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March 24, 2010

VIA EMAIL ONLY

The Honorable Victoria Espinel
U.S. Intellectual Property Enforcement Coordinator
Office of Management and Budget
The White House
Washington, DC 20500

Re: Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan (Federal Register Volume 75, Number 35 – FR Doc. 2010-3539)

Dear Ms. Espinel:

Verizon is pleased to respond to the Request for Comments regarding the Intellectual Property Joint Strategic Plan. The protection of intellectual property is of key importance to our company and to the nation. Verizon Communications Inc. and its subsidiaries (collectively “Verizon”) are the owners of a significant portfolio of patents, copyrights and trademarks, including the family of famous VERIZON trademarks. And as one of the world’s leading providers of communications and entertainment products and services, Verizon has invested many billions of dollars over the past seven years to build networks for the lawful distribution of all manner of content to its approximately 100 million wireline and wireless subscribers.¹

We commend the creation of the position of U.S. Intellectual Property Enforcement Coordinator (“IPEC”) and thank you for your leadership in this important role. We encourage your office, as part of its joint strategic plan for intellectual property, to consider a framework that promotes effective protection both domestically and internationally for all forms of intellectual property,

¹ By way of further background, Verizon Wireless is the nation’s largest wireless carrier, serving 91.2 million customers. Verizon Business serves some of the world’s largest organizations - including 96% of the Fortune 1000 - and governments over a global IP footprint in 159 countries across six continents. Verizon Telecom provides converged communications, information and entertainment products and services over America’s most advanced fiber-optic network. A Dow 30 company, Verizon employs a diverse workforce of approximately 222,900 employees and in 2009 generated consolidated operating revenues of more than \$107 billion.

including copyrights, patents or trademarks. The Request for Comments specifically asks for stakeholder recommendations on how to improve the U.S. Government's enforcement efforts, including reducing the supply of infringing goods, identifying weaknesses to effective enforcement, strengthening the enforcement efforts of other countries, and suggestions for encouraging other countries to assist in enforcement activities. As an initial matter, we believe that it will be important to prioritize the Government's enforcement activities. Specifically, we would encourage the Administration to focus on the criminal enforcement of IP laws and the investigation and prosecution of IP crimes, including large-scale commercial infringements and counterfeiting. Special priority should be given to any activities that could jeopardize the safety and health of the public.

We are pleased to recommend specific recommendations in the areas of trademark and patent law and to provide the IPEC with information on Verizon's efforts to protect the security of lawful content to its broadband subscribers.

Advancing a More Effective Trademark and Anticybersquatting Enforcement Program

The global enforcement of U.S. trademarks and the prevention of cybersquatting is a significant challenge for U.S. trademark owners, including Verizon, as the owner of the famous VERIZON trademarks. Trademarks are among a company's most valuable assets. Despite the economic crisis, the value of leading brands increased last year by 2% to 2 trillion.² Yet, protection and global enforcement of well known brands continues to be a challenge for U.S. trademark owners. As Verizon has noted in more extensive comments to USTR,³ certain countries continue to lack effective mechanisms to protect trademarks owned by U.S. companies.

For example, Brazil continues to experience extreme delays in both its trademark registration process and its adjudication of trademark disputes. Trademark challenges can linger for years, denying effective protection to U.S. trademark owners. Cyprus fails to provide adequate and effective protection for famous and well known trademarks and for trade names. Cyprus has a six-month statute of limitation to challenge infringing company names, which does not provide U.S. companies with sufficient time to learn of, investigate or challenge the infringement. Singapore fails to provide adequate protection for famous and well-known trademarks. We urge the Administration to work with all countries who fail to provide full protection for U.S. trademarks, including eliminating laws that restrict a U.S. company's ability to challenge infringing names and to ensure that such countries provide full protection for famous marks under trademark and dilution laws.

² <http://www.millwardbrown.com/Sites/Optimor/Media/Pdfs/en/BrandZ/BrandZ-2009-Report.pdf>

³ <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aa7ed3>

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The global problems associated with cybersquatting also continue to pose enforcement challenges for U.S. trademark holders. A recently released Harvard study⁴ analyzing the issue of cybersquatting estimates that the top infringing 100,000 websites owned by cybersquatters collectively receive 68.2 million daily visitors. If considered as a single website, the traffic generated from these diversions would be ranked as the 10th most popular website in the world. The study estimates that Google's revenue alone from serving advertisements to the top 100,000 cybersquatted websites is \$497 million per year. Despite federal laws such as the Anticybersquatting Consumer Protection Act ("ACPA") and the availability of arbitration procedures, such as the Uniform Dispute Resolution Procedure ("UDRP"), the problem of cybersquatting only continues to grow. There have been 45,000 UDRP complaints filed to date, which represents only 5% of the current infringing websites diverting consumers away from the true sources of legitimate products and services. Verizon, which has been among the most aggressive companies in the nation to enforce its trademarks, faces thousands of new cybersquatting incidents each year. The economic losses attributable to cybersquatting are measurable and significant. Last year, Verizon activated certain domain names in our portfolio, including a large number of domain names won back from cybersquatters, and re-pointed the traffic back to Verizon websites. We were able to verify 22 million new visitors to our websites and over 120,000 confirmed sales, all of which would have otherwise been lost to cybersquatting activity.

As outlined in Verizon's earlier comments to USTR, enforcement problems exist in both the generic top level domains ("gTLDs") (e.g., .com, .net and .org) and the country code top level domains ("ccTLDs"). For example, Cameroon operates the ccTLD extension ".cm". One of the most common typographical errors made by persons navigating to the popular ".com" top level domain name is to mistype ".com" as ".cm". Knowing this, cybersquatters have taken advantage of the Cameroon ccTLD system to register ".cm" domain names consisting of variations on famous trademarks. Enforcement remedies in Cameroon are not adequate to prevent brand abuse. Other countries require a local presence as a condition to registering valuable domain names in the ccTLD extensions. These artificial barriers to registration and enforcement permit local cybersquatters to exploit U.S. brands.

Likewise, China fails to provide adequate protection to U.S. trademark owners and company names through its operation of the ".cn" ccTLD. China's dispute process severely limits the time offered to trademark owners to object to ".cn" infringements. China also fails to police local entities posing as Internet registrars. These entities send fraudulent domain name registration notices via email to executives and other employees at large U.S. companies. The emails are designed to trick companies into purchasing unnecessary Internet domain names and keywords in both country code and generic top level domains.

⁴ Measuring Typosquatting Perpetrators and Funders (Tyler Moore and Ben Edelman, Feb. 17, 2010), <http://www.benedelman.org/typosquatting/typosquatting.pdf>

Unfortunately, the problem of cybersquatting is soon likely to grow exponentially. The Internet Corporation for Assigned Names and Numbers (“ICANN”) is committed to introducing a potentially unlimited number of new gTLDs into the domain name system. The introduction of new gTLDs will result in millions of new infringements for U.S. trademark owners around the world. Enforcement will prove difficult as the U.S. is currently the only country in the world with a law that prohibits cybersquatting and whose law contains a statutory damage remedy as a deterrent. In the future, many new registrants, registries and registrars will be located outside the U.S. Even today, many entities purposefully hide their domain names and operations outside the U.S. to avoid U.S. anticybersquatting laws and jurisdiction. The current remedies for trademark owners proposed by ICANN do not scale into a system with thousands of new gTLDs. U.S. trademark owners will inevitably have difficulty protecting millions of Internet users worldwide from the additional forms of online brand abuse that may arise from such new gTLDs, including counterfeits, fraud, identity theft and phishing to name but a few.

We urge the Administration to work with Congress to consider amending our Anti-Cybersquatting Consumer Protection Act to provide greater protections for U.S. trademark owners. We also urge the Administration to advance agreements that provide for additional international protections against cybersquatting, whether at the World Intellectual Property Organization or through other bilateral or multilateral IP agreements.

Promoting Smart Patent Policy

Although the request for public comment focuses on non-patent issues, any comprehensive federal strategic plan should recognize that patent enforcement policy may require different treatment. In patent law, innovation benefits from policies that promote *smart* patent enforcement, not simply *more* patent enforcement. Verizon is a leading high-tech innovator, and we strongly believe that appropriate patent enforcement rights are essential to promoting innovation. But as the National Academy of Sciences, the Federal Trade Commission, and a number of serious scholars of the field have noted, excesses in the granting and enforcement of patent rights have impeded innovation and competition.⁵ More patent enforcement, and more patent grants, does not necessarily spur more innovation. To the contrary, too many patents held by too many owners, coupled with sledgehammer penalties for inadvertent infringement, can lead to patent gridlock.

Poor quality patents needlessly tax future innovation and shield incumbents from competition.⁶ The prospect of a patent grant may be intended to induce innovation, but when the technological innovation is obvious or trivial, the social costs of granting that exclusivity right are hardly justified. And the social costs can be substantial: questionable patents can stand in the way of

⁵ See, e.g., National Research Council of the National Academies, *A Patent System for the 21st Century* (2004); Fed. Trade Comm’n, *To Promote Competition: The Proper Balance of Competition and Patent Law and Policy* (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> [hereinafter *FTC 2003 IP Report*]; Adam B. Jaffe & Josh Lerner, *Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What To Do About It* (2004).

⁶ See, e.g., *FTC 2003 IP Report*, supra note 3, at Exec. Smy. at 6.

bringing new products to consumers, shunt future R&D to less profitable paths, and tax follow-on innovation.

Moreover, where firms need access to hundreds or thousands of patents to bring a single product to market – as in the high-tech industries – the granting of too many patent rights to too many holders leads to a patent thicket, a “dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology.”⁷ Infringement becomes inevitable as it becomes impossible to clear – or even identify – all the necessary property rights in advance. Commercializers bringing products to consumers then become easy marks for patent holders, who can hold them up for their inadvertent infringement.⁸ In the telecommunications field, for example, wireless companies “must license thousands of patents to provide any one consumer product. Even in existing markets, if they miss a single high-tech horseshoe nail, a whole network may be threatened.”⁹

In short, excessive patenting can retard innovation and competition. Our patent system has the power to promote innovation, but granting questionable patents to too many holders, and awarding extraordinary remedies where they are unwarranted, seriously threatens innovation and competition. In shaping the Joint Strategic Plan, the IPEC should consider urging federal agencies to promote *smart* patent policy in the granting and enforcing of patents. For example, smart patent policy counsels urging the U.S. Patent and Trademark Office to screen carefully against the granting of unwarranted patents. Smart patent policy also calls for advocating for patent infringement remedies that are closely tailored to the harm caused by infringement, and that do not unnecessarily tax productive activity. Policies such as these can ensure that patent policy does not stand in the way of future innovation, but fosters it. We urge the Intellectual Property Enforcement Coordinator to take these considerations into account when shaping the Joint Strategic Plan.

Response to Supplemental Comment Topics in Federal Registry Notice

⁷ Carl Shapiro, *Navigating the Patent Thicket: Cross License, Patent Pools, and Standard-Setting*, in 1 INNOVATION POLICY AND THE ECONOMY 119, 120 (Adam Jaffe, et al., eds., 2001).

⁸ Patent infringement commonly is inadvertent. Indeed, a recent empirical study finds that “[w]ith very few exceptions, defendants are not making a calculated decision to infringe a patent. The overwhelming majority of defendants are independent developers who were unaware of the existence of the patent when they made their product design decisions.” Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1462 (2009) (noting further that “those who were aware of the patent and made a decision to infringe are mostly generic pharmaceutical companies subject to a special set of rules that make the application of reasonable royalty law implausible in the extreme.”).

⁹ Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, 100 (2008).

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Question 4:

Provide examples of existing successful agreements, in the U.S. or abroad, that have had a significant impact on intellectual property enforcement, including voluntary agreements among stakeholders or agreements between stakeholders and the relevant government.

Response:

Verizon has implemented a notice forwarding program as part of our commercial relationships with several content owners that we believe strikes an appropriate balance between the legitimate interests of rights holders in protecting their copyrights and the important privacy and other interests of our wireline Internet access customers. The automated notice forwarding program we voluntarily launched near the end of 2008 has proven very effective in not only notifying customers about allegations of infringing behavior involving their Internet connection, but also, importantly, at educating customers about copyrights and the importance of stopping any potentially infringing behavior, all with minimal adverse customer reaction.

Verizon's automated notice forwarding program combines several methods of notice to help ensure that the customer actually learns of, and has an opportunity to take action to modify, the infringing activity alleged to have taken place. The program has been designed to give customers detailed information about the copyrighted work alleged to have been infringed, the date of the alleged infringement, and the alleged application or protocol used. The notices also provide links to our terms of service and to an FAQ page that explains the copyright law and penalties for violation of the law. The links also provide instructions on ways to find out if peer-to-peer software is resident on the user's computer and ways to ensure the user's broadband router is operating in a secure (i.e., encrypted) mode. The goal of the notice forwarding system is to put useful information in the hands of our customers so they can assess whether a problem exists and can take appropriate action. Finally, our notices reinforce Verizon's strong belief in protecting user privacy by stating that we will not disclose the user's identity to any third party absent service of appropriate legal process.

Based on our experience to date, the Verizon notice forwarding program is working well. In 2009, the first full year for which we have data, roughly 70% of the notices we processed were for customers receiving their first notice. As customers progress through our multi-step process we see the number of notices processed declining rapidly at each stage, which demonstrates that the Verizon notice forwarding system is having the intended effect of decreasing dramatically the number of customers who receive multiple notices of alleged infringement. And importantly, the program is working with minimal customer complaints.

It is important to note that the vitality of these efforts is currently threatened by the "Net Neutrality" proposals currently being considered by the FCC.¹⁰ Verizon's successful notice efforts

¹⁰ http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-306A1.pdf

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are based in commercial agreements, in which Verizon benefits from the lawful distribution of content and hence has made millions of dollars of investment in the notice regime on top of the billions of dollars it has invested in its broadband networks. To the extent that “net neutrality” regulations would limit Verizon’s opportunities to benefit from the lawful distribution of content, Verizon’s ability to invest in the security of a third-party’s intellectual property will be severely diminished. The IPEC should insist that any “net neutrality” rules adopted by the FCC preserve the presence of network operators like Verizon in the market for the distribution of lawful content.

Conclusion

Verizon appreciates the opportunity to respond to this Request for Comment and looks forward to working with the Administration to improve copyright, patent and trademark enforcement efforts worldwide.