



DEPARTMENT OF JUSTICE

Joint DOJ-FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy

Opening Day Comments

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**February 6, 2002
FTC Room 432
2:00 p.m.**

James Opening Day Speech (Final)
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Good afternoon. It is a pleasure to be here to address you on the opening day of these hearings, during which the Department of Justice and the Federal Trade Commission will take a close look at the intersection of antitrust law and intellectual property law. Together, we are about to delve deeply into an intellectually exciting topic, one of keen relevance to the missions of both our agencies.

These hearings are the first to be jointly sponsored by the FTC and the Antitrust Division. I thank Chairman Muris for inviting us to participate in this significant endeavor. I note that there are many knowledgeable and able speakers with very interesting things to say this afternoon, including Mr. James Rogan, Under Secretary of Commerce for Intellectual Property and Director of the U. S. Patent and Trademark Office; the Honorable Pauline Newman of the U.S. Court of Appeals for the Federal Circuit; and Professor Robert Pitofsky, the recent former Chairman of the FTC, so I will try to keep my remarks short.

In recent decades, there has been increasing recognition on the part of antitrust enforcers and the courts that intellectual property and antitrust law share

the common purpose of promoting dynamic competition and thereby enhancing consumer welfare. Intellectual property law provides incentives for innovation and its dissemination and commercialization by establishing enforceable property rights in new products and processes and original works of expression. These property rights reward innovation and creativity by eliminating certain forms of imitation and unauthorized use. Antitrust law promotes dynamic competition and consumer welfare by prohibiting certain conduct by market participants that unreasonably constrains the competitive process. More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth and consumer satisfaction. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, care must be taken to maintain proper incentives for the innovation and creativity on which our national economy depends.

We at the agencies approach these hearings with open minds. We are going to hear from panels of business people, academics and practitioners representing a wide range of views on topics central to the debate about IP and antitrust policy.

The diversity of these panels should stimulate interesting and, at times, intense discussions. I would like to spend my time with you today previewing some of the issues lying at the heart of the intersection between antitrust and intellectual property law that we will encourage participants to explore during these hearings. (I note that up to date information about these hearings and how to contact us is available on both our websites: the Division's at www.usdoj.gov/atp and the FTC's at www.ftc.gov).

General issues

The Division and the FTC described our enforcement perspectives in this area in the joint 1995 *Antitrust Guidelines for the Licensing of Intellectual Property*. Let me assure all of you that we embark on these hearings neither to rehash the *Guidelines* nor to critique them. We are, however, quite interested in learning what real-world licensing issues people are now confronting and how they can best be approached under the antitrust laws. Of course many topics are possible, but unfortunately our available time is not infinitely expandable. In mapping out areas of interest, we have found it helpful to break up intellectual property licensing practices into several flexible sub-groups: licensing practices by a single IP holder,

practices by multiple IP holders, refusals to license IP and finally, comparing U.S. practice in these areas to that elsewhere in the world.

For convenience, there are several issues of particular interest that we have classified as licensing practices by a single IP holder. The first is the bundling of intellectual property rights through means such as package licensing. While the bundling of these rights appears to offer significant potential efficiencies in situations where multiple licenses are needed, they may also raise antitrust concerns if they threaten competition in the development and licensing of intellectual property.

Similarly, grant backs, which require a licensee to grant back to the licensor a right to use the licensee's patented improvements to the licensor's invention, can also have procompetitive effects, but can adversely affect competition in some instances. As the Section 5.6 of the *Guidelines* describe, grant backs can allow a licensee and licensor to share risks, and reward the licensor for making possible further innovation based on or informed by the licensed technology. But grant backs can also reduce a licensee's incentive to innovate. These hearings may help inform us about the current use of grant backs. Are they used in situations that

cause competitive concern? Alternatively, does antitrust uncertainty inhibit the use of efficiency-enhancing grant backs?

We will also encourage discussion of the competitive impact of licensing restrictions, payments or agreements not to compete that extend beyond the life of the intellectual property being licensed.

Refusals to license

Some of the most frequently discussed and debated areas of licensing practices involve the refusal to license patents and copyrights. Debate in this area has been heightened by the Federal Circuit's opinion 18 months ago, *CSU v. Xerox*, involving Xerox's refusal to continue supplying patented repair parts to independent service organizations. During the course of these hearings, we will encourage participants to examine the degree to which holders of intellectual property are refusing to grant licenses, and whether such refusals to license raise competitive concerns. We will facilitate discussion of the current jurisprudence in this area, including how it is affecting current licensing practices and if there are circumstances in which a refusal to license may raise antitrust concerns.

Participants may also investigate how the *CSU* opinion is being interpreted by the

lower courts, and the possible implications of this opinion in other areas, including the review of licensing agreements that are conditioned on other actions, such as dealing exclusively with the patentee, cross-licensing another patent, or purchasing other products.

Patent pooling

We are interested in facilitating discussion of collective intellectual property rights organizations, such as patent pools, as well as cross-licensing agreements. Both patent pools and cross-licensing agreements are methods by which industries seek to commercialize new technology that is covered by many overlapping intellectual property rights. In the late 1990s, the Division examined through the Business Review process three different proposals to jointly license patents to other companies, an MPEG patent pool (a video compression technology) and two DVD patent pools. In all three cases, the Division concluded that the proposed arrangements did not appear to pose antitrust concerns.

The Division's decisions rested on a number of factors, including the fact that the pools license only those patents essential for a manufacturer to comply with an established standard. The pools were designed to capture the efficiencies that may

come from licensing complementary technologies. Concomitantly, they were designed to limit the anticompetitive effect that can arise from pooling technology, such as the elimination of competition or the increase in prices that could arise if substitute technologies (that is, technologies that could compete against each other) were placed in a pool.

In these hearings, we will encourage exploration of a number of broad questions about patents pools, such as whether pools actually result in the competitive problems they are hypothesized to cause and whether the antitrust authorities have focused on the right criteria when evaluating patent pools. We will also suggest that participants address practical issues such as how the term “essential” should be defined and whether the identity of the administrator of the pool matters.

Standard setting

The legal and economics professions have long recognized the potential value of industrial compatibility standards, especially in industries that exhibit network effects. Such standards are an important element of our discussion of intellectual property right issues because standards can facilitate the development of new

products based on new technologies and because standard setting often involves firms' disclosing and sharing patented technology. One goal for these hearings is to improve our understanding of how various standard setting practices promote innovation and competition, and how various practices might result in abuses of market power or disincentives for innovation.

Compatibility between products can greatly enhance their value to consumers and businesses. For example, technical standards for digitizing data have proven vital for the usefulness and commercial viability of cellular phones, CDs, CD players, Internet communications, and a host of other products. However, the standard setting process generally requires that competitors come together to coordinate on a technological standard. In such a setting, there are opportunities for anticompetitive behavior as companies exert their influence over the process. After a standard has been established, there are many issues regarding access to the technology embodied in the standard; limited access could restrict the number of competitors in a market and severely inhibit entry. In some cases, we might want to consider whether consumer welfare is best served by having the industry settle on a single standard or by encouraging the development of multiple competing standards.

We will encourage participants in these hearings to discuss the influence of intellectual property and antitrust law on real world standard setting.

Practical issues

In addition to addressing these particular licensing practices, these hearings will also focus on some practical issues that often arise in the antitrust analysis of licensing activity. Both agencies are increasingly facing questions regarding the scope and validity of patent rights in assessing the competitive effects of transactions. For example, we often must determine as an initial matter whether a licensor and licensee should be viewed as having a horizontal relationship. Under the IP Guidelines (§ 3.3), we focus on what would happen absent a license, that is, whether (and to what degree) the IP right would foreclose the licensee from being an actual or likely potential competitor in the relevant market. And the answer, as with so much else in life, is “it depends.” It depends in large part on whether the patent is valid and on its scope.

Similarly, in a merger review, a party may argue that its intellectual property creates a blocking position for the entire field. The party claims that a merger with what may appear to be a competitor actually poses no competition problems,

because that “competitor” can only compete by infringing.

We will encourage discussion on the standards and methods the agencies and courts should use to make judgments regarding validity and scope that are needed for sound antitrust analysis. Where and how should we draw the line between accepting the IP holder’s position at face-value or a potential competitor’s position that it could effectively compete without infringing the intellectual property? What weight should the agencies give to existing market conditions in situations where there are numerous firms competing--notwithstanding a claimed IP blocking position? Or suppose that significant questions exist about the breadth of a firm’s patent position. The patents may not completely block the field, but no one knows for sure. In determining the ease and likelihood of entry into that relevant market, should we assess a potential entrant’s risk of infringement and the cost of defending a possible infringement action? Does potential rivalry mean the ability to compete free from risk of infringement liability?

International Issues

Our interest in the interaction of antitrust and IP law is not parochially limited

to understanding how these issues are being addressed in the United States.

Refusals to deal, licensing and standards, topics that are at the center of IP-based antitrust disputes in the United States, routinely have effects that reach far beyond our borders. On a regular basis, antitrust enforcers in multiple jurisdictions are asked to address complex antitrust issues arising from “borderless” intellectual property. An understanding of empirical and legal approaches to IP and antitrust in other countries may well serve to clear the underbrush in what has been called the “IP thicket.”

Many of our international colleagues have already undertaken the process of reviewing their competition and IP laws. In December 2001, the EU published a Green Paper evaluating the Technology Transfer Block Exemption, and is presently in the process of receiving comments on proposed changes. Australia, Canada and the UK, to name only three countries, have recently addressed the intersection of competition and IP. In the EU, refusals to license are the subject of pending litigation, in which courts are reviewing what “exceptional circumstances” may justify compulsory access to intellectual property under the EU’s antitrust provisions.

Antitrust disputes involving IP are being played out in “real time,” with direct effects on consumers around the world. These hearings provide an opportunity to enhance mutual understanding with our global antitrust law counterparts and we are looking forward to the international contributions to these hearings.

Conclusion

We have a number of interesting discussions ahead of us that will enhance our understanding of how antitrust and IP law and policy affect innovation and other aspects of consumer welfare. We in the Antitrust Division have our sleeves rolled up and are ready to facilitate productive discussions in conjunction with the FTC. We look forward to this opportunity to hearing your views on these significant issues.