The FTC-DOJ IP-Antitrust Report: An Overview

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Introduction

- Today I will present an overview of the Report on Intellectual Property and Antitrust, soon to be released jointly by the US FTC and US Department of Justice.
- The views expressed today do not necessarily represent the views of the Federal Trade Commission.

Background

- The FTC and DOJ held Hearings in 2002 on the interface of antitrust and intellectual property law doctrines.
- The hearings covered both patent-antitrust analysis and systemic patent reforms.
- A 2003 FTC report discussed possible patent system reforms, focused primarily on improved patent quality, to better harmonize competition and IP policies.

Background, continued

- A second product of the 2002 Hearings is a soon-to-be-released joint FTC-DOJ report aimed primarily at the antitrust-patent interface (“Second IP Report”).
- The Second IP Report will discuss findings of the 2002 Hearings and set forth topic-specific conclusions reached by FTC-DOJ.
- Below I will highlight my best guess as to likely key findings (findings not yet official).

General Conclusions

- The Second IP Report concludes that, properly understood, the IP and antitrust laws work in tandem to promote consumer welfare and innovation.
- The Second Report reaffirms the general principles of the 2005 FTC-DOJ IP Antitrust Guidelines: patents do not necessarily confer market power, IP licensing is generally procompetitive, and agreements involving IP can be analyzed using the same antitrust rules applied to agreements involving other property.

FTC-DOJ Conclusions: Unilateral Refusals to License Patents

- Sec. 271(d)(4) of the Patent Act does not immunize unilateral refusals to license.
- Supreme Court jurisprudence recognizes that unilateral right not to grant a patent license is a core part of the patent grant.
- Antitrust liability for unilateral unconditional refusals to license patents will not in and of itself play a meaningful role in interface between patent rights and antitrust.
- Conditional refusals to license that cause competitive harm are subject to antitrust liability.

FTC-DOJ Conclusions: Patents Incorporated into Standards

- Ex ante consideration of licensing terms by SSO members can be procompetitive.
- Rule of reason applies to SSO members' joint ex ante licensing negotiations.
- An IP owner's unilateral announcement of licensing terms is not an antitrust violation.
- IP owner's mere unilateral announcement of price terms is not an antitrust violation.
- Bilateral ex ante negotiations, outside SSO, between an IP owner and an IP owner unlikely without more to need special antitrust scrutiny.
- FTC/DOJ take no position on whether SSOs should engage in joint ex ante discussion of licensing terms.

FTC-DOJ Conclusions: Portfolio Cross-Licensing and Patent Pools

- FTC-DOJ will continue to apply Antitrust-IP Guidelines to cross licenses and pools.
- Combining complementary patents in a pool is generally procompetitive.
- Inclusion of substitutes in a pool not presumptively anticompetitive, case-by-case analysis employed.
- Case-by-case analysis of a pool's licensing terms, cost-benefits weighing.
- No assessment by agencies of "reasonableness" of royalties set by a pool. FTC-DOJ focus on pool's formation and whether its structure would likely enable pool members to impair competition.

Variations on IP Licensing Practices

- FTC-DOJ will continue to apply flexible rule of reason analysis of Antitrust-IP Guidelines to assess IP licensing agreements, including non-assertion clauses, grantbacks, and reach-through royalty agreements.

Tying and Bundling of IP Rights

- Antitrust-IP Guidelines will continue to guide analysis of IP tying and bundling.
  - Under Guidelines, FTC-DOJ consider both anticompetitive effects and efficiencies of a tie, and would be likely to challenge a tying arrangement if: (1) market power in tying good, (2) harm to competition in tied good market, and (3) anticompetitive harm outweighs efficiencies.
  - If a package license constitutes tying, it will be analyzed under general tying analysis principles.
- Note no presumption that patent confers market power in tying – *Independent Ink* case.

Extending Patent's Market Power Beyond its Statutory Term

- Starting point for practices that extend beyond a patent's term is analyzing whether that patent confers market power.
- Standard antitrust analysis applies to practices that have potential to extend market power beyond a patent's term.
- Collecting royalties beyond patent's term can be efficient, may reduce deadweight loss (but legal limitations remain, see *Brulotte v. Thys Co.*).

Conclusions

- FTC-DOJ have reached conclusions on IP-antitrust enforcement policy in light of 2002 Hearings and later developments.
- In general, focus is on actual competitive effect of particular practices, rather than on rigid formalistic rules.
- FTC-DOJ enforcement in this area will continue to be influenced by the development of sound economic policy and new learning.
- Thank you very much.