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Recent Developments in Intellectual Property and Antitrust Laws in the United States

**Remarks of Maureen K. Ohlhausen
Commissioner, Federal Trade Commission**

Interaction of IP and Antitrust: A US-China Comparative Perspective

George Washington University Law School

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Good morning. It is a pleasure to be here today and update you on some recent developments at the intersection of the intellectual property and antitrust laws in the United States.¹ Since our nation's inception, innovation has been the wellspring of American prosperity. From the first flight by the Wright Brothers, Thomas Edison's electric light bulb, the first general-purpose electronic computer at the University of Pennsylvania, and the interconnection of the world through the Internet, modern America stands on the shoulders of intellectual giants. But surely, those geniuses also owe us lawyers a great deal – or rather, they owe another group of geniuses – the drafters of our Constitution. Our founders instilled in us the belief that novel ideas are valuable property and that an inventor should have certain rights, including to be able to exclude others from using his or her property and practicing his or her invention. The Federal Circuit has noted that without the right to exclude “the express purpose of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined.”

But innovation is only half the equation of our nation's success. It is the other half – commercialization – that turns new ideas into wealth and social prosperity. And just as

¹ My remarks today reflect only my opinions; I am not speaking for the Commission or any other Commissioner.

innovation requires intellectual property protection, commercialization requires a level playing field free from anticompetitive duress, which requires vigilant antitrust protection. In the United States, it is our ambition to foster both innovation and commercialization that serves as common ground for our intellectual property and antitrust laws. As the FTC and DOJ observed in their 2007 IP Report, the antitrust and intellectual property laws “share the same fundamental goals of enhancing consumer welfare and promoting innovation [,] . . . work[ing] in tandem to bring new and better technologies, products, and services to consumers at lower prices.”²

Nonetheless, there is an obvious tension between offering an inventor the right to exclude competitors from practicing an invention and fostering free and open competition in the market. The White House, federal courts, federal agencies, and private parties have been negotiating the frontier between competitive markets and strong intellectual property rights. At the FTC, we have been active in the debate on these issues generally, and particularly as they relate to standard essential patents, or SEPs, and the role of patent assertion entities, or PAEs, in the market. For my part, I believe the best way to navigate this terrain is to aspire to transparency, predictability, and fairness in all our actions at the FTC. This philosophy about governance has led me to dissent in several important decisions by the FTC in the past year.

Standard Essential Patents

Let’s begin with standard essential patents, which have received a lot of attention lately. A patent is considered standard essential when it is declared or incorporated into an industry standard by a standard-setting body, thereby subsequently requiring manufacturers to license the patent for any technology that implements the standard. For example, a router maker that wants its routers to interoperate with most other wireless devices on the market cannot do so lawfully

² U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION at 1 (2007), *available at* <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

without licensing the patents essential to the relevant 802.11 WiFi standards, which are agreed on by the Institute of Electrical and Electronics Engineers, or IEEE, the relevant standard setting organization (SSO). There are hundreds of SSOs in every industry imaginable, each with its own focus, terms and membership.

The owner of a SEP could potentially use the market power that comes with its patent being incorporated into a standard and engage in patent hold-up, either by refusing to license to competitors or by demanding higher royalties. To mitigate this problem, many SSOs require that their members agree upfront to license their patents on fair, reasonable, and non-discriminatory, or FRAND, terms should those patents ever become essential to a standard. But most SSOs have not formally defined the exact meaning of their FRAND commitments. In particular, most SSOs have never clearly established whether a SEP owner must always try to negotiate a FRAND license or whether there are times the SEP owner can try to enjoin a manufacturer from using a SEP. Today, this issue is being litigated by private parties – mainly large technology companies – in federal courts around the country and before agencies like the International Trade Commission, or ITC. Resolving this issue, and related matters about the scope of enforcement of intellectual property rights, requires us to find the right balance between protecting intellectual property rights and maintaining competitive markets, while continuing to foster the commercialized innovation that has served us so well.

The FTC in the last year has spoken to this issue through advocacy and enforcement. Last summer, the Commission submitted testimony to Congress explaining some of its concerns about the possibility of SEP holders exerting market power to increase prices for licensees after a standard had been chosen. Chairwoman Ramirez, delivering the Commission’s testimony, said “Simply put, the FTC is concerned that a patent holder may use the threat of an ITC exclusion

order, or an injunction issued in district court, to ‘hold up’ or demand higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before its [intellectual property] was included in the standard.” I agreed with my fellow Commissioners that SEP hold-up is a theoretical possibility that the ITC or a court should consider in the analysis, but in keeping with my philosophy of transparency, predictability, and fairness, I broke with the other Commissioners when it came to two recent FTC enforcement actions on this issue.

In the first matter, *Robert Bosch GmbH (Bosch)*,³ the agency investigated a proposed acquisition by Bosch that raised competitive concerns in the market for certain automotive air conditioning repair equipment. During the course of the investigation, FTC staff uncovered evidence indicating that the acquired company, SPX Service Solutions (SPX), had sought injunctive relief against competitor firms that were interested in licensing certain SPX patents that may have been standard-essential and that SPX allegedly had offered to license on RAND terms.⁴ The FTC settled this matter with Bosch, requiring Bosch to divest certain assets to address the proposed merger.⁵ To address the alleged patent-related conduct, the FTC required Bosch, first, to agree not to seek injunctions on its standard-essential patents against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis.⁶

In the second matter, the FTC investigated and ultimately entered a settlement with Google and its recently acquired subsidiary, Motorola Mobility.⁷ As in *Bosch*, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act – but not the antitrust laws – by

³ *In re Robert Bosch GmbH*, FTC File No. 121-0081.

⁴ *Id.*, Analysis of Agreement Containing Consent Orders to Aid Public Comment, at 4 (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf>.

⁵ *See id.* at 3-4.

⁶ *See id.* at 4-5.

⁷ *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120.

seeking injunctive relief against competitors that were willing to license certain standard-essential patents that Motorola had agreed to license on RAND terms through its participation in several standard-setting organizations.⁸ In *Google*, the remedy imposed by the FTC was more complex than the flat prohibition on seeking injunctive relief imposed in *Bosch*. Rather, the FTC's consent order established a multi-step process that Google must go through before it is permitted to seek injunctive relief on its standard-essential patents.⁹

In my dissents in the *Bosch* and *Google* matters, I took issue with, among other things, the lack of transparency and guidance that these decisions provided patent holders and others subject to our jurisdiction.¹⁰ In particular, I raised concerns about the FTC enforcing Section 5 of the FTC Act without giving enough guidance about the relationship between that statutory provision and the antitrust laws, including the Sherman and Clayton Acts. Without this guidance, it is unclear what the term "unfair method of competition" means or how the Commission will use its prosecutorial discretion to enforce Section 5. The lack of clarity in the FTC Act makes it even more important that we provide meaningful limiting principles to application of Section 5.

A related point I raised in my *Bosch* and *Google* dissents is that one of the effects of those decisions was to create conflict between the FTC and other federal institutions.¹¹ The first is between the FTC and the ITC and federal courts, since the net result of our order is to prohibit

⁸ See *id.*, Analysis of Proposed Consent Order to Aid Public Comment, at 3-6 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf>.

⁹ See Analysis of Proposed Consent Order to Aid Public Comment, *supra* note 8, at 6-8.

¹⁰ See *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3-4 (Nov. 26, 2012) [hereinafter Ohlhausen *Bosch* Statement], available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>; *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1-3 (Jan. 3, 2013) [hereinafter Ohlhausen *Google* Dissent], available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

¹¹ See Ohlhausen *Bosch* Statement, *supra* note 10, at 1-2; Ohlhausen *Google* Dissent, *supra* note 10, at 5-6.

standard-essential patent holders from seeking injunctive relief in the ITC and the courts.¹² This conflict may have been exacerbated by the ITC's June 4th decision in the Apple/Samsung matter to grant an exclusion order to Samsung against Apple for infringing one of Samsung's SEPs. While the ITC's full opinion is not yet public, in announcing its decision the Commission specifically noted that FRAND commitments did not prevent Samsung from seeking injunctive relief in the form of an ITC exclusion order.¹³ This may be directly at odds with the FTC's recent decisions and advocacy efforts on SEPs.

We also may have created a second conflict between the FTC and the Antitrust Division. When we rely on Section 5 of the FTC Act, which only the FTC enforces, rather than the antitrust laws, which both agencies enforce, we risk creating two different standards for patent holders, depending on which agency happens to review alleged misconduct. This possible divergence in applying the law to SEPs may be highlighted by a policy statement on remedies for FRAND-encumbered SEPs that the DOJ and U.S. Patent and Trademark Office issued just five days after the FTC's decision in *Google*.¹⁴ Some market participants immediately observed that the DOJ/PTO statement appeared to allow fewer exceptions for a SEP holder to seek injunctive relief than the FTC order allows for Google. These conflicts, whether real or perceived, create confusion in the market and undermine predictability and fairness for market participants who hold or use SEPs.

These decisions also may send the wrong signal about the value we place on intellectual property rights in the United States. In both *Bosch* and *Google*, we substantially curtailed the

¹² See Ohlhausen *Bosch* Statement, *supra* note 10, at 2.

¹³ Notice and Order, *In the matter of* Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, No. 337-TA-794 (June 4, 2013), *available at* http://www.usitc.gov/secretary/fed_reg_notices/337/337-794_notice06042013sgl.pdf.

¹⁴ U.S. Dep't of Justice & U.S. Patent and Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), *available at* http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

ability of SEP holders to seek injunctions.¹⁵ In my view, the majority did this in each case with little, if any, evidence that the patent holder agreed to waive this right when it participated in the standard-setting process. As I said earlier, most SSOs have not memorialized their FRAND terms and do not expressly prohibit seeking injunctions for SEPs. Moreover, in *Bosch*, the FTC required Bosch to grant royalty-free licenses on its patents as a remedy for seeking injunctions on its potential SEPs.¹⁶

No matter how good our intentions, my concern is that our actions, if not properly explained, may send a message to our foreign counterparts that we do not place a very high value on intellectual property rights, which is clearly inconsistent with the appreciation for IP rights that we typically hold in the United States.

Let me share with you an example of what I mean. Recently, I was in China attending a conference and meeting with Chinese competition officials. At the conference, I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. In addition, it was suggested that when read in light of this doctrine, the FTC's Google decision implies that a SEP is an essential facility and an unreasonable refusal to license that SEP constitutes monopolization. It was further suggested that the best remedy for monopolization with a SEP would be compulsory licensing because permitting more parties to use the SEP would facilitate competition.

This is not a correct reading of relevant U.S. law or, in my opinion, of the FTC's decision in Google. This sort of misinterpretation is troubling on two levels. First, it undercuts the value of intellectual property rights and gives our counterparts abroad the misperception that we

¹⁵ See *In re Robert Bosch GmbH*, FTC File No. 121-0081, Decision and Order, at 13-14 (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf>; *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Decision and Order, at 6-12 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf>.

¹⁶ See *Bosch D&O*, *supra* note 15, at 13.

support wide application of compulsory licensing, which is completely incorrect. Second, if these misperceptions about our SEP enforcement actions here in the U.S. are actually implemented elsewhere in the world, the resulting harm to patent rights would create serious disincentives for investment in research and development and harm innovation.

Patent Assertion Entities

Let me turn now for a few minutes to another major topic, patent assertion entities. A patent assertion entity, or PAE, is typically understood to mean a firm that owns patents but does not practice them, and that did not contribute to the research and development of those patents. The business model for many PAEs is to broadly assert and litigate the patent claims and thereby derive licensing and other revenues. Let me give you a few facts for context:

- Nearly 5,000 patent lawsuits were filed in 2012; this is up from roughly 2500 in 2010.¹⁷
- It has been estimated that PAE-generated revenue cost defendants and licensees \$29 billion in 2011 – 400% more than in 2005.¹⁸
- As of December 1, 2012, PAEs brought roughly 60% of patent infringement lawsuits for the year. This is up from 45% in 2011 and just 19% in 2006.¹⁹
- PAEs make 100 or more demands for each lawsuit filed.²⁰
- Studies show that NPE/PAEs buy and litigate the patents of small companies (50%) and individual inventors (28%) more than the patents of others.²¹ This means they may serve a procompetitive benefit of protecting the little guy in monetizing patents. Other studies show, however, that the targets of PAE lawsuits are more often than not small companies on whom the impact is potentially more harmful.²²
- Studies have also shown that the legal costs exceed the settlement 90% of the time.²³
- Finally, another recent study showed that PAEs lose 92% of the time when litigated to trial on the merits.²⁴

¹⁷ Executive Office of the President, Patent Assertion and U.S. Innovation, June 2013, at 5 [hereinafter PAE Report].

¹⁸ James Bessen and Michael J. Meurer, *The Direct Costs from NPE Disputes* (Boston Univ. School of Law and Economics Research Paper No. 12-34, 2012); FTC Chairman Leibowitz, Opening Remarks at Patent Assertion Entity Workshop (Dec. 10, 2012) at 3.

¹⁹ Colleen Chien, Patent Assertion Entities (Presentation at 2012 FTC/DOJ PAE Workshop) (Dec. 2012) at 23, available at <http://www.justice.gov/atr/public/workshops/pae/presentations/290073.pdf>.

²⁰ *Id.* at 25.

²¹ *Id.* at 47.

²² *Id.* at 49-52.

²³ *Id.* at 68.

²⁴ John. R. Allison, Mark A. Lemley, & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L. J. 677, 694 (2011).

Many people are calling for action in this area, including most recently the White House, which issued a report this month, claiming that PAE activity “significantly retard[s] innovation in the United States and result[s] in economic ‘dead weight loss’ in the form of reduced innovation, income, and jobs from the American economy.”²⁵ The report calls for three action items: (1) “clearer patents with a high standard of novelty and non-obviousness,” (2) “reduced disparity of litigation costs between patent owners and technology users,” and (3) “greater adaptability of the innovation system to challenges posed by new technologies and new business models.”²⁶ Congress, for its part, is considering legislation called the SHIELD Act (“Saving High-tech Innovators from Egregious Legal Disputes”), which would increase the cost for PAEs to litigate by shifting the fees of litigation to the losing party for cases brought by PAEs and requiring PAEs to post bond.²⁷

PAEs do have some fans – and I’m not just referring to the PAEs themselves. Those in favor of PAEs contend they help promote innovation and resolve inefficiencies in the patent system. PAEs offer a means for small companies and individual inventors to more efficiently protect and monetize their inventions. If so, PAEs could be resolving a market inefficiency—large companies with deep pockets infringing the IP of smaller companies with little recourse.

The key issue here is whether PAEs are distorting competitive dynamics in technology markets and chilling innovation by purchasing patent portfolios and then asserting them on an *ex post* basis. The FTC has acknowledged the potential problems created by PAEs and observed that aligning patent law and competition policy would require facilitating *ex ante* transactions while making *ex post* transactions less necessary or frequent.

²⁵ PAE Report, *supra* note 17, at 12.

²⁶ *Id.* at 13.

²⁷ Saving High-tech Innovators from Egregious Legal Disputes (SHIELD) Act of 2013, H.R. 845, *available at* <http://beta.congress.gov/bill/113th-congress/house-bill/845/text>.

The FTC and DOJ have engaged in advocacy and education to determine the nature and scope of this problem. In 2011, the FTC held an intellectual property workshop (the Evolving IP Marketplace) and issued a report of its findings, including with respect to PAEs and the possibility for them to engage in patent hold up. And, just this December, the DOJ and FTC held a joint PAE workshop at which many scholars and market participants discussed the issues and potential solutions. We received a number of good comments, which we are currently studying to determine an appropriate course of action.

The FTC also is advocating for regulatory change, including greater transparency through registration of real parties in interest. In 2003, the FTC recommended a more streamlined review process for granted patents that was incorporated into the America Invents Act, which Congress passed in 2011.²⁸ The DOJ and FTC recently submitted comments to the PTO in support of a proposal to require additional notice of the real party in interest for patent transfers and assignments. At a minimum, requiring the identification of the ultimate parent entity of the patent holder will facilitate greater efficiency in licensing.²⁹ It also could help avoid inadvertent infringement, which studies show is a significant problem because it makes the implementer potentially more vulnerable to rent extraction by a PAE.

Although I generally support the FTC's efforts in examining the PAE issues and advocating for greater clarity and certainty in the patent system, I still have questions about whether this is a competition law problem or whether it is a problem in the patent system itself. One recent study indicates 82% of PAE defendants were sued for infringing software patents.³⁰ Another study estimates that it is five times more likely a software patent will be the subject of a

²⁸ FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY at 7 (2003); Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011).

²⁹ FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE at 17 (Mar. 2011), *available at* <http://www.ftc.gov/bc/workshops/ipmarketplace/>.

³⁰ PAE Report, *supra* note 17, at 5.

lawsuit as a chemical patent.³¹ It is even worse for business method patents, which are roughly fourteen times as likely to end up in litigation.³² This suggests to me that we are experiencing a problem in how to adequately define strong patents in terms of their nonobviousness, novelty, or other characteristics, which may not necessarily be a competition law problem.

As is probably obvious from what I have said about *Google/SEPs* and *Bosch*, as well as my philosophy of transparency, predictability, and fairness, I would be very cautious about expanding Section 5 competition law liability to attach to basic claims of infringement by PAEs. Only where there is some evidence of additional conduct by a PAE that tends for instance to undermine the patent process or that falls within a recognized exception to *Noerr* like sham or repetitive litigation would I be compelled to intervene. But, as with SEPs and other issues at the frontier of the intellectual property laws and competition policy, I am still evaluating these issues and will continue to refine my position on the nature of this problem and the appropriate remedy.

Thanks very much.

³¹ *Id.*

³² *Id.*