INTELLECTUAL PROPERTY & ANTITRUST

USA

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Intellectual Property & Antitrust

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Quick reference guide enabling side-by-side comparison of local insights, including into intellectual property law, the nexus between competition and IP rights, and consideration of industry standards; competition law, including such issues as interactions with copyright exhaustion or first sale doctrines; merger review; specific examples of competition law violations; remedies; economics and application of competition law; recent cases, remedies and sanctions; and other recent trends.

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INTELLECTUAL PROPERTY

Intellectual property law

Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

US federal law governs three types of intellectual property:

- patents (35 USC, section 101 et seq);
- copyrights (17 USC, section 101 et seq); and
- trademarks (15 USC, section 1051 et seq).

State law primarily governs the protection of trade secrets, with most states having adopted the Uniform Trade Secrets Act or some variation of it. In 2016, Congress passed the Defend Trade Secrets Act (DTSA), allowing the owner of a trade secret to sue in federal court for misappropriation. The DTSA largely mirrors the Uniform Trade Secrets Act; however, it does not pre-empt state law.

Holders of IP rights can generally transfer and assign their rights. The transfer and licensing of IP rights may be subject to pre-merger notification requirements under the Hart–Scott–Rodino Antitrust Improvements Act . The sale or licensing of IP rights is evaluated under the same antitrust statutes that apply to conduct involving tangible property, including the Sherman Act , the Clayton Act and the Federal Trade Commission (FTC) Act . The US views TRIPs as setting a minimum standard for the protection and enforcement of IP rights, and US standards frequently exceed TRIPs minimum standards.

Law stated - 26 January 2022

Responsible authorities

Which authorities are responsible for granting, administering or enforcing IP rights?

The US Patent and Trademark Office (USPTO) and the US Copyright Office are the main IP authorities in the United States. An agency of the US Department of Commerce, the USPTO has the authority to grant patents and register trademarks. It also advises the President of the United States, the Secretary of Commerce and bureaus of the Department, and other government agencies, on domestic and global IP issues.

The Copyright Office does not grant IP rights – copyright protection is created the moment that a work is created and fixed in a tangible form. The Office administers the Copyright Act ’s mandatory deposit provisions and various compulsory and statutory licensing provisions set forth in the Act, including collecting and distributing royalty fees. It also advises Congress on copyright policy.

The US International Trade Commission (ITC), pursuant to section 337 of the Tariff Act of 1930 (19 USC, section 1337), investigates claims regarding IP rights and infringement by imported goods.

Law stated - 26 January 2022

Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

US federal courts resolve patent, copyright and trademark infringement suits, largely brought through private party civil litigation. Although state courts normally resolve trade secret violations, federal courts might resolve these disputes as part of disputes involving federal law issues.

Administrative proceedings are handled in numerous different tribunals. The ITC adjudicates private claims of infringement by imported goods under section 337. The USPTO also holds administrative proceedings.

The America Invents Act of 2011 created the Patent Trial and Appeal Board (PTAB) within the USPTO, which conducts trials dealing with inter partes review, post-grant review, covered business method patent reviews and derivation proceedings, and hears appeals from adverse patent examiner decisions in patent applications and re-examination proceedings.

Relatedly, the USPTO's Trademark Trial and Appeal Board (TTAB) is responsible for adjudicating petitions opposing proposed trademark registrations and appeals from USPTO examiners denying registration of marks, as well as handling concurrent use and interference proceedings. Appeals from the USPTO and the ITC can be further appealed to the US Court of Appeals for the Federal Circuit.

The FTC can also bring an administrative enforcement action before an administrative law judge in the instance that private enforcement of IP rights violates competition laws.

Law stated - 26 January 2022

Remedies

What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

US IP statues provide numerous remedies for infringement. For patent and copyright infringement, IP owners can receive monetary relief (actual or statutory damages), preliminary or permanent injunctions, exclusion orders and seizures of imported items. For wilful or deliberate infringement, patent and copyright owners may win increased damages, which can be up to three times the compensatory damages. Additionally, costs may be recoverable, and in cases of wilful infringement, attorneys' fees are also recoverable.

Federal courts evaluate a request for an injunction to remedy patent infringement under the Supreme Court's decision in *eBay v MercExchange LLC*, 547 US 388 (2006). Under *eBay*, a plaintiff must demonstrate that:

- absent an injunction it would suffer irreparable injury;
- monetary damages are inadequate;
- that balance of hardships between the plaintiff and defendant favours an injunction; and
- an injunction is not contrary to the public interest.

Trademark owners also have numerous remedies available for infringement: injunctions, a court order requiring the destruction or forfeiture of infringing articles, damages (which may be trebled in cases involving bad faith) and disgorgement of the infringer's profits.

For dilution, the most likely remedy is an injunction against further dilution; however, if the trademark owner can prove wilfulness, they can seek attorneys' fees, monetary damages and even treble damages.

Although state and federal courts can grant injunctive relief and monetary damages for IP holders, administrative tribunals (such as the ITC) can usually offer injunctive relief, such as exclusion and cease-and-desist orders. Temporary exclusion and cease-and-desist orders can be granted in certain exceptional circumstances.

Law stated - 26 January 2022

Nexus between competition and IP rights

Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

The federal antitrust agencies and courts treat antitrust and intellectual property as complementary areas of law that work together to promote competition, innovation and consumer welfare. The acquisition or assertion of IP rights is neither particularly suspect nor immune from scrutiny under the antitrust laws.

For the purposes of antitrust enforcement, courts and agencies apply the same antitrust rules to matters involving IP rights as they apply to matters involving tangible property. Antitrust claims based on the acquisition, assertion or transfer of intellectual property rights are evaluated primarily under sections 1 and 2 of the Sherman Act, section 7 of the Clayton Act or section 5 of the FTC Act.

A wide body of federal case law provides guidance on the application of the antitrust laws to particular fact patterns. Key Supreme Court cases provide foundational principles that apply broadly to antitrust claims based on the acquisition or assertion of IP rights. The Supreme Court has held that although patents confer a bundle of rights that may include the right to exclude, patents do not confer monopoly power for purposes of establishing a claim under the antitrust laws (Illinois Tool Works v Independent Ink, 547 US 28 (2006)).

In addition, the Supreme Court has held that the First Amendment to the Constitution provides IP owners with immunity for antitrust claims based primarily on the assertion of their rights unless the assertion is both objectively and subjectively baseless (Prof'l Real Estate Inv'rs, Inc, v Columbia Pictures Indus, Inc , 508 US 49 (1993)).

The two federal antitrust agencies, the US Department of Justice (DOJ) and the FTC, have issued guidance materials on federal antitrust enforcement policy relating to IP.

Competition is also addressed in statutes and case law on IP rights. Patent misuse is an affirmative defence to patent infringement (not an independent cause of action).

Patent misuse sometimes, but not always, requires a showing of market power or competitive harm. In a controversial decision, the Supreme Court held that the payment of post-expiration royalties constitute per se misuse, despite appeals from academics that licensing agreements providing for post-expiration royalties can be efficient and should be evaluated under a rule of reason standard (Kimble v Marvel Entm't, LLC, 135 S Ct 2401 (2015)).

Claims of patent misuse based on tying or package licensing are typically evaluated under a reasonableness standard and so typically require a showing of competitive harm. Section 271(d) of the Patent Act bars a defence of misuse based solely on a unilateral refusal to license IP and requires a showing of market power to support a misuse defence based on tying. Federal courts have recognised a defence of misuse for copyright infringement. The Lanham Act , the principal federal trademark law, expressly provides for an antitrust defence to a trademark violation claim (15 USC, section 1115(b)(7)).

Law stated - 26 January 2022

Patent cooperation treaties and other agreements

Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

The US is party to the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Patent Cooperation Treaty, the Geneva Patent Law Treaty and all other major global agreements on intellectual property.

Law stated - 26 January 2022

Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

The Lanham and FTC Acts both provide remedies for false advertising and deceptive practices. The FTC has sole authority to enforce the FTC Act. Where the FTC finds a violation, it has the authority to issue a cease and desist order to enjoin deceptive practices and prevent a future violation. It also has the authority to pursue civil penalties in federal court.

Private parties may bring false advertising claims in federal and state court under the Lanham Act. A plaintiff may be awarded both an injunction against further unlawful practices and monetary damages as compensation for lost profits. Most states have similar laws that provide protection against false advertising, which may be enforced by either the state attorney general or through private rights of action.

Law stated - 26 January 2022

Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

The US implemented the WIPO protections on digital rights in 1998 through passage of the Digital Millennium Copyright Act (DMCA). The DMCA prohibits the circumvention of technological protections on copyrighted works or certain rights management information. Violations of the DMCA can give rise to both civil and criminal penalties.

There are no laws that limit the use of TPM or DRM protection on platforms. In certain cases, TPM or DRM software that blocks market access to unprotected aspects of a product or technology may give rise to antitrust liability, including claims for monopolisation or attempted monopolisation, if the other elements of a claim, including market power and anticompetitive exclusion, are established.

Law stated - 26 January 2022

Industry standards

What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

The activities of standards-development organisations (SDOs) are typically treated as agreements subject to section 1 of the Sherman Act. Courts have held that although the development of industry standards can limit competition, where standards are developed through transparent procedures and without undue capture by any single group of stakeholders, standards can also provide enormous procompetitive value. For those reasons, the activities of SDOs are almost always evaluated under the rule of reason standard (Allied Tube & Conduit Corp v Indian Head Inc. 486 US 492 (1988)). These same principles apply to the development of standards that include technologies covered by IP rights.

There are no special antitrust rules that apply to the assertion or licensing of standard-essential patents. Federal case law defines the application of section 2 of the Sherman Act to the unilateral conduct of essential patent owners. A claim for monopolisation or attempt to monopolise requires a showing that (among other things) deception during the standards-development process harmed the competitive process by excluding rivals.

However, absent exclusionary behaviour during the development process, the later breach of an agreement to provide access to essential patents on reasonable and non-discriminatory (RAND) terms does not alone provide the basis for an antitrust claim (Broadcom Corp v Qualcomm Inc 501 F3d 297 (Third Circuit 2007), Rambus Inc v FTC , 522 F3d 456 (DC Circuit 2018)); instead, claims that an essential patent owner has breached a RAND assurance are typically evaluated under principles of contract law (Microsoft Corp v Motorola, Inc , 795 F 3d 1024 (Ninth Circuit 2015)).

In two matters, the FTC has alleged that an essential patent owner that seeks an injunction against a firm willing to abide by a RAND licence may violate section 5 of the FTC Act (Robert Bosch GmbH , FTC Docket No. C-4377 and Motorola Mobility LLC , Docket No. C-4410). Both matters were resolved through settlement agreements that lack broader precedential value.

Federal courts have held that merely seeking relief in court, including seeking an injunction, is immune from antitrust liability under the Noerr-Pennington doctrine, providing further limits on the precedential value of the FTC's settlements (Apple, Inc v Motorola Mobility, Inc , 886 F Supp 2d 1061 (Western District Wisconsin 2012), TCL Commc'ns Tech Holdings, Ltd v Telefonaktienbolaget LM Ericsson , 2016 US Dist LEXIS 140566 (Central District California 2016)).

Law stated - 26 January 2022

COMPETITION

Competition legislation

What statutes set out competition law?

The Sherman Act, passed by Congress in 1890 and the Federal Trade Commission (FTC) Act and Clayton Act, both passed in 1914, are the three core US federal antitrust laws in effect today.

- The Sherman Act prohibits unreasonable restraints of trade, monopolisation, attempts to monopolise and conspiracies to monopolise.
- The Clayton Act prohibits acquisitions that may substantially lessen competition, as well as certain other issues, such as tying.
- The FTC Act, which is enforced solely by the FTC, prohibits unfair methods of competition, as well as unfair or deceptive acts and practices.

Although the FTC's authority to challenge unfair methods of competition technically reaches beyond letter of the Sherman Act, the precise scope of the FTC's 'unfair methods of competition' authority has been a subject of some controversy. The FTC has most often used its antitrust authority falling outside the scope of the Sherman and Clayton Acts to challenge invitations to collude, where no agreement forms. Beyond that, the FTC typically pursues claims for an unfair method of competition under the same standards federal courts apply to Sherman Act claims.

In addition to these federal statutes, most states have their own antitrust statutes – generally modelled after the federal antitrust laws – enforced by the state attorneys general or private plaintiffs.

Law stated - 26 January 2022

IP rights in competition legislation

Do the competition laws make specific mention of any IP rights?

US antitrust statutes do not specifically mention IP rights; however, the Department of Justice (DOJ) and the FTC have issued antitrust licensing guidelines (first in 1995 and most recently in 2017) and other guidance materials that outline the agencies' antitrust enforcement policy towards the licensing of intellectual property and other conduct involving IP, such as patent pools, bundled or package licensing arrangements and unilateral refusals to deal.

Law stated - 26 January 2022

Review and investigation of competitive effects from exercise of IP rights

Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The DOJ and the FTC jointly enforce the federal antitrust laws; however, only the DOJ has the authority to bring criminal enforcement actions – although the FTC can refer matters to the DOJ for criminal enforcement. Additionally, under section 5 of the FTC Act, the FTC may bring civil challenges to conduct that violates section 5 of the FTC Act (which covers but is not limited to claims that could be brought under sections 1 or 2 of the Sherman Act) either in administrative proceedings or federal court.

Coordination between the DOJ and the FTC is governed loosely by an informal memorandum of understanding, which distributes enforcement authority by industry expertise and knowledge. For example, the FTC is typically responsible for industries, including healthcare providers, pharmaceuticals, and food and retail. The DOJ is typically responsible for telecommunication, agriculture and insurance.

Law stated - 26 January 2022

Competition-related remedies for private parties

Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Private parties can recover for competition-related damages from the exercise, licence or transfer of IP rights under either federal or state antitrust law. Under federal law, the Clayton Act creates a private right of action for parties to recover damages from injuries flowing from a violation of the antitrust laws. Damages are typically trebled, and plaintiffs may also recover court costs and attorneys' fees (15 USC, section 15(a)). Plaintiffs may also win an injunction requiring the defendant to end the offending conduct.

To win relief, a plaintiff must establish antitrust injury, which requires that it suffered harm because of the restriction in competition that forms the basis for the violation. The alleged anticompetitive conduct must proximately cause the injury.

Forty years ago, the Supreme Court barred, with limited exceptions, indirect purchasers from seeking and recovering antitrust damages (Illinois Brick Co v Illinois, 431 US 720 (1977)). Over half of US states have enacted 'Illinois Brick repealer' statutes allowing for indirect purchasers to recover.

On 13 May 2019, the Supreme Court affirmed the Ninth Circuit's decision that because Apple sold iPhone apps directly to consumers, Apple should be treated as a distributor and consumers as direct purchasers with standing to sue Apple for alleged monopolisation of the market for iPhone apps (Apple v Pepper , 139 S Ct 1514 (2019)).

Law stated - 26 January 2022

Competition guidelines

Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

The DOJ and the FTC have issued joint guidance materials on federal antitrust enforcement policy relating to intellectual property. In 2007, the agencies issued a report outlining agency enforcement policy on a range of competition issues involving intellectual property, including unilateral refusals to license, the incorporation of patents into standards, patent pools, tying and bundling.

For purposes of antitrust analysis, the agencies distinguished unconditional from conditional refusals to license. Under US enforcement policy, unconditional unilateral refusals to license patents 'will not play a meaningful part in the interface between patent rights and antitrust protections'. Conditional refusals to license, such as a licence that includes exclusivity provisions, may raise antitrust concerns if restrictions in the licence lead to competitive harm.

In 2017, the DOJ and the FTC issued updated Antitrust Guidelines for the Licensing of Intellectual Property . The Guidelines incorporate the core principles from the 1995 Guidelines and remain consistent with the principles in the broader 2007 Antitrust IP Report. The 2017 Guidelines cover the antitrust treatment of licences involving patents, copyrights, or trade secrets. Although the Guidelines do not apply expressly to trademark agreements, 'the same general antitrust principles that apply to other forms of intellectual property apply to trademarks as well.'

The 2017 Guidelines incorporate several key principles:

- the agencies will apply the same antitrust principles to conduct involving IP as the principles applied to conduct involving other forms of property;
- IP rights do not create a presumption of market power under the antitrust laws; and
- IP licensing allows firms to combine complementary assets and is thus generally pro-competitive.

The vast majority of restrictions in licensing arrangements are evaluated under the rule of reason and are not likely to harm competition if the restriction does not limit competition that would have existed in the absence of the licence.

Law stated - 26 January 2022

Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

Courts have developed a number of exemptions and immunities from the antitrust laws, such as the state action doctrine or protection for the solicitation of government action (known as Noerr-Pennington immunity). These general exemptions apply equally to conduct involving IP rights.

Noerr-Pennington immunity protects IP owners from antitrust liability for pursuing infringement claims unless the underlying claims are both objectively and subjectively baseless (Professional Real Estate Investors v Columbia Pictures Industries , 508 US 49 (1993)). Petitioning immunity extends to conduct associated with seeking relief, such as sending infringement notices or other marketplace communications relating to infringement. Some courts have recognised an exception to petitioning immunity where the IP owner files repeated lawsuits without regard to individual merit (USS-Posco Industries v Contra Costa County , 31 F.3d 800 (Ninth Circuit 1994)).

The Federal Circuit has held that a mere unconditional unilateral refusal to license or share intellectual property is lawful and cannot give rise to antitrust liability (In re Independent Service Organizations Antitrust Litigation , 203 F3d 1322 (Federal Circuit 2000)). One appellate court has held that although a refusal to license is presumptively lawful as a legitimate exercise of the statutory right to exclude, but the presumption can be overridden by evidence that the refusal was a pretextual effort to harm rivals (Image Technical Services, Inc v Kodak Co , 125 F3d 1195 (Ninth Circuit 1997)); however, in reversing a district court decision, the Ninth Circuit more recently held that patent owner has no antitrust duty to deal with rivals except in limited circumstances articulated by the Supreme Court (FTC v Qualcomm , 969 F3d 974 (Ninth Circuit 2020), citing Verizon Communications Inc v Law Offices of Curtis v Trinko LLP , 540 US 398 (2004)).

Law stated - 26 January 2022

Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, ‘copyright exhaustion’ (EU) or ‘first sale’ (US)? If so, how does that doctrine interact with competition laws?

The first sale doctrine is codified under section 109(a) of the Copyright Act. Under the first sale doctrine, a party that lawfully acquires the tangible embodiment of a copyright work, such as a book or a compact disc, may resell the item without violating the copyright. Efforts to control the price at which the acquiring party resells the product are evaluated under state and federal antitrust laws relating to resale-price maintenance.

The first sale doctrine does not apply to computer software that is licensed rather than sold; thus, the copyright owner can exert greater control over subsequent distribution by licensing rather than selling the tangible product (Vernor v Autodesk , 621 F3d 1102 (Ninth Circuit, 2010)). The party asserting the first use defence bears the burden of proving ownership through lawful acquisition.

Law stated - 26 January 2022

Import control

To what extent can an IP rights holder prevent ‘grey-market’ or unauthorised importation or distribution of its products?

An IP owner can challenge the unauthorised importation of infringing products by filing a complaint with the US International Trade Commission (ITC) under section 337 of the Tariff Act.

Section 337 bars unfair methods of competition, including through importation of items that infringe US patent, copyright or trademark rights. The primary remedy in a 337 investigation is an exclusion order, which blocks entry of infringing items at the border.

The ITC may also stop the sale of infringing items already in the US through a cease and desist order. A trademark owner may also file suit in federal court under section 42 of the Lanham Act. Relief under the Lanham Act may include injunctive relief to stop infringing imports as well as monetary relief.

Law stated - 26 January 2022

Jurisdictional interaction between competition laws and IP rights

Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

US district courts have exclusive jurisdiction over claims brought under the patent and copyright acts. The Federal Circuit has exclusive jurisdiction to hear appeals in cases 'arising under' that patent laws. A case that involves both a patent and antitrust claim will be appealed to the Federal Circuit; however, the Federal Circuit will apply the law of the appropriate regional circuit to pure antitrust questions, such as relevant market and competitive effects.

Antitrust enforcement occurs at both the state and federal level. Actions are brought by the FTC, the DOJ and state attorneys general, as well as through private litigation. The FTC has sole authority to enforce the FTC Act, which it may do in federal court or in its own administrative tribunal. Administrative decisions are appealed to the Commission and may be ultimately reviewed by federal appellate courts.

Law stated - 26 January 2022

MERGER REVIEW

Powers of competition authority

Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Acquisitions involving IP rights are reportable under the HSR Act if the value of the IP rights triggers statutory thresholds and the parties otherwise meet the standard regulatory requirements for premerger notification. The FTC and the DOJ review both reportable and non-reportable mergers and acquisitions involving IP rights under the same statutes that apply to other mergers (the Sherman, Clayton and FTC Acts). State attorneys general also have the authority to review and challenge mergers, and that authority includes mergers that involve IP.

Certain IP licensing agreements that fall short of a full transfer or assignment of rights may also be reportable. Based on informal guidance from the FTC Premerger Notification Office, exclusive patent or trademark licences may be reportable under the HSR Act. Such licences may be reportable, even if exclusivity extends only to a particular geographic region.

Although non-exclusive licences are generally not reportable, the FTC issued a rule in 2013 that requires reporting for certain non-exclusive pharmaceutical patent licences that transfer 'all commercially significant' rights, even where the licensor retains manufacturing rights.

Law stated - 26 January 2022

Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The same principles apply to the evaluation of mergers and acquisitions involving IP rights as those that apply to transactions involving other forms of property however, in analysing mergers involving IP, the agencies may consider competitive effects in upstream technology markets for the IP rights themselves as well as downstream product markets.

In limited cases, the agencies may also consider the impact of a merger on research and development (R&D) activities, and the analysis of the competitive effects on R&D may be more likely in mergers that involve the transfer of significant IP. Potential anticompetitive effects in an R&D or innovation market has not played a meaningful role in merger investigations outside the pharmaceutical sector, where the agencies will evaluate the pipeline products of the merging parties; however, even those matters can be understood as focusing on potential competition rather than pure R&D.

Law stated - 26 January 2022

Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

The US agencies will apply the same statutes and legal standards towards evaluating the competitive effects of mergers involving IP as those that apply to other transactions and will take both horizontal and vertical effects into account. For example, the agencies may consider whether the transfer of a patent portfolio would combine ownership over technologies that would otherwise compete in upstream technology markets and whether that combination may substantially lessen competition.

The agencies may also evaluate whether the acquisition will change the incentives of the merging parties towards licensing potential downstream rivals. In 2011 and 2012, the DOJ investigated a series of transactions involving the transfer of large patent portfolios that included standard-essential. The agencies evaluated how the transfer would change incentives to share IP with downstream product market rivals. The DOJ allowed the transactions to proceed after certain acquiring parties made public assurances regarding their future licensing behaviour (Statement of the DOJ’s Antitrust Division, 13 February 2012).

Challenges to the aggregation of patents by patent assertion entities are likely to fail where plaintiffs are unable to show that the defendant enhanced its market power in any technology market consisting of patents that cover technical substitutes (Intel Corporation v Fortress Investment Group LLC, 2020 US Dist LEXIS 158831 (Northern District of California, 15 July 2020)).

Law stated - 26 January 2022

Remedies to address the competitive effects of mergers involving IP

What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The normal range of remedies is available to restore competition that may be lost in mergers that involve IP rights, including divestiture and behavioural remedies. In some cases, one of the merging parties may own intellectual property that creates a barrier to entry into the relevant market.

To resolve competitive concerns with the merger, the agencies may require the merging parties to provide a licence to new entrants to ameliorate the potential anticompetitive effects from the merger.

In 2012, the DOJ at least informally appeared to require certain technology companies acquiring stakes in large patent portfolios to provide assurances regarding their willingness to provide downstream competitors with access to standard-essential patents that were part of the portfolios (Statement of the DOJ's Antitrust Division, 13 February 2012).

In other cases, IP rights owned by one of the merging parties may act as a barrier to entry, in which case the agencies may require that the merging parties either divest certain intellectual property rights or to make licences available to new entrants to resolve competitive concerns associated with the merger. Courts also have the authority to require divestiture of assets, including IP rights, to remedy an anticompetitive merger.

Law stated - 26 January 2022

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

The same antitrust rules apply to price-fixing and conspiracy claims involving intellectual property as those that apply to horizontal conduct involving tangible property. Most licensing arrangements expand competition by allowing parties to share complementary assets; thus, the transfer or licensing or IP is seldom treated as per se unlawful.

When evaluating a licensing arrangement, the agencies will ask whether the licence restricts competition between the parties that would have existed in the absence of a licence. In cases where the licensee requires a licence to participate in the market, a licence expands competition, even if the parties agree on the resale price of licensed products or agree to operate in different territories; however, a licence or cross-licensing arrangement may support a price-fixing claim if it is used as a sham to control the price for products or technologies where the parties would be actual or potential competitors without the licence.

In Continental Auto Systems v Avanci , a district court dismissed claims filed by upstream component manufacturers alleging that a patent pool covering 5G standard-essential patents that offered licences solely to end-device manufacturers constituted an unlawful conspiracy. Applying the rule of reason, the court held that the pool agreement did not harm competition because it did not preclude pool members from individually negotiating licences that excluded the pool's field of use restriction (485 F Supp 3d 712 (Northern District of Texas, 10 Sept 2020)). Agreements among technology users on the price at which they will accept a licence may also give rise to a price-fixing claim.

Law stated - 26 January 2022

Scrutiny of settlement agreements

How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

While IP settlements are not immune from antitrust scrutiny, settlement of legitimate infringement actions is typically procompetitive and lawful under a rule of reason standard; however, patent infringement settlements in the pharmaceutical sector that involve a reverse payment from the infringer to the patent owner are often the subject of antitrust scrutiny.

The court rejected the assertion that a settlement that fell within the legitimate scope of the patent owner's rights should be immune from scrutiny, concluding that a large unexplained payment from the patent owner to the alleged infringer suggests that the patent would not survive challenge. As such, the presence of the reverse payment raises legitimate concerns that the settlement could be used primarily as a tool to restrain competition; however, the same antitrust standard applies.

The Supreme Court held in FTC v Actavis that reverse payment patent settlements are subject to antitrust scrutiny under a rule of reason standard – the same standard that applies broadly to agreements with the potential for procompetitive benefit.

Law stated - 26 January 2022

Reverse payment patent settlements

How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

Patent settlements in the pharmaceutical sector that include a reverse payment from the owner of a patent on a branded drug to an alleged generic infringer have been the subject of scrutiny from enforcement agencies and have been widely litigated by private plaintiffs as well.

In a significant 2013 decision, FTC v Actavis, Inc , the Supreme Court held that even in cases where the underlying infringement claim was not a sham, reverse payment settlements are subject to antitrust scrutiny under a section 1 rule of reason standard. The Court explained that an 'unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival', suggesting the objective of the settlement is to preserve and share monopoly profits by avoiding price competition.

However, the Court refused to find that reverse payment settlements were presumptively unlawful, which would effectively shift the burden to the settling parties to prove that the agreement was pro-competitive. It held that the anticompetitive effects of a settlement depended on a variety of factors, including the size of the payment relative to likely litigation costs, whether the payment provided compensation for other services and that a plaintiff 'must prove its case as in other rule-of-reason cases'.

Since Actavis , most district courts have concluded that a non-cash transfer of value from the branded pharmaceutical to the potential generic can constitute a reverse payment. The Third Circuit has held that the branded pharmaceutical firm's agreement to refrain from introducing an authorised generic during the first-filer's 180-day exclusivity period can constitute a reverse payment and support an antitrust claim. Additionally, in 2016, the First Circuit followed the Third Circuit in holding that these no authorised generic agreements may violate the antitrust laws, holding that to limit the holding of Actavis to only cash payments would put form over substance.

There are still numerous reverse payment lawsuits that continue to be litigated, for example:

- In re Glumetza Antitrust Litig, Case No. C 20-01198 WHA, 2020 US Dist LEXIS 39649, 2020 WL 1066934 (Northern District of California 5 Mar 2020) (partially granting and partially denying the motion to dismiss in reverse payment putative class action); and
- In re Zetia (Ezetimibe) Antitrust Litig, MDL No. 2:18-md-2836, 2020 US Dist LEXIS 152380, 2020 WL 4917625 (Eastern District of Virginia 21 Aug 2020) (partially granting class certification in reverse payment case).

Government agencies also continue to actively litigate such cases, such as Impax Labs, Inc v Fed Trade Comm'n , 994 F3d 484, 494 (Fifth Circuit 2021), cert denied, 211 LEd 2d 400 (2021) (upholding the ruling of the Federal Trade Commission (FTC) that Impax Laboratories had entered into an illegal reverse payment settlement with a competitor).

Congress has also begun to turn its attention to reverse payments. Bills have been introduced in both the US senate and the House of Representatives that are aimed at curbing or banning such settlements (see, for example, Expanding Access to Low-Cost Generics Act of 2021 , S 2910, 117th Cong (2021) and the Preserve Access to Affordable Generics and Biosimilars Act , HR 2375, 116th Congress (2019)).

California also passed legislation aimed at banning reverse payment agreements, although on 9 December 2021, that legislation was preliminarily enjoined in federal court for likely violating the dormant Commerce Clause (Ass’n for Accessible Meds v Bonta , Case No 2:20-cv-01708-TLN-DB, 2021 US Dist LEXIS 236387, at *17-18 (Eastern District of California, 9 Dec 2021)).

Finally, in response to President Biden’s July 2021 Executive Order on Promoting Competition in the American Economy, the FTC has begun exploring whether it should establish new regulations regarding pay-for-delay agreements (Fed Trade Comm'n, Statement of Regulatory Priorities (10 Dec 2021)).

However, private plaintiffs who previously entered into arbitration agreements with pharmaceutical manufacturers may have a harder time bringing lawsuits. In 2019, the Third Circuit found that a lawsuit alleging that a pharmaceutical manufacturer engaged in anticompetitive behaviour to protect its monopoly over a drug called Remicade was subject to an arbitration clause, even though that arbitration clause was part of a distribution agreement and not directly related to antitrust (In re Remicade (Direct Purchaser) Antitrust Litig , 938 F3d 515, 524-56 (Third Circuit 2019); but see In re Rotavirus Vaccines Antitrust Litig, Civil Action No. 18-CV-1734, 2020 US Dist LEXIS 217565, 2020 WL 6828123 (Eastern District of Pennsylvania 20 Nov 2020) (finding that physician buying groups did not have authority to bind their members to arbitration provisions)).

Law stated - 26 January 2022

(Resale) price maintenance

Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

The Supreme Court has long held that where an IP owner licenses a product market competitor, it may restrict the price at which its competitor sells the licensed product (United States v General Electric , 272 US 476 (1926)); however, for many years the liberal treatment afforded resale price maintenance for licensed products stood in contrast to the per se rule against vertical price-fixing more generally.

In 2007, the Supreme Court reversed the per se rule for vertical price-fixing and held that, given the potential for pro-competitive benefits, an agreement between vertically related entities on minimum resale prices will be evaluated under the rule of reason (Leegin Creative Leather Products v PSKS , 551 US 877 (2007)).

The rule of reason requires a showing that the agreement harmed competition and that the harm was not outweighed by countervailing competitive benefits. Competitive harm is unlikely in a situation where the licensor and the licensee would not have competed in the same relevant market absent the licence; thus, the law covering licensed and unlicensed products is now better aligned under federal law. However, resale price maintenance remains per se unlawful under many state antitrust statutes.

Law stated - 26 January 2022

Exclusive dealing, tying and leveraging

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

Exclusive dealing and trying arrangements involving intellectual property are evaluated under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act and section 5 of the FTC Act. These arrangements are subject to the same standards as arrangements involving tangible property and are almost always evaluated under the rule of reason standard.

In the 2017 Antitrust Licensing Guidelines, the FTC and the DOJ explained that tying and package licensing arrangements can provide substantial efficiencies and provided guidance on the application of the rule of reason to these arrangements. The agencies will challenge such arrangements only if the IP owner has market power in the tying product or technology, and the arrangement has an adverse effect on competition that is not outweighed by countervailing efficiencies.

In evaluating an exclusive dealing arrangement, the agencies will consider both the extent to which exclusivity enables the IP owner to realise the value of its rights more efficiently and the extent to which the arrangement forecloses competition that would have existed absent the licence. Though the term is used loosely in some opinions, US courts generally do not recognise leveraging as a distinct theory of harm. Any claim that a firm is using a licence to leverage power from one market to the next must meet the standards for anticompetitive exclusion to succeed.

Law stated - 26 January 2022

Abuse of dominance

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

US antitrust law does not recognise a claim for abuse of dominance. Single-firm conduct associated with the exercise or acquisition of monopoly power is evaluated under section 2 of the Sherman Act and section 5 of the FTC Act.

Monopolisation under section 2 requires a showing that a firm has acquired or maintained monopoly power through the anticompetitive exclusion of rivals, rather than creating 'a superior product, business acumen, or historic accident' (United States v Grinnell Corp, 384 US 563 (1966)); however, US antitrust laws do not prevent a lawful monopolist from charging prices or setting other terms of trade that reflect its lawfully acquired dominance of the market (Verizon Communications Inc v Law Offices of Curtis V Trinko LLP , 540 US 398 (2004)).

Although the FTC may have authority under section 5 to bring a monopolisation case that falls outside the scope of section 2, the bounds of the FTC's section 5 authority are unclear, and the FTC has not prevailed in court on a different theory.

Law stated - 26 January 2022

Refusal to deal and essential facilities

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

The US agencies stated in a 2007 report that they are unlikely to bring an enforcement action challenging the unconditional unilateral refusal to license patents. Similarly, the Federal Circuit has held that a refusal to license or share IP is lawful and cannot give rise to antitrust liability (In re Independent Service Organizations Antitrust Litigation , 203 F3d 1322 (Federal Circuit 2000)).

One appellate court has held that although a refusal to license is presumptively lawful as a legitimate exercise of the statutory right to exclude, the presumption can be overridden by evidence that the refusal was a pretextual effort to harm rivals (Image Technical Services, Inc v Kodak Co , 125 F3d 1195 (Ninth Circuit, 1997)).

Although Kodak has not been overruled, it has not been followed widely and has been criticised for its reliance on the subjective intent of the IP owner and the court's failure to provide sensible guidance on distinguishing a legitimate versus pretextual exercise of the right to exclude. In reversing a district court decision, the Ninth Circuit more recently held that patent owner has no antitrust duty to deal with rivals except in the limited circumstances described by the Supreme Court (FTC v Qualcomm , 969 F3d 974 (Ninth Circuit, 2020), citing Verizon Communications Inc v Law

Offices of Curtis V Trinko LLP , 540 US 398 (2004)).

Law stated - 26 January 2022

REMEDIES

Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

There are no special sanctions or remedies to resolve antitrust matters involving intellectual property. Private civil antitrust matters in federal court may give rise to treble damages as well as injunctive relief.

The Supreme Court has recognised compulsory licensing as an acceptable antitrust remedy in appropriate circumstances, although district courts have rarely required a compulsory licence in practice. More commonly, courts will refuse to enforce patent rights as a remedy for patent misuse.

The FTC has the authority to seek a range of equitable remedies through administrative litigation and has ordered compulsory licensing on reasonable rates as a remedy to a section 5 violation. Both the DOJ and the FTC may require a compulsory licence or divestiture of intellectual property as part of a settlement agreement resolving the potential anticompetitive effects of a merger. Although criminal antitrust matters involving intellectual property are unusual, criminal matters can give rise to both fines and imprisonment.

Law stated - 26 January 2022

Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

Special remedies specific to IP matters do not exist under US competition laws.

Law stated - 26 January 2022

ECONOMICS AND APPLICATION OF COMPETITION LAW

Economics

What role has competition economics played in the application of competition law in cases involving IP rights?

Economics has changed the way that IP rights are viewed under the antitrust law. The incorporation of economics into antitrust law has led to the recognition that strong IP rights promote competition by creating incentives to invest in the development of new technologies and products. Most antitrust matters involving intellectual property are evaluated under a rule of reason standard, which requires a showing of competitive harm, typically based on fact-intensive economic analysis and evidence.

Law stated - 26 January 2022

RECENT CASES AND SANCTIONS

Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

Qualcomm

On 21 May 2019, a federal district court in the Northern District of California ruled in favour of the Federal Trade Commission (FTC) in its antitrust case against Qualcomm (FTC v Qualcomm , 2019 US Dist LEXIS 86219 (Northern District of California, 21 May 2019)). After a 10-day bench trial, the court ruled that the FTC had shown that Qualcomm had unlawfully monopolised two markets for modem chips by requiring its modem chip customers to separately license Qualcomm's patented technology (rather than exhausting those rights through the sale of the chips themselves), refusing to provide licences for its standard-essential patents to its modem chip rivals and engaging in exclusive dealing arrangements with Apple.

Qualcomm appealed the decision to the Ninth Circuit, which stayed key aspects of the district court injunction order pending appeal. The US Department of Justice (DOJ) Antitrust Division filed an amicus brief supporting Qualcomm's appeal.

On 11 August 2020, the Ninth Circuit reversed the district court decision and vacated the remedy (FTC v Qualcomm , 969 F3d 974 (Ninth Circuit, 2020)). It rejected each of the FTC's substantive theories of harm. It held that Qualcomm had no antitrust duty to deal with rivals and that Qualcomm's licensing policies did not harm competition because chipset customers paid the same royalty rate for Qualcomm's patents regardless of whether they sourced their chips from Qualcomm or a competitor; its licensing model was 'chipset neutral'. The court did not reach the question of whether Qualcomm had breached its licensing commitment to two specific standards-development organisations because a breach alone would not constitute an antitrust claim.

The FTC sought rehearing, which was denied on 28 October 2020.

1-800 Contacts

On 11 June 2021 the Second Circuit reversed and vacated the Commission opinion in In the Matter of 1-800 CONTACTS, Inc 1-800 Contacts, Inc v FTC , 1 F4th 102 (Second Circuit, 2021). In August 2016, the FTC filed an administrative complaint against 1-800 Contacts. The company had asserted trademark infringement claims against several online sellers for bidding on the 1-800 Contacts brand name in a keyword search auction to trigger their own search advertising. The parties settled those claims using standard non-use agreements.

While the FTC did not challenge the legitimacy of the underlying infringement claims, it claimed that the settlement agreements nevertheless created an unreasonable restraint on competition under either a presumptively unlawful (quick look) or full rule of reason standard (complaint at 1, 4, In the Matter of 1-800 Contacts, Inc , FTC Dkt No. 9372 (8 August 2016).

The case was tried before the FTC's administrative law judge (ALF), who held in favour of the FTC complaint counsel in October 2017 (Initial Decision of Chief Admin Law Judge D Michael Chappell at 201, In the Matter of 1-800 Contacts, Inc , FTC Dkt No. 9372 (27 October 2017).

On 14 November 2018, the Commission upheld the ALJ decision by a vote of three to one, with one commissioner issuing a vigorous dissent and one declining to participate. (FTC, ' FTC Commissioners Find that 1-800 Contacts Unlawfully Harmed Competition in Online Search Advertising Auctions, Restricting the Availability of Truthful Advertising to Consumers ' (14 November 2018)). Although the majority affirmed the ALJ, it departed from the ALJ's analysis by deciding that the agreements were presumptively unlawful – a standard that the Supreme Court rejected for even reverse payment patent settlements in Actavis (Opinion of the Comm'n at 22, In the Matter of 1-800 Contacts, Inc , FTC Dkt No. 9372 (7 November 2018); but see Dissenting Statement of Comm'r Noah Joshua Phillips at 21, In the Matter of 1-800 Contacts, Inc , FTC Dkt No. 9372 (14 November 2018).

1-800 Contacts appealed to the Second Circuit, challenging, among other things, the Commission's decision to avoid a full analysis of competitive effects by both invoking the presumptively unlawful standard and, concluding, in the alternative, that a restriction on advertising that is the result of a bona fide assertion of trademark rights is sufficient to establish competitive harm (Final Form Brief for Petitioner at 39, 50, 1-800 Contacts v FTC , No. 18-3848 (2d Circuit, 11 October 2019)).

Oral argument was held in March 2020, and the Second Circuit issued a decision reversing and vacating the Commission decision and order. The Second Circuit held that while trademark settlements are not immune from antitrust scrutiny, the FTC improperly applied the 'quick look' rule of reason standard and failed to make a showing of competitive harm.

AbbVie

A Third Circuit opinion in 2020 provided further guidance on reverse payment settlements. The FTC sued AbbVie and other pharmaceutical companies for attempting to monopolise and restrain trade over the drug AndroGel (Federal Trade Commission v AbbVie, Inc , 976 F3d 327, 338 (Third Circuit, 2020)). The FTC claimed that AbbVie had pursued sham litigation claims against generic competitors Perrigo and Teva. It also claimed that the defendants had executed an anticompetitive reverse payment settlement agreement with Teva through a favourable supply agreement for a separate product, Tricor.

The district court agreed with the FTC that the defendants had pursued sham patent infringement claims and ordered disgorgement as a remedy; however, it dismissed the FTC's claims that were based on reverse payment settlements. Even though the Teva patent settlement and Tricor supply agreements were executed on the same day, the district court analysed the agreements separately and found neither to be anticompetitive standing alone.

On 30 September 2020, the Third Circuit reversed the decision, finding that the district court's analysis put form over substance and would allow parties to avoid antitrust liability by merely creating a separate contractual vehicle for the reverse payment. It remanded, with instructions to re-evaluate the agreement under the proper framework.

The Third Circuit also reversed the district court's order on disgorgement under section 13(b) of the FTC Act, reasoning that to sue under section 13(b), the FTC must have reason to believe an antitrust violation is imminent or ongoing, which is inconsistent with a remedy that deprives a wrongdoer of past gains, not current or imminent gains.

The Third Circuit denied the FTC's and the defendants' petitions for rehearing, and after the Supreme Court declined to review the ruling, the FTC fully withdrew the case (FTC, ' Federal Trade Commission Withdraws Remaining Case against AbbVie after Supreme Court Decision Strips Consumers of Relief ' (30 July 2021)).

In 2020, a federal district court dismissed a separate antitrust lawsuit brought against AbbVie. The plaintiffs alleged that AbbVie had cornered the market for Humira, which is an anti-inflammatory drug, by amassing a large number of patents related to the drug and using those patents to keep out competitors. The district court found that AbbVie had simply 'exploited advantages conferred on it through lawful practices' and found that the alleged patent amassing practices AbbVie had engaged in were not violations of antitrust law (In re Humira (Adalimumab) Antitrust Litig , No. 19-CV-1873, 2020 US Dist LEXIS 99782, 2020 WL 3051309 (Northern District of Illinois, 8 June 2020)).

Shire, Remicade and Biocad

In 2019, a trio of cases limited the jurisdiction of courts to hear pharmaceutical antitrust cases.

Shire

First, on 25 February 2019, the Third Circuit upheld the dismissal of the FTC's complaint against Shire Viropharma, Inc. From 2006 to 2012, Shire submitted a total of 43 Food and Drug Administration filings and instituted three federal court proceedings in an attempt to block the approval of generic versions of a drug called Vancocin. The FTC alleged that these filings were meritless filings that were an attempt to block generics from entering the market, and in 2017, sought an injunction against Shire by bringing suit under section 13(b) of the FTC Act.

However, by 2014, Shire had already divested its Vancocin holdings. The district court said that Shire was not currently violating the law and was not about to violate the law, and thus the FTC did not have the authority to obtain an injunction under section 13(b) (FTC v Shire Viropharma, Inc , 917 F3d 147, 159-60 (Third Circuit, 2019)).

Remicade

On 13 September 2019, the Third Circuit found that a plaintiff's antitrust claims were subject to an arbitration agreement. Rochester Drug Cooperative (RDC) sued Johnson & Johnson (J&J), alleging that J&J imposed anticompetitive clauses on insurers in an effort to keep the price of Remicade inflated; however, RDC had entered into a distribution agreement with J&J regarding Remicade that had an arbitration clause.

The Third Circuit found that because the price RDC paid for Remicade was directly intertwined with the distribution agreement, the antitrust claims were subject to the arbitration agreement (In re Remicade (Direct Purchaser) Antitrust Litig , 938 F3d 515, 524-56 (Third Circuit 2019)).

Biocad

On 5 November 2019, the Second Circuit upheld the dismissal on Foreign Trade Antitrust Improvements Act grounds of an antitrust complaint brought against a pharmaceutical company. Biocad, a company that made biosimilars to a set of drugs called mAbs, sued F Hoffmann-La Roche on the grounds that La-Roche had taken anticompetitive action in Russia to prevent Biocad from earning enough capital in Russia to be able to expand into the United States.

The Second Circuit affirmed that the case should have been dismissed, holding that even if La-Roche's actions were taken with the intent to block Biocad from the US market, there were no actions taken in the US or that affected the US import market directly (Biocad JSC v F Hoffmann-La Roche , Docket No. 17-3486, 2019 US App LEXIS 33011, 2019 WL 5700347 (Second Circuit, 5 November 2019)).

Law stated - 26 January 2022

Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

The full range of remedies is available in competition matters involving intellectual property. International Trade Commission unfair competition claims involving infringing imports are subject to exclusion and cease and desist orders to prevent US sales of infringing items.

Law stated - 26 January 2022

UPDATE AND TRENDS

Key developments

Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

The year 2021 brought a new administration with a new focus on competition enforcement. On 9 July 2021, the White House issued an executive order (EO) directing or encouraging federal agencies to take action to promote competition in the US economy.

The EO covered a number of areas relating to antitrust, competition policy and IP. In particular, it encouraged the attorney general and the Secretary of Commerce to reconsider the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued by the former administration on 19 December 2019.

On 6 December 2021, the US Department of Justice (DOJ), the US Patent and Trademark Office and the National Institute of Standards and Technology issued a draft revision to the 2019 policy statement and sought public comments . Public comments were due by 4 February 2022, and a decision on either withdrawing or revising the 2019 policy statement is likely in 2022. The policy statement is competition advocacy directed to courts and other tribunals making determinations on remedies for infringement of standard-essential patents subject to a FRAND licensing commitment.

The EO also urged the Departments of Agriculture and Health and Human Services to consider patent policy issues impacting competition in agricultural and pharmaceutical products. In addition, after a period of acting leadership at both the FTC and the DOJ, Lina Khan was confirmed as chair of the FTC on 15 June 2021, and Jonathan Kanter was confirmed as Assistant Attorney General for Antitrust at the DOJ on 15 November 2021. We are certain to learn more in 2022 about how these recent confirmations will impact agency enforcement and policy at the intersection of antitrust and intellectual property.

Law stated - 26 January 2022

Jurisdictions

China	Baker McKenzie
Germany	Meissner Bolte
India	Chadha & Chadha Intellectual Property Law Firm
Indonesia	SSEK Legal Consultants
Japan	Anderson Mōri & Tomotsune
Kazakhstan	Baker McKenzie
Mexico	Calderón & De La Sierra
Portugal	PLMJ
Turkey	ACTECON
United Kingdom	Arnold & Porter
USA	Crowell & Moring LLP