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Prepared Remarks of Commissioner Noah Joshua Phillips*

IP and Antitrust Laws: Promoting Innovation in a High-Tech Economy

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Good afternoon, and thank you all for inviting me to speak today. I'm excited to participate in today's important discussion regarding intellectual property (IP) rights, antitrust law, and the Internet of Things.

The intersection of IP and antitrust has concerned (and even bedeviled) competition enforcers for quite some time—and with good reason. Innovation and technological development are critical to human progress and economic growth. The Framers of our Constitution understood this, and so empowered Congress "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[1] And so it has.

* The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

[1] U.S. CONST. art. 1, § 8, cl. 8.

As a matter then, of economic and democratic necessity, protecting incentives to innovate through IP rights is critical. As high technology industries comprise an increasing share of our economy, and industries across the board adopt new technologies, ensuring competition increasingly involves looking at the use of IP rights.

That dynamic raises fascinating—and often difficult—questions for enforcers. Research, both theoretical and empirical, can help guide our quest for answers. And, as we build our base of knowledge and experience, we are better able to make informed decisions that maximize our goals of fostering both innovation and competition.

Today, I want to spend a little time talking about how IP rights contribute to innovation and economic growth and about the history of how IP and antitrust laws have interacted over time. Then I want to discuss a couple examples of the Commission's recent enforcement efforts, and the importance of thoughtful action in a world of global antitrust enforcement.

I. IP Rights and Economic Growth

The modern U.S. economy is heavily innovation-driven. As my friend Vishal Amin, the U.S. Intellectual Property Enforcement Coordinator, stated in his 2018 Annual IP Report to Congress, "technological innovation is linked to roughly three-quarters of U.S. growth since the mid-1940s."[2] That is a staggering amount—and

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[2] U.S. INTELLECTUAL PROP. ENF'T COORDINATOR, ANN. INTELL. PROP. REP. TO CONGRESS 27 (2018), https://www.whitehouse.gov/wp-content/uploads/2017/11/2018Annual_IPEC_Report_to_Congress.pdf (citing ARTI RAI, STUART GRAHAM & MARK DOMS, U.S. DEP'T OF COMMERCE, PATENT REFORM:

one made possible in part by our country's longstanding commitment to enforcing IP rights.

I want to be clear. While linked—strongly—IP and innovation are not synonymous. Industries like sports, cooking, and fashion are highly innovative, even without certain IP protections.[3] And IP rights should be calibrated to achieve their constitutionally-intended ends. But the literature establishes well that defining and enforcing IP rights can and does encourage innovation.[4] IP rights offer two primary, related, benefits that combine to increase incentives to innovate. The first—and most commonly discussed—is that IP rights are enforceable by law, allowing its owners to internalize more of the benefits of their contributions. By providing such rights, including the ability to exclude others from using and appropriating the value of their IP for a certain period of time, IP laws enhance incentives to invest in creating the IP in the first instance.[5]

UNLEASHING INNOVATION, PROMOTING ECONOMIC GROWTH & PRODUCING HIGH-PAYING JOBS (2010), https://www.commerce.gov/sites/default/files/migrated/reports/patentreform_0.pdf).

[3] KAL RAUSTIALA & CHRISTOPHER JON SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION (2012).

[4] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1 (2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf [hereinafter PROMOTING INNOVATION AND COMPETITION] ("Intellectual property laws create exclusive rights that provide incentives for innovation by 'establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression.'" (quoting U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY LAW § 1 (1995), *reprinted in* 4 Trade Reg. rep. (CCH) ¶13,132)); *see also* sources cited *infra* note 7, and throughout.

[5] *Id.*

Second, IP laws help to increase public disclosure and commercialization of products and services utilizing the IP.[6] IP laws create a system whereby underlying IP is disclosed, but subject to protection. This means that knowledge that might otherwise be indefinitely closely guarded (think of trade secrets) is shared and, subject to the IP holder's rights, can be incorporated into other products, built upon, and otherwise utilized.

Numerous studies conclude that IP protection positively correlates with innovation, R&D investments, and economic growth.[7] By providing a strong system of IP protection, the U.S. helps to foster all of this.

The modern story begins, or first hits home, with life- and work-changing innovations like the cotton gin, the electric light, the engine, and the telephone, some of which—by the way—begat in addition to economic growth a significant amount of patent litigation. Over the last several decades, we have witnessed innovations that contributed tremendously to consumer welfare, sometimes at a scale that rivals or even exceeds the value of competition itself. Antitrust law, which

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[6] *Id.*

[7] *See*, *e.g.,* JONATHAN ROTHWELL ET AL., BROOKINGS INST., PATENTING PROSPERITY: INVENTION AND ECONOMIC PERFORMANCE IN THE UNITED STATES AND ITS METROPOLITAN AREAS 4 (2013) ("Research has established that patents are correlated with economic growth across and within the same country over time.") (citations omitted); Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technological Change?,* 55 OXFORD ECON. PAPERS 235, 236 (2003) ("Our evidence shows, unambiguously, that intellectual property protection (proxied by an index of patent rights) has a strong positive effect on technological change (proxied by R&D investment expenditures)."); David M. Gould & William C. Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 J. DEV. ECON. 323, 324 (1996) ("We utilize cross-country data on overall levels of patent protection, trade regime, and country-specific characteristics and find that intellectual property protection (as measured by the degree of patent protection) is an important determinant of economic growth."); *see also* PROMOTING INNOVATION AND COMPETITION, *supra* note 4, at 2 ("Condemning efficient activity involving intellectual property rights could undermine th[e] incentive to innovate [created by intellectual property rights], and thus slow the engine that drives much economic growth in the United States.").

seeks to foster consumer welfare, thus properly considers and captures the value of innovation.

Scholars at M.I.T. and Carnegie Mellon, for instance, analyzed the economic impact of increased product variety that electronic markets facilitated.[8] Focusing on online booksellers, they found "the increased product variety of online booksellers enhanced consumer welfare by $731 million to $1.03 billion in the year 2000, which is between 7 and 10 times as large as the consumer welfare gain from increased competition and lower prices in this market."[9] A more recent National Bureau of Economic Research Working Paper analyzed the consumer surplus UberX yielded.[10] The authors estimated that "in 2015 the UberX service generated about $2.9 billion in consumer surplus in the four U.S. cities included in [their] analysis."[11] And, using a back-of-the-envelope calculation, they further estimated that "the overall consumer surplus generated by the UberX service in the United States in 2015 was $6.8 billion."[12]

Examples like these underscore the central role innovation plays in our modern economy. A strong IP rights system—including patent, copyright, and trademark protection—helps to protect incentives to innovate, and so it, too, has an important role to play.

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[8] Erik Brynjolfsson, Yu (Jeffrey) Hu & Michael D. Smith, *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, 49 MGMT. SCI. 1580 (2003).

[9] *Id.*

[10] Peter Cohen et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber* (Nat'l Bureau of Econ. Research, Working Paper No. 22627, 2016).

[11] *Id.*

[12] *Id.*

But IP rights are not unalloyed goods. They should be calibrated to accomplish the goals outlined in the Constitution, but no more. Within the next few years, the Sonny Bono Copyright Term Extension Act rights for several well-known entities—including classics like "Steamboat Willie"—which provides copyright protection for the life of the author plus 70 years, will expire.[13] Few believe that artist and writers have slowed their work as a result.

And IP rights can be employed in ways that do not themselves clearly foster innovation. Consider the FTC's 6(b) study on patent assertion, which observed evidence of "Strike Suit" behavior, wherein an entity files a lawsuit with the intent of extracting a settlement payment, typically for less than the legal costs the defendant would face to defend itself.[14] For those of you who know me, I spent a lot of time on that issue in my old job. For purposes of my new one, it bears noting that IP rights can be misused to inflict competitive injuries. Properly calibrated enforcement of antitrust laws can help to ensure innovative spaces, including those subject to IP protection, remain competitively healthy.

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[13] Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2) (1998).

[14] U.S. FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY 4 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf ("Litigation PAEs typically sued potential licensees and settled shortly afterward by entering into license agreements with defendants covering small portfolios, often containing fewer than ten patents. The licenses typically yielded total royalties of less than $300,000. According to one estimate, $300,000 approximates the lower bound of early-stage litigation costs of defending a patent infringement suit. Given the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs is consistent with nuisance litigation." (citations omitted)).

II. History of IP and Antitrust Laws

Early antitrust enforcement efforts dealing with IP rights adopted a more formalistic approach that treated these rights as, essentially, a *de facto* exception to the antitrust laws. This treatment may have reflected ancient notions relating to royal Letters Patent, which often conferred something closer to general monopoly rights to engage in an activity, rather than the limited protection to exclude others from using your particular invention, which patent rights offer today.[15] In England, the Queen or King would issue patents securing to subjects—often ones in particular favor at Court—exclusive rights to practice a business, not an innovation.[16] These abuses led to the passage of the Statute of Monopolies, which broadly invalidated all monopoly grants with a few exceptions, including one for new inventions.[17]

Courts before about the 1970s tended to presume that patents necessarily conferred monopolies to the rights holder, which conflicted with antitrust law's goal of promoting competition.[18] This hostility was further reflected in such legal rules as the "scope of the patent test", which essentially held that, so long as a patent holder did not artificially increase the scope of its patent rights, it could not be

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[15] *See, e.g.*, Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909 (2002); John Cochrane, *Monopoly in History*, GRUMPY ECONOMIST (Mar. 18, 2019, 12:01 PM), https://johnhcochrane.blogspot.com/2019/03/monopoly-in-history.html?spref=tw.

[16] *See* sources cited *supra* note 15.

[17] Ochoa & Rose, *supra* note 15, at 913.

[18] *See* Chairman Timothy J. Muris, U.S. Fed. Trade Comm'n, Prepared Remarks before American Bar Association, Antitrust Section Fall Forum: Competition and Intellectual Property Policy: The Way Ahead, (Nov. 15, 2001), https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

subject to antitrust liability.[19] It culminated in what have come to be known as the "Nine No-Nos"—a set of licensing practices the Antitrust Division of the Department of Justice (DOJ) once considered to be per se unlawful, regardless of their actual competitive effects.[20]

But as antitrust began to embrace economic insights—focusing on effects rather than form—agencies, courts, and scholars came to treat the two policies as aiming at common goals: fostering innovating and consumer welfare.[21]

Today, the agencies' articulated approach is to "apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of property."[22] This approach recognizes the benefits from establishing rights to exclude, and that these benefits arise with respect to both real and intellectual property (and so has been known as the "symmetry" principle).[23] An IP holder's exercise of its rights is, today, "neither

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[19] *See*, *e.g.*, *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298 (11th Cir. 2012); *see also* Jonathan M. Jacobson, *The "Patent Monopoly"*, 32(3) ANTITRUST MAG. 3 (2018); Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 25 SAN DIEGO L. REV. 515 (2015).

[20] Bruce B. Wilson, Deputy Assistant Attorney Gen., Antitrust Division, U.S. Dep't of Justice, Remarks Before the Fourth New England Antitrust Conference, Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions (Nov. 6, 1970) (speech articulating what we now know as the "Nine No-Nos").

[21] *See* General Makan Delrahim, Deputy Assistant Attorney Gen., Antitrust Division, U.S. Dep't of Justice, Remarks at The George Mason Law Review Symposium: The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property (Oct. 6, 2004), https://www.justice.gov/atr/speech/long-and-winding-road-convergence-application-antitrust-intellectual-property; Muris, *supra* note 18.

[22] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 3 (2017) [hereinafter IP GUIDELINES].

[23] *See* Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMPETITION POL'Y INT'L 41 (2013).

particularly free from scrutiny under the antitrust laws, nor particularly suspect under them."[24]

Most competition concerns involving IP rights are—like most other conduct today—evaluated under the rule of reason.[25] This approach allows enforcers to consider the actual (or likely) competitive effects of certain conduct—that is, to analyze whether a given use of an IP right is helping to further competition or is undermining it. Placing the competitive effects question at the heart of the analysis when IP rights are involved is not only consistent with enforcers' approach across the spectrum of other conduct, but also ensures that the fundamental goals of promoting innovation and consumer welfare are elevated above more formalistic concerns that used to dominate the discussion.

III. Modern Enforcement Efforts

Over the last several years, the Commission has developed significant experience studying and applying antitrust law and policy to matters involving intellectual property rights. Today, I'll direct your attention to two examples, and discuss the importance of thoughtfully approaching antitrust enforcement in a globalized environment.

The first is healthcare. Healthcare costs are at the top of mind for most Americans. Little wonder: these costs account for nearly 18% of annual GDP,[26] with Americans frequently facing high prices for pharmaceuticals and care. Many

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[24] IP GUIDELINES, *supra* note 22, at 3.

[25] *See id*. at 16.

[26] Statista, U.S. National Health Expenditure as Percent of GDP from 1960 to 2019 (Feb. 2019), https://www.statista.com/statistics/184968/us-health-expenditure-as-percent-of-gdp-since-1960/.

Americans go nary a week without dealing with booking an appointment, visiting a doctor, dealing with an insurer, seeking reimbursement or the like. For many Americans, this stuff is every day. That is why healthcare competition, broadly, has been and will remain one of the Commission's priorities for decades,

The Commission has pursued competition problems—schemes to limit competition in pharmaceuticals, regulatory abuses, and anti-competitive mergers—with great success over decades, but also with some continuing challenges. "Reverse payment settlements" are a good example, which highlight the development of our approach to IP.

Reverse payment settlements happen when an IP holder, the plaintiff, provides a large payment to an alleged infringer, the defendant, as part of a settlement of patent infringement litigation. Such settlements appear unique to the pharmaceutical industry, where the Hatch-Waxman Act creates special incentives for generic drug manufacturers to challenge patents—that's good—and where patent holders, in turn, have creatively sought to end such suits—sometimes, that's very bad.[27]

Some courts took different views, with some applying the aforementioned "scope of the patent" test, permitting virtually all such settlements. But the FTC

[27] *FTC v. Actavis, Inc.*, 570 U.S. 136, 142 (2013) ("Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner."); *id*. at 155-56 ("It may well be that Hatch-Waxman's unique regulatory framework, including the special advantage that the 180-day exclusivity period gives to first filers, does much to explain why in this context, but not others, the patentee's ordinary incentives to resist paying off challengers (*i.e.,* the fear of provoking myriad other challengers) appear to be more frequently overcome.").

pursued the issue all the way up to the Supreme Court. In its 2013 *Actavis* decision, the Court held that such "large and unjustified payments" flowing in the wrong direction raise a red flag indicating that the settlements may have anticompetitive effects.[28] Several pharmaceutical drug manufacturers responded by arguing "large and unjustified payments" referred only to cash payments, and began exploring various in-kind payments instead. This included arrangements like a commitment from the branded manufacturer not to introduce an authorized generic, which would undercut the revenue the generic challenger in such cases would otherwise earn. It also led some settling parties to attempt to disguise cash payments as part of other side deals.

This conduct underscores the need for the Commission to be on the watch for creative attempts to manipulate regulatory regimes or to evade liability.

The second example I want to discuss today is a novel and difficult question about IP and antitrust the Commission recently decided in administrative litigation: its *1-800 Contacts* decision. Complaint Counsel in that case alleged that the settlements 1-800 Contacts signed with other online contact lens retailers to end trademark litigation anticompetitively hampered competition in online search advertising auctions, by restricting truthful and non-misleading internet advertising to consumers.

The settlements were "non-use" agreements, which are regularly used to settle trademark disputes. They prevented each party from bidding on the other's

[28] *Id*. at 158.

trademarked terms in online search engine auctions, and required each party to deploy negative keyword options, which would prevent an ad from being triggered by the words or phrasing comprising the negative keywords. If you, an internet user, searched for a trademark of 1-800 Contacts, the counter-parties' ads would not accompany your search result (though they might appear in organic results); and similarly if you searched for a competitor's trademark, 1-800 Contacts' ads would not be displayed.

The settlements did not address advertising outside of this narrow context. Even within online search advertising, each party remained free to advertise their prices, quality, and other services as they saw fit. And many of the settlements included explicit provisions allowing bidding on price comparison search queries. There were no allegations that the underlying litigations were shams or otherwise fraudulent. But the majority opinion found not only that these settlements were anticompetitive, but also that it could employ a "quick look" analysis to condemn them.

I dissented because the novel setting and questions this case raised precluded the proper application of an abbreviated analysis. The majority acknowledged this case arose in the "relatively new context of search-based keyword advertising" and that the "phenomenon [at issue] is comparatively recent".[29] To me, those acknowledgements, standing alone, should have prevented a quick look review—which is reserved for those cases where, "based upon economic learning and the

[29] *1-800 Contacts, Inc.*, No. 9372, 2018 WL 6078349, at *1, 29 (F.T.C. 2018).

experience of the market, it is obvious that a restraint of trade likely impairs competition”.[30]

In *Actavis*—a reverse payment case, where the anti-competitive harm was far more striking on its face—the Supreme Court reemphasized that the “abandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick look’ approach) is appropriate only where ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”[31] And even in *Actavis*, where we had evidence of firms using settlements as a tool for maintaining and divvying up monopoly rents, the Court rejected an abbreviated antitrust analysis.[32]

In the “relatively new context” involving a “comparatively recent” phenomenon at issue in *1-800 Contacts*, then, the requisite economic learning and market experience likewise was, in my view, absent. The majority relied heavily upon a series of advertising studies and cases the Commission and others conducted and initiated relating to how various advertising restrictions affected competition. That is important work, but it arose mostly before the advent of the internet and none of the sources analyzed the effect of restrictions as applied to online advertising broadly or to online paid search advertising specifically.

In *1-800 Contacts* (unlike in *Actavis*), then, it was difficult to see how an IP holder’s garden-variety assertion and protection of its rights should subject that

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[30] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

[31] *Actavis*, 570 U.S. at 136, 159 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999)).

[32] *Id.*

rights holder to antitrust liability at all—let alone to a quick look condemnation.[33] Such actions potentially undermine the incentives to invest in costly innovation that IP rights are designed to protect, and highlight the importance of antitrust enforcers' acting with care and with respect for the larger legal ecosystem.

My basic view is that, when it comes to IP and antitrust, we should not be dogmatic—in either direction. And we should take care, in particular with respect to Congress' prerogatives and to where good research takes us. That is especially so given the increasingly global nature of antitrust. The innovative nature of U.S. industries, and their reliance on IP, raises an important issue: the use—or abuse—of competition laws in foreign countries continues in ways that undermine IP. The number of global antitrust regimes has exploded over the last thirty years. Today, around 130 jurisdictions worldwide have active antitrust laws and agencies.[34]

The advent of the Internet, smart phones, and other interconnected devices have made the global economy a reality today more than ever. This confluence of events has yielded a world in which antitrust regulators across the globe are often investigating the same or similar conduct. The actions of various regulators can resound across the globe today; and, while this may often be for the good, it is sometimes problematic—particularly when actions raise due process concerns or reflect efforts to use the antitrust laws to promote goals other than enhancing

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[33] I was concerned we failed to draw a clear line, and that this failure would chill the innovation IP rights sought to protect. And, as I explained in my dissent, the competitive effects evidence in that case did not indicate any competitive harm resulted from the trademark settlements.

[34] COMPETITION DIRECTORATE-GENERAL OF THE EUROPEAN COMMISSION, COMPETITION POLICY BRIEF 1 (May 2016) ("In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today."), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf.

competition.[35] The inconsistent application of principles and the failure to recognize and protect pro-innovation policies are real risks. Where we get it wrong, others may very well follow. And American firms may bear the brunt.

As the oldest active antitrust regime, the U.S. is watched closely by foreign enforcers, especially those with newer antitrust authorities. That is a testament to the important work the Commission and the DOJ have done over the last couple centuries.

But it also places on our agencies an important responsibility. It increases the stakes for agency actions and inactions—others may closely watch what the agencies are doing, and act in similar fashion. It also underscores the importance of agency advocacy abroad. Engagement with other jurisdictions to share our experiences and best practices can help to raise the level of international antitrust discourse and enforcement, to the benefit of consumers.

CONCLUSION

Preserving incentives to innovate is critical to the success of our innovation-driven economy. Enforcing IP rights has an important role to play in maintaining these incentives. But so does enforcing antitrust laws.

IP and antitrust laws work in tandem to promote competition and consumer welfare. When they intersect—particularly in new and emerging industries—they can present difficult questions for enforcers, which require careful examination, recognition of the limits of our knowledge, and continued learning. This rigorous

[35] *See*, *e.g.*, Pan Kwan Yuk & Tim Bradshaw, *Qualcomm handed record $774m antitrust fine in Taiwan*, FIN. TIMES (Oct. 11, 2017), https://www.ft.com/content/7f757226-ae9e-11e7-aab9-abaa44b1e130.

analysis will continue to be a necessity as IP-driven industries continue to expand and to constitute an important component of the economy. Even where commissioners disagree, I believe the Commission has proven more than up to this challenge, and look forward to continuing to engage in these important efforts.