FTC Hearing
The Evolving IP Marketplace

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Overview

- Industries driven by scientific and technological innovation are hindered by patent system flaws more than benefited by them
- Many remarkable changes have been made to the patent laws in the past several years
  - Mostly Judicial, doctrine focused
  - USPTO reform incremental
  - Legislative Reform is stuck
- However, the patent system as a whole is still out of balance
  - More focus on litigation than value-promoting licensing
  - Damages reform and Venue reform are two key aspects that remain unaddressed
- Better calibration required between patent law & policy, trade policy and domestic regulation of innovation-driven markets

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Concerns over patents: perception vs. reality

- **In early part of the decade, the perception emerged that patents had become too strong and patent owners wielded too much power**
  - While such dynamics were of a general cross-industry nature, focus was often on growth industries such as software and the Internet
  - Fear that new economy growth companies would own too great a portion of the public domain as well as the future of economy activity
  - Concern that prospective new entrants would be deterred by patent thickets and innovation would thereby by impeded
- **Different realities have emerged**
  - Open technology development has thrived
  - Start-ups have thrived
  - Innovation in all forms has thrived
  - Rather than consolidate excessive power through patent-related exercises, successful new economy companies have become beleaguered by defensive patent litigations brought by NPEs
  - New participants have fueled a “secondary market” for patents, intensifying pure patent licensing over true technology transfer

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The impact of Judicial Reform

- Proposed reforms took many faces, but key judicial decisions have had the most impact on tempering "patent power"
  - E*Bay v. MercExchange (S. Ct.) (Injunctive Relief)
  - KSR v. Teleflex (S. Ct.) (Obviousness)
  - MedImmune v. Genentech (S. Ct.) (Declaratory Relief)
  - In re Seagate (Fed. Cir.) (en banc) (Willful Infringement)
  - Quanta v. LG (S. Ct.) (Patent Exhaustion)
  - In re Bilski (Fed. Cir.) (en banc) (Patent Eligible Subject Matter)
- All of these cases have had the effect of curbing the power of individual patents as well as patent holders
- But have they really impacted market competition and value-promoting licensing activity as initially surmised?

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Obviousness

- Easier to prove since KSR, but only true in litigation context
- New standards lead to more inconsistent determinations at USPTO, since examiners have more discretion to impose subjective judgment
- Not much bearing on licensing as new standards only relevant at the margins
  - An obviousness conclusion is binary
  - But PHOSITA analysis is research intensive; undocumented bases for determining validity too uncertain to alter most licensing determinations
  - Particularly marginal in multi-patent license deals

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Willfulness & Declaratory Relief

- Seagate brought welcome improvements to the laws concerning willful infringement
  - Prior "due care" standard and related doctrines thwarted research value of patents and made willfulness a tool for litigation abuse
  - Now less risk from duly investigating patented technology for product clearance or possible in-licensing
- However, combined with MedImmune and progeny, Seagate has also prompted patent owners to forego licensing discussions and rush to litigation
  - Lower prospect of treble damages from pre-litigation discussions
  - Higher risk of being hauled into undesirable forum
  - NPEs, particularly, go straight to court without prior notice

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More and better calibration required

- NPE litigation suppresses value-adding licensing activity and drains resources from marketplaces
- Legislative reform on key open issues still necessary
  - ***Damages*** and ***Venue*** reforms particularly
- Standards for software patentability between EU, APAC and US lacking harmonization in key areas
  - In re Bilski preserves legitimate role for software and business method patents, but uncertainties remain
  - We need "Safe Harbor" claiming for software and business method patents in U.S. that would meet subject matter requirements of EPC and APAC nations
  - "Inventive Step" harmonization with "Non-Obviousness Standards"
- Greater patent marketplace transparency desirable

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QUESTIONS ?

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