

December 19, 2018

Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

**RE: Hearings on Competition and Consumer Protection in the 21st Century,  
fourth session (Docket No. FTC-2018-0090), Project No. P181201**

To Whom It May Concern:

Eagle Forum Education and Legal Defense Fund, a nonprofit organization founded by Phyllis Schlafly<sup>1</sup> in 1981, has long been engaged on matters relating to American invention, inventors, and patents. We are pleased to comment pursuant to the Federal Trade Commission's (FTC) fourth session of Hearings on Competition and Consumer Protection in the 21st Century, regarding the role of intellectual property (IP) in promoting competition (Docket No. FTC-2018-0090), Project No. P181201.

Our comments focus on the importance of IP in promoting innovation, based upon the core principles of patent protection and reliable private property rights; appropriate ways the government can support innovation; and the best approach for the FTC to exercise its authority where innovation is concerned.

### **Patent Protection, Private Intellectual Property Rights, and Innovation**

The first principles of American intellectual property appear in Article I, Section 8, Clause 8 of the U.S. Constitution. The Founders intentionally empowered Congress to establish exclusive private property rights for inventors and authors to control initially and benefit from the fruits of their intellectual labors. The Founders did so precisely for the purpose of promoting economic gains through the expansion of knowledge and applied industrial arts and sciences. One of the very first laws enacted by the First Congress unleashed an unprecedented, private property rights-based means of generating "the discovery and production of new and useful things," as President Lincoln put it, by uniting "the fuel of interest to the fire of genius."

Ten million U.S. patents later, the benefits to the nation, our economy, society, consumers, and as a spur of innovation in garages, basements, and barns across the country prove the Founders' brilliance. Further, the two-plus century track record of American exceptionalism as the world's innovation leader, with the economic dominance and standard of living to back it up, provides irrefutable evidence that exclusive property rights in one's creations and inventions is the best way to promote progress in the ways that count most.

Patents and intellectual property secure for inventors and creators the right to exclude. A patent secures these exclusive private property rights as a deed to intangible but defined property. These rights may be licensed to others, either exclusively or nonexclusively, or put to commercial, personal, or no use by other means. "Quiet title" is important to assuring IP protection and the ability to enforce those rights against infringers. The right to exclude others

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<sup>1</sup> Phyllis Schlafly was an outspoken advocate of the rights of inventors, emphasizing the importance of those traditional rights to our national prosperity and security. She wrote often about this topic. A compilation of her writings on this topic is *Phyllis Schlafly Speaks, Vol. 4, Patents & Inventions*. Skellig America, 2018 (Ed Martin, Editor).

from using one's innovations and the ability to exercise those rights, including by contract or in court or with the government standing behind IP owners, make IP meaningful.

From time to time, some Americans and government officials have lost sight of the vital importance of innovation to the United States, along with the critical role of exclusive IP rights, which incentivize risk-taking in pursuit of invention and creativity as well as giving private investors confidence in financially backing an IP commercialization project. And from time to time, we are reminded of why IP is a vital ingredient to advancing innovation. "Technological innovation is a mainstay of the American economy," President Reagan's Commission on Industrial Competitiveness reminded us. "It is the foundation of our economic prosperity, our national security, and our competitiveness in world markets."<sup>2</sup> At the center, the commission said, lies the incentive to fund research and development, with no guarantee of any return on investment, that intellectual property provides.

Thus, there is a direct line running from the exclusive private property rights associated with owning what one creates or discovers to the risk-taking underlying innovation that results from the incentives IP rights provide. In the view of Eagle Forum Education and Legal Defense Fund, the first principles of America's patent system are clear: exclusive ownership rights, private property, secure and enforceable title, freedom to operate. These underlying principles of American IP result in what Phyllis Schlafly called the "magic formula [that] unleashed the ingenuity and resourcefulness of man."<sup>3</sup>

### **Government Support for Innovation**

Because, as discussed above, invention, discovery, and creativity are endeavors carried out by private individuals and private-sector entities, the best way the government can support or advance innovation is inhibiting it as little as necessary. The U.S. government should preserve and protect private property rights and free enterprise. The government's role here is to ensure the rule of law, civil peace, limited regulations or other official interference in people's and businesses' lives, and the like. Together, the combination of private ownership and the free enterprise system work their magic, providing the opportunity for Americans to work hard, risk their resources, flourish from their successful creative endeavors, and simultaneously improve their own lot and that of society.

With regard to IP and antitrust, competition agencies and courts must respect the commercialization of private property when IP is involved — and the critical element of exclusivity afforded to IP owners. Competition agencies, especially, must exercise restraint where IP is involved. This approach fosters significant consumer and competitive benefits wrought by the "dynamic competition" model. This is discussed in more detail in the following section. Too often, especially where antitrust is concerned, enforcers and courts behave like a carpenter; when you have a hammer, everything looks like a nail. Wielding the hammer of antitrust, with its per se standards and strict liability, inflicts much damage to innovators trying to exercise their IP rights. A more constructive approach would be for competition agencies and courts more regularly to hold their fire toward IP owners and instead scrutinize implementers and infringers with the hammer of antitrust.

Rather than becoming a tool of foreign competitors, American agencies should exercise regulatory humility in their enforcement decisionmaking and advocate for U.S. firms facing foreign "antitrust as industrial policy" hijinks. For competition agencies to pursue legitimate

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<sup>2</sup> James Edwards, "Property Rights: The Key to National Wealth and National Security," *Conservatives for Property Rights* report, February 2018.

<sup>3</sup> *Phyllis Schlafly Speaks*, p. 4.

conduct by U.S. IP-centric innovators, including those whose patents set technological standards, or to apply undue, inappropriate antitrust scrutiny to standard-essential patent owners sends a dangerous, harmful signal to foreign competitor nations.

Indeed, foreign countries that engage in industrial policy — picking winners and losers with the government manipulating the market — have added “competition” and antitrust to foreign toolkits of industrial policy. China, South Korea, and other nations have cited overly aggressive U.S. antitrust enforcement against American companies exercising their IP rights as the grounds for their nations’ antitrust counterparts to conduct industrial policy by other means. Along with forced joint ventures, IP expropriation, subsidizing their national champion companies, state-ownership of national champions, and more, U.S. antitrust agencies provide an excuse for foreign attacks to use antitrust tools. These foreign entities routinely deny U.S. firms due process, deny fairness and the rule of law, deny access to evidence, and otherwise play to win. They go through the motions of legal procedures to ensure favorable outcomes for their national corporate champions. Thus, U.S. competition agencies, particularly the FTC, must be keenly aware of the ramifications of domestic enforcement decisions on the broader stage and factor those far-reaching consequences into what may seem straightforward.

In addition to enforcement and prosecutorial self-restraint, scrutinizing technology implementers, and actively intervening with foreign “competition as industrial policy” actors on behalf of American companies, there are other ways in which the government can and should seek to promote innovation. These generally fall outside the scope of antitrust, but the FTC and other competition agencies should be aware of and, where able, support them. They include strengthening our patent system and facilitating technology transfer of government-funded research to American entrepreneurs and businesses for commercialization.<sup>4</sup>

Regarding our patent system, congressional, administrative, and judicial efforts have inflicted serious harm on America’s patent system and on inventors. This has been driven in the name of international “harmonization,” which Phyllis Schlafly accurately described as dumbing down America’s system by adopting alien characteristics. These include automatically publishing patent applications 18 months after filing, rather than preserving their confidentiality until a patent has issued. Now, foreign governments and IP thieves alike obtain the technical details of new U.S. inventions before exclusive property rights are secured — directly in conflict with the “patent bargain” the Founders gave us.

Perhaps the single most destructive legislation to become law is the mislabeled 2011 “America Invents Act” (AIA). Among other things, the AIA undermined private property rights by creating the Patent Trial and Appeal Board (PTAB) and its quasijudicial administrative means of invalidating issued patents. The biased manner in which PTAB was implemented has tilted the playing field and thus outcomes in favor of patent infringers and against inventors and patent owners. Recently, the U.S. Patent and Trademark Office has begun to remediate some of the worst elements of PTAB and to reduce some of the uncertainty and lack of “quiet title” surrounding patents, but much ground remains to be made up.<sup>5</sup> The U.S. Supreme Court piled on in *Oil States v. Greene’s Energy Group*, stripping two centuries’ worth of precedents where patent rights are understood as private property rights on par with land and personal property.

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<sup>4</sup> See proceedings of Capitol Hill briefing, “Benefiting from Federal Research Funding: Technology Transfer, the Bayh-Dole Act, Patent Rights, and Society,” hosted by Eagle Forum Education and Legal Defense Fund, Washington, D.C., October 18, 2018.

<sup>5</sup> See comments of Eagle Forum Education and Legal Defense Fund to U.S. Patent and Trademark Office Notice of Proposed Rulemaking regarding changing PTAB’s claim construction standard (Docket No. PTO-P-2018-0036), July 9, 2018.

The courts have also disrupted patentable subject matter (e.g., *Bilski*, *Myriad*, *Mayo*, *Prometheus*, *Alice*), injunctive relief (e.g., *eBay*), patent exhaustion (e.g., *Lexmark*), obviousness (e.g., *KSR*), and more.

The evidence is mounting that these governmental assaults against U.S. innovation have inflicted serious damage. The U.S. Chamber of Commerce's Global Innovation Policy Center annual rankings have seen the U.S. patent system slide from the top spot to 10th place by 2017 and 12th place in 2018. The United States has dropped out of the Bloomberg Innovation Index's top 10; America ranked #1 in 2013, #9 by 2017, and #11 in 2018. The 2018 Global Innovation Index downgraded the United States to 6th place from 4th in 2017. Intellectual Asset Management reports that patent values have fallen 60 percent since the AIA became law. U.S. Startups and Inventors for Jobs (USIJ) has found a shift in investment capital away from IP-centric early-stage ventures to ventures that do not have IP at the core of their business models. From 2004 to 2017, USIJ finds, IP-centered investment fell from 21 percent to 3 percent of total venture capital funding; non-IP ventures' share of investment funding rose over the same period from 11 percent to 36 percent.<sup>6</sup>

With regard to technology transfer, the Bayh-Dole Act has succeeded at deriving practical benefits from federal research funding. The Bayh-Dole Act employs the first principles of intellectual property, discussed above, securing private intellectual property rights and thereby facilitating the commercialization of discoveries that originate from federally funded research. Bayh-Dole enables federal grantees to take sole title in the resulting discoveries and enter exclusive licensing arrangements with those willing to invest private resources into applied research and commercial development. The results are incontestable. Since 1996, Bayh-Dole patents and licensing have meant a \$1.3 trillion increase to U.S. gross industrial output, a \$591 billion increase to U.S. gross domestic product, 11,000 startup businesses, 4.3 million jobs supported, more than 200 FDA-approved drugs and vaccines developed, and over the past 25 years, university research has disclosed more than 380,000 inventions and been granted more than 80,000 patents.<sup>7</sup>

The technology transfer record of federal laboratories and research agencies has fallen well short of that of universities. The Stevenson-Wydler Act requires that tech transfer be a top priority of each federal research agency and laboratory. In the 1980s, the Secretary of Commerce ensured through high-level oversight of government agencies that tech transfer laws were implemented appropriately and that federal agencies utilize the provisions of the Federal Technology Transfer Act to partner with the private sector. The Reagan administration's high-level office effectively supervised the implementation of these laws, stopping a number of international agreements that threatened to give away rights to taxpayer-funded R&D. The Clinton administration diminished this function, which now has fallen into disuse.

There is a performance gap, where federally funded university research results in a licensed patent about five times more often than federal agencies and a patent license about seven times more than the government. University licensing revenue amounted to \$1.78 billion in 2014 from their inventions. Licensing of government inventions totaled royalties of only \$194 million the same year.<sup>8</sup> Commerce Secretary Wilbur Ross and the White House Office of

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<sup>6</sup> See James Edwards, "Make Patents Great Again," Daily Caller, Sept. 18, 2018.

<sup>7</sup> Biotechnology Innovation Organization and Association of University Technology Managers, "The Economic Contribution of University/Nonprofit Inventions in the United States, 1996-2015," June 2017.

<sup>8</sup> Gene Quinn, "Commerce Secretary ready to push update to tech transfer laws to ensure greater commercialization," IPWatchdog, April 20, 2018.

Science and Technology Policy, along with the National Institute of Standards and Technology, are examining how to close this gap and get federal research agencies to return tech transfer to being a high priority. Requiring bureaucrats actively to seek out American companies and close patent licensing deals would improve the return on taxpayer investment, if the government honors the same elements that make Bayh-Dole so successful: secure property rights in private hands, IP exclusivity, and user-friendly processes, but in the federal agencies' case under the watchful eye of the Commerce Secretary.<sup>9</sup>

Thus, the branches of government on one hand should restrain themselves from inflicting harm where IP is involved and on the other affirmatively respect the private property rights that innovators and creators are supposed to have in their creations. Exclusivity and secure property rights in discoveries are paramount to innovation. Contrast the success of the patent exclusivity-oriented Bayh-Dole Act with the devaluation of and uncertainty concerning patents in PTAB. Prudence and awareness of far-reaching consequences from enforcement, advocacy, and adjudicatory decisions are required if government is to advance innovation.

### **Antitrust Authority and Innovation**

While it is understandable that competition agencies might normally look askance at a market player with exclusivity, this is exactly what the Founders, the Constitution they gave us, and the fruit of their vision for intellectual property provide for those who create new property. This exclusive private property right performs the critical function of injecting dynamism into the marketplace and stimulates competition as well as innovation, which in turn creates wealth and jobs and new benefits, and thus grows our economy.

Recognizing the tension between intellectual property and antitrust laws, Shenefield and Stelzer note that these two sets of laws “represent complementary systems, designed in the long run to achieve maximum consumer welfare through the encouragement of both innovation, which is one of the chief engines of competition, and competition understood more broadly.”<sup>10</sup>

Disrupting or weakening an element of the principles underlying our IP system risks diminishing innovation, depriving the United States of its competitive edge, and cementing existing markets in static competition. It is therefore imperative that what the U.S. Patent Office giveth, a competition agency or court not taketh away.

“The goal of antitrust law is to protect free market competition and thereby consumers, but if misapplied, it can cause great harm to innovation, the competitive process, and the consumer,” Assistant Attorney General for Antitrust Makan Delrahim warns.<sup>11</sup> The reason is the dynamic competition that innovation causes, if it is not constrained by overly restrictive application of antitrust laws to efforts to commercialize IP-protected discoveries, inventions, and creations.

Of course, antitrust laws serve an important function. They promote market-based competition and protect consumer welfare. These laws appropriately maintain a level playing

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<sup>9</sup> Comments of Eagle Forum Education and Legal Defense Fund to National Institute for Standards and Technology Request for Information, Federal Technology Transfer Authorities and Processes (Docket No. 180220199-819-01), July 26, 2018.

<sup>10</sup> John H. Shenefield and Irwin M. Stelzer, *The Antitrust Laws: A Primer*, 3rd ed. Washington, D.C.: AEI Press, 1998, p. 83.

<sup>11</sup> Makan Delrahim, remarks at University of Southern California Gould School of Law, November 10, 2017.

field, once a market is established, and referee the rules of the game that ensure competitors on the field compete, compete fairly, and do not throw the game. To repeat, the underlying assumption of antitrust law is an established market. Antitrust laws should allow a company to compete its way into a dominant position; there should be room for a market player to compete fairly and squarely to become the commercial or industrial equivalent of the New York Yankees, with a dominant 27 World Series victories, or Alabama Crimson Tide on the gridiron. The risk-and-reward aspect of free enterprise should allow the benefit of the fruits on one's labor. The antitrust laws must allow for the dynamism that innovation brings to the market.

"New inventions do not appear out of the ether," Mr. Delrahim says, "and excessive use of the antitrust laws . . . can overlook and undermine the magnitude of investment and risk inventors undertake . . . . Every incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate. I therefore view policy proposals with a one-sided focus [favoring implementers] . . . with great skepticism because they can pose a serious threat to the innovative process."<sup>12</sup>

There must be plenty of room for IP exclusivity to perform its effects of injecting dynamism in the market — creating new markets out of commercializing the initial exclusive discovery or creation, spurring others to compete, and bringing consumers new products and services from which they benefit and enjoy. In other words, dynamic competition must be kept front of mind and not stifled by government action, even if well-intentioned.

The dynamic competition model involves unfettered ability to exercise one's IP rights, in order to create a new commercial or industrial market, thereby expanding the market and enticing new competition. The Reagan industrial competitiveness commission's Research, Development and Manufacturing Committee (RD&M) commended the Reagan administration's adoption of the rule of reason standard of antitrust scrutiny with respect to patent licensing, thus replacing the inappropriate per se standard that had frustrated America's economic dynamism that arises from IP.

RD&M reported that "the very act of licensing is procompetitive rather than anticompetitive." This postulate lays the foundation for "view[ing antitrust] restrictions in light of all the surrounding circumstances, especially the impact on competitiveness."<sup>13</sup> IP commercialization efforts do not guarantee success. Developing new products and markets are arduous, expensive, and risky endeavors. One may be the exclusive player in a nascent market, but a market starts from nothing. Treating the IP-based dominant player in a new market niche as if it were some "robber baron" in a highly established sector employing cartel-like behavior to restrain trade and harming consumers through bait-and-switch tactics is wrong-headed and harmful to innovation and competition.

Whether such efforts involve licensing or other approaches, they deserve the freedom to operate, including freedom from antitrust agencies and courts depriving IP rights and crushing their economic benefits when the IP protections are supposed to guarantee exclusivity. RD&M observed, "Not only do licenses introduce more competitors into the marketplace, but insofar as they increase the patent holder's reward, they encourage the patent system itself and therefore the incentive for R&D." IP rights promote a virtuous circle, whereas inappropriate antitrust application against IP owners feeds a static market.

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<sup>12</sup> Ibid.

<sup>13</sup> President's Commission on Industrial Competitiveness, Committee on Research, Development, and Manufacturing, "A Special Report on the Importance of Intellectual Property Rights," *Preserving America's Industrial Competitiveness*, Appendix D, October 1984.

Thus, the most appropriate route for the FTC's antitrust enforcement, policy, and litigation agenda would be giving deference in all instances to the exercise of one's IP rights. This includes respecting IP owners' exercise of the right to exclude, including where standard-essential patents are involved. We urge the FTC to model such an approach where IP is concerned in connection to potential antitrust issues. We encourage the agency to display what Mr. Delrahim calls "enforcement humility." He notes, "[A]s enforcers, we have an obligation to ensure that antitrust policy remains sound, so that consumers enjoy the benefits of dynamic competition."<sup>14</sup> We strongly agree.

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Eagle Forum Education and Legal Defense Fund appreciates the FTC's inquiry into the relation of intellectual property and antitrust, in connection with fostering U.S innovation. We urge the FTC — and all competition agencies and courts — to regard innovation as the result of private parties exercising their right to exclude others with respect to their new inventions and discoveries.

Understanding that intellectual property rights constitute the essence of dynamic competition will serve as a North Star to guide due constraint and indeed deference to innovators, whose creativity leads to development of new markets, new wealth, and new benefits for consumers and competitors.

Sincerely,

/s/

Ed Martin  
President  
Eagle Forum Education and Legal Defense Fund  
7800 Bonhomme Ave.  
Saint Louis, MO 63105

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<sup>14</sup> Makan Delrahim, remarks at the Leadership Conference on IP, Antitrust, and Innovation Policy, April 10, 2018.