



Federal Trade Commission  
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Washington, DC 20580

August 20, 2018

**Comments of Alliance for U.S. Startups and Inventors for Jobs (“USIJ”) Re: FTC’s  
Announced Competition and Consumer Protection in the 21<sup>st</sup> Century Hearings, Project  
P181201**

The Alliance of U.S. Startups for Inventors and Jobs (“USIJ”)<sup>1</sup> respectfully responds to the announcement of hearings and request for public comments published June 20, 2018 by the U.S. Federal Trade Commission (“FTC” or “Commission”) regarding competition and consumer protection in the 21<sup>st</sup> Century. Item 8 in the list of topics set forth in the announcement relates to “The Role of Intellectual Property and Competition Policy in Promoting Innovation.” USIJ encourages the Commission to probe deeply with respect to this topic. The term “innovation” is broadly used today as a catchall for numerous activities that result in improvements to existing products and services, however marginal, and to clever financing and marketing schemes. Far more important to the long-term future of our country than hand waving about these types of

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<sup>1</sup> USIJ is a coalition of over 30 startup companies and their affiliated executives, inventors and investors that depend on stable and reliable patent protection as an essential foundation for their businesses. A list of USIJ members is attached as Appendix A. USIJ was formed in 2012 to address concerns that legislation, policies and practices adopted by the U.S. Congress, the U.S. Supreme Court and the USPTO were placing individual inventors and research-intensive startups (“the invention community”) at an unsustainable disadvantage relative to their larger incumbent rivals, both domestic and foreign. USIJ’s fundamental purpose is to assist and educate Members of Congress and leaders in the Executive branch regarding the critical role that patents play in our nation’s economic system. In this endeavor, USIJ works closely with numerous other groups and coalitions within the invention community to insure that protection of the creative role played by individual inventors, startups and small companies is recognized as one of the primary objectives of the U.S. patent system.

innovation is real “invention” – the creation of genuinely new technologies and breakthrough solutions to problems previously thought to be difficult or unsolvable. It is important for the Commission to keep this distinction well in mind as it proceeds. To encourage and facilitate the “invention” and implementation of breakthrough technologies that are essential to the long term security and well-being of Americans, both intellectual property policy and the careful application of competition laws are critically important.

The Commission is uniquely positioned to address some of the more important questions today, because Section 5 of the FTC Act gives it the flexibility, in a proper case, to address anticompetitive trade practices that do not fit neatly into the specific matrices that the Supreme Court and the lower courts have set forth for measuring conduct under the Sherman Act. While we recognize, as many others have advocated, the need for cognizable principles that underlie the application of Section 5, we also believe that the emergence of economic superpowers and the tendency of their managements to equate what is good for America with what is good for their company may require the creation of legal curbs to the behavior of some of our largest companies, which also – incidentally – are some of the most egregious abusers of the intellectual property rights of others. To be clear, we think that the increasingly common apologetic for “efficient infringement” of the property rights of individual inventors and small companies is a pernicious development, which – in the face of astronomical disparities in the relative resources – should be examined as an unfair trade practice (at the very least) and as potentially harmful to competition.

Following are a few of the key areas of inquiry that we think the Commission may find useful and informative:

- When incumbent companies, jointly and individually, pursue business practices that have either the purpose or the effect of diminishing the incentives of new entrants to develop new technologies and become potential competitors, should there be intervention by Federal agencies to restore or preserve competitive incentives?
- It seems undeniable that the United States has experienced, over the last fifteen years, a significant decline in the ability of owners of intellectual property to enforce their property rights against both foreign and domestic infringers. What effect, if any, has this diminished enforceability had on the incentives for investment and invention in the U.S.? Assuming that it has had a significant and adverse impact (which we believe is the case), what is the appropriate role for government agencies such as the FTC and DOJ in addressing that reality?
- One aspect of the problem of diminished enforceability of IP rights is the extraordinary cost of IP litigation, particularly with respect to patents, which has the practical effect of foreclosing access to the judicial system for a significant number of individual inventors

and small companies. Is there a role for the government to play in helping to restore a reasonable balance between the owners of intellectual property and those who infringe such rights, particularly in the area of amicus filings that bring a higher level of expertise than many judges enjoy?

- Recognizing that certain “platform” companies have acquired significant market power as the purchaser or end user of new technologies invented and patented by third parties for use with their platforms, is there a legitimate governmental interest triggered when a platform owner systematically and intentionally infringes such patents and refuses to pay for a license? Stated differently, can there be circumstances in which infringement and a bad faith refusal to pay for a license would constitute a predatory or unfair trade practice as viewed by the FTC or DOJ?
- To what extent are collaborative refusals to negotiate patent licenses by companies in the same or related industries extant and widespread, and should such refusals be addressed as unlawful boycotts under the Sherman Act or the FTC Act?
- In analyzing standard setting practices from a policy point of view, is there sufficient public awareness of antitrust concerns implicated by the collaboration and coordinated conduct of the users of the technology embodied in a standard?

USIJ would be happy to elaborate on any of the foregoing questions or to brief the existing case law applicable to the issues raised.