Federal Trade Commission
Public Hearings Concerning the Evolving Intellectual Property Marketplace
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Submitted by:
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Sun Microsystems, Inc. ("Sun") is a leading consumer, developer and supplier of technologies, products and services in the information, computer and telecommunications technology sector. As such, we are a large owner, licensor, licensee and implementer of patented technology. Sun is one of many companies that participate in standards setting activities and that are concerned about the potential harmful effects the changing intellectual property ("IP") marketplace can have on industry standards and the markets they impact. We appreciate the opportunity to submit these comments in order to raise our concerns to the attention of the Federal Trade Commission ("FTC").

The IP marketplace has seen a number of significant changes in the past five to ten years. One of the most noteworthy changes is the substantial increase in the number of patent sales in the secondary patent market. It is reasonable to expect that, as a consequence of this trend, there has or will be an increase in the number of sales of patents that are the subject of license commitments made to standards development organizations ("SDOs") by the owners of the patents. To ensure that markets remain competitive and innovative, it is important that these license commitments continue to be honored not only by the patent owners who originally make the commitments, but also by subsequent owners of such patents. This should not set an unreasonable expectation, as patent owners are the issuers of the license commitments they make to SDOs with respect to the patents that they own, and notices of such commitments can be easily provided to, or obtained by, subsequent owners.

As previously acknowledged by the FTC, once a patented technology is incorporated into an adopted standard, implementers of the standard (who are also IP owners and often own other patents that are incorporated into the standard) have no choice but to license the patented technology from the patent owner in order to conform to the standard. This creates an opportunity and financial incentive for an unprincipled patent owner to leverage not only the virtual monopoly created by the adoption of the standard, but also the costs, uncertainty and threat of large damages associated with patent infringement claims, to insist upon the payment of supra-competitive royalties. The opportunity to do, so as well as the potential financial incentive, can be greater if the patent owner (or a subsequent owner) chooses to disregard its patent license commitment after standard setting participants relied in good faith on the assumption that the license commitment would be honored and that the patent owner would not insist upon supra-competitive royalties. The potential for damaging effects can be more pronounced if the patent owner is a non-practicing entity ("NPE") that does not need to license any patents in order to implement the standard, and therefore has little incentive to act reasonably or in good faith with other patent owners who intend to implement the standard.

The scenario described above was recently exemplified in *In the Matter of Negotiated Data Solutions LLC* (FTC File No. 051-04). In that case, Negotiated Data Solutions LLC ("N-Data") acquired a patent whose previous owner had made a written commitment to license the patent to implementers of a standard for a one-time fee of $1,000 if the patent was incorporated into the standard. After the commitment was made, the patent was incorporated into the standard. Later, N-Data acquired the patent, then reneged on the prior commitment, and sought to extract larger royalties from the implementers after the standard was widely adopted by industry.

As stated by the FTC in its action against N-Data for its failure to abide by the commitment made by the previous patent owner:

> The impact of [N-Data's] alleged actions, if not stopped, could be enormously harmful to standard-setting. Standard-setting organization participants have long worried about the impact of firms failing to disclose their intellectual property until after industry lock-in. Many standard-setting organizations have begun to develop policies to deal with that problem. But if N-Data's conduct became the accepted way of doing business, even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies.[1]

Further to the point made by the FTC, without the certainty that both the original patent owner and subsequent owners of the patent will abide by the license commitments made by the original patent owner, participants involved in the development and implementation of a standard face the risk of damaging "patent-holdups" that can operate to limit competition, increase prices and arrest technological innovation.

The potential for serious harm to competition and the consuming public cannot be underestimated, particularly in light of the vital role that standards have to our economy. As noted by the FTC:

> Industry standards are widely acknowledged to be one of the engines of the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a "fundamental building block for international trade." Standards make networks, such as the Internet and telecommunications, more valuable to consumers by allowing products to interoperate.[2]

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[1] *In the Matter of Negotiated Data Solutions LLC* (FTC File No. 051-04).

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation and Competition 33, available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf (2007) (internal citations omitted).

Accordingly, the rise of the secondary patent market and the increase in the number of NPEs can have a serious negative impact on competition and the economy if patent owners are free to disregard patent license commitments made to SDOs.

Sun respectfully asks the FTC to recognize in its report the risks described above. We also respectfully request that a statement be included in the report that patent license commitments made to SDOs should attach to the patent and be binding not only on the patent owners who make them but also on subsequent owners in order to avoid creating opportunities and incentives for patent owners to disregard prior commitments and leverage the virtual monopoly created by industry lock-in of a standard and the uncertainty and high cost of patent litigation to extract supra-competitive royalties from the marketplace. We appreciate the FTC's consideration of these comments.