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Recent Developments in Intellectual Property and Antitrust Laws in the United States

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Interaction of IP and Antitrust: A US-China Comparative Perspective

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Good morning. It is a pleasure to be here today and update you on some recent developments at the intersection of the intellectual property and antitrust laws in the United States.¹ Since our nation's inception, innovation has been the wellspring of American prosperity. From the first flight by the Wright Brothers, Thomas Edison's electric light bulb, the first general-purpose electronic computer at the University of Pennsylvania, and the interconnection of the world through the Internet, modern America stands on the shoulders of intellectual giants. But surely, those geniuses also owe us a great deal – or rather they owe another group of geniuses – the drafters of our Constitution. Our founders instilled in us the belief that novel ideas are valuable property and that an inventor should have certain rights, including to be able to exclude others from using his or her property in practicing his or her invention. The Federal Circuit has noted that without the right to exclude “the express purpose of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined.”

But innovation is only half the equation of our nation's success. It is the other half – commercialization – that turns new ideas into wealth and social prosperity. And just as

¹ My remarks today reflect only my opinions; I am not speaking for the Commission or any other Commissioner.

innovation requires intellectual property protection, commercialization requires a level playing field free from anticompetitive duress, which requires vigilant antitrust protection. In the United States, it is our ambition to foster both innovation and commercialization that serves as common ground for our intellectual property and antitrust laws. As the FTC and DOJ observed in their 2007 IP Report, the antitrust and intellectual property laws “share the same fundamental goals of enhancing consumer welfare and promoting innovation[,] . . . work[ing] in tandem to bring new and better technologies, products, and services to consumers at lower prices.”²

Nonetheless, there is an obvious tension between offering an inventor the right to exclude competitors from practicing an invention and fostering free and open competition in the market. The White House, federal courts, federal agencies, and private parties have been negotiating the frontier between competitive markets and strong intellectual property rights. At the FTC, we have been active in the debate on these issues generally, and particularly as they relate to standard essential patents, or SEPs, and the so-called patent assertion entities, or PAEs, in the market. For my part, I believe the best way to navigate this terrain is to aspire to transparency, predictability, and fairness in our actions at the FTC. This philosophy about governance has led me to dissent in several important decisions by the FTC in the past year.

Standard Essential Patents

Let’s begin with standard essential patents, which have received a lot of attention lately. A patent is considered standard essential when it is declared or incorporated into an industry standard by a standard-setting body, thereby subsequently requiring manufacturers to license the patent for any technology that implements the standard. For example, a router maker that wants its routers to interoperate with most other wireless devices in the market cannot do so lawfully

² U.S. DEPT’ OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS PROMOTING INNOVATION AND COMPETITION at 1 (2007), available at

without licensing the patents essential to the relevant 802.11 WiFi standards, which are agreed on by the Institute of Electrical and Electronics Engineers, or IEEE, the relevant standard setting organization (SSO). There are hundreds of SSOs in every industry imaginable, each with its own focus, terms and membership.

The owner of a SEP could potentially use the market power that comes with its patent being incorporated into a standard and engage in patent hold-up either by refusing to license to competitors or by demanding higher royalties. To mitigate this problem, many SSOs require that their members agree upfront to license the patents on fair, reasonable, and non-discriminatory, or FRAND, terms should those patents ever become essential to a standard. But most SSOs have not formally defined the exact meaning of the FRAND commitments. In particular, most SSOs have never clearly established whether a SEP

order, or an injunction issued by a district court, to

seeking injunctive relief against competitors⁸ that were willing to license certain standard-essential patents that Motorola had agreed to license on RAND terms through its participation in several standard-setting organizations. In *Google*, the remedy imposed by the FTC was more complex than the flat prohibition on s

standard-essential patent holders from seeking injunctive relief in the ITC and the courts.¹² This conflict may have been exacerbated by the ITC's 4th decision in the Apple/Samsung matter to grant an exclusion order to Samsung against Apple for infringing one of Samsung's SEPs. While the ITC's full opinion is not yet public, in announcing its decision the Commission specifically noted that FRAND commitments did not prevent Samsung from seeking injunctive relief in the form of an ITC exclusion order.¹³ This may be directly at odds with the FTC's recent decisions and advocacy efforts on SEPs.

We also may have created a second conflict between the FTC and the Antitrust Division. When we rely on Section 5 of the FTC Act, which only the FTC enforces, rather than the antitrust laws, which both agencies enforce, we are creating two different standards for patent holders, depending on which agency happens to review alleged misconduct. This possible divergence in applying the law to SEPs may be highlighted by a policy statement on remedies for FRAND-encumbered SEPs that DOJ and U.S. Patent and Trademark Office issued just five days after the FTC's decision in *Google*.¹⁴ Some market participants immediately observed that the DOJ/PTO statement appeared to allow for exceptions for a SEP holder to seek injunctive relief than the FTC order allows for Google. These conflicts, whether real or perceived, create confusion in the market and undermine predictability and fairness for market participants who hold or use SEPs.

These decisions also may send the wrong signal about the value we place on intellectual property rights in the United States. In both *Bosch* and *Google*, we substantially curtailed the

¹² See Ohlhauser *Bosch* Statements *supra* note 10, at 2.

¹³ Notice and Order *In the matter of*

ability of SEP holders to seek injunctions¹⁵In my view, the majority did this in each case with little, if any, evidence that the patent holder agreed to waive this right when it participated in the standard-setting process. As I said earlier, most SSOs have not memorialized their FRAND terms and do not expressly prohibit seeking injunctions for SEPs. Moreover, *Bosch*, the FTC required Bosch to grant royalty-free licenses on its patents as a remedy for seeking injunctions on its potential SEPs¹⁶.

No matter how good our intentions, my concern is that our actions, if not properly explained, may send a message to foreign counterparts that we do not place a very high value on intellectual property rights, which is clearly inconsistent with the appreciation for IP rights that we typically hold in the United States.

Let me share with you an example of what I mean. Recently, I was in China attending a conference and meeting with Chinese competitors. At the conference, I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. In addition, it was suggested that when read in light of this doctrine, the FTC's Google decision implies that a SEP is an essential facility and an unreasonable refusal to license that SEP constitutes monopolization. It was further suggested that the best remedy for monopolization with a SEP would be compulsory licensing because permitting more parties to use the SEP would facilitate competition.

This is not a correct reading of relevant U.S. law or, in my opinion, of the FTC's decision in Google. This sort of misinterpretation is troubling on two levels. First, it undercuts the value of intellectual property rights and gives our counterparts abroad the misperception that we

¹⁵ See *In re Robert Bosch GmbH*, FTC File No. 121-0081, Decision and Order, at 13-14 (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf>; *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Decision and Order, at 6-12 (Jan. 3, 2012), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf>

Many people are calling for action in this area, including most recently the White House, which issued a report this month, claiming that

The FTC and DOJ have engaged in advocacy and education to determine the nature and scope of this problem. In 2011, the FTC held an intellectual property workshop (the Evolving IP Marketplace) and issued a report of its findings, including with respect to PAEs and the possibility for them to engage in patent hold up. And, just this December, the DOJ and FTC held a joint PAE workshop at which many scholars and market participants discussed the issues and potential solutions. We received a number of good comments, which we are currently studying to determine an appropriate course of action.

The FTC also is advocating for regulatory change, including greater transparency through registration of real parties in interest. In 2003, the FTC recommended a more streamlined review process for granted patents that was incorporated in the America Invents Act, which Congress passed in 2011²⁸. The DOJ and FTC recently submitted comments to the PTO in support of a proposal to require additional notice of the real party in interest for patent transfers and assignments. At a minimum, requiring the identification of the ultimate parent entity of the patent holder will facilitate greater efficiency in licensing. It also could help avoid inadvertent infringement, which studies show is a significant problem because it makes the implementer potentially more vulnerable to rent extraction by a PAE.

Although I generally support the FTC's efforts in examining the PAE issues and advocating for greater clarity and certainty in the patent system, I do have questions about whether this is a competition law problem or whether this is a problem in the patent system itself. One recent study indicates 82% of PAE defendants sued for infringing software patents³⁰. Another study estimates that it is five times more likely a software patent will be the subject of a

²⁸ FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY at 7 (2003); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011).

²⁹ FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE at 17 (Mar. 2011) available at <http://www.ftc.gov/bc/workshops/ipmarketplace/>

³⁰ PAE Report, *supra* note 17, at 5.

lawsuit as a chemical patent.³¹ It is even worse for business method patents, which are roughly fourteen times as likely to end up in litigation.³² This suggests to me that we are experiencing a problem in how to adequately define strong patents in terms of their nonobviousness, novelty, or other characteristics, which may not necessarily be a competition law problem.

As is probably obvious from what I have said about *Google/SEPs* and *Bosch*, as well as my philosophy of transparency, predictability, and fairness, I would be very cautious about expanding Section 5 competition law liability to attach to basic claims of infringement by PAEs. Only where there is some evidence of anticompetitive conduct by a PAE that tends for instance to undermine the patent process or that falls within a recognized exception to *Noerr* like sham or repetitive litigation would I be compelled to intervene. But, as with SEPs and other issues at the frontier of the intellectual property laws and competition policy, I am still evaluating these issues and will continue to refine my position on the nature of this problem and the appropriate remedy.

Thanks very much.

³¹ *Id.*

³² *Id.*