Interview of Commissioner Ohlhausen

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FTC Commissioner Maureen K. Ohlhausen was sworn in on April 4, 2012, to a term that expires in September 2018. Before serving as Commissioner, Ohlhausen was a partner at Wilkinson Barker Knauer, LLP, where she specialized in FTC issues drawing from 11 years of prior FTC service as Director of the Office of Policy Planning, as attorney advisor for former FTC Commissioner Orson Swindle, and working in the FTC General Counsel's Office. In this interview, Commissioner Ohlhausen discusses the 1995 Licensing Guidelines, efforts by foreign competition authorities to advance antitrust-IP policy, the use of injunctions in standards setting, Section 5 of the FTC Act, PAEs, patent reform, the pharmaceutical industry, and trends to look for in 2016. Christie L. Stahlke, a counsel in Crowell & Moring's D.C. office, conducted the interview.

1. Recently, there has been some commentary by FTC and DOJ officials regarding whether the 1995 Licensing Guidelines are due for an update. What is your view?

I'd be delighted to answer that question and others that you may have. Let me begin by thanking you, Christie, for interviewing me today. It's a pleasure to discuss the pressing issues that exist at the border of IP and antitrust law.

The IP Licensing Guidelines have been remarkably durable, even in the face of rapidly evolving technology markets. Their staying power reflects their flexibility and balanced approach. They teach that IP issues are not a special case that requires a different competition jurisprudence. Rather, common principles apply to restraints regardless of whether they accompany technology-licensing agreements or "brick and mortar" contracts. The Guidelines also adopt certain economic principles that, in 1995, not all courts had yet accepted. Specifically, the agencies do not assume that patents confer market power on their owners. Eleven years after the Guidelines, the Supreme Court accepted that principle in *Illinois Tool Works*.[1] Inevitably, of course, the Guidelines cannot keep pace with every material development. For example, they reflect a pre-*Leegin* per se rule against resale price maintenance.

Clearly, the last twenty years have transformed the technology-licensing space. The 1995 Guidelines focused primarily on the acquisition and restriction of individual intellectual property rights (IPRs). Today, large patent-portfolio acquisitions are common. Thus, an updated analysis, perhaps including cluster market definition, may be appropriate in some cases. Also, since 1995, complex antitrust questions have emerged concerning standard-essential patents (SEPs), such as the impact of hold-up and hold-out. Further,

[1] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

the rise of patent aggregators like patent-assertion entities and defensive patent-buying funds has produced antitrust litigation in the federal courts. Although many of the battles in the smartphone wars are now behind us, the relationship between competition law and patent accumulation continues to be a hot topic.

Unique questions also arise in the life-sciences industry. The Rule of Reason framework for analyzing pay-for-delay agreements remains uncertain post *Actavis*,[2] as does the appropriate standard for judging product hopping and other forms of predatory innovation.

The FTC and DOJ have expertise and a good track record in educating the courts, practicing bar, and companies on difficult antitrust issues. I do not, however, perceive an urgent need to revisit the 1995 Guidelines, which continue to offer a sensible and balanced approach for addressing these complex scenarios.

2. Several countries are in the process of reviewing their own guidelines regarding the intersection of antitrust and IP, including Japan, Korea, and Canada. In your view, are the competition authorities in other countries getting it right? What, if anything, should the U.S. be doing to lead in this space?

As proprietary technology plays a greater role in industry, questions of IP rights, antitrust, and larger economic policy come to the fore. Thus, it is no surprise that competition authorities around the world are grappling with many of the same issues that have occupied U.S. enforcers.

Antitrust-IP problems are difficult. The trick is to analyze them in a disciplined fashion, with an appreciation for the relevant economic analysis and the particular facts, as well as due regard for transparency, predictability, and fairness. The FTC and DOJ can help their sister agencies around the globe to think through challenging antitrust-IP problems. We should use a delicate touch, however, respecting that countries' economic conditions and policies sometimes differ from our own. If they are using non-competition factors in their analysis, however, we should encourage them, at a minimum, to be explicit about such factors.

I do have one overarching concern. In the U.S., antitrust law protects the competitive process but does not mandate particular outcomes. We protect the means by which markets freed from artificial restraints provide lower prices, higher output, and greater innovation. The Sherman Act is not a price-regulation statute. That is a feature of a well-calibrated competition policy, rather than a bug. I worry that some jurisdictions view competition law as a tool of regulation, which enforcers can wield to condemn high prices or objectionable licensing demands. To the extent that certain of our colleagues wish to use antitrust to dictate specific market outcomes, they bypass the competitive process. Although well intentioned, efforts to limit acceptable prices using antitrust law are

[2] *FTC v. Actavis, Inc.*, 570 U.S. __, 133 S. Ct. 1310 (2013).

counterproductive. Market processes instill incentives and capitalize on private information in a way that antitrust agencies never can.

3. You have previously stated that a *per se* rule prohibiting standard essential patent holders from seeking injunctions is overbroad. Could you provide an example of when requesting an injunction may be warranted, and conversely, one in which the request itself might be anticompetitive (not involving deception)?

An injunction is a form of relief that courts can and do tailor to the circumstances of each case. Economics teaches that protecting entitlements using a property rule (injunction) rather than with a liability rule (damages) can enhance efficiency by inducing parties to bargain in modest-transaction-cost environments where the parties have superior information as compared to courts. In simpler terms, injunctive relief leads those wishing to use property to negotiate a license up front. Of course, there are circumstances in which a liability rule is more efficient. The key is to be sensitive to the economic context surrounding the property and its appropriation.

In the standard-setting arena, injunctions can protect SEP owners against strategic conduct by technology users, whether individually or collectively. Suppose that a firm practices a standard-essential technology, but ignores the owner's licensing overtures or makes only pretextual, desultory attempts to negotiate price. We have also seen cases where a group of technology users allegedly acted jointly to reduce what they would pay for a license. By holding out—forcing the patentee to go through the full legal process, potentially over years and at great expense, to secure a royalty—the technology user deprives the SEP owner of its just reward and possibly gains a competitive advantage over other market participants that are paying a licensing fee (or a higher, competitively set license fee). Injunctive relief prevents strategic hold-out and may thus be appropriate in such cases.

Of course, the uncritical award of an injunction could facilitate the opposite problem of hold-up. Conceivably, a dominant firm could seek to enjoin its competitor using a SEP subject to a reasonable and non-discriminatory (RAND) commitment, even though the accused infringer is a genuinely willing licensee. Such conduct may potentially affect competition in a downstream product market, but that result depends on several criteria. First, there must be a material chance that the court will grant the injunction (which the relevant history suggests is granted infrequently). Otherwise, the threat of injunctive relief is hollow and would have scant market effect. Second, if the alleged anticompetitive conduct is not deception, but merely seeking an injunction, then the challenged act is government petitioning immunized by the *Noerr-Pennington* doctrine absent sham. Finally, when antitrust agencies condemn the mere request for an injunction, they deprive the judiciary (or International Trade Commission) of its role within the U.S. administrative framework.

Opportunistic conduct can occur on either side of the bargaining table, which means that injunctions should not be categorically prohibited or granted. Courts have a nuanced jurisprudence to determine when injunctive relief is appropriate. Indeed, in *Apple v.*

Motorola[3] in 2014, the Federal Circuit rejected a per se rule against injunctions for SEPs and held that "an injunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect." It is a mistake for antitrust authorities to usurp that process because we fear that the courts may grant injunctions inappropriately.

4. Under what circumstances should Section 5 of the FTC Act have broader applicability for conduct associated with the assertion of IP rights when that conduct would not otherwise rise to the level of a violation under the Sherman Act?

Section 5's proscription of "unfair methods of competition" can become problematic when it strays beyond the borders of the Sherman Act. The FTC's Statement of Principles on Section 5 last summer did little to add clarity, as I explained in my dissent.[4] In the IP space, I worry that the FTC may wield Section 5 to condemn patentee conduct that does not harm the competitive process. For example, I did not support the FTC's decision to challenge the pursuit of injunctive relief by SEP owners absent deception of an SSO in the *Bosch* and *Google/MMI* matters. If the Sherman Act (or Clayton Act) does not capture patentee conduct due to a lack of harm to competition, then I see no reason to extend Section 5's amorphous arm to condemn that behavior.

I have supported application of Section 5 to invitations to collude, however, and would likely support a case that involved an invitation to collude on prices for IP rights.

5. Two years ago, you identified as a key question whether PAEs are harming competition by distorting competitive dynamics in technology markets and chilling innovation. But you also noted that the information necessary to answer this question was not yet available. Do you expect the forthcoming PAE study to provide that information? What can we expect to learn from the forthcoming PAE study?

There has been no lack of criticism of PAEs, but it is important to understand the actual market effects of their patent accumulation and licensing. The FTC has already laid down a marker in this area when we challenged abusive and deceptive demand letters in our *MPHJ* case. Beyond that matter, there are important questions going to the quality of the patents that PAEs aggregate and license; whether PAEs allow some value to flow from downstream technology users to upstream inventors and, if so, in what proportion; and whether PAEs engage in ex ante technology transfer or ex post assertion against independently invented technologies. In addition to those core issues there are policy questions, such as whether any problems are unique to patent law or whether they also implicate antitrust rules.

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[3] 737 F.3d 1286 (Fed. Cir. 2014).

[4] *See* FTC Act Section 5 Policy Statement, C. Ohlhausen, dissenting (Aug. 13, 2015), *available at* https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy.

Although some illuminative studies have recently emerged, evidence of PAEs' ultimate market effects still remains incomplete. I believe that the PAE study will provide data that bear on these important questions and which I hope will inform policymaking.

6. How important is patent reform in your view to the goal of protecting property rights and spurring innovation?

The patent system lies at the heart of U.S. innovation policy. Patents lead firms to invest in technologies that would otherwise be vulnerable to copying. That dynamic is most obviously apparent in the life-sciences industry, but it applies elsewhere, too. Patents also encourage inventors to commercialize their discoveries and to disclose how their new technologies work. The results speak for themselves: the American economy has been uniquely successful in fostering innovation. IP rights, which enjoy Constitutional regard, form part of a rich incentive environment for R&D investment. For those reasons, I have championed the protection of IP rights both domestically and abroad.

Of course, today's patent regime is not perfect. Some flaws are inevitable and some uses of the patent system can harm welfare. When patents are of dubious validity, are too broad, or are ambiguous, they can suppress follow-on innovation or subject technology users to unjustified costs. When evidence arises that some patents have that effect, targeted reform is appropriate.

I support reform directed at abuses, or demonstrated shortcomings, of the patent system. I worry, however, that some commentators have urged an excessive dilution of IP rights. Incremental adjustment is appropriate, particularly when the U.S. Supreme Court has acted in the last several terms to remedy shortcomings with the patent system. Policymakers should try to calibrate patent rights to reflect the realities of today's technology markets, but they should not dilute property rights that have long formed part of our innovation system, which continues to be the envy of the world.

7. There has been quite a bit of recent press regarding sudden and exponential price increases for certain pharmaceuticals. Should the antitrust agencies play a role in addressing this phenomenon?

I understand the urge to condemn perceived price gouging, especially when the affected product is vital for some patients. It is important to remember, however, that antitrust does not regulate prices. Its mandate is to guard the competitive process. We do this through a very active program of careful merger review and targeted conduct enforcement in the pharmaceutical industry. If we see a sudden and large increase in price, we must ask what made that price increase possible. If the seller achieved the requisite power by dissolving a competitive constraint on its pricing, then it may well be a problem for the antitrust agencies. If the firm did not lift a market constraint on its pricing power, however, then there may not be an antitrust issue.

Price fluctuations are an integral feature of our market economy. Raised prices signal conditions of excess demand vis-à-vis supply, spurring procompetitive entry and output

expansion. They also induce frugality at times of limited supply. As with any system, abuses in outlier cases are possible. But to the extent instances of excessive pricing justify a policy reaction, the answer lies in antitrust only if the underlying cause is harm to competition.

8. What antitrust-IP trends should we look for in 2016?

The biopharmaceutical industry will remain an active area for the antitrust-IP intersection this year. Many antitrust questions relevant to that industry remain unresolved. The nature of the rule-of-reason framework established by the Supreme Court in *Actavis* for pay-for-delay settlements is particularly important. Further, compensation in those cases appears to be changing form. Some pioneer drug manufacturers have agreed not to launch authorized generics, which may represent especially harmful forms of reverse payments. I would like to see the Commission provide guidance on how to analyze a pay-for-delay case under the *Actavis* framework by pursuing a challenge through administrative litigation, instead of going directly to federal court.

Furthermore, the FTC has recently challenged several healthcare-system mergers, which raise interesting issues. I expect that those matters will illuminate the relevant antitrust analysis brought to bear on potentially anticompetitive combinations in the healthcare industry.

Finally, 2016 will doubtless provide further insight into the effect of PAE conduct on competition and efficiency. The FTC's PAE study remains in progress, and I look forward to discussing its results upon its release.