Commissioner Julie Brill
Keynote Address
AAI CCIA Conference on Innovation, Patents, and PAEs
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Thank you, Bert Foer, for that kind introduction, and thank you Bert, AAI and CCIA for inviting me to speak this afternoon.

We have been celebrating our centennial at the FTC this year, taking some time to reflect on the people and the times that shaped our agency. In the process, we've been marveling at how much the world has changed since 1914. What would President Wilson, Louis Brandeis, and the other Progressive-era leaders who designed the FTC make of their agency today? I can imagine they would take one look at our tech-heavy agenda and think we had taken to doing our business in a foreign language: cybersecurity, mobile cramming, patent assertion entities, robocalls, the Internet of Things, and, a personal favorite, caffeine-infused shapewear (the FTC recently settled charges of fraudulent weight loss claims with that product's producer). Those august reformers might also take a look at the roster of sitting commissioners – four out of five of us are women – and think they had mistakenly picked up the roll for one of Carrie Chapman Catt's suffragette rallies. U.S. women would not win the right to vote until six years after the FTC Act was signed.

But on closer look, I think our founders would find, as I have found in studying our history, that Shakespeare got it right: what's past is prologue.[1]

Yes, it is true, for the first time, a majority of the FTC's commissioners are female – at a time when the agency's work is concentrated on fostering innovation in the market for high tech, considered by many to be a male-dominated world. But I would challenge that assumption. From its very beginnings, one finds women at key pivot points of high tech history.

Ada Lovelace, born exactly 199 years ago today, in her extensive writings on Charles Babbage's Analytical Engine, was the first to conceptualize a general computer that could do anything given the right program and inputs.[2] In the mid-twentieth century, Alan Turing, the father of computer science, developed the notion of artificial intelligence in direct response to Ada Lovelace's work.[3]

Hedy Lamarr, the film star of the '30s and '40s, was another trailblazing high tech innovator. Though she is best known for her sultry eyes and serial matrimony, she discovered that varying the frequencies at which radio signals are transmitted can protect them from being jammed. This so-

industry affected."[11]

I chose to quote that particular line because I believe it highlights the duality that our founders infused into the FTC's very foundation. Yes, devotees of the then-new social sciences that the Progressives were, they wanted us to think and analyze and study – and we do, with our workshops and our reports and our research authority. But they also wanted us to act, which is why they gave us law enforcement powers, policy advocacy responsibilities, and an education mission.

Thinking and acting is exactly how the FTC has approached, and will continue to approach, patent assertion entities (or "PAEs"). We first began looking at PAE activity in workshops leading up to our 2011 Report on the IP marketplace.[12] We followed that up by focusing exclusively on PAEs through a joint workshop with the Department of Justice Antitrust Division in 2012.[13] Because of the many complex issues surrounding PAEs, we are currently in the midst of an extensive review of PAE activity, a so-called 6(b) study, named after the statutory provision that gives us authority to undertake the project.[14]

As most of you know, PAEs attempt to generate profits by purchasing patents, then either licensing them to companies already using the patented technology or litigating against those businesses. All reports indicate that PAE-initiated lawsuits are on the increase,[15] with one study claiming PAEs accounted for 62 percent of all infringement suits in 2012.[16] Some find this trend a positive one. They argue PAEs make the market for intellectual property more robust - by compensating small inventors who might not otherwise have the resources to enforce their patents - by acting as a ready buyer for the patents of failed start-ups thus reducing the investment risks associated with early stage technologies[17] - and by allowing operating companies to monetize intellectual property.

Others disagree. PAEs, they contend, impose unnecessary costs without promoting the dissemination of technological know-how. Also, because PAEs do not manufacture products, they are not subject to countersuit, and therefore have little or no incentive to cross-license

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[11] S. Rep. No. 597, 63d Cong., 2d Sess. 9 (1914).

[12] FED. TRADE , THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), *available at* http://wIa 6.48 -0 0 6.48 77 6549.12 C /TT1.001 (11)Tj 9.18Ttp15w

That said, there is no need to wait for completion of our 6(b) study to resolve some of the most pressing problems surrounding PAEs. The Supreme Court has been doing its part by grappling over the past year with some key patent problems that the FTC's IP Reports had identified as fostering an environment conducive to problematic PAE activities.[26] But despite these recent cases, there still are important issues for Congress to address.

First, let's talk about the three Supreme Court cases decided earlier this year. In *Nautilus, Inc. v. Biosig Instruments, Inc.*,[27] the Supreme Court spelled out with some more specificity how clear a patent must be to satisfy the patent statute's requirement of definiteness. Biosig sued Nautilus for infringing Biosig's patents regarding technology for heart ra 2(s)(t s)1(ta5C.2)5(s) atllr2(ts)1(-31.8

from stronger patent notice requirements, as they would help innovators be less fearful of an infringement claim based on an ambiguous patent. Such changes would lead to increased efficiencies in the necessary licensing and cross licensing of the thousands of patents applicable to consumer electronics devices, with more clearly identifiable patents.

component of our patent system, as it promotes the development and commercialization of innovative products by helping third parties and patentees avoid uncertainty as to their rights. The importance of clear notice, however, is not limited to drafting pat

reforms.

Similarly, the fact that we are still in the middle of our study should in no way prevent appropriate law enforcement action. If the law enforcement agencies – the FTC and DOJ, as well as the states – uncover PAE activity that is in violation of current law, they should act expeditiously to take whatever enforcement actions are warranted to stop inappropriate PAE abuse.

One hundred years ago, the FTC's founders built an agency that could both think and act, and placed us at the center of the nation's efforts to protect competition and consumers. I believe our founders would thoroughly approve of our efforts on PAEs. We are studying carefully PAEs' impact on innovation and markets, but we are not just studying. We are acting when it is clear PAEs are behaving in ways that are illegal and detrimental to competition, and we are applauding when other agencies or courts do the same. I am calling on other branches of government to do more, too.

I would like to think Admiral Hopper would endorse this strategy. She was fond of quoting the motto: "A ship in harbor is safe, but that is not what ships are made for."[49]

Well, an FTC or Congress parked waiting for the PAE 6(b) study to conclude is not what we were made for. For the FTC, we should use all the tools our founders gave us to pursue our mission of protecting competition as it shapes the economy and consumers as they navigate the markets. They expected us to think and act, and when it comes to PAEs, or any of the other myriad of competition issues under our jurisdiction, that is exactly what you can count on us to do.

[49] John Augustus Shedd, Salt from My Attic (1928), cited in The Yale Book of Quotations 705 (Fred R. Shapiro ed., 2006).