



DEPARTMENT OF JUSTICE

INTERNATIONAL ANTITRUST AND INTELLECTUAL PROPERTY: CHALLENGES ON THE ROAD TO CONVERGENCE

Remarks by

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I. INTRODUCTION

Thank you for that kind introduction, and thanks for inviting me to participate on this panel. I want to say a few words about the relationship between antitrust law and intellectual property generally, and then speak briefly about international convergence in the application of antitrust principles to intellectual property.

II. THE RELATIONSHIP BETWEEN ANTITRUST LAW AND INTELLECTUAL PROPERTY¹

As you know, intellectual property-based exports – whether copyrighted music, movies or software, or patent-protected goods such as pharmaceuticals or electronic products – have become this country's number one export. As such, their creation and protection is critical to maintaining a vibrant economy. But, with the rapid pace of globalization, intellectual property rights are increasingly crucial to all sectors of the global economy as well.

Of course, globalization presents real challenges for IP rights. As firms innovate, manufacture and market their products globally, licensing of the intellectual property rights they hold or need often proceeds on a global scale, and differences among nations' licensing rules have the potential to disrupt cross-border commerce. As a result, the United States has an important and justified interest in the choices other jurisdictions make about how their antitrust authorities will analyze the restrictions that appear in intellectual property licensing agreements.

Fortunately, we now live in an era in which the benefits of intellectual property rights are recognized around the world and the protection of these rights, once they have been recognized

¹ For a longer discussion, see Makan Delrahim, *US and EU Approaches to the Antitrust Analysis of Intellectual Property Licensing: Observations from the Enforcement Perspective*, Remarks at the American Bar Association, Section of Antitrust Law Spring Meeting (April 1, 2004) (at <http://www.usdoj.gov/atr/public/speeches/203228.htm>).

in any one country or region, is often made global through a patchwork of bilateral and multilateral agreements.² These agreements have played a vitally important role in creating a bundle of rights and obligations that in effect globalize the protections for intellectual property.

So, how does antitrust law fit into this picture? In our view, antitrust law and policy must be careful not to constrain the legitimate exercise of intellectual property rights. The application of antitrust laws must not illegitimately stifle innovation by condemning pro-competitive activities that would maximize incentives for investments or efficiency-maximizing business arrangements. We should also strive to eliminate as much as possible the unnecessary uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation. Only when the holders of intellectual property rights go beyond the legitimate exercise of these rights should antitrust law be used to constrain their activities, and only then in a manner that is based on sound economic policies.

One of the major challenges, of course, lies in distinguishing the legitimate exercise of IP rights from conduct that goes too far in constraining competition. As we attempt to make that distinction, we should always be guided by the principle, recently noted by the Supreme Court in the *Trinko* case, that “[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”³

² *See id.* at 1 (citing examples).

³ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 124 S. Ct. 872, 879 (2004).

III. THE ROLE OF CONVERGENCE

So, what is the role of convergence? As you know, countries in Europe, but also nations in Asia, Latin America, Africa, and Australia all have competition regimes in various stages of development. Nearly 70 jurisdictions have enacted merger review laws and even more have joined the International Competition Network.⁴ This is a great achievement for free and economic-based market development, but it also means that we are confronted with another significant challenge. We could soon face a world in which global corporations must navigate scores of very different antitrust regimes, whether to consummate a merger or implement a technology transfer.

The Antitrust Division's response to this development, and one of the key policy initiatives of this administration, is convergence.

"Convergence" refers to the goal of achieving consistency in antitrust law, policy, processes, and economic theory across jurisdictional lines. With respect to intellectual property laws in particular, it also reflects this administration's view, and frankly, the view of all free-market scholars, that antitrust principles and intellectual property laws do not conflict but, instead, support the same goals of protecting and promoting both innovation and competition. Like all shorthand concepts, convergence runs the risk of becoming a mere buzzword, so I want to emphasize that it's not a buzzword. And convergence emphatically does *not* mean a slavish

⁴ See <http://www.internationalcompetitionnetwork.org/members.html>. For a general discussion of the ICN's recent accomplishments, see R. Hewitt Pate, *The Korean Fair Trade Commission and the International Competition Network*, remarks at the Seoul Competition Forum (April 20, 2004) (at <http://www.usdoj.gov/atr/public/speeches/203329.htm>); see also R. Hewitt Pate, Address before the 2003 Annual Fall Conference on Competition Law, Canadian Bar Association (at <http://www.usdoj.gov/atr/public/speeches/201336.htm>).

pursuit of consensus at the expense of the “right” answer – we seek agreement only where sound policy supports it.

Convergence has tremendous benefits. Convergent global antitrust and intellectual property laws mean that global firms spend less time and money on compliance and can devote more of those resources to the business of competition and innovation. Moreover, when global rules are predictable, business feel greater freedom to forecast, take risks, innovate, and compete. As Chair of the ICN’s Merger Working Group, I have seen firsthand benefits of working toward convergence. Three years after the founding of the ICN, we are making real progress in streamlining procedures to overcome the problems of multijurisdictional review. It is at least as critical to apply the same process to coordinate and streamline our systems for analyzing intellectual property-related conduct.

The most important recent development in quest for convergence in the IP-antitrust area is the European Union’s new Technology Transfer Block Exemption, often referred to as the TTBE,⁵ and its accompanying Technology Licensing Guidelines.⁶ The European Union adopted its first version of the TTBE in 1996,⁷ one year after the United States issued its own most

⁵ Commission Regulation (EC) No.../2004 of [...] on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, at http://europa.eu.int/comm/competition/antitrust/legislation/licensing_arrangements/en.pdf.

⁶ Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, at http://europa.eu.int/comm/competition/antitrust/legislation/licensing_arrangements/guidelines_en.pdf.

⁷ Commission Regulation (EC) No. 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements, 1996 O.J. (L 31) 2, at <http://europa.eu.int>.

recent, revised *IP-Antitrust Guidelines*.⁸ Where the US guidelines used an effects-based approach to evaluating intellectual property licenses, the original TTBE used a structural approach. This year, however, the European Commission's revised TTBE took some significant steps toward convergence in this area.

The accomplishments of the new TTBE cannot be summarized in a paragraph, but a few of its most important features are that it: (1) largely embraces an economic effects-based approach; (2) treats agreements between competitors differently from those between non-competitors; and (3) measures competitor/non-competitor status *ex ante*. The new TTBE is a significant step toward economic liberalization and we commend Commissioner Mario Monti, Director General Philip Lowe, and the EC for their efforts in this area. With two of the world's largest trading blocks – the US and EU – both using an effects-based, economics-intensive approach to the analysis of intellectual property licenses, there is a significant chance to develop global consistency in this most vital area of commerce.

There are, however, still significant differences between the US and EU antitrust analysis of IP issues. I discussed a number of those differences at this year's Spring Meeting, and those remarks are available on the Division's web site.⁹ Among other things, I noted that the US and EU may also differ somewhat over antitrust liability for unilateral and unconditional refusals to license intellectual property. In the past, the European Commission has found an abuse of dominance for refusals to license copyrights under certain "exceptional" circumstances, while

⁸ U.S. Dep't of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (Apr. 6, 1995), at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm>.

⁹ See Delrahim, *supra* note 1.

the US has generally taken a much more skeptical approach to the question whether such refusals to license should result in antitrust liability.¹⁰

A recent development suggests that convergence on this question may be possible. The case I am referring to, *IMS Health*, involved a refusal to license a copyrighted marketing research tool. On April 29, 2004, the European Court of Justice indicated that a refusal to license a copyright “cannot in itself” constitute an abuse of a dominant position, and that such a refusal will be considered abusive if three additional factors are met.¹¹ The case is not over yet, but it may signal that under most circumstances, EU law would not prohibit unilateral refusals to license where the potential licensee’s entry would be to the economic detriment of the intellectual property owner.¹² On its face, this test seems to be somewhat similar to a standard for Section 2 liability that the Antitrust Division advocated in its *amicus* brief in *Trinko*, namely, to ask whether the dominant firm’s conduct makes economic sense but for its elimination or lessening of competition. While it is too early to speculate about the impact of *IMS Health* on IP-antitrust law generally in the EU, we will be watching the case with great interest.

¹⁰ *Id.* at 9.

¹¹ The additional factors are: (1) the refusal prevents the emergence of a new product for which consumer demand exists; (2) the refusal is not justified by any objective considerations; and (3) the refusal excludes competition in a “secondary market,” which appears to mean a market different from the copyright owner’s primary product line. *IMS Health GmbH & Co. OHG*, Case C-418/01 at ¶¶ 34, 38, 53, available at <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>.

¹² The copyright portion of the case is proceeding in local German court, which certified a question to the EU-wide court for clarification of the relevant competition law standards.

IV. FUTURE CONVERGENCE EFFORTS

Moving now to the question of where to seek convergence in the future, I could identify a number of areas. For competitive analysis of intellectual property licenses, we hope to build on the EU's efforts with its new TTBE and Guidelines and join the EU in promoting effects-based analysis worldwide. We hope to promote the view that there is less risk of anticompetitive behavior when parties are in a vertical rather than a horizontal licensing relationship, which the TTBE also recognized.

Finally, I will add that another area to explore convergence is the use of compulsory licensing as a remedy.¹³ Compulsory licensing is certainly necessary in some situations (as shown by the Microsoft case) but it raises a number of issues. As a matter of policy, we still must protect innovation incentives even where the defendant – since this is the remedy phase – has already been found to violate the antitrust laws. As a matter of practical effects, compulsory licensing can force regulators not just to review past conduct, which is relatively easy, but also to monitor ongoing contractual relationships between the defendant and the licensed third parties. Such ongoing monitoring can require a large commitment of staff time, can lead to ancillary litigation, and risks requiring a court to, I quote, “assume the day-to-day controls characteristic of a regulatory agency,” something the Supreme Court criticized in this year's *Trinko* decision.¹⁴

¹³ For a longer discussion, see Makan Delrahim, *Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust*, remarks at the British Institute of International and Comparative Law (May 10, 2004) (at <http://www.usdoj.gov/atr/public/speeches/203627.htm>).

¹⁴ *Trinko*, 124 S. Ct. at 882, *quoting* Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 ANTITRUST L.J. 841, 853 (1990).

Compulsory licensing has an important place in the context of mergers, where it can be necessary to permit a divested entity to function. The remedy also has an important place as a potential alternative to divestiture, where, instead of splitting up a physical asset, a merged firm may simply license out a portion of its intellectual property rights as a less restrictive solution to preserve competition. But in the civil non-merger context, we should be very careful when applying compulsory licensing.

V. CONCLUSION

I will close by emphasizing again that convergence at the intersection of IP and antitrust law is one of the Division's paramount goals. To that end, our international efforts are at an all-time high. The Organization for Economic Cooperation and Development is holding a conference this June on the intersection of certain intellectual property laws and antitrust law, and so, together with the Federal Trade Commission, we have prepared a submission that explains the United States experience with certain IP-antitrust issues. Finally, we continue to meet with the EU in a series of informal Intellectual Property working groups, and we have plans for similar meetings with other nations, on varied topics involving IP and competition. Indeed, we have now established IP Working Groups with Japan and South Korea and will have our initial video conference with our colleagues at the Japan Fair Trade Commission next week. We hope to raise the topics I have mentioned today in these forums and we will welcome the continued assistance of the private bar, particularly this section of the American Bar Association, as we pursue this vital agenda. Thank you on behalf of the Antitrust Division for your past support and thanks, personally, for your invitation today.