



What Others Are Saying About the FTC's PAE Study

ALDEN ABBOTT – HERITAGE FOUNDATION

"[T]he reasonable observer would conclude from this that the agency was (to say the least) in no position to make any sort of policy recommendations, given the absence of any hard evidence of PAE abuses or excessive waste from litigation...

"Without getting into the merits of [the FTC's] individual suggestions ... it is sufficient to note that they bear no logical relationship to the factual findings of the report...

"In short, the recommendations are classic pre-baked 'solutions' to problems that have long been hypothesized. Advancing such recommendations based on discrete information regarding a small skewed sample of PAEs – without obtaining crucial information on the direct costs and benefits of the PAE transactions being observed, or the incentive effects of PAE activity – is at odds with the FTC's proud tradition of empirical research...

"In conclusion, the FTC would be well advised to avoid putting forth patent reform recommendations based on the findings of the PAE Study. At the very least, it should explicitly weigh the implications of other research, which explores PAE-related efficiencies and considers all the ramifications of procedural and patent law changes, before seeking to advance any 'PAE reform' recommendations."

*Alden Abbott, Senior Legal Fellow and Deputy Director of Meese Center for Legal and Judicial Studies at The Heritage Foundation
Truth on the Market, "The FTC's PAE Study Recommendations: Case Not Proven,"
October 20, 2016*

JORGE CONTREAS – UNIVERSITY OF UTAH COLLEGE OF LAW

"Even more challenging for an empirically oriented researcher like me is the lack of detail regarding the methodology used [in the FTC's study] to select the sample of firms surveyed...

"The study hinges on the definition of patent assertion entity... There's a problem with the definition: it's potentially over-inclusive and under-inclusive.

"We know the survey recipients were not selected methodically to form a representative sample of the PAE marketplace. **As a result, the study can't be used to draw generalizable conclusions about the marketplace.** That's been acknowledged by outside commentators as well as the FTC itself."

*Jorge Contreas, Associate Professor, S.J. Quinney College of Law, University of Utah
Remarks at Federalist Society Teleforum, "FTC's 6(b) Patent Assertion Entity Study,"
October 18, 2016*

THE HON. DOUGLAS H. GINSBURG – SENIOR JUDGE

"The study is neither sufficient nor necessary to support the recommendations..." There's simply a logical disconnect between the study and the recommendations... We have a recommendation that's free floating from the study....

"The study can't tell us whether the Supreme Court [rulings]...in Highmark and Octane Fitness cases...already addressed some of the concerns."

*Hon. Douglas H. Ginsburg, Senior Judge, U.S. Court of Appeals for DC Circuit
and Professor of Law, Antonin Scalia Law School, George Mason University
Remarks at Searle Center Conference, "Public Policy Forum
on the Patent Assertion Entity Activity: An FTC Study,"
October 13, 2016*

DEVLIN HARTLINE – CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY

"As many predicted, the FTC makes several broad recommendations for substantive and procedural reforms. The problem with this, however, is that the study was not designed to reveal the sort of data that could support such policy recommendations.

"The FTC itself even admitted this. When seeking approval from the Office of Management and Budget (OMB) to go ahead with the study, the FTC explained that its findings 'will not be generalizable to the universe of all PAE activity.' In another submission to the OMB, the FTC acknowledged that 'the case study should be viewed as descriptive and probative for future studies seeking to explore the relationships between organizational form and assertion behavior.' Now that the study is out, we see that the FTC has neglected to recognize the very limitations it once acknowledged to exist.

"It's clear that many had already jumped the gun, claiming both that we need this study to understand PAEs but that we know enough about PAEs to condemn them. They were going to use this study to argue for broad reforms no matter what it said. And now that the study is out, itself suggesting many fundamental changes, the anti-patent crowd has more fuel for the anti-inventor bonfire. **That the study does not support its conclusions matters a great deal, and it's disappointing that the FTC would use an exploratory study designed to simply suggest hypotheses to claim that those hypotheses have now been fully tested.**"

*Devlin Hartline, Assistant Director, Center for the Protection of Intellectual Property
blog, "FTC's PAE Study Makes Unsupported Recommendations,"
October 6, 2016*

ANNE LAYNE-FARRAR – NORTHWESTERN UNIVERSITY SCHOOL OF LAW

"Lastly, just the small sample size, everyone has been careful to call this a case study. **FTC has been very clear, these are case studies. They are not to be generalized.** Keep that in mind when we think about the application of the data to any follow-on recommendations.

*Anne Layne-Farrar, Vice President, Charles River Associates and
Adjunct Professor at Northwestern University School of Law
Remarks at Searle Center Conference, "Public Policy Forum
on the Patent Assertion Entity Activity: An FTC Study,"
October 13, 2016*

MARK A. LEMLEY – STANFORD LAW SCHOOL

“...[T]here is a problem out there, although it's narrower and more focused than people might otherwise have thought...”

“A lot of the tailoring that was done in the legislative proposals was directed at NPE and PAEs; that may still be painting too broad a brush.”

*Mark A. Lemley, William H. Neukom Professor of Law, Stanford Law School
Remarks at Searle Center Conference, “Public Policy Forum
on the Patent Assertion Entity Activity: An FTC Study,”
October 13, 2016*

SUZANNE MUNCK – FEDERAL TRADE COMMISSION

“This is an opportunity for more research. We're not saying this is the end-all-be-all.”

*Suzanne Munck, Chief Counsel for Intellectual Property, U.S. FTC
Remarks at Searle Center Conference, “Public Policy Forum
on the Patent Assertion Entity Activity: An FTC Study,”
October 13, 2016*

SUZANNE MUNCK – FEDERAL TRADE COMMISSION

“Because the PAE universe is unknown, **the FTC’s findings cannot be extrapolated to all PAE’s operating in the U.S...**”

“The recommendations in this report are meant to address the litigation PAE behavior that we observed ... It is limited to the folks that were in the case study.”

*Suzanne Munck, Chief Counsel for Intellectual Property, U.S. FTC
Remarks at Technology Policy Institute event,
“Federal Trade Commission’s Patent Assertion Entities Study,”
October 20, 2016*

KRISTEN OSENGA – UNIVERSITY OF RICHMOND LAW SCHOOL

“[The] subjects of the FTC study did not lead to a realistic picture of patent licensing firms... Bottom line ... is that the FTC study in this report will end up doing more harm than good...”

“First, the policy recommendations shouldn’t have been made because the facts gathered were incomplete. Second, the policy recommendation shouldn’t have been made because the facts they gathered don’t even support the recommendations they made...”

“Nothing can truly be extrapolated from this data and the FTC does admit that in some various meetings that they’ve had since then....”

“The FTC admits in the report that it cannot speak to any efficiencies that patent licensing creates because the data was too hard to collect.”

“They gathered up data about litigation and what patent assertion entities are doing wrong, but when it came time to gather up data about revenue sharing with inventors and any sort of

efficiencies that were created by the existence of patent assertion entities, the FTC says... we're just not going to say anything about it... They left the positive side of the equation blank, and then made recommendations...."

*Kristen Osenga, Professor, University of Richmond Law School
Remarks at Federalist Society Teleforum, "FTC's 6(b) Patent Assertion Entity Study,"
October 18, 2016*

FRITZ SCHEUREN – CENTER FOR EXCELLENCE IN SURVEY RESEARCH, NORC

"What can we learn from the highlights? That it's not designed to serve as a basis for policy recommendations. Maybe more study, but not yet..."

"The policy recommendations are non-sequiturs...they're not linked to the study directly. They're linked to the study, but not in a cause and effect relationship..."

"The study used results in ... a way that was contrary to what the study was designed to do... The results and the recommendations made don't logically follow..."

"Bottom line, the study should not serve as a basis for litigation reform legislation."

*Fritz Scheuren, Senior Fellow and Vice President,
Center for Excellence in Survey Research, NORC
Remarks at Technology Policy Institute event,
"Federal Trade Commission's Patent Assertion Entities Study,"
October 20, 2016*

MATTHEW L. SPITZER – NORTHWESTERN UNIVERSITY SCHOOL OF LAW

"There wasn't evidence of giant demand letter campaigns. [And so] what's not found in the report is forcing us to reconsider the traditional narrative about what PAEs are doing..."

"There's a lack of connection between the facts found in the main body of the report and the policy recommendations that are at the end..."

"The lack of connection runs in two ways. The facts contain virtually nothing that would lead us to know if we should adopt the recommendations. They're on different topics."

"The principle insight in the report ... is that there are different types of PAEs... This crucial distinction that runs through the whole report didn't make its way into the recommendations... On this element, making the connection between the facts found and the recommendations given, a failure. There's nothing there to allow the facts to inform the recommendations."

*Matthew L. Spitzer, Director, Searle Center, Northwestern Pritzker School of Law
Remarks at Searle Center Conference, "Public Policy Forum
on the Patent Assertion Entity Activity: An FTC Study,"
October 13, 2016*

JOSHUA WRIGHT – GEORGE MASON UNIVERSITY SCHOOL OF LAW

"Would the recommendations pass the cost benefit analysis? I don't think we've got enough to answer that question. And my preferred course in that case is don't give policy recommendations until you do. That's a threshold standard..."

"[The policy recommendations] don't say 'let's think about it' and 'it's natural to ask.' They say 'courts should do' in large part. I think there's a fundamental disconnect on what the standard of care is for an expert agency making policy recommendations....

"[Saying let's do more research] would have been a more preferred outcome for a variety of reasons."

*Joshua Wright, Executive Director of the Global Antitrust Institute,
George Mason University School of Law
Remarks at Technology Policy Institute event,
"Federal Trade Commission's Patent Assertion Entities Study,"
October 20, 2016*

ROSEMARIE ZIEDONIS – BOSTON UNIVERSITY SCHOOL OF BUSINESS

"We found compelling evidence that those patent rights are really important for entrepreneurs and venture capital-backed companies that are investing non-trivial amounts in those companies: many of which will fail. A lot of expensive experimentation. The promise of the patent rights, enforce those rights or even to sell those rights to another party in the event that your bet actually failed, was pulling in investment. That's one of those ex-ante efficiency effects...

"The main weakness is that even learning what we've learned, we still can't answer the fundamental question based on the evidence in this study alone, as to whether these ex-post lawsuits ... outweighs some of those ex-ante incentives...

"We are clearly taking, I think, a very laudable step away from the 'troll' terminology. You actually have some evidence in the report ... that suggests that ... maybe these aren't just lawsuits of dubious value...

"Patent assertion entities are playing a non-trivial role in that market for patents: buying these assets, not for tech transfer, but these are bets entrepreneurs and venture capitalists were placing under great uncertainty. Many of those companies, and those bets, fail. And yet, one of the wonderful things about patents as an asset is that you can actually have a re-sale market. Again, ex-ante efficiencies. **I think there's just a disconnect in terms of the evidence versus the recommendations."**

*Rosemarie Ziedonis, Associate Professor of Strategy and Innovation, and
Academic Director for Entrepreneurship, Boston University Questrom School of Business
Remarks at Technology Policy Institute event,
"Federal Trade Commission's Patent Assertion Entities Study,"
October 20, 2016*