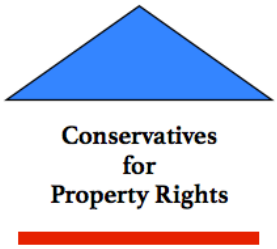

December 20, 2018

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. 181201)

To whom it may concern:

Conservatives for Property Rights (CPR), a coalition of policy organizations representing tens of thousands of Americans on a wide array of private property rights issues, welcomes the opportunity to comment in regard to the Federal Trade Commission's (FTC) fourth session of Hearings on Competition and Consumer Protection in the 21st Century, focused on the role of intellectual property (IP) in promoting competition (Docket No. FTC-2018-0090, Project No. 181201).

CPR appreciates the FTC's examining the role IP fills in stimulating not only innovation and creativity, but providing the foundation of economic activity built on the new private property and the property rights inherent in the newly created property, which patents, copyrights, and other IP secure.

At its heart, innovation comes from the incentives associated with private property rights. The God-given right to benefit from the fruits of one's labor, regardless of the form of the property created or the form of IP that protects it, leads to discovery or creativity and commercial use, followed by competitive new markets and industries. Without IP protection, these incentives and benefits are far reduced.[1]

Alas, American IP — our patent system in particular — has suffered serious undermining of the essential private property rights basis at its heart. These assaults include undue diminution of the presumption of patent validity, weakened ability to assert patents and enforce copyright and patent rights, barriers to obtaining justice against patent and copyright infringers, judicial narrowing of patentable subject matter, and even loss of the key understanding that patents secure private property rights. Further, the misplaced application of antitrust enforcement against the legitimate exercise of rights of exclusivity contributes to a weakened IP regime that has created far more new markets, competition, innovation, and national competitiveness than the antitrust laws have fostered.

Our comments, including the description of foundational U.S. IP principles, focus on the importance of IP in advancing innovation and on the government's role in connection with innovation. We also discuss the appropriate balance of IP exclusivity and antitrust.

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[1] Council of Economic Advisors, "The Opportunity Costs of Socialism," October 23, 2018.

Intellectual Property's Role Stimulating Innovation

Uniquely under the U.S. Constitution, the Founders provided a means of guaranteeing to inventors and creators the exclusive control of their creations while providing society benefits from the associated knowledge. IP rights in the United States were intentionally democratized, going to the true inventor or creator, whoever he or she may be.

Patents, copyrights, and trademarks are akin to deeds on real estate, securing clear title to specific property. They constitute intangible property that has traditionally been and inherently should be enforceable, transferrable, and salable. Only, in the case of IP, the property is the fruit of one's intellectual labors. As Abraham Lincoln observed, the U.S. patent system's secure private property rights and exclusive use of one's own inventions "added the fuel of interest to the fire of genius, in the discovery and production of new and useful things."

The social contract of the "patent bargain" (or IP bargain more generally) consists of an inventor or creator gaining exclusivity (clear title of ownership) over his or her discovery or creation for a set period of time; society gains access to the new knowledge associated with the newly created private property, once the discovery or creation is verified to be new and original. This trade of exclusive property rights for public disclosure, protected by what is essentially a registered deed to the new creation, "promote[s] the progress of science and useful arts."[2]

The Founders sought to stimulate private initiative in order to spur further invention and creativity and, ultimately, economic flourishing that benefits both creators and society. By providing private property interest in discovering and creating new knowledge, along with the ability to secure those private property rights, inventors and creators could seek economic gain for themselves and their families. Meanwhile, other equally incentivized inventors and creators could build upon the new knowledge right away, during the discovery's or creation's exclusivity, and improve upon or expand the state of a particular art or field of knowledge.

Because of this democratized ability to secure one's intellectual property (as opposed to Old World crony capitalism by monarchs), the United States has benefitted from an equal-opportunity patent and IP system.[3] It led to new technologies and new tools, labor-saving devices and the development of a manufacturing base, while the nation's economy grew as a direct result of IP-secured property rights. Thus, creative individuals won, society won, and our country won. America saw the creation of multiple "disruptive" technologies (steam engines, new forms of fast transportation, electrification, mechanized agriculture, telecommunication, etc.),[4] a rising standard of living (e.g., higher per-capita income, longer life, improved health, greater convenience, time savings), wealth creation, new and better-paying jobs, and widespread benefits from the many new products and industries thus created.

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[2] U.S. Constitution, Article I, Section 8, Clause 8.

[3] B. Zorina Khan, The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920. Cambridge University Press, 2014.

[4] See Phyllis Schlafly, Ed Martin, ed., "How American Inventors Changed the Way We Live," chapter 3 of Phyllis Schlafly Speaks: Patents & Invention, vol. 4. Skellig America, 2018, pp. 16-49.

Under constitutional private property rights protections, including those guaranteed by the Fifth and Seventh Amendments, the Founders' clear intent is to tilt the presumptions and safeguards decidedly in favor of property owners, including owners of IP, against both the government and private interests. Thus, if someone makes, uses, sells, or imports an owner's IP, that owner is supposed to have the right and the ability to exclude the infringer from such unlawful use. Federal courts have traditionally enabled IP owners to enforce their right to exclude in intellectual property matters on the same basis as the enforcement of other forms of property's ownership rights. Such foundational matters must be understood, preserved, and protected, regardless of modern economic and legal theories whose utility may be limited or misplaced in comparison with the compelling historical record of America's economic gains, becoming the world leader in innovation.[5]

Inherent property rights to one's own creations and discoveries cannot and should not be regarded as or treated differently from other private property rights. Primarily, the temporary period of exclusivity before the property enters the public domain differentiates IP from other forms of property. The broad-based innovation our IP system has stimulated attests to the importance of intellectual property protection and the general applicability of these laws across industries and market types.

Because of a fairly recent change in our patent law, which starts a patent term from date of filing an application and displaces the American convention of beginning a patent's term upon issuance, along with the steady growth of the regulatory state, it is appropriate to extend the period of exclusivity for adversely affected technological areas. The more sophisticated an invention, the longer the patent prosecution takes, the more extensive the regulatory hurdles to get to market, then the less patent term the patent owner has to develop product and market. In such arts and sciences as nuclear energy, biotechnology, and pharmaceuticals, extraordinary regulatory burdens further drain patent life. Thus, patent term extension, such as that afforded by the Hatch-Waxman Act for biopharmaceuticals, appropriately mitigates some lost effective patent protection.[6]

To keep sufficient incentive to pour private investment into research and development, particularly in sophisticated areas of technology and standard-setting patents, adequate exclusivity rights must be afforded to inventors in these sectors. "Continued innovation depends on recovery of R&D costs. This is particularly true for new technologies where the risk is great and the research costs are high," President Reagan's Commission on Industrial Competitiveness said. "Frequently, cost recovery can occur only when innovators are guaranteed exclusive rights to innovations in the marketplace."[7]

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[5] See James Edwards, "Property Rights: The Key to National Wealth and National Security," Conservatives for Property Rights report, February 2018.

[6] The Hatch-Waxman Act also provides "pioneer" pharmaceutical makers a period of regulatory exclusivity to clinical data, separate from patent exclusivity. Both forms of IP are complementary; they incentivize innovation, while promoting competition once exclusivity expires. See chapter 11 of David Adams et al., Food and Drug Law and Regulation, 3rd ed. Washington, D.C.: FDLI, 2015.

[7] 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.

Moreover, innovation continues even after a product has reached the market, generating important improvements that bring real benefits for consumers. IP protections are critical in driving this continued innovation and incentivizing the substantial R&D efforts needed to develop subsequent innovations.

Therefore, at its core, intellectual property's part in advancing, protecting, and supporting innovation rests upon the foundation of exclusivity and private property rights. The proper role of the government in advancing innovation is to preserve and respect the private property rights-based design of U.S. IP. Secure, enforceable IP rights provide individuals, investors, and companies the certainty necessary to assume the associated risks of trying to move a protected discovery or creation to market. The essential ability to keep others off one's intellectual property — to exercise the right to exclude — enables the development of new industries and markets, and thereby stimulates innovation in the new art or science, which leads to competition. It is the duty of government vigorously to safeguard exclusive IP rights. Without reliable IP rights and the ability to enforce those exclusive rights, the Founders' intent to encourage democratized creative flourishing is undermined, innovation suffers, and America loses out.

Innovation, IP, and Competition

It is important to promote competition by ensuring rules of the road for competitors and the ability of the marketplace to operate fairly. Integral to regulation and enforcement must be competition agencies' recognition and proper understanding of the roles of innovation and intellectual property in a growing, thriving market economy. Applying the appropriate approach to mature versus emerging industries and markets is paramount, if consumer and competitive interests are to be served.

IP, notably copyrights and patents, secure exclusive, private property rights to those who create or take title to new property. The essence of IP rights is the right to exclude others from making, selling, using, or importing their discoveries, inventions, or creations without permission as well as to compensation that is acceptable to the IP owner. Antitrust laws are intended to promote competition in the marketplace, specifically by protecting consumers against monopolies, price-fixing, restraint of trade, and anticompetitive combinations that concentrate market power to the detriment of consumers and a competitive marketplace.[8]

By definition, exclusive ownership and sole control of the use of a commercial product, process, or other good represents a single player in a market. However, properly understood, property protected by IP is not a monopoly in the antitrust sense. Market power in a nascent market is like being a lone fish in a puddle. The puddle may dry up. And the market behavior of such an exclusive actor is not anticompetitive, monopolistic, or harmful to consumers. Rather, one who discovers something new, such as a new device for extracting raw materials more efficiently or safely, or develops standard-setting technology, such as 5G semiconductors on which next-generation telecommunications will seamlessly interoperate, secures exclusive

[8] "Monopoly" is used here to mean the willful acquisition of market power to exclude competitors from an established market, using unfair means designed to harm competition itself and that harms downstream consumers; the term excludes the exercise of intellectual property-protected exclusivity, including standard-essential IP.

rights through IP protection and facilitates commercializing the invention — advancing progress in science and the useful arts as a participant in dynamic competition.

"Dynamic competition" is the appropriate way to approach questions at the nexus of innovation and competition. Black's Law Dictionary reflects the dynamic aspects in new and established markets, noting that gaining or maintaining market power inappropriately is "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[9] Dynamic competition-oriented analysis guides antitrust enforcement decisions in a manner that avoids murdering emerging technologies, product lines, industries, and markets in the crib.[10] As the Presidential Commission on Industrial Competitiveness wrote, "IP rights actually expand the market through initial exclusivity and result in eventual-competition once the patent expires." A dynamic-competition approach to antitrust entails applying rule-of-reason analysis whenever IP-protected market action is involved and recognizing the asymmetric advantages favoring implementers over innovators.

Exclusionary conduct connected with IP commercialization pursuant to exercise of one's IP rights should receive deference and presumption of the conduct's legitimacy. No market is static. Market participants respond to changes in the marketplace. Even mergers of large players represent changes to which existing and new competitors respond so as to gain customers. IP-based market activity often introduces important new developments that cause more-dynamic changes than do shifts among players in an established market where IP protection is absent or of less importance.

Adding dynamism to markets, innovators produce benefits for consumers. As counterintuitive as it may seem, the introduction of a new, IP-protected technology and its commercial open-field advantage lay the foundation for new industries, new markets, and new innovation that can quickly stimulate the responses of would-be competitors. Innovators and creators contribute new knowledge; new products and services; the avenues for new wealth creation, industrial growth, and national competitiveness; and spur new entrants into that space. Thus, despite the exercise of the right to exclude during IP protection, the dynamics of the resulting new market landscape benefit consumers with access to brand-new products and services, as well as attract new market entrants, even while the first-mover still enjoys exclusivity — competitors emerge who have improved upon the initial entrant's product or developed a competitive alternative.

Dynamic competition often involves innovators seeking implementers to use, make, or sell their inventions. This division of labor strengthens the emerging market and serves to lay the groundwork for future competition. Many, if not most, inventors have looked to others with the manufacturing abilities, sales channels, etc. to commercialize their inventions. This is the norm, as Sokoloff and Khan have reported.[11]

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[9] Black's Law Dictionary, 6th ed., St. Paul, Minn.: West Publishing, 1990; "Monopoly," p. 1007.

[10] Experts who have studied and elaborated on the economic concept of dynamic competition include U.S. Assistant Attorney General Makan Delrahim, former FTC Acting Director Maureen Ohlhausen, and FTC General Counsel Alden Abbott.

[11] Sokoloff, Kenneth L. and B. Zorina Khan, "Intellectual Property Institutions in the United States: Early Development and Comparative Perspective," World Bank Summer Research Workshop on Market Institutions, Washington, D.C., July 17-19, 2000.

And those innovators, who bore the up-front costs and uncertainty of whether their efforts would actually result in a viable invention, require payment. Royalty payments pursuant to a license compensate the creator or innovator for sunk costs long spent, as well as replenish R&D coffers for the next round of innovations. Similar to the seeming stratospheric pay for elite professional athletes, whose years for a playing career are quite limited compared with a 40-year average career of nonathletes, patent owners enjoy exclusivity for a limited period, after which others may use, sell, and make these inventions without having to obtain a license.

Whether innovators manufacture their own IP-based products, are nonpracticing entities, or license standard-setting technologies is irrelevant, with respect to the nexus of antitrust, IP licensing, and royalty rates. Those who use patented technology in their products ("implementers") only have invested in the potential deal on the product and market development side of the equation; that is, their "skin in the game" is relatively little and after the fact. The huge disparity between innovators' and implementers' "skin in the game" regarding a patented technology calls into question patent holdup theory and illustrates the incentive patent owners have to strike deals with implementers, regardless of innovators' business model. Theoretical "patent holdup," or refusal to license patents at a rate potential licensees demand, strains credulity in comparison to the actual asymmetric incentive and leverage implementers enjoy from "patent holdout," where would-be licensees refuse to license a patent at an acceptable rate. Assistant Attorney General Makan Delrahim, the head of the Department of Justice Antitrust Division, is instructive: "Innovators make an investment before they know whether that investment will ever pay off. . . . If the implementers hold out, the innovator has no recourse, even if the innovation is successful.

"In contrast, the implementer has some buffer against the risk of hold-up because at least some of its investments occur after royalty rates for new technology could have been determined. Because this asymmetry exists, underinvestment by the innovator should be of greater concern than underinvestment by the implementer."[12] Thus, benefits to consumers and competition derive from allowing market-based, deserved reward in the risk-and-reward equation for innovators. Antitrust scrutiny should apply more closely to implementers, whose asymmetric advantages outweigh those of innovators in licensing and SEP matters. Not only are implementers late-comers, they hold undue advantage from the market power represented by "holdout" conduct.

Further, Mr. Delrahim has observed, "[C]ompetition and consumers both benefit when inventors have full incentives to exploit their patent rights."[13] This echoes President Reagan's Commission on Industrial Competitiveness, which reported that "the very act of licensing is procompetitive rather than anticompetitive," justifying "view[ing antitrust] restrictions in light of all the surrounding circumstances, especially the impact on competitiveness." This blue-ribbon commission continued, "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."

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[12] Quoted in James Edwards, "Delrahim Doctrine Resetting the Patent-Antitrust Debate," Inside Sources, July 11, 2018.

[13] Quoted in James Edwards, "Order of the New Day: IP Rights in Dynamic Competition," IPWatchdog, June 10, 2018.

Regarding dynamic competition relative to IP and antitrust, those who build a better mousetrap and convince consumers or standard-setting organizations of its superiority deserve to have their duly acquired market power respected as the will of the invisible hand, not presumed to be prima facie evidence of untoward conduct, due to the dynamic market effects it may have and the new wealth it may create. The very creation of new intangible property and commercializing it with any degree of success attests to the front-end investment in research and development — with zero guarantee of success — and the strong presumption of legitimacy the IP owner should receive from competition agencies and courts.

Mr. Delrahim explained: "[P]atents are a form of property, and . . . the fundamental right of intellectual property, namely, the right to exclude, [is] one of the most important bargaining rights a property owner possesses. Rules that deprive a patent owner from exercising this right — or processes that dilute the meaning of this right — can undermine the underlying incentives to innovate. It is a perverse result indeed when the misapplication of the competition laws results in less innovation, less competition, and ultimately, fewer consumer choices. This is why . . . competition law enforcers should exercise humility and enforce the competition laws in a manner that best promotes dynamic competition for the benefit of consumers."[14]

Unfortunately, the FTC fell short of demonstrating enforcement humility, or even enforcement prudence, in January 2017. This most unfortunate and destructive action runs diametrically opposite to a proper appreciation of dynamic competition and IP rights of exclusivity. In a rare written dissent, Commissioner Maureen Ohlhausen rebuked her fellow commissioners' decision to press an 11th hour "enforcement action based on a flawed legal theory (including a standalone Section 5 count) that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine U.S. intellectual property rights in Asia and worldwide."[15] In the interest of advancing innovation, respecting property rights and the rule of law, and adhering to appropriate exercise of official powers, we urge the FTC never to proceed in such a roughshod, abusive manner again.

Therefore, exercising the right to exclude under one's IP protection should receive broad latitude from antitrust enforcers and courts, while "patent holdout" and similar questionable conduct by IP implementers should face closer antitrust scrutiny. This approach shows respect for the patent bargain. It shows respect for private intellectual property rights. It shows respect for the dynamism of the market, which owes its expansion to innovators. For antitrust enforcement to assault these crucial foundations is to put the official thumb on the scales against innovators exercising their property rights and for those who would merely implement the new technology, without bearing the up-front risks and costs.

Internet Platforms and Intellectual Property

The Internet was made in America, and it has transformed how we communicate, conduct commerce, and entertain ourselves. But recent dominant Internet platform-related scandals have demonstrated that cyberspace – like any space – can be used for harm. This

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[14] Ibid.

[15] Dissenting Statement of FTC Commissioner Maureen K. Ohlhausen in the Matter of Qualcomm, Inc., File No. 141-0199, January 17, 2017.

dynamic is familiar to rights holders, who have long struggled to protect their creations and inventions from pervasive online theft.

From the time of Napster and Megaupload to today, stealing movies, music, and more has deprived creators of the opportunity to take full advantage of the Internet's potential by depriving them of compensation for their work. Indeed, perfect copies of creative and innovative works that in many cases took years and millions of dollars to develop, can be disseminated instantly, limitlessly, and for virtually no cost. Enforcing one's IP rights online poses a daunting and expensive challenge. One estimate found that foreign IP theft alone costs the U.S. economy up to $600 billion a year.[16]

Persistent and growing Internet theft can in part be attributed to a lack of accountability by dominant online platforms. Section 512 of the Digital Millennium Copyright Act of 1998 (DMCA) granted these companies immunity from liability for infringing content carried on their services if they comply with limited obligations to remove the infringing content once notified by rights owners. But the Internet of today looks little like the Internet of 1998, which was dominated by companies like AOL, Prodigy, and GeoCities. Today, creators must play an endless game of "whack-a-mole" by sending millions of notices to online service providers only to see their works reappear virtually immediately. The scale of the problem is staggering. Google alone processed close to 900 million notices from copyright owners in 2017.

This state of affairs chills creativity and innovation. For example, some platforms pay inordinately low royalty rates for music available on their streaming services — in large part because songwriters are competing with illegal free copies of their work. And innovators suffer, too. In a 2015 letter to shareholders, Netflix CEO Reed Hastings said "[p]iracy continues to be one of our biggest competitors. [Its growth] … is sobering."

What's more, piracy puts consumers at risk. Online safety groups such as the Digital Citizens Alliance have found that nearly 1/3 of piracy sites infect their users with malware, thereby putting consumers at risk for identity theft, fraud, ransomware, and more.

To address the persistent and growing problem of online piracy, recommended in CPR's recent report "Property Rights: The Key to National Wealth and National Security: Restoring 'Morning in America' to Regain Industrial Competitiveness" is that Congress should "[s]trengthen and update the 'notice and takedown' process of the Digital Millennium Copyright Act to better protect creative works online. Require Internet platforms to keep infringing content from reappearing on their services once notified of its existence and encourage them to work more collaboratively with creative rights holders to reduce massive online IP infringement."

While the FTC cannot update the DMCA, it can encourage better behavior from online platforms and use its consumer protection authority to go after piracy device sellers and site operators, and educate consumers about the dangers online IP piracy represents to them and their families.

For too long, dominant platforms have eschewed any responsibility for harmful conduct they enable, including IP theft. It is time for the FTC and other government entities to help

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[16] Commission on the Theft of American Intellectual Property, "The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy," National Bureau of Asian Research, February 2017.

diminish illegal conduct online, thereby promoting creativity, innovation, jobs, and consumer welfare.

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In conclusion, Conservatives for Property Rights appreciates the FTC's consideration of the unique, critical part IP plays in innovation.

In connection with the national interest in antitrust humility in the face of IP commercialization, the report published by Conservatives for Property Rights titled "Property Rights: The Key to National Wealth and National Security" elaborated on many of the themes discussed herein. Its recommendations included: "Amend antitrust laws so as to defer to the exclusivity a patent confers. Bar antitrust treatment when a U.S. patent is being commercialized, including licensing." It further recommended: "Require U.S. agencies closely to monitor, intervene, warn against, and sanction foreign abuse of 'competition' laws and proceedings, and other unfair trade practices. Have U.S. officials present at regulatory, judicial, and other proceedings against U.S. firms; intervene in proceedings when unfair or biased treatment is perpetrated against a U.S. company." The context of these recommendations deserves brief discussion.

IP directly contributes to building what President Reagan referred to as "sunrise industries," such as biotechnology and information technology. Today's sunrise industries include 5G wireless communications technology, immunotherapy, computer-laden medical devices, and artificial intelligence. Their U.S. success depends on the ability to protect and enforce their makers' IP rights. The payoff comes in the benefits to consumers, as well as the U.S. skilled jobs they create, the new wealth they generate, the American industrial footprint with suppliers and other indirectly connected jobs produced, and importantly the competitive technological, economic, and national security edge the United States gains from our private-sector innovators' research and development in these key areas. To lose sight of the bigger picture and err on the side of punctilious antitrust application is like the hollow victory of "peace in our time" that British Prime Minister Neville Chamberlain obtained from Adolph Hitler; the war came anyway and Britain suffered mightily. Only, in this instance, the United States would be the loser to an aggressive, unbounded, conniving China's seizing the global leadership spot in critical technologies.

American innovators invest substantial time, effort, and money into inventing or creating and commercializing a new IP. It is in the best interests of the United States that government competition agencies and courts give due respect to exclusive IP rights and not treat the exercise thereof as if this exclusivity is no different from the improper anticompetitive behavior of monopolists.

The FTC must promote the dynamic competition that IP produces, account for the asymmetric vulnerability of IP owners in licensing situations, show enforcement humility, and scrutinize IP implementers whose inordinate market power more closely reflects the ability to choke off "disruptive" new entrants. This approach is in the best interest of the American people.

Respectfully,

James Edwards
Executive Director