JUNE 2018

IP COMPETITION PROJECT

The Need for an Approach to IP Law that Promotes "Competition Values"

As a research, education, and advocacy organization devoted to promoting competition and competitive markets, the American Antitrust Institute (AAI) has long recognized and analyzed the tensions and problems at the intersection of competition and intellectual property (IP) law, particularly patent law. A well-designed patent system can serve to promote competition and innovation. But excessive patent rights and remedies can undermine competition, innovation, and consumer welfare, particularly when coupled with abusive enforcement strategies.[1] For example, the problem of patent thickets is well recognized,[2] especially in markets involving information technology, where a single consumer device may read on tens or hundreds of thousands of patents.[3] Patent assertion entities have attracted much attention, but they highlight flaws in the patent system that are exploited by others as well.[4]

Competition advocacy within the domain of patent law is especially important. This is because patent policy makers and patent courts are often less sensitive to promoting innovation and consumer welfare than to protecting patentees.[5]

At least until recently, the U.S. Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) have been active in enforcement and advocacy in addressing competition concerns with the patent system, a development that the Antitrust Section of the American Bar Association (ABA) once supported.[6] But their advocacy role in the Trump administration seems likely to change. Indeed, the new Assistant Attorney General for Antitrust has advocated in speeches that patent rights have been undervalued, that patent "holdout" is more of a problem than patent "holdup," and that standard setting organizations may violate Section 1 when they adopt patent policies that arguably favor "implementers" over "innovators" (ignoring the fact that implementers are also innovators).[7] Moreover, despite their excellent policy studies, the Antitrust Division and the FTC filed only a handful of amicus briefs on patent issues in the last decade. And the DOJ is constrained by its need to coordinate with the Patent and Trademark Office.

AAI's History of Involvement in IP Competition Issues

The AAI has advocated a "competition friendly" approach towards problems that arise at the intersection of antitrust and IP law, as well as those within the exclusive domain of patent and copyright law. Assisted by some of the nation's leading scholars and experts on IP and competition,[8] the AAI has filed numerous amicus briefs on patent-antitrust issues, including standard-setting abuse, patent misuse by exclusive package licensing, *Walker Process* claims, and reverse payments and product hopping in prescription-drug markets.[9]

Several amicus briefs filed by the AAI focus on "pure" patent issues with competition implications, such as the exhaustion doctrine, patentability, and remedies for infringement of standard essential patents (SEPs). The AAI has also focused its efforts on combating holdup strategies involving SEPs, as well as abuses by patent assertion entities (PAEs). The AAI has also addressed the problem of overly expansive copyright protection of computer software. The competition-IP balance in transgenic seeds has also been an important concern.

AAI's voice on these matters is respected for several reasons. AAI positions harness the expertise of its renowned advisory board. They also reflect the important perspective of supporting competition for the benefit of consumers and the public in a domain in which vested interests tend to dominate.

Objectives and Priorities of the IP Competition Project

The IP Competition Project accomplishes three important objectives. First, it brings together AAI's existing research, education, and advocacy with respect to patent and other IP issues. Second, it makes such work a key organizational priority. And third, it expands AAI's work in new directions. The Project will focus AAI's IP research, education, and advocacy on the following objectives and priorities:

- **Encourage the DOJ and FTC to renew their longstanding and bipartisan competition advocacy and enforcement to address competition concerns with the patent system**. As the ABA once recognized, the Agencies "should be ambassadors of a consumer-welfare-focused view of patent policy to the courts, other federal entities . . . and the public at large."[10] The AAI will endeavor to carry that flag when the Agencies do not or cannot act.
- **Support limits on patent remedies, particularly where a patent covers only a minor feature of an infringing product**. The goal is to ensure that compensatory damages and injunctions are assessed in a manner that aligns a patentee's compensation with the invention's economic value, taking into account royalty stacking and holdup concerns arising in or outside the standard-setting context.
- **Support judicial, legislative, and administrative efforts to improve patent quality.** This priority includes efforts to improve patent notice.
- **Combat abusive conduct by PAEs.** This priority includes efforts to address indiscriminate demand letters, portfolio aggregations and disaggregations that enable the exercise of market power, and the lack of transparency as to patent ownership and infringement claims.
- **Address hold-up strategies involving SEPs.** This priority includes helping clarify the meaning of commitments to license on "reasonable and non-discriminatory" (RAND) terms in the courts and among standard-setting organizations.
- **Oppose counterproductive interpretations of the *Noerr Pennington* doctrine.** The goal is to discourage outcomes that would immunize abusive conduct by PAEs and SEP holders.

As in other areas, AAI's research and advocacy will largely take the form of amicus briefs, white papers, and agency comments. In addition, the AAI will continue to hold educational workshops and briefings on patent/competition issues, will highlight the IP Competition Project on its website, and disseminate information and work product related to it. For more about the IP Competition Project, please contact AAI General Counsel Richard Brunell, 202-600-9640, rbrunell@antitrust institute.org, or AAI President Diana Moss, 202-536-3408, dmoss@antitrustinstitute.org.

Opportunities to Support AAI's IP Competition Project

The AAI invites innovators, entrepreneurs, incumbents, and new-entrant firms to help support the IP Competition Project. Support will enable AAI to advance the state of research, education, and advocacy on IP rights and competition and ensure that IP policy promotes—rather than impairs—competitive markets, innovation, and consumer welfare. Opportunities to support this important

initiative are available through sponsorships and contributions. For more information, please contact Sarah Frey at 410-897-7028 or sfrey@antitrustinstutue.org.

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[1] The Federal Trade Commission has pointed out that "ever greater intellectual property protection is not necessarily socially beneficial," and that "[a] failure to strike the appropriate balance between competition and patent law and policy can harm innovation." Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Policy* 3, 14 (October 2003); *see also* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 1993 (2007) (excessive royalties "act as a tax on new products incorporating the patented technology, thereby impeding rather than promoting innovation").

[2] *See generally* Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, *in* 1 Nat'l Bureau of Econ. Research, *Innovation Policy and the Economy* 119 (Adam B. Jaffe et al. eds. 2001).

[3] *See, e.g.,* Jorge L. Contreras & Richard J. Gilbert, *A Unified Framework for RAND and Other Reasonable Royalties*, 30 Berkeley Tech. L. J. 1451, 1489 & n. 147 (2015) (citing estimate by RPX Corp. that more than 250,000 patents cover a single smartphone).

[4] *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 2117 (2013).

[5] As Professor Hovenkamp has observed: "The intellectual property laws, but particularly copyright and patent, are among the most captured regimes in the American legal system today. By and large, Congress has listened to producers while paying little attention to the voices of consumers. One consequence of this is that patent law has not developed any equivalent to the "consumer welfare" prescription that has become so central to antitrust analysis." Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 Ohio St. L.J. 467, 483 (2015).

[6] *See* ABA Antitrust Section, *Presidential Transition Report: The State of Antitrust Enforcement 2012* at 34 (Feb. 2013) ("The Agencies should promote the accommodation of greater concerns about competition policy into patent policy, and, where appropriate, should encourage the federal courts to take competition issues into account in cases involving patent scope and remedies."). *But cf.* ABA Antitrust Section, *Presidential Transition Report: The State of Antitrust Enforcement* at 44 (Jan. 2017) ("To protect the ability of U.S. businesses to innovate and compete, the Agencies may wish to consider whether the concerns [about foreign IP competition policy] warrant an adjustment in U.S. policy or an international dialogue that might reconcile these conflicting policies.").

[7] *See, e.g.,* Makan Delrahim, Assistant Attorney General, Antitrust Division, The "New Madison" Approach to Antitrust and Intellectual Property Law, Mar. 16, 2018. The initial Trump administration acting chair of the FTC, Maureen Ohlhausen, was also skeptical of the role of agency in combatting IP abuse and lauded the fact that "the revised IP Licensing guidelines lacked any reference to standard-essential patents, limits on the pursuit of injunctive relief, and PAEs." Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Antitrust Policy for a New Administration at 3, Jan. 24, 2017. Seventy seven scholars and former agency officials wrote to Delrahim contending that his speeches were not "consistent with the broad bipartisan legal and economic consensus that has existed for over a decade regarding standard setting." Letter from Michael Carrier and Timothy Muris to Assistant Attorney General Makan Delrahim (May 17, 2018), *available at* https://patentlyo.com/media/2018/05/DOJ-patent-holdup-letter.pdf.

[8] Notable intellectual property scholars on AAI's Advisory Board include law professors Michael Carrier (Rutgers), Daryl Lim (John Marshall Law School), Andrew Chin (University of N. Carolina), Shubha Ghosh (Syracuse), Christopher Leslie (U.C. Irvine), Elizabeth Winston (Catholic), and economists Richard Gilbert (U.C. Berkeley emeritus) and F.M. Scherer (Harvard emeritus). Numerous other advisors also have expertise in intellectual property matters.

[9] See attachment for list of notable briefs, white papers and other filings on IP matters.

[10] ABA Antitrust Section, 2012 Transition Report, *supra* note 6, at 34.