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Patent experts critique potential misuse of FTC study

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Pallavi Guniganti

L-R: Fritz Scheuren, Anne Layne-Farrar, James Kress and Koren Wong-Ervin (Credit: Freedom Film)

Observers of the intersection of intellectual property and competition law raised concerns on Wednesday about what the Federal Trade Commission might do with the soon-to-be-public results of its inquiry into patent assertion entities. *Pallavi Guniganti at GCR Live: IP & Antitrust USA*

In her keynote, FTC commissioner Terrell McSweeny had emphasised the exploratory nature of the FTC's study, done under the auspices of its 6(b) authority as an expert agency to subpoena information in order to learn

more about this “incredibly opaque industry”.

She noted that currently, little is known about patent-assertion entities and their impact on competition and innovation. Such entities do not themselves develop and sell patents, but rather buy them and then demand royalties from companies that make use of that technology.

While PAE proponents say they create a valuable secondary market for patents, thereby rewarding innovators, opponents say these companies actually divert resources from research and development, McSweeny said. Without taking a position, the commissioner said her agency believes it first and foremost needs to understand how PAEs are doing business.

It began the study in 2014 with information requests to approximately 25 different PAEs, and 15 other companies in the wireless chipset sector. The FTC intends to publish a descriptive report on findings in the “very near future”, McSweeny said.

Other speakers at the conference raised concerns that the government might then use that report as a basis for antitrust enforcement or patent legislation.

Charles River Associates economist Anne Layne Farrar said that the secondary market was, at least in theory, an “unequivocal positive” for consumers and competition to provide an additional outlet for returns on innovation. A company that is good at inventing but bad at commercialising its inventions now has an alternative way to earn money, she said.

As for concerns about PAEs’ litigation, she acknowledged that the harder questions are about what the patent buyers do with their asset, but said there is “some natural level of litigation” in patents that does not stymie innovation.

“If one of the purposes of 6(b) study is to get a handle on whether there is too much litigation, the study is just not capable of answering that question,” Farrar said, due to its narrow scope and focus on entities that had sued to enforce patent. Nor is it “meaningful enough” to be a foundation for new legislation to

limit patent litigation, she said.

Though Farrar said she hoped the FTC's inquiry would encourage additional studies by academics into this area, she recalled that the commission had said, in seeking permission from the Office of Management and Budget, that it would not extrapolate from the companies that submit information to a broader set.

"Let's hope they remember those statements and use the study for what it was designed for" – learning about PAEs and their conduct, Farrar said .

Baker Botts partner James Kress, who said he had represented multiple respondents to the 6(b) study, speculated that part of the reason for delay in the FTC's report may not just be the "monumental challenge in terms of gathering data", but the difficulty in drawing conclusions from it.

Despite its having been "mainstream for antitrust to focus on PAEs" in the past few years, Kress said, there have been few cases. Even though FTC commissioners promised to go after the entities' conduct that raises competition or consumer protection problems, he said, there has been no "huge outburst" of litigation or enforcement.

"There's one piece of empirical evidence to draw a conclusion on," he said.

Kress advised focusing on the conduct, and not the form of the business model, and noted that practising entities can take just as aggressive positions and back them up with injunctions and recourse to the International Trade Commission's import bans for patent-infringing products.

Some legislative proposals would require patent plaintiffs to disclose who the real party-in-interest for the company is, in order to make clear when a company is engaging in litigation to disadvantage a market rival. This "privateering" behaviour, Kress said, could be the focus of another study.

He and Farrar were joined on the panel by economist Fritz Scheuren, with the discussion moderated by former FTC attorney and Global Antitrust Institute director Koren Wong-Ervin.