



Donald S. Clark
Federal Trade Commission
Office of the Secretary 600
Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)

Washington, DC 20580

August 20, 2018

Re: Internet Association’s Initial Comments on the Federal Trade Commission’s Competition and Consumer Protection in the 21st Century Hearings -- Project Number P181201

Dear Mr. Clark:

Internet Association appreciates the opportunity to provide its response to the FTC’s request for comments in advance of the Competition and Consumer Protection in the 21st Century Hearings. These comments generally respond to the Commission’s Topic 8, which is “the role of intellectual property and competition policy in promoting innovation.”

Internet Association is the only trade association that exclusively represents leading global internet companies on matters of public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. We believe the internet creates unprecedented benefits for society, and as the voice of the world’s leading internet companies, Internet Association works to ensure legislators, consumers, and other stakeholders understand these benefits.

Each year, Internet Association members collectively invest billions of dollars on research and development, frequently driving the development of technological products and societal freedoms through their creativity and innovation. Internet Association members collectively own tens of thousands of patents, which they rely upon to protect their substantial investments in research and development. The patent system that supports these investments is about more than affording exclusive protection. It should be flexible, rational, and consistent with needs of the end users of the products and services protected by intellectual property. Intellectual property protection is only one driver of innovation. Most innovators are eager to solve problems, build products, and please their users and customers. Systems for intellectual property protection should never be an impediment to innovation. One source of impediments facing Association members is the unprecedented barrage of patent assertion and litigation—the vast majority of which involve low-quality patents.

Given the substantial experience of its members on both sides of patent enforcement and litigation, Internet Association can offer a balanced perspective on the role of the patent system in promoting innovation. Based on this experience, Internet Association believes the problem of low-quality patents remains an ongoing concern that merits further study. As the



Commission has rightly stated, low-quality patents stifle innovation and injure the public by generating wasteful litigation, creating business uncertainty, and preempting subject matter that ought to be part of the public domain.

Indeed, patent litigation and assertion have risen dramatically over the last decade.¹ The majority of patent litigation today is brought by patent assertion entities (PAEs) and is especially concentrated on information technology.² Small and medium sized businesses are also frequent targets of PAEs, often because they are simply users of technology.³ Despite a moderate, recent drop in the litigation rate, it remains at historic highs. Moreover, changes in litigation procedures, like those recommended in the FTC's report on PAE litigation, while helpful in many respects, can do little to address the problem of low-value nuisance litigation demands aimed at small companies. Preventing vague, trivial and invalid patents from issuing and eliminating those that do issue as efficiently as possible provide the best pathways for addressing that problem.

The Commission's re-engagement on the issue of patent quality would well serve its mission of studying how IP and innovation can best promote competition in the 21st Century. The PTO has set a record for issued patents every year since 2010, when, for the first time, the PTO issued more than 200,000 utility patents.⁴ The number of issued patents has risen dramatically each year since. From FY 2012 to 2016, filings increased 15%. In 2016, more than 650,000 applications were filed—the highest number ever – and the PTO issued over 334,000 patents, also the highest number ever.⁵ Half of all patents have been granted since 1991, culminating in this year's milestone of the PTO issuing the 10 millionth patent.⁶ It is estimated that nearly 3 million patents are in force today.⁷

The impact on consumers of this enormous surge in issued patents, the ongoing crisis of patent quality in information technology sectors, and misuse of low-quality patents remain poorly understood and the subject of a debate. They necessitate further study and proposals for new solutions.

¹ See PwC 2018 Patent Litigation Study <https://www.pwc.com/us/en/forensic-services/publications/assets/2018-pwc-patent-litigation-study.pdf>.

² See Unified Patents 1st Half 2018: Patent Dispute Report ! <https://www.unifiedpatents.com/news/2018/6/28/1st-half-2018-patent-dispute-report>.

³ See Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 485 (2014), ! <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1554&context=facpubs>.

⁴ See U.S. Patent Statistics, Calendar Years 1963-2014, ! http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf ("Grants: Total Utility"). !

⁵ See U.S. Patent and Trademark Office, PTO Performance and Accountability Report for Fiscal Year ! 2016 15, 178 (2016), <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf>.

⁶ See USPTO 10 Million Patents timeline at <https://10millionpatents.uspto.gov/>. !

⁷ See Remarks By Director Michelle K. Lee at the George Washington University School of Law, May 16, ! 2017, <https://www.uspto.gov/about-us/news-updates/remarks-director-michelle-k-lee-george-washington-university-school-law>. !



One aspect of the patent quality crisis merits specific mention. Since the Commission’s ground-breaking report on the patent system in 2003, *To Promote the Progress*, one recommendation that has been adopted by Congress and has had a beneficial impact on patent quality and innovation is now under attack—inter partes review (IPR). As the FTC recommended, Congress created an effective and fair mechanism for administrative review of the patentability of patent claims post-issuance. IPR is now an essential tool for addressing the assertion of low-quality patents and in improving general patent quality. The agency has implemented a mechanism for public challenges to patentability that is faster than the previous program of inter partes reexamination, more flexible than the court system, and ultimately more workable and efficient for patent owners and patent challengers than any prior mechanism. Unfortunately, misleading attacks on the IPR system risk driving changes that could diminish that achievement and increase the harm to consumers caused by invalid patents.

In addition, we are concerned about enforcement issues with respect to standard essential patents (SEPs). Patent holders often commit in the standards development process to licensing patents related to the standard under fair, reasonable, and nondiscriminatory (“FRAND”) terms. Enforcing FRAND commitments is key to preventing patent hold-up. As the FTC previously recognized in its 2011 Report, *The Evolving IP Marketplace*, unless FRAND commitments are upheld, “an entire industry” could be “susceptible” to the “particularly acute” concern of holdup, which can result in “higher prices” and “discourage standard setting activities and collaboration, which can delay innovation.”

Conclusion

Internet Association looks forward to actively participating in the hearings and providing additional comments. We encourage the Commission to consider the overwhelmingly positive benefits our members’ products and services offer to consumers, and the important role that balanced patent policies play in fostering continued innovation and corresponding benefits.

Respectfully submitted,


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Internet Association !