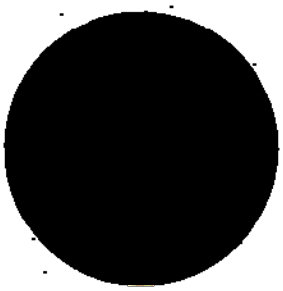

Federal Trade Commission

DISTINGUISHING UNILATERAL CONDUCT FROM AGGRESSIVE COMPETITION

REMARKS

of

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FEDERAL TRADE COMMISSION

prepared for

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I am delighted to be in Tokyo and here with you at the Tokyo America Center. Currently, thousands of visitors are in Washington, D.C. enjoying the blooming of the beautiful cherry blossoms. Those cherry trees, of course, were a gift from the Mayor of Tokyo, to enhance the growing friendship between Japan and the United States and to celebrate the continued close relationship between our two nations – a relationship that has continued to blossom. Likewise, the relationship between the Japan Fair Trade Commission and the U.S. Federal Trade Commission, as well as our sister agency, the United States Department of Justice Antitrust Division, is strong, as we work bilaterally and through international organizations to meet the challenges of modern competition enforcement. I appreciate the opportunity to appear before

[1]The views stated here are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

acumen, or historic accident.'"[3] In the words of our great American jurist Learned Hand, who delivered a significant antitrust opinion in 1945, "size alone does not determine guilt; . . . there must be some 'exclusion' of competitors."[4] The company that, "by virtue of [its] superior skill, foresight and industry," prevails over its competitors should not be condemned as having violated antitrust laws.[5] Put more simply, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[6]

Our Supreme Court explained why that principle is so important in a significant decision handed down just two years ago: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*"[7]

In a recent FTC example, in *In re Unocal*, the FTC alleged that the anticompetitive conduct in which Unocal engaged was a deceptive "hold up" in the standard-setting context. The California Air Resources Board ("CARB") was developing mandatory standards for certain

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[3]*Verizon v. Trinko*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell*, 384 U.S. 563, 571 (1966)).

[4]*United States v. Alcoa*, 148 F.2d 416, 429 (2d Cir. 1945).

[5]*Id.* at 430.

[6]*Id.*

[7]*Trinko*, 540 U.S. at 407 (emphasis in original).

low-emission gasoline products.[8] The FTC charged in an administrative complaint that Unocal had misrepresented to CARB that certain gasoline research was non-proprietary and in the public domain.[9] Yet, Unocal was allegedly secretly pursuing patent rights at the same time – rights that would allow it to charge companies producing CARB-mandated gasoline substantial royalties if its intellectual property became part of CARB's standards. Unbeknownst to CARB, the standards it adopted did in fact incorporate Unocal's intellectual property, and the resulting high royalties to Unocal would likely be passed on to consumers, resulting in up to $500 million in additional consumer costs, the Commission's complaint alleged. Thus, the anticompetitive conduct alleged was that Unocal misrepresented the status of its intellectual property in order to ensure that it would become part of the standard and enable Unocal to charge royalties. This could be distinguished from gaining the ability to charge royalties based on a superior product, business acumen, or historic accident.

Unocal settled the case with the Commission last summer, entering into two consent decrees that resolved those hold-up allegations as well as the issues surrounding Chevron's proposed $18 billion acquisition of Unocal. Under the consent agreement, Chevron agreed not to enforce the Unocal patents.[10]

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[8]Specifically, it was alleged that CARB was engaged in rulemaking proceedings to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG").

[9]Complaint *In re Unocal and In re Chevron and Unocal* (Mar. 4, 2003), *available at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[10]*See* Statement of Federal Trade Commission, *In re Unocal and In re Chevron and Unocal* (Aug. 2, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050802statement.pdf.

Despite guidance from cases like these, this is an area that still creates substantial

solicited public comment on the specific types of conduct reviewable under Section 2 that may raise antitrust concerns in a variety of industries.

It is important to get this right. Under-enforcement of the monopolization laws risks permitting firms to continue to engage in unlawful, exclusionary conduct that harms consumers. But when we over-enforce the monopolization laws, we risk chilling pro-competitive business conduct that benefits consumers. That can lead to serious problems, both within the United States and, beyond our borders. At home, challenging procompetitive conduct can undermine healthy business practices that spur competition to serve consumers better, offering them lower

Intellectual Property and Antitrust

Increasingly, the business conduct we examine occurs in industries heavily characterized by intellectual property ("IP"), and patents in particular, sometimes adding an additional layer of complexity to our antitrust analysis. At their core, patent law and competition law share a common goal: to promote innovation. Patents, as property rights, provide protection against copying and thereby offer incentives to innovate. Patents also promote the public disclosure of knowledge that otherwise might be held as trade secrets. Competition, too, drives innovation, as fear that a rival is getting ahead provides a powerful incentive to innovate. The intersection of patents and competition law presents new issues in enforcement and in policy-making.

Accordingly, in this area too, the FTC has turned to research to inform our own actions, as well as those of other policy-makers, and the public. In 2002, for example, we launched a series of intellectual property hearings, co-hosted with DOJ. The hearings, which lasted 24 days and included presentations by more than 300 panelists and numerous written submissions, led to a major report in October 2003: *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*. The FTC's Report, while strongly endorsing a properly functioning patent system, also states that competition can be harmed when the system grants a patent that should not have been granted. If that "wrongfully granted" patent confers market power, it can raise price in the short run and hinder follow-on innovation in the long run – without promoting any of the laudable objectives of a well-functioning patent system. In light of these findings, our Report recommended measures to promote better patent quality at the U.S. Patent and Trademark Office ("PTO").

The most recent and notable judicial development regarding the antitrust and intellectual

[12] 126 S. Ct. 1281 (2006).

The Supreme Court reversed the Federal Circuit and overruled its old precedent that established the presumption in the first place, concluding that the legal and economic foundations for that precedent had been eroded. After outlining the historical roots of the presumption, the Court's decision showed that those historical underpinnings are no longer valid. It noted that Congress has signaled its displeasure with the presumption in a related area of law; that economists almost uniformly believe that the presumption is inappropriate; and that the antitrust agencies have expressly disavowed the presumption.

What I find most exciting and encouraging about the case is that it shows the Court being influenced by "extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws."[13] Whatever our views on the presumption in the past, the agencies have made clear for at least the past ten years that we do not "presume that a patent, copyright, or trade secret necessarily confers market power upon its owner."[14] The Court cited that view in support of its decision to jettison the presumption, holding that "a patent does not necessarily confer market power upon the patentee."[15] Old assumptions that patents convey market power – like assumptions that patents amount to essential facilities per se – are outdated, with the evidence amassed over time suggesting a more varied picture. Some patents may convey market power; many do not. We have to look at the evidence to tell which is which.

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[13] *Id.*, slip op. at 3.

[14] U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.2 (1995).

[15] *Independent Ink*, slip op. at 16.

The Supreme Court currently has another important intellectual property case on its docket: *eBay v. MercExchange.* The question presented in this case is whether the U.S. Court of Appeals for the Federal Circuit erred when it announced a "general rule" favoring injunctive relief after a finding of patent infringement. Because the grant or denial of patent injunctions may directly affect competition and innovation in the marketplace, this case implicates questions of core concern to the FTC and DOJ, and the United States government as a whole.

On March 10, the United States filed an amicus brief supporting the respondent, MercExchange, and urging the Court to consider the broader implications of this case. The United States reasoned that the Patent Act's provision that injunctions shall issue "in accordance

that the agreements were proper means of settling patent litigation and that Schering's paying the generics to delay entry was not an antitrust violation because Schering's patents constrained the generics from entering in the first place. We are seeking *certiorari* in the Supreme Court now because we believe that the court of appeals essentially imposed a rule that a patentee is presumptively entitled to buy protection from all generic competition for the full patent term, even if such payments effectively augment the patent's actual power.

In Schering, we are not making any broad pronouncements about the enforceability of intellectual property generally, or even about the enforceability of pharmaceutical patents. Indeed, as we recently reported, legitimate patent settlements – using means other than reverse payments – still occur today, undeterred by our actions in *Schering.* In *Schering*, we are simply taking the position that antitrust enforcement can be warranted when generic entry before the end of a patent term is relatively certain, especially since Congress has spoken on the issue through our Hatch-Waxman amendments, and because we know from our study of the industry that would-be generic entrants have prevailed in almost 75 percent of patent litigation initiated under Hatch-Waxman.

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Refining and clarifying the standards governing single-firm conduct, and understanding the proper interaction between antitrust policy and intellectual property, are two of the most exciting and cutting-edge challenges in competition policy today. The FTC will continue its work in both of these areas, and will work with our counterparts around the world in identifying best practices. I appreciate the opportunity to discuss these important issues with you today. Thank you.