PUBLIC COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION AND ENGINE ADVOCACY REGARDING PROPOSED CONSENT AGREEMENT

MPHJ Technology Investments, LLC, et al—Consent Agreement; File No. 142 3003

Submitted on December 8, 2014 to the Federal Trade Commission

The Electronic Frontier Foundation ("EFF") and Engine Advocacy ("Engine") welcome the FTC's interest in patent assertion entities and are grateful for this opportunity to comment. EFF is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. Founded in 1990, EFF represents more than 22,000 contributing members. EFF and its members have a strong interest in promoting balanced intellectual property policy that serves both public and private interests. Through litigation, the legislative process, and administrative advocacy, EFF seeks to promote a patent system that facilitates, and does not impede, "the Progress of Science and useful Arts."

Engine is a non-profit organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. As part of its advocacy efforts, Engine has built a coalition of more than 500 high-growth businesses and associations, pioneers, innovators, investors, and technologists from all over the country, committed to engaging on the policy issues that affect the way they run their businesses. With the burden of litigation by patent assertion entities resting unfairly on the smallest—and most productive—businesses in the economy, Engine, as the voice of startups in government, has a vested interest in leveling this litigation playing field.

I. Summary

EFF and Engine commend the FTC for responding to MPHJ's[1] campaign of deceptive patent assertion letters. Even though few targets were intimidated into getting licenses, these letters imposed enormous costs and stress on targeted businesses. We make four comments: 1) MPHJ's behavior warranted action from the FTC; 2) the consent agreement should include provisions providing for disgorgement of licensing revenues secured through deceptive letters; 3) the consent agreement should include provisions limiting MPHJ's deceptive use of sham licensing entities; and 4) the FTC should consider investigating other patent assertion entities that have engaged large campaigns of sending deceptive patent demand letters. While we believe

[1] We use "MPHJ" to refer collectively to all of the respondents.

that the consent agreement would be significantly improved by actual penalties for MPHJ's outrageous conduct, we support the FTC's decision to take action in this case.

II. Comments regarding the proposed agreement

A. Action against MPHJ was warranted.

As the FTC's complaint explains, MPHJ sent out thousands of misleading demand letters. The targets of these letters were generally small businesses with little or no experience of the patent system. These targets suffered harm even where they did not get a license. As one of the few non-profits that provides legal referrals for patent cases, EFF received inquiries from many recipients of these letters. As few patent litigators provide pro-bono legal services (a situation EFF is working to improve with our growing network of cooperating attorneys), we were unable to find legal counsel for many of MPHJ's targets.

As the FTC is surely aware, legal services, especially with respect to patent issues, are very expensive. Even a consultation can be a major expense for a small business or non-profit. This is especially true for the thousands of MPHJ targets who received MPHJ's third letter, which attached a draft federal complaint, and needed help analyzing these complaints. Of course, in addition to the expense and inconvenience, MPHJ's letters likely caused considerable stress to their victims who may have never before been threatened with a lawsuit. For these reasons, we believe that this case warranted FTC action.

We are mindful of the First Amendment issues raised by this case. Courts have generally found pre-litigation communications to be protected by the *Noerr-Pennington* doctrine. *See, e.g.*, *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Nevertheless, *Noerr-Pennington* does not protect sham litigation, nor does it protect intentionally deceptive demand letters. *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 353 (9th Cir. 2014). MPHJ's letters were intentionally deceptive. For example, MPHJ lied about licensing payments it claimed to have negotiated with other companies.[2] As knowingly deceptive, MPHJ's actions fall outside the protection of the *Noerr-Pennington* doctrine.

B. The agreement should provide for disgorgement of licensing revenue secured through deceptive letters.

Our main concern about the consent agreement is that it does not include any penalty for MPHJ's deceptive conduct. The Commission may seek disgorgement of revenues secured through violations of the FTC Act. *See F.T.C. v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 36-38 (D.D.C. 1999). Penalties are appropriate in this case both as punishment for MPHJ's outrageous conduct and as a deterrence to those who might copy its model.

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[2] MPHJ's deceptive statements can be contrasted to the letters at issue in *Sosa*. In that case, the letters made allegations regarding the conduct of the *recipients* of the letters. The court reasoned that since the recipient would know about its own conduct, the sender could not have intended to deceive. *See Sosa*, 437 F.3d at 941. In contrast, MPHJ made deceptive statements about non-existent licensing negotiations that its targets had no way to independently verify.

Alternatively, the consent agreement could include a provision requiring MPHJ to contact all licensees and provide them with an option of rescinding their licensing agreements. MPHJ made such a commitment to the New York State Office of the Attorney General in an Assurance of Discontinuance. The New York assurance included the following provision:

> [MPHJ] will provide a written notice to the New York Person that entered into a license agreement with respect to the Patents from [MPHJ] as a result of its receipt of the Letters referenced in this Assurance, including a copy of this Assurance and informing the licensee that pursuant to this Assurance it has the right to void its license agreement with [MPHJ], and in return receive a full refund of all license payments made, provided the New York Person provides written notice to [MPHJ] of its election to cancel the license agreement within 21 days of its receipt of the notice. In the event that such licensee requests rescission of the license agreement, [MPHJ] shall make such refund within ten business days of the licensee's election.[3]

Absent disgorgement, a similar commitment should be included in MPHJ's consent agreement with the FTC.

C. The agreement lacks any provision limiting MPHJ's deceptive use of sham licensing entities.

The proposed consent agreement responds to the core deceptive statements by MPHJ and enjoins it from similar deceptions in the future. But the agreement does not enjoin MPHJ's misuse of shell company licensing entities. As the complaint notes, MPHJ created a dizzying array of confusingly named entities. None of these so-called licensing entities operated with any independence from MPHJ (all were controlled entirely by J. Mac Rust) and they served no legitimate business purpose. Instead, MPHJ created these companies for the sole purpose of making it harder for targets to uncover its deceptions.

MPHJ's use of sham licensing entities made it impossible for small businesses to quickly learn who was really behind the letters they were receiving. This, in turn, made it difficult for the targets to verify whether the claims in the letters were true. As the New York State Office of the Attorney General concluded, "the number of different, cryptic names of the Subsidiaries made it more difficult for targeted businesses to find information about [MPHJ] and the Company's licensing program."[4] MPHJ should be prevented from using licensing entities for this purpose – any future letters should inform recipients about the owner of the patent and any real parties in interest.

It may be that amending the agreement is not possible at this stage. Nevertheless, we urge the FTC to remain vigilant regarding companies that use shell companies as part of a pattern of

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[3] *See* In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of MPHJ Technology Investments, LLC, Assurance No. 14-015 at 9 (Jan 13, 2014), http://www.ag.ny.gov/pdfs/FINALAODMPHJ.pdf.

[4] *See id*.

deception, given that patent assertion entities often take advantage of the lack of transparency in patent ownership. *See generally* Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 Stan Tech L. Rev 1 (2012). MPHJ was a particularly brazen example.

III. The FTC should continue to investigate deceptive conduct by patent assertion entities.

We urge the FTC to investigate similar bad actors. In particular, we urge the FTC to investigate a patent assertion entity named Innovatio IP Ventures (Innovatio). Like MPHJ, Innovatio sent out thousands of patent demand letters to small businesses. We believe that an investigation into its conduct may uncover violations of the FTC Act.

Innovatio used a portfolio of a few dozen patents to conduct a systematic, 10,000+-letter-campaign against end-user businesses simply for purchasing off-the-shelf Wi-Fi routers. Innovatio's letters demanded that those end-users—primarily consumers and small businesses—pay thousands of dollars for the mere use of an inexpensive, widely-available WiFi chip. Evidence suggests that Innovatio's letter campaign was deceptive. First, Innovatio demanded thousands of dollars per location without informing letter recipients that the patents were subject to RAND[5] commitments.[6] This omission was material because Innovatio's licensing demands were many thousands of times larger than any objectively reasonable RAND royalty.[7] Second, Innovatio reportedly targeted the owners of as many as *100 million* licensed devices without informing letter recipients that they were already protected, by a license obtained by their

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[5] "Reasonable and Non-Discriminatory." *See* United States Department of Justice and United States Patent and Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, Jan. 8, 2013, available at http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf

[6] Innovatio's demands have reportedly ranged between $2,300 and $5,000 per location—including locations such as cafés that might contain only a single router. *See* Roy Strom, *Wi-Fi Case Sheds Light On Patent Trolls*, Chicago Lawyer (Dec. 20, 2013), http://www.chicagolawyermagazine.com/Archives/2013/04/Innovation-Patent-Trolls.aspx; *see also* American Hotel & Lodging Association Statement on Innovatio, https://www.ahla.com/PressRoom.aspx?id=33218.

[7] Judge Holderman of the U.S. District Court for the Northern District of Illinois has held that: (a) the smallest salable part allegedly covered by Innovatio's nineteen in-question patents was the Wi-Fi chip in the devices, and (b) that the RAND rate in the event of infringement would be 9.56 cents per chip. *In re Innovatio IP Ventures, LLC Patent Litigation*, No. 11-C-9308, 2013 WL 5593609, at *3 (N.D. Ill. Oct. 3, 2013). This means that Innovatio's letters demanded license fees as high as 50,000 times the RAND rate.

upstream supplier.[8] An investigation is likely to uncover that Innovatio knew that it was making objectively unreasonable licensing demands and targeting licensed devices.[9]

Companies like MPHJ and Innovatio rely on fundamental information asymmetry—an abuse of process—to cause direct financial damage to small businesses. Protecting consumers from these practices is at the core of the FTC's jurisdiction. We urge the FTC to build on its work in this case and continue to investigate patent assertion entities.

Respectfully submitted,

/s/
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[8] Joe Mullin, *Wi-Fi "patent troll" will only get 3.2 cents per router from Cisco*, Ars Technica (Feb. 6, 2014, 4:46 PM), http://arstechnica.com/tech-policy/2014/02/cisco-strikes-deal-to-pay-wi-fi-patent-troll-3-2-cents-per-router/.

[9] One court held that Innovatio's letters were shielded by *Noerr-Pennington* immunity. *See In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903 (N.D. Ill. 2013) . However, this conclusion was based on the fact that the complaint in that case did "not allege that Innovatio knew that any particular Target was using wireless products containing components subject to those licenses." *Id.* at 917. It appears that many, if not most, of Innovatio's targets devises were licensed (because the targeted devices contained Wi-Fi chips made by industry giants like Broadcom and Qualcomm that held licenses to Innovatio's patents). For this reason, we believe that it is likely that an investigation would show that Innovatio knowingly targeted licensed devices.