

The IP-Antitrust Balance: A U.S. Government Perspective

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Views Expressed Are Solely Attributable to the Speaker
They Do Not Necessarily Represent the Views of the FTC

Introduction

- I am delighted to be here today to address this most important topic
- The IP-competition law interface is of growing importance to public policy and private decision-making
 - IP, which embodies knowledge, increasingly significant part of value-added and a key to many business transactions, thus IP legal rules loom larger
 - Globalization of business and spread of competition regimes raises significance of competition rules

IP, Economic Progress, and Welfare

- IP has a critical role in furthering economic progress and public welfare – it emerges from and contributes to innovation
 - Innovation reduces costs by improving production and distribution
 - It stimulates economic growth by bringing to market new products desired by consumers
 - It yields new technologies that transform industries and may lower entry barriers (Schumpeterian “creative destruction”)

IP-Competition Law Tensions

- Before the 1980s competition law and IP law were viewed as in tension in the U.S.
- IP (especially patent) law viewed as a means for creating/bolstering monopolies, competition law for combating them
- Licensing restrictions by which IP holders sought to maximize profits (e.g., territorial and field of use limitations) were suspect

Harmonizing IP and Patent Law

- U.S. antitrust enforcers changed tune in 1980s, saw IP/patents as property rights that, appropriately enforced, may boost innovation and thus enhance competition
- 1995 DOJ-FTC IP-Antitrust Licensing Guidelines set policies still largely followed:
 - IP a property right, not a monopoly (not presumed IP confers market power)
 - IP licensing restrictions deemed generally efficient, rule of reason analysis (except for “naked” restraints)
 - Safe harbors for transactions with low market shares

IP-Competition Hearings and 2003 FTC Report

- US FTC and DOJ held hearings on the patent-competition law interface in 2002
- 2003 FTC Report concluded that patent and antitrust law, properly balanced, both promoted innovation & consumer welfare
- 2003 Report recommended various steps to minimize issuance of questionable patents and to provide early and reliable notice of a patent's coverage – and thus enhance business certainty
- U.S. Supreme Court favorably cited FTC Report
- 2004 NSF Report had similar thrust

2007 FTC-DOJ Report

- In 2007 the FTC and DOJ issued a report focused more specifically on IP-antitrust
- Report reiterated that 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

2007 Report: Unilateral Refusals to License Patents

- U.S. 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
- Patent Act does not immunize unilateral refusals to license
- Conditional refusals to license that cause competitive harm are subject to antitrust liability

2007 Report: 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 user, 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

2007 Report: 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, costs and benefits are weighed
- 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

2007 Report: Tying and Bundling

- 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 market, (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 – Supreme Court *Independent Ink* case

2007 Report: Patent Extension

- 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.*)

Other Recent Policy Developments

- June 2009 USG OECD submission on patents, competition, and innovation
- Described Supreme Court decisions that limited overly broad patent holdings and strengthened competitive considerations
- Noted administrative reforms by PTO to improve patent examination quality
- Discussed legislative reform proposals
- Highlighted 2009 FTC Hearings on Evolving IP Marketplace (report expected soon)

IP-Antitrust Enforcement

- The FTC and DOJ will challenge anticompetitive arrangements involving IP, where IP holders seek to obtain returns beyond legitimate scope of property right
- A very brief summary of types of enforcement actions is set forth below
- I focus briefly on pharmaceutical and standard setting cases, merely by way of example (other cases not precluded)

Pharmaceutical Cases

- The FTC has challenged anticompetitive arrangements involving patents that drive up pharma costs
- It has challenged “reverse payments” where name brand pharma patent holders allegedly “paid off” generic producers to delay entering market, e.g., *Schering-Plough* (FTC lost on appeal), *Cephalon*, *Solvay* (latter two are in litigation) (other cases and settlements)
- DOJ filing in private *Cipro* case (2009) supported rebuttable presumption of illegality in such cases
- Language in House version of health care reform bill would establish presumption that reverse payments are anticompetitive
- FTC also pursues anticompetitive agreements among generic producers and anticompetitive pharma mergers

Standard Setting Cases

- FTC has challenged alleged deceptive conduct before SSO to obtain monopoly power (*Rambus*, FTC lost on appeal)
- FTC entered into settlement with firm that allegedly harmed competition by reneging on patent royalty commitment made in earlier SSO proceedings (*N-Data*)
- FTC merger settlement obtained zero royalty commitment from firm that allegedly misled regulatory body regarding its IP rights in rulemaking proceedings (*Unocal*)
- FTC continues to investigate standard setting

Refusals to Deal

- A firm's unilateral refusal to deal with its rival can give rise to antitrust liability under U.S. law (*Aspen Skiing*, 1985), but firms are generally free to decide with whom they will deal (*U.S. v. Colgate*, *Verizon v. Trinko*, 2004)
- See also *Otter Tail Power Co. v. U.S.* (1973) (Supreme Court upheld liability against electric utility for refusing to sell power to municipalities trying to establish their own distribution systems and for refusing to "wheel" power to municipalities from another supplier)
- *Data General v. Grumman* (1994) (unilateral refusal to license a copyright may be exclusionary conduct, but author's desire to exclude others from use of copyrighted work is a presumptively valid business justification)
- Successful U.S. antitrust refusal to deal cases very rare
- *Microsoft* appeals court decision (2001) rejected proposition that a company has "an absolute and unfettered right to use its IP as it wishes," but this decision did not address mere refusals to license

Essential Facilities Doctrine

- Some lower courts have decided refusal to deal cases under the rubric of the “essential facilities” doctrine
- **But U.S. Supreme Court has never recognized it and leading scholars have heavily criticized it**
- U.S. courts that have invoked doctrine have recognized four elements establishing obligation to provide access: (1) control of facility by a monopolist, (2) competitor’s inability practically or reasonably to duplicate the facility, (3) denial of use of facility, and (4) feasibility of providing the facility. *MCI v. AT&T* (1983)
- A facility that is controlled by a single firm will be deemed essential only if control of facility carries with it power to eliminate competition in the downstream market, *Alaska Airlines v. United Airlines* (1991)

Conclusion

- The intersection between IP and antitrust will continue to raise difficult questions for enforcers, courts, and businesses
- I have just scratched the surface in highlighting key U.S. principles and developments in this area
- Thank you for your attention