Antitrust and Intellectual Property

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Antitrust Prohibitions vs IP Protections

The Challenge

• Harmonizing U.S. antitrust laws that sanction the illegal use of monopoly/market power with patent laws that grant limited monopoly.
1. Overview of Antitrust Laws

A. Sherman Act §1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce"

B. Sherman Act § 2

"Monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce"

C. Clayton § 7

"The effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"
2. Evolution of Antitrust Treatment of Patents


- tying the purchase of unpatented materials as a condition of the license;
- requiring a licensee to assign back subsequent patents;
- restricting the resale right of a product's purchasers;
- restricting a licensee's ability to deal in products outside the scope of the patent;
- prohibiting a licensor from granting further licenses;
- requiring mandatory package licensing;
- requiring, as a condition of the license, royalties not reasonably related to the licensee's sales of products covered by the patent;
- restricting a licensee's use of a product made by a patented process; and
- setting minimum resale price provisions for licensed products.
2. Evolution of Antitrust Treatment of Patents (cont'd)


- "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation... The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition."

- General Principles
  - for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property;
  - the Agencies do not presume that intellectual property creates market power in the antitrust context; and
  - the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive
2. Evolution of Antitrust Treatment of Patents (cont'd)


- Abandoned presumption that intellectual property confers market or monopoly power.

- Thus, in an antitrust claim involving a “tying” arrangement where the allegedly “tying” product is patented, the plaintiff must prove that the patent owner has market power in the patented product.
3. Basic Issues at the Intersection of Antitrust and IP

A. **Bad faith enforcement litigation can**, in theory, constitute an antitrust violation under the "sham" exception to the *Noerr-Pennington* doctrine, which generally holds that the mere bringing of a lawsuit cannot itself constitute an antitrust violation.


- Supreme Court held that enforcement of a patent procured by fraud can violate Section 2 of Sherman Act.
- Walker Process counterclaims often brought as counter-claims to infringement actions.
3. Basic Issues at the Intersection of Antitrust and IP (cont'd)

B. Patent Pooling and Assignments

- In United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) transfer of a patent found to violate Section 1 in context of broader monopolistic scheme.

  • An exclusive license can require, in certain circumstances, the same U.S. antitrust filing as a merger.

- Patent pooling among competitors is analyzed under the antitrust rule of reason and is often permissible. Standard Oil Co. v. United States, 283 U.S. 163 (1931).

- Basic rule of thumb - if ancillary to legitimate procompetitive goal, likely ok. But, if used to restrain competition, perhaps not, e.g., Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969).

A. Normal antitrust analysis applies to IP Rights.

B. Ownership of IP Rights, on its own, does not convey market power.

C. Licensing is generally pro-competitive and subject to rule of reason.

D. Innovation market – "the research and development directed to particular new or improved goods or processes" – will be analyzed as a distinct market.

E. Antitrust safety zone for licensing arrangements – under 20%.
5. Three Hot Topics

A. Standard Setting
B. FRAND
C. Reverse Payments/Pay for Delay
A. Hot Topic – Standard Setting

A. Procompetitive Benefit of Standard Setting

– The development of standards through industry collaboration can produce necessary/beneficial interoperability standards and performance standards

B. Antitrust Risk

– The standard-setting process often involves communication and deliberation among competitors;
– Particularly where a trade association is involved, a standard adopted by a group of competitors may discriminates against other competitors
Standard Setting (cont'd)

- Violation found where association members conspired to release code interpretation unfavorable to competitors

**Allied Tube & Conduit Corp. v. Indian Head, Inc.,** 486 U.S. 492 (1988)
- Violation found where association members conspired to release code interpretation unfavorable to competitor
Standard Setting (cont'd)

**FTC Activity on Standard-Setting**

**Dell Computer Corp.,** **121 FTC 616 (1995)**
- FTC sued Dell for failing to disclose while participating in the standard-setting process that it owned a "blocking patent" incorporated into standard and then attempted to enforce patent rights once standard was adopted. In settlement, Dell agreed not to enforce.

**Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008)**
- Rambus was accused of antitrust violation by intentionally deceiving the JEDEC during SDRAM standard setting. FTC's finding of violation was reversed in court because court held that the FTC had not demonstrated that standard would have been different if Rambus had disclosed.
Standard Setting (cont'd)

Institute of Electrical and Electronic Engineers ("IEEE") - DOJ Feb. 2015 Business Review Letter

IEEE's Revised Policy

- Companies agreeing to the IEEE RAND commitment must offer to license patents to all requesting parties, without picking and choosing licensees, and cannot seek an injunction against potential licensees who are willing to negotiate for a license

- "Reasonable rate" must not include the value derived from the fact that the patent is included in the standard (i.e. basing the royalty rate on the smallest saleable unit by focusing on the intrinsic value of the technology)

- May demand a reciprocal license in return

- Should ensure that subsequent purchasers of the patent are bound by these agreements
B. Hot Topic – FRAND/RAND
What’s Antitrust Got To Do With It?

The question of applying competition/antitrust laws to FRAND licensing and contracts is "hot" around the world. This focuses on the United States.

"Hold Up" Issue

- An entity with a SEP even when making a FRAND/RAND commitment may hold up the potential licensee for unfair and anticompetitive rates – or use rate negotiations to renege on the commitment generally
- The FTC – and particularly the DOJ – have been actively suggesting that the hold up problem is real, and an antitrust remedy potentially necessary (the DOJ IEEE letter is reflective of this view)

Some Question Whether "Hold Up" is a Problem

- If it is a problem, is contract law sufficient to address it?
- Would antitrust policy drive royalty rates below market value?
FRAND/RAND (cont'd):

Microsoft v. InterDigital, D. Del, filed Aug. 2015.

- Microsoft brought Section 2 Sherman Act claim, alleging abusive licensing practices and unlawful monopolization in relevant markets for 3G and 4G cellular technologies, including "false promises to make its technologies available on FRAND terms."

- In February 2016, district court denied InterDigital's Motion to Dismiss, finding that Microsoft had sufficiently pled anticompetitive conduct.
  
  • The complaint alleges that [InterDigital] made an "intentional false promise that [it] would license its . . . technology on FRAND terms, on which promise [ETSI] relied in choosing the . . . technology for inclusion in the" relevant standards. This conduct "induced ETSI to adopt a technology "that they would not have considered absent a FRAND commitment." Following the incorporation of its technology, the complaint alleges, [InterDigital] refused to comply with its FRAND licensing obligations.
  
  • Microsoft alleged specific ways in which InterDigital exploited its unlawfully acquired power against Microsoft.
Microsoft Allegations Against InterDigital (cont’d)

- Refused to honor the obligation to license its patents on FRAND terms;
- Demanded excessive and discriminatory royalties from companies that sell 3G and 4G devices;
- Tied access to its U.S. patents to its foreign patents along with the requirement that licensees pay royalties on worldwide sales;
- Tied access to its SEPs to licensing of its admittedly non-essential patents;
- Transferred hundreds of SEPs to a controlled entity in order to "double dip" in its royalty demands;
- Misappropriated technical information submitted by other standards members so that it could obtain patents in its name and accordingly profit from technologies created by others;
- Discriminated in its pricing demands against Microsoft based on Microsoft's smaller market share relative to Microsoft's competitors;
- Tied access to its SEPs and proposed license terms for them to prospective licensee's agreement to enter mandatory non-disclosure terms while refusing to disclose license terms provided to Microsoft's competitors in order to hide InterDigital's discriminatory pricing; and
- Pursued baseless infringement actions and baseless demands for injunctive relief and exclusion orders designed to increase Microsoft's costs and thereby coerce Microsoft to capitulate to InterDigital's unreasonable, non-FRAND demands.
C. Hot Topic – Reverse Payments/Pay for Delay

- Settlements in the pharmaceutical industry that result from the structure of the Hatch-Waxman Act. These agreements involve structures where patent holders agree to make a payment to the challenger of the underlying patent. The effect of the agreements is to delay the point at which the competitor enters the market.

- For the last decade, the FTC has made it an antitrust enforcement priority to pursue such agreements as anticompetitive.

- Parties had defended these settlements as immune from antitrust attack so long as the anticompetitive effects fell within the scope of the exclusionary or the patent.
Reverse Payments/Pay for Delay (cont'd)

Reverse Payment Cases

• **FTC v. Actavis, Inc., 570 US 756 (2013)**
  
  – Held that reverse payments can sometimes violate antitrust laws.
  
  – But, declined to hold that reverse payments are presumptively unlawful.
  
  – Instead, courts should analyze the settlement agreement under the antitrust rule of reason. The Supreme Court said that the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.
  
  – The Supreme Court left it to the lower courts to sort out.
Reverse Payments/Pay for Delay (cont'd)

**Actavis in the Lower Courts**

- Two Circuit Courts have held that a lack of a cash payment does not doom a reverse payment antitrust case, but *Actavis* can be applied to payments that don’t take the form of cash. In one of the cases, the drug companies have asked that the Supreme Court review that ruling.

- One case has been tried to a jury which found for the defendants. That case, involving Nexium, is on appeal.

- The FTC has several cases pending. In *FTC v. Endo Pharmaceuticals*, the FTC brought pay-for-delay claims over no authorized generics agreements as "the currency" for delaying the generic manufacturer’s entry into market.
Thank you!