Before the Federal Trade Commission

In re: Competition and Consumer Protection in the 21st Century Hearings Topic 8: The Role of Intellectual Property and Competition Policy in Promoting Innovation	Project No. P181201 Docket No. FTC-2018-0055

Comments of the R Street Institute

In response to the Federal Trade Commission's request for comments dated June 20, 2018, the R Street Institute respectfully submits the following comments. Submitted in advance of the hearings planned to be held, these are intended to identify topics for those hearings, and will likely be supplemented by more detailed analysis afterward.

This comment is one of several that R Street is submitting, pursuant to the Commission's request of a separate comment per topic. This comment relates to Topic 8 on the role of intellectual property and competition policy in promoting innovation.

R Street and its policy experts have substantial experience in intellectual property policy and its relationship with competition policy in areas such as standard-essential patents, copyright in technical standards and substantive standards for patentability. We have presented this work in research papers, *amicus curiae* briefs, congressional testimony, and comments before the Commission and other agencies. A bibliography is included as an appendix to this comment.

The effects of intellectual property policy on competition and innovation are important and ought to play a major role in the Commission's agenda. In the upcoming hearings, we therefore encourage it to consider at least the following topics.

Standard-Essential Patents and Licensing Practices in Technical Standard-Setting Bodies. The Commission has already studied this issue in the past,[1] but ongoing developments in the area warrant its continued attention. Standard-setting organizations have taken steps to revise their intellectual property licensing policies[2] and companies have been involved in active litigation involving patents on technical standards.[3] Because technical standards are a linchpin of information and communication technology today, licensing of patents on standardized

[1] "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," Federal Trade Commission and Department of Justice (April 2007). https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.

[2] "IEEE Statement Regarding Updating of its Standards-Related Patent Policy," Institute of Electrical and Electronics Engineers, Feb. 8, 2015. https://www.ieee.org/about/news/2015/patent-policy.html.

[3] For a current list, see "SEP or Related Litigations," Essential Patent Blog. https://www.essentialpatentblog.com/list-of-litigations-involving-seps.

technologies can have an outsized impact on innovation and competition. The Commission should thus consider recent developments and policy concerns in this area.

Copyright in Standards and Their Implementation. Although the Commission's attention regarding technical standard-setting has largely been directed to patent policy, recent developments implicate copyright policy as well. In *Oracle America, Inc. v. Google Inc.*,[4] the Federal Circuit held that an implementer of another's application programming interface may infringe copyright in that interface. Since practically every technical standard is an application programming interface of a sort, the *Oracle* case thus makes copyright a powerful lever of control over technical standards.[5] Accordingly, the Commission should consider the effects of the *Oracle* decision on competition and future innovation.

Patent Licensing Practices, Including Those of Operating Companies. Patent owners' practices in licensing patents can present competition problems. The Commission's ongoing litigation against Qualcomm, for example, relates to practices in pricing patent license bundles, practices that other competition agencies around the world have already deemed anticompetitive.[6] Additionally, there are ongoing concerns about "patent privateering," in which an operating company engages a non-practicing entity to assert patents against the company's competitors.[7]

Recent case law also raises new possibilities of anticompetitive licensing. In *Impression Products v. Lexmark International*,[8] the Supreme Court held that a patent owner cannot engage in a "conditional sale" of a patented product to control how the product is used. In the wake of that decision, some patent owners contemplated licensing or leasing strategies that would effectively maintain downstream control over their products.[9] It is not known whether and to what extent those strategies have been put into effect since the *Impression* decision, but they present important issues of competition and consumer protection.

The Obviousness Doctrine in Patent Law. In the past, the Commission has investigated how competition can be facilitated by strengthening substantive doctrines of patent law.[10] These investigations have been greatly influential: The Commission's report on vague and indefinite

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[4] *Oracle America, Inc. v. Google Inc.*, 750 F.3d 1339 (Fed. Cir. 2014). https://scholar.google.com/scholar_case?case=15197092051369647665. The commenter has noted disagreement with this decision on several occasions.

[5] Brief of Public Knowledge as *Amicus Curiae*, *Cisco Systems, Inc. v. Arista Networks, Inc.*, No. 17-2145 (Fed. Cir. Dec. 23, 2017). https://www.publicknowledge.org/documents/amicus-brief-in-cisco-v-arista.

[6] Federal Trade Commission's Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 5:17-cv-220 (N.D. Cal. Feb. 1, 2017). https://www.ftc.gov/system/files/documents/cases/0038_2017_02_01_redacted_complaint_per_court_order_dkt.pdf.

[7] Matthew Sipe, "Patent Privateers and Antitust Fears," *Michigan Telecommunications and Technology Law Review* 22:2 (2016), p. 191. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1215&context=mttlr.

[8] *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017).

[9] D. Brian Kacedon and Kevin D. Rodkey, "The Aftermath of *Impression Products v. Lexmark*," Finnegan, Nov. 13, 2017. https://www.finnegan.com/en/insights/the-aftermath-of-impression-products-v-lexmark.html.

[10] E.g., "The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition," Federal Trade Commission (March 2011). https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition.

patents was a leading reason for the Supreme Court's revision of the patent definiteness standard.[11]

The Commission should therefore continue to look into substantive doctrines of patent law that harm competition, and the current standout is the obviousness doctrine. Although that doctrine is meant to prevent the issuance of patents on simple combinations or variations of known ideas, there is general consensus that the Federal Circuit has excessively constrained obviousness.[12] In a recent case, for example, an old hearing aid was rendered nonobvious and patentable simply by reciting the hearing aid in combination with an electrical plug.[13]

An unduly narrow obviousness doctrine can have serious anticompetitive effects. It enables the practice of evergreening of pharmaceutical patents in which a brand-name manufacturer, facing expiration of its lead drug patent, seeks additional patents on minor variations in order to effectively extend the patent term.[14] Patent assertion entities often take advantage of obvious software patents on the theory that the cost of settlement is less than the price of litigation to invalidate the patent.[15] These and other effects of obvious patents on competition and innovation merit study by the Commission.

The Music Licensing Industry. Practices in music copyright licensing are extraordinarily complex, but certainly present competition issues of ongoing interest. Debate over the consent decrees for the major music licensing clearinghouses, for example, has recently arisen.[16] The Commission is in a good position to disentangle the complexities of this industry, to assess how music copyright licensing actually works today, and to determine whether it could be better arranged to serve the interests of innovation and creation both of new musical works and of new technologies for distribution and performance.

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[11] *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 , 2129 (2014) (citing the above FTC report). https://scholar.google.com/scholar_case?case=18039289154394507479#p2129.

[12] E.g., Brief of the United States as Amicus Curiae, *Samsung Electronics Co. v. Apple Inc.*, No. 16-1102 (U.S. Oct. 17, 2017), p. 16–17 (Supreme Court review of recent obviousness decisions "may ultimately be warranted"). http://www.scotusblog.com/wp-content/uploads/2017/10/16-1102-ac-US.pdf.

[13] *K/S HIMPP v. Hear-Wear Technologies, LLC*, 751 F.3d 1362 (Fed. Cir. 2014). https://scholar.google.com/scholar_case?case=79173943140962179.

[14] Roger Collier, "Drug Patents: The Evergreening Problem," *Canadian Medical Association Journal* 185:9 (2013), p. E385. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3680578/.

[15] James Bessen et al., "The Private and Social Costs of Patent Trolls," *Regulation*, Winter 2011–2012, p. 34. https://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/5/v34n4-1.pdf.

[16] Eriq Gardner, "Justice Dept. Reviewing Movie Licensing Restrictions on the Books for Decades," *The Hollywood Reporter*, Aug. 2, 2018. https://www.hollywoodreporter.com/thr-esq/justice-dept-reviewing-movie-licensing-restrictions-books-decades-1131827.

R Street thanks the Federal Trade Commission for the opportunity to submit these comments, and recommends that the Commission pursue the above-identified areas in its ongoing work on promoting competition and innovation.

Respectfully submitted,

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Appendix: Bibliography of R Street Institute Work Relating to Topic 8

These include works written while the author of this comment was employed by his prior organization, Public Knowledge.

General:

Charles Duan, Comments of Public Knowledge to the U.S. Department of Justice and the Federal Trade Commission, Proposed Update to the Antitrust Guidelines for the Licensing of Intellectual Property, Sept. 26, 2016. https://www.justice.gov/atr/file/897756/download.

Charles Duan, *A Five Part Plan for Patent Reform* (2014). https://www.publicknowledge.org/documents/a-five-part-plan-for-patent-reform.

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Copyrights in Standards:

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Charles Duan, "Can Copyright Protect a Language? What a Big Software Case Could Mean for Klingon Speakers," *Slate: Future Tense*, June 3, 2015. http://www.slate.com/articles/technology/future_tense/2015/06/oracle_v_google_klingon_and_copyrighting_language.html.

Patent Licensing Practices:

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Commerce, "The Targeting Rogue and Opaque Letters Act (TROL Act)," 114th Congress (2015). https://www.publicknowledge.org/assets/uploads/blog/testimony-trol-act_PK_CharlesDuan.pdf.

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Obviousness Doctrine:

Brief of *Amici Curiae* Public Knowledge and the Electronic Frontier Foundation in Support of Petitioner, *K/S HIMPP v. Hear-Wear Techs., LLC*, 135 S. Ct. 1439 (Jan. 22, 2015) (No. 14-744). https://www.publicknowledge.org/documents/pk-and-eff-brief-himpp-v-hear-wear.

Charles Duan, "How Amazon Got a Patent on White-Background Photography: Bad Laws, Not Bad Examiners, Create Obvious Patents," *Ars Technica*, June 10, 2014. http://arstechnica.com/tech-policy/2014/06/how-amazon-got-a-patent-on-white-background-photography.

Music Licensing:

Sasha Moss and Meredith Rose, "Congress Must Update Music Licensing for the Modern Era," *The Hill*, Apr. 10, 2018. http://thehill.com/opinion/campaign/382464-congress-must-update-music-licensing-for-the-modern-era.

Sasha Moss, "Transparency in Music Licensing and the Statutory Remedy Problem," R Street Policy Study No. 47, Dec. 2015. https://www.rstreet.org/2015/12/08/transparency-in-music-licensing-and-the-statutory-remedy-problem.