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The Effects of Intellectual Property on Competition - U.S. Status

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Intellectual Property and Competition

- IP increases invention and innovation
- Antitrust laws foster competition
- Tensions between the doctrines but both promote innovation
- Let's look at key cases, Antitrust Guidelines for IP and FTC hearings

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Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980)

HOLDING:

R&H did not engage in patent misuse and antitrust violation

35 U.S.C.S. § 271 effectively conferred upon a patentee limited power to exclude others from competition in nonstaple goods.

FACTS:

R&H refused to grant licenses. Petitioners alleged patent misuse and antitrust violation.

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Eastman Kodak Co. v. Image Technical Services Inc. et al., 504 U.S. 451, 112 S.Ct. 2072 (1992)

HOLDING:

Summary Judgment for Kodak Reversed on Whether Kodak Committed an Antitrust Violation

In refusing to deal with its competitors or their customers, the monopolist must be able to cite valid business reasons.

FACTS:

Kodak refused to sell parts or to license software to competitors. Competitors alleged that Kodak committed antitrust violations.

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In Re Independent Service Organizations Antitrust Litigation; CSU, L.L.C., v. Xerox Corporation, 203 F.3d 1322 (Fed. Cir. 2000)

HOLDING:

Xerox did not commit antitrust violation

Patent holders may exclude competitors both in the market defined by the patented product and within any market that falls within the scope of the patent.

FACTS (almost identical to those in Kodak):

Xerox refused to sell parts or to license software to competitors. Competitors brought suit alleging antitrust violations.

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PSC Inc. v. Symbol Technologies, Inc., 26 F. Supp. 2d 505 (1998)

HOLDING:

PSC committed antitrust violation and patent misuse

The collection of two royalties on the same product under the same patents constituted an unreasonable restraint on competition and patent misuse.

FACTS:

PSC licensed two patents from Symbol. PSC contended that Symbol was precluded from collecting a royalty from two different parties for a single use of the same patents.

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Antitrust Guidelines for the Licensing of Intellectual Property U.S. Department of Justice and the Federal Trade Commission (April 6, 1995)

- Standard Antitrust analysis applies to intellectual property
  - Market power is not presumed upon an IP right holder
  - Licensing benefits invention and competition
- Antitrust concerns and modes of analysis
  - Markets affected by licensing arrangements
  - Horizontal and vertical relationships
  - Framework for evaluating licensing restraints
- Agencies' evaluation of licensing arrangements is under the rule of reason
  - Analysis of anti-competitive effects:
    - Market structure, coordination, and foreclosure
    - Licensing arrangements involving exclusivity

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Antitrust Guidelines *(Cont'd)*

- Efficiencies and justifications
- Antitrust "safety zone"

- Application of general principles:
  - Horizontal Restraints
  - Resale price maintenance
  - Tying arrangements
  - Exclusive dealings
  - Cross-licensing and pooling arrangements
  - Grantbacks
  - Acquisition of IP rights
- Enforcement of invalid intellectual property rights

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Federal Trade Commission Hearings on Competition and Intellectual Property

Trends of the Federal Circuit in the last 5 years. The Fed. Circuit has:

- issued more antitrust opinion that have attracted attention
- attempted to narrow the doctrine of equivalents
- published a very large number of opinions on patent claim construction
- issued fewer fraud and inequitable misconduct opinions
- imposed a greater evidentiary burden on the US Patent and Trademark Office to explain its finding of obviousness

What is the meaning of the trend regarding obviousness? Does this affect the Patent and Trademark Office?

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Hearings (*Cont'd*)

During 1980-2002, drop in the number of cases where PTO affirmed examiners. Does this have a meaning? Should there be more deference to the knowledge of examiners?

A clear trend is a tendency to have some significant patent positions in new industries

- Due to the interpretation of §§103/112:
- In biotechnology, it is easier to get a patent but more difficult to get a broad one.
- In the software industry, it is more difficult to get a patent, but when you get it, it is broad.

Is it good to use the §§103/112 analysis or better to use the doctrine of equivalents, or something else to modulate the scope of patent?

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