

The IP-Antitrust Interface: An FTC Perspective

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Introduction

- Many thanks to Gene Quinn and IP Watchdog. Today I will reflect briefly on the U.S. Federal Trade Commission's (FTC) initiatives at the intersection of intellectual property (IP) law and antitrust law.
- I will address policy initiatives first (which draw heavily on economics) and then turn to antitrust enforcement actions. (The FTC and Justice Department (DOJ) enforce antitrust.)
- The views expressed today are my own. They do not necessarily represent the views of the FTC or any individual FTC Commissioner.
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Background: Innovation and IP

- FTC agrees that IP rights spur innovation and dynamic competition.
 - Council of Economic Advisers Report (2020): “[C]onsumers often benefit most from dynamic competition, as driven by investment and innovation in new products, inventions, and technologies. Intellectual property rights—such as patents, trademarks, and copyrights—limit competition from infringing products in order to encourage this dynamic competition.”
- Patents play a key coordination role in reducing risks to investors in new inventions and fostering commercialization.
 - Patents as “beacons in the dark, drawing to themselves all of those potential complementary users of the IP-protected-asset to interact with the IP owner and each other.” (Kieff (2016), Comment on DOJ-FTC IP Licensing Guidelines.)

Background: Antitrust and IP

- **Sound enforcement** of antitrust law also promotes innovation by attacking exclusionary practices that harm dynamic competition.
- Thus IP law and antitrust law, properly applied, are complementary regimes designed to advance innovation and consumer welfare.
- IP rights may be seen as encouraging firms to engage in competition, particularly competition that involves risk and long-term investment.
- But business schemes that diminish competition are not shielded by the mere fact that IP rights are involved in the schemes – the key question is whether IP is being invoked in a manner that goes beyond the legitimate scope of the rights protected under IP law.

FTC Policy Tools and IP

- For over 20 years, the FTC has used policy tools to address emerging issues at the intersection of antitrust and IP. These efforts include convening public hearings to examine issues such as the role of patent quality and the role of antitrust in promoting innovation.
 - 2003 FTC Report on the Patent System; 2007 joint FTC-DOJ Report on Antitrust Enforcement and IP Rights (how antitrust and IP can align with the patent system to promote innovation); 2009 FTC Report on Biologic Drug Competition; and 2011 FTC Evolving Marketplace Report (emphasis on notice to public of what a patent protects and remedies for patent infringement).
- Also, FTC Act 6(b) reports (e.g., 2016 Patent Assertion Entities Report).
 - Section 6(b) empowers FTC to conduct wide-ranging studies that do not have a specific law enforcement purpose, enhance quality of policy dialogue.
- Also, FTC files amicus briefs and advocacy letters.

Policy Work: IP Licensing Guidelines (2017)

- Updated Joint FTC and DOJ 2017 IP Licensing Guidelines state DOJ and FTC antitrust enforcement policy with respect to licensing of IP protected by patent, copyright, trade secrets, and know-how.
- 3 key Guidelines principles: (1) Agencies apply the same analysis to conduct involving IP as to other forms of property, taking into account the specific characteristics of a particular property right; (2) Agencies do not presume that IP creates market power in the antitrust context; and (3) Agencies recognize that IP licensing allows firms to combine complementary factors of production and is generally procompetitive.
- Antitrust “rule of reason” normally applies, efficiencies recognized.

2017 IP Guidelines: Some Key Points

- IP laws that grant “enforceable property rights” have social value (§ 1.0);
- 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).

FTC-DOJ 2020 Vertical Merger Guidelines

- The Vertical Guidelines outline how the FTC and DOJ evaluate the likely competitive impact of vertical mergers – mergers between firms at different levels of the distribution system, such as a manufacturer and a distributor.
- Guidelines aim to increase transparency into the agencies' principal analytical techniques, practices, and enforcement policies for evaluating vertical transactions. Framework to analyze potential harms and benefits:
 - Foreclosure, raising rivals' costs, access to sensitive information, coordinated effects.
 - Elimination of double marginalization, efficiencies of coordination and complementarity, overcoming limitations of imperfect contracts.
- These Guidelines will assist the FTC and DOJ in determining whether a merger may eliminate potential, nascent, or future competition between firms—in addition to direct competition. Licensing and deployment of IP assets a key issue in many vertical transactions.

FTC 21st Century Hearings and IP

- The FTC's Hearings on Antitrust and Consumer Protection held in 2018 and 2019 included two days of sessions on IP policy.
- One panel focused on the role of government in promoting innovation, addressing whether, and if so, to what extent, government should have a role in promoting innovation, which in turn affects the competitive landscape. Conclusion: proper level of government involvement may depend highly on the industry.
 - E.g., Bayh-Dole Act has sparked substantial innovation from federal labs by allowing private sector innovators to obtain patents based on R&D carried out at those labs – particularly in the biotech, pharma, and defense industries.

21st Century Hearings and IP, continued

- Patent quality another theme – raises a host of issues, e.g., does lack of clarity over patentability stifle innovation (Section 101 debate).
 - Alliance of U.S. Startups and Inventors for Jobs Report (August 2020): shift of venture capital resources away from R&D-intensive industries, due to a patent system that has facilitated patent infringement without consequences.
- Hearings also address whether post-America Invents Act changes and the availability of new PTAB procedures has affected competition.
- As the FTC has done in the past, it is considering how and to what extent it can collaborate productively with USPTO to promote increased transparency, reliability, and predictability of outcomes – all of which are good for competition, as well as the patent system.

Have Recent Legal Changes Weakened Patent System and Undermined Innovation?

- Some recent scholarship has raised the concern that recent statutory changes and case law developments have weakened patent system.
- Discussing this literature is beyond the scope of today's remarks.
- However, I would point you to a provocative recent article by Geoff Manne, Kristian Stout, Julian Morris, and Dirk Auer entitled "The Deterioration of Appropriate Remedies in Patent Disputes," in 21 Federalist Society Review, see <https://fedsoc.org/commentary/publications/the-deterioration-of-appropriate-remedies-in-patent-disputes>.
- This article concludes that the deterioration of appropriate remedies in patent disputes (e.g., availability of injunctions) may reduce the utility of patents in facilitating efficient resource allocation, thereby ultimately limiting the diffusion of innovations and harming incentives to invent.

FTC Platform Study

- In February 2020, pursuant to FTC Act Section 6(b), the FTC unanimously approved the issuance of Special Orders to five large technology platforms (Alphabet Inc., including Google; Amazon.com, Inc.; Apple Inc.; Facebook, Inc.; and Microsoft Corp.).
 - The Orders required them to provide information about prior acquisitions not reported to the FTC and DOJ under the Hart-Scott-Rodino (HSR) Premerger Notification Act, seeking information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between 2010 and 2019.
 - The FTC hopes the study based on this information will enhance its understanding of technology platforms' acquisition activity, including whether the transactions include potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds.

FTC IP-Antitrust Enforcement Highlights

- FTC has long been involved in litigation with IP issues.
- First, standard setting organizations (SSOs).
 - in a single device and in multiple networked devices, the need for widespread interoperability is addressed through voluntary consensus-based SSOs.
 - Standards increase competition, innovation, product quality, and choice. Standards lower costs by increasing manufacturing volume, and they increase competition by eliminating switching costs for consumers who want to move between products manufactured by different companies.
 - While SSOs create efficiencies, we must also be mindful of the potential for SSO conduct to result in competitive harm – anticompetitive exclusion (*Allied Tube*; and *American Society of Sanitary Engineering*, an FTC matter pled as both an unfair methods of competition and an unfair or deceptive acts or practices case) and collusion (*Radiant Burners*).

FTC Enforcement: SSOs, Continued

- 5 FTC settlements involving SSOs and patent licensing commitments.
 - *Dell* (1996) (failure to disclose patent rights, SSO process manipulation, later patent assertion against standard users, Dell agreed not to enforce patent).
 - *N-Data* (2008) (N-Data acquired patents subject to prior IEEE licensing terms, N-Data did not honor, N-Data agreed to offer conforming terms licenses).
 - *Google* (2013) (breach of FRAND commitments on SEPs by threatening or pursuing injunctions, Google agreed to provide licensees with terms necessary to license its SEPs and to offer binding arbitration over terms of a license).
 - *Robert Bosch GMBH* (2013) (alleged Bosch acquisition of SPX had harmed market necessary to license its SEPs on FRAND terms, and that SPX had sought injunctions against willing licensees of those patents; Bosch agreed to abandon these claims for injunctive relief).
 - *Unocal* (2005) (Unocal agreed not to enforce patents on reformulated gasoline in light of alleged fraud before California regulator that conferred monopoly power)

FTC Enforcement: *Rambus* Litigated Case

- In *Rambus* (D.C. Cir., 2008) the FTC found that Rambus engaged in deceptive conduct which violated JEDEC SSO disclosure rules by either failing to disclose patent related data, or making misleading statements about such data. This led the SSO to adopt standards allegedly covered by Rambus patents, thereby permitting Rambus to acquire monopoly power and excessive licensing fees. FTC ordered Rambus to license its patents for reasonable royalty rates years for 3 years, and no royalties thereafter.
- D.C. Circuit: Since the FTC was unable to show that JEDEC would have selected a nonproprietary technology had Rambus made the required disclosures, its reliance on the absence of RAND licensing to show harm to competition was insufficient. Harm to competition, said the Court, required an antitrust plaintiff to prove the SSO would not have adopted the standard but for the misrepresentation or omission.

FTC Health Care and Biopharma Enforcement

- Settlement with 2 remaining defendants in *FTC v. Actavis* (2019).
 - Global “pay for delay” settlement with Teva prohibits Teva from entering into agreements that include reverse payments (where patentee pays generic to delay entry) in the form of: (1) side deals, in which the generic receives compensation through a business transaction entered at the same time as a patent litigation settlement; or (2) a no-Authorized Generic commitment, in which a brand company agrees not to compete with an Authorized Generic version of a drug for a period of time.
 - Similarly, Solvay’s current owner AbbVie is prohibited from entering into certain patent settlement agreements that restrict generic entry for certain drugs and contain common forms of reverse payments, including side deals and no-Authorized Generic commitment.

Health Care and Biopharma, continued

- *Impax Labs* (2019) – FTC held that Impax Labs violated antitrust laws by entering into a reverse-payment agreement with Endo Pharmaceutical to block entry of a generic version of Endo’s branded oxymorphone ER. FTC’s Final Order bars Impax from entering into reverse payment that defers or restricts generic entry (5th Cir. Appeal).
- “Product hopping” – where brand introduces a reformulated product and then takes steps to impede competition on the merits between the original and the reformulated drug before generics have the chance to be substituted at the pharmacy raises antitrust concerns.
 - 1st FTC case – *Reckitt Benckiser* (W.D. Va. 2019) (in litigation).

Health Care and Biopharma, continued

- *AbbVie* (E.D. Pa. 2018) – FTC charged several pharmaceutical companies with illegally blocking consumers' access to lower-cost versions of AndroGel (testosterone replacement therapy) by filing baseless patent infringement lawsuits against potential generic competitors and by alleging that AbbVie entered into anticompetitive settlement agreement with Teva to further delay competition.
- Court dismissed pay for delay claims, but held defendants illegally and willfully maintained their monopoly power by filing sham litigation, which delayed the entry of generic competition to the detriment of consumers. Court awarded FTC \$448 million in equitable monetary relief and \$46 million in prejudgment interest. Appealed to 3rd Circuit.

Pharma Enforcement: *Vyera Pharmaceuticals*

- In 2020, FTC filed federal court complaint alleging Vyera engaged in an anticompetitive scheme to maintain its monopoly over life-saving drug Daraprim, the “gold standard” treatment for toxoplasmosis.
- Vyera acquired Daraprim then dramatically raised its price, which would have encouraged competition from generic competitors.
- Complaint alleged Vyera illegally restrained trade through restrictive distribution agreements that ensured that would-be generic entrants could not buy samples of Daraprim needed for FDA testing.
- Vyera also prevented competitors from accessing a critical ingredient used to manufacture Daraprim, plus other anticompetitive actions.

FTC Statutory Review of Settlements

- Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Hatch-Waxman patent settlements must be filed with FTC.
- According to staff's most recent report on these agreements – the third since the Supreme Court's decision in *FTC v. Actavis* – agreements using the types of reverse payments that are the most likely to be anticompetitive continue to decline while the total number of final Hatch-Waxman patent settlements entered by pharmaceutical companies has continued to increase.
- In FY 2016, reverse-payment agreements using side deals and no-authorized generic commitments declined to their lowest level in 15 years.

Qualcomm v. FTC (9th Cir. 2020)

- The FTC has petitioned for rehearing en banc of a 2020 9th Circuit panel decision holding that Qualcomm's patent licensing practices did not violate the antitrust laws.
- The panel decision reversed a district court decision finding that Qualcomm had engaged in illegal monopolization.
- I am recused on this matter and will say no more.

1-800 Contacts: Trademarks and Antitrust

- In 2018, the FTC issued an administrative decision holding that 1-800 Contacts, the largest U.S. online retailer of contact lenses, entered into anticompetitive agreements with rival online contact lens sellers.
 - The agreements, embodied in litigation settlements, prevent online contact lens retailers from bidding for search engine result ads that would inform consumers that identical products are available at lower prices.
 - The FTC held that the agreements harm competition in bidding for search engine key words, artificially reducing the prices that 1-800 Contacts pays, as well as the quality of search engine results delivered to consumers.
 - In defending its decision before the 2nd Circuit (pending), the FTC argued that the settlement terms governing use of keywords encompassed terms that did not raise trademark concerns and required competitors to withhold their advertising even when the competitor did not use 1-800's trademarks.

Elimination of Future Competition: Key Cases

- In recent years FTC has investigated, and in appropriate cases challenged, transactions where a key competitive concern was the elimination of future competition.
- The extent of the concern depends upon the performance of the market or the position of one of the merging parties in the absence of the merger, the competitive significance of the emerging or future competitor, and how that significance compares to other firms.

Future Competition: Illumina/PacBio Merger

- Illumina Inc. was a monopoly supplier of DNA sequencing products. At the time of proposed merger (2019), Pacific Biosciences of California, Inc. had relatively small sales and its sequencing products used a very different technology than Illumina's that produced more detailed data, but was less efficient and higher-cost.
- But PacBio had continually improved its system with the goal and effect of converting volume from Illumina's technology, and for the past several years Illumina had viewed PacBio (and its technology) as a threat to its monopoly. Other market participants also recognized that, as an independent company, PacBio was poised to take increasing sequencing volume from Illumina in the future.
- FTC charged that Illumina was seeking to unlawfully maintain its monopoly in the U.S. market for next-generation DNA sequencing (NGS) systems by extinguishing PacBio as nascent competitive threat. Merger plans dropped.

Future Competition: Thoratec Case

- In 2009, when Thoratec proposed to acquire HeartWare International, Inc., Thoratec was a monopolist in the U.S. market for left ventricular devices (LVADs) and HeartWare was a potential competitor.
- Thoratec had the only FDA-approved LVAD, and HeartWare's developmental device, the HVAD, had a novel design that promised superior reliability with fewer surgical complications, making its technology a very disruptive potential competitor to Thoratec's LVADs.
- Because other devices in development lacked these distinguishing features, were considerably further behind in the development process, or both, the FTC concluded that the acquisition would eliminate future competition, and decrease innovation, and filed for an injunction, prompting the parties to abandon the merger.

IP and Future Competition Cases

- In considering whether a transaction is likely to harm competition, the FTC may weigh whether the divestiture of particular IP and research and development functions would be beneficial in maintaining incentives to innovate.
- Because so many of the issues surrounding potential, nascent, and future competition relate to IP-intensive issues, including innovative technologies that are under development, it will inquire whether efforts to preserve future competition may also serve to discourage and chill venture capitalist activities in some industries.
- FTC gathering data on this subject, e.g., 6(b) Platform Study, above.

Possible Technology Platform Cases

- The FTC is also thinking carefully about issues relating to technology platforms, and the analytical techniques and enforcement policies that should be applied to these firms.
- Technology platforms are software-based businesses that connect other businesses with consumers or other businesses. Firms often build their business “on top” of the platform’s software. Therefore, platforms often present unique issues given the nature of the technology they provide, their competitive relationships with the firms using the platform, and potential for anticompetitive conduct.
- FTC is currently assessing the various theories under which a technology platform’s conduct may amount to an antitrust violation.

Cases Challenging Platform Acquisitions

- FTC may challenge a technology platform's acquisition under Section 7 of the Clayton Act and/or under Section 5 of the FTC Act.
 - Section 5 prohibits “unfair methods of competition” and encompasses all violations of the Sherman Act, including Section 1 (contracts, combinations, or conspiracies in restraint of trade) and Section 2 (monopolization and attempted monopolization).
- Section 2 case is appropriate when the acquisition was a means of acquiring or maintaining monopoly power – for example, where a monopolist platform unlawfully maintains its monopoly power by acquiring actual, nascent, or potential rivals.
- Section 7 violation where the effect of the transaction is to “substantially. . . lessen[] competition, or to tend[] to create a monopoly.”
- FTC may conclude that a transaction violates both the Clayton and the Sherman Acts, and include both such counts in a complaint.
 - E.g., if a platform with monopoly power seeks to or acquires one or more potential or nascent rivals, then such conduct could constitute monopoly maintenance in violation of Section 2, and may substantially lessen competition in violation of Section 7.
 - Ongoing FTC platform investigations and long-term implications of 6(b) Platform Study (above).

Anticompetitive Government “Petitioning”

- The Noerr-Pennington doctrine immunizes private entities from antitrust liability for their efforts to influence the passage or enforcement of laws, even if the outcome for which they advocate would harm competition.
- The courts have developed a “sham” exception to Noerr, which holds that using the petitioning process simply as an anticompetitive tool without legitimately seeking a positive outcome to the petitioning destroys immunity.
- Courts have deemed litigation to be a form of “petitioning the government” that presumptively enjoys Noerr protection. In the 1993 *PRE* case, the Supreme Court held that a lawsuit must be both objectively and subjectively baseless in order for the sham exception to apply.

FTC, NOERR Litigation, and Patents

- FTC through litigation has sought to narrow Noerr, particularly where it is invoked to shield not only genuine petitioning efforts, but other abuses of governmental process that are not deserving of immunity.
- Noerr is frequently invoked in cases involving the pharmaceutical industry, where the FTC is dedicated to ensuring that brand-name patented drug manufacturers do not use anticompetitive litigation tactics to delay the entry of generic competitors.
- An improper or overly broad application of Noerr could immunize brand serial litigation against generic pharmaceutical producers, thereby blunting the Commission's enforcement initiatives.

2003 FTC Bristol-Myers Squibb (*BMS*) Settlement (FTC Statement to Aid Public Comment)

- Hatch-Waxman Act was intended to encourage the manufacture of generic drugs by the pharmaceutical industry, and incentivizes brand-name drug manufacturers to file patent infringement suits by rewarding them with a stay of up to 30 months if they do so, and allows serial petitioners to argue that their conduct was consistent with the design and intent of Hatch-Waxman.
- In explaining why Bristol-Myers Squibb's conduct was not protected by Noerr, the Commission noted, among other things, that the overall course of conduct across three different drug products and involving different types of conduct—including improper FDA Orange Book listings, false or misleading statements to the FDA, and filing patent suits without regard to their merits—represented a broad and global pattern of anticompetitive misuse of governmental processes.

FTC Initiatives for Noerr Reform

- We are also interested in using the FTC’s policy tools to further clarify the sham exception to Noerr, including refining what it means for a suit to meet the historically narrow “objectively baseless” standard.
- FTC will seek to be vigilant in identifying cases in which to bring, or weigh in on where the facts present an opportunity to hone Noerr’s boundaries, advocating for a case-specific, fact-intensive approach.
- FTC will actively seek Noerr-related amicus filing opportunities, in the hope of curbing litigation abuses that undermine competition.
- I will close with a capsule summary of two Noerr-related FTC amicus filings, one of which involved a holding favorable to the FTC’s view.

FTC-DOJ Amicus in *Intellectual Ventures I LLC (IV) v. Capital One Financial Corp.* (Fed. Cir. 2019)

- IV sought to license its portfolio of financial services patents to Capital One. When IV and Capital One could not agree on license terms, IV sued Capital One for patent infringement. Capital One asserted antitrust counterclaims, alleging that IV violated Section 2 of the Sherman Act by monopolizing or attempting to monopolize a market for financial-services patents, and that IVs' acquisition of these patents violated Section 7 of the Clayton Act.
- District Court held that IV's antitrust claims were Noerr-barred, and suggested that mere presence of protected petitioning activity (i.e., litigation) in an overall course of anticompetitive conduct also shields non-petitioning aspects arising from the same conduct from antitrust liability. FTC and DOJ argued this interpretation of Noerr doctrine is incorrect. Case was dismissed on other grounds.

Takeda Pharmaceutical Co. v Zydus Pharmaceuticals (USA) Inc. (D.N.J. 2018)

- Ulcer medicine patentee Takeda filed a patent infringement suit against generic producer Zydus under the Hatch-Waxman Act.
- Zydus brought an antitrust counterclaim for sham litigation, Takeda moved to dismiss it, arguing that because Takeda had a statutory right to file a patent infringement suit under the Hatch-Waxman Act, its suit could not be a sham and thus qualified as conduct subject to Noerr immunity.
- FTC amicus argued that patent infringement suits brought under Hatch-Waxman are exempt from antitrust scrutiny; neither the Act's language, nor the case law, nor FDA regulations should operate to exempt all Hatch-Waxman suits from antitrust scrutiny as potential shams.
- The District Court ultimately agreed with the FTC's position.

Conclusion

- I hope that my overview of FTC policy and litigation initiatives involving the IP-antitrust interface has sparked your interest.
- The FTC's goal in pursuing these initiatives is to promote innovation and enhanced consumer welfare.
- Given the ubiquity of IP in the modern high technology economy, it is inevitable that antitrust enforcers will have to grapple with IP-related questions on a regular basis.
- It is incumbent upon antitrust enforcers to get IP-antitrust right. To that end, we will rely on sound economics and empirical work.
- Thank you very much.