



**Comments of the  
Software & Information Industry Association (SIIA)  
on the  
Federal Trade Commission Hearings on Competition and  
Consumer Protection in the 21<sup>st</sup> Century  
August 20, 2018**

**Topic #8: The role of intellectual property and competition policy in promoting innovation**

**About SIIA**

With nearly 700 member companies, SIIA is the principal trade association of the software and digital content industries. Our members are global industry leaders in the development and marketing of software and electronic content for business, education, government and consumer markets. They range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are leading providers of, among other things:

- Data analytics and artificial intelligence,
- business, enterprise and networking software,
- publishing, graphics, and photo editing tools,
- corporate database and data processing software,
- financial trading and investing services, news, and commodities,
- online legal information and legal research tools,
- education software, digital content and online education services,
- specialized business media,
- open source software, and
- many other products and services in the digital content industries.

**The Commission should continue to be a voice supporting the role of competition policy and economics in patent legal doctrines.**

Consistent with its mission of protecting consumer welfare, the Commission has long been an advocate for policies that maximize innovation through recognition of the role that competition policy and economic analysis should play in patent policy. In its 2003 report, *To Promote Innovation*, the Commission recognized that “Competition and patents stand out among the federal policies that influence innovation. Both competition and patent policy can foster innovation, but each requires a proper balance with the other to do so.” To achieve that balance, the Commission urged that policy makers entrusted with the development of patent law to expand their consideration of economic learning and competition policy concerns and made multiple recommendations to improve patent quality.

In its 2011 report, *The Evolving IP Marketplace*, the Commission again discussed how the patent system and competition policy could work better together to support innovation and enhance consumer

welfare if the patent doctrines were changed to improve the notice function of patents and if remedies analysis better incorporated economic principles. In the 2016 study of *Patent Assertion Entity Activity*, the FTC again applied its economic perspective to identify the burdens imposed on innovation by *ex poste* licensing behavior and nuisance patent litigation.

At a time when some corners are calling for an approach to patent law doctrine based on absolutist, moral rights, the Commission's unique voice protecting consumer welfare is needed more than ever. The Commission has always recognized that the best way for the patent system to benefit consumers is to follow the command of the Constitution to establish patent legal doctrines based on a goal of "promot[ing] the progress of science and the useful arts" by aligning patent policy, competition policy and economic analysis. The on-going public debate on patent policy needs the Commission's input now.

### **The Commission should reinvigorate its Study of Patent Quality and Notice.**

The 2003 report, *To Promote Innovation* recognized that questionable, low-quality patents are a significant competitive concern and can harm innovation in multiple ways, including by deterring or raising the cost of innovation, complicating licensing, and fueling patent thickets and wasteful defensive patenting.

The problem of low quality patents and the ways in which they can disrupt competition and harm innovation remains an ongoing concern that merits further study. The rate of patenting has almost doubled since 2003. Every year sees record-breaking patent filings and issuances, now nearing 350,000 per year, further raising questions about patent quality and the impact of patent thickets identified by the Commission. Industry, academics, and government agencies continue to highlight ongoing problems of poor patent quality, especially with regards to software and high-tech inventions.<sup>1</sup> Academic work suggests that the PTO incentivizes the overgranting of patents, which reduces quality and negatively impacts consumer welfare.<sup>2</sup> A recent study by the Government Accountability Office also raised questions about the patent granting process and its impact on quality.<sup>3</sup>

A lot has happened in the 15 years since the Commission released its report. Some of the Commission's recommendations were adopted by either Congress or the Courts and had a beneficial impact on patent quality and innovation, but have since been reversed or are now under attack. For instance:

- As the FTC recommended, Congress created an administrative procedure for the PTO to reconsider the validity of issued patents with input from the public when it passed the America Invents Act in 2011. It is a balanced system that improves patent quality by more efficiently removing invalid patents from the system. It has been instrumental in bringing down the excessive and destructive amounts of litigation documented in the FTC's 2016 report on patent

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<sup>1</sup> See, e.g., Comments re: Partnership for Enhancement of Quality of Software-Related Patents. USPTO (2013). <https://www.uspto.gov/patent/laws-and-regulations/comments-public/comments-re-partnership-enhancement-quality-software>.

<sup>2</sup> See Frakes, Michael D., and Wasserman, Melissa F. "Does the US Patent and Trademark Office Grant Too Many Bad Patents: Evidence from a Quasi-Experiment." *Stan. L. Rev.* 67 (2015): 613; and Miller, Shawn P. "Where's the Innovation: An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents." *Va. JL & Tech.* 18 (2013): 1.

<sup>3</sup> US GAO. Intellectual Property: Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity. Report to the Chairman, Committee on the Judiciary, House of Representatives (2016). <https://www.gao.gov/assets/680/678113.pdf>

assertion entities. But proposals have been made recently to weaken it to the point of being useless or to eliminate it entirely.

- The FTC recommended that the courts tighten the legal standard used to evaluate whether a patent is obvious. The Supreme Court did so in *KSR v. Teleflex* (2007) by rejecting the Federal Circuit’s “teaching, suggestion, or motivation” test. But there is a serious question now of whether the Federal Circuit’s case law has effectively undone the Supreme Court’s decision by requiring that a “motivation to combine” be treated as a factual issue.<sup>4</sup>
- The FTC recommended that legislation be enacted to limit willful infringement to those cases in which a defendant has received written notice of infringement or there has been deliberate copying. The Commission recognized that the threat of treble damages based on a loose and unpredictable standard for finding willful infringement was deterring R&D in areas crowded with unclear, often invalid patents, to the harm of innovation. In 2007, the case law evolved in *In re Seagate* to include an objective analysis that addressed many of the harms to innovation that the FTC identified as caused by previous willful infringement doctrine. But the law has now gone backwards. The Federal Circuit’s implementation of the 2016 Supreme Court case *Halo v Pulse Electronics* now makes defendants liable on a vague and subjective “should have known” standard.<sup>5</sup>

The time is ripe for the Commission to revisit these issues and others related to the fundamental and critical problem of improving patent quality. Closely related is the problem that patents, especially those related to high tech products, do not provide clear public notice of what subject matter is protected and what is free to the public to use. As the 2011 *Evolving IP Marketplace* report explained, lack of clarity in patent claims creates uncertainty that can deter investment in R&D. Resolving the scope of unclear claims often involves expensive litigation, which diverts resources and disrupts business operations. And the vast number of patents related to a product makes a thorough review of the landscape impossible. More study of and solutions to these problems are needed.

**The Commission should study the problem of valuing patent portfolios, including portfolios of standard essential patents.**

Over the past 15 years, the FTC has been active on the topic of standard essential patents (SEPs) through multiple enforcement actions, hearings and analysis, including the 2007 report on *Antitrust Enforcement and Intellectual Property* and the 2011 report on *the Evolving IP Marketplace*. Through all of this work, the Commission has carefully approached the need to balance the incentives to innovate provided by SEPs against the very real danger of hold up and its ability to harm consumers.

Debates and disputes concerning the proper understanding of an SEP owner’s obligation to license on fair, reasonable and non-discriminatory (FRAND) terms continue, including litigation asking courts to set royalties on a FRAND portfolio license. While there is a large body of law in which a court decides infringement and validity for a relatively small number of patents and then determines the patentee’s compensation through a damages award, the courts are just now beginning to grapple with the difficult

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<sup>4</sup> Apple v. Samsung (Fed. Cir. 2016) (J. Dyk, dissenting) (“[T]he majority concludes that combinations of prior art used to solve a known problem are insufficient to render an invention obvious as a matter of law. According to the majority, there must be evidence of a specific motivation to combine. Both aspects of these conclusions are contrary to *KSR*.”)

<sup>5</sup> *Western Geco LLC v ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016).

question of how to determine a FRAND licensing rate for a portfolio of hundreds of patents. The question is made especially difficult by the complex patent landscape for high-tech products that usually incorporate multiple royalty-bearing standards, each of which have thousands of patents declared against it held by multiple SEP owners. And of course, every high-tech product is covered by thousands more non-essential patents.

Courts have not yet developed consistent legal doctrines for valuing SEP and non-SEP portfolios that consider the large number of relevant patents and the danger of royalty stacking. The Commission's expertise would lend a valuable perspective to the debate, not only on questions of antitrust law, but also on questions of competition policy and patent law doctrine that require a thorough understanding of the standards landscape, the economic factors that ought to guide the licensing of SEPs and the broader patent landscape for non-standards patents.