



DEPARTMENT OF JUSTICE

Closing Remarks

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Patent Assertion Entity Activities: Enforcement and Policy

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I would like to thank everyone for joining us today for this compelling and timely discussion of the implications on competition enforcement and policy of patent assertion entity activities. I want to thank the FTC for co-hosting this event, and for being a partner in this workshop and the many others held over the years on competition issues associated with intellectual property. And I want to thank Stuart Graham, Chief Economist at the PTO, for spending part of his day with us and for bringing us news from the PTO.

My biggest thanks, though, go to our many excellent participants in the workshop today. You have put tremendous thought and effort into these issues, and many of you traveled great distances to be here to share your insights with us. The issues you addressed today are challenging and complex, and the diverse perspectives you shared will contribute to preserving an innovative, competitive IP marketplace to the benefit of businesses and consumers.

Competition is especially important in innovation-driven sectors that are integral to economic growth. A recent PTO report estimates that more than one-third of U.S. economic activity is attributable to IP-intensive industries.¹ So this is an area – and I think we’ve made this pretty clear – that we at the Division care a great deal about.

When we see activity in the IP marketplace that raises questions about how it will effect competition, consumers, or innovation, the Antitrust Division digs in. We talk with members of the affected industries. We seek out and talk with leading academics, our relevant sister agencies like the PTO, and other key stakeholders. When it is valuable to do so, we bring these parties together for a workshop, as we have done today, to hear their varied perspectives and to assess the positive and negative impacts of whatever conduct is at issue on a competitive, efficient, innovative economy.

¹ ECON. & STATISTICS ADMIN. AND U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS 3 (2012), available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf (IP-intensive industries accounted for 34.8 percent of U.S. GDP in 2010).

Today we have been focused on PAE activity and you might ask why. This workshop was prompted by the dramatic changes and growth in patent assertion activity over the past decade, along with concerns that some of this activity may be hampering innovation and competition, rather than promoting it. Critics have argued that, through the aggregation of opaque patent portfolios and aggressive litigation tactics, PAE activity increases costs, slows technology transfer, and taxes consumers and industry. Supporters argue that PAE activity can facilitate the transfer of IP and put more funds towards inventors and research and development.² And we have heard both of these viewpoints today.

Our panelists today addressed many issues raised by PAEs. Professor Chien painted for us the historical development of revenue-driven licensing and explained the balance of costs and benefits from this activity, including effects on practicing entities. Professor Shapiro described for us the motivating theory behind efficient licensing of IP rights and contrasted that with some of the real-life challenges we see arising from PAE licensing practices. These benefits and costs of PAE activity were the focus of our Session B panels. We received an insightful real-world view of the benefits and costs of PAE activities from industry and practitioners in the field.

We want to see an efficient market for the transfer of patent rights that appropriately rewards inventors and innovators so as to create incentives for further research and development. We want inventors and innovators to promote adoption of cost-effective technologies when producers are making investment decisions *ex ante*. We do not want a system that harms vibrant, ongoing innovation through inefficient or opportunistic licensing activities.

² See *e.g.*, BRIAN T. YEH, CONG. RESEARCH SERV., RL42668, AN OVERVIEW OF THE “PATENT TROLLS” DEBATE 1-2 (2012).

The courts, Congress, and the administration all are seeking to promote the benefits of our IP system against the potential overreaches of PAE activity. Our courts have sought to align damages with the value of an infringed invention and grant injunctions only when equitable standards are met. Congress passed the American Invents Act in 2011, which includes joinder rules that prevent plaintiffs from filing a single complaint against multiple alleged infringers. And the PTO is engaged in important efforts to improve patent quality and increase the transparency surrounding changes in patent ownership.

In our final session, panelists explored how PAE activity might harm competitors and how aggregations of patent portfolios can enhance market power and harm consumers. This falls within the bailiwick of the antitrust agencies. The Division will continue to evaluate these theories in view of the activities taking place in the marketplace. And we will continue to work with the FTC in these efforts.

We welcome feedback on the intersection of PAE activity and the antitrust laws, and I want to encourage attendees at this conference and public stakeholders to send comments to the Antitrust Division and the FTC. The deadline for submitting public comments is March 10, 2013. Comments received by this date will be posted on our website. In addition, we welcome opportunities to speak with you in person about your competition concerns.

Last, but certainly not least, I want to close by expressing my appreciation for the hard work of the Antitrust Division and Commission staff. It is our staff members that make workshops like this one possible and productive, and it is our staff that work tirelessly everyday to investigate and, when necessary, go to court to protect the American consumer.

Thank you all, and have a good evening.