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STICKS AND STONES:
HOW THE FTC'S NAME-CALLING MISSES THE
COMPLEXITY OF LICENSING-BASED BUSINESS
MODELS

*Kristen Osenga**

INTRODUCTION

It is a scary time to be a firm that operates under a patent licensing business model (“patent licensing firms”). These firms are receiving an extraordinary amount of scrutiny, not to mention bad press.¹ As the story goes, these firms allegedly send threatening letters, which seek exorbitant license fees for patents that are probably invalid and that cover technology they did not develop.² They purportedly delay offering licenses until manufacturing companies are deeply engaged in making and selling products that incorporate the patented technology, forcing the manufacturing companies to choose between taking a license and losing a significant portion of their business.³ When patent licensing firms do file lawsuits against manufacturing companies, conventional wisdom is that the primary purpose of the suit

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¹ The scrutiny of patent licensing firms comes from all corners, but seems to be particularly prevalent in Congress at present. *See, e.g.*, Danny Vinik, *The One Thing Democrats and Republicans Say They Can Get Done in 2015 Will Put You to Sleep*, NEW REPUBLIC (Nov. 5, 2014), <http://www.newrepublic.com/article/120142/republicans-and-democrats-patent-reform-will-happen-114th-congress> (describing how both political parties have patent reform, and particularly a measure aimed at patent trolls, at the top of the new agenda). Bad press associated with patent licensing firms has been consistent and longstanding. *See, e.g.*, Ashby Jones, *Patent ‘Troll’ Tactics Spread*, WALL ST. J. (July 8, 2012), <http://online.wsj.com/articles/SB10001424052702303292204577514782932390996>; *This American Life: When Patents Attack!*, CHI. PUB. MEDIA (July 22, 2011), <http://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack>.

² *See, e.g.*, John “Jay” Jurata, Jr. & Amisha R. Patel, *Taming the Trolls: Why Antitrust Is Not a Viable Solution for Stopping Patent Assertion Entities*, 21 GEO. MASON L. REV. 1251, 1252, 1256 (2014) (detailing complaints that “patent trolls” engage in “demand letter campaigns threatening litigation unless the recipient pays exorbitant licensing fees” and “are often made without regard to the validity of the patents at issue or the merits of such allegations”); Anup Malani & Jonathan S. Masur, *Raising the Stake in Patent Cases*, 101 GEO. L.J. 637, 645 (2013) (“On the flip side, there are frequent complaints about ‘patent trolls’ . . . who either patent ideas that require little research or purchase patents based on others’ research, then do not make any risky investment to develop those patented ideas.”).

³ *See, e.g.*, Malani & Masur, *supra* note 2, at 645 (“[Patent trolls] wait[] until some other party takes the expense and risk to commercialize these ideas and, if the other party is successful, files an infringement suit to extract a portion of the latter’s profits.”).

is to force a quick settlement and to obtain money without having the validity of the firm's patents called into question.⁴ As President Obama tersely put it, these firms “hijack somebody else's idea” simply to “extort some money.”⁵

Whether a firm is solely a patent licensing firm or operates only partially under this business model, it is lumped into a single category. Regardless of whether or not a firm engages in the potentially negative behaviors enumerated above, these firms are saddled collectively with the label “patent troll,” in an instance of name-calling that rivals those on elementary school playgrounds. No matter whether that category is the pejorative “patent troll,” or one of the supposedly less disparaging terms—“non-practicing entity” (“NPE”), or “patent assertion entity” (“PAE”), or “patent monetization entity” (“PME”)—the bottom line is that patent licensing firms have been deemed “a huge problem.”⁶ In addition to the accusations described above, highly touted, albeit problematic, studies claim that patent licensing firms account for over 60 percent of lawsuits and have led to \$29 billion in costs.⁷ These studies, coupled with theoretical claims and anecdotal remarks, are being used to justify various efforts to reform the patent

⁴ See, e.g., Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2013) (highlighting a growing type of patent troll “interested in quick, low-value settlements” and that do not want to go to trial).

⁵ President Obama made these remarks during a Google Hangout, responding to “an entrepreneur” who expressed concern about patent trolls. Ali Sternburg, *Obama Acknowledges Patent Troll Problem [w/ Transcript]*, PAT. PROGRESS (Feb. 14, 2013), <http://www.patentprogress.org/2013/02/14/obama-acknowledges-patent-troll-problem-w-transcript/>; see also Dustin Volz, *White House on Patent Trolls: It's Your Turn, Congress*, NAT'L J. (Feb. 21, 2014), <http://www.nationaljournal.com/tech/white-house-on-patent-trolls-it-s-your-turn-congress-20140221> (describing executive actions designed to combat patent trolls, as well as comments from members of the executive branch).

⁶ See, e.g., Press Release, Senator Charles E. Schumer, *Schumer: 'Patent Trolls' Preying on New York's Technology Industry with Unwarranted Lawsuits—Costing Legitimate Companies Billions of Dollars; Announces New Legislation to Crackdown on Growing Problem* (May 2, 2013), <http://www.schumer.senate.gov/record.cfm?id=341612> (calling “patent trolls” a “growing problem”).

⁷ James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 396-97 (2014) (claiming “patent trolls” are costing companies \$29 billion a year); Colleen Chien, *Patent Trolls by the Numbers*, PATENTLY-O (Mar. 14, 2013), <http://patentlyo.com/patent/2013/03/chien-patent-trolls.html> (attributing 62 percent of lawsuits filed in 2012 to PAEs). These studies have been used to support the scrutiny and bad press that have surrounded patent licensing firms. See, e.g., Dara Kerr, *Patent Trolls Curb Innovation and Cost the U.S. \$29B in 2011*, CNET (June 26, 2012, 5:41 PM), <http://www.cnet.com/news/patent-trolls-curb-innovation-and-cost-the-u-s-29b-in-2011/>; Rebecca J. Rosen, *Study: Patent Trolls Cost Companies \$29 Billion Last Year*, ATLANTIC (June 29, 2012, 7:37 AM), <http://www.theatlantic.com/technology/archive/2012/06/study-patent-trolls-cost-companies-29-billion-last-year/259070/>. However, these studies, and in particular Bessen and Meurer's, have been criticized for substantive and methodological failings. See David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 431-45 (2014).

system in Congress and the courts.⁸ Now the Federal Trade Commission (“FTC”) has taken up the gauntlet against patent licensing firms, asserting that these firms negatively impact innovation and competition.⁹

But what if the problem is not, as is being claimed, the existence of patent licensing firms? After all, the patent licensing business model is not new—inventors, including such American icons as Thomas Edison and Charles Goodyear, have monetized their inventions through licensing for years.¹⁰ Just as there are negative inferences drawn from theory and anecdote, there are theories and anecdotes that support claims that these firms have positive effects on innovation and competition.¹¹ This Essay asserts that the real problem is that patent licensing firms are treated as a homogeneous category, with no attention paid to the wide range of business models that exist under the patent licensing firm umbrella. The categorical determination of patent licensing firms as “problems” imputes to a large, diverse

⁸ See, e.g., Stopping the Offensive Use of Patents Act, H.R. 2766, 113th Cong. (2013); Patent Litigation and Innovation Act of 2013, H.R. 2639, 113th Cong. (2013); End Anonymous Patents Act, H.R. 2024, 113th Cong. (2013); Patent Abuse Reduction Act of 2013, S. 1013, 113th Cong. (2013); Patent Quality Improvement Act of 2013, S. 866, 113th Cong. (2013); Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. (2013). See also *Alice Corp. v. CLS Bank Int’l*, No. 13-298, slip op. at 5-10 (U.S. June 19, 2014) (discussing primarily the patent eligibility of software and business method patents, but the “patent troll problem” played heavily throughout the arguments and opinion); *Octane Fitness v. Icon Health & Fitness*, No. 12-1184, slip op. at 7-11 (U.S. Apr. 29, 2014) (making it easier to shift attorney’s fees in exceptional cases, removing the burden from Congress to pass a fee-shifting bill); Brief of Google Inc. et al. as Amici Curiae in Support of Respondents at 33-34, *Alice Corp.*, No. 13-298 (U.S. 2014).

⁹ FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 8 (2011) [hereinafter EVOLVING IP MARKETPLACE], available at <http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> (“Increasing activity by [PAEs] in the information technology (IT) industry has amplified concerns about the effects of ex post patent transactions on innovation and competition.” (footnote omitted)). This concern has manifested the PAE Study at the core of this Essay. See *infra* Part II.

¹⁰ See, e.g., CHARLES SLACK, NOBLE OBSESSION: CHARLES GOODYEAR, THOMAS HANCOCK, AND THE RACE TO UNLOCK THE GREATEST INDUSTRIAL SECRET OF THE NINETEENTH CENTURY 195 (2002) (discussing the prominence of Goodyear’s patent licenses throughout the world); Naomi R. Lamoreaux et al., *Patent Alchemy: The Market for Technology in US History*, BUS. HIST. REV., Spring 2013, at 3, 6 (discussing Edison’s dependence on licensing early in his career). Goodyear did not just license his patents, but also litigated to enforce them. E.g., *Goodyear v. Beverly Rubber Co.*, 10 F. Cas. 638, 638 (C.C.D. Mass. 1859) (No. 5,557); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 991 n.183 (2007).

¹¹ See, e.g., Kristen Osenga, *Formerly Manufacturing Entities: Piercing the “Patent Troll” Rhetoric*, 47 CONN. L. REV. 435, 453, 455-63 (2014); James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189, 190 (2006); Timothy Holbrook, *Not All Patent Trolls Are Demons*, CNN (Feb. 21, 2014, 9:08 AM), <http://www.cnn.com/2014/02/21/opinion/holbrook-patent-trolls-demons/>. For a helpful discussion of both sides of the “patent troll” conversation, see Sannu K. Shrestha, Note, *Trolls or Market-Makers? An Empirical Analysis of Nonpracticing Entities*, 110 COLUM. L. REV. 114, 119-31 (2010).

group of firms the negative actions and qualities of a small number of bad actors.¹² To theorize about, propose legislative reform of, or even to develop a study of patent licensing firms, without acknowledging the myriad of possible business models that underlie the category, is naïve and inaccurate. To borrow from the playground retort to name-calling, this is a case where words actually can hurt, much more so than sticks and stones.

The purpose of this Essay is not to condemn the FTC study of PAEs. Instead, the FTC's study could be an incredibly important step in the right direction towards understanding the many complex business models that exist in the patent licensing world and how these firms affect innovation and competition. Although others have tried to study patent licensing firms using publicly available information, litigation information, or proprietary survey data, the FTC's study has the potential to be much more valuable because the Commission is authorized under § 6(b) of the Federal Trade Commission Act to compel corporations, persons, or partnerships to prepare and file special reports.¹³ The FTC study is thus likely to uncover previously unattainable information, yet very relevant to understanding the effects of patent licensing firms. Unfortunately, the lack of evidence so far has been used to support the claims that these types of firms are harmful.¹⁴ But as FTC Commissioner Joshua Wright has stated, the study could add much-needed data to the largely unsupported theories that are driving patent reform efforts.¹⁵ Unfortunately the FTC study is destined to produce incomplete and inaccurate results because the FTC's definition of PAE, which will determine what firms are selected to respond to the survey, is premised on a one-size-fits-all conception of patent licensing firms. Further, the very few questions that inquire about a responding firm's business model do not adequately investigate some important facets of patent licensing firms. For

¹² The same conventional wisdom that ascribes negative attributes to all patent licensing firms also seems to conveniently ignore that bad actions are also committed by practicing entities and other non-patent licensing firms.

¹³ 15 U.S.C. § 46(b) (2012).

¹⁴ Matt Levy, *The FTC Chairwoman Calls Out Patent Assertion Entities*, PAT. PROGRESS (June 20, 2013), www.patentprogress.org/2013/06/20/the-ftc-chairwoman-calls-out-patent-assertion-entities/ (quoting FTC Chairwoman Edith Ramirez as saying "[t]he limited evidence we have today tends to support the Commission's concern that PAEs may do more to distort than improve incentives to invent" (quoting Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Opening Remarks Before the Computer & Communications Industry Association and American Antitrust Institute Program: Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do 7 (June 20, 2013) (internal quotation marks omitted), available at https://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf)).

¹⁵ Melissa Lipman, *FTC Patent Troll Study to Disappoint Some, Wright Says*, LAW 360 (Sept. 4, 2014, 5:32 PM), <http://www.law360.com/articles/573222/ftc-patent-troll-study-to-disappoint-some-wright-says> (quoting Commissioner Wright as saying that the study may provide some data on an issue that is "chock full of theory and supposition but completely devoid of empirical evidence" and has the potential to improve the "incredibly, remarkably, intolerably high ratio of theory to evidence in this space").

these reasons, it is likely that the conclusions and inferences drawn from the study will fall into the trap created by the current rhetoric surrounding patent licensing firms, and will thus squander this opportunity to gain an understanding of a very complex economic, competition, and innovation ecosystem.

Part I of this Essay describes the genesis of the FTC's interest in patent licensing firms and the details of the § 6(b) study.¹⁶ It also explores the underlying bases for the FTC's interest in this area, specifically the claims about how patent licensing firms impact innovation and competition. Part II explains that the FTC's study will not provide a true picture of how these firms affect innovation and competition due to its failure to recognize the heterogeneity of patent licensing firms in its survey population and questions. In fact, the FTC's narrow view of patent licensing firms and behaviors could, in fact, cause more harm than good; inaccurate and incomplete data will go far to bolster the inapt theories that are currently holding the day for those who wish to hinder, if not destroy, patent licensing firms. A wider viewpoint, one that recognizes and engages with the variations that exist amongst patent licensing firms and how the differences may manifest as positive or negative effects depending on a firm's business model, would be a better indicator of what types of legal and policy changes are in order.

I. THE FTC AND PATENT LICENSING FIRMS

The FTC is charged with preventing anticompetitive business practices and enhancing consumer choice, for example by promoting innovation.¹⁷ Given the bad behaviors attributed to patent licensing firms, accurate or not, it is unsurprising that the FTC has taken an interest. An initial indication of the FTC's interest appeared in a 2011 report, entitled *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, which discussed providing narrower remedies for patent infringement in cases involving what the report deemed "patent assertion entities."¹⁸ In the report, PAEs were defined as firms with a business model that "[primarily] focuses on purchasing and asserting patents against manufacturers already using the

¹⁶ This Essay will refer to "patent licensing firms," rather than PAEs to signal that the category of patent licensing firms is much broader and complex than is understood. However, when referring specifically to FTC documents or actions, this Essay will use the FTC's terminology, PAE.

¹⁷ *About the FTC*, FED. TRADE COMMISSION, <http://www.ftc.gov/about-ftc> (last visited Jan. 26, 2015) (stating that the Federal Trade Commission's mission is to "prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity").

¹⁸ See *EVOLVING IP MARKETPLACE*, *supra* note 9, at 7-9.

technology.”¹⁹ PAEs are contrasted to practicing entities that manufacture and sell goods that incorporate patented technology to consumers and to NPEs, which the FTC differentiates as “patent owners that primarily seek to develop and transfer technology, such as universities and semiconductor design houses.”²⁰ Based on these definitions, the FTC noted a surge in patent sales and litigation, and attributed this increase to PAEs.²¹ The conclusion was that these activities negatively affect innovation and competition.²²

The 2011 report was followed by a joint roundtable in December 2012, convened by the FTC and the Department of Justice, to examine the effects of PAE activities on innovation and competition.²³ On the heels of the roundtable, a period was held to receive comments from the public about PAEs.²⁴ In September 2013, the FTC offered its original proposal for a study of PAEs and in October 2013, the FTC published its First Notice soliciting comments on the proposed study.²⁵ Based on public comments received during the notice and comment period, the FTC published a revised proposal for comments in May 2014.²⁶ Both requests for comments yielded many responses, with most expressing support for the study and especially for the FTC to obtain data that is otherwise unavailable.²⁷ Although the costs of compliance for the select PAEs and other parties compelled to answer would be high, the general belief was that the potential benefits outweighed those costs.²⁸ To address the cost concern, however, the FTC did narrow the document requests to be more focused and less burdensome for the answering parties.²⁹ In August 2014, the Office of Management and Budget approved the FTC’s request to study PAEs.³⁰

¹⁹ *Id.* at 8 & n.5. This definition has been somewhat refined over time. See *infra* note 84 and accompanying text.

²⁰ See EVOLVING IP MARKETPLACE, *supra* note 9, at 8 n.5 (stating that the definitions of PAEs and NPEs, at least in the view of the FTC, are mutually exclusive).

²¹ *Id.* at 60.

²² *Id.* at 8-9.

²³ Press Release, Fed. Trade Comm’n, Federal Trade Commission, Department of Justice to Hold Workshop on Patent Assertion Entity Activities (Nov. 19, 2012), <http://www.ftc.gov/news-events/press-releases/2012/11/federal-trade-commission-department-justice-hold-workshop-patent>.

²⁴ *Id.*

²⁵ Press Release, Fed. Trade Comm’n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>; Agency Information Collection Activities; Proposed Collection; Comment Request, 78 Fed. Reg. 61,352, 61,352 (Oct. 3, 2013).

²⁶ Agency Information Collection Activities; Submission for OMB Review; Comment Request, 79 Fed. Reg. 28,715, 28,715 (May 19, 2014) [hereinafter May 2014 Comment Request].

²⁷ *Id.* at 28,716.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *E.g.*, Matt Larson, *FTC “Patent Assertion Entity Study” Approved*, ESSENTIAL PAT. BLOG (Aug. 14, 2014), <http://www.essentialpatentblog.com/2014/08/ftc-patent-assertion-entity-study-approved/>.

Impetus for the FTC's study did not come solely from participants of the roundtable and comments submitted by the public. The Executive Office of the President reported that "suits brought by PAEs tripled in just the last two years" and President Obama himself has made multiple calls for patent reform.³¹ Members of Congress personally urged the FTC to study "the abusive practices of [PAEs] that are a drag on innovation, competition, and our economy."³² The Government Accountability Office ("GAO"), having been directed by Congress to study the impact of PAE litigation, issued a report in August 2013, which found an increase in litigation (although far less than that reported by the Executive Office) but stated that several data deficiencies limited its ability to study the issue in detail.³³ Based on all of these preliminary inputs, the FTC decided to further investigate PAEs using its investigatory power under § 6(b) of the Federal Trade Commission Act.³⁴ The § 6(b) study is described in greater detail in Section A, along with a discussion in Section B of the potential impacts PAEs may have on innovation and competition policy.

A. 6(b) Study

Thus far, data about PAE activity have been limited to publicly available documents (i.e., litigation data). However, the great bulk of patent licensing activity occurs before, and outside of, the litigation context, and therefore out of the public's view. The FTC's ability to obtain non-public data on licensing requests, negotiations, and agreements, patent acquisitions, and other information related to these activities will open the door to a greater understanding of patent licensing firms. As the FTC puts it, the study "will add significantly to the existing literature and evidence about PAE form, structure, organization, and behavior."³⁵ The study is ideally not meant to signal the FTC's sanction or censure of patent licensing firms.³⁶ Instead, it should "present[] descriptive data and descriptive analytics to the world."³⁷

³¹ *E.g.*, May 2014 Comment Request, *supra* note 26, at 28,715 (internal quotation marks omitted).

³² *Id.* (internal quotation marks omitted). Other Congressional leaders, including Senator Patrick Leahy, made similar requests. Press Release, Senator Patrick Leahy, Leahy Urges FTC to Act Against Patent Trolls (June 20, 2013), <http://www.leahy.senate.gov/press/leahy-urges-ftc-to-act-against-patent-trolls/> (publishing Senator Leahy's letter to FTC Chairwoman Edith Ramirez "encourage[ing] the FTC to prioritize investigations of and enforcement actions" against patent trolls).

³³ May 2014 Comment Request, *supra* note 26, at 28,716.

³⁴ 15 U.S.C. § 46(b) (2012); May 2014 Comment Request, *supra* note 26, at 28,716.

³⁵ May 2014 Comment Request, *supra* note 26, at 28,716.

³⁶ *See* Lipman, *supra* note 15 (quoting Commissioner Wright as stating, "[a] study that is addressing the right research questions in the right way has to disappoint an audience that is just in it for the thumbs-up or thumbs-down signal from an agency").

³⁷ *Id.* (quoting Commissioner Wright).

The FTC study will proceed in two parts. The first part is designed to investigate PAE behavior, while the second part is designed to compare patent assertions by PAEs with patent assertions by non-PAEs.³⁸ Specifically, the first part of the study will be sent to approximately twenty-five firms “with a business model based primarily on purchasing patents and then attempting to generate revenue by litigating against, or licensing to, persons who are already practicing the patented technology.”³⁹ The FTC is asking broad questions that include the following:

- How do PAEs organize their corporate legal structure, including parents, subsidiaries, and affiliates?
- What types of patents do PAEs hold and how do they organize their holdings?
- How do PAEs acquire patents; who are the prior patent owners; and how do they compensate prior patent owners?
- How do PAEs engage in assertion activity (i.e., how do they behave with respect to demands, litigation, and licensing)?
- What does assertion activity cost PAEs?
- What do PAEs earn through assertion activity? and
- How does PAE patent assertion behavior compare to that of other entities that assert patents?⁴⁰

The second portion of the study will “compare[] how PAEs, manufacturing firms and NPEs assert intellectual property” within one limited technological sector: wireless communications.⁴¹ One area of exploration will be “whether the potential for countersuit against manufacturing firms changes their respective assertion behavior relative to PAE firms.”⁴² To unearth this information, the FTC will solicit information from approximately fifteen manufacturing firms and NPEs that have asserted patents in the wireless communications sector, allowing for comparison with PAEs.⁴³

³⁸ See May 2014 Comment Request, *supra* note 26, at 28,716 (“The FTC clarifies that the study will consist of two parts. The primary focus of the study consists of a descriptive examination of the PAE business model. The second part is a narrowly focused comparative case study of PAE activity in the wireless communications sector.”).

³⁹ *Id.* at 28,715.

⁴⁰ *Id.* at 28,716-17.

⁴¹ *Id.* at 28,717.

⁴² *Id.*

⁴³ *Id.* There were a number of comments that requested the FTC not restrict its comparative study to the wireless communications sector; however, the FTC responded that a limited study in this technological area was appropriate because the “sector is relatively well-defined with a significant amount of assertion by PAEs, manufacturing firms, and NPEs” and to expand the study may be unduly burdensome. May 2014 Comment Request, *supra* note 26, at 28,717.

B. *Effects of Patent Licensing Firms on Innovation and Competition*

As with nearly everything, there is a potential for good and bad. The same is true in the case of patent licensing firms, although one would not know that based on popular and scholarly accounts of these firms. While the harms allegedly caused by patent licensing firms have received much attention, their potential benefits receive little attention and are generally dismissed when even discussed.⁴⁴ The FTC's view is no different. For instance, the FTC states "[e]ven if it is correct that PAEs incentivize and fund the work of inventors, the effect of this activity on innovation can be detrimental."⁴⁵ To provide a more balanced viewpoint, this Section briefly discusses both the potential positive and negative effects of patent licensing firms.

1. Positive Effects of Patent Licensing Firms

The prevailing view, and the one the FTC holds, is that the only benefit patent licensing firms serve is to compensate inventors, but that invention is not enough. The FTC states "[e]ven if PAEs arguably encourage invention, they can deter innovation by raising costs and risks without making a technological contribution."⁴⁶ This is a rather shortsighted viewpoint of the varied roles that patent licensing firms can play in the innovation space, which can lead to healthy competition.

Broadly speaking, commercialization is a form of innovation; it is simply the process of introducing a new product or process to the market.⁴⁷ But, as the FTC correctly notes, commercialization of an invention is anything but simple;⁴⁸ there are many steps between invention and the introduction of an actual product to the market and consumers.⁴⁹ These steps include

⁴⁴ For just a few examples of the many articles extolling the negative aspects of "patent trolls," see Bessen & Meurer, *supra* note 7, at 388; Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implication for the Patent System*, 62 HASTINGS L.J. 297, 300 (2010); Sara Jeruss et al., *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. & TECH. REV. 357, 358 (2012); Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls without Harming Innovators?*, 161 U. PA. L. REV. 1309, 1310-11 (2013).

⁴⁵ EVOLVING IP MARKETPLACE, *supra* note 9, at 69.

⁴⁶ *Id.* at 9.

⁴⁷ See OFFICE OF TECH. ASSESSMENT, U.S. CONG., OTA-BP-ITC-165, INNOVATION AND COMMERCIALIZATION OF EMERGING TECHNOLOGY 2 (1995) (defining "commercialization" as the "attempt to profit from innovation through the sale or use of new products, processes, and services").

⁴⁸ See EVOLVING IP MARKETPLACE, *supra* note 9, at 69 ("Invention is only the first step in an often lengthy and expensive development process to bring an innovation to market.").

⁴⁹ See, e.g., F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 707-08 (2001).

transforming an idea into a marketable embodiment, developing facilities to produce the marketable embodiment, creating distribution channels to bring the embodiment to the consumer, and making the consumer aware of the new product.⁵⁰ Each of these steps requires its own additional resources in the form of both capital and labor.⁵¹

Critics of patent licensing firms generally constrain “commercialization” to firms that manufacture and sell their own products. The reality is that not every inventor is able to take an invention from an idea to market product, and some that may be able to are uninterested or unwilling. This is where a significant benefit of patent licensing firms is demonstrated: connecting inventors with an idea to manufacturers who can bring a product to market.

Specifically, in addition to compensating inventors, patent licensing firms facilitate commercialization through what has been termed “match-making” and “market-making” functions.⁵² Billions of dollars are exchanged as patents are assigned, bought, and sold between actors in the innovation economy. As a match-maker, a patent licensing firm can solve problems that arise when the actors are asymmetrically situated.⁵³ As a market-maker, the patent licensing firms adds liquidity to patents and also helps reduce information asymmetries.⁵⁴ Both of these functions can result in increased innovation and competition. Competition is particularly evident through these exchanges. The presence of patent licensing firms provides an inventor with choices of potential parties to assign his patent rights. Patent licensing firms are subject to competition in and around the patent as they work to convince companies to license the innovative technology.

With respect to the match-making function, patent licensing firms can help connect patent buyers and sellers that may not otherwise find each other, and thus serve as key intermediaries between those who are unable to commercialize innovative technology and those who can.⁵⁵ Patent licensing firms also aid in match-making by presenting a credible threat of litigation that an individual inventor may not have due to lack of resources to commence and sustain an infringement lawsuit against a larger company.⁵⁶ Fi-

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See* Osenga, *supra* note 11, at 450; *see also* McDonough, *supra* note 11, at 190.

⁵³ *See, e.g.,* Gregory Gorder, *Innovation and the Invention Gap: The Need for a New Invention Economy*, 21 GEO. MASON L. REV. 811, 822 (2014); Andrei Hagiu & David B. Yoffie, *The New Patent Intermediaries: Platforms, Defensive Aggregators, and Super-Aggregators*, 27 J. ECON. PERSP. 45, 45 (2013).

⁵⁴ *E.g.,* McDonough, *supra* note 11, at 190.

⁵⁵ *See, e.g.,* Hagiu & Yoffie, *supra* note 53, at 45-46, 49.

⁵⁶ McDonough, *supra* note 11, at 209-10; Ryan T. Holte, *Trolls or Great Inventors: Case Studies of Patent Assertion Entities*, 59 ST. LOUIS U. L.J. (forthcoming 2015) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426444.

nally, the most accepted, yet least appreciated, aspect of patent licensing firms as match-makers is the transfer of resources to inventors, providing funds for additional development activity.⁵⁷

With respect to market-making, patent licensing firms create a liquid market, or a centralized market in which patents are bought when a seller is ready and sold when a buyer is ready.⁵⁸ Furthermore, patent transactions today often happen in a litigation-avoidance context, obscuring accurate valuation.⁵⁹ Patent licensing firms, as experienced market participants, are in a better position to evaluate patents using the valuation specialization and experience they have obtained that individual inventors and small companies generally cannot.⁶⁰ As match-makers and market-makers, patent licensing firms decrease information asymmetries, make more efficient transactions possible, increase liquidity in the market for innovation, and, as a result, incentivize invention and commercialization.⁶¹

2. Negative Effects of PAEs

The hyperbolic negative behaviors imputed to PAEs—the “surprise” demand letters for outrageous fees,⁶² the “sneaking out from underneath a bridge” to file a nuisance lawsuit in hopes of settling rather than having a patent invalidated⁶³—have been discussed in detail elsewhere and so there is no need to repeat them here.⁶⁴ With respect to innovation and competition, the general argument is as follows: the costs of investigating, responding to, and defending against patent assertion lawsuits (or paying unfounded licensing fees) divert precious resources from invention and innovation

⁵⁷ See, e.g., McDonough, *supra* note 11, at 190, 207; Schwartz & Kesan, *supra* note 7, at 428. Some examples of this aspect include Intellectual Ventures, which has provided \$500 million to individual inventors while acting in a match-making capacity, and Acacia Research Corporation, a patent licensing firm that provides inventors 50 percent of the total royalties collected from negotiated licenses. Nicole Shanahan, Deconstructing the Patent Bubble: An Exploration of Patent Monetization Entities from Sewing Machine Combination to Rockstar Bid Co. 17 (Jan. 24, 2013) (unpublished comment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359912 (discussing testimony sent to FTC from Acacia); *Corporate Fact Sheet*, INTELLECT. VENTURES, http://www.intellectualventures.com/assets_docs/IV_Corporate_Fact_Sheet_2.pdf (last visited Feb. 8, 2015).

⁵⁸ See, e.g., EVOLVING IP MARKETPLACE, *supra* note 9, at 68 (noting that the activity of a secondary market provided by patent licensing firms has increased liquidity of patents, allowing patentees to recoup their research and development investments); McDonough, *supra* note 11, at 213-14.

⁵⁹ Hagiu & Yoffie, *supra* note 53, at 48.

⁶⁰ E.g., McDonough, *supra* note 11, at 214-15.

⁶¹ *Id.* at 223.

⁶² Jurata & Patel, *supra* note 2, at 1256.

⁶³ Gerard N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 NOTRE DAME L. REV. 1809, 1814-15 (2007).

⁶⁴ See sources cited *supra* note 44 (listing a sampling of anti-“patent troll” scholarship).

efforts, resulting in fewer products (and players) on the market.⁶⁵ There has long been tension between antitrust and patent law.⁶⁶ While asserting patent rights is not itself an antitrust violation, the actions of PAEs receive greater scrutiny.⁶⁷ More specifically, the negative effects associated with patent licensing firms can be boiled down to four main areas: ex post licensing, asymmetrical litigation positions, mass patent acquisition, and poor patent quality.

Patent licensing firms are accused of engaging in an extraordinary amount of ex post licensing. Ex post licensing, or the transfer of rights after the licensee has already adopted the technology, is viewed as a much bigger problem than ex ante licensing.⁶⁸ In particular, if a company commercializes technology it invented and then is sued by a patent licensing firm, the FTC views the resulting license as being of questionable benefit to consumers.⁶⁹ While ex ante licensing is said to increase innovation, ex post licensing increases the risk and expense of innovation by others, decreasing the incentive to enter any particular technology space.⁷⁰

Patent licensing firms are also alleged to have a better position when it comes to litigation. Although litigation is costly for any party, practicing entities suffer from indirect costs that patent licensing firms may not incur, such as counterclaims, disruption of business, and loss of reputation.⁷¹ When a practicing entity sues another practicing entity, the symmetry of risks encourages fair licensing and discourages aggressive litigation.⁷² On the other hand, the risks are asymmetrical when a patent licensing firm sues

⁶⁵ Joshua D. Wright, Comm'r, Fed. Trade Comm'n, What Role Should Antitrust Play in Regulating the Activities of Patent Assertion Entities?, Remarks at the Dechert Client Annual Antitrust Spring Seminar 10 (Apr. 17, 2013) [hereinafter Wright Dechert Remarks], available at http://www.ftc.gov/sites/default/files/documents/public_statements/what-role-should-antitrust-play-regulating-activities-patent-assertion-entities/130417paespeech.pdf.

⁶⁶ See, e.g., Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 14 FED. CIR. B.J. 21, 32, 36 (2004).

⁶⁷ See, e.g., Jay Levine, *FTC Study on "Patent Troll" Behavior: Innovation Enhancers or Competition Killers*, TECH. L. SOURCE (Oct. 8, 2013), <http://www.technologylawsources.com/2013/10/articles/intellectual-property-1/ftc-study-on-patent-troll-behavior-innovation-enhancers-or-competition-killers/>. In fact, some argue that even when a PAE acquires patents from a practicing entity to aggressively monetize the asset, it would not violate antitrust laws. See, e.g., Carl Shapiro, Professor, Patent Assertion Entities: Effective Monetizers, Tax on Innovation, or Both?, Presentation at the FTC and DOJ's Patent Assertion Entity Activities Workshop 22 (Dec. 10, 2012), available at <http://www.ftc.gov/opp/workshops/pae/docs/cshapiro.pdf>.

⁶⁸ See EVOLVING IP MARKETPLACE, *supra* note 9, at 52 ("When a company commercializes technology that it invented independently and later faces a patent assertion, the resulting ex post license provides no direct benefits to consumers, however.")

⁶⁹ *Id.* However, if the technology was copied from the patentee, the calculus is different. *Id.* at 52 n.8.

⁷⁰ *Id.* at 52-54, 69.

⁷¹ Wright Dechert Remarks, *supra* note 65, at 5-6.

⁷² *Id.* at 6.

a practicing entity, because patent licensing firms face little risk of counterclaims or business disruption.⁷³ In addition, patent licensing firms are often able to better handle litigation costs through creative structuring of legal fees, capturing economies of scale, and lowering discovery costs as fewer documents are involved in a patent licensing firm's ordinary course of business.⁷⁴

Mass patent acquisition is another area of concern in the field of patent licensing firms. Although the business model of monetizing patents by licensing has long been used, the aggregation of mass quantities of patents is a somewhat recent development.⁷⁵ The large portfolios of patents held by patent licensing firms may have the potential to increase their market power and change their enforcement incentives.⁷⁶ Further, because patent licensing firms sometimes hold significant patent portfolios, critics allege it is difficult to know which of the many patents being offered for license are being infringed, and it is difficult to separate the strong from the weak patents.⁷⁷ The efforts required to make these distinctions are just too great, and patent licensing firms often offer licensing of the entire portfolio, or at least a substantial portion thereof, making such distinctions irrelevant.⁷⁸ A related issue to mass patent acquisition is the acquisition of patents from practicing entities, particularly if the practicing entity remains involved in the licensing of the patents.⁷⁹ This coordination gives rise to hybrid patent licensing firms or "patent privateers."

The last concern is that patent licensing firms are alleged to assert patents of questionable quality. This is problematic because "monetiz[ing] [] low-quality patents imposes a de facto tax on productive economic activity, with little or no offsetting benefits for consumers."⁸⁰ Although the flaws in the patent system affect everyone, it is asserted that patent licensing firms are able to exploit these flaws to the fullest to wreak the most havoc on innovation and competition.⁸¹

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 7-8.

⁷⁶ Jurata & Patel, *supra* note 2, at 1257-58.

⁷⁷ Jay Levine, *FTC Study on "Patent Troll" Behavior: Innovation Enhancers or Competition Killers? Part 2*, TECH. L. SOURCE (Oct. 14, 2013), <http://www.technologylawsources.com/2013/10/articles/intellectual-property-1/ftc-study-on-patent-troll-behavior-innovation-enhancers-or-competition-killers-part-2/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *E.g.*, Levy, *supra* note 14 (quoting Ramirez, *supra* note 14, at 10) (internal quotation marks omitted).

⁸¹ *See id.*

II. PROBLEMS WITH THE FTC STUDY

It is clear the FTC study could shed some much-needed light on the activities of patent licensing firms and how these activities affect innovation and competition. For the sake of more productive policy discussions and more tailored patent reform, having a detailed understanding of the complex world of patent licensing firms would be an incredible boon. However, the configuration of the study is slanted in such a way that only part of the story will be uncovered. Worse still, the study has been shaped in a way that will simply add fuel to the anti-“patent troll” fire without providing any data that would explain the best way to fix the real problems in the patent field today. To be clear, this Essay is not suggesting that there are no problems in the patent field, or even that patent licensing firms present no concerns for innovation and competition. However, the problems that do exist should be tied to behaviors that hinder innovation and competition, not to categories of patent holders, regardless of their behaviors. A carefully drafted study into patent licensing firms would be able to separate patent holders from patent activities and focus the policy and reform discussions on the right target.

This Essay posits that there are two key, albeit related, flaws with the FTC study. First, the study perpetuates the mistaken notion that all patent licensing firms are the same by drafting its study such that the recipients of the survey are selected via a one-size-fits-all definition. Second, although the FTC claims to be studying the different business and organizational models of patent licensing firms, there are few questions related to that issue and the questions that are asked do not probe some very significant aspects of patent licensing firms. Each of these flaws will be described in detail below.

A. *The FTC’s Definition of PAE Ignores the Heterogeneity and Complexity of Patent Licensing Firms*

To truly understand the impact that patent licensing firms have on innovation and competition, it is critical to acknowledge that patent licensing firms are not homogenous. The current one-dimensional viewpoint turns all patent licensing firms into caricatures, which fires up the rhetoric but obscures thoughtful discussion and debate about the issue.⁸² The root of this problem is that the term “patent troll” has no consistent meaning among

⁸² Wright Dechert Remarks, *supra* note 65, at 8 (explaining that patent troll debate is more complicated “than the rival caricature[s]” suggest, but the truth can be found by listening carefully to the data).

agencies, policy makers, and scholars.⁸³ Because there is no consistent meaning, people use the term broadly so as to include all of the types of entities that they wish to malign. This creates a category that necessarily includes multiple different business models lumped together without regard for their individual qualities or behaviors.

For purposes of the § 6(b) study, the FTC has defined PAEs as “firms with a business model based primarily on purchasing patents and then attempting to generate revenue by litigating against, or licensing to, persons who are already practicing the patented technology.”⁸⁴ The “already practicing” clause of the definition may seem a bit extraneous, as there can be no infringement actions and no credible licensing demands if the manufacturing party is not practicing the patented technology. However, it seems that the FTC is trying to discuss *ex post* licensing.⁸⁵ Beyond this, there are two things to note about the FTC’s definition: first, it is narrower than many of the definitions that have been used by others studying patent licensing firms; and second, it does not reflect the idea that the patent licensing firm ecosystem is complex.

There are at least three features that cause the FTC definition to be narrower than that of others commonly referred to: the “purchasing” requirement; the “already practicing” requirement; and the wide exclusion for NPEs. For example, Professors Mark Lemley and Douglas Melamed define “patent trolls” as “patent owners whose primary business is collecting money from others that allegedly infringe their patents.”⁸⁶ Professor Colleen Chien’s definition includes firms whose primary business is to assert patents.⁸⁷ Neither the Lemley and Melamed definition nor the Chien definition hinges on whether the asserted patents were, in general, purchased or whether the alleged infringer was “already practicing” the patented technology. The FTC definition is also narrower than that used by Professors Jim Bessen and Michael Meurer in that the FTC specifically excludes cer-

⁸³ *E.g.*, *Demand Letters and Consumer Protection: Examining Deceptive Practices by Patent Assertion Entities: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. 37 (2013) (statement of Adam Mossoff, Prof. of Law, George Mason Univ. Sch. of Law, and Senior Scholar, Ctr. for the Prot. of Intellectual Prop.) (“[T]here is no settled, agreed-upon definition of a PAE [(i.e., patent assertion entity)] or patent troll”); Bessen & Meurer, *supra* note 7, at 396 (“There is no consensus among researchers on the proper definition of [non-practicing entity, or patent troll].”); Jeruss et al., *supra* note 44, at 366 (“There . . . has been considerable disagreement about the type of entity to include in the category of ‘non-practicing entity.’”); Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 163–64 (2006) (noting “the difficulty of defining exactly what a patent troll is”).

⁸⁴ May 2014 Comment Request, *supra* note 26, at 28,715. This has been refined from an earlier definition. See *supra* note 19 and accompanying text.

⁸⁵ See *supra* notes 68–70 and accompanying text.

⁸⁶ Lemley & Melamed, *supra* note 4, at 2118.

⁸⁷ Chien, *supra* note 7.

tain NPEs, such as universities, whereas Bessen and Meurer do not.⁸⁸ Similar comparisons could be made with other popular “patent troll” definitions.

It is not just an academic exercise to point out these differences between the FTC’s definition and those used by others. If patent licensing firms are going to be lumped into a single category, it is important that the category at least have a consistent meaning. The data that will be discovered through the FTC’s study will be used to drive action in the patent reform and policy realms, but what kind of debate can be had if the parties to the discussion are talking about different things? This would be like a group of people sitting around a table discussing the pros and cons of planting fruit trees, where each of the participants has a different type of fruit in mind. Because all patent licensing firms, like all fruit trees, are not alike, it is important that, at the very least, the specific differences of the FTC’s definition be emphasized when considering and analyzing the data received.

Whether narrow or broad, the FTC’s definition is still one-dimensional. The FTC acknowledged in its 2011 report that, over the past decade, a number of “increasingly sophisticated and complex” business models have emerged.⁸⁹ The report noted that PAEs may originate in different ways, including not just firms that are formed for the purpose of patent assertion, but also firms that were once manufacturing firms that “have turned their focus away from the active development or practice of their patents and have moved towards patent enforcement.”⁹⁰ The report also differentiated among firms it categorized as “[p]atent enforcement and licensing companies,” “[l]itigation finance firms,” and “[p]atent aggregators.”⁹¹ How these firms originated, how these firms evolved, and how these firms currently behave would all seem to be relevant when determining what type of patent licensing firms should be part of the § 6(b) study, as well as when discussing patent policy and reform. But the FTC’s definition is instead one-size-fits-all. Although the FTC states it will seek information from firms that “use different organizational models and assertion strategies,”⁹² its definition does not allow for as wide a variety as would be useful, nor does it ensure that a wide variety will be surveyed. For this reason, it is possible that the FTC will fail to study an appropriately diverse group of patent licensing firms that would make for robust results and better understanding of the complexity of those using this business model.

⁸⁸ Compare Bessen & Meurer, *supra* note 7, at 395-96, with *EVOLVING IP MARKETPLACE*, *supra* note 9, at 8 n.5.

⁸⁹ *EVOLVING IP MARKETPLACE*, *supra* note 9, at 62-63.

⁹⁰ *Id.* at 60-61 (quoting Chien, *supra* note 44, at 329-30) (internal quotation marks omitted). See generally Osenga, *supra* note 11, at 453, for an in-depth look at patent licensing firms that began as manufacturing firms.

⁹¹ *EVOLVING IP MARKETPLACE*, *supra* note 9, at 62-66. The report also mentions “[d]efensive buying funds” and an ambiguous “[i]ntermediaries” category. *Id.* at 66-67.

⁹² May 2014 Comment Request, *supra* note 26, at 28,717.

B. *The FTC's Survey Questions Do Not Address Important Variations in Business Models*

Studying patent licensing firms and their impact on innovation and competition cannot simply be a matter of counting how many patents a firm has or how many times it has sued a practicing entity after licensing negotiations broke down. These simple questions belie the complexity of the patent licensing business model and have already resulted in incomplete data that have been singularly unhelpful in presenting an accurate view of patent licensing firms. The FTC's ability to ask more interesting questions, such as how these firms acquire their patents and from whom, how much they spend and how much they earn in these transactions, and so forth, will certainly provide data where there is currently a black hole. There is one type of question, however, that is not being asked: why?

The "why" question is hard to ask and hard to answer, but can lead to valuable information. As Commissioner Wright notes, the FTC's definition of PAE fails to tell a complete story, as it ignores important questions such as "[w]hy . . . patent holders sell to PAEs? . . . [and] [w]hy . . . PAEs purchase the patents?"⁹³ Commissioner Wright continues by stating that the reasons for selling, such as lacking capabilities to exploit the innovative technology, are as varied as the reasons for buying.⁹⁴ This Essay asserts there is another "why" question that is relevant to the effects of the licensing business model on innovation and competition: "why are you a patent licensing firm?" To ask the question another way, "what type of patent licensing firm are you?" And yes, it does matter. Even anti-"patent troll" scholarship admits that some patent licensing firms could provide positive impact.⁹⁵

Answers to "why" a firm follows a patent licensing business model vary. Some, of course, begin with this business model in mind.⁹⁶ Others invent new technology but are unable to successfully commercialize it themselves, despite making efforts to do so.⁹⁷ Still others exist as practicing

⁹³ Wright Dechert Remarks, *supra* note 65, at 2.

⁹⁴ *Id.*

⁹⁵ See, e.g., Bessen & Meurer, *supra* note 7, at 396 ("It is surely difficult to attempt to distinguish 'good' . . . from 'bad' [trolls] . . ."); Chien, *supra* note 44, at 320 (stating that, among PAEs, there are "many kinds of entities, each with its own . . . patent strategy," and noting it can be hard to distinguish between good and bad trolls); Love, *supra* note 44, 1314-15 (stating that "patent trolls" can either be "extortionists" or helpful disseminators of innovative technology).

⁹⁶ See, e.g., Raymond Millien & Ron Laurie, A Summary of Established & Emerging IP Business Models 4 (Oct. 12, 2007) (working paper from the Eighth Annual Sedona Conference on Patent Litigation), available at <http://www.concap.cc/wp-content/uploads/2012/03/IP-Business-Models.pdf> (identifying Acacia Research Corporation as an example).

⁹⁷ E.g., Michael Arrington, *What to Do with Failed Startup IP?*, TECHCRUNCH (May 6, 2008), <http://techcrunch.com/2008/05/06/what-to-do-with-failed-startup-ip/> (presenting Edgeio, Inc. as example of a startup that failed and subsequently sold its IP assets to third parties); Adam Pasick, "The Un-

entities for years or decades before something changes—supply change issues, rampant infringement by competitors, and regulatory initiatives—and they are no longer able to exist as a viable practicing entity.⁹⁸ Answers to “what” type of patent licensing firm one is also vary. Some firms exist solely as patent intermediaries, buying and selling patents.⁹⁹ Other firms license patents on technology they developed and tried to commercialize.¹⁰⁰ Still others license their own patents, as well as complementary patents they have obtained.¹⁰¹ There are firms that, in addition to licensing patents—whether their own, or those they have obtained, or both—also develop new innovative technology that they also make available for license.¹⁰² Some firms that previously operated as practicing entities continue to support and refine their products.¹⁰³

The questions the FTC asked about the organization of patent licensing firms do not seek answers that would illuminate these issues. Regarding “Firm Information,” the FTC simply asks for the business’s legal names, the corporate structure including subsidiaries, and other persons who are engaged in patent assertions or have some sort of interest in the firm.¹⁰⁴ And although the FTC plans to survey firms with “different organizational models,” the differences described above are unlikely to be the criteria used.¹⁰⁵

Again, these are not simply musings about how patent licensing firms can be sub-categorized. The type of patent licensing firm and the reason for it being a patent licensing firm may have implications for what type of impact that particular licensing firm or similarly situated firms have on innovation and competition. Consider companies that used to be practicing entities, but now function primarily as patent licensing firms. One example of this type of patent licensing firm would be Conversant, which operated for many years as the semiconductor manufacturing company MOSAID.¹⁰⁶ One possible impact of a firm’s origin may be that there is less concern about ex post licensing, as competitors were on notice based on the firm’s commer-

dertaker” of Venture Capital, REUTERS UNSTRUCTURED FIN. BLOG. (July 7, 2008), <http://blogs.reuters.com/unstructuredfinance/2008/07/07/the-undertaker-of-venture-capital/> (identifying Sherwood Partners as a company that specializes in purchasing and reselling IP assets of failed entities).

⁹⁸ See Osenga, *supra*, note 11, at 453-64 (presenting case studies of former manufacturing entities that shifted their business models to licensing, such as Conversant Intellectual Property Management, Sovereign Software, Immersion Corporation, and Rockstar Consortium).

⁹⁹ *E.g.*, Hagiu & Yoffie, *supra* note 53, at 49 (identifying Thinkfire, IPValue, and Pluritas as examples of traditional patent intermediaries).

¹⁰⁰ See EVOLVING IP MARKETPLACE, *supra* note 9, at 40-41.

¹⁰¹ *E.g.*, Osenga, *supra* note 11, at 456.

¹⁰² *E.g.*, *Corporate Fact Sheet*, *supra* note 57.

¹⁰³ *History*, CONVERSANT INTELL. PROP. MGMT., <http://conversantip.com/about/history/> (last visited Feb. 13, 2015).

¹⁰⁴ May 2014 Comment Request, *supra* note 26, at 28,718. The questions do seek details about the origins of the patents owned and asserted, but this is a small piece of the issue discussed above.

¹⁰⁵ *Id.* at 28,717.

¹⁰⁶ *History*, *supra* note 103.

cialization of its own products.¹⁰⁷ Another impact would address asymmetrical litigation positions, as a firm that was once part of an industry may have a different business ethos based on maintaining its reputation in the relevant industry.¹⁰⁸ Finally, in the market-making arena, this type of firm is more likely to be better at evaluating innovative technology due to its experience in commercializing it themselves.¹⁰⁹ Or consider firms that are not just engaged in licensing of acquired innovative technology, but also have active research facilities that provide new technologies of their own. An example of this type of firm would be Intellectual Ventures, which employs numerous inventors and is regularly developing innovative technology.¹¹⁰ On the flipside from firms that used to act as practicing entities, firms that are inventing as well as licensing are in a unique position when serving as match-makers and market-makers because they understand the pre-commercialization issues and the difficulties in obtaining *ex ante* licensing.¹¹¹ Further, the incentives to exploit poor patent quality are different when a firm is not just the patent holder, but also the inventive entity.¹¹² Despite the potential positive impacts (or at least a mitigation of the negative impacts) that are mentioned above, both Conversant and Intellectual Ventures, as well as many other similarly situated firms, are lumped into the category of “patent trolls” and are vilified without regard to their actual behaviors—positive or negative.¹¹³ Because the FTC survey does not ask the right questions, this problem is unlikely to change.

CONCLUSION

The outcome of the FTC’s study will be used to shape policy decisions, and so a more nuanced view of patent licensing firms is required. Recommendations thus far and rhetoric surrounding the issue consolidate all patent licensing firms into a single group without looking at the different origins, different types, and different behaviors that separate these firms. Ideally all patent and policy reform would be based solely around deterring behaviors that may harm innovation and competition. However, to the ex-

¹⁰⁷ Osenga, *supra* note 11, at 475.

¹⁰⁸ *Id.* at 473-74.

¹⁰⁹ *Id.* at 475.

¹¹⁰ *Corporate Fact Sheet*, *supra* note 57 (stating that Intellectual Ventures has more than “4,000 active inventors and 400 universities and institutions in [its] international network”).

¹¹¹ Osenga, *supra* note 11, at 450-52.

¹¹² *Compare id.* at 473-74, with Lemley & Melamed, *supra* note 4, at 2125-28.

¹¹³ See, e.g., Gene Quinn, *Intellectual Ventures Becomes Patent Troll Public Enemy #1*, IP WATCHDOG (Dec. 9, 2010), <http://ipwatchdog.com/2010/12/09/intellectual-ventures-becomes-patent-troll-public-enemy-1/id=13711>; see also Lemley & Melamed, *supra* note 4, at 2136 n.83 (naming Conversant among “patent trolls”); *This American Life: When Patents Attack!*, *supra* note 1 (“[The] blog, *IP Watchdog*, called Intellectual Ventures ‘patent troll public enemy #1.’” (quoting Quinn, *supra*)).

tent that policy discussions must, for reasons of convenience, revolve around categories of actors, it is important to acknowledge there are many sub-categories under the “patent troll” umbrella, and any action must be more narrowly tailored than those recently suggested reforms. A more open-minded study by the FTC could go a long way towards explaining the variety of business models that engage in patent licensing, and thus eventually creating more tailored policy and legislative reform. Unfortunately, the criteria for selecting firms for study and the questions that are being asked of these firms about their business models are unlikely to reveal these important differences, and therefore will not provide the information needed to take a better approach to solving the problem.