Introductory Remarks of Commissioner Julie Brill
"The Need for Patent Litigation Reform"
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Thank you, Joe Mullin, for that kind introduction, and thanks to CES for inviting me to speak this morning.

Many of you in this room today may know my agency, the Federal Trade Commission, as a small but mighty federal agency with a mandate to protect consumers and competition across a broad swath of the economy. But many of you may not realize that the Federal Trade Commission is one of the oldest independent federal agencies. This year represents our 100th anniversary.

We were the brainchild of then trust-buster (and later Supreme Court Justice) Louis Brandeis. Of course, Brandeis also was someone deeply concerned about the role of technology in society, beginning with some high tech developments during Brandeis' time, including what he called "snapshot photography."[1] Fast forward 100 plus years, we can only imagine what someone like Louis Brandeis would be thinking if he walked the halls here at the Consumer Electronics Show. One thing we know for sure is that Brandeis would champion the FTC playing a central role in thinking about the most appropriate way for patents, competition law, and consumer protection to drive the kind of innovation and enhancements to consumer welfare we see on display here at CES. Indeed, in light of our parentage, one might say that focusing on these issues – the intersection of patents, antitrust, and innovation – is built into the FTC's DNA.

So it is only fitting that various aspects of the patent system, including patent assertion entities (or patent trolls, as some call them), have caught our attention. In just the last two years, lawsuits brought by PAEs have tripled, rising from 29 percent of all infringement suits to 62 percent.[2] Some evidence suggests that PAEs may have threatened over 100,000 companies with patent infringement in 2012 alone.[3] Supporters of the PAE business model say that it facilitates the transfer of patent rights, rewards inventors, and funds ongoing research and development efforts. Critics say the PAE business model can sometimes amount to a tax on product

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[1] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. R. 193, 196 (1890).

[2] Executive Office of the President, Patent Assertion and U.S. Innovation, June 2013, prepared by the President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy, *available at* http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force [hereinafter Presidents PAE Report]; Fiona Scott Morton, Carl Shapiro, Strategic Patent Acquisitions, Haas School of Business, University of California at Berkeley, working paper, 2 July 2013, *available at* http://faculty.haas.berkeley.edu.

[3] Presidents PAE Report, *supra* note 2.

development, with adverse effects on competition and innovation that ultimately hurts consumers as well as industry.

Over the past decade, the FTC has closely examined the intersection of patent and antitrust laws. Our extensive work has included numerous workshops and hearings, with input from a wide spectrum of stakeholders – business representatives from large and small firms, the independent inventor community, leading patent and antitrust organizations and practitioners, consumer groups, and scholars. The resulting reports[4] and guidelines,[5] spanning across various administrations, have represented the views of Commissioners of all political stripes.

Our 2003 Patent Report focused on the impact patent quality can have on innovation and competition. We found that trivial and overbroad patents – including software and business method patents – can undermine competition, with no offsetting benefits to consumers, by leading a competitor to forgo research and development in an area the patent supposedly covers, deterring follow-on innovation and new market entry. We proposed reforms to improve patent quality to avoid these problems.[6]

Our 2011 Patent Report examined the impact of patent notice and remedies on competition, incentives to innovate, and consumer welfare.[7] These issues are especially important to the consumer electronics industry, where interoperability is vital. Because a single consumer electronic device can involve thousands of patent claims,[8] efficient licensing and cross-licensing of patents are imperative, and will occur most easily where there is clear notice about each patent and what it covers. When innovators can't find relevant patents, or if the

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[4] FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf [hereinafter 2003 Patent Report]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf [hereinafter 2007 Patent Report]; FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf [hereinafter 2011 Patent Report]. Our 2007 Patent Report was co-written with DOJ.

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.ftc.gov/bc/0558.pdf.

[6] 2003 Patent Report, *supra* note 4, at 4-18 (Executive Summary).

[7] We recommended, among other things, enhancing the patent examination record to assist potential competitors more easily interpret the scope of patent claims. 2011 Patent Report, *supra* note 4, at 14. We also recommended that administrative and judicial review of patent applications incorporate more full considerations of competitors' ability to predict the breadth of claims from their written descriptions. *Id.* at 15. With respect to patent remedies, we addressed the need to align compensation to patent holders with the economic value of their patented inventions. *Id.* at 17-25.

[8] Some have estimated that the number of patents in a smartphone is as high as 250,000. *See* David Drummond, Google Senior Vice President and Chief Legal Officer, When Patents Attack Andriod, August 3, 2011, *available at* http://googleblog.blogspot.com/2011/08/when-patents-attack-andriod.html#!/2011/08/when-patents-attack-andriod.html.

scope of a competitors' patent is unclear, it is much more difficult to license and cross-license patents in a manner that promotes innovation and competition.[9]

Our 2011 Patent Report also began to examine PAEs and asked why they might have less incentive to engage in the more traditional forms of licensing that foster innovation and competition. Because PAEs do not manufacture products, they are not subject to countersuit, and have less incentive to cross-license patents.[10] This is in contrast to the more traditional situation involving rival makers of complex products, who each have their own patents, and thus have an incentive to settle competing infringement cases by cross-licensing, rather than engage in expensive legal battles.[11] Moreover, PAEs also have few of the reputational concerns that might deter a brand-conscious company from appearing to victimize other innovators or inadvertent infringers.[12]

Some progress has been made to reform the patent system to address some of these concerns. The Supreme Court has played an important role, by eliminating the presumption that had led to nearly automatic injunctive relief as an infringement remedy in 2006[13] and by refining the standards for patent "obviousness" the following year.[14] Congress's 2011 Patent Reform Bill, the America Invents Act, was another significant reform effort. It adopted several of our policy recommendations[15] – most notably, incorporating a new post-grant review process that

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[9] *See* Edith Ramirez and Lisa Kimmel, A Competition Policy Perspective on Patent Law: The Federal Trade Commission's Report on the Evolving IP Marketplace, the Antitrust Source, August 2011, *available at* http://www.antitrustsource.com.

[10] They also have lower discovery costs. The President's PAE Report indicates that the success of the PAE business model is due in part to the combination of these various attributes. President's PAE Report, *supra* note 2.

[11] *See* Henry C. Su, Invention Is Not Innovation and Intellectual Property Is Not Just Like Any Other Form of Property: Competition Themes from the FTC's March 2011 Patent Report, the Antitrust Source, August 2011, *available at* http://www.antitrustsource.com.

[12] Evidence suggests that the majority of litigated patent infringement claims are against inadvertent infringers. 2011 Patent Report, *supra* note 4, at 131 n.337.

[13] eBay v. MercExchange, 547 U.S. 338, 394 (2006). Justice Kennedy cited the FTC's 2003 Patent Report in his concurrence, noting that firms primarily engaged in IP licensing can use the threat of injunctive relief to demand higher royalties or more costly licensing terms after the standard is implemented than they could have before their IP was included in the standard.

[14] KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398, 415 (2007).

[15] The National Academies of Science issued a patent report in 2004, not long after the FTC's 2003 Patent Report, making numerous similar recommendations, including our recommendation to broaden the ability to invalidate patents for obviousness. National Research Council of the National Academies, A Patent System for the 21st Century (2004), *available at* http://www.nap.edu/html/patentsystem/0309089107.pdf.

will provide a less expensive means short of litigation to allow third parties to challenge trivial or overbroad patents.[16]

But there is more that can and should be done. Congress is currently considering several legislative proposals aimed at addressing other perceived flaws in the patent and litigation systems that PAEs may be exploiting. Last month the U.S. House of Representatives overwhelmingly passed the Innovation Act[17] with a bi-partisan vote of 325-91, and the Senate Judiciary Committee held a hearing focusing on a similar legislative proposal put forth by Senate Judiciary Chairman Patrick Leahy.[18] The federal bills are aimed at PAEs who assert weak or vague patents, and are designed to make it difficult for PAEs to use the threat of costly patent litigation to secure unjustifiable settlements.

For example, the Goodlatte bill would raise the bar for sending infringement letters by limiting remedies when a patent complainant fails to list which patents are being infringed or name the offending products or processes.[19] The Leahy bill, among other things, seeks to enhance the FTC's authority to police false or misleading PAE demand letters.[20]

Of course there are many more complex issues associated with PAEs worthy of study. PAEs argue that they serve a vital role in the patent system, whether by compensating inventors who might not otherwise have the resources to enforce their patents or by reducing the

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[16] Leahy-Smith America Invents Act, Pub. L. No. 112-29 Ch. 29 125 Stat. 305, 305-313. Congressman Smith described our 2003 Patent Report as an "authoritative report on patent reform" in his 2011 report on the AIA. *See* Report on the America Invents Act, H.R. Rep. No. 112-98, pt. 1 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt98/pdf/CRPT-112hrpt98-pt1.pdf.

[17] H.R. 3309, Congressman Goodlatte's bill. The bill requires the loser in patent litigation to pay the other side's litigation fees, requires more up-front technical detail in support of infringement claims, and halts most discovery until after the court interprets the patent claims.

[18] Senator Leahy's proposed legislation is S. 1720, the Patent Transparency and Improvements Act of 2013. *See* "Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse," Senate Judiciary Committee full committee hearing, December 17, 2013, *available at* http://www.judiciary.senate.gov/hearings.hearing.cfm?id=32caee808f9297f0e7df6280b03ff1f.

[19] *See* http://goodlatte.house.gov/press_releases/476.

[20] *See* http://www.leahy.senate.gov/press/patent-trolls-leahy-introduces-bipartisan-bill-to-protect-vt-businesses-from-patent-lawsuit-abuse-. Several other legislative proposals have also been put forward in the Senate, by, for example, Senators Orrin Hatch, John Cornyn, and Charles Schumer, with varying provisions. The states have also taken legislative action against PAEs. My home state of Vermont filed the first lawsuit against a patent troll alleging a violation of Vermont's law prohibiting unfair and deceptive trade practices. *See* State of Vermont v. MPHJ Technology Investments, LLC, Consumer Protection Complaint, Docket No. 282-543Wncv, *available at* http://www.atg.state.vt.us/assets/files/Vermont%20v%20MPHJ%20Technologies%20Complaint.pdf. Additionally, the Vermont state legislature recently passed a law that provides recourse for individuals targeted with bad faith patent assertions. 9 V.S.A. § 4195 *et seq., available at* http://www.leg.state.vt.us/docs/2014/Acts/Act044.PDF.

investment risks associated with early stage technologies by acting as a ready buyer for the patents of failed start-ups.[21]

In October of last year, the FTC began the process of studying these more complex issues in depth. Our 6(b) study – named after the statutory provision that gives us authority to undertake the project[22] – will gather qualitative and quantitative information on PAE acquisition, litigation, assertion, and licensing practices.[23] In particular, we will examine how PAE patent assertion behavior may differ from other patent owners in the wireless industry.

We hope the eventual report that we issue based on our 6(b) study will provide a fuller and more accurate picture of PAE activity, which we can then share with Congress, other government agencies, academics, industry, and other stakeholders. We anticipate that, as in the past, our study, once it is done, will be put to good use by Congress and others who examine closely the activities of PAEs.[24] Notably, 42 State Attorneys General and the Department of Justice Antitrust Division have expressed strong support for our study.[25]

But should Congress wait for the FTC's 6(b) study before acting on the Goodlatte bill, the Leahy bill, and other bills currently under consideration, as some have called for? Or should the FTC and other law enforcement agencies wait on the results of the 6(b) study before undertaking enforcement actions against PAE activity that crosses the line? I believe the answer to both questions is "no." Further reforms to the patent litigation system are clearly warranted. With regard to the legislation under consideration, various provisions in the bills may help to

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[21] 2011 Patent Report, *supra* note 4, at 52-53.

[22] Federal Trade Commission Act, 15 U.S.C. § 46(b).

[23] Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 26, 2013), *available at* http://www.ftc.gov/opa/2013/09/paestudy.shtm. The study is the follow-up from a joint workshop we held in December 2012 with the Department of Justice to discuss the activities of PAEs. While workshop panelists and commenters provided anecdotal evidence of potential harms and efficiencies of PAE activity, many stressed the lack of more comprehensive empirical evidence. For example, there is little systematic publicly available information describing the types of patents acquired by PAEs and their assertion strategies as compared to other patent holders. The workshop materials are available at the following link: http://www.ftc.gov/opp/workshops/pae/.

[24] *See, e.g.*, "FTC's Brill Voices Support for Broad "Patent Troll" Probe", LAW 360, July 31, 2013, *available at* http://www.law360.com/articles/461432/ftc-s-brill-voices-support-for-broad-patent-troll-probe; Chairwoman Ramirez, Opening Remarks at the CCIA and AAI Program: Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do (June 20, 2013), *available at* http://ftc.gov/speeches/ramirez/130620paespeech.pdf.

[25] Letter from National Association of Attorneys General to Donald S. Clark, Secretary, Federal Trade Commission, dated Dec. 16, 2013, re: Comment by State Attorneys General on FTC's Proposed Information Requests to Patent Assertion Entities, *available at:* http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00065-87873.pdf; Renata Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, The Art of Persuasion, Competition Advocacy at the Intersection of Antitrust and Intellectual Property, *available at:* http://www.justice.gov/atr/public/speeches/301596.pdf.

discourage frivolous lawsuits and improve patent quality, actions the FTC has long encouraged. I believe Congress should act with deliberate speed to implement those proposed reforms that will further these goals.[26] And if, after our PAE 6(b) study is completed, it appears that additional reforms are warranted, Congress can consider further action at that time.

Similarly, the FTC's study should present no barrier to 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. In so doing, the FTC would continue to fulfill its original mission – established 100 years ago – to use its authority to protect competition, innovation and enhance consumer welfare.

Thank you.

[26] Last June, the Executive Office of the President issued a set of legislative recommendations and executive actions aimed at PAE activity. President's PAE Report, *supra* note 2. FTC Chairwoman Edith Ramirez has also urged continuing effort on patent reform. *See* Remarks of Chairwoman Edith Ramirez, FTC, Fall Networking Event, ABA Antitrust Section's Intellectual Property Committee, *available at* http://www.ftc.gov/public-statements/2013/11/remarks-chairwoman-edith-ramirez-fall-networking-event-aba-antitrust.