



United States of America
Federal Trade Commission

Antitrust Policy for a New Administration

January 24, 2017
The Heritage Foundation
214 Massachusetts Avenue NE, Washington DC

Maureen K. Ohlhausen¹
Commissioner, Federal Trade Commission

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

The FTC has unfortunately contributed to that dynamic. The essential quality of a patent is the right to exclude.¹⁷ And yet the FTC sees a competition problem when owners of standard-essential patents ask a court to enjoin unlicensed infringers. In doing so, the Commission wrongly heeded calls by technology users that want to pay the smallest possible royalties for their inputs.

Over my dissent, the FTC in *Google-MMI*¹⁸ and *Robert Bosch*¹⁹ alleged that it was an unfair method of competition for a RAND-encumbered SEP owner to seek an injunction. In the FTC's view, there was no need to ask whether deception of an SSO or other conduct eliminated a substitute technology in an upstream licensing market, or—indeed—whether any competitive effects actually followed at all.

Those decisions were not only wrong on their own merits, they sent a most unfortunate message overseas. During one of my many trips to China as a Commissioner, Chinese scholars stated that the FTC's *Google-MMI* decision shows that U.S. law recognizes an essential-facilities doctrine for patent rights. Nothing could be further from the truth, but that was the message

Suffice it to say that I hope that the Commission under the Trump Administration will act to protect IP rights.

3. *Economic Liberty and Abuse of the Government Process*

Finally, I want to address a promising avenue for further work by the FTC. Everyone who cares about economic liberty should worry about efforts to use the government process to suppress competition. Occupational-licensing requirements sometimes impose disproportionate burdens on prospective entrants with dubious public-safety justifications. Through political capture, some favored companies can induce government to pass anticompetitive legislation for their favor.

I am proud to have played an ongoing role in the FTC's efforts to challenge abuses of government process and to promote economic liberty. The FTC has already made real strides in this area through wins at the Supreme Court in *Phoebe Putney*²² and *North Carolina Dental*.²³ Going forward, I would like to see the Commission build on this important work.

Thus, the FTC should increase its advocacy efforts before legislatures that weigh potentially anticompetitive legislation through its Office of Policy Planning—which I am proud to say I used to run.

Conclusion

We have a tremendous amount to discuss today, and thus here I can address issues unique to the FTC only in the most cursory way. What I can safely conclude, however, is that we should be excited about the possibilities that now await. Collectively, we have an opportunity to build on past successes at the FTC, while correcting missteps. Seeing ample room for improvement, and being honored to share this panel with such an illustrious group, I am interested to hear your thoughts on where the FTC is today and where it should go tomorrow.

Thank you for your time and I look forward to the discussion ahead.