



American Intellectual Property Law Association

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VIA ELECTRONIC SUBMISSION THROUGH PORTAL:

<https://www.ftc.gov/i-would/file-comment/open-comment>

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

RE: Supplemental Comments on Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century: Discussion of Innovation and IP Policy, October 23-24, 2018

The American Intellectual Property Law Association (AIPLA) thanks the Federal Trade Commission (FTC) for conducting Hearing #4 on Competition and Consumer Protection in the 21st Century, with a Discussion of Innovation and IP Policy on October 23-24, 2018, and for this opportunity to supplement our comments made during the hearing and prior written comments submitted on August 20, 2018.

AIPLA is a national bar association of approximately 13,500 members engaged in private or corporate practice, in government service, or in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our membership represents both owners and users of intellectual property, big and small, across all sectors of the economy.

Our mission includes helping establish and maintain fair, balanced, and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

At the outset, we want to note two data points that serve to highlight AIPLA's concern about the state of protection of intellectual property in this country. This October, the Nobel Prize in Economics was awarded to Professor Paul Romer of NYU for his important work concerning the connection between economic growth and innovation, and the role of patent protection in incentivizing innovation.¹ And earlier this year, the U.S. Chamber of Commerce's International IP

¹Ben-Achour, Sabri, "How Nobel Prize winner Paul Romer redefined economics," North Carolina Public Radio (October 8, 2018), <http://www.wunc.org/post/how-nobel-prize-winner-paul-romer-redefined-economics#stream/0>

Index ranked the U.S. 12th in the world in the category of patent protection²—a disappointing turn of events for a country that has traditionally led the world in this area and championed intellectual property rights.

AIPLA understands antitrust enforcers sometimes refer to “innovation” as “dynamic competition.” We commend modern U.S. antitrust law for recognizing that “competition” and “innovation” are generally synonymous, and that innovation-based competition is equally as important as the more traditional static “price competition”.

In order for the U.S. to maintain competitiveness and leadership in the global marketplace, it is important to support innovation by having a strong patent system that enables a sustainable return for investment in research and development. Innovators in high-technology industries spend many billions of dollars on high-risk R&D. These innovators face substantial risks that their R&D will not succeed, and that their R&D expenses will not be rewarded. Ensuring a strong patent system allows innovators to be more confident that they will be able to obtain a return on their investments, should they successfully develop new technologies. Without this promise of a return, there would be far less incentive to invest in R&D and create these new technologies. Mindful of that, AIPLA believes antitrust agencies need to be careful not to adopt policies that devalue patents and other forms of intellectual property (“IP”) or that facilitate infringement of IP rights.

We are encouraged that the current U.S. Administration recognizes this basic principle. For example, in a recent October 4 speech³, Vice President Pence described efforts by foreign governments to obtain American intellectual property through “theft of American technology,” and the implications of that for U.S. businesses. Officials at the U.S. Trade Representative (USTR) are currently working overtime in an attempt to thwart such efforts. Not only is such leadership important domestically, but AIPLA urges the Commission to be mindful of the overseas implications of your statements, policies and enforcement actions, because they are heard loud and clear across the world.

More specifically in antitrust circles, AIPLA notes that a year ago then- FTC Chairman Maureen Ohlhausen’s speech “Strong Patent Rights, Strong Economy”,⁴ recognizing the fundamental role that patent rights play in promoting innovation. Similarly, we agree with her recommendation that “policymakers should take an economically and empirically grounded approach to IP issues”. It is

² U.S. Chamber of Commerce Global Innovation Policy Center, U.S. Chamber International IP Index, at 35 (February 2018) http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf (showing that the United States falling to 12th relative to other countries in the category of Patents, Related Rights and Limitations).

³ Remarks by Vice President Pence on the Administration’s Policy Toward China, available at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>

⁴ See Strong Patent Rights, Strong Economy (October 13, 2017) available at https://www.ftc.gov/system/files/documents/public_statements/1264483/ohlhausen_-_hillsdale_speech_10-13-17.pdf

our hope the FTC will continue this line under the leadership of Chairman Simons, as the stakes in this area are very high.

AIPLA also points out the statements by the Assistant Attorney General for Antitrust, Makan Delrahim, who reminded us that patents are “enshrined in Article I, Section 8” of the Constitution, and that the “exclusive rights” described therein “importantly and necessarily include the power to exclude”.⁵ AAG Delrahim has warned of the misapplication of the antitrust laws to punish the legitimate exercise of intellectual property rights. AIPLA encourages the FTC to equally subscribe to this basic principle and recommends that the sister U.S. antitrust agencies continue to work together in this area.

The Shifting Landscape of U.S. Patent Law and Practice

A number of major patent law changes took place after the FTC issued its 2003, 2007 and 2011 report involving intellectual property, including:

1. Section 101 case law

In three Supreme Court decisions issued between 2010 and 2014 – *Bilski*, *Mayo Collaborative Services* and *Alice Corp.*⁶ – the U.S. Supreme Court has distorted the patent eligibility determination process under Section 101 of the Patent Act.

In a May 2017 Report,⁷ the AIPLA expressed concern that the Supreme Court’s new, subjective interpretation of patent eligibility law is undermining the fundamental principles underlying the Patent Act, Title 35, on which our modern innovation economy rests.

Section 101 of Title 35 was intended as an enabling provision, identifying particular categories of subject matter that qualified for patent protection. It was not intended to provide the standard for deciding whether a particular technical advance should receive patent protection.⁸ Rather, “Sections 102, 103, and 112 ... were intended to provide a yardstick for judging novelty, non-

⁵ See page 6 of Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, TAKE IT TO THE LIMIT: RESPECTING INNOVATION INCENTIVES IN THE APPLICATION OF ANTITRUST LAW, Remarks as Prepared for Delivery at USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing (November 10, 2017) available at <https://www.justice.gov/opa/speech/file/1010746/download>.

⁶ *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Alice Corp. Pty, Ltd. v. CLS Bank Int’l*, 134 U.S. 2347 (2014)

⁷ Available at https://www.aipla.org/docs/default-source/advocacy/aipla-legislative-proposal---patent-eligible-subject-matter.pdf?sfvrsn=7e208efe_2

⁸ *Data Engine Technologies LLC v. Google LLC*, Fed. Cir., No. 17-1135, 10/9/2018, at 20; (the patent eligibility determination may not be reduced to merely asking whether anyone has used the technology before, which is a question reserved for §§102 and 103); <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/17-1135.Opinion.10-9-2018.pdf>.

obviousness, and the sufficiency of disclosure in the specification and claims”.⁹ The Supreme Court’s subjective rules of patent ineligibility have increasingly blurred these statutory functions, causing significant uncertainty in the law and potentially driving innovation investments abroad. The present uncertainty has weakened the U.S. patent system and discouraged investments (particularly domestic investments) in areas ranging from software to life-saving diagnostic tools and therapeutic medicines. The Federal Circuit, the district courts, and the U.S. Patent and Trademark Office are all struggling to find a principled formula to guide their decision-making.

AIPLA believes that legislative reform is needed to restore predictability to the patent system and to maintain incentives to invest in future cutting-edge technologies that will not only enhance lives, but also save them. AIPLA has called for Congress to intervene and return the law to what the 1952 Patent Act meant to provide: an objective, evidence-based analysis for awarding patent protection.

Many other businesses and organizations have similarly recognized this significant problem and called for a solution. In fact, just this past year AIPLA was able to reach an agreement with the Intellectual Property Owners on a joint consensus solution.¹⁰

We have proposed a path to a legislative reform in this area that provides a clear, objective test that will result in appropriately broad eligibility, including expressly removing consideration of “inventiveness” from the eligibility determination for patent protection.

We hope that the FTC will take this uncertainty into consideration when it evaluates the market effect or power associated with patents.

2. Impact of Inter Partes Reviews by the PTAB

The 2011 America Invents Act (AIA) resulted in the creation of administrative trial proceedings before the USPTO’s Patent Trial and Appeal Board (“PTAB”), which have become a new normal in patent litigation and licensing. In their first six years since their introduction in September 2012, over 9100 petitions for inter partes review (IPR), post grant review (PGR) and covered business method patent review (CBM) have been filed, with about 92% of the filings being IPR petitions.¹¹

⁹ AIPLA Legislative Proposal and Report on Patent Eligible Subject Matter, available at https://www.aipla.org/docs/default-source/advocacy/aipla-legislative-proposal---patent-eligible-subject-matter.pdf?sfvrsn=7e208efe_2

¹⁰ See AIPLA, *AIPLA Legislative Proposal and Report On Patent Eligible Subject Matter* (May 12, 2017); Intellectual Property Owners Ass’n, *Proposed Amendments to Patent Eligible Subject Matter Under 35 U.S.C. § 101* (Feb. 7, 2017), https://www.aipla.org/docs/default-source/advocacy/aipla-legislative-proposal---patent-eligible-subject-matter.pdf?sfvrsn=7e208efe_2 AIPLA and Intellectual Property Owners Association, *Joint IPO-AIPLA Proposal Concerning Legislative Amendment of 35 U.S.C. § 101*, (May 2018), <https://www.aipla.org/advocacy/congress/Pages/joint101proposal.aspx>

¹¹ https://www.uspto.gov/sites/default/files/documents/trial_statistics_20180930a.pdf

These proceedings were intended to be a lower-cost procedure to address validity/patentability disputes, but have been far more popular than originally anticipated.

The emergence of these proceedings has dramatically changed U.S. patent enforcement by adding a second-prong to litigation and it has added a degree of uncertainty to patent licensing. In fact, one study suggests that 86.8% of patents at issue in AIA trial proceedings also have been the subject of litigation in the federal courts.¹² AIA trial proceedings have fundamentally changed the considerations that a patent owner must consider before pursuing enforcement in the courts or engaging in licensing discussions. While AIA trial proceedings may be less costly than district court litigation for validity disputes, they often add to the overall cost of litigation where cases are not stayed pending their resolution or where accused infringers continue to assert invalidity on grounds outside the scope of the AIA trial proceedings. Anecdotally, we understand that the threat of AIA trial proceedings often impacts patent licensing negotiations, as well.

Against this backdrop of changed and changing strategies for patent enforcement and defense, the USPTO is seeking to improve its implementation of these proceedings and the courts continue to address fundamental issues involving post grant proceedings. In the past year, the U.S. Supreme Court issued two significant decisions, *Oil States Energy v. Greene's Energy Group, LLC*, 584 U.S. (2018) (confirming Article III constitutionality of IPR proceedings), and *SAS Institute Inc. v. Iancu*, 584 U.S. (2018) (overturning the PTAB's interpretation of 35 U.S.C. § 318(a) and ending "partial institution" practice). In addition, the Federal Circuit, has issued several *en banc* decisions relating to post grant proceedings, including three recent decisions in *Aqua Products v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017) (the burden of persuasion for proving unpatentability of amended claims remains with the petitioner), *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018) (holding that time-bar determinations in IPR proceedings are reviewable on appeal), and *Click-to-Call Technologies, LP v. Ingenio, Inc.*, 899 F.3d 1321, 1330 n.3 (Fed. Cir. 2018) (holding § 315(b) time bar applies "when an IPR petitioner was served with a complaint for patent infringement more than one year before filing its petition, but the district court action in which the petitioner was so served was voluntarily dismissed without prejudice."). Even as the courts continue to address these administrative trial proceedings, the USPTO is making changes to attempt to add more balance to the proceedings, including changing the claim construction standard to be the same as the standard used in district court actions and issuing a proposal to revise motion to amend practice.

While the caselaw, rules and procedures controlling AIA trial proceedings continue to develop, this is not necessarily the time for these relatively new proceedings to impact the FTC's enforcement policy and agenda per se. That said, there may be a couple of areas that could use further examination, including the use of serial challenges by petitioners and the development of law regarding time bars to challenges. With respect to serial challenges, while the PTAB may exercise its discretion and decline to institute trial proceedings, multiple trial proceeding challenges may be brought by a single petitioner or multiple petitioners against the same patent. While there can be a public interest in canceling unpatentable patent claims, serial challenges are taxing on patent owners and can place a cloud on a challenged patent over its entire life, leading to devaluation of patents generally. Uncertainty also

¹² Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 Berkeley Tech. L.J. 45 (2016) (available at <https://ssrn.com/abstract=2731002>).

exists with respect to who is a real-party-in-interest (RPI) and who is in privity with a petitioner or RPI, which impacts who may bring challenges and whether such challenges may be time-barred.

In light of the above developments, which have led to uncertainty and unpredictability, it may be appropriate for the FTC to reexamine some of its enforcement policies. Antitrust law, especially in the single-firm conduct area governed by Section 2 of the Sherman Act, is especially interested in exclusionary effects. The FTC-DOJ Licensing Guidelines, issued in 1995 and lightly updated in 2017, repeatedly equate intellectual property rights with the “power to exclude”. That assumption seems to form a basis to the Guidelines. However, given patent law developments in recent years, it is unclear whether this connection/association still holds true today. Therefore, the antitrust agencies may want to revisit this assumption. Section 6 of the 2017 FTC-DOJ Licensing Guidelines suggests that the FTC “may challenge the enforcement of invalid intellectual property rights as antitrust violations” under section 2 of the Sherman Act or section 5 of the Federal Trade Commission Act.¹³ Under the current state of the law, there may not be the same justification for this stance. The fundamental presumption that a patent right provides an automatic right to exclude was changed by the Supreme Court in 2006,¹⁴ and the policies meant to curtail unfair enforcement are now out of balance and have the effect of curtailing fair enforcement.

3. Patent litigation has changed in many ways – which may negatively impact the rights of patent owners

In addition to the above, few would dispute that over the past 12 years, the legal framework for enforcing IP rights has seen dramatic changes which have led to uncertainties and a lack of clarity, in some respects weakening the patent right, including:

- Injunctions: The 2006 eBay¹⁵ decision sharply limited the ability of patent holders to obtain injunctions. The Court there refused to hold that the loss of patent exclusivity was enough by itself to constitute irreparable harm for permanent injunctive relief. In light of that case law, the repeated portrayal in the 2017 FTC-DOJ Licensing Guidelines¹⁶ of IP rights as conferring the unbridled power to exclude may no longer be totally accurate. Similarly, we are not sure the Guidelines’ statement that “An intellectual property owner’s rights to exclude are similar

¹³ See <https://www.justice.gov/atr/IPguidelines/download>

¹⁴ See *eBay, Inc. v. MercExchange*, 547 US 388 (2006).

¹⁵ *Id.*

¹⁶ See <https://www.justice.gov/atr/IPguidelines/downloadintellectual>. property right confers the power to exclude

to the rights enjoyed by owners of other forms of private property”¹⁷ holds as true today as it may have in 1995 when this text was written.¹⁸

- Similarly, other developments in patent law have negatively impacted the ability of patent owners to enforce their rights and recoup investment costs. These developments affect, among other issues, venue,¹⁹ divided infringement,²⁰ pleading requirements,²¹ reducing the burden for attorney-fee shifting,²² and patent exhaustion.²³

Recent Development re Injunctions for Infringement of Standard Essential Patents Subject to a Voluntary F/RAND Commitment

AIPLA notes that this month, the Department of Justice Antitrust Division announced that it is withdrawing the Division’s assent to the 2013 “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.”²⁴ AIPLA has not had the

¹⁷ U. S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.1 (Jan. 12, 2017), <https://www.justice.gov/atr/IPguidelines/download>.

¹⁸ U. S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.1 (Apr. 6, 1995), <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>.

¹⁹ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017) (holding that “a domestic corporation ‘resides’ only in its State of incorporation for the purpose of patent venue”).

²⁰ *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023–24 (Fed. Cir. 2015) (“Where more than one actor is involved in practicing the steps [of a claimed method], a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for infringement. We will hold an entity responsible for others’ performance of method steps in two sets of circumstances: (1) where that entity directs or controls others’ performance, and (2) where the actors form a joint enterprise.”).

²¹ Many district courts have held that the *Twombly-Iqbal* standard applies to patent infringement cases. *E.g.*, *e.Dig. Corp. v. iBaby Labs, Inc.*, No. 15-cv-05790-JST, 2016 WL 4427209, at *3 (N.D. Cal. Aug. 22, 2016); *RainDance Techs., Inc. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 WL 927143, at *2 (D. Del. Mar. 4, 2016); *InCom Corp. v. Walt Disney Co.*, No. CV15-3011, 2016 WL 4942032, at *7–9 (C.D. Cal. Feb. 4, 2016). This has resulted in a need for more detailed and voluminous pleadings. *E.g.*, *Atlas IP, LLC v. Exelon Corp.*, 189 F. Supp. 3d 768, 775 (N.D. Ill. 2016) (holding that factual allegations in patent infringement pleadings must “permit a court to infer that the accused product infringes each element of at least one claim”).

²² *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755–56 (2014) (“This text is patently clear. It imposes one and only one constraint on district courts’ discretion to award attorney’s fees in patent litigation: The power is reserved for ‘exceptional’ cases.”).

²³ *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523, 1531 (2017) (holding that any authorized sale by a patent owner exhausts all patent rights in the product sold).

²⁴ Makan Delrahim, Assistant Attorney General for Antitrust, Dep’t of Justice, “Telegraph Road”: Incentivizing Innovation at the Intersection of Patent & Antitrust Law, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute 7 (December 7, 2018), <https://www.justice.gov/opa/speech/file/1117686/download>.

opportunity to fully review the impact of this development and would like to reserve the right to provide additional commentary in the future on these issues.

Issues Related to Copyrights, Trademarks and Trade Secrets

AIPLA supports the FTC's facilitation of discussion regarding the role of intellectual property law, including not only patents, but also copyrights, trademarks and trade secrets, in competition policy. AIPLA notes that the impact of *eBay* in making injunctions more difficult to obtain is affecting not only patent protection, but also copyrights and in many jurisdictions trademarks as well.

AIPLA further supports discussion of additional matters affecting non-patent intellectual property rights. AIPLA supports the creation of a copyright small claims tribunal, such as that proposed in the CASE Act, H.R. 3945, or similar legislation, as an alternative dispute resolution forum.²⁵ AIPLA also believes there is value in continuing the discussion regarding potential concerns with certain forms of software copyright licensing, including the impact of end-user license agreements (EULAs), perpetual licenses, and possibly the interplay of 1201 rule making. To the extent that certain licensing transactions are falsely advertised, this could also fall within the FTC's oversight of deceptive business practices. Finally, AIPLA supports further consideration of the FTC's role in policing online piracy of copyrights and trademarks and in promoting voluntary methods to curb piracy, particularly those involving products falsely advertised and sold to consumers to facilitate piracy. This is particularly important as more and more consumers are turning to the online marketplace to purchase goods and services.

Conclusion

The past 12 years have seen a consistent legislative and judicial trend that has produced inconsistencies and uncertainties about patent rights and their enforceability. During that time, antitrust policies that further limit the ability to exercise patent rights have continued going strong. AIPLA is very concerned that the balance of U.S. patent policy has tilted too far toward limiting enforcement rights, which may lead to a negative impact on R&D investment and reduce the innovation that produces dynamic competition in U.S. markets.

Governments, through agencies like the FTC, have the power to promote or discourage innovation through policy. Nobel Prize winning Professor Romer was recently quoted as saying, "I've been really disappointed that we just haven't had the kind of political environment where we can think about speeding up technological progress." At AIPLA, we share that concern. We believe that intellectual property protections are important to accelerating technological progress and economic

²⁵ AIPLA, *Comments in Support for H.R. 3945, the Copyright Alternative in Small-Claims Enforcement ("CASE") Act of 2017* (September 24, 2018), https://www.aipla.org/docs/default-source/advocacy/aipla-letter-to-hjc-on-h-r-3945-sept-2018.pdf?sfvrsn=89e3a63d_0; AIPLA, *Comments to House Judiciary Committee on First Policy Proposal on Review of U.S. Copyright Law* (January 30, 2017), https://www.aipla.org/docs/default-source/advocacy/aipla-letter-to-goodlatte-conyers-on-copyright-policy-013117.pdf?sfvrsn=9941f76d_0,

growth, and we submit that a rebalancing of the law to restore protections for intellectual property is overdue.

Only in a market where everyone, small and big, benefit from strong intellectual property protection will consumers reap the benefits of maximized innovation (dynamic competition). More generally, in this regard, we believe the FTC should use caution to ensure that its policies are both size and business-model neutral.

AIPLA appreciates the opportunity to provide these comments. Please contact us if you would like us to provide additional information on any issues discussed above. In the event that comments on additional topics may be relevant or appropriate, AIPLA looks forward to providing further materials, comments or testimony.

Sincerely

A handwritten signature in blue ink, appearing to read "Sheldon H. Klein". The signature is written in a cursive style with a distinct dot above the "i" in "Klein".

Sheldon H. Klein

President

American Intellectual Property Law Association