

# Antitrust and Intellectual Property Rights: An FTC Perspective

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# Introduction

- Many thanks to Dan Spulber and Northwestern. Today I will summarize U.S. Federal Trade Commission (FTC) initiatives at the intersection of intellectual property (IP) law and antitrust law.
- I will address FTC policy initiatives first then highlight FTC antitrust enforcement actions (both draw heavily on economics). (Recall that FTC and DOJ share antitrust enforcement authority.)
- Views expressed today are my own, they do not necessarily represent views of the FTC or any individual FTC Commissioner.
- Special thanks to Elizabeth Gillen and Anupama Sawkar of the FTC's Policy Planning Office for their outstanding assistance in the preparation of these remarks.

# 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 to antitrust and IP can align with the patent system to promote innovation); 2009 FTC Report on Biologic Drug Competition; and 2011 FTC Evolving IP 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 21<sup>st</sup> 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.

# 21<sup>st</sup> 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. Acquisition of IP rights may be examined.
  - FTC hopes the study based on this information will enhance its understanding of technology platforms' acquisition activity, including whether transactions include potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds. IP issues may arise.

# FTC IP-Antitrust Enforcement Highlights

- FTC has long been involved in litigation that raises 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 – including anticompetitive exclusion (*Allied Tube* and *American Society of Sanitary Engineering*) and collusion (*Radiant Burners*).
  - 6 FTC cases involving undermining of SSO processes and patent licensing commitments: *Dell*, *N-Data*, *Google*, *Robert Bosch*, *Unocal*, and *Rambus*.

# FTC Enforcement: Health Care Antitrust

- “Pay for delay” – payment by patentee to generic producer to delay entry and thereby harm competition and consumer welfare. E.g.:
  - *Actavis* (Supreme Court says rule of reason applies), *Impax Labs*, others.
- “Product hopping” – patent-protected reformulated product introduced by brand maker to forestall competition with old product.
  - 1st FTC case – Reckitt Benckiser (W.D. Va. 2019) (in litigation).
- Sham litigation to illegally block consumer access to lower cost drugs
  - *Abbvie*: Ct. held sham litigation maintained Androgel monopoly (on appeal).
- Congress required FTC of Hatch-Waxman pharma patent settlements.
  - 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* (9<sup>th</sup> Cir. 2020)

- The 9<sup>th</sup> Circuit's August 11, 2020 panel decision holding that Qualcomm's patent licensing practices did not violate the antitrust laws is noteworthy, but I am recused on this matter, and can say little about it.
- Among other things, the 9<sup>th</sup> Circuit found that Qualcomm had no antitrust duty to license its SEP patents to its rivals and that its OEM-specific "no license, no chips" patent licensing policy was "chip supplier neutral."
- I leave commentary on the merits of this decision to others.

# Other FTC IP Cases

- *1-800 Contacts*: FTC condemns litigation settlements between 1-800 Contacts and small online contact lens sellers that prevent bidding on internet search terms referencing 1-800's trademarks (on appeal).
- Elimination of future competition through merger: *Illumina/Pac-Bio* (DNA sequencing), *Thoratec* (left ventricular device technology).
- *Bristol-Myers Squibb* (false/misleading patent listings, baseless suits).
- Investigations and possible cases challenging acquisitions by big digital platforms as monopoly maintenance (stay tuned).
- Cases always require strong factual findings and sound economics.



# 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. And we have no crystal ball!
- It is thus 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.