

November 30, 2012

Via Fed Ex

Honorable Renata B. Hesse, Esq.,  
Office of the Assistant Attorney General, Antitrust Division,  
Department of Justice,  
Main Justice Building, Room 3109,  
950 Pennsylvania Ave., N.W.,  
Washington, DC 20530.

Dear Ms. Hesse:

IPXI Holdings, LLC (“Holdings”) and its wholly-owned subsidiary Intellectual Property Exchange International, Inc. (“IPXI”) respectfully submit the following information in support of their request that the DOJ issue a “Business Review Letter” regarding their planned activities.

IPXI has created and is preparing to launch the first transparent market-based trading platform, open to all, for intellectual property (“IP”) license rights. As set forth in greater detail below, IPXI will (i) receive offers of interest from patent owners to license their patents; (ii) fully vet the patent rights at issue by examining validity, infringement and other issues; (iii) determine levels of interest to license those patents by those using the technology under review; and (iv) if there is sufficient market interest under terms and conditions acceptable to the patent owners, IPXI will sell license rights through its exchange, which incorporates transparent pricing information and standardized terms. The keystone of IPXI’s licensing model is a tradable license instrument, the Unit License Right™ contract (“ULR”). The offering and trading of ULR contracts will rely on market-based principles, including transparency, price discovery, efficiency, and liquidity.<sup>1</sup>

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<sup>1</sup> The ULR may include necessary know-how, software and the like. In the pages that follow, we refer to the product licensed by the ULR as “patents,” which is the focus of the IPXI ULR offering.

The IPXI model will offer patent licensing benefits that are not available in the marketplace today. In most situations, patent licensing is conducted through bilateral negotiations between a patentee and each licensee, or commonly under the threat or as a result of litigation. This system is burdened by several problems, including the inefficiency of multiple bilateral negotiations, increased transaction costs and a lack of information regarding pricing and terms. These inefficiencies are multiplied with respect to widely used patents, such as those that are essential to industry or technological standards.

In contrast with IPXI, certain existing licensing models are shrouded in secrecy. For example, one patent aggregator is alleged to have established more than 1,000 shell companies to hold tens of thousands of patents. This information disadvantage, in turn, leads to severe disadvantages to start-ups and small businesses who may be forced to pay a premium on licensing rather than absorb the costs investigating validity and infringement and engaging in litigation. IPXI addresses these inefficiencies which arise with increasing frequency in the market. As noted in detail below, no patent is offered on the IPXI exchange unless (1) it has been fully vetted by IPXI, and (2) the results and underlying documents of the vetting process are made available to all potential licensees. Through this and other benefits of the IPXI model, a level playing field is created as all interested parties—regardless of size—have access to substantial, fundamental information about the license being offered and the patents in such license, and all have access to a license under identical terms and at identical costs. IPXI fully expects its model to bring technologies to small users—often those willing to abide by their intellectual property obligations—without the access barriers created by high transaction costs and a lack of transparency. Accordingly, there is a significant demand for patent licensing mechanisms such as IPXI's that provide price and information transparency, market pricing, increased efficiency, and standardized terms.

The IPXI model is supported by many of the world's leading IP owners, licensees and experts in licensing rights. Those who have contributed to developing this new model include leading corporations such as Philips Electronics, Sony, Ford, JPMorgan Chase Bank, Hewlett-Packard; universities such as the University of California, Columbia University, and Northwestern University; multiple Department of Energy National Laboratories, including Lawrence Livermore National Laboratory, and dozens of respected professional services companies with expertise in intellectual property.<sup>2</sup>

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<sup>2</sup> A complete list of current IPXI members is available on [www.IPXI.com](http://www.IPXI.com) and is attached hereto (Ex. M hereto).

IPXI offers an alternative and efficient monetization model for patent owners, and increased information to licensees. In the pages that follow, we describe the IPXI model, its pro-competitive effects, and the measures which IPXI respectfully submits eliminate any competitive concerns.

I. The IPXI Model.

A. The ULR.

Under the IPXI model, license rights are offered through ULRs traded on the exchange. An owner of intellectual property may offer licenses to specific IP through the listing and sale of ULR contracts on IPXI's exchange. The ULR is a contract conferring the right to use specified patents to make a product within the field of use defined in the ULR.<sup>3</sup> Each ULR contract in an Offering is standardized so that all purchasers, whether large or small users of the patents, receive the same terms. ULR purchasers report their production of products, at which point the ULRs for those products are retired or "consumed" and the product becomes licensed. Licensing is thus tied to the purchaser's actual use of the patented technology, and there are no upfront costs such as initial lump sum licensing fees. IPXI performs extensive diligence on the IP included in each ULR, and provides the results to all potential ULR purchasers so that all potential purchasers have the same information.

Through the sale of ULR's on the exchange, IPXI seeks to bring to the licensing of patents all the efficiencies and transparency that are fundamental to existing financial markets for products such as securities, commodities and derivatives. Indeed, the IPXI model is based on these markets, with accommodations for the unique features involved in offering and trading intellectual property.

The IPXI market model generally is defined by the IPXI Market Rulebook (Ex. A hereto), IPXI Guidelines and Procedures (Ex. B hereto); IPXI Membership Agreements (Ex. C hereto); Committee Membership Agreements (Ex. D hereto); Submission Agreement (Ex. E hereto); Option Agreement (Ex. F hereto); the Exclusive License Agreement (Ex. G hereto); the ULR Contract Sublicense Agreement (Ex. H hereto); Operating Agreement (Ex. I hereto); Employee Confidentiality Agreement (Ex. J hereto); IPXI Nondisclosure Agreements (Ex. K hereto); and the Offering Summary Document (Ex. L hereto). The description of the IPXI model in the pages that follow begins with a description of IPXI's structure and then a detailed explanation of how the IPXI model will operate in a license offering.

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<sup>3</sup> At a legal level, the ULR contract is structured as a sublicense to make, use, sell, offer for sale, or import a single "unit" of a product covered by the patents licensed. (Ex. H, ULR Contract).

B. Structure.

IPXI Holdings LLC (“Holdings”) was established on December 17, 2007. Holdings is the 100% owner of Intellectual Property Exchange International, Inc. (“IPXI”). Members having an ownership interest in Holdings include Royal Philips Electronics NV, CBOE Holdings, Inc., Ocean Tomo, LLC, and other financial and private investors. The Board of Holdings is co-chaired by the CEO of IPXI and a representative of Ocean Tomo; the CEO is the Chairman of IPXI.

The Executive Management team of IPXI includes Gerard J. Pannekoek, President and CEO, Donald L. Horwitz, Managing Director and General Counsel, and Robert Moore, Managing Director and CFO. Other executives, officers and employees bring to IPXI substantial experience in markets, licensing and patent law. Generally, IPXI is organized to perform four basic functions: (i) business development; (ii) modeling, legal, and market analysis; (iii) transaction and marketing of license offerings; and (iv) operations such as accounting, HR and IT.

As set out in the Rulebook (Ex. A, Rule 300), IPXI has several classes of Members<sup>4</sup> defined by, among other things, the Member’s role in the IPXI process, the Member’s commitment to sponsor one or more offerings, and the nature of the Member’s business. With respect to the purchase of ULR contracts, any bona fide entity can qualify as a “Purchasing Member” and purchase and consume license rights without the payment of any membership fee. (Ex. C, Purchasing Member Agreement.) In other words, bona fide users of the patents licensed through a ULR need not pay any entrance or any other upfront fees in order to purchase a ULR to obtain a license.

Much like any other financial exchange, IPXI’s Members are eligible for and may be appointed to one or more IPXI committees which play a large part in establishing rules and procedures for the IPXI market. The IPXI committees are the Executive Committee, the Rules Committee, the Selection Committee, the Business Conduct Committee, the Enforcement Committee and the Market Operations Committee. (Ex. A, Rules 201–202.) As discussed in greater detail below, significant recommendations made by each of the other committees are considered by the Executive Committee and ultimately by the IPXI Board of Directors which has ultimate decision-making authority. The committees’ principal functions are as follow:

Executive Committee: The Executive Committee makes recommendations to the Board of IPXI based on input received from other IPXI

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<sup>4</sup> Except where otherwise noted, the capitalized term “Member” refers to a member of the IPXI exchange and not a member having an ownership interest in IPXI Holdings, LLC or Intellectual Property Exchange International, Inc.

committees. Issues considered by the Executive Committee include whether to undertake a new Offering, enact changes to IPXI's Rulebook, audit Operational Users, and enforce patents licensed as ULR contracts. (Ex. A, Rules 201, 202.A-E.)<sup>5</sup> The CEO of IPXI is a member of the Executive Committee (Ex. A, Rule 201.).

Rules Committee: The purpose of the Rules Committee is to prepare and maintain the Rulebook and to propose revisions and additions to the Executive Committee. (Rulebook at 202.A.)

Selection Committee: The Selection Committee considers and evaluates potential Offerings that have been brought to IPXI. Based on a set of specific criteria (Ex. A, Rule 202.B(3)), the Selection Committee will evaluate whether to recommend a particular Offering to the Executive Committee.

Business Conduct Committee: The primary function of the Business Conduct Committee is to ensure the fair and efficient functioning of the IPXI market (Rule 202.C). In general, the committee will investigate alleged Rulebook violations and recommend responses to the Executive Committee, consider and make recommendations

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<sup>5</sup> The IPXI documents define several terms that are used throughout this letter. As noted above, Unit License Rights™ or "ULRs" are the contracts sold over the exchange that constitute the right to make a single unit of a product within the defined field of use. "Operational Users" are those who purchase ULRs in order to use the patents in making or selling a product. "Liquidity Providers" are qualified financial institutions who may trade on the IPXI for financial reasons, with no intent to "consume" or use the ULR to make a product. "Sponsors" are patent owners who offer their patents on the exchange. "Issuer" is the special purpose vehicle established by IPXI to offer a Sponsor's ULR. "Secondary Market" refers to the market in which owners of ULRs make bids and offers to sell ULRs which are matched by IPXI, in contrast to the "Primary Market" for initial sale of ULR contracts in an Offering. "Offering" refers to a series of ULR tranches to be sold on the Exchange in the case of an Initial Offering or a single ULR tranche in the case of a Follow-on Offering. An "Offering Summary Document" is a detailed description of a proposed Offering that is used by IPXI to fully vet the Offering and determine quality and user demand. "Offering Memorandum" is a document prepared by IPXI and sent to all parties who may be interested in purchasing a ULR. The Offering Memorandum provides robust and detailed information about the proposed Offering and the patent(s) involved. "Consumed" refers to the use of a ULR by an Operational User to make a product after which the ULR is retired. "Amnesty" refers to the extent to which, if any, that a Sponsor has decided to forgive past use of the patent(s) in a ULR.

regarding audits, and determine any appropriate response to audit results (Ex. A, Rule 202.C). Any recommendation for discipline will proceed only in accord with a detailed process set out in the Rulebook, which includes notice of charges, an opportunity to be heard at a hearing (Ex. A, IPXI Market Rulebook, Ch. 7). As with all other IPXI Committees, the Business Conduct Committee operates with specific and transparent criteria to ensure the integrity and consistency of its decision-making process (Ex. A, IPXI Market Rulebook, Chs. 7–8).

Enforcement Committee: A ULR contract Sponsor has the right, but not the obligation, to bring an enforcement action for infringement of the IP contained in an Offering. However, enforcement must first be authorized by IPXI. Neither the Sponsor nor IPXI can initiate litigation on their own (Ex. G, Exclusive License Agreement § 7.2). The Enforcement Committee will investigate alleged instances of infringement and recommend to the Executive Committee whether IPXI should permit initiation of an infringement lawsuit by a Sponsor (Ex. A, Rule 412; Ex. B, Guidelines Ch. 3). The Executive Committee, in turn, will make its own recommendation to the Board (*Id.*).

Market Operations Committee: The Market Operations Committee is charged with developing “best practices” operation of the ULR Registry and Trading Platform. This committee is responsible to monitor the Exchange trading market operations and identify actions that may be needed to enhance market performance and liquidity, and oversee the periodic expansion of the market with a view to assuring efficient market performance (Ex. A, Rule 202.E).

Membership in committees is proposed by the Executive Committee with approval of the Board. To ensure maximum participation of Members in the committee process, committee members serve a one-year term (Ex. A, Rule 202.A(1), 202.B(1), 202.C(1), 202.D(1), 202.E(1)). The Executive Committee is selected by a Nominating Committee consisting of the CEO and one additional member of the Board (Ex. A, Rule 201.A).

A key element of IPXI’s goal of assuring fair and efficient operation is that committee membership is subject to comprehensive and written conflicts of interest procedures (Ex. A, Rule 204). In general, each committee member who has a “material conflict of interest” (“Interested Person”) must recuse themselves from any consideration or determination of any action that may affect the company that employs such member. Committee members are required to disclose the material facts concerning his or her relationship or interest in the matter (Ex. A, Rule 204(c); Ex. D, Committee Membership Agreement § 1). Upon such disclosure, the committee may determine that the participation by the Interested Person would be consistent with the interests of IPXI and Exchange Members (Ex. A, Rule 204(e)). Rule 204(e) provides a more limited exception for such person to “participate in deliberations prior to a vote” if certain disclosures are

made and such other procedures are followed as set forth in detail in the Rule. Accordingly, a committee chair may require recusal of any committee Member who has not made the disclosure required under 204(c). (Ex. A, Rule 204(d)). Moreover a committee Member must acknowledge in writing that his or her responsibility is to act solely in the best interests of IPXI and that this obligation does not conflict with any requirement of their employer. (Ex. D, Committee Membership Agreement). Failure to follow this recusal policy may result in removal of the Member from the committee and/or a recommendation for sanctions by the Business Conduct Committee (Ex. A, Rule 714).

C. The ULR Process.

In a process extending several months, a patent owner may approach IPXI and, after careful vetting, have its patents offered on the exchange through a ULR. The process to accomplish this goal is set out below:

First, patent owners interested in exploring a market-based model and IPXI personnel will discuss the possible Offering and the steps necessary to secure a successful Offering. IPXI staff works with the owner to prepare an Offering Summary Document (“OSD”) for submission to the Selection Committee. The OSD will typically include the following:

- Identification of the IP to be included in the Offering;
- Abstract of the technology and perceived business opportunity to license the patents;
- Detailed financial model of the potential value of a ULR contract;
- Information regarding the relevant markets and potential use of the patents at issue;
- Proposed field of use;
- Any known encumbrances on the patents such as existing licenses; and
- Other relevant facts, such as prior litigation involving the patents.

(Ex. L, Offering Summary Document).

The completed OSD is submitted to the Selection Committee, which will make its recommendation whether to proceed to the next step (Ex. B, Guideline 2.0).

If the Selection Committee approves the OSD, the patent owner (“Sponsor”) will enter into a Submission Agreement with IPXI (Ex. B, Guideline 2.0, Ex. E, Submission Agreement) which, among other terms, provides IPXI adequate time to conduct due diligence on the quality of the patent(s) and the nature of the business opportunity.

In the course of their review, IPXI patent attorneys and other staff—who may retain third parties to assist in the due diligence process—will analyze issues related to the patents’ scope, strength, application, and potential use and value.

Upon conclusion of this vetting process, the OSD may be modified to conform to the results of IPXI’s due diligence. The OSD, IPXI staff recommendations, and results from the vetting process are then reviewed again by the Selection Committee, which may recommend to the Executive Committee that IPXI proceed with an Offering. If the Executive Committee recommends to the Board and the Board decides to proceed, the Sponsor and IPXI will enter into an Option Agreement for the respective patents. (Guidelines at 2.4). If the Board rejects the proposed Offering, the Sponsor retains all rights in its patents and the Submission Agreement expires (Submission Agreement).

If the Offering is accepted after IPXI’s due diligence process, IPXI will then meet with various third parties, including potential licensees, to conduct a “roadshow” to introduce IPXI and the Offering, as well as to gather pricing and other relevant information from the market. IPXI will make available during this period an Offering Memorandum, which will provide the material terms of the offering and information about the patents, including potential uses and the identity of the anticipated market. The Offering Memorandum may be refined as a result of market feedback.

The IPXI vetting process necessarily creates substantial information about the patents offered in a ULR. This information may include (but is not limited to) relevant prior art, generic claim charts, the Offering Memorandum, technical analyses, and patent prosecution histories. A unique and substantial benefit of the IPXI process is that this data assembled by IPXI will be made available to all Members in a “data room” during the roadshow containing the results of its due diligence process. The data room will be available to Members upon publication of the Offering Memorandum and will remain available as long as the ULR is trading on the IPXI exchange.

Upon completion of the roadshow and due diligence, IPXI will discuss with the Sponsor the synthesis of the information it has received, but will not reveal user-by-user interest in the ULR contracts (Ex. A, Rule 507). Upon receipt of this



information, the Sponsor will determine whether to proceed with offering a ULR and at what price and volume the ULR will be offered (Ex. B, Guideline 2.7–2.8). Information IPXI gathers from its “roadshow” activity will be reported only to the Sponsor (in an aggregate form) and not to any other Member or any committee (Ex. A, Rule 507).

If the Sponsor wishes to proceed and IPXI has received sufficient indications of interest to make a market-based offering sensible, the Sponsor and IPXI will proceed with the Offering. Once the final terms of the Offer are determined, IPXI will notify the market of any changes to the Offering Memorandum, including pricing and quantity information. Once an Offering is “closed,” a special-purpose LLC (*i.e.*, a “special purpose vehicle” or “SPV” formed by IPXI and the Sponsor) will receive from the Sponsor an exclusive license to the patents that will be the subject of the Offer, including the rights to grant sublicenses (*i.e.*, ULRs) and any other terms as the Sponsor may specify (Ex. G, Exclusive License Agreement § 2, *et seq.*).

When drafted, information provided in the Offering Memorandum will include:

- A general description of the technology and fields of use;
- The extent of the license grant and what constitutes the use or “consumption” of a single ULR;
- The indicative price of a ULR;
- The total indicative volume of ULR’s to be offered in three tranches;
- The conditions under which second tranches, third tranches and Follow-on Offerings will be offered;
- Prior licensing history; and
- The extent of any amnesty.<sup>6</sup>

An Offering will typically proceed by offering the ULR in three tranches, through trading in a secondary market, and with the promise of Follow-on Offerings if

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<sup>6</sup> The Sponsor may determine that all prior use is subject to amnesty; none; or something in-between such as seeking the purchase of one ULR for 10 past uses (Ex. B, Guideline 2.11; Ex. H, ULR contract Arts. 2–3).

demand exceeds the volume offered in the initial tranches. Although IPXI and the Sponsor will attempt to estimate current and future demand and seek to meet that demand within the first three tranches of the Offering, additional supplies will always be available to meet demand.

The identification of a fair price accepted by a willing buyer and seller during the roadshow process will be used by the Sponsor to price the third tranche of the Offering. In order to encourage adoption and establish trading, the first and second tranche will be offered at a discount to the third tranche.

The Sponsor will determine the amount of the discounts from the third tranche, although the extent of the discount will be limited to 30% (Ex. A, Rule 505). The objective in the offering of the first (discounted) tranche of ULRs is to meet the immediate demand for purchase of ULR contracts. In other words, the expectation and objective is to sell out the first tranche at the very beginning of trading. Once the first tranche is sold, trading will begin on a secondary market on which IPXI will match bids and asked prices that are set by ULR owners and those offering to purchase a ULR.

For example, a Sponsor may set the prices for the first, second and third tranches of an Offering at \$.70, \$.85 and \$1.00, respectively with the \$1.00 price generally reflecting the price of a willing buyer. The price and volume for all tranches will be disclosed to all before any ULR trading.

As noted, after the completion of the first tranche, trading will commence in the IPXI secondary market and the second tranche will be offered. Prices and volumes of trades on the secondary market will be set purely by the market created by third party bids and asked prices, although the price of the next available tranche will be that noted on the Offering Memorandum. Once the preceding tranche has been sold, additional tranches will be offered under the terms specified in the Offering Memorandum. The secondary market will provide any necessary market adjustments to the extent that any tranche offering did not successfully price a ULR at a price of a willing buyer and seller.

IPXI provides a supply mechanism to meet surplus market demand for ULRs beyond the initial tranches. Each Sponsor commits to provide a Follow-on Offering once certain pre-set trigger points (disclosed in the Offering Memorandum) such as when the originally priced tranches are sold, and a set percentage of sold ULRs have been reported as consumed. Thus, *e.g.*, at commencement, a Sponsor will have committed to make a Follow-on Offering in the event all tranches have been sold and, *e.g.*, 70% of ULRs have been consumed. The mechanism to determine the price of any Follow-on Offering will be provided in the Offering Memorandum before trading begins, and will be based on the price in the secondary market during a prescribed period prior to the particular Follow-on Offering (such as, *e.g.*, 30 days). Whatever triggers for a

subsequent offer may have been set, additional ULRs will always be available to meet demand.

The secondary market will be available to all Operational Users and Liquidity Providers. For example, Operational Users who purchase ULRs in order to consume them, may find they “overbought” ULRs and wish to sell them back onto the market. In addition, Liquidity Providers, (qualified financial institutional investors) may wish to trade ULRs offered on the IPXI markets for purely financial reasons. IPXI trading rules limit the quantity of ULRs available to Liquidity Providers, in order to prevent market distortions (Ex. A, Rule 415).

In the event the Sponsor and IPXI have not properly estimated market demand, IPXI provides mechanisms for the Sponsor to adjust ULR pricing and other terms in order to avoid a disruption in trading (Ex. A, Rule 202.E(4)). For example, if there are no ULRs available on the secondary market and the bid price for the ULR remains below the tranche currently offered for an extended period (evidencing demand, but at a price lower than that offered by the tranche), the Market Operations Committee may authorize the Sponsor to re-price the ULR offered through the current tranche in order to meet the lowered bid level if sufficient consumption has occurred and the preceding tranche has completely sold out.

As with other markets, IPXI will report aggregate trades in ULRs, including the volume at various bids and asked prices in the secondary market and the total quantity of ULRs consumed. Consumption reports will be based on reports made to IPXI by Operational Users who must make such reports in order to take advantage of the license grant (Ex. H, ULR Contract § 2.1). IPXI will maintain a confidential log of all trades and individual Registry accounts for all Members (Ex. B, Guidelines Ch. 4). No company-by-company trading data will be reported publicly or made available to any Member (Ex. A, Rules 408, 508; Ex. B, Guidelines 4.3.C; Ex. H, ULR Contract § 3.6). In the unlikely event of a thinly traded market in which, *e.g.*, there are three or less participants, IPXI will not report even aggregate consumption of ULRs to prevent Members or others from attempting to determine the consumption by individual licensees through aggregate reports (Ex. A, Rule 508).

ULRs will continue to be offered until there is no longer any demand. Revenue from the sale of ULRs by the Issuer will be shared between IPXI and the Sponsor. Typically, IPXI expects to collect 20% of the net revenue generated by Issuer sales with the Sponsor collecting 80%.

## II. Efficiencies and Pro-Competitive Effects.

As compared with current models, including take it or leave it terms offered by pools, opaque bilateral licensing negotiations, broad licenses offered by patent

aggregators and a Non Practicing Entity (“NPE”) license through litigation models, IPXI offers many efficiencies that are not available in current models. Those include the following:

A. Transparency, Efficiency, and Offering Thoroughly Vetted Patent Rights.

Before bringing any ULR contract to market, the IPXI team will fully vet the patents, examining issues related to validity and infringement, and provide information learned during vetting in a data room that is available to licensees before they determine whether to purchase the Offering. In addition to the obvious transparency brought to the licensing decision, this will reduce transaction costs, including legal and diligence, through IPXI’s assumption of those expenses that otherwise would be duplicatively borne by each prospective licensee. Moreover, the IPXI vetting process will provide confidence to the market that only those patents which have been fully examined are being offered, and create a unique opportunity for both patent holders and licensees to access this market at substantially reduced costs.

Unlike other licensing models where licensees may face threats of litigation without being provided even the most basic knowledge of the patent at issue (see page 2 *supra.*), the IPXI model ensures that prospective licensees have the opportunity to make an informed decision. By providing significant and basic information to all, and offering ULRs on identical terms to all licensees regardless of size, the IPXI model brings technology to those who otherwise might not be able to afford it, who would otherwise not have the panoply of information about the issues that IPXI makes available, and who otherwise may very well pay licensing royalties that are not based on the value of patents or the licensee’s use of them. In sum, the IPXI model permits both patent owners and licensees to access a market for patent rights with *de minimis* transaction costs and with their eyes “wide open.”

B. A Non-Litigation Based Model.

Concerns continue to arise that patent licensing is plagued by litigation “hold-ups” by NPEs and others. The IPXI model relegates litigation to a virtual last resort because there is no inherent incentive for such activity. Indeed, baseless or overly aggressive litigation is filtered out through the Enforcement Committee process and there is no economic incentive to the Exchange for obtaining large settlements. Moreover any such litigation would harm rather than advance the goal of IPXI being recognized as a truly efficient marketplace.

IPXI offers an efficient, cost-effective, market-based model, one not premised on the threat of infringement litigation. Because the IPXI model focuses on addressing inefficiencies and assessing patent user’s interest in licensing rights and their corresponding financial interest, and because no Offering will be made unless there is

widespread interest sufficient to create a market, the IPXI model reduces the incentive for “stick licensing”—based on opaque threats of litigation.

The IPXI model can only be achieved if there are willing buyers and sellers of license rights. IPXI, its current Members and supporters anticipate that its model will be “game-changing,” and therefore encourage adoption by those using patent rights at fair, market-based levels.

C. Level Playing Field and Increased Market Penetration.

The significant reduction of transaction costs and other such features of the IPXI model will lower financial barriers for those interested in buying and selling patent rights. Thus, all Liquidity Providers and Operational Users, regardless of their means, can buy and sell in this market under identical terms and conditions. On the inventor side, IPXI offers greater access to large markets, and an opportunity for a fair return on the value of the invention while lowering the often substantial costs inherent in patent licensing such as legal services and litigation.

Indeed, IPXI hopes and expects that its model will spur innovation, as inventors know that useful new patented inventions can be efficiently licensed through IPXI’s markets while the inventor retains patent ownership. On the licensee side, as noted previously, IPXI’s due diligence will be available to all, pricing information will be transparent, and potential licensees, large and small, may make an informed decision about whether to purchase a license without the additional costs inherent in other models.

D. Fair, Market-Based Pricing.

Unlike the typical bilateral licensing negotiation or other models that are based on “take it or leave it” license terms, license rights offered by IPXI will for the first time be based on a large volume of input from prospective licensees and true matches in a market of willing buyers and sellers. Unless IPXI is able to determine that licensees are willing to purchase license rights at a level that is acceptable to the patent owner, no IPXI Offering will be made. IPXI is aware of no model in which license rights will be available only if there is a community of willing licensees at the terms and conditions offered. Indeed, this is the fundamental basis of the entire IPXI model—market-based pricing and transparency that currently is unknown in the licensing business.

Through the transparent vetting of patent rights and input from prospective licensees in the pre-Offering roadshow process, IPXI will gauge the level of interest of prospective licensees. As a result, no ULR contracts will be brought to market unless there is a sufficient volume of willing purchasers at a price that is acceptable to the Sponsor. Once the initial tranche of the Offering of a particular ULR is sold, the IPXI

Secondary Market will be available that will form yet another basis to determine a true market price for license rights.

The IPXI model thus not only provides transparency and market pricing for the particular license rights, but IPXI expects its market to provide a baseline for fair, reasonable and non-discriminatory market terms and conditions that may be used as a benchmark for other non-IPXI offered patent rights and even for litigation damage valuation.

E. Litigation and FRAND Licensing.

With the increase in standardization and FRAND (Fair, Reasonable and Non-Discriminatory) commitments by patent owners, litigation has ensued over what constitutes compliance by patent owners with such promises to standard setting organizations. The IPXI model offers an opportunity to provide what is by definition FRAND licensing (based on a free market) and a benchmark to determine FRAND licensing.

The IPXI model will offer patent rights at quintessentially fair and reasonable terms because the price of a ULR contract is set by the market and input from both buyers and sellers. If the terms are not fair, reasonable and acceptable, the IPXI Offering will fail. The model does not permit and will not survive with license terms that only can be accomplished through a lack of transparency or threats of litigation.

Similarly, the IPXI model creates non-discriminatory licensing as well as the ability to pay for exactly what is needed. There are no lump sum costs or upfront payments. A purchaser pays for what is needed and is free to sell any excess ULRs on the Exchange. At any given time during the life of an Offering, a ULR contract will be available under identical terms and conditions to all prospective licensees regardless of size, resources or level of production. Moreover, the IPXI model allows participation by licensors and licensees with *de minimis* transaction costs.

Thus, IPXI anticipates that it will eliminate litigation not just over issues of infringement, but also concerning whether licensing terms that are offered comply with FRAND obligations.

F. Licensing Options.

As suggested above, IPXI provides an alternative for patent owners to monetize patent rights without transferring patent ownership rights to NPEs. IPXI believes that the trend of transferring patent rights to NPEs in some circumstances creates transactional inefficiencies, other monetary costs, a lack of transparency and “settlements” that do not reflect the true value of the patent at issue, but rather the threat

of costly litigation and its consequences. In the “pre-IPXI world,” inventors who wish to monetize valid patent rights without substantial investment often have few options other than to transfer patent rights to NPEs with the resulting costs and inefficiencies. The IPXI model offers an alternative for inventors large and small. The major qualification for patentees to gain access to the IPXI model will be objectively valuable, valid patent rights and an agreement with IPXI upon consensual terms.

In sum, the IPXI model creates numerous efficiencies that currently are unavailable in existing market models. In particular, IPXI is not aware of any model that creates such transparency with respect to the patent at issue or provides mechanisms to establish a true market price and avoid the hold ups and inefficiencies of litigation. Those benefits and efficiencies are not provided by NPEs or through bilateral licensing.

Indeed, it is because of these unique pro-competitive benefits that IPXI will bring that the IPXI model has generated such widespread interest and support from, among others, commercial licensors and licensees, educational institutions, and several Department of Energy national laboratories. These entities are convinced they will benefit from (i) IPXI’s qualified licensing resources and the monetization possibilities such resources create; (ii) a market determination of the value of a patent or a set of patents for a specific purpose based on a level of transparency that does not exist today; (iii) a patent licensing model based on a patent’s value rather than informational inefficiencies or litigation; and (iv) access to licensing with significantly reduced transactional costs for both licensors and licensees.

### III. Structures to Address Competitive Concerns.

IPXI understands that its role as a marketplace and its varied interactions with multiple Sponsors and buyers of ULR contracts may cause concern about competitive issues. IPXI respectfully submits that any such concerns are both unfounded, and overwhelmingly outweighed by the efficiencies IPXI brings to the market. In any event, IPXI has put measures in place to ensure that it provides the efficiencies of a market for IP licenses without exposing the market to potential competitive harm. At a high level, IPXI uses combinations of its Rulebook and legal arrangements to ensure that access to sensitive information is limited; that conflicts of interest are managed; that competitive Offerings are identified and addressed; that markets remain liquid; and that no Member is able to exploit IPXI’s marketplace to impose undue burdens on any other Member. These mechanisms underscore IPXI’s primary goal: to become the marketplace for quality IP in the form of ULR contracts.

First and foremost, incentives weigh heavily against anticompetitive conduct. IPXI’s success is dependent on its credibility as an efficient market for the trading of IP rights. Without widespread confidence among its Members that IPXI

functions as a true market, IPXI will not succeed. Consequently, the incentives for IPXI to engage in anti-competitive behavior in any Offering are negligible at best, but the risks are catastrophic. Nevertheless, IPXI will implement the mechanisms detailed below to alleviate any legitimate competitive concerns. These mechanisms include the following:

A. Potentially Competitive Offerings.

While IPXI understands that a theoretical concern may be raised that IPXI's Members might collude or coordinate with respect to Offerings where products embodying patented technologies may compete, IPXI does not believe that there is any meaningful risk in practice. First, the reputational risk for IPXI to engage in or permit market manipulation, as noted above, is catastrophic and the benefits are minimal: specifically, IPXI stands only to gain from its 20% share in any marginal increase in revenues generated by collusive behavior for a single Offering of ULR contracts.

Second, IPXI has no effective ability to achieve any collusive price effect. IPXI does not "set" prices for any ULR contract. The responsibility for pricing is always with the particular Sponsor, who sets the terms of the specific Offering based on relevant feedback from participants in the marketplace. Additionally, once an offered ULR contract has begun trading, prices of successive tranches are determined in accordance with the published offering memorandum. Thus, although IPXI will share its views of where the market "is" with respect to price and quantity, ultimately each Sponsor decides whether and at what price and quantity to proceed.<sup>7</sup> This information is available to all Members as part of the offering memorandum.

Third, the secondary market for ULR contracts, where prices are determined by bids and asks of third parties, will impose severe constraints on attempted market manipulation in any Offering competitive to the one that is trading. The chances that Sponsors can collude on pricing decisions through the IPXI marketplace on one Offering are severely constrained by the secondary market's pricing mechanism, *i.e.*, trading by multiple entities, on the competitive Offering. Moreover, because a Sponsor

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<sup>7</sup> We respectfully note that the Division has issued several favorable business review letters to patent pool administrators that do not raise concerns regarding Sponsorship of potentially competitive technologies. *See* [www.justice.gov/atr/public/busreview/238429.htm](http://www.justice.gov/atr/public/busreview/238429.htm) (RFID); [www.justice.gov/atr/public/busreview/2485.pdf](http://www.justice.gov/atr/public/busreview/2485.pdf) (DVD-ROM); [www.justice.gov/atr/public/busreview/215742.htm](http://www.justice.gov/atr/public/busreview/215742.htm) (MPEG LA). IPXI believes that in the pool context, most pool Sponsors have a greater ability to influence price than IPXI in the market context and that, therefore, there is even less reason for concern with the IPXI model than with respect to patent pools.



can only directly control the price of ULR contracts offered in the *primary* market—and only in the Initial Offering—the capacity for two Sponsors to use IPXI to coordinate pricing is limited. Any attempt to achieve supra-competitive pricing on a second Offering will be readily undone in the secondary market where the first competitive Offering already is trading based on multiple bids and asks. To the extent a super-competitive price is sought on a second competitive Offering, buyers will simply switch to the other Offering where price has been set in the market and for which supply will always be available.

Fourth, although in certain circumstances patents may confer market power, the ability of a Sponsor to improperly use such power is, at best, minimal. Offerings are reviewed by IPXI staff and the Selection Committee, and IPXI cannot initiate patent infringement actions without the authorization of its Enforcement and Executive Committees and the consent of the Sponsor, which by definition can only occur after the market has accepted an Offering's price. Initiating litigation against an infringer after the vetting of a patent, the opening of a data room, and the market setting of a price between a willing buyer and willing seller is a far cry from much of the opaque patent litigation being brought today. Indeed, the entire basis of the IPXI model and the key to its success is the voluntary purchase of ULR contracts at a price the market accepts, not a price which is forced on any licensee.

Notwithstanding the substantially minimal risk, IPXI has adopted the following procedures to address any concerns:

First, the IPXI Rulebook prohibits Sponsors from discussing with any other Sponsor of any other Offering any competitively sensitive information such as price and quantity (Ex. A, Rule 410). IPXI reserves the right to suspend any offer if there has been a violation of this rule by any Sponsor (Ex. A, Rule 713).

Additionally, IPXI has established confidentiality measures to ensure that it does not become a conduit for communication of coordinating information between its Members (Ex. A, Rule 203 (committee confidentiality), 204 (conflicts of interest), 507 (marketing information), 508 (consumption information), 603.C (IPXI staff firewalls)). Specifically, IPXI requires its employees and the members of its committees to enter into confidentiality agreements as a condition for participation in their respective roles. (Ex. A, Rule 205; Ex. J, Employee Confidentiality Agreement). Moreover, IPXI rules provide that information gained in the course of service may only be used in the performance of their official duties (Ex. A, Rules 203, 205). Likewise, IPXI enters into—and adheres strictly to—non-disclosure and non-use agreements with its Sponsors and prospective Sponsors (Ex. K, IPXI Standard NDA). These mechanisms reduce the possibility that IPXI could become a “go-between” for IPXI Members under any circumstance.

Second, IPXI will identify potentially competitive Offerings and, if found, will put additional remedial procedures into effect to prevent any possibility of competitive harm (Ex. A, Rulebook Ch. 6). To identify potentially competitive Offerings, IPXI attorneys will examine each proposed ULR which, like virtually all patent licenses, will contain a field of use that limits the use of the licensed patents for a particular purpose. For each ULR contract considered, IPXI lawyers will examine each field of use to determine if a product within the field of use of one ULR is likely to be competitive with or a substitute for any other product made through the field of use of a second ULR (Ex. A, Rules 601, 602). This analysis will take into account prices of products, intended use, and other factors.

If IPXI determines that a proposed ULR contract competes with an existing ULR contract, IPXI will initiate several procedures to ensure that competition is not harmed. First, IPXI will not offer any second competitive Offering for one year from the date of a first competitive Offering. Second, regardless of the year interval between Offerings, IPXI will not discuss ULR contract pricing with a Sponsor unless the identified competitive Offering has traded on the secondary markets for a minimum of 60 days (Ex. A, Rule 603.B). Third, a competing Offering will not proceed to a roadshow unless IPXI counsel has certified that there have been sufficient structures put in place to prevent collusion under the circumstances of each Offering (Ex. A, Rule 603.D). Finally, IPXI will keep records for a minimum of five years after an Initial Offering of the market input IPXI received, such as indications of interest from third parties and IPXI recommendations to Sponsors (Ex. A, Rule 603.E). We believe that these records will demonstrate beyond contravention that IPXI's role in discussing terms with Sponsors reflects the synthesis of information received from the marketplace and that no pricing and/or volume determinations reflect any coordination with any other Offering.

Thus, for every proposed Offering of ULR contracts, IPXI's model, rules and agreements operate to prevent price coordination and collusion by competing Sponsors with or through IPXI.

B. Possession of Competitively Sensitive Information.

IPXI takes steps to ensure that competitively sensitive information obtained during the roadshow for a ULR contract is not misused by a Sponsor or by other Members of IPXI. IPXI will never publish or make available to anyone outside of IPXI any indications of interest, individual ULR contract consumption data, or trading history information (Ex. A, Rule 507, 508). Information obtained from roadshow activities are shared only with a Sponsor and only on an aggregate basis (Ex. A, Rule 507). No such information is provided to any other Member (*Id.*). Company by company consumption of ULR contracts is never reported to any committee or other Members (Ex. A, Rule 408), and in the event any such individual trading can be "backed out" of aggregate

consumption reports because of a thinly traded market, IPXI will not publish aggregate consumption data while the thin trading condition prevails (Ex. A, Rule 508).<sup>8</sup>

Furthermore, each committee member is required to enter into a confidentiality agreement which prevents the misuse of IPXI information (Ex. A, Rule 205; Ex. D, Committee Membership Agreement).

C. Management of Conflicts of Interest Among Committee Members.

Because IPXI is a committee-driven exchange, the independence of its committee members is essential to IPXI's credibility as a marketplace. To ensure this independence, IPXI has developed conflicts of interest rules to which all committee members are bound when they accept their appointment to a committee (Ex. A, Rule 204). These rules are discussed in greater detail at pages 10–11, *supra*. These rules ensure that no committee member participates in a decision for which that member cannot offer unbiased advice for the benefit of the Exchange. Sanctions for violations of the IPXI conflicts rule may include removal from the committee and further sanction against the Sponsoring member (Ex. A, Rule 712).

D. Coherent Patent Composition of Any ULR.

To protect its members from the burden of sifting relevant patents from irrelevant ones in a large portfolio, IPXI will ensure that an offered ULR contract includes only patents that may be reasonably necessary to a licensee when carrying out the activity contemplated by a ULR (Ex. A, Rule 501). No group of patents will be offered only in a single ULR unless such a determination had been made.

Moreover, except in the cases of patents deemed essential to standardized technologies, no ULR contract will license patents of more than one Sponsor—regardless of whether they are complements—unless each Sponsor licenses its patents separately in a ULR contract (Ex. A, Rule 502).

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<sup>8</sup> We note that aggregate consumption reports reflect historical use. In fact, reports to Members of aggregate consumption contain information that is not unlike readily available third party market reports and studies which identify company by company historic sales. IPXI will never report to *any* entity the number of ULR contracts held by particular traders or Member firms—the equivalent of anticipated future sales or consumption need—under any circumstances.

E. Audit Target Selection.

IPXI has the right to audit its members to determine whether Operational Users – *i.e.*, users that purchase and consume ULR contracts to obtain licenses—accurately report their consumption of ULR contracts (Ex. H, ULR Contract; Ex. A, Rulebook Ch. 8). IPXI has rules in place to select audit targets fairly, and prevent the process of selecting members for audits from being misused.<sup>9</sup> These include the random selection of a proportion of audit targets (Ex. A, Rule 408, 802 and 202.C(4)), specified criteria to be used in selecting audit candidates (Ex. A, Rule 801, 803), limits on the frequency of audits for a particular ULR contract, the use of qualified outside auditors to conduct any audit (Ex. A, Rule 803), and mandatory recusal of any committee member from the determination of whether to select his employer as an audit candidate (Ex. A, Rule 204). These mechanisms ensure that all Operational Users for a particular ULR contract stand on a level playing field with respect to their obligations to comply with the rules, and their potential audit financial burden.

F. Freedom to Operate and Open Licenses.

IPXI intends for the price of a ULR contract to reflect the value of the patent rights licensed without burden from restrictive covenants. Thus, no ULR contract will ever (i) restrict the ability of an Operational User to manufacture a product within the field of use with features and/or designs selected by the Operational User; (ii) restrict where or at what price the tangible good licensed under the ULR contract may be sold; (iii) limit volumes of production or sale of any patented product; or (iv) prevent the use of any other technology not licensed by the ULR contract whether such technology is competitive or not.

G. Enforcement.

While the IPXI model does not and cannot eliminate the threat of or the initiation of infringement litigation, it provides a licensing environment that is free from the effects of constant threats of legal process. IPXI has established rules and procedures to ensure that enforcement occurs as a last resort, and only at the recommendation of its independent Enforcement Committee. Only after an Offering is successful—*i.e.*, with buyers and sellers of ULR contracts—will IPXI ever play any role in enforcement against infringers. Even then, IPXI's rules contemplate the possibility of mediation and/or arbitration with infringers before litigation (Ex. A, Rule 412(2)), and IPXI's agreements with Sponsors (Ex. G, Exclusive License Agreement Art. 7; Ex. I, Operating Agreement

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<sup>9</sup> There is no monetary cost or consequence to the Operational User if the audit reveals the Operational User has been accurately reporting consumption of ULRs.

Art. 9), rules (Ex. A, Rule 411) and procedures (Ex. B, Guidelines Ch. 3) ensure that litigation cannot begin until after the careful application of objective criteria by the IPXI Enforcement Committee. Although the Sponsor retains an ultimate decision whether to enforce its patents, no Sponsor may not do without the consent of IPXI vis-à-vis the SPV (Ex. G, Exclusive License Agreement § 7.2; Ex. A, Rule 202.D).

Under IPXI's enforcement procedures, a user of patents offered for license in a ULR contract who—unlike other market participants—refuses a license from the ULR contract market to fulfill its intellectual property obligations may be the subject of an IPXI enforcement investigation. (Ex. B, Guidelines Ch. 3). The Enforcement Committee will review available facts, and make a recommendation to the Executive Committee whether an enforcement action by the Sponsor should be permitted based on consideration of objective criteria, including:

- The likelihood of success on the merits;
- The cost and duration of proceedings;
- The value of the infringing activity;
- Any professional or technical opinions regarding the infringement;
- Other infringing activity by the party under review;
- The thoroughness and credibility of the technical case for infringement; and
- The perceived strength of potential affirmative defenses.

(Ex. B, Guideline 3.2).

The recommendation from the Enforcement Committee is reviewed by the Executive Committee and its determination regarding the infringement action is subject to Board review.<sup>10</sup> While the law of standing will require the SPV as exclusive licensee to be a party to any infringement case, the case cannot proceed without the Sponsor as plaintiff. While IPXI will never fund litigation, it may identify and approach third party sources of funding as may be necessary (Ex. B, Guideline 3.11).

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<sup>10</sup> As with all activities, enforcement determinations are subject to IPXI's conflict of interest policies (Ex. A, Rule 204(a)).

To the extent any litigation brought by the Sponsor results in a recovery, funds must be dispersed in accordance with the Guidelines (at 3.13). The Guidelines specify that recoveries must first be used to pay any obligations to funding sources, next to reimburse IPXI for any resources of its attorneys IPXI devoted to the process, next to purchase ULRs to reflect the level of the adjudicated infringing activity and, finally, the remaining balances are paid to the Sponsor.

The IPXI procedures thus relegate litigation in the licensing process to a last, not first result, and ensure that litigation will only be brought if it has substantial merit. This de-prioritization of litigation and requirement of a merit-based determination by an independent committee ensures that fear of legal expense is not a primary motivation to take a license through purchase of ULR contracts. Thus, IPXI's enforcement mechanisms prevent Sponsors from exploiting the inefficiencies of patent litigation through the courts to coerce weaker competitors into taking a license.

#### IV. Conclusion.

In conclusion, IPXI will bring multiple efficiencies and other benefits to IP licensing not currently available in the marketplace. IPXI and its many supporters believe the effect of the IPXI model—including patent vetting, transparency, the data room available to licensees, market pricing, de-emphasis of litigation, and enforcement, if necessary, on terms far more fair and reasonable than those prevalent today—will create a profound, significant and undeniably positive effect on IP and the way it is licensed. Smaller companies and start-ups—whether licensor or licensee—will have access to technology and IP licensing without transaction costs and on the same terms and conditions as larger competitors; licensing decisions will be made with full access—at no cost—to important and significant information about the IP at issue; inventors will be able to monetize valuable inventions without turning to NPEs or others whose practice may create inefficiencies and taxes on the system, licensees will have access to precisely the number of licenses that are necessary for its activities, and license costs will be determined by a fair and free market.

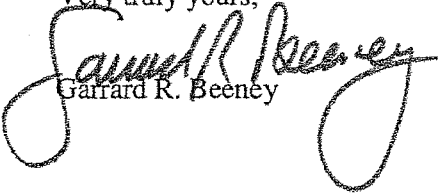
While IPXI understands that any structure that involves collaboration may raise competition concerns, we respectfully submit that the structures IPXI will employ to address any such concerns are robust and effective. Consequently, any such concerns are far outweighed by the benefits of the IPXI model.

Honorable Renata B. Hesse, Esq.

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We appreciate the Division's attention to this matter and stand ready to provide whatever additional information the Division would find useful to its analysis.

Very truly yours,

  
Garrard R. Beene

(Enclosures)