Statement of Commissioner Maureen K. Ohlhausen

U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property

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Intellectual property is the foundation of a successful innovation policy. Its intersection with antitrust thus affects the new economy. Unfortunately, there has been a worrying trend as some overseas enforcers wield their antitrust laws in unprincipled fashion to dilute IP rights. That approach discounts the importance of dynamic efficiencies to long-term economic growth, exaggerates the short-term gains to technology users of reduced input prices, and inappropriately morphs antitrust into a tool of price regulation.

In response to skepticism in some quarters about the value of IP in spurring technological advance, I have made the case for robust patent and copyright protection. *See, e.g.*, Maureen K. Ohlhausen, *The Case for a Strong Patent System* (June 8, 2016), https://www.ftc.gov/public-statements/2016/06/case-strong-patent-system; Maureen K. Ohlhausen & Dan Schneider, *Intellectual Property and the National Security Issue*, WASH. TIMES, Dec. 1, 2015. My study of the relationship between patent strength, private-firm R&D investment, and innovation will soon be published. Maureen K. Ohlhausen, *Patents Rights in an Era of IPR Skepticism*, 30 HARV. J.L. & TECH. (2017) (forthcoming). Although abuses do occur in the IP space, I argue for an evidence-based solution. *See* Maureen K. Ohlhausen, *The FTC PAE Study in Context* (Oct. 20, 2016), https://www.ftc.gov/public-statements/2016/10/prepared-remarks-commissioner-maureen-k-ohlhausen-ftc-pae-study-context. An evidentiary approach should apply equally to antitrust intervention in the patent space. I have expressed concern that, on occasion, the Federal Trade Commission has deviated from these principles. *See, e.g.*, Maureen K. Ohlhausen, *What Are We Talking About When We Talk About Antitrust?*, pp. 9-13 (Sept. 22, 2016), https://www.ftc.gov/public-statements/2016/09/what-are-we-talking-about-when-we-talk-about-antitrust.

Against that backdrop, the Antitrust Guidelines for the Licensing of Intellectual Property are a welcome guidepost. Last year I observed that the 1995 Guidelines offered a "sensible and balanced approach[,]" recognizing that "IP issues are not a special case that requires a different competition jurisprudence." ABA Section of Antitrust Law's Intellectual Property Committee, *Interview of Commissioner Ohlhausen*, PUBLIC DOMAIN 11-12 (Feb. 2016). Today the Agencies modestly update the Guidelines, embracing principles of commendable flexibility. I applaud the following attributes of the revised Guidelines, in particular:

- IP laws that grant "enforceable property rights" have social value (§ 1.0);
- The Guidelines observe that the "antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors" (§ 2.1);
- IP licensing is generally procompetitive (§ 2.0);
- The Agencies do not presume that IP bestows market power (§ 2.0);
- There is no liability for excessive pricing without anticompetitive conduct—indeed, "[i]f an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws" (§ 2.2); and

- The rule of reason governs vertical IP-licensing restraints, including minimum resale price maintenance (§§ 5.2, *passim*).

Those notable features are by no means exhaustive, but reflect key principles to which the Agencies commit to adhere. Read in conjunction with the Agencies' other joint reports in the antitrust-IP space—*see, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 30 (2007) ("[L]iability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections."), www.usdoj.gov/atr/public/hearings/ip/222655.pdf—it is clear that patentees and other IP owners properly enjoy strong rights under U.S. law.