RACKSPACE, THE OPEN CLOUD COMPANY COMMENTS TO FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE CONCERNING PATENT LITIGATION

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Like the others who have entered comments, Rackspace appreciates the efforts of the Federal Trade Commission (FTC) and Department of Justice (DOJ), as they focus on the widespread problems and abuses of Patent Assertion Entities (PAEs). Abuse of the patent system is a large and growing problem that will only be addressed through a comprehensive series of reforms.

Rackspace is a member of the Internet Association (IA) and the Coalition for Patent Fairness (CPF). We join and endorse the comments from both of those organizations. We also endorse the comments filed by many other companies, such as Google, Dell, and Barnes & Noble, Inc. We believe that the reforms advocated by these companies and organizations are urgently needed to address the problem of patent abuse by PAEs. We look forward to continuing to work with the FTC and DOJ to help institute the needed reforms.

I. Rackspace's Perspective: Innovation is Open

Rackspace believes that the primary goal of the FTC and DOJ in examining the problem of PAEs and abuse of the patent system should be the fostering of innovation and competition in our economy. The patent system is not an end in itself—it is just a tool to promote the progress of science and the useful arts.[1] The policies and laws of the United States should always be measured against this yardstick.

The FTC and DOJ are uniquely situated to advance this purpose. The FTC's mission statement states that it is there to "prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity."[2]

The DOJ's antitrust division has as its mission the "The mission of the Antitrust Division is the promotion and maintenance of competition in the American economy…. Through participation in Executive Branch activities and in regulatory

[1] U.S. CONST. art. I, § 8, cl. 8.
[2] Fed. Trade Comm'n, *Our Mission*, http://www.ftc.gov/ftc/about.shtm (last visited Apr. 5, 2013).

and legislative processes, the Division seeks to ensure that Government action is precompetitive or not unnecessarily anticompetitive."[3]

Open innovation is the goal of the patent system: In return for full disclosure of your idea, you are granted the ability to prevent anyone else from making, using, selling, offering for sale, or importing the invention. This is a bargain between the people—as represented by the United States government—and the inventor. It is designed to align the interests of individuals and society by providing individual incentives to develop and share knowledge.

In contrast, the typical behavior of PAEs falls entirely outside this bargain. PAEs do not share knowledge. They do not develop inventions. The entire function of PAEs is to find existing, successful companies and extract a private tax on their success. As shown below, PAE practice is contrary to the principles of open innovation, competition, and consumer protection that the FTC and DOJ uphold.

II. Open Innovation is Pro-Competitive and Pro-Consumer

Protecting open innovation should be the goal of every discussion of patent policy. Open innovation comes in many different forms, not all of them patented. Especially when there are extensive records and reports of the damage to jobs, competition, and innovation occurring because of patent system abuse, the means of "securing for limited Times to … Inventors the exclusive Right to their respective … Discoveries"[4] should not overshadow the purpose for which those limited privileges are granted.

One example of non-patent-based open innovation is open source-licensed code.[5] Open source provides a framework for individuals and companies to work together in cooperation to solve common problems, while still allowing competition to flourish.

Rackspace's own history is instructive of the power of open source. A couple of years ago, Rackspace created a cloud computing system called OpenStack in cooperation with NASA. Rackspace and NASA jointly released OpenStack under an open source license, making it free to use for individuals and businesses alike.

The results were—and have been—astounding. Within two years, hundreds of businesses adopted or were created to build, support, and promote OpenStack. An industry-wide consortium, including such giants as HP, Cisco, IBM, and Red Hat,

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[3] U.S. Dept. of Justice, *Antitrust Division Manual*, 1-2 (2012), *available at* http://www.justice.gov/atr/public/divisionmanual/.

[4] U.S. CONST. art. I, § 8, cl. 8.

[5] For some commonly-accepted definitions of open source or "free software," see the "Open Source Definition" from the Open Source Initiative, available at http://opensource.org/osd, or the Free Software Definition from the Free Software Foundation, available at http://www.gnu.org/philosophy/free-sw.html.

came together to create a nonprofit foundation to work together on areas of common interest within the OpenStack project. Thousands of jobs were created as those same companies also competed with each other to provide the best support and services around the shared foundation of open source code.

Scientific laboratories such as CERN use OpenStack to compute the results of their experiments. Researchers at universities, such as San Diego State University, are creating experimental architectures for high performance computing using OpenStack. Professors at Loyola University in Chicago are evaluating how to use OpenStack to teach their students how to build distributed systems.

This is open innovation. This is promoting the progress of science and the useful arts. This advanced the missions of the FTC and DOJ: consumers were benefited and businesses thrived.

Rackspace believes that the patent system can and should be held to the same standard of performance as other types of open innovation. Open source promotes innovation by facilitating information transfer between different people and by helping define the boundaries of shared effort and robust competition. Although the means are different, the end goal of the patent system is the same: Patents, at their best, help facilitate information transfer between different groups. They spread the knowledge of innovators to others, who can then stand on the shoulders of previous inventors to create a better, more prosperous, and more competitive society.

In contrast, the worst parts of the patent system are exposed by PAE activity. PAE suits do not serve to spread knowledge. Instead, they seek to "monetize" the products that are already in the marketplace and actually benefiting consumers.

Patents that are vague and general are valuable to PAEs because they can be asserted broadly—but the vagueness and generality make those same PAE patents worthless for actual information transfer between institutions.

PAE activity in the International Trade Commission (ITC) is particularly abusive. ITC cases by PAEs seek to impose private tariffs and duties on international trade. Excluding products and services from consumers and businesses in the United States to protect "licensing" activity punishes consumers, businesses, and innovators without offering anything in return.

III. PAE Activity, Even By "White Hat" PAEs, Kills Open Innovation

It isn't surprising that PAEs seek to justify their actions by arguing that they support innovation. For example, IP Navigation Group[6] (IP Nav) also provided

[6] *See* http://www.ipnav.com/.

comments to the FTC and DOJ defending their actions.[7] In their comments, IP Nav describes "White hat" PAEs:

> "Black hat" patent monetizers use "spam"-type methods to seek enforcement of weak patents where there is dubious infringement – casting a wide net in hopes that at least some targets will pay to settle rather than spend more money to defend themselves in court.
>
> "White hat" patent monetizers are the reputable players in the field – companies that only enforce valid patents where there is clear infringement.[8]

IP Nav goes on to distinguish themselves as a "white hat" PAE, asserting that "the reporting of 'black hat' tactics has unfairly sullied the reputation of white-hat PAEs and has led to all PAE's being lumped together under the pejorative label of 'patent trolls.'"[9]

Given IP Nav's self-characterization of what constitutes a "white hat" PAE, it is particularly helpful to contrast its rhetoric with its actual activity in the marketplace.

- *PAEs targeting open source—a key driver of open innovation:* In March of this year, an IP Nav client named Parallel Iron sued twelve defendants in Delaware for allegedly infringing on a trio of patents that Parallel Iron says cover the use of the open source Hadoop Distributed File System (HDFS).[10]

- *PAEs send threatening letters over dubious patents:* It is a matter of public record that IP Nav makes a practice of sending patent assertion letters without divulging the details of their infringement claims—not even the patent numbers or the patent owner—unless the accused parties enter into a forbearance agreement preventing a declaratory judgment action.[11]

- *PAEs hope that targets will pay rather than defend themselves in court:* The cases listed above are actually the second round of cases filed by IP Nav and

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[7] *See* Barry Leff, *Comments on Patent Assertion Entity Activities*, 1, Public Comment posted to Fed. Trade Comm'n Patent Assertion Entity Activities Workshop, http://www.ftc.gov/os/comments/pae/pae-0010.pdf (last visited Apr. 5, 2013).
[8] *Id.*
[9] *Id.*
[10] *See* Complaint for Patent Infringement, *Parallel Iron, LLC v. Cloudera, Inc.*, No. 1:13-cv-00443 (D. Del. Mar. 18, 2013) (No. 1).
[11] *See* Complaint for Declaratory Judgment, *Renaissance Learning, Inc., v. Doe No. 1*, No.11-cv-166 (W.D. Wis. Mar. 4, 2011) (No. 1); Rackspace's Original Complaint and Jury Demand, *Rackspace US, Inc. v. Parallel Iron, LLC*, No. 5:13-cv-274 (W.D. Tex. Apr. 4, 2013) (No. 1).

> Parallel Iron. In the first round, IP Nav and Parallel Iron sued on a patent that they had no standing to enforce. Most defendants settled rather than fight it out in court. Parallel Iron only dismissed the lawsuit when their lack of standing came to light through the efforts of one of the defendants.[12]

In Rackspace's experience, this "white hat" behavior is toxic to all types of innovation. In contrast to the principle of open innovation, PAEs seek to place a tax on the actual innovation going on in open source. If "white hat" PAEs only "enforce[d] valid patents where there is clear infringement," as IP Nav asserts, there would be no need to hide the information about the patent from the accused infringer.[13] It boggles the mind trying to imagine the lengths to which "black hat" patent monetizers must go.

IV. PAE Activity Targeting End-Users is Deceptive, Unfair and Anticompetitive

In the context of the FTC and DOJ's roles protecting consumers and addressing anticompetitive conduct, it is important to note that PAE suits targeting end-users are deceptive, unfair, and anticompetitive—killing business and open innovation. An example of this conduct is "Project Paperless." Project Paperless, LLC is a PAE targeting copier and scanner use by small businesses. It sends assertion letters to companies, frequently asking a sum such as $1,000 per employee. In return, it promises not to file suit.[14]

As described above, the fundamental purpose of patent law is to promote the progress of science and the useful arts. Patent law seeks to accomplish this goal by providing inventors a limited time in which they have the exclusive rights to their inventions. This is done to prevent others from copying inventions and undercutting the original inventor in the marketplace. But, by definition, end-users that already own a scanner, phone, or Wi-Fi access point are not in the market and cannot "undercut" the legitimate inventor.

More importantly, going after end-users is fundamentally unfair. Patents—the documents that are supposed to put the public on notice—are written to be interpreted and interpretable only by those "of skill in the art." As a general rule, people who buy packaged products are not going have the education and training to be "of skill in the art." Because of this disconnect between the language of the patents and the skill level of the end users, the public notice function of patents and patent claims is completely

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[12] Plaintiff Parallel Iron, LLC's Answering Brief to Defendant EMC Corporation's Motion for Attorney's Fees and Related Expenses Pursuant to Fed. R. Civ. P. 54 and 35 U.S.C. § 285 at 6, *Parallel Iron, LLC v. Adconion Media Inc.*, No. 1:11-cv-799 (D. Del. Sept. 14, 2012) (No. 124).

[13] *See* Barry Leff, *Comments on Patent Assertion Entity Activities*, 1, Public Comment posted to Fed. Trade Comm'n Patent Assertion Entity Activities Workshop, http://www.ftc.gov/os/comments/pae/pae-0010.pdf (last visited Apr. 5, 2013).

[14] *See* Stop Project Paperless, *Project Paperless, LLC*, http://stop-project-paperless.com/ (last visited Apr. 5, 2013).

eliminated. End-users never receive notice until they receive an assertion letter, or worse, are sued by a PAE. These companies have limited resources to fight a patent claim, and therefore, most agree to settle out of court for what may be tens of thousands of dollars each.

V. Conclusion

Rackspace believes that abuse of the patent system—and PAE activity in particular—is a serious threat to business and to innovation. In our own experience, we have seen a 500 percent spike in litigation expense since 2010—entirely due to PAE activity. Without serious reform, companies of all sizes and industries could—and likely will—find themselves in the crosshairs of a PAE. We know from industry reports that we are not alone.

We urge the FTC and DOJ to take strong measures to promote real, open innovation in America. We know there are many paths to take and discussions to have to come to the right set of reforms. In all those discussions, however, the FTC should take the perspective that the correct set of reforms will be those that foster open innovation and competition in all parts of our economy, both inside and outside the patent system.

In particular, Rackspace calls upon the FTC and DOJ to take the following actions:

- Prioritize open innovation—of all types—over narrow reforms that do not take into account the primary purpose of promoting the progress of science and the useful arts

- Work with the ITC to exclude licensing activity as a domestic industry for purposes of ITC jurisdiction

- Investigate and ban the practice of patent suits against end-users who do not have effective notice

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Respectfully submitted,

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