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Dear Congress: Don’t Take Away the FTC’s Best Tool for Fighting Patent Trolls

David Balto (Law Offices of David A. Balto) · Thursday, November 28th, 2013

In anticipation of a House Energy and Commerce Committee hearing next week, entitled “The FTC at 100: Where Do We Go from Here,” David Balto offers this post, discussing the important role Section 5 of the Federal Trade Commission Act can play in the battle with patent trolls.

One hundred years ago Congress created the Federal Trade Commission to serve as this nation’s consumer protection cop. Recognizing the limits of the antitrust laws and the lack of consumer protection law Congress gave it broad powers under Section 5 of the FTC Act to attack “unfair trade practices” and “unfair methods of competition.” On December 3, the House Energy and Commerce Committee will hold an FTC oversight hearing and some may take the Federal Trade Commission to task for its use of Section 5. Before Congress jumps on that bandwagon they should recognize that Section 5 can play a critical role in attacking the devious and egregious practices of patent trolls.

Section 5 is no stranger to controversy; Congress scrutinized the FTC’s use of Section 5 in the early 1980s. The FTC responded to criticisms by releasing policy statements on their use of Section 5 against unfair and deceptive acts or practices. What may be surprising then is just how uncontroversial the FTC’s use of Section 5 has been. No one questions the FTC’s use of Section 5 to attack deceptive acts or practices. On the consumer protection side, the FTC has used its unfairness power in a precise and disciplined fashion, for example attacking companies with grossly inadequate data security that has led to the theft of consumers’ identities.

On the competition side to date the FTC largely uses Section 5 as a gap filler to the Sherman Act to target truly egregious activity, such as invitations to collude (considering the epidemic of cartel prosecution by the DOJ attacking invitations to collude seem like a wise investment).

In fact the criticism of the FTC’s use of Section 5 in competition cases seems like a tempest in a teapot. In the past decade almost all of the FTC’s Section 5 competition cases have been voted out unanimously by a bipartisan Commission. The most controversial case involved a patent troll, N-Data, who refused to honor commitments to license at reasonable and non-discriminatory rates. Regardless of any theoretical concerns posed by the dissenting Commissioners this is not the type of conduct that should be welcomed by anyone.

This is not the time to shackle the federal agency best suited to use its enforcement powers to attack patent trolls. These criticisms come at a time when Congress and the public have made it

clear that we need the FTC to aggressively police patent troll activity. Members of Congress have even specifically asked for the FTC to pursue these abusive trolls through their Section 5 authority.

As noted by members of Congress, Section 5 is ideally suited to protect end users from abusive patent troll practices. Demand letters are exhibit one. The letters are vague and unclear, and often do not contain information on what patent claims are infringed by which products or how those products are infringing. Patent trolls sometimes seek licenses from end users already covered under a manufacturer's license (see Krish Gupta's testimony before the House Judiciary Committee). Patent trolls often do not perform proper due diligence before making claims and therefore do not know if the party they are sending a demand letter to is infringing. A patent troll has even sent a demand letter to a man living in a nursing home in Nebraska based on claimed infringement by a company he never worked for. The FTC should be able to pursue cases against these deceptive acts that force patent settlements when no infringement has occurred.

Egregious practices by trolls should be challenged under the FTC's unfairness powers, even where there are not deceptive demand letters. For example, Texas hotels have been targeted by patent trolls for offering WiFi to their guests. These trolls demand a $5,000 settlement which is far above the anticipated fair price of the patents in question. A court recently found that all 23 patents covering WiFi technology owned by a patent troll were only entitled to a licensing fee of 9.56 cents per chip using the patents. A Texas hotel would have to be using 50,000 covered WiFi routers for the settlement to be a fair price.

Finally, the FTC should use its power to attack troll practices such as failing to abide by commitments to license, or acquiring patents to pursue litigation (known as privateering) under its Section 5 power. Even if these do not qualify as Sherman Act violations they increase costs to consumers and do not enhance efficiency.

We need more not less enforcement against trolls and the FTC should use its full panoply of powers to attack their abusive conduct.

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