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Licensing of IP rights and competition law – Note by the United States

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4. In the United States, there are three types of patents: (1) utility patents; (2) plant patents; and (3) design patents.[7]
focuses on utility patents, the IP Guidelines also apply to plant and design patents.

5. Copyrights protect original works of authorship fixed in a tangible medium of expression, including published and unpublished literary, dramatic, musical, and artistic works.[8]
and that it contains at least a minimal degree of creativity.[9] Unlike a patent, which protects an invention not only from copying but also from subsequent independent creation by others, a copyright does not preclude others from independently creating a similar expression.

6. Trade secret protection applies to information whose economic value depends on it not being generally known.
maintain secrecy and has no fixed term. As with copyright, trade secret law does not restrict independent creation by third parties, in contrast to patent protection. U.S. patent law and copyright law are solely federal doctrines, while trade secret law is predominantly a creature of state law. However, the United States recently enacted a federal law creating a federal private cause of action for the misappropriation of trade secrets.[10]

7. Know-how is a general term that refers to the knowledge or expertise necessary to run manufacturing processes or other business requirements. It often is licensed together with trade secrets or patents.[11]

8. Although each of these doctrines has a different purpose, each creates intangible rights that can promote innovation and facilitate technology transfer through their licensure.

2.2. Overview of U.S. antitrust law

9. In the United States, DOJ and FTC share a competition mission to enforce the antitrust laws.
exclusionary unilateral action, and merger review. The three core U.S. federal antitrust laws are the Sherman Act, the Clayton Act, and the FTC Act, which is enforced solely by FTC and prohibits unfair methods of competition as wellET/GS1 8412(or)-3(expe)8(r)-3(t)6(i)-4(se)7( )-10(ne)9(

in the United States) and contribute more than $6 trillion dollars to, or 38.2 percent of, U.S. gross domestic product. IP is used in virtually every segment of the U.S. economy.[20]

13. Historically, firms engaged in their own research and development (R&D) to bring Recognizing the benefits of acquiring innovation developed by others for use in their own products and services, firms Open innovation facilitates a division of labor between those who focus on R&D and those who focus on production, which can increase the pace of innovation and result in broader, faster distribution of new products to consumers. Open innovation allows firms to leverage external innovation to support their own development. This model can involve collaboration through joint venture agreements, or technology transfer through licensing or acquisition agreements.[21]

14. IP rights promote innovation and technology transfer in several ways. Having the ability to obtain enforceable rights encourages individuals and firms to take risks and invest in research and development to create new products and services and improve quality. IP rights make it easier for parties to receive compensation for the use of their innovation and create a marketplace for ideas. IP also guards innovation against the risks inherent in complex development processes. The patent system, for example, prevents others from making, using, or selling a patented invention for a fixed term, thus protecting against copying that might otherwise drive down prices or otherwise discourage new research and development. The exclusive rights granted by the patent system also permit patent holders to license their patents on an exclusive or non-exclusive basis, encouraging complementary investments and innovation to commercialize the patented invention. The patent system further promotes innovation by requiring public disclosure of patented inventions, which allows follow-on invention based on the disclosed information.

15. Antitrust law likewise promotes innovation. Dynamic competition based on innovation, i.e., competition based on the introduction of new or improved products or services, is at the heart of many industries. Antitrust law protects market-based competition by condemning unreasonable restraints of trade and other conduct that harms competition. Competition between firms vying to succeed in the marketplace can lower prices, improve the quality of goods or services, increase the productivity of firms, spur the introduction of new products, and otherwise motivate innovation. Antitrust law based on sound economics safeguards this competitive process and aims to prevent anticompetitive or exclusionary practices that undermine consumer welfare.[22]

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[20] U.S. DEP T OF COMMERCE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE (2016), https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf.

[21] U.S. FED. TRADE COMM N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 33-34 (2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

[22] Dynamic competition refers to successive rounds of competition, which can maximize what economists refer to as dynamic efficiency.
it becomes more or less entrenched. Competiti
In technologically dynamic markets, however, such entrenchment may be
United States v. Microsoft Corp., 253 F.3d 34, 49 50 (D.C. Cir. 2001) (first quoting Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 57 & n.7 (1968); and then citing JOSEPHUnited States v. Micros 8(etz,)-5( )]TJET/GS1 gs0 0000008871 0 595.320007324 842.0399

16. The Agencies have long recognized that the policies of the patent laws and antitrust laws are aligned in their mutual aim to foster innovation that creates dynamic competition.[23]

laws . . . are actually complementary, as both are aimed at encouraging innovation, industry [24] Ultimately, IP rights should not be viewed as solely intended to protect their owners *from* competition; rather, IP rights should be seen principally as encouraging firms to engage *in* competition, particularly competition that involves risk and long-term investment.

2.4. The importance of licensing freedom

17. The United States agencies have long held the view that unilateral refusals to license are rarely, if ever, anticompetitive. Indeed, the agencies have consistently expressed the view that antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust [25]

18. The antitrust laws generally do not impose liability upon a firm for a unilateral

19. A related point is that lawful monopolists are free to charge monopoly prices. The prospect of earning monopoly profits can encourage innovation from rivals and new entrants. In the case of IP royalties, prices are best set by bilateral agreement between licensors that choose to license their IP and licensees that want to use the claimed invention.[28]

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power by the patent holder. Moreover, even if an IP right does confer market power which must be established through a fact-based inquiry that market power is not, by itself, illegal. When the Antitrust-IP Guidelines first issued in 1995, the Agencies recognized that whether IP presumptively conferred market power was unsettled in the courts. In 2006, however, the U.S. Supreme Court ado
power.[30]

The Agencies recognize that IP licensing agreements are generally procompetitive. IP is often one component among many in a product or process, which derives its value from its combination with complementary inputs. Licensing, cross-licensing, and other transfers of IP can facilitate the efficient integration of technology and production facilities needed to commercialize a new product or service. Licensing may also provide incentives to innovate by providing additional avenues through which innovators can obtain returns on their investments.

3.2. General analytical framework

24.

licensees, or between the licensor and its licensee(s). Examples of arrangements involving exclusive licensing that may give rise to antitrust concerns include cross-licensing by competitors that collectively possess market power (including pooling arrangements discussed in paragraph 32), grantbacks, and acquisitions of IP rights.

Exclusive dealing: An exclusive dealing arrangement prevents or restrains the licensee from licensing, selling, distributing, or using competing IP, technology, or products. The arrangement may be explicit or be the result of incentives contained in the license. Exclusive dealing arrangements can have procompetitive benefits including encouraging licensees to invest in the

through their merger enforcement work.[35] Where a transaction is likely to harm competition

on current and past employees who were hired by the divestiture acquirer, and provide at no cost to the divestiture acquirer an irrevocable, fully paid-up perpetual and nonexclusive