Evolving IP Marketplace – P0939000
Comments from:

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Comments submitted responsive to:

Federal Trade Commission's Request for Public Comments

In the Subject Category of:

Public Hearings Concerning the Evolving Intellectual Property Marketplace

Mr. Perlman's background:

Steve Perlman, Rearden Founder & CEO, is an entrepreneur and inventor devoted to pioneering Internet, entertainment, multimedia, consumer electronics and communications technologies and services. He has more than 30 years of technology development experience, 19 years of start-up experience and a track record of bringing media-rich products and services quickly to market. In addition to having founded and operated multiple startup companies, funded by hundreds of millions in funding from VCs and major corporations, Steve has been a Microsoft Division President and a Principal Scientist at Apple Computer.

Steve's technology work is built into all iPhones, video iPods, Macs and most PCs and has been deployed by DirecTV, Dish, Comcast, Time Warner, Charter and Adelphia cable TV and satellite TV networks; and retailed as consumer products from Sony, Philips, RCA, Panasonic, Mitsubishi, Samsung, Fujitsu, Motorola, Scientific Atlanta and Sega. Products he has created include Mova® Contour® Reality Capture, WebTV®, the Moxi® Media Center and the underpinnings of Macintosh multimedia technology, including QuickTime®.

Steve's recently patented facial motion capture technology, Mova Contour, was used for the production of the photoreal computer-generated faces of Brad Pitt in "A Curious Case of Benjamin Button" (2008) and Edward Norton and Tim Roth in "The Incredible Hulk" (2008).

Steve holds over 80 patents in the fields of multimedia, communications, alternative energy materials, optics, security and transportation and has more than 100 additional patents pending. Steve's startup companies alone have produced billions of dollars of revenue from products and services based on his patents, resulting in thousands of US jobs. Almost all of Microsoft and Apple's video-related products were directly developed by, or are based upon the work of, Steve and his teams or his startups.

To date, Steve's companies are all purely "practicing entities": all of his patents have been filed for the sake of his companies' own products and services. The patents have not been licensed for products produced by others, nor have any patents been litigated against would-be infringers. That said, the patents have been absolutely essential for the funding of the companies and for protecting the new products and services from being cloned by large established companies or foreign companies with lower operation costs. Patents figure into the operation of Steve's companies on a daily basis.

Steve's companies have also worked with many outside patent holders, both proactively by analyzing patents for potential infringement or after notification of potential infringement. In some cases, Steve companies have licensed outside patents. In other cases, they have declined to license patents either because, after analysis, the products are determined to not be infringing, or because a reasonable workaround is found to avoid infringement. But, by far the primary benefit Steve has found in analyzing other patents (he has reviewed thousands through the course of his career) has been learning from the teachings of prior inventors.

Notably, few of Steve's inventions are ever filed as patents: only inventions whose protection are critical to the success of his companies and their products and services are filed. Much of Steve's work is disclosed in the form of open source, disclosed when products are released or is simply shared with fellow creative individuals in industry and academia.

Responses to Questions in View Notice at https://secure.commentworks.com/ftc-ipmarketplace/Notice.pdf (Federal Register Vol. 73, No.226, page 70647-70648)

1. **How has the IP marketplace changed in the past five to ten years? What changes are expected in the future? What aspects of the patent system drive those changes? What is the impact of those changes on innovation?**

To start with, I presume that this, and other questions asked by the FTC refer to the "IP marketplace" (as described and discussed in the FTC's "The Evolving IP Marketplace" hearing that occurred on December 5, 2008 and as described for the hearing scheduled for February 11, 2009 the "FTC Hearings") focus almost exclusively on *patent* Intellectual Property (IP). Narrowly defining the "IP marketplace" to just the patent marketplace is woefully inadequate, and it is also a departure from the FTC's October 2003 report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (the FTC Report) which, while focused on patents, noted that other intellectual property , figured significantly in the development of new products and services. For example, the FTC Report found that many mechanisms were used to promote innovation, e.g. on Page 11 the FTC Report notes:

> …A later study found that lead time, learning curve advantages, complementary sales or service efforts, and secrecy were all more effective means of protecting the competitive advantages of new processes than patents were. With regard to new products, patents ranked ahead of secrecy but behind the other three mechanisms.

In my work, both in Big Tech corporations and in startups, patents are just one type of IP that we rely upon in the IP marketplace (i.e. the marketplace where we transact business that involves IP). We utilize and rely upon many "formalized" types of IP including trade secrets, copyright, copyleft (e.g. open source), trademarks and trade names.

But, even if we include all of these "formalized" types as components of the "IP marketplace", we still are not referencing a marketplace that actually exists on its own. IP itself is just one type of *market power*, and we rely on IP intermingled together with other forms of market power to carry out our businesses.

As a simple example, Google Corporation, one of the most successful and powerful tech companies in the world, holds 131 US patents and has 191 US patents pending, as of February 2, 2009. As an individual inventor, I have been granted around 80 patents, and have over 100 patents pending. Of course, different patents will have different scope, quality and impact, but in round numbers, Google's thousands of engineers and scientists have produced about 2x the patent IP as I've produced as an individual in my career. Yet, Google's *market power* (and its intellectual capital) is *vastly* greater than what I have created alone. Indeed, Google's market power is rivaling that of Intel, Cisco, Microsoft, Apple and IBM, companies which in the aggregate hold tens of thousands of patents. Clearly, patents alone are not the only currency of the market power in the tech market, and to consider them in isolation of other forms of market power is of limited utility, at least within the tech market.

So, I'm far more interested in changes in market power currency overall, rather just patent currency, as the FTC has apparently defined the IP marketplace. I will attempt to touch on both.

First, the biggest changes in the patent world I've seen over the last 5 years has been a dramatic increase in the variability of USPTO patent pendency, and a dramatic increase in the average pendency of a patent. As examples, I have had patents that have take over 5 years before their first examination, and patents that have taken over 7 years until allowance. And, in contrast, I have patents that have been examined, prosecuted and issued in a little over a year. There is no discernable pattern to why some patents take longer or shorter to be examined because the patents at both extremes of time are in the same fields of art.

And, on top of this 1-to-5 year variability in first examination, what I've seen in the last 5 years are far more Office Actions and a far longer process to get from the first examination to an issued patent. There have been times when we have received an Office Action, responded to it, and then received an Office Action back which is literally verbatim (e.g. with the same typos) as the prior Office Action, and it is quite apparent that the examiner has not considered our response at all. Other times, we receive Office Actions that progress extremely reasonably and the examiner is both efficient and very insightful. It is all over the

map. You definitely are left with the impression that the examiners are rushed and, in some cases, seem more motivated to meet a quota than to give your patent the attention it needs.

Of course, such huge variations in pendency and examination time make it exceptionally difficult to plan product development and to obtain funding for the development. Sometimes, by the time a patent issues, the technology it covers is obsolete. And, sometimes the patent issues before the product development is complete. It is impossible to predict.

The other thing that has changed in the cost of filing patents has skyrocketed. This has largely been due to going through far more Office Actions than we have in the past, and all of the legal fees associated with each one. For example, in the 1990s we used to consider most of the cost of a patent to be associated with the initial filing. Now, usually most of the cost is in the Office Action prosecution after the filing.

This has significantly hampered innovation. We are spending far more time and money than is necessary on filing patents. And, much of that money is wasted because the patent issue too late for us to utilize them to secure funding. In several cases, we have abandoned products that were in development because we had no idea when the patents would ever be examined, let alone issued, and we knew if we were to introduce the products, they would be quickly cloned by low-cost manufacturers overseas.

2. What are the new business models involving intellectual property? What has motivated the development of these business models? What is their impact on innovation?

We have been approached by non-practicing entities (NPEs), just like any other companies. Sometimes they are just form letters, or we told we have to license patents that we've already licensed. So far, it is has been a minimal distraction. We look at their patents, we tell them why we are not infringing (frequently because we attach prior art because we have deep knowledge of the development that has gone on in our fields), and that's the end of it. We also frequently help other companies who have been approached both by NPEs and large companies with threatening letters and review the patents and help them find prior art, or suggest design-arounds. Again, it's a very small percentage of our time.

I suspect that one thing that has motivated these new business models is, with the long pendency of patents, they are far less useful to inventors to actually use them for making products, and so they sell the patents to NPEs to get something out of their development and patent filing costs. We have patents sitting around that took so many years to issue that we abandoned the products planned for them and, in theory, we could try to get some value out of by selling them. We have no interest in pursuing that sort of business, but I can't think of any other value we could get out of the patents at this point.

3. What economic evidence is relevant when analyzing whether to grant a permanent injunction following a finding of infringement? What proof have courts required? How should the analysis take into account the incentives to innovate provided by the patent system and the benefits of competition? What is the appropriate remedy when the court has denied a permanent injunction after a finding of infringement?

We've never been in litigation with any patent infringement. But what I can say is that, without the threat of litigation, particularly permanent injunction, there is no possible way we would have ever been able to get funding for new products that go up against large established companies. For them, even a massive dollar award is worth it, so long as they get the strategic benefit of entering a new market. So, the only threat that has significant meaning to them is if they are enjoined from entering a market.

4. Do the legal rules governing patent damages result in awards that appropriately compensate patentees? Are there circumstances in which they result in overcompensation or undercompensation of patentees? What evidence is there of the extent of these problems? What information would be helpful to better assess whether damage awards appropriately compensate patentees? Are courts and juries able to make damages determinations with sufficient accuracy? To the extent that there are problems resulting from the determination of damages for patent infringement, how should they be addressed?

It is hard for me to imagine any legislation that does not take into account the myriad range of considerations that go into the value of a patent. And, the major recent court decisions around patents, it's hard to see how any legislation in the near term could be crafted until a few years go by and we see what is the impact of the court decisions is.

5. How have changes in willfulness doctrine changed the behavior of patentees and potential infringers? Do recent changes in the law adequately address the concerns with willfulness doctrine identified in the October 2003 FTC IP Report?

No comment.

6. How will changes in patent law rendered by Supreme Court and Federal Circuit decisions of the past five years affect the value of patents? How will these changes affect the operation of the IP marketplace? How will they affect innovation and competition?

They will clearly weaken the value of patents, but in my opinion, they will strengthen the overall value of US products and services in the market and promote innovation. The reason for this is, as I said earlier, patents are only one form of market power, and like any other, unreasonable uses of patents should be curbed. That said, we don't want to unreasonably

devalue patents to the point where it is impossible to introduce disruptive technologies into a market dominated by large established players. We need to strike a balance, and so far, I think the courts are doing that.

7. How does uncertainty regarding the validity and scope of patents affect the operation of the IP marketplace? Does the current system adequately fulfill the notice function of patents? How does uncertainty influence the operation of the IP marketplace? What are the sources of uncertainty that affect the value of patents and the operation of the IP marketplace? What could be done to address them?

I've address the uncertainty issues above. To fix the problems at the USPTO, we need to adequately fund it, and we need to create appropriate protocols and incentives for examiners.

8. How transparent is the current IP marketplace? Can it be made more transparent? Is that desirable?

As pendency has become longer and less certain, having a period of time when patents are unpublished has become increasingly important. Otherwise, you are telling the world your idea, but you will be afforded no protection of it.