

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re: MPHJ Technology Investments, LLC,
et al.—Consent Agreement

File No. 142 3003
79 Fed. Reg. 67,159

COMMENTS OF PUBLIC KNOWLEDGE

Attn: Office of the Secretary
Federal Trade Commission
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Public Knowledge respectfully submits the following comments in response to the Proposed Consent Agreement regarding MPHJ Technology Investments, LLC et al., dated November 13, 2014. Public Knowledge is a nonprofit organization that focuses on the intersection of technology and policy. PK has previously discussed these matters with FTC counsel and also filed related comments in the FTC's proceeding on its Section 6(b) study on patent assertion entities.¹

The Federal Trade Commission is to be applauded for taking action against this most egregious example of anti-consumer practices by MPHJ Technology Investments and its affiliates. As the FTC itself has recognized, the Commission's statutory authority cannot solve all of the abusive practices attendant to patent assertion, such as frivolous, protracted litigation involving questionable patents.² But when it comes to fraudulent threats of patent litigation directed at technology consumers, as occurred here, the Commission acts fully within its central mission, and it should forcefully and authoritatively send a message that such practices are not tolerated by U.S. law.

The following comments suggest how the FTC may further strengthen the proposed consent order to protect these important consumer protection interests.

¹ See Comments of Public Knowledge on Agency Information Collection Activities (Patent Assertion Entity Study), 79 Fed. Reg. 28,175 (Fed. Trade Comm'n & Office of Mgmt. & Budget May 19, 2014), *available at* <https://www.publicknowledge.org/assets/uploads/documents/comments-omb-ftc-pae-study.pdf>.

² See, e.g., *Hearing on a Bill to Enhance Federal and State Enforcement of Fraudulent Patent Demand Letters H.R. ___ Before the H. Subcomm. on Commerce, Manufacturing and Trade*, 113th Cong. (2014) (statement of Fed. Trade Comm'n, manuscript at 2), *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Greisman-CMT-Fraudulent-Patent-Demand-Letters-2014-5-22.pdf>.

I. ACTION AGAINST MPHJ IS FULLY WITHIN THE FTC’S CONSUMER PROTECTION AUTHORITY UNDER SECTION 5 OF THE FTC ACT

The FTC’s mission includes preventing “unfair or deceptive acts or practices,” namely those “likely to cause substantial injury to consumers.”³ MPHJ engaged in unfair and deceptive acts by sending numerous demand letters threatening litigation over its patents, those letters containing misstatements and falsities intended to deceive consumers into paying unwarranted settlements. These unfair and deceptive acts directly affected American consumers: as the FTC’s complaint notes, MPHJ sent letters to over *sixteen thousand* small businesses⁴—consumers of off-the-shelf scanning technology that MPHJ claimed its patents covered.

The FTC properly takes action against MPHJ, but the proposed consent order does not sufficiently prevent MPHJ, who has already shown willingness to conceal itself and flout the law, from continuing its campaign of deception. Accordingly, we recommend that the proposed consent order be strengthened in the following ways.

II. THE COMMISSION SHOULD NOT LIMIT ITS PROSCRIPTIONS AGAINST MPHJ TO THE PARTICULAR DECEPTIONS MPHJ HAS ALREADY USED

This case presents a clear-cut example of consumer deception and fraud: a shady company thinly veiling its owner and lawyers, setting up a hundred and one shell subsidiaries to conceal its identity,⁵ sending threats of litigation that it had no intention of acting upon,⁶ claiming existing licenses that never existed,⁷ and directing these unfair and deceptive acts to consumers selected specifically for their inability to understand the situation or defend themselves from this abuse.⁸

In view of this, it is surprising that the FTC’s proposed consent order only prevents MPHJ from making the specific deceptive statements already made in its past demand letters. Sections I.A through I.D of the proposed order disallow MPHJ from making misleading representations in Patent Assertion Communications relating to licensees to MPHJ’s patents or

³ 15 U.S.C. § 45(a), (n).

⁴ See Compl. ¶ 17.

⁵ See *id.* ¶¶ 1–2.

⁶ *Id.* ¶¶ 36–39.

⁷ *Id.* ¶¶ 29–35.

⁸ See *id.* ¶ 13 (noting that targeted business were those in the industries of “Veterinary Services, Lawn and Garden Services, Building Maintenance Services, and Medical Laboratories”).

intent to file lawsuits—but there is no catch-all preventing the wide range of deceptive practices in which MPHJ might engage.

MPHJ might misrepresent the scope of their patents, the validity of those patents, assessed valuations of those patents, and much more. All of these would be acts against which the FTC clearly could take action.⁹ Thus, rather than waiting for MPHJ to attempt to skirt the consent order, the FTC should preclude such consumer abuses from the start. A company willing to open 101 nonexistent subsidiaries will not hesitate to dream up a new way to trick victims into paying undue license fees under false duress.

Along similar lines, the proposed order exempts “communications between attorneys and . . . prospective clients” from the definition of “Patent Assertion Communication.”¹⁰ Attorneys such as Farney Daniels might characterize letters to victims as solicitations for potential “clients.” The definition should be clarified to avoid such an undesirable result.

III. THE COMMISSION SHOULD IMPOSE STRONGER DISCLOSURE AND REPORTING REQUIREMENTS ON MPHJ

If the FTC is to meaningfully ensure that MPHJ cannot continue in its deceptive practices, it should require MPHJ to disclose, in every Patent Assertion Communication that it sends, that MPHJ is subject to this FTC order. Furthermore, such communications should provide FTC contact information so that recipients may notify the Commission of violations.

In addition, the FTC should collect the records required in section II of the order, so that it may examine the communications sent for compliance with the order. This goes hand in hand with the broader section I prohibitions suggested in the previous section: the FTC must ensure that any new deceptive statement that MPHJ devises does not go unnoticed.

Given MPHJ’s demonstrated willingness to conceal itself, engage in deception, and evade the FTC’s authority at every turn,¹¹ such requirements are fully warranted. The FTC Act specifically acknowledges that “public notification respecting . . . the unfair or deceptive act or practice” is an appropriate form of consumer redress.¹² Furthermore, given that demand letters

⁹ Obviously where there is a real question of patent scope or validity, the courts must first weigh in. But a truly blatant misrepresentation of a patent is no different from any other misrepresentation unlawful under § 5(a).

¹⁰ Proposed Consent Order, Definitions, ¶ 5.

¹¹ See, e.g., *MPHJ Tech. Investments, LLC v. Fed. Trade Comm’n*, No. W-14-CV-011, slip op. at 1 (W.D. Tex. Sept. 16, 2014) (denying MPHJ’s attempt “to disrupt the FTC’s investigation” through an unripe district court action).

¹² 15 U.S.C. 57b(b).

are sent privately, the only way that the FTC will quickly learn of compliance or non-compliance with its order will be to review the contents of the letters themselves.

IV. CONCLUSION

For at least the foregoing reasons, the Federal Trade Commission should withdraw from the proposed agreement. Commenters thank the Commission for providing this opportunity to comment. Should any further information be of help, please contact the undersigned attorney at the address listed below.

Respectfully submitted,

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