August 20, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Innovation Alliance Comments for Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century Hearings, Project P181201, Docket No. FTC-2018-0055

Dear Commissioners:

The Innovation Alliance appreciates the opportunity to submit comments to the Federal Trade Commission concerning the role of intellectual property and competition policy in promoting innovation, in connection with the Commission's upcoming hearings.

The Innovation Alliance is a coalition of research and development-based technology companies representing innovators, patent owners, and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. The Innovation Alliance is committed to strengthening the U.S. patent system to promote innovation, economic growth, and job creation, and we support legislation and policies to help achieve those goals.

We appreciate the Commission's inclusion of intellectual property and competition policy among the many topics for its hearings. Intellectual property is critically important to R&D-intensive firms across countless industries. Innovation consumes vast amounts of time and resources, and carries significant risk of failure, raising its cost. The constitutionally protected patent system envisioned by the Founders, and enacted by Congress in the earliest days of the Republic, creates strong incentives for R&D firms and small inventors alike to engage in the risky business of innovation, by granting them property rights in their inventions, allowing them to control who makes, uses, sells, or imports their patented ideas or products.[1] Legally protecting the rights of inventors to exclude others from making, using, selling, or importing their inventions serves significant pro-innovation, pro-competitive, and pro-consumer functions.

[1] *See* 35 U.S.C. § 271(a).

First, strong patents incentivize risk-taking that leads to innovation. If patent owners expect they will be able to charge reasonable licensing fees in exchange for permission to use their inventions, invention is encouraged. When a fair return is available, patents permit innovators to recoup the investments they make in their R&D enterprise. Strong patent protection thereby perpetuates a cycle that rewards inventors for risk-taking in innovation, and accelerates consumer access to innovative technologies.

Second, patents function as what former U.S. Patent and Trademark Office Director David Kappos has called "the currency of innovation."[2] Patent rights facilitate commercialization, collaboration and follow-on innovation. Patent protection ensures that inventions can be freely bought, sold, or licensed, allowing patent owners to reap the benefit of their inventions, while making inventions available to parties who may be better positioned to commercialize them for consumer or industry use.

Third, patents result in the disclosure of technological advances and facilitate collaboration among inventors, including the development of standards, in a pro-competitive manner.

Unfortunately, over the past decade or so, government policy has placed the interests of companies using patented technology in their products ("implementers") above the interests of inventors and, from time to time, attacked intellectual property rights. Supreme Court decisions over the last decade have made it harder to obtain a patent, easier to invalidate a patent, and harder to enforce or defend a patent. With high invalidation rates in post-grant reviews at the U.S. Patent and Trademark Office, and repeated attempts in Congress to change the patent laws to reduce the value of patents and make them easier to infringe, strong patent rights are under assault.

This weakening of patent protections has encouraged infringement, as companies that use patented technology in their products have less reason to fear being held accountable. Implementers are encouraged to take their chances infringing on patents rather than negotiate a fair license. This behavior is so widespread that it has a name: "efficient infringement." Taken together, these developments have diminished the value of patents, and have contributed to the U.S.'s fall to twelfth place in the world for IP strength, down from tenth last year (and first every year before that) according to the most recent U.S. Chamber of Commerce International Intellectual Property Index.[3]

Competition policy, too, must recognize the importance of patent rights, and their pro-innovation role in facilitating technological growth. The risk to patent holders of over-aggressive antitrust challenges to the legitimate exercise of their patent rights has further enabled efficient infringement. Antitrust policy must carefully balance the need to protect consumers from genuinely anticompetitive assertion of intellectual property rights with the need to ensure that the users and implementers of patented technology do not obtain unfair and anticompetitive

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[2] David J. Kappos, Why America's Patent System Is Not Killing Innovation, *Fortune*, May 8, 2015, http://fortune.com/2015/05/08/why-americas-patent-system-is-not-killing-innovation/.

[3] *See* Global Innovation Policy Center, U.S. Chamber Int'l IP Index, 6th ed., Feb. 2018, at 35, http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf.

bargaining power over innovators as a result of unjustified attempts to restrict the enforcement of valid rights. Employing evidence-based competition policy, fairly enforced by independent government authorities, ensures that companies and inventors that contribute to global standards compete vigorously with one another to ensure that standards represent only the very best technology.

At the same time, when the Commission does consider cases that involve intellectual property rights, we encourage it to resist the temptation to second-guess the USPTO's determination concerning issues of patentability. Whether an invention is patentable under Section 101 or any other provision of the Patent Act is irrelevant to whether the assertion of that patent implicates, much less violates, the antitrust and consumer protection laws within the Commission's jurisdiction.

The antitrust laws exist to protect the competitive process, and thus to protect consumers from anticompetitive behavior. They have only a limited role in regulating the exercise of patent rights. Together, the intellectual property system and the antitrust laws exist to, as Assistant Attorney General Makan Delrahim has said, "maximize innovation incentives while protecting the competitive process."[4] Sound competition policy and enforcement that prevent technology implementers from exercising market power or political influence to the detriment of patent owners are essential to ensuring that free market forces lead to the creation of the best technologies.

The Innovation Alliance looks forward to a vigorous discussion of these issues at the Commission's hearings and stands ready to work with the Commission to ensure that our nation's antitrust policy permits innovation and progress while protecting consumers from anticompetitive business practices.

Sincerely,

Brian Pomper
Executive Director

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[4] Makan Delrahim, Remarks at USC Gould School of Law, Nov. 10, 2017, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.