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As a matter then, of economic and democratic necessity, protecting incentives to innovate through IP rights is critical. As high technology industries comprise an increasing share of our economy, and industries across the board adopt new technologies, ensuring competition increasingly involves looking at the use of IP rights.

That dynamic raises fascinating—and often difficult—questions for enforcers. Research, both theoretical and empirical, can help guide our quest for answers. And, as we build our base of knowledge and experience, we are better able to make informed decisions that maximize our goals of fostering both innovation and competition.

Today, I want to spend a little time talking about how IP rights contribute to innovation and economic growth and about the history of how IP and antitrust laws have interacted over time. Then I want to discuss a couple examples of the Commission's recent enforcement efforts, and the importance of thoughtful action in a world of global antitty.4 -2.41 .h.003 Tw2 Tw 0.28 0P (of433 -36.26 -2.4 Td.T(i)-5 (n)1 (f)y)TjEM

one made possible in part by our country's longstanding commitment to enforcing IP rights.

I want to be clear. While linked—strongly—IP and innovation are not synonymous. Industries like sports, cooking, and fashion are highly innovative, even without certain IP protections.[3] And IP rights should be calibrated to achieve their constitutionally-intended ends. But the literature establishes well that defining and enforcing IP rights can and does encourage innovation.[4] IP rights offer two primary, related, benefits that combine to increase incentives to innovate. The first—and most commonly discussed—is that IP rights are enforceable by law, allowing its owners to internalize more of the benefits of their contributions. By providing such rights, including the ability to exclude others from using and appropriating the value of their IP for a certain period of time, IP laws enhance incentives to invest in creating the IP in the first instance.[5]

UNLEASHING INNOVATION, PROMOTING ECONOMIC GROWTH & PRODUCING HIGH-PAYING JOBS (2010), https://www.commerce.gov/sites/default/files/migrated/reports/patentreform_0.pdf).

[3] KAL RAUSTIALA & CHRISTOPHER JON SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012).

[4] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST INNOIOEF N 06 Tc 0.004 Tw 0.277 0 0 8.04 190.5

seeks to foster consumer welfare, thus properly considers and captures the value of innovation.

Scholars at M.I.T. and Carnegie Mellon, for instance, analyzed the economic impact of increased product variety that electronic markets facilitated.[8] Focusing on online booksellers, they found "the increased product variety of online booksellers enhanced consumer welfare by $731 million to $1.03 billion in the year 2000, which is between 7 and 10 times as large as the consumer welfare gain from increased competition and lower prices in this market."[9] A more recent National Bureau of Economic Research Working Paper analyzed the consumer surplus UberX yielded.[10] The authors estimated that "in 2015 the UberX service generated about $2.9 billion in consumer surplus in the four U.S. cities included in [their] analysis."[11] And, using a back-of-the-envelope calculation, they further estimated that "the overall consumer surplus generated by the UberX service in the United States in 2015 was $6.8 billion."[12]

Examples like these underscore the central role innovation plays in our modern economy. A strong IP rights system—including patent, copyright, and trademark protection—helps to protect incentives to innovate, and so it, too, has an important role to play.

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[8] Erik Brynjolfsson, Yu (Jeffrey) Hu & Michael D. Smith, *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, 49 MGMT. SCI. 1580 (2003).

[9] *Id*.

[10] Peter Cohen et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* (Nat'l Bureau of Econ. Research, Working Paper No. 22627, 2016).

[11] *Id*.

[12] *Id*.

But IP rights are not unalloyed goods. They should be calibrated to accomplish the goals outlined in the Constitution, but no more. Within the next few years, the Sonny Bono Copyright Term Extension Act rights for several well-known entities—including classics like "Steamboat Willie"—which provides copyright protection for the life of the author plus 70 years, will expire.[13] Few believe that artist and writers have slowed their work as a result.

And IP rights can be employed in ways that do not themselves clearly foster innovation. Consider the FTC's 6(b) study on patent assertion, which observed evidence of "Strike Suit" behavior, wherein an entity files a lawsuit with the intent of extracting a settlement payment, typically for less than the legal costs the defendant would face to defend itself.[14] For those of you who know me, I spent a lot of time on that issue in my old job. For purposes of my new one, it bears noting that IP rights can be misused to inflict competitive injuries. Properly calibrated enforcement of antitrust laws can help to ensure innovative spaces, including those subject to IP protection, remain competitively healthy.

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[13] Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2) (1998).

[14] U.S. FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY 4 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf ("Litigation PAEs typically sued potential licensees and settled shortly afterward by entering into license agreements with defendants covering small portfolios, often containing fewer than ten patents. The licenses typically yielded total royalties of less than $300,000. According to one estimate, $300,000 approximates the lower bound of early-stage litigation costs of defending a patent infringement suit. Given the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs is consistent with nuisance litigation." (citations omitted)).

particularly free from scrutiny under the antitrust laws, nor particularly suspect under them."[24]

Most competition concerns involving IP rights are—like most other conduct today—evaluated under the rule of reason.[25] This approach allows enforcers to consider the actual (or likely) competitive effects of certain conduct—that is, to

Americans go nary a week without dealing with booking an appointment, visiting a doctor, dealing with an insurer, seeking reimbursement or the like. For many Americans, this stuff is every day. That is why healthcare competition, broadly, has been and will remain one of the Commission's priorities for decades,

The Commission has pursued competition problems—schemes to limit competition in pharmaceuticals, regulatory abuses, and anti-competitive mergers—with great success over decades, but also with some continuing challenges. “Reverse payment settlements”

pursued the issue all the way up to the Supreme Court. In its 2013 *Actavis* decision, the Court held that such "large and unjustified payments" flowing in the wrong direction raise a red flag indicating that the settlements may have anticompetitive effects.[28] Several pharmaceutical drug manufacturers responded by arguing "large and unjustified payments" referred only to cash payments, and began exploring various in-kind payments instead. This included arrangements like a commitment from the branded manufacturer not to introduce an authorized generic, which would undercut the revenue the generic challenger in such cases would otherwise earn. It also led some settling parties to attempt to disguise cash payments as part of other side deals.

This conduct underscores the need for the Commission to be on the watch for creative attempts to manipulate regulatory regimes or to evade liability.

The second example I want to discuss today is a novel and difficult question about IP and antitrust the Commission recently decided in administrative litigation: its *1-800 Contacts* decision. Complaint Counsel in that case alleged that the settlements 1-800 Contacts signed with other online contact lens retailers to end trademark litigation anticompetitively hampered competition in online search advertising auctions, by restricting truthful and non-misleading internet advertising to consumers.

The settlements were "non-use" agreements, which are regularly used to settle trademark disputes. They prevented each party from bidding on the other's

[28] *Id*. at 158.

trademarked terms in online search engine auctions, and required each party to deploy negative keyword options, which would prevent an ad from being triggered by the words or phrasing comprising the negative keywords. If you, an internet user, searched for a trademark of 1-800 Contacts, the counter-parties' ads would not accompany your search result (though they might appear in organic results); and similarly if you searched for a competitor's trademark, 1-800 Contacts' ads would not be displayed.

The settlements did not address advertising outside of this narrow context. Even within online search advertising, each party remained free to advertise on their own

experience of the market, it is obvious that a restraint of trade likely impairs

rights holder to antitrust liability at all—let alone to a quick look condemnation.[33] Such actions potentially undermine the incentives to invest in costly innovation that IP rights are designed to protect, and highlight the importance of antitrust enforcers' acting with care and with respect for the larger legal ecosystem.

My basic view is that, when it comes to IP and antitrust, we should not be dogmatic—in either direction. And we should take care, in particular with respect to Congress' prerogatives and to where good research takes us. That is especially so given the increasingly global nature of antitrust. The innovative nature of U.S. industries, and their reliance on IP, raises an important issue: the use—or abuse—of competition laws in foreign countries continues in ways that undermine IP. The number of global antitrust regimes has exploded over the last thirty years. Today, around 130 jurisdictions worldwide have active antitrust laws and agencies.[34]

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competition.[35] The inconsistent application of principles and the failure to recognize and protect pro-innovation policies are real risks. Where we get it wrong, others may very well follow. And American firms may bear the brunt.

As the oldest active antitrust regime, the U.S. is watched closely by foreign enforcers, especially those with newer antitrust authorities. That is a testament to the important work the Commission and the DOJ have done over the last couple centuries.

But it also places on our agencies an important responsibility. It increases the stakes for agency actions and inactions—others may closely watch what the agencies are doing, and act in similar fashion. It also underscores the importance of agency advocacy abroad. Engagement with other jurisdictions to share our experiences and best practices can help to raise the level of international antitrust practices a

analysis will continue to be a necessity as IP-driven industries continue to expand and to constitute an important component of the economy. Even where commissioners disagree, I believe the Commission has proven more than up to this challenge, and look forward to continuing to engage in these important efforts.