

U.S. Patent-Antitrust Interface

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Introduction

- My thesis is that antitrust law has gradually weakened U.S. patent rights in the U.S.
- This development began over 10 years ago but has accelerated in the Obama Administration
- This is in marked contrast to the pro-patent bipartisan antitrust consensus of 1980s-1990s
- Premised on theories of patent system defects and weak patents, the recent anti-patent trend ignores evidence that a strong patent system promotes economic growth and innovation

U.S. Patent-Antitrust History

- Early 20th century U.S. jurisprudence strongly pro-patent, antitrust application limited
 - E.g., *General Electric* (Sup. Ct. 1926), in licensing patent to a competitor, licensor could set price of the product manufactured pursuant to the license
- Mid-20th century (1940s-1970s) less pro-patent, “patent monopolies” constrained
 - Culminated in DOJ’s “9 no-nos” (1970s), deeming almost all licensing restraints antitrust violations

Patent-Antitrust History, continued

- Newly pro-patent stance in 1980s and 1990s
 - Patents legitimate property rights, all but hard core licensing restrictions under rule of reason
 - Efficiencies of licensing restraints emphasized
 - Maximizing value of legitimate property right OK, even if through price discrimination
 - Harms to competition among rival technologies major remaining source of antitrust concern
- 1995 IP Guidelines embodied this approach

Pendulum Swings Back, 2000-Present

- Over past 15 years, move in “anti-patent” direction by U.S. Government (especially FTC)
- 2003 FTC Report: many “bad” patents, royalty stacking, needed “balance” with antitrust
 - Call for administrative reforms
- 2007 FTC-DOJ Report: reaffirms 1995 Guidelines, addresses new practices (e.g., standard setting, patent pools), less anti-patent (DOJ influence)
 - Generally supportive of unilateral refuses to license, but raises issue of “hold-ups” through standard setting

Pendulum Swings Back, continued

- 2011 FTC Report on Evolving IP Marketplace
 - Damages recommendations tended to reduce potential recoveries by patentees (e.g., look at reasonable *ex ante* royalties before lock-in)
 - Concerns about patent assertion entities (PAEs)
 - Call for legislative-regulatory patent clarifications
- Focus on regulatory and litigation excesses
- Agenda of 2011 Report would, if adopted, substantially reduce returns to patentees

Recent Government Initiatives

- FTC 6(b) investigation of PAEs (“patent trolls”)
- FTC “reverse payments” litigation
 - FTC took enforcement actions against agreements whereby drug patentee paid generic firms in settling infringement suit, with generic entry into market delayed (but entry still within patent term)
 - FTC: payments presumptively anticompetitive
 - Private litigants also brought “pay for delay” cases
 - Plaintiffs initially had rather poor litigation results

FTC v. Actavis (Sup. Ct. 2013)

- Actavis: U.S. Supreme Court held (5-3) reverse payments subject to antitrust rule of reason
 - Broad hint that rule of reason analysis could be tilted toward finding of illegality, based on patent
- Dissent (Chief Justice Roberts):
 - Majority decision subjected to antitrust scrutiny a standard exercise of rights within scope of patent
 - Majority's rule would discourage settlements and weaken patent protection for innovators

Broad Implications of *Actavis*

- *Actavis* majority's reasoning: major change
- Rather than focusing on activity that extends market power beyond patent's boundaries, courts now must evaluate "strength" of patent
- Concern about "excessive" exercise of patent-specific market power more "EU-like" in tone
- More uncertainty – FTC has extended *Actavis* beyond its narrow confines in arguing "reverse payments" could take alternative forms

Standard-Setting Cases

- FTC and private cases on alleged abuses of patents that “read on” standards
 - *Rambus* (D.C. Cir. 2008): FTC loses, deception in failing to reveal patents to SSO (failure of proof)
 - *N-Data* (2008 FTC settlement) – transferee firm’s failure to honor SSO patent commitment
 - *Unocal* (2005 FTC settlement) (deception by patentee in state regulatory proceedings)
 - *Motorola Mobility* and *Bosch* (2013 FTC settlements) (stop seeking injunctions re patents covered by SEPs)

FTC and DOJ SEP Pronouncements

- Consistent with these cases, FTC and DOJ pronouncement suggest curbing returns to SEPs
- E.g., DAAG Renata Hesse (2012 and 2013 speeches), FTC Chairwoman Ramirez (2013 speech and congressional testimony), other officials (remarks)
- Central notion: opportunistic hold-ups by SEP holders spawns excessive licensing and litigation costs
- But reducing returns to SEPs could undermine standard-setting and promote “reverse hold-ups” by buyers, with suboptimal licensing rates
- Curbing SEPs could undermine standards-related innovation efficiencies, efficient cooperation

Economic Arguments to Curb Patents

- Levin *et al.* (1980s): Patents effective means for return to R&D only in pharma, chemicals
- Shapiro and Lemley (2005 and later): patent rights “highly uncertain” (“probabilistic”), so reform patent administrative system and litigation, scrutinize patent settlements
- Research used to bolster policy argument for weakening patents (patents as wasteful)

Economic Counter-Arguments

- Enforcers ignore strong counter-arguments
- *Patent system* spurs economic growth and innovation by lowering information costs, signaling to capital markets, promoting beneficial licensing, creating “prospects”
 - E.g., Kitch (1977), Long (2002), Heald (2005), Kieff (2000), Daily and Kieff (2013)
- Curbing patent rights undermines these benefits, weakness of *particular patents* is irrelevant

Who Has the Better Argument?

- On balance, empirical research generally finding stronger national patent policies associated with faster economic growth bolster case for a strong patent policy tilt
 - E.g., Go and Wang (2013)
- Recent increased antitrust scrutiny has undermined patent system by limiting returns to presumptively valid patents, rather than focusing on restraints among competitors

Antitrust Error Cost Considerations

- Consistent with decision theory, optimal antitrust rules should minimize sum of (1) welfare losses due to discouraging welfare-promoting behavior, (2) false positives, (3) false negatives, and (4) administrative costs of antitrust enforcement
- Error cost considerations on net counsel against “peering behind” individual patents to see if they have been deployed in a manner that yields “excessive” returns to the property right – thus recent government initiatives appear problematic

Curbing PAE Activity

- Effects of intensified patent antitrust scrutiny may be magnified by attacks on PAEs
- Even if PAE abuses are appropriately reined in, risk that enhancing efficient secondary market in patents inappropriately will be curbed
- More vibrant secondary market raises small inventor monetization opportunities and facilitates more efficient deployment of IP

Concluding Thoughts

- Recent shift in U.S. patent antitrust policy will create marginal disincentive to patenting
- Criticisms of individual patents ignore law and economics arguments and empirical research on the benefits of strong patent regimes
- With expansion of global competition system, officials around the world will be influenced by increased U.S. antitrust patent skepticism
- Public officials may wish to keep these concerns in mind in adjusting antitrust enforcement policy