



Regulatory Transparency Project

Unlocking Innovation & Opportunity

Putting the Public Back In “Public Interest” in Patent Law

Intellectual Property Working Group

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This paper was the work of multiple authors. No assumption should be made that any or all of the views expressed are held by any individual author. In addition, the views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

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Table of Contents

Introduction	3-4
What is the Public's Interest in Patent Law?	4-7
Administrative Agencies Have Adopted an Unduly Narrow View of the "Public Interest"	7-12
Putting the Public Back Into the Public Interest Assessment	12-14
Conclusion	14-15

Introduction

We live in a remarkably innovative world. New medical products let us live longer and healthier lives. Communications systems connect us instantly to family and friends anywhere in the world, and they get faster and more sophisticated every year. Innovation makes our lives more productive and more fun. We access the Internet on devices smaller than a deck of cards, watch almost any movie or video wherever and whenever we want, text friends everywhere in the world while flying vast distances, and watch movies with special effects that our grandparents would have never thought possible. We interact with marvelous inventions countless times every day, and the quality of our lives is drastically improved because of it.

Because society benefits from innovation, our laws have been designed to encourage innovation since the founding of this country. Most importantly, we grant intellectual property rights in inventions — patents — which give inventors exclusive rights in their inventions. The Constitution provides for the granting of patent rights to “promote the progress of science and the useful arts.”¹ Congress passed the first patent statute in 1790, and the United States has led the world in innovation ever since. Thomas Jefferson, who sometimes expressed skepticism of the value of patents, recognized that “issuing patents for new discoveries has given a spring to invention beyond my conception.”² From the first patent that issued in 1790 to the 10 millionth patent that issued in June 2018,³ the United States has seen remarkable amounts of innovation and has led the world in breakthrough innovations. All of this was made possible by our patent system.

The overwhelming economic and historical evidence confirms that protecting patent rights stimulates the creation and distribution of innovation throughout the U.S. and the world.⁴ Since we want the flow of inventions to continue — we want faster, safer, and more efficient transportation systems; medical treatments for the diseases that still lack cures; and the like — everyone has a profound interest in maintaining a strong patent system. A strong patent system provides reliable and effective property rights in exchange for invention and innovation.

Recently, several administrative agencies have begun interfering with the patent system, undermining patent rights in ways that will decrease innovation. These agencies are taking away an important right of patent owners — the right to exclude others from using their technologies. They rationalize this regulatory interference with patents by asserting that it serves “the public interest.” In reality, they are playing favorites and picking winners and losers. Ultimately, some innovators are deemed

¹ U.S. CONST. art. 1, §8, cl. 8.

² Letter from Jefferson to Benjamin Vaughan (June 27, 1790) in 16 PAPERS OF JEFFERSON (Julian P. Boyd et al. eds., 1956-92) 579, cited in Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1030-32 (2006).

³ See U.S. Patent & Trademark Office, Press Release 18-12, *United States Issues Patent Number 10,000,000*, June 19, 2018, available at <https://www.uspto.gov/about-us/news-updates/united-states-issues-patent-number-10000000>. There are in fact more than 10 million patents if one includes design patents and the patents issued before the current numbering system was instituted after a fire destroyed the Patent Office in 1836.

⁴ See Stephen Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON. L. REV. 811 (2016).

by our public officials to be less deserving of the rightfully earned fruits of their inventive labors—the property right secured to them by a patent.

This paper first describes the important role patents play in encouraging innovation and the public’s interest in a strong patent system. Next, this paper describes how various agencies have been weakening patent rights in the name of the public interest. Finally, this paper explains that these agencies need to understand “public interest” differently, because the public has great interest in the innovative technologies that are encouraged by a strong patent system.

I. What is the Public’s Interest in Patent Law?

Patents encourage innovation by securing to an “exclusive right” to inventors—a property right. This serves the public interest in the same way that all property rights serve the public interest. The promise of an exclusive right in the fruits of one’s labors incentivizes people to invest and create new valuable assets, such as homes, farms, factories, and skyscrapers. Likewise, patents incentivize innovators to engage in their own productive labors, inventing tractors, cars, lightbulbs, telephones, airplanes, computers, drugs that treat cancer, and other products and services that make modern life a veritable miracle.

As property rights, patents also facilitate the distribution of new products and services by making it possible for innovators to create new companies and sell new products in the marketplace. Classic examples include Cyrus McCormick creating innovative installment-purchase plans and never-before-seen customer service warranties to sell his mechanized reaper to farmers in the 1840s and Steve Jobs and Steve Wozniak creating Apple Computer in the 1970s to sell their new personal computers (and later iPods, iPhones, and iPads). Today, people see this key commercial function of patents in every episode of *Shark Tank*, as venture capitalists always ask the inventors if they have a patent to secure their exclusive rights and to serve as collateral for the proposed investments and other commercial endeavors.

This is why courts recognize that “the public has a great[] interest in acquiring new technologies through the protection provided by the Patent Act.”⁵ Patents are granted for only *new innovations*, which is a key legal requirement in an inventor receiving a patent.⁶ Officials in the early American Republic recognized that patents are not monopolies, because they do not take away preexisting property rights. Instead, patents both expand the store of common knowledge through the publication of the patent and expand access to new products and services sold to consumers in the marketplace. All of this contributes to a growing innovation economy and a flourishing society—goals in which the public clearly has an interest.

In defending the power conferred on Congress to secure patents (and copyrights) in the new Constitution, Founder James Madison explained in *The Federalist No. 43* that the “public good fully coincides in both [patents and copyrights] with the claims of individuals.”⁷ Later in 1839, Supreme

⁵ *Douglas Dynamics v. Buyers Products Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013).

⁶ See 35 U.S.C. § 102 (requiring that a valid patent can only issue for a *novel* invention).

⁷ *The Federalist No. 43* (James Madison)

Court Justice Joseph Story explained to a jury that, unlike the odious monopolies granted by the King when the American colonies were still part of the British Empire, “[p]atents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public.”⁸ Today, judges continue to recognize this important public interest in securing patents.⁹

As a property right, a patent protects an inventor by securing “the right to exclude.” If someone else makes, uses, or sells the patented invention without permission, that person is infringing. If someone simply offers to sell the patented invention without permission, that person is infringing. If someone imports the patented invention without permission, that person is infringing.

In protecting a property right, whether in land or in an invention, courts issue an “injunction” — a court order, after a trial, that the infringing party must stop its infringing acts (sales, uses, and so forth). In the same way that a homeowner is secure from invaders disrupting her life or a business is secure in choosing how it may choose to profit in the market,¹⁰ an injunction achieves the same protection for innovators by leaving them free to choose how they will use their property.¹¹ In 1845, judges observed that in “an ordinary case of infringement . . . an absolute injunction is the only adequate relief” for a patent owner.¹² An injunction thus gives force to — puts the power of the court behind — the patent owner’s right to exclude.

A court’s ordering an injunction to stop infringement of a valid patent —enforcing the right to exclude — benefits the public in several other ways. As a practical matter, a patent owner’s competitors do not simply sit to the side, waiting for the patents to expire. They consider whether they can design their product innovatively around the patent. The injunction thus stimulates

⁸ *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (No. 1,518) (Story, Circuit Justice).

⁹ *See, e.g., Amazon.com Inc. v. Barnesandnoble.com Inc.*, 73 F.Supp.2d 1228, 1248-49 (W.D. Wash. 1999), *vacated on other grounds and remanded*, 239 F.3d 1343 (Fed. Cir. 2001) (“The public has a strong interest in the enforcement of intellectual property rights. The purpose of the patent system is to reward inventors and provide incentives for further innovation by preventing others from exploiting their work. . . . Encouraging [the patent owner] to continue to innovate—and forcing competitors to come up with their own new ideas—unquestionably best serves the public interest.”).

¹⁰ *See, e.g., Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1105 (9th Cir. 1994) (issuing an injunction against the unauthorized sale of airline coupons because “Continental was entitled to control whether its coupons were transferred” and thus “[n]either Intra nor the courts are entitled to substitute their business judgment for Continental’s”).

¹¹ *See Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (observing that “price erosion, damage to ongoing customer relationships, loss of customer goodwill (*e.g.*, when an effort is later made to restore the original price), and loss of business opportunities” are all harms to patent owners by infringement that can be only remedied by an injunction)

¹² *Brooks v. Stolley*, 4 F. Cas. 302 (C.C.D. Ohio 1845) (No. 1,962) (McLean, Circuit Justice). *See also Cook v. Ernest*, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”).

innovation by the patent owner's competitors, resulting in more products, and different products, which serves the public interest.¹³

Also, knowing that a court will enjoin them from using the invention without permission, they may approach the patent owner for a mutually beneficial license. With that license in place, they develop and market their competing products in the market. The injunction thus stimulates economic transactions, benefitting the market and the public.

Negotiation for a mutually beneficial license would fall apart without the threat of the injunction. Consider, by way of an analogy, a landlord who owns an apartment building. Suppose there are squatters in the building—people who moved in without permission and refuse to leave. Suppose there is one thing the landlord cannot do: evict them. The landlord may try to negotiate with the squatters for payment of rent, but both sides know that no court will ever order eviction. And when new tenants apply to live in the building, they know that they could simply move in, and no one would kick them out. This knowledge fundamentally skews the rental negotiation, driving down the amount the landlord can collect. The same thing would happen if injunctions were not awarded for patent infringement. The fact that courts will enforce the right to exclude protects the patent owner in all licensing negotiations.

In addition, the fact that a court will issue an injunction may even persuade inventors to apply for patents in the first place, rather than keeping the details of their invention as a “trade secret.” The public benefits when an inventor picks a patent instead of trade secret law, because patents are public documents. They describe inventions in detail, and the descriptions can be fertile ground for other inventors, giving them ideas about areas of research to pursue. If inventors know that courts will enforce their patents, through injunctions, they will pick patents over secrecy, and the public reaps the benefits.

In short, the entire patent system is grounded in furthering the public interest. And although the United States Patent and Trademark Office (USPTO) does not consider the public interest when deciding whether to grant a patent, other entities involved in the patent system do take the public's interest into account. For example, district court judges must consider the public interest when deciding whether to grant an injunction against a party found to be infringing a patent.¹⁴ In addition, as described in the next section, two federal agencies — the International Trade Commission (ITC) and Federal Trade Commission (FTC) — consider the public interest when taking actions relating to

¹³ *Amazon.com Inc. v. Barnesandnoble.com Inc.*, 73 F.Supp.2d 1228, 1248-49 (W.D. Wash. 1999), *vacated on other grounds and remanded*, 239 F.3d 1343 (Fed. Cir. 2001) (“The public has a strong interest in the enforcement of intellectual property rights. . . . Encouraging [the patent owner] to continue to innovate—and forcing competitors to come up with their own new ideas—unquestionably best serves the public interest.”).

¹⁴ *See Douglas Dynamics v. Buyers Products Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013) (“While the general public certainly enjoys lower prices, cheap copies of patented inventions have the effect of inhibiting innovation and incentive. This detrimental effect, coupled with the public's general interest in the judicial protection of property rights in inventive technology, outweighs any interest the public has in purchasing cheaper infringing products. In sum, the public has a greater interest in acquiring new technology through the protections provided by the Patent Act than it has in buying ‘cheaper knock-offs.’”).

patents. The next section explains how these two agencies have recently taken steps — in the name of “public interest” — that actually weaken patent law and undermine the public’s interest.

II. Administrative Agencies Have Adopted an Unduly Narrow View of the “Public Interest”

Most people associate the USPTO with the patent system, because this agency reviews patent applications and issues patents. But other federal agencies also interact with the patent system in less obvious ways. For example, the U.S. International Trade Commission (ITC) hears patent infringement cases relating to imported goods. Also, the Federal Trade Commission (FTC), which is charged in part with protecting competition in the marketplace, sometimes expresses concerns about how patent owners are enforcing their rights. Both agencies are expected to take into account the public’s interest. At the ITC, an administrative law judge (ALJ) must consider the public’s interest before issuing an order that prevents importation of infringing goods. Similarly, the FTC must act in the public’s interest when considering how competition law interacts with patent law. As explained below, these agencies are misconstruing the public’s interest and weakening patent rights in the process.

A. U.S. International Trade Commission

The ITC is a federal agency with broad responsibilities relating to trade. Among other things, it holds hearings following the filing of a complaint alleging that the importation of products infringe intellectual property rights.¹⁵ These cases are known as “Section 337 investigations.” Thus, if a patent owner believes that someone is importing goods that infringe its patent, it may seek relief from the ITC instead of a federal court. If the ITC finds that the imported goods infringe the patent, it can issue an “exclusion order,” which requires customs officials to stop the goods from entering the country.¹⁶ The exclusion order operates like an injunction from a federal court; it gives force to the patent owners “exclusive” right. It is the only remedy the ITC can order.

When deciding whether to issue an exclusion order, the ITC must consider the public’s interest. The statute directs the ITC to consider the effects of exclusion on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.¹⁷ It also maintains the careful balance of patent law between encouraging innovation and encouraging competition in the market. It does this by creating a presumption in favor of exclusion. It states a default rule that exclusion orders “shall” be issued, allowing the ITC to find in exceptional cases that public interest concerns override the natural default of exclusion. When Congress enacted the statute, a Senate Committee explained that these classic public interest concerns could override the otherwise exclusive rights granted through a

¹⁵ See United States International Trade Commission, *About the USITC*, available at https://www.usitc.gov/press_room/about_usitc.htm.

¹⁶ See United States International Trade Commission, *About Section 337*, available at https://www.usitc.gov/intellectual_property/about_section_337.htm.

¹⁷ 19 U.S.C. §1337(d)(1).

patent.¹⁸ But the statute presumes that the patent right, the right to exclude, will be protected. This furthers the public's interest in a strong patent system.

Ordinarily, the public's interest is best served by an exclusion order, just as it is served by injunctions in court. The ITC has historically declined exclusion only in extraordinary cases.¹⁹ In nearly every case — 96% of the time — when an administrative law judge found patent infringement, the ITC issued an exclusion order.²⁰ Between 1978 and 2018, the ITC found that the public's interest in the product in question was stronger than the public's interest in a strong patent system in only four cases.²¹

These four cases were truly extraordinary. One case involved specialized beds for burn victims. The patent owner was unable to meet consumer demand, and no competing bed provided the same beneficial treatment for burn victims.²² Another case involved supplies required for basic atomic research, leading the ITC to note that “basic scientific research . . . is precisely the kind of activity intended by Congress” when considering public health and welfare.²³ The oil shortage of the late 1970s was the backdrop for another case. In this case the ITC found an overriding national interest in the supply of fuel-efficient automobiles, and the patent owner was unable to meet demand for the necessary parts.²⁴ In instances where there is no public health or economic crisis, however, the ITC traditionally has issued exclusion orders.

The fourth case, from 2011, shows how the ITC historically understood the public's interest in an effective and reliable patent system.²⁵ The case involved mobile phones using 3G technology. The infringer argued that the public interest would best be served by denying an exclusion order, because first responders rely on the GPS system and interfaces provided by the patented technology. The ITC, however, recognized the tension between the public's interest in health and safety and the public's interest in a strong patent system: “We do not accept the general proposition that, if the infringing activity is great enough, the public interest forbids a remedy.”²⁶ Rather than denying an exclusion order outright, the ITC protected the patent system by crafting a partial injunctive remedy,

¹⁸ See S. Rep. No. 93-1298, at 35 (1974).

¹⁹ See Colleen Chien, *Patently Protectionist?: An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 70 (2008) (finding injunctive relief granted to prevailing patentees in 100% of cases from 1995-2007).

²⁰ Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Decisions*, 21 HARV. J.L. & TECH. 457, 484 (2008) (finding injunctive relief granted in 96% of cases as of September 2006 where infringement was found).

²¹ Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, & the Public Interest*, 98 CORNELL L. REV. 1, 18-19 (2012).

²² See *Certain Fluidizing Supporting Apparatus and Components Thereof*, Inv. 337-TA-182/188, USITC Pub. 1667 (Oct. 5, 1984) (Final) (Commission Memorandum Opinion).

²³ See *Certain Inclined Field Acceleration Tubes and Components Thereof*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 29, 1980) (Final) (Commission Action and Order).

²⁴ See *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 (Dec. 17, 1979) (Final) (Commission Determination and Order).

²⁵ See *Certain Baseband Processor Chips & Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Prods. Containing Same, Including Cellular Telephone Handsets*, 337-TA-543, USITC Pub. 4258, at 3 (Oct. 2011).

²⁶ See *id.* at 153.

allowing for limited exceptions to the exclusion order to accommodate the needs of first responders to effectively address medical crises, fires or other public emergencies.²⁷

Unfortunately, the ITC's longstanding policy of issuing injunctions except in very rare cases has begun to crumble. Rather, the ITC has started using the claim of "public interest" to pick winners and losers in the technology innovation space. Academic commentators have encouraged the ITC to do just this. For example, Professors Colleen Chien and Mark Lemley suggest that the ITC take advantage of the discretionary nature of the public interest inquiry to broadly shape patent policy.²⁸ They argue that the ITC should allow infringement if the value of the patent owner's particular invention is small compared to the value of the larger product that includes the invention.²⁹ Some practitioners recommend that infringing defendants offer new public interest arguments so that the ITC will "redefine the contours" of the public's interest.³⁰ They point out that the ITC cannot award money damages for infringement, so denial of an exclusion order on public interest grounds is a "total and complete victory" for infringers.³¹

These arguments bore fruit late last year, when the ITC denied another exclusion order and either misunderstood or completely disregarded the public's interest in a patent system that secures reliable and effective property rights. In October 2018, an administrative law judge at the ITC found that Apple infringed a patent owned by Qualcomm.³² Apple's smartphones included Intel modems, which infringed Qualcomm's patent. The judge then declined to exclude the infringing Apple smartphones from the U.S. market, citing the public interest.³³ He reasoned that two suppliers (Qualcomm and Intel) are better than one when it comes to standardized technology and that, if the infringing product were excluded, the (infringing) supplier would not participate in the coming 5G market, which could in turn harm national security.³⁴ The judge's ruling signals a bias against awarding injunctive relief if the patent owner creates and owns foundational, standardized technologies such as telecommunications technologies like 4G and 5G — even though this means the company is innovating in a critical area of technology that the public wants and relies on.³⁵

²⁷ *See id.*

²⁸ *See* Chien & Lemley, *supra* note 21, at 34-36.

²⁹ *See id.*

³⁰ Andrew Riley & Scott A. Allen, *The Public Interest Inquiry for Permanent Injunctions or Exclusion Orders: Shedding the Myopic Lens*, 17 VAND. J. ENT. & TECH. L. 751, 768 (2015).

³¹ *Id.* at 754.

³² *See* In the Matter of Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof, Inv. 337-TA-1065 (Sept. 28, 2018) (Notice Regarding Initial Determination and Recommended Determination).

³³ *See id.*

³⁴ *See id.* at 193-96 (Initial Determination and Recommended Determination – Public Version).

³⁵ The findings are also flatly inconsistent with the Federal Circuit's observation, in 2013, that although the general public "certainly enjoys lower prices" when an injunction is denied, "cheap copies of patented inventions have the effect of inhibiting innovation and incentive." *Douglas Dynamics, LLC v. Buyers Products Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013). The court added, "[t]his detrimental effect, coupled with the public's general interest in the judicial protection of property rights in inventive technology, outweighs any interest the public has in purchasing cheaper infringing products." *Id.*

B. Federal Trade Commission

Like the International Trade Commission, the Federal Trade Commission has recently taken a cramped view of the public's interest where innovation is concerned, excluding the public's interest in reliable and effective patent rights in favor of other generalized concerns. The FTC focuses on protecting "consumers and competition," for instance from deceptive advertising, unfair business practices, and violations of competition (antitrust) law. Because of its focus on competition in the market, its investigations and actions often involve products protected by patents and force it to interact with patent law.³⁶ Although its mission inherently focuses on advancing the public's interest, and it is supposed to take action to advance a "specific and substantial" public interest,³⁷ when it interacts with patent law it ignores the public's interest in a strong patent system.

As an example of an FTC action based in competition law, consider the recent lawsuit brought by the FTC against Qualcomm.³⁸ Qualcomm is an innovative U.S. company who has received numerous patents for its innovations in computer processors and other standardize technologies used in mobile devices and telecommunication networks.³⁹ As a participant in the standards development organizations (SDO) that are involved in the standardization of 4G and 5G technologies and more, Qualcomm had agreed to license its patents on these technologies (called "standard essential patents," SEP) on a fair, reasonable, and non-discriminatory (FRAND) basis. The FTC alleged that Qualcomm's "no license, no chips" policy was anticompetitive and an unfair exercise of the company's monopoly power. The FTC's suit claimed that Qualcomm had considerable market power in the market for the computer chips on which the 3G and 4G technologies resides, that Qualcomm had exercised that power to obtain excessive licensing fees for its patents on the transmission technologies, and thus that it had not licensed its patents on FRAND terms. Judge Lucy Koh, who heard the case, agreed with the FTC.⁴⁰ As part of the suit, Judge Koh ordered Qualcomm to renegotiate all of its licenses worldwide, including even the licenses on 5G technologies that were not part of the FTC's lawsuit. She also ordered Qualcomm to renegotiate license terms for these standard essential patents in good faith without the "threat of lack of access." Judge Koh has removed the availability of injunctive relief for infringing Qualcomm's patents at the behest of the FTC, an agency that is supposed to be acting in the public's interest.

As an example of an FTC action based in unfair business practices, consider the FTC's study of "patent assertion entities" (PAE). These are companies that buy patents and then earn revenue by licensing the patents to other companies who are using the patented technology. Despite these types of companies having long existed in the U.S. innovation economy going back to the 19th century,⁴¹

³⁶ See Federal Trade Commission, ABOUT THE FTC, available at <https://www.ftc.gov/about-ftc>.

³⁷ See, e.g., FTC v. Klesner, 280 U.S. 19, 28 (1929) ("To justify filing a complaint, the public interest must be specific and substantial.").

³⁸ See FTC v. Qualcomm Corp., 2019 WL 2206013 (N.D. Cal. 2019).

³⁹ See Tekla S. Perry, *Irwin Jacobs: Captain of CDMA*, IEEE SPECTRUM (April 25, 2018), <https://spectrum.ieee.org/geek-life/profiles/irwin-jacobs-captain-of-cdma>;

⁴⁰ See FTC v. Qualcomm Corp., 2019 WL 2206013 (N.D. Cal. 2019).

⁴¹ See Adam Mossoff, *Patent Licensing and Secondary Markets in the Nineteenth Century*, 22 GEO. MASON L. REV. 959 (2015).

they often get a bad rap today and are now called “patent trolls.”⁴² A few years ago, the FTC used its § 6(b) power to launch what it claimed would be a detailed study of how PAEs behave in the marketplace. There are numerous problems with the final 6(b) study released by the FTC,⁴³ but relevant to this paper are the FTC’s recommendations to change the legal rules for patent litigation to make it allegedly less attractive for PAEs, which would make it harder and more costly for *all* patent licensing companies to sue for infringement and to obtain their rightful relief to stop infringement of their property rights with injunctions. Despite a line in the FTC’s study report that claims that the “FTC recognizes that infringement litigation plays an important role in protecting patent rights, and that a robust judicial system promotes respect for the patent laws,” the truth is that the FTC only protects patent rights if the patent owner is the right kind of entity – that is, a patent owner who is not licensing and does not participate in standard development organizations. This is essentially an agency picking winners and losers in the innovation economy, and this is not evidence-based policy making. By advocating for changes in the law so that courts can more easily deny injunctive relief for certain patent owners, the FTC is not acting in the public’s interest.

Finally, in an interaction between these two agencies, the FTC recently submitted written comments to the ITC on what it sees as the public’s interest in issuing exclusion orders in cases pending before the ITC. As discussed above, an exclusion order is an injunction issued by the ITC that stops the importation of infringing goods into the U.S. In 2012, the FTC submitted a statement in an ITC case arising from an allegation that importation of mobile devices contained software and other components that infringed valid patents. The FTC argued that an exclusion order in this case would facilitate “patent holdup.”⁴⁴ Despite no actual evidence supporting its claim that patent holdup occurred in this case or in any other case, the FTC asserted that holdup (or even the threat of holdup) would harm consumers by hindering innovation and, to mitigate this alleged harm, the ITC should “find that Section 337’s public-interest factors support denial of an exclusion order.”⁴⁵

Other agencies have echoed to the ITC this unverified concern about “patent holdup.” In January 2013, the US Patent and Trademark Office and the Department of Justice, Antitrust Division, issued a joint policy statement making similar claims to those raised by the FTC.⁴⁶ Specifically, the

⁴² See Jay Kesan, *Patent Trolls*, in HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW: ANALYTICAL METHODS, vol. 2 (Peter S. Menell & David L. Schwartz, eds., 2019) (forthcoming), <https://ssrn.com/abstract=3473854> (detailing the economic facts about patent licensing companies and the costs and benefits of these types of commercial intermediaries in the innovation economy); Adam Mossoff, *Repetition of Junk Science and Epithets Does Not Make Them True*, IPWATCHDOG (Nov. 19, 2015), <https://www.ipwatchdog.com/2015/11/19/repetition-of-make-them-true/id=63302/> (criticizing the use of improper statistical methods and false claims in the policy debates over patent licensing).

⁴³ See Kristen Osenga, *Sticks and Stones: How the FTC’s Name-Calling Misses the Complexity of Licensing-Based Business Models*, 22 GEO. MASON L. REV. 1001 (2015).

⁴⁴ See Third Party U.S. Fed. Trade Comm’n’s Statement on the Public Interest, Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers & Components Thereof, Inv. No. 337-TA-745, Doc. No. 482234 (June 6, 2012).

⁴⁵ See *id.* at 4.

⁴⁶ See U.S. Dep’t of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments 7-8 (2013) [hereinafter 2013 DOJ & USPTO Policy Statement], <http://www.uspto.gov/about/offices/ogc/Final> DOJ-PTO Policy Statement on FRAND SEPs 1-8-13.pdf.

statement noted that the threat of an exclusion order might “pressure an implementer . . . to accept more onerous licensing terms than the patent owner would be entitled to receive” and this would harm competition and consumers.⁴⁷ The 2013 DOJ & USPTO Policy Statement suggested that the ITC may conclude that the public interest factors weigh against issuing an exclusion order.⁴⁸ These agencies, however, emphasized that their statement should not be construed as advising, in the name of public interest, against an exclusion order in every case involving SEPs.⁴⁹

Significantly, in December 2019, the DOJ and the Patent Office, joined now by the National Institute of Standards and Technology, issued a new policy statement on SEPs and injunctive relief.⁵⁰ They withdrew the 2013 DOJ & USPTO Policy Statement, recognizing that a SEP committed to FRAND licensing is not a bar to obtaining injunctive relief and that there should be no “special set of legal rules that limit remedies for infringement of standards-essential patents subject to a F/RAND commitment.”⁵¹ The 2019 DOJ, USPTO & NIST Policy Statement is tremendously significant. It confirms that the earlier 2013 DOJ & USPTO Policy Statement was not based in evidence and ultimately weakened the patent system and harmed innovation – neither of which are in the public interest. Unfortunately, the FTC and the ITC have yet to change their own improperly narrow approach to defining the “public interest” without considering an effective patent system and the innovation it makes possible.

III. Putting the Public Back into the Public Interest Assessment

There is little controversy that the public has a real interest in a strong patent system that provides effective and reliable property rights for patent owners. The patent system encourages invention and innovation, stimulating our economy, saving lives, improving our productivity, and making us happier. As a property right, a strong patent system should provide the same legal protections that all property owners receive when their rights are violated—presumptive injunctive relief for ongoing infringement of a valid patent right.⁵² Only when a patent owner directly acts inequitably to the prejudice of an accused infringer, such as deliberately delaying bringing a lawsuit (called “laches” in

⁴⁷ *See id.* at 6.

⁴⁸ *See id.* at 10.

⁴⁹ *See id.* at 7.

⁵⁰ *See* U.S. Dep't of Justice, U.S. Patent & Trademark Office & Nat'l Institute of Standards Technology, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019) [hereinafter 2019 DOJ, USPTO & NIST Policy Statement], <https://www.justice.gov/atr/page/file/1228016/download>

⁵¹ *Id.* at 6.

⁵² Courts have long recognized that patents should be secured with injunctions, just like other property rights. *See, e.g.,* *Cook v. Ernest*, 6 F. Cas. 385, 391 (C.C.D. La. 1872) (“If the rights of property so invaded were rights to land or other tangible estate, no court would hesitate for a moment to restrain the wrong-doer by injunction. The property in a patent is just as much under the protection of the law as property in land. The owner has the same right to invoke the protection of the courts, and when he has made good his claim to his patent, and shown an infringement of it, it is the duty of the courts to give him the same relief meted out to suitors in other cases.”); *Conover v. Mers*, 6 F. Cas. 322 (1868) (“[W]here, as here, the patent has been sustained on full hearing, and the infringement is clear . . . the complainant is entitled to have his rights promptly protected by injunction.”); *Day v. New England Car Co.*, 7 F. Cas. 248, 248-49 (1854) (“Under the rules of equity pleading . . . The defendants must disprove the invention, or the right of the plaintiff as assignee, or the infringement of the patent Otherwise, the plaintiff will be entitled to an injunction on the proofs.”)..

the law⁵³) or in other extraordinary circumstances— such as caring for burn victims or mitigating an economic crisis caused by a worldwide oil shortage — is society benefited by not securing the exclusive right in a patent and which is the essence of all property rights. This is what makes these agencies’ actions so baffling. The ITC and FTC are charged with considering the public’s interest, and yet they take a very cramped view of the public’s interest that effectively denies the importance of innovation to the public.

To put the public back into the public interest, two things must happen. First, the ITC and FTC should not prohibit injunctive relief for patent infringement unless they have actual evidence that granting an injunction would adversely affect the public’s interest in that specific case. To date, they have based their opposition to injunctions on theory and speculation, rather than data.⁵⁴ “It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation.”⁵⁵

The agencies’ actions bear this out. Consider the ITC administrative law judge who denied an exclusion order on an untested theory that if the infringer were not allowed to continue infringing, it would be less competitive and might exit the industry, and, further, if this happened the U.S. might move more slowly towards adoption of 5G technology. This is all “if, then” hypothetical conjecture, and there was no recitation of actual evidence of harm to the public or to competition. Or consider the FTC’s usual reason for opposing injunctive relief for participants in standard development organizations and for patent assertion entities: it speculates about patent hold-up, even though empirical research has shown this is not a real, systemic problem.⁵⁶ The public’s interest in a strong patent system cannot be overridden by theoretical or speculative concerns.

Second, agencies should not ignore the interests of the patent owners who form the very heart of the innovation economy by which the public enjoys and benefits. The ITC and FTC seem to have determined that certain types of patent owners are not as important as other types of patent owners. Yet, the public has an interest in all patent owners benefiting from the equal protection of their property rights under the rule of law. Patent licensing companies, or so-called “patent assertion entities” or “patent trolls,” provide a valuable commercial service. They facilitate transactions

⁵³ See, e.g., *Cooper v. Mattheys*, 6 F. Cas. 482 (C.C.E.D. Pa. 1842) (denying an injunction given evidence of laches by the plaintiff patent owner).

⁵⁴ See Alexander Galetovic & Stephen Haber, *The Fallacies of Patent Holdup Theory*, 13 J. COMPETITION L. & ECON. 1 (2017).

⁵⁵ Letter from 13 judges, former judges and government officials, law professors, and economists to Assistant Attorney Gen. Makan Delrahim (Feb. 13, 2018), <https://cpip.gmu.edu/wp-content/uploads/sites/31/2018/02/Letter-to-DOJ-Supporting-Evidence-Based-Approach-to-Antitrust-Enforcement-of-IP.pdf>.

⁵⁶ See, e.g., Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 BERKELEY TECH. L.J. 1316, 1344 (2017) (finding that available empirical evidence does not support the theory of patent holdup); Damien Geradin, *The Meaning of “Fair and Reasonable” in the Context of Third Party Determinations of FRAND Terms*, 21 GEO. MASON L. REV. 919, 940 (2014) (“[A]lthough holdup and royalty stacking could occur in theory, there is little evidence that they regularly occur in the real world.”); J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley & Shapiro*, 82 MINN. L. REV. 714, 718-19 (2008) (discussing studies that question the prevalence of hold-up and royalty stacking).

between inventors who cannot or do not want to manufacture their inventions and manufacturers that wish to use patented technologies.⁵⁷ Companies that participate in and submit technological innovations to standard development organizations also provide a valuable service, allowing these organizations to arrive at the optimal technological standard for any given problem.⁵⁸

To deny these patent owners the injunctive relief that all patent owners have a right to receive as a remedy for ongoing infringement of their valid patents will discourage both creating innovation and participating in these important commercial mechanisms that efficiently place new innovations into the hands of consumers in the marketplace. And yet the public has an interest in the viability of both patent assertion entities and companies that participate in standard setting organizations, because both allow for more and better products to be made available on the market. Thus, the public has an interest not just in a strong and reliable patent system, but in a patent system that does not unduly discriminate against certain types of patent owners.

I. Conclusion

The founders recognized that a society that protects the rights of liberty and property is essential to economic growth and flourishing lives. Despite any mistakes in the practical implementation of this important moral and political principle, the Constitution was the first founding political document in human history that was animated by this principle. It is not an accident that the Constitution authorizes the government to protect the “exclusive right” of an inventor, and that the United States was the first country to secure patents as property rights in the same way and for the same reasons the government protects homes, farms, and the myriad of other valuable fruits of people’s productive labors. The courts and agencies like the ITC secure the liberty interests and economic values reflected in property rights by legally protecting them with an injunction to stop ongoing or willful violations of these individual rights. This has been a bedrock foundation for the explosive economic growth and the incredible standards of living enjoyed by everyone today—achievements that were considered miracles or science fiction by historical standards.

Unfortunately, administrative agencies like the ITC and FTC have forgotten today this important public interest in reliable patent rights that are effectively secured against ongoing violations. In their orders and administrative actions, the ITC and FTC have either outright eliminated or severely undermined the ability of patent owners to obtain injunctions to stop ongoing or willful infringement of their patents. This has weakened the incentives that patents provide to create more innovation and to efficiently distribute this innovation throughout the world as products and services that consumers easily purchase in the marketplace. The U.S. has led the world in innovation since the 19th century, benefiting the public at large in innumerable ways, but this leadership is threatened today by administrative agencies adopting a narrow and cramped view of the “public

⁵⁷ See, e.g., Clifton B. Parker, *Patent trolls serve valuable role in innovation, Stanford expert says*, STANFORD NEWS (Feb. 23, 2015), <https://news.stanford.edu/2015/02/23/haber-patent-trolls-022315/>; Kristen Osenga, *Formerly Manufacturing Entities: Piercing the ‘Patent Troll’ Rhetoric*, 47 CONN. L. REV. 435, 450-52 (2014).

⁵⁸ See, e.g., Kristen Osenga, *Ignorance Over Innovation: Why Misunderstanding Standard Setting Organizations Will Hinder Technological Progress*, 56 U. LOUISVILLE L. REV. 159, 166-169 (2018).

interest” that does not account for this fact. It is time the public interest in its entirety is placed back into the deliberations and legal analyses of the ITC and FTC.