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Views of the Honorable F. Scott Kieff, Commissioner, United States International Trade Commission, on the United States Federal Trade Commission's and the United States Department of Justice Antitrust Division's Joint Guidelines for the Licensing of Intellectual Property

To Whom It May Concern,

As a Commissioner of the United States International Trade Commission (ITC), I submit these views in reply to the United States Federal Trade Commission's (FTC) and the United States Department of Justice Antitrust Division's (DOJ) Notice dated 12 August 2016 seeking views on your proposed update to your joint Antitrust Guidelines for Licensing of Intellectual Property.¹ Let me summarize my contribution at the outset: while there are many approaches to thinking about intellectual property (IP) and antitrust (AT), including those that focus on providing direct incentives to create or invent, there are important benefits to an alternative approach that instead focuses on indirect incentives for commercialization.

¹ The views expressed here are my own, are not properly attributable to the ITC or any of its other Members or Staff, and are offered to provide only overarching ideas and perspectives while taking no position on any particulars of pending or proposed governmental actions.

I appreciate the extensive and careful work you do at the IP-AT interface, as well as the many helpful submissions by others who reply to your requests for views in this important area of your work. I write here to further elaborate some ideas about the economics of IP and AT in the hope of helping all of us who are interested in analyzing IP and AT systems.

Over the past many years, many discussions of IP, including many you have offered² and many in the literature, have collectively focused on the role IP can play on the one hand in providing beneficial incentives to create or invent, and on the other hand in enabling harmful concentration of market power leading to increased prices and reduced output. Significant attention in these discussions often is paid to the types of harm this may inflict on consumers in general and the poor and underprivileged in particular. Such discussions often then focus essentially on how much of the good is enough, how much of the bad is too much, and tradeoffs between them.

Those discussions then offer various approaches to legal regimes to address both sides of the tension. One set of approaches includes the use of other inducements or rewards for creation or invention in the place of or in addition to IP, such as regulatory exclusivity, tax credits, grants, prizes, and the like. A second set of approaches exempts particular fields of technology from eligibility for IP protection, such as those having to do with healthcare, software, or finance, usually with the expectation of significant, frequent, and ongoing updates to the boundaries of these exempted fields. A third set of approaches decreases the remedies available for IP infringement, including damages, injunctions, and exclusion orders. A fourth set of approaches directly addresses interactions between IP owners and IP users, including heightened AT scrutiny, compulsory licenses, detailed rate regulation of IP royalties by AT enforcers, and governmental takings of IP licenses or the entire IP rights themselves. Many other ideas are also offered.

For example, your August Notice points out that you are updating your guidelines in part so that their "discussion of general principles [reflects] the research in the FTC's 2011 Evolving IP Marketplace report" (FTC Report).³ The FTC Report, in turn, states at the

² These include the submissions, which I appreciate, that some of your Members have offered to help in the work my colleagues and I do at the IP-AT interface in our work at the ITC. See, e.g., Certain 3G Mobile Handsets and Components Thereof, USITC Investigation No. 337-TA-613 (Remand), Reply Submission on the Public Interest of Federal Trade Commissioners Maureen K. Ohlhausen and Joshua D. Wright (July 20, 2015); Certain 3G Mobile Handsets and Components Thereof, USITC Investigation No. 337-TA-613 (Remand), Written Submission on the Public Interest of Federal Trade Commission Chairwoman Edith Ramirez (July 13, 2015); Correspondence from United States Federal Trade Commission Chairwoman Edith Ramirez to United States Trade Representative Michael Froman (July 15, 2013); Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, USITC Investigation No. 337-TA-745, Third Party United States Federal Trade Commission's Statement on the Public Interest (June 6, 2012); Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, USITC Investigation No. 337-TA-752, Third Party United States Federal Trade Commission's Statement on the Public Interest (June 6, 2012).

³ Federal Trade Commission Notice, FTC and DOJ Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property (Aug. 2016), available on-line at www.ftc.gov/news-events/press-releases/2016/08/ftc-doj-seek-views-proposed-update-antitrust-guidelines-licensing (citing Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition 22 (Mar. 2011)).

outset its focus on “incentives to innovate” that are created when patents protect “innovators” from “copying that might otherwise drive down prices” and the better “alignment” of those goals by “balancing” them against the goals of competition and consumer protection pursued through FTC and DoJ AT enforcement and regulation.⁴

A common theme across these sets of approaches is to view IP more in the tradition of public law, or as regulatory entitlements, by focusing more on the use of extensive interactions between governmental bodies and private parties. The more that regulatory or enforcement systems can be impacted by flexible decision-making within the policy discretion of politically-responsive parts of the government, the more that private parties tend to interact with those governmental bodies whenever they are interacting, or likely to interact, with each other around property rights and contracts. To the extent that IP and AT systems that are heavily dependent on public law approaches want to demonstrate support for rules-based trading systems, they must place special emphasis on decision-making approaches that are transparent and grounded in the factual record, thereby mitigating the effects of politics, fashion, prerogative, and power.⁵

I share the overarching values that often are expressed in discussions about IP and AT: fostering access to creative or inventive technologies, competition, economic growth, and diverse and inclusive participation; as well as improving both efficiency and fairness for all. But these same shared values also are championed by an intellectual approach to IP and AT that is different than those briefly mentioned above. Indeed, as explored below, consideration of this different approach can better further those shared values. Simply put, it offers a view of exclusivity in IP that can further rather than frustrate FTC and DoJ stated interests in AT, competition, and consumer protection.

This different approach—a commercialization approach—has been embraced across the American political spectrum, including both the Carter administration and the Reagan administration,⁶ as well as by celebrated jurists of the last century coming from diverse philosophical perspectives, including Circuit Judges Learned Hand, Jerome Frank, and Giles Rich,⁷ who saw it as important to helping the economy and society.⁸ The roots of a

⁴ FTC Report, at 1.

⁵ Much has been written about the vital need to have government agencies, including those in both the fields of IP and AT, conduct careful, scientific, fact-based, analysis and decision-making, that accounts for diverse views and perspectives while providing predictable guidance to private parties. See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1193 (1982); David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 *Geo. Wash. L. Rev.* 1446 (2014). See also, Remarks by Ambassador Froman at the Rand Corporation Breakfast (Jun. 21, 2016) (“since World War II, the United States and its partners have worked hard to create an open, rules-based global trading system”), available on line at ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/june/remarks-ambassador-froman-rand.

⁶ Judge Pauline Newman, *Foreword: The Federal Circuit in Perspective*, 54 *Am. U. L. Rev.* 821 (2005).

⁷ Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 24 *J. Pat. & Trademark Off. Soc'y* 159 (1942), reprinted in 14 *Fed. Cir. B.J.* at pages 5, 21, 37, 67, and 87 (2004-5) (five-part series of articles); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring); *Reiner v. I. Leon Co.*, 285 F.2d 501, 503 (2d Cir. 1960) (Hand, J.) (noting “[t]here can be no doubt that the Act of 1952 meant to change the slow but steady drift of judicial decision that had been hostile to patents”); Lyon

commercialization approach to patents, in particular, reach back even further into American history, including Abraham Lincoln's view that the patent system "added the fuel of interest to the fire of genius, in the discovery and production of new and useful things."⁹ Its study has also long extended far beyond our nation.

A commercialization approach to IP views IP more in the tradition of private law, rather than public law. It does so by placing greater emphasis on viewing IP as property rights, which in turn is accomplished by greater reliance on interactions among private parties over or around those property rights, including via contracts. Centered on the relationships among private parties, this approach to IP emphasizes a different target and a different mechanism by which IP can operate. Rather than target particular individuals who are likely to respond to IP as incentives to create or invent in particular, this approach targets a broad, diverse set of market actors in general; and it does so indirectly. This broad set of indirectly targeted actors encompasses the creator or inventor of the underlying IP asset as well as all those complementary users of a creation or an invention who can help bring it to market, such as investors (including venture capitalists), entrepreneurs, managers, marketers, developers, laborers, and owners of other key assets, tangible and intangible, including other creations or inventions. Another key difference in this approach to IP lies in the mechanism by which these private actors

v. Bausch & Lomb Optical Co., 224 F.2d 530, 536-37 (2d Cir. 1955) (Hand, J.) (noting "§ 103. . . restores the original gloss . . . [A] legislature . . . must be free to reinstate the courts' initial interpretation, even though it may have been obscured by a series of later comments whose upshot is at best hazy."). The work at the IP-AT interface by Judge Rich is especially important because, as the Supreme Court elaborated in its 1980 Dawson decision, he served as a primary drafter of the 1952 Patent Act, a statute that codified the entire US patent system and was specifically designed to implement two key shifts in policy that cut in the opposite direction of your proposed guidelines: a redefining of the boundary between what is patentable and what is not patentable, and a realigning of the patent-AT interface. Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) (approvingly providing extensive review of legislative history of the 1952 Patent Act and its impact on the patent-AT interface).

⁸ Some representative examples in the literature that are consistent with commercialization approach include the following: Stephen Haber, Patents and the Wealth of Nations, 23 Geo. Mason L. Rev. 811 (2016); Jonathan M. Barnett, The Anti-Commons Revisited, 29 Harvard J.L. & Tech. 127 (2015); Alexander Galetovic, Stephen Haber, & Ross Levine, An Empirical Examination of Patent Holdup, 11 J. Competit. L. & Econ. 549 (2015); Daniel F. Spulber, How Patents Provide the Foundation of the Market for Inventions, 11 J. Competit. L. & Econ. 271 (2015); Pierre Larouche, Jorge Padilla, & Richard S. Taffet, Settling FRAND Disputes: Is Mandatory Arbitration a Reasonable and Nondiscriminatory Alternative?, 10 J. Competit. L. & Econ. 581 (2014); F. Scott Kieff & Anne Layne-Farrar, Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations, 9 J. Competition L. & Econ. 19 (2013); Mark P. Gergen, John Golden, & Henry E. Smith, The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203 (2012); Richard A. Epstein, The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary, 62 Stan. L. Rev. 455 (2010). Henry E. Smith, Intellectual Property as Property: Delineating Entitlements in Information, 116 Yale L.J. 1742, 1745, 1751–52 (2007); F. Scott Kieff & Troy A. Paredes, The Basics Matter: At the Periphery of Intellectual Property, 73 Geo. Wash. L. Rev. 174 (2004); Naomi R. Lamoreaux & Kenneth L. Sokoloff, Intermediaries in the U.S. Market for Technology, 1870–1920, in Finance, Intermediaries, and Economic Development 209, (Stanley L. Engerman et al. eds., 2003); and B. Zorina Khan & Kenneth L. Sokoloff, History Lessons: The Early Development of Intellectual Property Institutions in the United States, J. Econ. Persp., 233 (2001).

⁹ Abraham Lincoln, "Second Lecture on Discoveries and Inventions" (February 11, 1859), in 3 The Collected Works of Abraham Lincoln 356, 363 (Roy P. Basler, ed., Rutgers University Press, 1953) (emphasis added and omitted).

interact over and around IP assets. This approach sees IP rights as tools for facilitating coordination among these diverse private actors, in furtherance of their own private interests in commercializing the creation or invention.

This commercialization approach sees property rights in IP serving a role akin to beacons in the dark, drawing to themselves all of those potential complementary users of the IP-protected-asset to interact with the IP owner and each other. This helps them each explore through the bargaining process the possibility of striking contracts with each other.

Several payoffs can flow from using this commercialization approach. Focusing on such a beacon-and-bargain effect can relieve the governmental side of the IP system of the need to amass the detailed information required to reasonably tailor a direct targeted incentive, such as each actor's relative interests and contributions, needs, skills, or the like. Not only is amassing all of that information hard for the government to do, but large, established market actors may be better able than smaller market entrants to wield the political influence needed to get the government to act, increasing risk of concerns about political economy, public choice, and fairness. Instead, when governmental bodies closely adhere to a commercialization approach, each private party can bring its own expertise and other assets to the negotiating table while knowing—without necessarily having to reveal to other parties or the government—enough about its own level of interest and capability when it decides whether to strike a deal or not.

Such successful coordination may help bring new business models, products, and services to market, thereby decreasing anticompetitive concentration of market power. It also can allow IP owners and their contracting parties to appropriate the returns to any of the rival inputs they invested towards developing and commercializing creations or inventions—labor, lab space, capital, and the like. At the same time, the government can avoid having to then go back to evaluate and trace the actual relative contributions that each participant brought to a creation's or an invention's successful commercialization—including, again, the cost of obtaining and using that information and the associated risks of political influence—by enforcing the terms of the contracts these parties strike with each other to allocate any value resulting from the creation's or invention's commercialization. In addition, significant economic theory and empirical evidence suggests this can all happen while the quality-adjusted prices paid by many end users actually decline and public access is high. In keeping with this commercialization approach, patents can be important antimonopoly devices, helping a smaller “David” come to market and compete against a larger “Goliath.”¹⁰

A commercialization approach thereby mitigates many of the challenges raised by the tension that is a focus of the other intellectual approaches to IP, as well as by the responses these other approaches have offered to that tension, including some – but not all – types of AT regulation and enforcement. Many of the alternatives to IP that are often suggested by other approaches to IP, such as rewards, tax credits, or detailed rate

¹⁰ Picard v. United Aircraft Corp., 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring).

regulation of royalties by AT enforcers can face significant challenges in facilitating the private sector coordination benefits envisioned by the commercialization approach to IP. While such approaches often are motivated by concerns about rising prices paid by consumers and direct benefits paid to creators and inventors, they may not account for the important cases in which IP rights are associated with declines in quality-adjusted prices paid by consumers and other forms of commercial benefits accrued to the entire IP production team as well as to consumers and third parties, which are emphasized in a commercialization approach. In addition, a commercialization approach can embrace many of the practical checks on the market power of an IP right that are often suggested by other approaches to IP, such as AT review, government takings, and compulsory licensing. At the same time this approach can show the importance of maintaining self-limiting principles within each such check to maintain commercialization benefits and mitigate concerns about dynamic efficiency, public choice, fairness, and the like.¹¹

To be sure, a focus on commercialization does not ignore creators or inventors or creations or inventions themselves. For example, a system successful in commercializing inventions can have the collateral benefit of providing positive incentives to those who do invent through the possibility of sharing in the many rewards associated with successful commercialization. Nor does a focus on commercialization guarantee that IP rights cause more help than harm. Significant theoretical and empirical questions remain open about benefits and costs of each approach to IP. And significant room to operate can remain for AT enforcers pursuing their important public mission, including at the IP-AT interface.

For example, when operating at the IP-AT interface, the ITC has shown diverse, independent, collaborative approaches that are grounded in the factual record and emphasize procedural fairness to both IP owners and users.¹² Consider the *Amkor v.*

¹¹ See, Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing of Pharmaceutical Patents*, 78 U. Chicago L. Rev. 71 (2011).

¹² Independent, collaborative, transparent, rules-based analysis and adjudication grounded in the factual record have been hard-wired into the ITC's structure since its inception. When the ITC recently celebrated its 100th anniversary earlier this month, we had occasion to remember the difficult task our Nation's first treasury Secretary, Alexander Hamilton, had to manage when figuring out how to finance the operation of our new central government while at the same time hopefully helping or at least mitigating the harm to our then-fledgling domestic manufacturing industry. (More about the ITC Centennial including the entire freely available contents from a forthcoming scholarly book on the topic can soon be found on-line here: www.usitc.gov/centennial.htm) For the first century of its existence, the federal government was financed essentially with tariffs on imports. There was no income tax back then. It took until 1913 for the Sixteenth Amendment to our Constitution to be ratified, giving the Federal Government the power to raise revenue from sources internal to the country such as via a tax on income. Tariffs on imports can raise money for a national government. But that will only work to the extent that imported goods continue to flow into the country despite rising prices paid by purchasers. Tariffs also can protect domestic industries, including the then-fledgling manufacturing sector, from foreign competition in finished manufactured goods. But that will only work so long as the tariffs don't also cover imported inputs to domestic manufacturing processes. Tariffs also can trigger reciprocal tariffs that can hamper exports. It can be tricky to figure out the net impact of these several dynamic forces that point in opposite directions. Although sometimes seen as an attempt at protectionism, Hamilton's effort brought a scientific approach to bear on these questions led him to compile a "Report on the Subject of Manufactures" as a study of this dynamic system and to offer more balanced recommended policy actions informed by such as study. See, Douglas Irwin, *The Aftermath of Hamilton's Report on Manufactures*, 64 J. Econ. Hist. 800 (2004). To be sure, Hamilton's report was just an

Carsem “encapsulated integrated circuits” case involving the standard setting organization called “JEDEC,” in which three Commissioners joined in offering additional views that considered the conduct of both the IP owner and the IP user—including whether holdup and/or reverse holdup was in evidence—and emphasized the importance of maximizing procedural fairness so that the evidence of record could be tested and weighed appropriately, and in which a fourth Commissioner provided her own additional views addressing similar substantive and procedural issues.¹³ Such symmetrical concern for substantive and procedural nuance is also elaborated in the European Court of Justice’s *Huawei v. ZTE* decision, which may suggest the emergence of an international norm.¹⁴

One size rarely fits all, and each approach typically involves benefits as well as costs. This brief discussion is designed to shed some added light on a commercialization approach to the IP-AT interface that has not been as thoroughly explored as other approaches in your recent published work. It is offered in the hope it might help empower and enable ongoing analysis by anyone studying any IP or AT system in general as they work to ensure the best fit for themselves. I also hope this commercialization approach may help as you continue your best efforts in your important work to analyze and explain the tradeoffs inherent in IP-AT regulation and enforcement.

Respectfully submitted,

/s/ F. Scott Kieff

initial effort; and the intense debates and problems surrounding the dynamic impact of tariffs continued for about a century until, together with slavery, they brought our country to war with itself in the Civil War. By soon after the end of the War, the confluence of two factors brought much needed help. First was the evolution in the state of the art in economic science, including much better understanding of how to gather data and analyze it. The second was the suggestion by Frank Taussig, Chairman of the Economics Department at Harvard, for a new approach to a government agency tasked in this area. See generally, John. M. Dobson, *Two Centuries of Tariffs, the Background and Emergence of the United States International Trade Commission*, (1976), at 86. That new agency model, attempted a few times after the Civil War, eventually became the ITC. It has a few key structural characteristics that are replete with checks and balances to coerce behavior that is collaborative, independent, analytical, and professional, while punishing prerogative. While many of the Bi-Partisan-Commissions in the US Government are lead by an odd number of Presidentially-Nominated-and-Senate-Confirmed Commissioners (usually five), the ITC is designed for deadlock with an even number: six. Although most of the other Commissions have a Chair who generally can serve until replaced by the President, the ITC Chair is required to switch person and party every two years, among the existing Commissioners. And, at the ITC, the Commissioner terms are longer than at many of the other commissions, (9 years) and generally non-renewable, thereby further tamping down incentives for responsiveness to pressure from politics and intellectual fashion.

¹³ (337-TA-501, 2014) (with additional views of Broadbent, Kieff, and Pinkert, as well as additional views of Aranoff), available on-line:

www.essentialpatentblog.com/wp-content/uploads/sites/64/2014/05/2014.04.28-Encapsulated-Integrated-Circuits-...-ITC-337-TA-501-sm.pdf.

¹⁴ Case C-170/13 *Huawei Technologies Co. Limited v. ZTE Corp.* (Fifth Chamber, 16 July 2015) available on-line: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CA0170>.