transportation and logistics, warehousing, supply and demand forecasting, inventory control, and ordering. It is a key enabler

of retailers' in-store innovation as well as their adoption of cloud computing, e-commerce, and social media.

II. Patent Trolls Tax Innovation

Some have referred to the costs that are being imposed by patent trolls as a "tax" on innovation, but from the vantage point of RILA and its members, those costs are more than simply a "cost of doing business," like a zoning fee; they are an unbounded, unpredictable, and unavoidable impediment to providing innovative products and services to consumers.

RILA acknowledges the importance of patents in spurring innovation; indeed, many RILA members are patent holders. Moreover, RILA applauds the work that went into the America Invents Act ("AIA") and the resulting reforms to Patent and Trademark Office procedures; however more must be done.

Patent lawsuits, many of which can only be described as baseless, continue to proliferate. As RILA member jcpenny said in recent testimony to Congress, "[i]n 2012 the number of patent cases increased over the 3,600 cases filed in 2011. And for the first time a majority of the cases filed were by patent trolls. A recent study concluded that in 2007, 22% of patent cases filed were by patent trolls. In 2011 that number had risen to 40%."[1]

By 2012, according to Professor Colleen Chien of Santa Clara University Law School, fully 60% of all patent suits filed were by patent trolls.[2] Citing research by RPX Corporation, Professor Chien recently reported that "PAEs initiated 62% of all patent litigation or 2,921 of 4,701 suits in 2012."[3]

Approximately 90% of patent cases end without a judgment on the merits, but the high rate of settlement does not imply that most suits are well-founded; on the contrary, many if not most cases are settled even though no actual infringement may have occurred. Given the costs involved in patent litigation, this is not surprising. A recent study reported that the median cost of litigating a patent case through trial is between $650,000 and $5 million, and the discovery phase costs $350,000 to $3 million.[4] Critically important, the patent troll, unlike the defendant, often has little or no discovery cost because it simply purchased the patent and is not the inventor. Thus, patent trolls exploit the high and asymmetric costs of defense to force settlements.

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1 Janet L. Dhillon, Executive Vice President, General Counsel and Corporate Secretary, jcpenney, "Abusive Patent Litigation: The Impact on American Innovation & Jobs, and Potential Solutions," prepared statement for U.S. House of Representatives Committee on Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, at 3 (citing Sara Jeruss, Robin Feldman & Joshua Walker, "The America Invents Act 500: Effects of Patent Monetization Entities on U.S. Litigation," at 5 & 43-47, Duke Law & Tech Review, forthcoming).

2 Colleen V. Chien, "Patent Trolls by the Numbers" (March 13, 2013). Santa Clara Univ. Legal Studies Research Paper No. 08-13, available at SSRN: http://ssrn.com/abstract=2233041.

3 *Id.*

4 American Intellectual Property Law Association, Report of the Economic Survey 2011.

But this is not the only way in which patent trolls unfairly game the system. As noted by a number of commenters and participants at the December 2012 FTC-DOJ workshop on PAEs, lack of transparency is a key enabler of the patent trolls' strategies. It manifests itself in several common PAE tactics: (1) disaggregation or "un-pooling" of patents that are in the same IP "stack" (for example, the patents associated with the technology of emailing scanned documents); (2) use of interrelated shell entities to hold and enforce (or threaten to enforce) parts of the same patent stack; and (3) transfer of patents to, or between, PAEs in order to obscure the identity of the real-party-in-interest in threatened or actual patent litigation.

These tactics exacerbate the *ex post* holdup problem, *i.e.*, the patent trolls' practice of demanding licenses from technology users long after the IP has become embedded in widely used products. As one observer put it:

> "[PAEs] have effectively exploited longstanding flaws in the patent system, particularly ambiguities in patent scope; they have also learned how to manipulate large patent portfolios to facilitate enforcement of weak patents and how to multiply successful holdup demands by dividing those aggregations with the benefit of obfuscation regarding what is included in each resulting subaggregation."[5]

III. Patent Trolls Have Trained Their Sights On Retailers

PAEs are increasingly targeting technology end users, especially retailers. Among the participants at the FTC-DOJ workshop who noted the upsurge in activity against technology users was Neal Rubin, corporate counsel at networking equipment maker Cisco. Rubin described three emerging PAE tactics: (1) threats, or actual suits, against downstream customers of technology companies; (2) demands for total IP portfolio licenses, backed by the threat of further suits; and (3) PAEs' refusing to disclose or, at least, making it nearly impossible for a defendant to determine, what patents the PAE (or its affiliates) owns, thus preventing technology users from determining whether a settlement will achieve patent peace or will instead only be the opening round in a succession of threatened or actual suits.[6]

Retailers are bearing much of the brunt of patent troll campaigns against technology users. Citing an analysis conducted by Patent Freedom, which provides market intelligence on patent trolls, Professor Chien has reported that in 2011-2012 the number of suits against users for the first time exceeded suits against technology companies. The same analysis found that "[r]etailers are hit hardest by non-tech PAE suits, followed by automotive . . , financial services, and consumer products."[7]

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[5] Robert A. Skitol, "FTC-DOJ Workshop on Patent Assertion Entity Activities: Fresh Thinking on Potential Antitrust Responses to Abusive Patent Troll Enforcement Activities," Dec. 14, 2012, at 3.

[6] Neal Rubin, Vice President, Litigation, Cisco Systems, Inc., Patent Assertion Entity Activities Workshop, prepared statement for Federal Trade Commission and the U.S. Department of Justice on Patent Assertion Entities (Dec. 10, 2012) at 10, available at http://www.rila.org/email/121210paept2.pdf

[7] Chien, "Patent Trolls by the Numbers," *supra*.

Patent trolls are by no means limiting their attacks to large retailers and non-tech companies. On the contrary, they indiscriminately sue or send demand letters to countless small retailers such as coffee shops, bakeries, and podcasters. As Professor Chien has pointed out, "[s]mall companies are *vulnerable* targets when, because of a lack of leverage, they pay nuisance settlements regardless of the merits."[8] She continues, citing two particularly egregious PAE campaigns:

> "Small companies are often targets of patent suits because they are users of technology. Innovatio LLC has sued small coffee shops and hotels that use wifi, and Project Paperless LLC has sued small businesses due to their use of digital scanners. 40% of survey respondents stated that they were being targeted because of their use of another's or a widely available technology and at least 60% of cases involved software or other high-tech patents."[9]

Professor Chien here alludes to a prominent feature of patent troll litigation against retailers and other users: in many cases, the technology involved has been in widespread use for a number of years, sometimes decades. jcpenney's experience in this regard is typical of RILA members:

> "For example, we have been sued for displaying catalog images and having drop down menus on our website, activating a gift card at the point of sale, browsing a website on a mobile phone or enabling a customer to put her purchases in an electronic shopping bag or cart. We have been subjected to multiple claims for providing information regarding our store locations to a mobile phone. These patents date back to the 80's and early to mid-90's and all have had multiple owners with minimal or no continuing involvement of the actual inventor."[10]

These circumstances confer even greater leverage on the trolls, who "know the evidence necessary to invalidate these patents has often been destroyed, potential witnesses have died or memories have faded, which makes reconstructing the prior art and proving the patent invalid almost impossible and extremely expensive."[11]

The pressure on retailers to settle, often with no appreciable evidence of infringement and for amounts well in excess of the incremental value of the claimed invention, is enormous. Moreover, the patent trolls' strategy of acquiring and attempting to enforce patents many years after issuance makes it impossible, for all practical purposes, for technology users to predict, and if possible avoid or protect themselves against, the next wave of demands. In this climate, all technology may appear fraught with legal danger and not worth the risk to users or would-be users.

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[8] Colleen V. Chien, "Startups and Patent Trolls" (Sept. 2012), at 4-5 (emphasis in original), available at http://ssrn.com/abstract=2146251.

[9] *Id.*

[10] Dhillon, *supra* n. 1, at 4.

[11] *Id.*

IV. The FTC and DOJ Have Important Roles in Curbing Abusive Practices

Solutions to the problems of patent troll abuse will not be simple, and are unlikely to emanate from any single agency. Indeed, Congressional action may be necessary to achieve certain reforms. The purpose of these comments is not, in any event, to endorse any particular set of legislative reforms, but rather to emphasize the important roles the FTC and DOJ can and should play in this area as investigative and law enforcement agencies.

The recent PAE workshop, and the agencies' request for comments, is an important step, but only if it is followed by robust action on their parts, employing all appropriate investigative and enforcement tools. Existing legislative authority under, for example, the Sherman Act and the Federal Trade Commission Act, is sufficient for the tasks of identifying and challenging, through administrative proceedings or federal court actions, many forms of anticompetitive abuses by patent trolls. Areas for potential investigation and enforcement might include, for example, instances in which PAEs have frustrated technology users' ability to evaluate the scope of the PAE's patents, by un-pooling IP stacks and playing "hide and seek" among groups of ostensibly distinct entities. Misuses and abuses of administrative and legal processes, beyond the scope of *Noerr-Pennington* immunity, could be another fruitful area of inquiry. Of course, the agencies should continue to develop their understanding of the patterns and effects of patent troll activities through means similar to the recent workshop. They should also advocate against abusive PAE practices through comments, amicus filings, and other appropriate means. Again, such activities are squarely within the FTC and DOJ's core competencies.

By acting vigorously to root out abuses by patent trolls, the FTC and DOJ can help alleviate the burden of senseless and wasteful patent litigation that is being felt so acutely by retailers, thereby benefiting all actors in the supply chain and, most importantly, consumers.

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RILA applauds the FTC and DOJ for seeking our input and thank you for the consideration of our views. Please contact me directly at deborah.white@rila.org or 703.600.2067 if you have any questions.

Deborah White
Executive Vice President
& General Counsel