Does the FTC Have a New IP Agenda?

Remarks of Joshua D. Wright

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It is my pleasure to be here and I would like to thank the Antitrust and Trade Regulation

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licensing IPRs, which provide that the "[a]gencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property."[1]

Of course, some precision as to what symmetry means and does not mean in this context is useful. It does not mean ignorance of economic facts unique to IPRs. Neither the symmetry principle nor the 1995 Guidelines require the agencies to ignore unique features of IPRs relevant to the antitrust analysis.[2] The primary contribution of the symmetry principle is that it affirmatively rejects the notion that a different analytical framework or special rules are required to enforce the antitrust laws in a manner consistent with promoting consumer welfare.

Agencies in the United States have some experience with and can glean lessons from prior deviations from the symmetry principle.

commentators and academics – to treat IPRs differently and deem nearly all licensing arrangements involving IPRs as what modern practitioners might describe as “inherently suspect.” Indeed, just a few decades ago, antitrust’s well-known “inhospitality tradition” applied in full force to IPRs and culminated in per se prohibitions of various arrangements involving patents embodied in the now-infamous “Nine No-No’s.”[3]

That obsolete and economically incoherent approach has been rejected in favor of a largely symmetrical approach to antitrust enforcement involving IPRs and other forms of property. However, the temptation to grant IPRs special treatment does revisit from time to time. Some recent FTC enforcement actions and antitrust scholarship suggest the makings of an intentional and calculated departure from symmetry may be underway – and, as with the Nine No-No’s – the departure is increasingly and uniformly hostile to IPRs.

Let me begin by elaborating upon the notion of symmetry between IPRs and real property for the purposes of antitrust law and discussing some of the advantages of such an approach.

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[3] See Bruce B. Wilson, Deputy Assistant Att’y Gen., Antitrust Division, Remarks before the Michigan State Bar Antitrust Law Section (September 21, 1972), reprinted in 5 CCH Trade Reg. Rep. (CCH) ¶ 50,146.

II. The Symmetry Principle and Its Benefits

One can conceive of the symmetry principle as establishing that an antitrust claim based upon the use of one's IPR is no more suspect than a claim arising from the use of any other form of property. It equally implies antitrust claim cannot be defended upon the ground that the use of an IPR is inherently less suspect than the use of some other form of property. As I've mentioned, the antitrust agencies' joint 1995 Guidelines clearly and prominently endorse the former proposition.[4] The best – and most colorful – expression form implies the 1

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it would be appropriate for both IPRs and real property. For example, naked price fixing is obviously and correctly per se unlawful whether the underlying assets involve intellectual or other types of property rights.[6]

repudiated and reconciled with good reason by the Supreme Court in Illinois Tool Works,[8] that IPRs necessarily confer emerging antitrust community includes countries with less of a tradition of institutions that value well defined and robustly enforced property rights. Other countries in the growing antitrust community have no such tradition to speak of at all. If antitrust is to contribute to the global economy by facilitating innovation, competition and economic growth, then it should recognize that convergence on the ideal of using economic analysis to guide competition policy is a far more achievable goal in the short and medium term than convergence across legal institutions and cultures exhibiting enormous variation. Legal institutions respect borders far more than the law of demand.

What does this have to do with the symmetry principle? Quite a bit, I would argue. There is in some quarters a growing concern about some antitrust regimes around the world using the antitrust laws to further nationalistic goals at the expense of IPR holders, among others. This has evoked an important discussion about the appropriate role for antitrust in limiting IPR rights, especially in young and emerging antitrust regimes, and most notably in China. There is no doubt that certain business arrangements involving IPRs harm competition. However, as China and other emerging jurisdictions craft their own approach to applying antitrust principles to IPRs the best and most intellectually coherent approach. The symmetry principle articulates 1

Applying standard antitrust principles, the FTC acknowledged that horizontal relationships involving IPRs can potentially generate efficiencies but warned that, as with such agreements in the real property context, agreements facilitating naked price fixing or market division would constitute per se violations of the antitrust laws.[12]

Similarly, the FTC's enforcement agenda in the area of reverse payment settlements also has state that although exclusive dealing agreements involving IPR are often pro-competitive, they may anticompetitively foreclose access to, or increase competitors' costs of obtaining, important inputs, or facilitate coordination to raise price or reduce output."[14] This is precisely the anticompetitive concern with exclusive dealing and tying contracts involving other forms of property and the relevant factors for assessing the likelihood of competitive harm are identical for all types of property.[15]

The FTC has also adhered to the symmetry principle in monopolization cases involving allegations that deception in the standard setting process led to the acquisition or maintenance of market power. For example, in *Unocal*, the FTC found a patent holder liable for affirmative misrepresentations.[16] In *Rambus*,[17] the D.C. Circuit ultimately overturned the Commission's analysis because it concluded the FTC had not established that the alleged deception resulted in the exclusion of a rival from the standard. However, the D.C. Circuit's analysis does not reject the analytical underpinnings of the FTC's enforcement efforts targeting deception in the standard setting process: that deceptive conduct that excludes rival technology holders and

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[14] ANTITRUST IP GUIDELINES, *supra* note 1, § 4.1.2, at 19.

[15] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 69-70 (2001).

[16] In re Union Oil Co. ("Unocal"), 138 F.T.C. 1 (2004), available at http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[17] Opinion of the Commission, In re Rambus Inc., FTC No. 9302 (F.T.C. Aug. 2, 2006), *rev'd*, Docket Nos.

results in harm to the competitive process can constitute exclusionary conduct under Section 2 of the Sherman Act; this is true whether or not IPRs are involved.

The symmetry principle also applies to

The most prominent strand involves the observation that patent rights are generally inherently more probabilistic in nature than real property rights and generate greater incentives for opportunistic or anticompetitive behavior.[19] The threat of patent hold up is by now a generally well understood phenomenon. For example, in the standard setting that intellectual property is not fundamentally different from other assets,"[22] such a rule of thumb "does not address fundamental differences between most forms of real property, such as real estate, and questionable patents with vague boundaries,"[23] and that "[t]ransferring probabilistic 'exclusion rights' is fundamentally different from transferring more conventional assets such as production facilities, trade secrets, brand names, or skilled personnel."[24]

A second strand examines whether the optimal level of antitrust enforcement should depend upon the strength of the patent rights associated with each particular industry. For example, Professor Mark Lemley advocates for a policy where the antitrust laws should be strong when IPRs are strong.[25] In this view, antitrust acts as an ad hoc counterweight to IP; the need for antitrust enforcement "depends on the industry in question and the nature of the invention."[26]

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[22] Id.

[23] Id.

[24] Id.

[25] Mark A. Lemley, *New Balance Between IP and Antitrust*, 13 SW. J.L. & TRADE AM. 237 (2007). The argument is grounded in the tradeoff between the benefits, on the one hand, of innovation and dynamic competition and, on the other hand, the deadweight loss associated with monopoly. One difficulty with calibrating antitrust policy on an industry by industry basis based upon a presumed positive or "inverted U shape"

The net impression left by these separate strands has been to encourage a form of IP exceptionalism for antitrust. The exceptionalism calls for a deviation from symmetry that uniformly favors greater intervention and limits placed upon the exercise and use of IPRs. The impact of these academic attacks on symmetry has been relatively widespread acceptance of the proposition that injunctive relief should generally not be available for patent holders because it is, from a competition and consumer welfare perspective, inherently suspect. While my own view is that neither available economic theory nor empirical evidence warrants such a presumption, there is no doubt that this view has gained many supporters and that it has influenced the enforcement priorities of the antitrust agencies, including the FTC.

III. Does the FTC Have a New IP Agenda?

Recent FTC enforcement actions, testimony, and speeches appear to suggest the beginning of what could be a wholesale departure from the symmetry principle. This development is troublesome, in my view, because it invites a drift toward ad hoc antitrust analysis of IPRs and promotes hostility toward the exercise of property rights and their exchange. It also sends a dangerous signal of approval to emerging antitrust regimes that special rules for IP are desirable from a competition perspective and that business arrangements involving IPRs may be safely presumed to be anticompetitive without rigorous economic analysis and proof of competitive harm.

a. Pursuit of Preliminary Injunctions by SEP Holders

The FTC has repeatedly expressed its opposition to the availability of injunctive relief for aggrieved SEP holders. For example, the FTC recently submitted an amicus brief to the Federal Circuit in support of a district court's denial of injunctive relief to a RAND-encumbered holder of an SEP.[27] Similarly, in June 2012, the FTC encouraged the International Trade Commission to apply the "public interest standard" of Section 337 of the Tariff Act of 1930 in a manner that would preclude granting an injunction to an SEP holder on the ground that consumers would be harmed thereby.[28] The Commission has apparently adopted the view that granting injunctive relief to an SEP holder in this setting is presumptively anticompetitive and thus against the public interest. The Commission has even encouraged Congress to adopt or endorse this

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[27] Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Neither Party at 16, Apple Inc. v. Motorola, Inc., Nos. 2012-1548 & 2012-1549 (Fed. Cir. Dec. 5, 2012) (stating that "[w]hen a patentee makes a RAND commitment to an SSO, the irreparable harm analysis, balance of harms, and the public interest will, as here, generally militate against an injunction"). Commissioner Ohlhausen did not vote in favor of its submission.

[28] See Third Party United States Fed. Trade Comm'n's Statement on the Public Interest, In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (June 6, 2012), www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf; Third Party United States Fed. Trade Comm'n's Statement on the Public Interest, In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Inv. No. 337-TA-752 (June 6, 2012), http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf. I was not a member of the Commission when the Statement was filed.

approach, abdicating the Commission's role as economic analyst of a complex issue in favor of an overly simplistic legislative change.[29]

The FTC's opposition to injunctions for SEP holders extends beyond mere advocacy to other agencies and institutions. Two recent FTC enforcement actions that predate my term alleged that a FRAND encumbered SEP holder violated Section 5 of the FTC Act merely by seeking an injunction. In Bosch, the FTC alleged an SEP holder's pursuit of an injunction was precisely such an unfair method of competition.[30] In Motorola, the FTC alleged the company "breached its FRAND obligations by seeking to enjoin and exclude implementers of its SEPs;" that after its acquisition of Motorola, "Google used these threats of exclusion orders and injunctions to enhance its bargaining leverage against willing licensees;" and that "Motorola filed, and Google prosecuted, patent infringement claims before the United States International Trade Commission."[31] Ignoring for a moment that no federal court has endorsed such a theory of competitive harm in a Sherman Act case, and that these cases can only exist because of the unbounded nature of the FTC's expansive Section 5 authority, it is worth exploring the

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[29] Fed. Trade Comm'n, Prepared Statement of the Fed. Trade Comm'n before S. Comm. on the Judiciary, Concerning Oversight on the Competition of Exclusion Orders to Enforce Standard Essential Patents at 2 (July 11, 2012), available at http://www.ftc.gov/os/testimo ny/120711standardpatents.pdf.

[30] Complaint at ¶ 20, In re Robert Bosch GmbH, Docket No. C 4377, File No. 121 0081, 2012 WL 5944820 (F.T.C. Nov. 21, 2012).

[31] Complaint at ¶¶ 25 26, In re Motorola Mobility LLC, Docket No. C 4410, File No. 121 0120, 2013 WL 3944149 (F.T.C. July 23, 2013).

central analytical assumption underlying these consents. These complaints and consent orders, taken together, logically and necessarily depend upon the assumption that seeking injunctive relief, without more, is itself anticompetitive. There is certainly no economic evidence available to support that policy view. It is difficult to imagine a more open and notorious rejection of the symmetry principle or the basic economic proposition that the exercise and enforcement of presumptively valid property rights promotes economic exchange.

b. Breach of an SSO Commitment Alone Violates Section 5 of the FTC Act

The FTC's newfound hostility to IPRs has also extended to what might be described as garden variety breaches of contract. For now, the only example of this conversion of breach of contract involving IPRs – there was no allegation of deceptive conduct – to an antitrust violation is *N Data*, where the Commission alleged that departure from a contractual commitment to IEEE violated Section 5 of the FTC Act.[32] Over dissenting statements from Chairman Majoras and Commissioner Kovacic,[33] which highlighted the lack of evidence of competitive harm, the FTC ruled that

[32] Statement of the Federal Trade Commission, *In re Negotiated Data Solutions LLC*, FTC File No. 051 0094 (Jan. 23, 2008), available at http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf

departure from a contractual commitment to an SSO, standing alone, was enough to violate Section 5.

the case for rejecting symmetry has rested largely but not exclusively upon an inexplicable presumption of net anticompetitive harm which is at odds with the conventional antitrust treatment of the exercise of real property rights, and is also, at a minimum, in significant tension with the symmetry principle enshrined in the 1995 Antitrust IP Guidelines.[35]

To be sure, there is some serious and important scholarly work exploring the possibility of patent hold up – a strategy usually perfected by the patentee seeking of an injunction in order to extract supra competitive royalties.[36] However, this literature demonstrates the possibility that an injunction against infringement of a patent can be profitable and potentially anticompetitive. The same literature has long recognized, in both the IPR and real property context, the threat of reverse holdup. There is – to be clear – no empirical evidence that enforcement of a presumptively valid IPR is inherently or even likely anticompetitive. The reflexive position that an SEP holder violates the antitrust laws simply by seeking an injunction to vindicate its right clearly

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[35] I am also aware of recent instances in which antitrust agencies continue to endorse the symmetry principle, at least rhetorically. See, e.g, Renata Hesse, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, IP, Antitrust, and Looking Back on the Last Four Years (Feb. 8, 2013) ("[T]he Antitrust Division applies the same general antitrust principles to mergers and conduct matters involving intellectual property that it applies to any other

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– the SSOs and their members – do not internalize the costs and benefits of further restricting injunctive relief.[38]

Beyond agency activity advising SSOs on how to write their contracts, this issue also extends into potential enforcement activity. The most common defense of asymmetry and the related presumption against injunctions is that an SEP holder seeking an injunction itself amounts to a breach of contract in the FRAND setting,[39] which is in turn the crux of the antitrust violation.[40] At least two immediate problems arise with this defense of asymmetry. First, mere breach of contract without more generally does not violate the antitrust laws when it comes to IPRs or real property

[38] SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission, at the Center for the Protection of Intellectual Property Inaugural Academic Conference, Arlington, VA, Sept. 12, 2013, available at http://www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf

[39] Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) ("By committing to license its patents on FRAND terms, [the patent holder] committed to license the [patent in suit] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.").

[40] This theory has been asserted primarily as a violation of Section 5 of the FTC Act. See, e.g., In re Motorola Mobility LLC, Docket No. C-4410, File No. 121-0120, 2013 WL 3944149 (F.T.C., July 23, 2013); In re Negotiated Data Solutions, LLC, FTC File No. 051-0094 (Jan. 23, 2008), available at http://www.ftc.gov/os/caselist/0510094/08012statement.pdf. Cf. Hesse, supra note 35, at 21 (indicating the DOJ's interest in examining whether Section 2 of the Sherman Act should apply in cases of patent hold up that do not involve deception).

rights.[41] Even in cases involving allegations of patent hold up, every federal court to rule on the issue has required some additional conduct, such as deception in the standard setting process, to support an antitrust violation.[42] The second problem with the "injunction seeking as breach of contract" theory is that it depends upon the assumption that a FRAND commitment comprises an implicit agreement not to seek an injunction. This assumption appears to be widely accepted, but it is not compelled by economic logic or maxims of contract interpretation. An examination of actual industry practice suggests the opposite: No SSO appears expressly to currently disallow injunctions,[43] and some SSOs appear expressly to have considered and rejected such a rule.

[41] The Supreme Court's analysis in Kodak is the closest the court has come to accepting a role for antitrust in regulating ex post contractual opportunism – though the underlying conduct at issue there was an aftermarket tie, not an allegation that breach of contract itself violated the antitrust laws. To the extent Kodak opened the door to using the antitrust laws to police police

V. Conclusion

Recent FTC enforcement actions and testimonies assert that injunctive relief is inappropriate in some IPR settings, or that IPR-related mergers require special review, or that IPR-enmeshed contracts give rise to antitrust liability for ordinary breaches of contract, all reduce to the same unsupported proposition: IPRs are inherently different from other property rights and, for antitrust purposes, inherently suspect.

I disagree. Departures from symmetry are not just lacking analytical support, they are also potentially quite harmful. Untethering antitrust enforcement from the symmetry principle creates uncertainty because it is in tension with the Commission's 1995 Guidelines. It also creates a risk of regressing toward an antitrust enforcement regime that is overly hostile to the exercise and exchange of IPRs. That risk is most acute when departures from symmetry substitute for rigorous analysis. Thus, it is fundamentally important that any such departure be both calculated and justified by the economic evidence on consumer welfare grounds. Otherwise, deviations create a significant risk that the FTC and other antitrust agencies signal to emerging antitrust

standards that are being widely implemented in the marketplace with no apparent IPR-related challenges. Letter from Microsoft to the Fed. Trade Comm'n, Comment for Work To[illegible] regimes that it is desirable or acceptable to adopt special limits and restrictions upon the exercise and exchange of IPRs.

It is my hope that the FTC will reaffirm the symmetry principle in the 1995 Guidelines, and reaffirm that the symmetry provides a consistent and predictable theoretical framework for antitrust challenges involving intellectual property, just as antitrust functions for all other kinds of property. On the other hand, if there are valid reasons and evidence for departing from the symmetry principle, the FTC should be clear about the reasons for treating IPRs differently. At the very least, the FTC ought to be cognizant and cautious of the departure that appears to be underway, and evaluate vigilantly whether it is the best policy going forward for the sake of competition, innovation, and consumer welfare.