

Antitrust – IP Interface Perspectives



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The views expressed are the presenter's and do not necessarily represent the views of the Federal Trade Commission or any Commissioner.

Antitrust Enforcement Around the World

U.S.

- FTC and DOJ Antitrust Division; State level enforcement; private antitrust enforcement

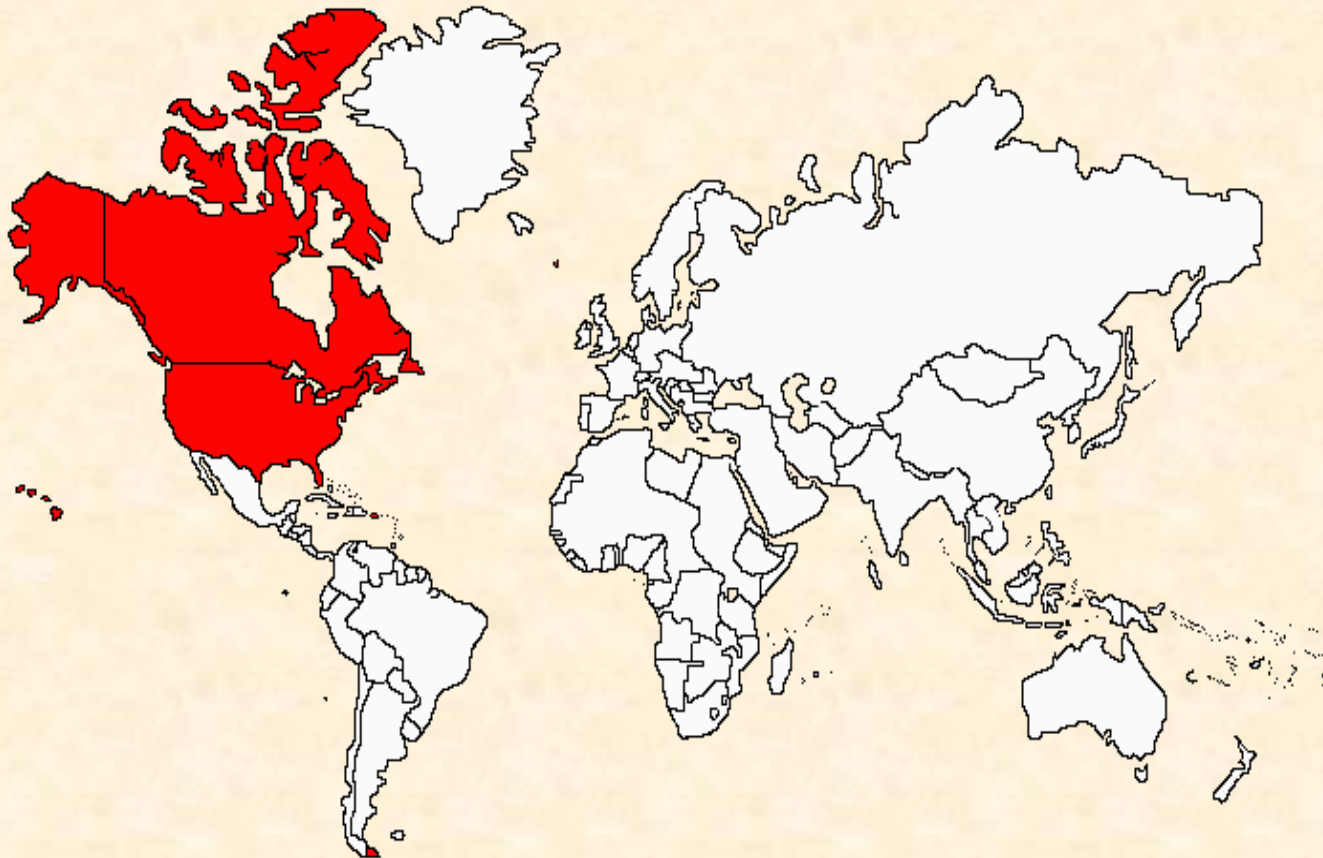
EU

- European Commission Directorate General for Competition (DG COMP); Member States' enforcement

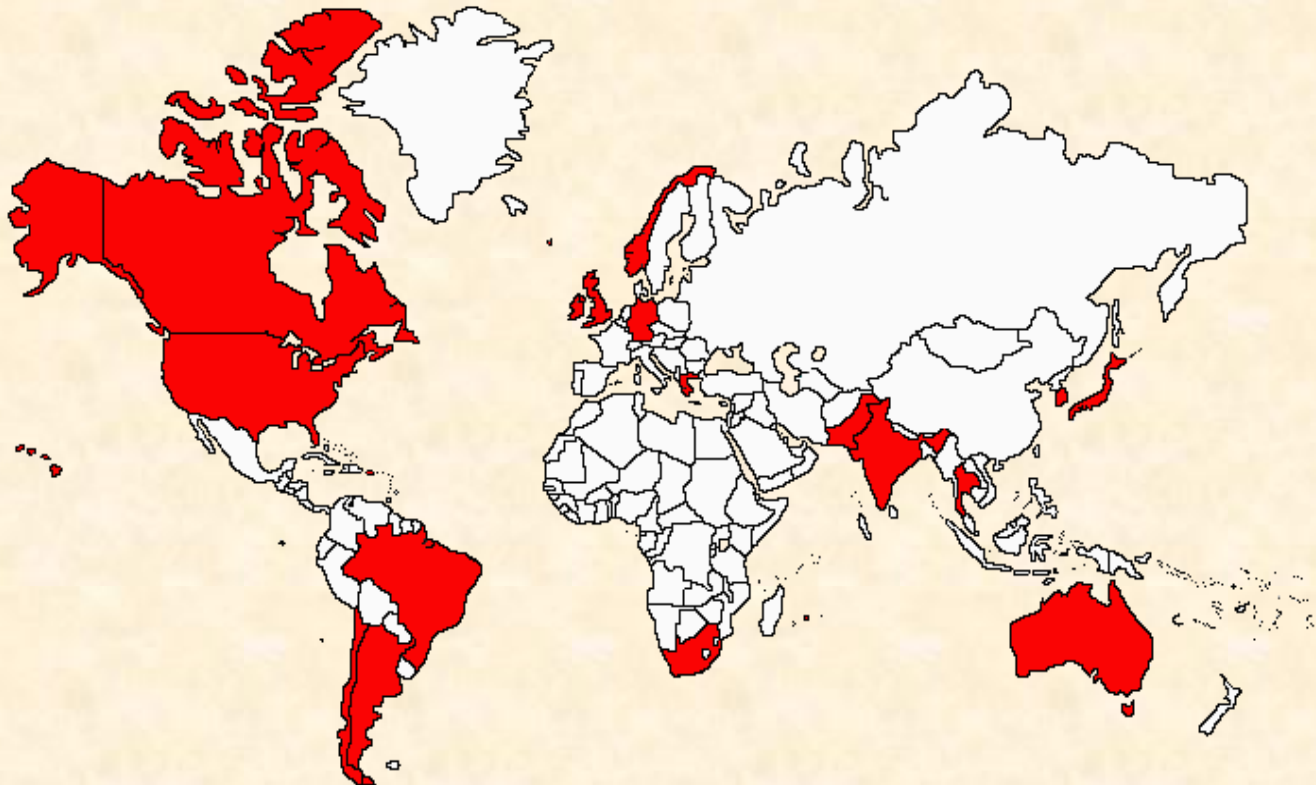
Worldwide

- Over 100 jurisdictions around the world now enforce antitrust laws
- India and China among the jurisdictions adopting competition regimes in recent years

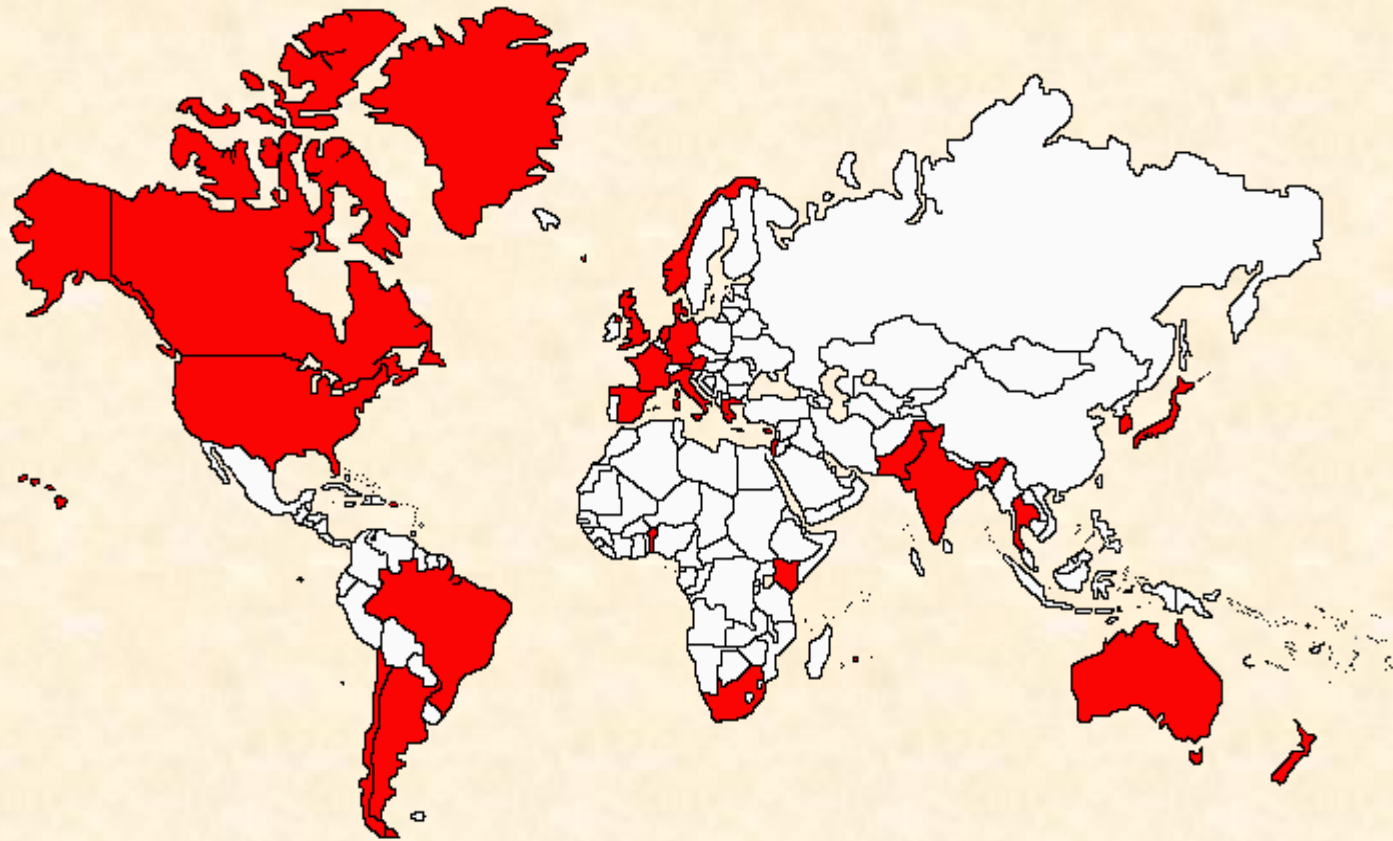
Worldwide Antitrust Enforcement: 1900



Worldwide Antitrust Enforcement: 1980



Worldwide Antitrust Enforcement: 1990



Worldwide Antitrust Enforcement: 2000



Reasons for Growing Worldwide Interest in Antitrust-IP Issues

- ❖ Antitrust enforcement spread around the world during the past two decades
 - ❖ IP protection already broadly recognized around the world, and, until recently, an ongoing trend of expansion of IP-protected subject matter
 - ❖ Today's product markets are increasingly based on information and know-how protected by intellectual property rights
- The interface between these two doctrines is expanding (more antitrust matters involve IP elements)

Growing Interest in Antitrust-IP Issues

A similar trend in other jurisdictions, for example:

- EC Regulation 772/2004 (now being evaluated) relating to technology transfer agreements (“TTBER”).
- Art. 55 of China’s new law prohibits conduct that “eliminates or restricts competition by abusing...I.P. rights.”
- The Korean FTC recently adopted standard-setting guidelines
- The Japan FTC revised its IP guidelines in 2007.

In the U.S.

- U.S. antitrust agencies employ intellectual property specialists
- U.S. antitrust agencies work closely with the U.S. Patent and Trademark office.
See, e.g. a joint 2010 workshop http://www.uspto.gov/ip/global/patents/ir_pat_workshop.jsp (how the patent application backlog creates a competitive challenge; standards issues)

In the U.S.

- Antitrust statutes contain very broad language
- The antitrust agencies have provided guidance in this area through guidelines and reports
 - ❖ 1995 Joint I.P. Licensing Guidelines
<http://www.ftc.gov/bc/0558.pdf>
 - ❖ 2003 FTC Report on the Proper Balance between IP and Competition (“IP1”)
<http://www.ftc.gov/os/2003/10/innovationrpt.pdf>

In the U.S.

- ❖ 2007 joint FTC-DOJ report on Antitrust Enforcement and IP Rights: Promoting Innovation and Competition

<http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (“IP2”)

- ❖ 2011 FTC Report on the Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition

<http://www.ftc.gov/os/2011/03/110307patentreport.pdf> (“IP3”)

IP1 & IP2: The Process

- 24 days of hearings in 2002
- Over 300 panelists
- More than 100 written submissions
- Submissions & transcripts available at www.ftc.gov/opp/intellect/index.shtm
- Agency review of the scholarly literature and case law

The Products

- IP 1 FTC report on the patent system

To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (October 03).

- IP 2 FTC/DOJ report on IP/antitrust issues

Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (April 07).

Main Themes

- Competition and patent policy work together to promote innovation and enhance economic welfare.
- IP 1 Report: A questionable patent can raise costs and prevent competition and innovation that otherwise would benefit consumers.
- IP 2 Report: Antitrust law must take into account the procompetitive nature of the patent system's incentives to innovate.

General Conclusions from IP2

- The principles of the 1995 DOJ/FTC IP Licensing Guidelines still apply:
 - 2.1: The special characteristics of IP can be taken into account by standard antitrust analysis.
 - § 2.2: Patents do not necessarily confer market power (see also *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006)).
 - § 3.4: IP licensing is generally procompetitive and will, in most cases, be analyzed under the rule of reason.

IP2 Report Contents

- **Ch. 1: Unilateral Refusals to License Patents**
- **Ch. 2: Collaboratively Set Standards**
- **Ch. 3: Cross-Licensing and Patent Pools**
- **Ch. 4: Variations in IP Licensing Practices**
- **Ch. 5: Tying and Bundling**
- **Ch. 6: Terms Extending Beyond Patent Expiration**

Ch. 1: Refusals to License Patents

- Antitrust liability for mere unilateral, unconditional refusals to license patents **will not play a meaningful role** in the interface between patent rights and antitrust protections.
- Conditional refusals to license that cause competitive harm are subject to antitrust liability.
- Compare to the EC approach:
Unconditional refusals not an abuse unless “exceptional circumstances” apply.

Ch. 2 : Collaborative Standard Setting

- **Industry standards are widely acknowledged as one of the engines driving the modern economy; can increase innovation, efficiency and consumer choice**
- **Typically, their pro-competitive benefits outweigh their loss of market competition**
- **However, there have been a few cases where courts have found antitrust liability in manipulation of the standard-setting process**

Ch. 2 : Collaborative Standard Setting

- **These cases are the exception, not the rule (their number is small compared to the vast number of standards adopted in the U.S.)**
- **The U.S. Government expresses a general preference for federal agencies to rely on voluntary consensus standards**

Ch. 2 : Collaborative Standard Setting

- Joint *ex-ante* consideration of licensing terms can be procompetitive and is unlikely to constitute a *per se* antitrust violation.
- *Ex-ante* licensing negotiations are most likely to be reasonable when the adoption of a standard will create market power for a patent holder.
- Agencies take no position as to whether SSOs should engage in joint ex ante negotiations of licensing terms.

Ch. 3 : Cross-Licensing and Pooling

- Rule of reason and 1995 Antitrust Guidelines of the Licensing of I.P. apply.
- Combining complementary patents is generally procompetitive.
- The Agencies will evaluate the competitive effects of including substitute patents in a pool on a case-by-case basis.

Ch. 4: Licensing Variations

- Non-assertion clauses, grantbacks, and reach-through royalty agreements are addressed.
- Competitive impact is evaluated under the rule of reason, applying the IP Licensing Guidelines.
- Analysis considers whether the restraint harms competition among entities that would have been actual or likely potential competitors.

Ch. 5: Tying & Bundling

- The Agencies will continue to rely on 5.3 of the Antitrust-IP Guidelines when analyzing IP ties and bundles, likely challenging such restraints if:
 - the seller has market power in the tying product;
 - there is a negative effect on competition in the market for the tied product;
 - the efficiency justifications do not outweigh the anticompetitive effects.
- EC similarly recognizes potential efficiency justifications for tying (191-195 of Guidelines on TTBER).

Ch. 6: Terms Extending Beyond Patent Expiration

- Collecting royalties beyond the statutory term may not cause competitive harm.
- *Per se* prohibition is not warranted – but rather Rule of Reason (unless sham).
- EC: A similar approach (but different reasoning) - see 159 of Guidelines on TTBER.
- However, see *Brulotte v. Thys Co.*, 379 U.S. 29 (1964) – different from the FTC/DOJ position in the Report.

FTC Hearings: The Evolving Intellectual Property Marketplace

- ❖ Eight days public hearings between December 2008 and May 2009; more than 100 participants; 50 submissions

Background:

- ❖ The patent system experienced significant changes since the FTC's 2003 report
- ❖ Congress considered (now passed) legislative reform
- ❖ New business models for buying, selling and licensing patents (e.g. Non Practicing Entities)

Themes from the “Evolving Intellectual Property Marketplace” Hearings (cont’d)

Two broad areas of patent policy, beyond patent quality, significantly impact the alignment of the patent and competition systems

❖ **Notice** - how well a patent informs the public of what technology is protected; and

❖ **Remedies** – judicially awarded damages and injunctions following a court finding of patent infringement

Themes from the “Evolving Intellectual Property Marketplace” Hearings (cont’d)

- ❖ Many firms have embraced “open innovation”, i.e. innovation that includes technology transfers from other innovators
- ❖ Open innovation is efficient, lowers barriers to entry, and benefits consumers by resulting in better, cheaper products
- ❖ The patent system can facilitate “open innovation” if damages make patent owners whole upon infringement

Themes from the “Evolving Intellectual Property Marketplace” Hearings (cont’d)

- ❖ Ex post patent transactions – when the licensee already uses the patented technology when approached by the patent owner - can distort competition:
 - Duplicated R&D efforts
 - If manufacturer has sunk cost, the patent owner can use the investment as negotiating leverage for a higher royalty than he could have commanded ex-ante

Themes from the “Evolving Intellectual Property Marketplace” Hearings (cont’d)

- ❖ Increasing activity by non-practicing entities (NPEs) in the information technology industries – has raised concerns about the effects of ex post patent transactions on innovation and competition
- ❖ The FTC’s IP3 Report, issued March 2011, focuses on approaching patent notice and remedies (damages and injunctions) in a way that supports role of patents in open innovation while decreasing incentives for unproductive speculation

Antitrust-IP: How it works in practice

- ❖ **The antitrust agencies challenge anticompetitive arrangements involving IP where IP holders seek to obtain returns beyond the legitimate scope of property right in a manner that violates antitrust laws. For example, pay-for-delay cases**
- ❖ **Intellectual property can also be a relevant asset in merger review**

Questions or Comments (Now or in the future)

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