

Patent Assertion Entity Workshop

invalidating patents on obviousness grounds – opening a channel to improve patent quality.² Joining Congress, the antitrust agencies, and most economists, the Court rejected the presumption that patents convey market power.³ Similarly, when the Supreme Court issued its *eBay* decision, it ended an almost automatic injunction rule for patent infringement.⁴ *eBay*'s equitable test now provides a much-improved framework to address a myriad of injunction issues, including those involving FRAND-encumbered SEPs.

Today, we look at the related issue of Patent Assertion Entity (“PAE”) activity and its impact on innovation and competition. What can the Agencies do to promote competition here? Before we dive into what I know will be a lively debate, however, let me briefly talk about acronyms. Here in DC, who doesn't love a good acronym?

We are looking today at PAE activity, not the more general non-practicing entity, or NPE, activity. The term NPE includes any entity that does not manufacture or sell products that use its patented technology. For example, universities are NPEs. They conduct research, patent their inventions, share this research with companies who seek to include this technology in new or improved products. By contrast, PAEs focus on purchasing patents from existing owners. PAEs make money by licensing the intellectual property to (or litigating against) manufacturers who are already using the patented technology. Acronyms aside, we all know a few colorful street names for PAEs, but we are not going to use any of them today. In this workshop, as my former colleague Chairman Bill Kovacic would say, we are merely seekers of the truth.

² *KSR v. Teleflex*, 550 U.S. 398, 415 (2007), *see also* 2003 Report at 22-24.

³ *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 45-46 (2006), *see also* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (1995).

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A truthful fact: it is clear that PAE activity is a growing issue for the United States. There were more than 4,000 patent lawsuits filed last year. James Bessen and Michael Meurer report that PAE-generated revenue cost defendants and licensees \$29 billion in 2011, a 400% increase from 2005.⁵ They calculate that no more than 25% of this flowed back to innovation. Almost like lobbying in Washington, D.C., 75% was deadweight loss! Later today, we will hear a discussion of this point.

Another one: Congress is beginning to pay attention. The America Invents Act directed the Government Accountability Office to study the costs, benefits, and consequences of PAE litigation, and to recommend how to “minimize any negative impact” of PAE litigation. The GAO report will issue shortly, and like many of you, we are eagerly awaiting the results.

Yet another: one of our panelists, Robin Feldman, and her colleagues, who worked on the GAO study, report that PAE suits are on the rise.⁶ 6a866Co, 22%e of

litigate their intellectual property? What role do defensive aggregators play in this model?

After lunch, we will hear from Stuart Graham, the Chief Economist of the United States Patent and Trademark Office. I am especially glad that Stu has joined us today. He will address the PTO's efforts to improve transparency concerning the ownership of patent applications and patents. Now I am just a government lawyer, but let me ask you this: why is there no disclosure of real-party-in-interest information for all patents and patent applications? I commend the PTO for their upcoming roundtable on this topic, but preliminary responses from our panellists today would be greatly appreciated.

In our second session, we will examine the potential efficiencies and harms of PAE activity. Supporters of the PAE business model believe that PAEs promote invention and investment in R&D by reducing transaction costs, managing the risks of monetizing inventions, maximizing revenue, and compensating small inventors. Not surprisingly, others believe that PAE activity imposes a "tax on innovation," undermining the incentives to engage in R&D. Detractors also raise concerns about operating companies transferring IP to PAEs as a means of raising rivals' costs. If that is actually happening – perhaps because of asymmetries of information and liability – it would seem, well, kind of unsavory.

Finally, our last session brings together academics and outside counsel to discuss whether competition law can play a role in enhancing the potential efficiencies and reducing the potential harms of PAE activity.

The FTC and DOJ value your input on these important issues. We are holding the public comment period open until March 10, and actively seek your observations. Right

now, I look forward to hearing the panelists offer a better sense of how the Agencies can be constructive. That is how we determine whether we need to do more, or whether we need to do less, or whether we should let the marketplace sort itself out, which is often our preference.

Thank you.