

# ***U.S. Information Quality Act Filing Reveals Patent Assertion Entity Propaganda***

By Lawrence A. Kogan

(As seen on [OIRAWatch.com](http://OIRAWatch.com))

On March 30, 2015, electrical engineer and long-time IEEE member and patent holder, Ron Katznelson, filed an [Information Quality Act Request for Correction](#) (IQA/RFC) with the White House Office of Science and Technology Policy (WH/OSTP). The IQA/RFC sought correction of the statistical data and other information contained in a 2013 White House Task Force on High-Tech Patent Issues report entitled, “[Patent Assertion and U.S. Innovation](#).” This report is otherwise known as the patent assertion entity (PAE) or “patent troll” report.

## *Focus of the IQA/RFC*

Mr. Katznelson’s IQA filing was explained in an [April 6, 2015](#) blog post in *PatentlyO*. It challenges the objectivity, quality, integrity, utility and reproducibility of the information and data contained within third-party reports upon which the WH/OSTP PAE report principally relied. In particular, it takes issue with how such information and data “purport to document patent litigation rates, quantify the private and social costs of patent litigation, survey of ‘victims’ of PAE litigation, and show the purported adverse effects of PAE activities.”

Mr. Katznelson, apparently, has good reason to be concerned about how such information and data led the WH/OSTP to publicly disseminate the following controversial information concerning PAEs:

“‘Patent Assertion Entities’ (PAEs) often abuse the U.S. intellectual property system’s strong protections by using tactics that create outside costs to defendants and innovators at little risk to themselves. The PAE business model is based on the presumption that in many cases, targeted firms will settle out of court rather than take the risky, time-consuming course of allowing a court to decide if infringement has occurred.

The practices of this group of firms, which has come to file 60% of all patent lawsuits in the US, act to significantly retard innovation in the United States and result in economic ‘dead weight loss’ in the form of reduced innovation, income, and jobs for the American economy.”

The Katznelson IQA/RFC sets forth twenty-one specific requests for correction. It argues that the WH/OSTP PAE report violates the IQA primarily because the WH/OSTP had failed to peer review the report’s underlying third-party studies, which it effectively endorsed as its own, prior to the report’s public dissemination. In addition, the filing asserts that, had the WH/OSTP rigorously peer reviewed such third-party information and data *before* incorporating them into the PAE report, as the IQA and applicable OMB and White House IQA-implementing guidelines required, said Office would have discovered that the underlying studies: 1) “relied on opaque or erroneous methods and surveys;” 2) “lack[ed] objectivity;” and 3) “lack[ed] practical utility.” In

other words, the WH/OSTP would have learned (if it already didn't know) that such data and information was impervious to validation.

### *The USPTO Connection*

The White House relied upon the PAE report, inclusive of such non-peer reviewed information, as the basis for making intentionally politically-charged but non-legally binding “legislative recommendations” and “executive action” proposals identified in a June 4, 2013 [WH Press Release/Fact Sheet](#).

These included a recommendation that Congress enact legislation potentially enabling the U.S. Patent and Trademark Office (USPTO) to identify the individual sources of PAE litigation. For example, the WH called for legislation that would require

“any party sending demand letters, filing an infringement suit or seeking PTO review of a patent to file updated ownership information, and enabling the PTO or district courts to impose sanctions for non-compliance.”

In addition, these also included a proposal for unilateral agency (USPTO) action entitled, “Making ‘Real Party-in-Interest’ the New Default:”

“PTO *will* begin a rulemaking process to require patent applicants and owners to regularly update ownership information when they are involved in proceedings before the PTO, specifically designating the “ultimate parent entity” in control of the patent or application” (emphasis added).

The White House Fact Sheet based this proposal on a single self-serving sentence contained on p. 4 of the PAE report generally attributed to various sources, notwithstanding WH/OSTP's failure to adequately peer review them in conformance with the IQA and OMB (and OSTP) IQA-implementing guidelines. In fact, the Fact Sheet reproduced the following report language:

“[PAEs] may hide their identity by creating numerous shell companies and requiring those who settle to sign non-disclosure agreements, making it difficult for defendants to form common defensive strategies (for example, by sharing legal fees rather than settling individually).”

These White House information disseminations were supplemented in 2014 by announcements describing new [“initiatives \[taken\] to combat so-called ‘patent trolls.’”](#) Arguably, the White House press release, Fact Sheet and updates, as well as, other USPTO public statements (“disseminations”) mentioning the PAE report had violated the IQA.

For example, the [USPTO website](#) contains information about and hyperlinks to said report. The PAE report also was discussed and mentioned by name in an [August 2013 speech](#) then Acting PTO Director, Teresa Stanek Rea, delivered before the Japan Patent Attorney Association.

More importantly, however, the USPTO had relied upon the disseminated PAE report and its *single* unsubstantiated statement (consisting of innuendos rather than validated and reproducible evidence) as a principal basis for [proposing the issuance of a new regulation](#) calling for patent

applicants, assignees and owners to regularly update ownership information during proceedings before the USPTO. As [the Preamble to the proposed regulation](#) states,

*“Purpose: On June 4, 2013, the White House issued five executive actions designed to increase transparency of the patent system, ensure the highest-quality patents, reduce abusive patent litigation and level the playing field for innovators. The first of these executive actions is titled ‘Making ‘Real Party in Interest’ the New Default,’ and calls for the Office to begin a rulemaking process to require patent applicants and patent owners to regularly update ownership information when the applicant or patent owner is involved in a proceeding before the Office, including designation of the ‘ultimate parent entity(ies)’ of those owners.”*

As readers will recall, the USPTO’s proposed regulation had been met with many critical public comments, which the White House and USPTO had initially been accused of [minimizing and even suppressing](#). The USPTO subsequently bowed to public pressure and posted to its website the many adverse stakeholder [comments](#) it had received.

Whether for want of sufficient regulatory authority, the inability to secure an Office of Management and Budget [\(OMB\)-issued control number](#) to [collect information under the U.S. Paperwork Reduction Act](#), and/or a lack of hard statistics definitively showing PAEs are the primary source of patent litigation, the USPTO ultimately chose, at least for the time being, [not to finalize](#) its proposed regulation.

However, the USPTO’s regulatory inaction should be interpreted as a tactical retreat rather than as an all-out defeat. The White House PAE report, legislative recommendations, proposed regulation and subsequent updates were the manifestation of a long-term Obama administration agenda dating back, at least, to 2011 when the USPTO had first convened a [“Patent Statistics for Decision Makers Conference”](#) which this author attended. While the putative purpose of that conference had been to emphasize the agency’s overall lack of statistical data on patent litigation generally, the *administration’s* true objective was and remains to gather and ultimately wield that data at a later time against PAEs.

### *The USFTC Connection*

In addition to the WH/OSTP PAE report, the USPTO’s proposed regulation expressly referenced and relied upon a controversial 2011 [USFTC report](#), which arguably also did not conform to IQA peer review requirements. As the record clearly shows, a similar anti-PAE agenda had previously been pursued by the U.S. Federal Trade Commission (USFTC). For example, during June 2011, the USFTC convened a [workshop on intellectual property rights in standards settings](#) (which this author attended) that discussed the possibility of employing regulatory tools outside of patent law to address the perceived problem of [patent holdups](#). In addition, the USFTC’s March 2011 report drew the conclusion that PAE litigation had disrupted technology markets.

*“Increasing activity by patent assertion entities (PAEs) in the information technology (IT) industry has amplified concerns about the effects of ex post patent transactions on innovation and competition. The business model of PAEs focuses on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology...According to panelists, the increase in IT litigation and patents offered for sale can be almost*

entirely attributed to assertions made by patent assertion entities – typically called non-practicing entities – rather than competitors.”

In addition, the USFTC report concluded that prevailing PAE practices served to deter market innovations by focusing on *ex post* licensing rather than *ex ante* technology transfer.

“Even if it is correct that PAEs incentivize and fund the work of inventors, the effect of this activity on innovation can be detrimental if efforts focus only on *ex post* licensing and not *ex ante* technology transfer. Paying inventors only to invent and patent may generate more invention and patents, but it may not generate more innovation. Invention is only the first step in an often lengthy and expensive development process to bring an innovation to market. More [] invention creates the potential for more innovation but does not guarantee it. *To the extent that [] patenting and ex post licensing increase the risk and expense of the development and commercialization process of others without providing new technology ex ante, that activity deters innovation[]*” (emphasis added).

In other words, the USFTC continued to focus on the negative rather than positive aspects of PAE market behavior and their potential downstream impacts.

#### *The USFTC Report Attracts Congressional GAO Attention*

The USFTC report, thereafter, attracted the attention of Congress’ Government Accountability Office (GAO). In its 2013 report focusing on patent litigation and patent quality, [the GAO found](#) that “operating companies and related entities brought an estimated 68 percent of all lawsuits...[while patent assertion entities brought from 17 to 25 percent of all lawsuits] from 2007 to 2011.” The GAO report also found that while software patents had accounted for most of the increase in patent litigation, this had been due, in part, to “patent quality” issues (i.e., “unclear property rights” attributable to their “overly broad and/or unclear claims”) - and to “the potential for large monetary awards from the courts.” In other words, as reported in *PatentDocs.com*, [“\[i\]t turned out that the sky was not falling”](#) on account of PAEs.

Apparently, the GAOs’ findings, which had revealed [a lack of concrete statistical information](#) pointing to PAE responsibility for most of the observed increase in patent litigation, has since prompted the USFTC, like the USPTO, to continue the search for the “problem” to be addressed by the administration’s desired “solution” – the severe curtailment of PAE activities. To this end, the USFTC, unlike the USPTO, successfully sought and [obtained OMB approval](#) (a control number) to pursue a [study seeking information from PAEs and other companies](#) “to develop a better understanding of how PAEs may impact innovation and competition.”

Presumably, the USFTC has since reviewed Mr. Katznelson’s recent Information Quality Act (IQA) filing and recognizes that the WH/OSTP PAE study suffers from critical procedural and substantive data quality flaws, and will work to ensure that *its* forthcoming PAE study is more thorough, considered and IQA-compliant.

However, [USFTC Commissioner Julie Brill’s keynote address](#) delivered at the joint December 2014 Annual Conference of the American Antitrust Institute/Computer & Communications Industry Association does not appear to reflect such situational awareness. Instead, it focuses largely on ideology and the need for agency enforcement and regulation:

“And these Progressive Era reformers [who built the FTC] certainly wouldn’t be surprised that the Commission has influenced, and will continue to influence, the development of law and policy relating to high tech innovation, such as patent law and the role of patent assertion entities.”

“Thinking and acting is exactly how the FTC has approached, and will continue to approach, patent assertion entities (or “PAEs”). We first began looking at PAE activity in workshops leading up to our 2011 Report on the IP marketplace.[] We followed that up by focusing exclusively on PAEs through a joint workshop with the Department of Justice Antitrust Division in 2012.[] Because of the many complex issues surrounding PAEs, we are currently in the midst of an extensive review of PAE activity, a so-called 6(b) study, named after the statutory provision that gives us authority to undertake the project.[]”

“...The data is coming in as I speak. We hope to be able to complete a report relatively quickly – by the end of next year – which we are sure policy makers at all levels and branches of government will put to good use.[] Forty-two State Attorneys General and the Department of Justice Antitrust Division expressed strong support for our study.[]”

Given the calculating nature and progressive agenda of this White House (and that of the USPTO and USFTC which it [manages and oversees](#)), it can reasonably be concluded that these agencies and executive offices were aware of and had dismissed [prior studies](#) showing how [regulatory and policy risks](#) arising in the [ICT sector](#) as the result of controversial government policy agendas, regulatory capture and insufficient legislative due diligence can successfully be used to trigger market uncertainties capable of reshaping the political debate, PAE behavior and the scope of judicial review.

The USFTC’s forthcoming study may even serve the USPTO’s interests, and its pending status could constitute another reason why the USPTO has not yet finalized its proposed regulation. At the very least, these disseminations have been intended to, and to some degree, already have begun to figure into the decision calculus of various patent-holding companies, assignees and investors, as a number of stakeholder comments to the proposed regulation appear to indicate.

Production of evidence illustrating such an impact (‘chilling effect’) would arguably contribute to IQA stakeholders’ ability to conclusively demonstrate the long-term adverse economic effects the WH/OSTP’s failure to correct its IQA noncompliant disseminations have imposed on patent holders, licensees and assignees and the commercialization of market innovations, and ICT industry competitiveness overall. In other words, such evidence could potentially be used to establish grounds for U.S. federal jurisdiction and constitutional (Article III) and prudential standing in a future [IQA legal action brought under the U.S. Administrative Procedure Act](#) challenging the WH/OSTP (and possibly USFTC reports’) IQA noncompliance, once all applicable administrative remedies have been exhausted.

### *The International WIPO Connection*

The 2011 FTC report and the 2013 WH/OSTP PAE report represent only the most recent national manifestations of the Obama administration’s long held thinly veiled antipathy toward

the current PAE business model and the scope of patent protections available more generally. Based on this author's experience, such antipathy is shared by numerous foreign governments participating at the World Intellectual Property Organization (WIPO) Secretariat and Standing Committee on the Law of Patents (SCP) which, during 2008-2009, had released two key intergovernmental reports intended to reshape global patent norms. These include SCP report [SCP/13/2 "Patents and Standards"](#) and SCP report [SCP13/3 "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights."](#)

As these reports clearly indicate, WIPO member governments have pursued two pathways in their quest to justify control over the exercise of private patent rights which, consequently, have the effect of weakening them in service to a broad notion of the "public interest." First, they have endeavored to employ mechanisms *within* patent law to: 1) limit patentable subject matter (private vs. public goods); 2) limit the scope of the patent right (patent quality; infringement); and 3) restrict the exercise of the patent right vis-a-vis other patent holders and/or the user community (overzealous patent exploitation; patent abuse). Second, governments have endeavored to employ mechanisms *outside* of patent law to limit the exercise of patent rights in service to the "public interest." This has occurred through: 1) employment of unfair trade practice laws (FTC); and 2) employment of civil antitrust laws (FTC; DOJ).

For example, paragraph 127 of the SCP report SCP/13/2 "Patents and Standards" expressly referenced the USFTC's 2008 ruling in *In the Matter of Negotiated Data Solutions LLC*, but did not adequately discuss the full factual context of the case. The FTC had found that NData's decision (as a nonmember of IEEE) not to accept the RAND/FRAND licensing obligations of its predecessor entity (an IEEE member) was not only inconsistent with IEEE patent policy, but also constituted an unfair method of competition actionable under Section 5 of the Federal Trade Commission Act.

"Since the IPR policy does not bind non-participants to the standard-setting process, whether a licensing commitments made by the previous patent owner during the standardization process has a legally binding effect on the new patent holder (who did not participate in the standardization) is an interesting question...In the United States of America, the Federal Trade Commission (FTC) found that Negotiated Data Solutions LLC (N-Data) violated Section 5 of the FTC Act by engaging in unfair methods of competition and unfair acts or practices regarding its enforcement of patents essential to implement a computer network standard. [] The patents essential to implement the Ethernet standard were first owned by National Semiconductor Corporation (National) which had made a licensing commitment during the standard setting process. The FTC found that N-Data obtained the patents from National, knowing about that prior licensing commitment, and refused to comply with that commitment after the industry became committed to the standard and instead demanded royalties far in excess of that commitment."

As this [author's comments](#) previously submitted in response to said paragraph reveal (I served as the representative of the nonprofit [Institute for Trade, Standards and Sustainable Development](#) which was (is) an [ad hoc observer](#) to the WIPO SCP), the USFTC had then considered the PAE business model to be *illegitimate*.

“...one key fact militated in favor of these findings, namely, that *NData’s “sole activity [wa]s to collect royalties in connection with a number of patents”*. In other words, plaintiffs were successful in persuading the FTC in viewing *NData as a patent troll* rather than as an inventor, manufacturer or downstream user, and thereby stigmatized them.[] ***The FTC, thus, could not conceive of the acquisition and licensing of patents as a legitimate business model.*** It also did not consider the extent to which NData had made bona fide efforts to renegotiate the RAND obligations with the SSO and the companies working on the standard in question. Paragraph 127, for example, fails to discuss key facts revealed in the dissenting opinions” (italic and boldfaced emphasis added).

Arguably, the timing of this WIPO report’s issuance (Feb. 2009) and the Obama administration’s failure to object to it appears prescient in hindsight. It provides much needed international context to the more recent national efforts of the USPTO and USFTC to reform U.S. patent law and limit the exercise of the patent right, especially by PAEs, [consistent with evolving international IP and sustainable development norms](#), notwithstanding the persistent absence of substantive statistical evidence linking PAE patent litigation to diminished or depressed technology markets.

### *Conclusion*

Mr. Katznelson should be applauded for his initiative to expose these White House and USPTO Information Quality Act (IQA) compliance failures. A similar disregard for the IQA and the rule of law (in the subject matter areas of environmental, natural resources and wildlife law) currently prevails at the US Environmental Protection Agency, National Oceanic and Atmospheric Administration and Department of Interior ([EPA](#), [NOAA](#) and [DOI](#)). And, as I recently argued in [Forbes](#), the lack of an IQA mechanism during the Reagan administration resulted in prior White House policy and political decision-making based mostly on ideology and misinformation, and inadequately peer reviewed science leading to the unwarranted execution of an international environmental treaty.

The U.S. Information Quality Act, [which implements the U.S. Paperwork Reduction Act](#), offers the only federal procedural mechanism available to potentially challenge (administratively and legally) the validity of scientific, technical and statistical data and information that federal agencies develop and disseminate, both as support for standalone studies intended to have a ‘chilling’ (or behavior modification) effect on the markets, and as support for federal agency regulations and rulemakings which have their own compound effect(s) on market behavior. For these reasons, PAEs and their stewards should take careful notice of the Katznelson IQA filing and the opportunity it affords patent stakeholders to legally hold the PTO, FTC and White House to account for the unnecessary burdens their improperly peer reviewed PAE-related disseminations impose.

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