Evaluating Patent Infringement and Validity in Antitrust Analysis

DOJ/FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy

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The Problem

- The evaluation of competition between parties that are involved in an intellectual property disputes depends on important assumptions about infringement (or misappropriation)
- The characterization of the relationship between two parties as horizontal may depend on unresolved infringement issues
  - Is a merger horizontal? Does a license agreement restrict a horizontal competitor?
  - Not if the competitor's business is built around your patent or stolen trade secret
- Antitrust institutions have not developed the capability to address IP issues meaningfully

The Non-Solution

- Today's non-solution is to assume that any two parties that compete are legitimate competitors
- Even if A is infringing B's fundamental patents, antitrust institutions treat them as horizontal competitors until A is enjoined from competing
- Two basic rationales for this non-solution
  1. Antitrust analysis is already complicated enough without encumbering it with complexities of IP disputes
  2. Consumers should have the benefit of competition until a court enjoins the allegedly infringing product

The Problem With the Non-Solution

- Sidestepping IP issues because they are complicated makes efficiency of resolution the highest value in antitrust analysis
  - Are we looking for the answer or for a shortcut?
  - Econometric analysis is complicated too
- Giving consumers the "benefit of competition" until final resolution of the IP dispute assumes an entitlement to competition that may be illegal
- But there is some merit to notion that you can't resolve a multi-year IP dispute within the time span of a short antitrust investigation

Conduct Cases Are Easier

- Dynamics are different in merger and non-merger cases
  - Credible threat to litigate patent dispute in non-merger cases
    - In FTC v. Intel, FTC agrees to important stipulation to avoid litigation of patent claims
  - Longer time horizon
- In merger cases, agencies have few incentives to resolve IP issues through detailed evaluation of evidence of infringement and validity
- What do you say to the client who says "but they've built their business around our patents?"

The Practical Dilemma

- In merger context, parties are over a barrel
  - Target wants to preserve ability to claim that patent is not infringed and/or is invalid if deal isn't approved
  - Result is that parties can't present a united front on non-horizontal nature of merger
- It's possible to get around this by giving reviewing agency access to alleged infringer's privileged documents, but only if the stars align
  - Acquirer stipulates not to claim waiver on that basis
  - Only possible where no third party can seek documents

The Agencies Need IP Capabilities

- Current non-solution prevents efficient resolution of IP disputes
  - Litigate to the death cannot be the only solution
  - Judges pound parties to settle but antitrust agencies are hostile to settlements
- Agencies are right to worry about getting bogged down in patent disputes, but only to a point
- If entire analysis is based on predictions about competitive effects, why are predictions about the resolution of IP disputes off limits?

No Good Answers, But Status Quo Can Be Improved

- Agencies can try to understand infringement disputes better by developing IP capabilities
  - If IP is important enough to hold months of hearings, it's important enough for agencies to get IP expertise
  - More expertise can help agencies understand IP questions better and reduce fear of getting bogged down in infringement or validity disputes
- With functional IP capabilities, agencies can give merging parties a break based on likelihood of infringement and validity

No Panaceas

- Yes, there are other unknowns even if patent is valid and infringed
  - Would an injunction be issued?
  - Is a license with running royalties the likely outcome?
  - Would parties enter into cross-license absent the merger?
- But an analytical structure that gives parties a chance to resolve some infringement disputes through merger is still better than the status quo