OVERVIEW: The following "comments" have been prepared for purposes of the United States Federal Trade Commission's public hearings regarding the "Evolving IP Marketplace."

COMMENT #1 – Patent licensing companies are pro-competitive: Patent licensing companies, who are sometimes more appropriately referred to as *Patent Dealers*[1], are pro-competitive in that they make the "patent market more efficient"[2]. In an efficient patent market, inventors have the means to "gain the value of their patents"[3]. Because inventors have the ability "to easily liquidate their patents, they are more likely to invent"[4], which in turn promotes further innovation in the marketplace. Given the majority of inventions come from small entities, as P. Detkin noted at the December 5, 2008 hearings in Washington D.C., the importance of such companies to innovation cannot be underestimated. Even if such smaller entities have the capability and know how to realize value by manufacturing and selling their patented inventions, they can often be precluded from doing so by necessary underlying intellectual property rights that are owned by another. Placing (further) limitations on the ability of patent licensing companies to realize value from their intellectual property, therefore, is to seek return to the feudal system of years past, referred to by Ray Millien at the December 5th hearing, where patents are dominated by a few large companies.

COMMENT #2 – Legislative proposals regarding damages have not considered the potentially significant economic consequences which could result and will not address the key issue of the practical limitations associated with analyzing large and assessing the relative contributions and importance of large numbers of patents: The recent proposal in the 110th Congress to explicitly require apportionment in the statutory remedies available for infringement of a patent cause further serious economic harm at a time of great economic turmoil in the U.S.: it has been noted that such an "apportionment-centric " system of patent damages assessment will likely have several adverse effects including (i) reduction in U.S. patent value of between $34.4 billion and $85.3 billion; (ii) reduction in value of U.S. public companies of between $38.4 billion and $225.4 billion; (iii) reduction in R&D of between $33.9 billion and $66 billion per year and (iv) the potential risk of loss of between 51,000 to 298,000 U.S. manufacturing jobs. [4A] At the very least, additional research should be commissioned from all affected stakeholders to further study the economic impacts of such dramatic changes before they receive serious consideration from policymakers. [4B]

Moreover, a damages apportionment system also fails to address a key issue: how to determine the value of any one patent with respect to an infringing device, system or method, when there may be hundreds or thousands of other applicable patents? Such a sweeping change would simply add further ambiguity to the law and call into question decades of precedent which specifically deals with how to resolve such issues. While this case law does not provide a perfect guide for judges and juries to determine the exact amount of damages in any particular case, it is difficult to see how the proposed

legislative changes would help in this regard. Resolution by the Courts on a case by case basis or by free market forces is preferable to such sweeping legislative changes. Regarding the free market, patent licensing companies create further benefits by often aggregating intellectual property rights, thereby reducing transaction costs for licensees, and establish a set price range for their property (and as a result, comparable IP of third parties), which further reduces transaction costs.

COMMENT #3 – Any proposed legislative changes should be supported by actual evidence: Similar to the Chief Judge of the Court of Appeals for the Federal Circuit, the Honorable Paul R. Michel, policymakers should be skeptical of any claims of a litigation crisis, and should heed the comments of Peter Detkin and Brian Kahin that any claims regarding excessive patent damages or licensing royalties should be supported by actual evidence. The FTC should consider to "Federal Judicial Caseload statistics which reveal that there is no U.S. Patent litigation crisis"[5]. "Patent lawsuits as a percentage of patents granted have remained constant at 1.5 percent [between 1996 and 2006]. With an expanding economy and more innovation, the absolute number of patent applications filed and patents issued has increased, but there has been no abnormal surge in patent litigation"[6]. It should be noted that between 1996 and 2006, the combined patent settlement payments disclosed by the seven founding members (Apple, Cisco, Dell, HP, Intel, Micron and Oracle) of the "Coalition for Patent Fairness" (CPF) were "one ninth of one percent (0.11 percent)"[7] of their combined revenues. "Whatever the amount of secret patent settlements they make, the amount must be immaterial to any public companies performance – otherwise the company officers are in violation of Sarbanes-Oxley disclosure rules"[8]. Furthermore while the CPF companies have argued that the "U.S. economy is increasingly bogged down in patent disputes that drain billions of dollars that would otherwise be invested in developing new innovations"[9], these same companies, between 1996 and 2006, "disclosed patent settlements [that] equaled 1.5% of [their] total R&D investment, which suggests that patent litigation has had no significant impact on their research and development activities"[10].

COMMENT #4 – The right to exclude is a fundamental tenet of the definition of property and should automatically follow a finding of infringement: The right to exclude another from encroaching on one's property is a fundamental characteristic of all property rights. Preventing certain owners of IP from exploiting their rights to the same extent as others, on the basis of not "practicing the invention", therefore, is unconstitutional and contrary to the rule of law. Furthermore, as noted above with respect to Comment #1, one may be precluded from practicing one's invention, if underlying intellectual property is owned by another. Professor Cotter sensibly proposes that a property based approach to intellectual property is preferable in that it encourages private parties to decide what the property is worth, as opposed to Court imposed royalties which, for reasons stated above with respect to Comment #2, can often be difficult and impractical to assess. In the absence of the threat of exclusion, an infringer will be no worse off if it chooses to infringe rather than acquire a licensed, which creates an incentive to litigate. By way of analogy, if the current patent system were applied to real property, one could not prevent one's neighbor from planting crops in their front yard, if the yard was not being "used" for farming, so long as that neighbor paid a

reasonable fee/royalty in respect of its actions. In fact, under the current system, the neighbor would likely not pay the royalty at all until ordered by a court to do so, given the cost and risk faced by the property owner in enforcing his/her property right. With respect to companies which do not "practice their inventions", it can be noted that this is often by design in order to avoid infringing the rights of others, namely potential infringers. As a matter of policy, therefore, respect for the intellectual property rights of others should not, be used as a basis to deny the property rights of non-practicing entities.

COMMENT #5 -- Strong patent rights are essential to United States prosperity in the information age and knowledge economy: "With as much as 75% of the value of publicly traded companies in the [United States coming] from intangible assets"[11], any limitations on rights which protect such intangible assets will negatively impact the US economy. The Patent Reform Act, of 2007 generated much discussion amongst intellectual property experts in countries around the world with many observing that the Bill weakened patent protection, made it less costly to infringe patents, and as a result would make it easier for companies in other countries to do business in the U.S. For example, Mr. Yongshun Cheung, the former Deputy Director of IP Division of Beijing High People's Court, Senior Judge, in an article analyzing the Patent Reform Act, 2007 (the bill), stated "this bill will give companies from developing countries more freedom and flexibility to challenge the relative US patent for doing business in the US and make it less costly to infringe"[12]. Similarly, the European Union Chamber of Commerce in China has claimed "that Chinese authorities [have discouraged Chinese enterprises from entering into negotiations] on patent licensing agreements and pay royalty to patent owners. [This gives] Chinese companies an unfair advantage, as they are not contributing their fair share to the costs of technological progress."[13]

[1] James F. McDonough III, , *The Myth Of The Patent Troll: An Alternative View Of The Function Of Patent Dealers*, Emory University School of Law, Law & Economics Research Paper Series, Research Paper No. 07-7, *available* at http://ssrn.com/abstract=9599945, pg 200 - 201

[2] James F. McDonough III, , *The Myth Of The Patent Troll: An Alternative View Of The Function Of Patent Dealers*, Emory University School of Law, Law & Economics Research Paper Series, Research Paper No. 07-7, *available* at http://ssrn.com/abstract=9599945, pg 207

[3] James F. McDonough III, , *The Myth Of The Patent Troll: An Alternative View Of The Function Of Patent Dealers*, Emory University School of Law, Law & Economics Research Paper Series, Research Paper No. 07-7, *available* at http://ssrn.com/abstract=9599945, pg 204 – 220

[4] James F. McDonough III, , *The Myth Of The Patent Troll: An Alternative View Of The Function Of Patent Dealers*, Emory University School of Law, Law & Economics Research Paper Series, Research Paper No. 07-7, *available* at http://ssrn.com/abstract=9599945, pg 217

[4A] Scott Shane, Professor of Economics, Case Western Reserve University *The Likely Adverse Effects of an Apportionment-Centric System of Patent Damages*, prepared for the Manufacturing Alliance on Patent Policy, January 14, 2009, page 1.

[4B] Scott Shane, Professor of Economics, Case Western Reserve University *The Likely Adverse Effects of an Apportionment-Centric System of Patent Damages*, prepared for the Manufacturing Alliance on Patent Policy, January 14, 2009, page 9.

[5] http://www.uscourts.gov/library/statisticsreports.html

[6] Pat Choate, Phd, *"The Patent Reform Act of 2007: Responding to Legitimate Needs or Special Interests?*, United States Business and Industry Council Education Foundation, page 11.

[7] Pat Choate, Phd, *"The Patent Reform Act of 2007: Responding to Legitimate Needs or Special Interests?*, United States Business and Industry Council Education Foundation, page 13.

[8] Pat Choate, Phd, *"The Patent Reform Act of 2007: Responding to Legitimate Needs or Special Interests?*, United States Business and Industry Council Education Foundation, page 13.

[9] "Who We are" Coalition for Patent Fairness, http://www.patentfairness.org/about the coalition/who we are.cfm

[10] Pat Choate, Phd, *"The Patent Reform Act of 2007: Responding to Legitimate Needs or Special Interests?*, United States Business and Industry Council Education Foundation, page 13.

[11] *"A market for Ideas"*, The Economist, October 22, 2005

[12] Yongshun Cheug and Li Lin, *"The Greatest Changes of the U.S. Patent System in the Last 50 Years"*, China Intellectual Property News, *Available at* http://infringement.blogs.com/philip_brooks_patent_infr/files/patent_reform_article_china_intellectual_property_news.pdf

[13] Intellectual Property Rights Position Paper of the European Union Chamber of Commerce in China, September 9, 2005