FTC Hearing
The Evolving IP Marketplace

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Overview

- 825 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 focusedO -0form4 Tc-0.c -al-4(i)-3(al, doctrin

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 (y.) betent

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

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

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

QUESTIONS ?

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