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SEPs and FRAND at the FTC and ITC: Current Policy Proposals and Respect for IP Rights

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application of some policy proposals. Finally, I will provide some suggestions on a balanced approach.

Intellectual Property Rights at the FTC

I am increasingly concerned that some of my colleagues on the Commission place too little emphasis on the incentives for innovation afforded by strong IP rights, which could have serious implications for the U.S. economy.[10] This trend is pronounced when SEPs are involved, and hits its stride when discussing the relative threats of holdout and holdup.

In my time as a Commissioner, I have seen evidence that both holdup and holdout strategies appear in the real world. As a result, a contract dispute between sophisticated parties negotiating over IP rights could, at times, result in litigation. While my colleagues on the Commission recognize that both holdup and holdout "may well be a problem in the licensing world," they view only holdup as an antitrust issue.[11] In other words, the actions of SEP holders may be unlawful under the antitrust laws, but the actions of patent implementers are immune from scrutiny under those same laws.

Further, my colleagues applaud the broad use of the FTC's Section 5 authority to target innovators that hold SEPs.[12] In doing so, they cite the FTC's action against Qualcomm.[13] I have made my views on that case abundantly clear.[14] But the important issue today is not whether

[10] Richard Gilbert, Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate? INNOVATION POLICY AND THE ECONOMY 159 (2006), https://www.nber.org/system/files/chapters/c0208/c0208.pdf (surveying the economic theory of innovation and finding that exclusive rights generally lead to greater innovation incentives in more competitive markets, while nonexclusive rights generally lead to the opposite conclusion.).

[11] SEPs, Antitrust, and the FTC Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery, ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting at 5 (October 29, 2021),

Lenovo, BlackBerry, Apple, and ZTE.[22] It spent relatively little time discussing patent license negotiations involving smaller companies, including "smaller Chinese OEMs."[23] I am concerned that if the FTC inserts itself into FRAND licensing disagreements, the cases will look a lot like Qualcomm, where the FTC put its thumb on the scale to benefit large and sophisticated implementers like Apple and Huawei.

Intellectual Property Rights at the ITC

Chair Khan and Commissioner Slaughter recently advocated for pro-implementer policies in a submission to the International Trade Commission ("ITC"). The statement was submitted in response to a request for submissions in a dispute between Phillips and Thales, but the policy proposals advanced in the statement extend beyond the facts of that case. To be clear, they did not take a position on the facts of the case in their submission,[24] and I am not taking any position on that case today. Instead, I am highlighting this recent submission as a useful vehicle for discussing the varying policy positions the U.S. government could take.

Chair Khan and Commission Slaughter clearly articulate the question their advocacy seeks to address: "Is it in the public interest to issue an ITC exclusion order based on a [SEP] where a United States district court has been asked to determine [FRAND] licensing terms?"[25] Their submission argues that "where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other market participants without providing commensurate benefits."[26] Fur-1.aTmarketd(commensurate /s Tca compaplainroyalty.0007 Tw 10.63 su91o dete

with the FRAND commitment because a licensee may agree to pay supra-FRAND royalties to avoid being excluded from the market[.]"[27]

Let's consider the practical implications of the proposals that Chair Khan and Commissioner Slaughter advance in their submission. For example, they are concerned that "even firms that are willing and able to take FRAND licenses can be excluded from the market[.]"[28] Specifically, the submission states that "where the standard implementer is a willing licensee—including cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND or that will be determined by a neutral adjudication/in a court proceeding—an exclusion order would be contrary to the public interest."[29]

The characterization of these hypothetical licensees as "willing" and "able" paints these unlicensed technology users in the best possible light. But this characterization does not acknowledge that the ITC's public interest analysis already accounts for these and other concerns raised by pro-implementer advocates. Deanna Tanner Okun, who served two terms as Chair of the ITC during her 12 years as a Commissioner, has explained the ITC's statutorily required public interest analysis:

> [T]he ITC is statutorily required to conduct a public interest analysis before issuing any relief. The ITC also must determine that either the patentee or its licensee has made significant investments in plants and equipment or has employed significant labor or capital in the United States directed to its own patented products, or otherwise made in the United States substantial investments in exploiting the asserted patent.
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> In other words, to even get to the remedy phase of the process, the ITC's investigation needs to have found an imported product is implementing another party's patented invention without permission and that party is using the patented invention itself in the United States. By this point, the adversarial process has also provided the allegedly infringing company with an opportunity to argue the inventing company broke its commitment to standards-developing organizations by not offering licensing terms that are fair and reasonable, if that is the case.[30]

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[27] Id. at 4.

[28] Id. at 5 (emphasis added).

[29] Id. (emphasis added).

[30] Deanna Tanner Okun, Policy Shift Against SEP Rights Poses Risks for U.S. Innovation and Undermines Mandate of the ITC, IPWATCHDOG (May 18, 2022), https://www.ipwatchdog.com/2022/05/18/policy-shift-sep-rights-poses-risks-u-s-innovation-undermines-mandate-itc/id=149116/.

there is no side that the government should unequivocally favor in these disagreements. And note that my summary of this disagreement is only the tip of the iceberg because, as I noted, Apple and Ericsson are fighting this battle in jurisdictions across the globe.

Second, I highlight this case because of

on a timely basis and must compete with implementers that engage in holdout. If the companies that engage in holdout are large companies like Apple that can fund ongoing litigation, then favoring implementers in FRAND disputes will help large companies over small competitors.

At bottom, I am concerned that an approach prohibiting injunctions if a court has simply been asked to resolve FRAND terms will, in the long run, disincentivize innovation.

A Balanced Approach

Competition law and patent law share the same goal of fostering competition and innovation. I had the honor of serving as Chief of Staff to FTC Chairman Tim Muris when we launched the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. In announcing the hearings, Chairman Muris explained a fundamental principle: properly understood, "IP law and antitrust law both seek to promote innovation and enhance consumer welfare."[42] "IP law, properly applied, preserves incentives for … innovation" – and innovation (i) "benefits consumers through the development of new and improved goods and services" and (ii) "spurs economic growth."[43] "Similarly, antitrust law, properly applied, promotes innovation and economic growth by combatting … anticompetitive arrangements and monopolization" that deter vigorous economic activity.[44]

To achieve these goals, policymakers must focus on both the short-term and long-term implications of their proposals. One important element of the analysis requires striking a balance between static and dynamic considerations – essentially, between instant and delayed gratification.[45] Short term competition arising from a disregard for patent rights will undermine long term innovation – which benefits neither consumers nor the economy. In addition, policymakers should acknowledge the potential for opportunistic behavior by both innovators and implementers. And finally, policymakers should exercise restraint, acknowledging the sound

Incorporated at 9 (Sept. 10, 2020), www.justice.gov/atr/page/file/1315291/download (explaining the harm to innovation and the standards development process as a result of a standards development organization policy that tipped the balance away from innovators).

[42] Timothy J. Muris, Competition and Intellectual Property Policy: The Way Ahead, Prepared Remarks of before American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

[43] Id.

[44] Id.

[45] See Thomas O. Barnett, Maximizing Welfare Through Technological Innovation, Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007), https://www.justice.gov/atr/file/519216/download.

limits of antitrust and avoiding the injection of competition law into purely contractual matters.