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Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take

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I. INTRODUCTION

One of the most pressing issues confronting antitrust in 2013 (and beyond) involves patent assertion entities ("PAEs"), previously known as patent trolls. Supporters proclaim PAEs' benefits to "invention markets." Critics lament extortion-like demands. Into this debate tiptoes antitrust, wondering if it can play any meaningful role.

In this article, I offer six actions the antitrust agencies can take to address PAEs: (1) Offer guidance about potential harms from patent aggregation, (2) Promote transparency, (3) Prohibit transfers to PAEs that refuse to adhere to previous standards-based licensing promises, (4) Use PAEs' distinct incentives to employ Clayton Act Section 7 when "plus" factors are met, (5) Monitor collusive activity, and (6) Consider the use of FTC Section 5.

II. OFFER GUIDANCE ON POTENTIAL HARMS FROM PATENT AGGREGATION

First, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") can revise the 1995 Intellectual Property ("IP") Guidelines, or at least offer guidance, on potential harms arising from the creation and exploitation of massive patent portfolios. The 1995 Guidelines were a needed antidote to the preceding era of hostility towards patents.[2] But just like the patent/antitrust interface has swung between periods of excessive aggressiveness and excessive deference, the time has come to reevaluate the Guidelines' exclusive focus on the pro-competitive justifications of IP combinations in "facilitat[ing] integration of the licensed property with complementary factors of production," which "lead[s] to more efficient exploitation . . . benefiting consumers through the reduction of costs and the introduction of new products."[3]

While these justifications will still be relevant in many settings, the agencies can recognize a fact that was not so obvious in the mid-1990s: Massive patent portfolios can be used offensively, and can be valuable primarily because of their size rather than the validity of each patent in the

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[2] *See* Willard K. Tom & Joshua A. Newberg, *Antitrust and Intellectual Property: From Separate Spheres to Unified Field*, 66 ANTITRUST L.J. 167, 178-79 (1997) (describing period from 1968 to 1981, in which the Antitrust Division followed a "Nine No-No's" policy that revealed hostility towards common licensing practices).

[3] U.S. DEPT. OF JUSTICE & FED. TRADE COMM., INTELLECTUAL PROPERTY GUIDELINES ¶ 2.3 (1995), http://www.justice.gov/atr/public/guidelines/0558.htm.

portfolio.[4] Entities focused on compiling large portfolios often shift the focus from the patent's "strategic objective" to the question, "[W]hat can I patent?"[5]

The danger of large portfolios was revealed by IBM's famous meeting with Sun in which IBM claimed that Sun had infringed seven of its patents. In response to Sun's claims that the patents were invalid and not infringed, IBM stated that even if "you don't infringe these seven patents . . . we have 10,000 U.S. patents" and can "find seven patents you do infringe" unless "you want to make this easy and just pay us $20 million."[6]

To be sure, not every collection of patents will present this harm. And this issue also encompasses entities other than PAEs (which do not develop or commercialize technologies but instead "buy[] and assert[] patents against companies that have already begun using them").[7] But the agencies could make clear that large portfolios might not offer only pro-competitive justifications. In certain cases, they could also present anticompetitive effects including patent holdup, raised rivals' costs, and even increased price or reduced innovation. In the context of PAEs, and especially in evaluating new acquisitions, the agencies should consider the challenges presented by large patent portfolios.

III. PROMOTE TRANSPARENCY

The second action the agencies could take in the PAE context would be to require transparency in evaluating patent-based behavior. Transparency in patent transactions is crucial to a functioning patent system. Companies that are sued (or that face threats of litigation) must know who is suing them, what patents they are being sued on, and the portfolio of patents held by the plaintiff.

Despite the need for transparency, much PAE activity today is hidden beneath a labyrinth of shell companies. Two of the biggest parent companies are Acacia Research Corp ("Acacia") and Intellectual Ventures ("IV"). Acacia's subsidiaries control 250 patent portfolios.[8] And IV has used at least 1,276 shell companies to purchase and hold patents.[9]

The danger of shell-company strategies in the patent context is that potential targets find it difficult to engage in licensing negotiations with entities that have no "website, employees, or offices."[10] As a result, it is "difficult or impossible to call someone" and "have a conversation about licensing fees."[11]

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[4] R. Polk Wagner, *Understanding Patent-Quality Mechanisms*, 157 U. PA. L. REV. 2135, 2157 (2009); Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 7-8, 31 (2005).

[5] Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and its Implications for the Patent System*, 62 HASTINGS L.J. 297, 338 (2010).

[6] Gary L. Reback, *Patently Absurd*, FORBES.COM, June 24, 2002.

[7] Brian T. Yeh, *An Overview of the "Patent Trolls" Debate*, CRS REPORT R42668, at 1 (Aug. 20, 2012).

[8] Acacia Research Group LLC, *Patent Portfolios*, http://acaciatechnologies.com/patentportfolio.htm (last visited Dec. 14, 2012).

[9] Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1, 4.

[10] Matthew Rappaport & Lily Li, *How Hidden IP Assets Hurt the Entire Patent Community*, LAW 360, at 2 (Nov. 28, 2012).

[11] *Id.*

Nor can potential licensees easily evaluate a patent portfolio held by a shell company. The portfolio could consist of "weak, overbroad patents" but the lack of information makes it "nearly impossible to know what the licensee is getting for its money."[12] PAEs that wish to preserve "the element of surprise" or prevent reexamination challenges make it more difficult for licensees to clear rights or obtain reliable patent information.[13]

One study found that in one-third of cases brought by PAEs, "the plaintiff was not the patent owner of record as of the day the litigation was initiated" and that in 10 percent of cases, owners that "had been assigned rights to the patent . . . waited until after the [litigation] was initiated to record the assignment."[14]

IV has claimed that secrecy is needed so that it is not forced to "shar[e] the fruits of [its] labors with the rest of the market."[15] And it analogizes its conduct to that of Warren Buffett, who does not "tell the world where he's investing next," and Disney, which does not "broadcast which plots of land it is planning to buy for its next theme park."[16]

There are differences, however. In contrast to Buffett's holdings and Disney's land, the identity of which ultimately become public, IV's subterranean network of shells and patents is not disclosed. Nor, in the period before the investment becomes public, do Buffett and Disney employ secrecy to potentially harm rivals. In contrast, IV can threaten licensees unable to determine the scope and quality of its patent portfolio. Finally, IV's justification appears to have little direct connection to promoting innovation and much effect in shrouding crucial relationships in secrecy.

The category of secret activity also includes a related concern of "privateering." This concept traces back to "state-sponsored piracy" in which governments allowed private parties to "seize the property of the state's enemies."[17] In the PAE setting, privateering can result in aggressive third parties scaring customers and suppliers. A practicing company, for example, could reject a license offered by a PAE, but then be sued for even more by a privateered third-party PAE.[18] As the "market value" of the patents increases, these problems will only escalate.

The sheer scale of such networks could offer clues about potential pro-competitive and anticompetitive effects. Absent the disclosure of relevant PAE shells and subsidiaries, the agencies would not be able to engage in appropriate antitrust analysis. Gathering evidence on these entities is consistent with the FTC's 2010 changes to the Hart-Scott-Rodino Act, which introduced the concept of "associates," which includes entities managed by the acquiring entity.[19]

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[12] *Id.* at 1.

[13] Colleen Chien, *Eliciting More Complete Patent Assignment Information* Comment, USPTO Docket No. PTO-P-2011-0077, Jan. 23, 2012, at 5, http://www.uspto.gov/patents/law/comments/f_chien_120123.pdf.

[14] *Id.* at 3.

[15] Peter Detkin, *The Red Herring of Transparency*, INTELLECTUAL VENTURES, Dec. 6, 2012, http://www.intellectualventures.com/index.php/insights/archives/the-red-herring-of-transparency.

[16] *Id.*

[17] Tom Ewing, *Indirect Exploitation of IP Rights by Corporations and Investors*, 4 HASTINGS SCI. & TECH. L.J. 1, 8 (2012).

[18] Ewing & Feldman, *supra* note 9, at 13.

[19] Stephen Wu & Carla A.R. Hine, *Recent Changes to Antitrust Merger Review Process*, AIPLA, Oct. 31, 2010, http://www.lexology.com/library/detail.aspx?g=e23a884b-e760-48d2-b414-c8087d2a5fc7; U.S. DEPT. OF JUSTICE &

In their analysis of various forms of PAE behavior, the agencies must be able to obtain as much information as they need to determine competitive consequences.

IV. ENSURE TRANSFERABILITY OF STANDARDS-BASED PROMISES

Standard-setting organizations ("SSOs") allow industries to adopt a common technology, which has benefits that include interoperability and competition. SSOs often adopt policies to mitigate the power acquired by a company with patents incorporated into the standard. One of those policies requires patentees to agree, before selection, to license their patents on reasonable and nondiscriminatory ("RAND") terms if selected.[20]

RAND promises are typical for standard-essential patents ("SEPs"), which are essential to the implementation of a standard. But a potentially fatal loophole is created if RAND promises could be avoided by the transfer to a subsequent party that is not bound by the promise. To pick one example, after the agencies approved the acquisition of the Nortel patent portfolio by the Rockstar consortium based on promises made by members (Apple and Microsoft) to agree to RAND licensing, the Rockstar CEO publicly stated that the consortium "isn't bound by the promises that its member companies made" since "[w]e are separate" and the promises "do[] not apply to us."[21]

The agencies should make crystal clear that they will not allow any acquisition by a PAE (or an operating company) that does not agree to honor RAND promises made by its predecessor.[22] Evading such a solemn obligation through transfer threatens to make a mockery of the RAND promise at the heart of the standard-setting process.

V. CLAYTON ACT SECTION 7

The fourth action the agencies could take is to apply Section 7 of the Clayton Act to mergers and acquisitions involving PAEs. Previous enforcement actions provide a foundation for challenges, which could be appropriate given PAEs' incentive and ability to harm competition and the presence of "plus" factors.

A. Mergers/Acquisitions Framework: Ability/Incentive To Harm Competition

The ability and incentive to exercise market power and harm competition is crucial to the analysis of mergers and acquisitions. The 2010 Horizontal Merger Guidelines make clear the role played by "diminished competitive constraints or incentives" facing merging parties in their

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FED. TRADE COMM., HART-SCOTT-RODINO ANNUAL REPORT 7 (2011), http://www.ftc.gov/os/2012/06/2011hsrreport.pdf.

[20] *See generally* Michael A. Carrier, *A Roadmap to the Smartphone Patent Wars and FRAND Licensing*, 2 COMPETITION POLICY INTERNATIONAL: ANTITRUST CHRONICLE 2, 2 (2012). The licensing is known as FRAND (fair, reasonable, and nondiscriminatory) in Europe.

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

[22] For a positive development along these lines, see Analysis of Proposed Consent Order To Aid Public Comment, In the Matter of Motorola Mobility LLC and Google Inc., File No. 121-0120, at 8, Jan. 3, 2013 (requiring successors to agree to assume FRAND commitments).

ability to exercise market power, which results in price, output, or innovation effects.[23] The Guidelines also make clear that unilateral actions can increase price and reduce innovation.[24]

In any analysis of antitrust conduct, one initial question is market power. Because PAEs do not manufacture products, goods markets (at least in the context in which PAEs do not act together with operating companies) will not apply. But in contrast, technology markets consist of "the intellectual property that is licensed . . . and its close substitutes."[25] When IP rights are "marketed separately from the products in which they are used," the agencies can use technology markets "to analyze the competitive effects of a licensing arrangement."[26]

Technology markets could be relevant in assessing the competitive consequences of PAE conduct. By their own admission, PAEs create "invention capital markets."[27] PAEs often have the power to hold up rivals through threats to litigate or actual litigation on patents. Such holdups demonstrate a direct market effect in a narrowly confined technology market.

In technology markets, PAEs could have an ability and incentive to exercise market power. Several enforcement actions have emphasized these factors:

- The Barnes & Noble ("B&N") acquisition of book distributor Ingram, blocked by the agencies since B&N could have had an incentive to raise the costs of downstream retailer rivals[28];
- Commissioner Rosch's concurrence in the *Ovation* case, which emphasized that Ovation's acquisition of a drug eliminated reputational constraints that would have prevented Merck from increasing the price by 1300 percent[29];
- The acquisition of Novell patents, in which CPTN agreed to honor open-licensing commitments and Microsoft's sale of (and receipt of a license to) the patents[30];
- The Comcast/NBC transaction, in which Comcast agreed to relinquish NBC's management rights in Hulu, not retaliate against networks, and license programming to online cable TV competitors[31]; and
- Google's acquisition of ITA, by which Google was required to license internet travel site software to airfare websites on reasonable terms.[32]

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[23] U.S. DEPT. OF JUSTICE & FED. TRADE COMM., HORIZONTAL MERGER GUIDELINES ¶ 1 (2010).

[24] *Id.* ¶ 6.4.

[25] INTELLECTUAL PROPERTY GUIDELINES ¶ 3.2.2 (1995).

[26] *Id.*

[27] Intellectual Ventures, *About Us* (2012), http://www.intellectualventures.com/index.php/about.

[28] Richard Parker, *Global Merger Enforcement*, remarks before the International Bar Association, Sept. 28, 1999, http://www.ftc.gov/speeches/other/barcelona.shtm.

[29] Concurring Statement of Commissioner J. Thomas Rosch, *Federal Trade Commission v. Ovation Pharmaceuticals, Inc.*, FTC File No. 0810156 (Dec. 16, 2008), http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

[30] U.S. Dept. of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns*, Apr. 20, 2011, http://www.justice.gov/opa/pr/2011/April/11-at-491.html.

[31] Competitive Impact Statement, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.pdf.

B. PAE Acquisitions: Ability/Incentive To Harm Competition

The ability/incentive analysis highlights the relevance of Clayton Act Section 7 for PAE acquisitions. Such acquisitions can allow incumbent companies to harm rivals due to the unique characteristics of PAEs. Litigation between operating companies is constrained by *risk symmetry*. Mutually assured destruction ("MAD") fosters settlement and reduces litigation. For example, a sued operating company can file a counterclaim against another operating company based on a product it manufactures.[33]

PAE litigation, in contrast, is characterized by *risk asymmetry*. PAEs have no real disincentive to sue since they do not manufacture products, and thus do not face the possibility of countersuit. As a result, there is no MAD. PAEs also produce few documents, do not face disruption to their business since "litigation and licensing are their business," and often pay lawyers on a contingency-fee basis.[34]

In addition to these advantages, PAEs do not confront the reputational harms faced by operating companies when suing or threatening to sue. PAEs do not encounter constraints arising from a status as a repeat player in a standards organization. They also do not face customers exerting pressure to settle litigation or shareholders skeptical of patent enforcement.[35] These concerns are compounded because of high litigation costs, defendants' inability to quickly dispose of cases, and high design-around costs for companies already using a technology.[36]

Litigation and threats of litigation are central tenets of the PAE business model. Many PAEs operate "on similar terms to private equity and venture funds," seeking "to make most of [their] money on carried interest."[37] And they "forge ahead with weak suits" to "reinforce their bargaining position with future targets."[38] In short, in many ways, PAEs face fewer constraints than operating companies, which could lead to acquisitions that result in higher royalties, denied licenses, and increased enforcement.[39]

C. Plus Factors

Not every patent acquisition by PAEs will automatically violate Section 7. For example, a PAE could conceivably license patents in a situation in which a dominant incumbent would

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[32] Competitive Impact Statement, United States v. Google, Inc., No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011), http://www.justice.gov/atr/cases/f269600/269620.pdf.

[33] Yeh, *supra* note 7, at 13.

[34] Tina M. Nguyen, *Lowering the Fare: Reducing the Patent Troll's Ability To Tax the Patent System*, 22 FED. CIRCUIT B. J. 101, 114-15 (2012); David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALABAMA L. REV. 335, 376 (2012).

[35] Danielle Williams & Steven Gardner, *Basic Framework for Effective Responses to Patent Trolls*, NORTH CAROLINA BAR ASS'N, at 1, Apr. 2006, http://www.kilpatricktownsend.com/~/media/Files/articles/BasicFrameworkforEffectiveResponsestoPatentTrolls.ashx.

[36] Yeh, *supra* note 7, at 13.

[37] Nigel Page, *IV Shifts Gear*, IAM MAGAZINE, 4 (2009), http://www.iam-magazine.com/issues/Article.ashx?g=2c2a2269-4563-4558-98cc-9b631ce95854.

[38] Yeh, *supra* note 7, at 13.

[39] Ilene K. Gotts & Scott K. Sher, *Antitrust Concerns of Patent Acquisition*, at 5, CPI ANTITRUST CHRONICLE (Sept. 2012).

refuse to license them to a downstream rival. But the different incentives confronting PAEs call for careful scrutiny when these entities are involved in acquisitions. Though blanket conclusions are not possible, supplemental, or "plus" factors—like those triggering liability in the setting of parallel pricing—exacerbate the concerns, in some cases pushing the acquisition over the line of antitrust liability. Several plus factors can be envisioned: (1) heightened incentives based on contractual provisions, (2) increased incentives based on an investment model, (3) a pattern of late filing of suits in relation to patent issuance, (4) specific conduct that blocks needed disclosure (like not revealing the identity of patents used as threats), (5) the combination of a PAE with an operating company having an incentive and ability to harm rivals, and (6) disaggregation of a portfolio.

The first plus factor occurs when facts demonstrate incentives to harm competition beyond those confronting the typical PAE. Mosaid provides one example. Upon acquiring 2,000 Nokia wireless patents in 2011, Mosaid proclaimed that the "revenues from licensing, enforcing, and monetizing this wireless portfolio will surpass the Company's total revenues since its formation in 1975."[40] Mosaid agreed to fund the portfolio acquisition "through royalties from future licensing and enforcement revenues," and its ownership of the patents was "subject to minimum future royalty milestones."[41]

If Mosaid did not reach certain milestones, it would lose the right to transfer the patents and cede ownership of the patents altogether. A PAE that obtains milestone payments only if it initiates lawsuits will unsurprisingly have a strong incentive to aggressively file suit or threaten suit. That incentive is magnified when the entity loses the patents if it fails to reach the milestones. In examining the acquiring parties' ability and incentive to exercise market power, the agencies should take such evidence seriously, particularly when it aligns with the interests of downstream manufacturers that could use the transfer to target rivals.

A second, related, plus factor could be present when a PAE follows an investment model based on providing a specified level of returns to investors. In this case, again, the PAE has a strong incentive to sue and threaten to sue. In fact, obtaining payment is the goal for companies that invest in these PAEs.

Intellectual Ventures has raised more than $5 billion from operating companies, institutional endowments, and wealthy individuals.[42] For those investors not interested in access to the patents, venture-capital-like returns are expected. One study estimated that to be successful, Intellectual Ventures would need to amass a 25 percent return each year, leading to a lifetime revenue expectation of between $40 billion (over a 10-year period) and $244 billion (over a 20-year period). Such expectations encourage litigation.

[40] *MOSAID Acquires 1,200 Nokia Standards-Essential Wireless Patents and 800 Wireless Implementation Patents*, MOSAID, Sept. 1, 2011, http://www.mosaid.com/corporate/news-events/releases-2011/110901.php.

[41] *Id.*

[42] Ewing & Feldman, *supra* note 9, at 9.

Another example is provided by Acacia, whose shares grew more than 30 percent per year between 2002 and 2007, and whose investors include mutual fund managers Oppenheimer Funds, Fidelity, and Vanguard.[43]

A third plus factor could be revealed by a pattern of late filing of suits in relation to patent issuance. Patents that are used to protect companies against rivals are typically litigated shortly after their products are introduced.[44] In contrast, PAEs tend to assert patents late in the patent term and litigate their patents "to the verge of expiration."[45] One commentator concluded that PAEs "engaged in classic 'troll-like' behavior" by "suing the better part of a well-established industry for infringement of an aging patent" that tended to cover "software or high-tech subject matter" and that "overwhelmingly los[t] when pushed to prove their infringement allegations."[46] In testimony before the agencies, Hewlett Packard pointed to the age of many of the patents on which it was sued and commented that there was typically a 12-year period between the patent priority date and the time the patent issued.[47]

This third factor alone would not be sufficient to show antitrust harm. But PAEs that consistently file lawsuits at the end of the patent term provide evidence of patents that are not directly exploited to recoup the rewards of the invention. As a result, the agencies could use this factor to show how PAEs are not fostering innovation and, depending on the existence of other factors, possibly to add to a story of anticompetitive harm.

A fourth factor could be specific PAE conduct that blocks needed disclosure. For example, in the operating-company context, Barnes & Noble alleged that Microsoft refused to disclose the patents on which it was suing Barnes & Noble.[48] Microsoft allegedly would not disclose this basic information unless Barnes & Noble executed a non-disclosure agreement, even though the patents were public. Such a non-transparent policy could serve as a plus factor.

A fifth factor could be revealed by the combination of a PAE and an operating company where the operating company has an incentive and ability to harm its rivals. For example, the operating company could acquire patents with a PAE and then enlist the PAE to sue its rival. This could present a combination of the operating company raising its rivals' costs and the asymmetry advantages possessed by PAEs.[49]

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[43] 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).

[44] Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, at 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917709.

[45] *Id.*

[46] *Id.* at 39.

[47] Statement of Cynthia Bright, Associate General Counsel, IP Litigation & Public Policy, Hewlett-Packard, Federal Trade Commission & Dept. of Justice, Patent Assertion Entity Activities Workshop, Dec. 10, 2012, http://www.ftc.gov/video-library/index.php/ftc-events/patent-assertion-entity-activities-session-24/2028431449001.

[48] Letter from Eugene V. DeFelice, Vice President, General Counsel & Secretary, Barnes & Noble, to James J. Tierney, Chief, Networks and Technology Enforcement Section, U.S. Dept. of Justice, Apr. 25, 2011, at 2, *available at* http://www.groklaw.net/pdf3/675083-463533.pdf.

[49] Fiona Scott Morton, *Patent Portfolio Acquisitions: An Economic Analysis*, at 7, Sept. 21, 2012, http://www.justice.gov/atr/public/speeches/288072.pdf.

A sixth factor could be presented by disaggregation of a portfolio. The issue of "royalty stacking" occurs when multiple claims for royalties are "stacked together," which can lead to higher costs that increase the price charged to consumers or that drive rivals out of the market.[50]

This list is not exclusive, and other plus factors could be identified. The point is that the unique factors presented by PAEs should raise the antenna of the agencies in considering acquisitions under Section 7. And the existence of plus factors could push the case over the threshold of an antitrust challenge or the imposition of conditions.

There is no magic formula that dictates which plus factors must be present before antitrust enforcement is appropriate. And the existence of any single plus factor, or even combination, is not automatically a recipe for a successful antitrust challenge. For in any case, the agencies must offer a story of anticompetitive harm. They must explain how the PAE acquisition would affect the acquiring company's ability and incentive to exercise market power by harming rivals in a way that would increase price or reduce output or innovation. The presence of plus factors, however, in emphasizing secrecy, incentives to sue, raised costs, and other factors, could make that more likely.

VI. SHERMAN ACT SECTION 1

Although Clayton Act Section 7 will be the most natural setting to analyze the antitrust effects of PAE activity, Sherman Act Section 1 also might be applicable in certain settings involving collusion. One example discussed in the literature involves the alleged monthly calls between RPX and Acacia in which "Acacia describes the producers they are in the process of targeting and the patents they will assert against the producers."[51] In return, Acacia "names a price for the patents in question" and "RPX purchases the patents if it wishes."[52] Such conduct implicates collusive activity that should be explored under Section 1.

Another type of interaction that could conceivably implicate Section 1 involves collusive relationships between operating companies and PAEs discussed above. For example, if Nokia and Microsoft pooled their patents and enlisted Mosaid to use the patents to sue competitors, that could present a concern of raising rivals' costs or removing a rival from the market. In any of these cases, conduct could be analogized to that considered in *United States v. Singer Manufacturing Co.*, in which the Supreme Court struck down an arrangement in which three companies pursued a "common purpose" to suppress competition "through the use of [a] patent."[53]

A third example could be revealed by the bid of $525 million by Apple, Google, Microsoft, Intellectual Ventures, RPX, and others for bankrupt Kodak's digital imaging patents. The agencies would need to ensure that the operating companies in the consortium do not collude with PAEs to harm entities outside the group and stifle competition.

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[50] *Id.* at 4; Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1993 (2007).

[51] Ewing & Feldman, *supra* note 9, at 26.

[52] *Id.*

[53] 374 U.S. 174, 194-95 (1963).

A fourth example could be presented by a tying arrangement. Demonstrating the requisite market power and coercion, a PAE could require licensees to take not just the desired patent but also other patents or even entire portfolios. This could occur given the secrecy, shells, and subsidiaries through which certain PAEs operate.

VII. FTC SECTION 5

PAE behavior also could potentially constitute an unfair method of competition prohibited by Section 5. Section 5 reaches beyond antitrust but needs a justifiable framework based on well-defined limiting principles. One potential setting involves incipient or "frontier" conduct that has recently developed and that does not fit into well-established antitrust categories. Some commentators underscore the propriety of Section 5 in this setting on account of its prospective application and the lack of a private damages recovery.[54]

Antitrust has not previously dealt with PAEs. In addition, the predominant use of patents seems directly connected not to innovation but to a business model for extracting revenue from products already on market.[55] Commentators have emphasized how PAE activity has little to do with "commercializing patented technology," but instead consists of "scanning the horizon to pick out today's hot technology areas" and "then finding and securing orphaned and non-aligned patents that can be used to extract a return from today's products."[56] Others have stated that PAEs "do not participate in the growth of knowledge and technology" but are "opportunistic litigation mills" that "cloak themselves in the legitimacy of patents" and exploit "a market for a product that has no social value at all."[57]

Although the FTC has not yet offered a precise framework for Section 5, one conceivable framework could require the factors of: (1) market power, (2) a lack of a non-trivial efficiency (*i.e.*, behavior not justified by purposes of patent system), (3) causation, and (4) consumer harm. In the PAE setting, (1) market power is possible in technology markets, (2) PAEs' revenue-driven licensing will often not be connected to product creation, and the behavior (3) seems likely to cause competitive harm and could result in (4) higher prices or reduced innovation for consumers. The "plus" factors discussed above in the context of a heightened ability and incentive to exercise market power are relevant here in exploring the existence of justifications and consumer harm.

PAEs confronting Section 5 prosecution should be given the opportunity to show that the proceeds they collect actually benefit inventors in non-trivial proportions. But absent such a showing, and given the articulation of limiting principles, the application of Section 5 could

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[54] Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, THE ANTITRUST SOURCE 4 (Feb. 2009).

[55] *E.g.*, The International Trade Commission and Patent Disputes: Hearing Before the Subcomm. on Intellectual Prop., Competition and the Internet of the H. Comm. on the Judiciary, 112th Cong. (2012) (statement of Neal A. Rubin, Vice President of Litigation, Cisco Systems, Inc.), at 4, http://judiciary.house.gov/hearings/Hearings%202012/Rubin%2007182012.pdf.

[56] *E.g.*, Ewing & Feldman, *supra* note 9, at 20-21; Yeh *supra* note 7, at 7 n.61.

[57] Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 BERKELEY TECH. L.J. 1583, 1599 (2009).

conceivably be appropriate given the potential unjustified consumer harm in a setting that lacks antitrust precedent.

VIII. CONCLUSION

PAEs present a challenge for antitrust law. But even if the empirical evidence on PAEs across society is not yet fully collected, and even if certain PAEs can justify *some* of their conduct, that does not mean that *all* PAE activity is immune from antitrust scrutiny. For if it was so protected, then the most aggressive and unjustified behavior, undertaken by PAEs with the greatest market power and largest portfolios, and inflicting the greatest harm on rivals and consumers, would fall through the antitrust cracks.

Antitrust enforcement is crucial to the protection of consumers and a competitive marketplace. Certain behavior by PAEs threatens competitive harm. This article has discussed six actions the antitrust agencies can take to remedy this harm. The novelty of PAE behavior ensures that the framework must be applied flexibly. But antitrust enforcement cannot automatically be shunned in a context that presents new and powerful opportunities to inflict anticompetitive harm.