

Practical Issues In Intellectual Property Investigations: *Balancing Rules versus Discretion*

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Practical Issues: Overview

- Assessing Future IP Status Is Often Critical to Antitrust Analysis
 - Mergers between potential competitors
 - Patent pools
 - Assessing the likelihood of entry
 - Future IP Status Is Characterized By Uncertainty
 - Resolution of uncertainty will never be possible
 - Intellectual property assessments are not the Agencies' comparative advantage
 - Can Rules Provide A Useful Substitute For Individual IP Assessments?
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Individual IP Assessments Difficult

- Agencies Not Well Situated to Determine IP Status
 - Responsible for too many industries
 - Significant time constraints
 - Significant information constraints
 - Agency Decisions Will Usually Require Subjective Determinations
 - Current IP status not always relevant
 - Information about historical IP status may be difficult to come by
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Issues Regarding Agency Determinations On IP Status

- Agency Decisions Regarding IP Status May Pose Problems
 - Subsequent challenges of Agency decisions likely because of the inherently uncertain aspect of IP
 - Challenges likely as the new facts emerge over time
 - Likelihood of a challenge to an Agency decision perpetuates uncertainty about permissible conduct
 - Revised views on IP will undermine Agencies' authority
 - How will Agency decisions affect parallel IP litigation?
 - Decisions Based on “Expected Values” Subject to the Same Criticisms
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Substituting Rules For Individual IP Assessments

- Easier Said Than Done
- The Benefits of Rules
 - Reduced costs for everyone
 - Increased certainty about the process and the outcome
 - Increased speed of resolution
 - Avoids “parallel litigation” of IP issues
- The Costs of Rules
 - Rules will sometimes result in an *ex-post* bad call
 - Rules may not utilize all relevant information
 - Defining rules may be too difficult given complexity and variety of issues

Goals in Implementing Rules

- Choosing a Rule Involves Significant Tradeoffs
 - Avoid the harm from allowing “bad conduct”
 - Avoid the harm from preventing “good conduct”
 - Deferred decisions will be better informed decisions
 - Is Market Power More Likely In Markets With IP?
 - If so, is anticompetitive mischief more likely?
 - Greater scope for mischief justify more conservative rules?
 - Alternatively, are efficiencies more likely, calling for more generous rules?
 - Rules That Restrict Strategies May Be Valuable
 - Can rules eliminate a strategy that creates uncertainty?
 - Rules on restricting strategies should balance Type I and Type II errors
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Choosing Between Alternative Rules

- Rules Should Be Resistant to “Gaming”
 - How will parties avoid the rules?
 - What loopholes will parties find?
 - Agency reluctance to pursue “complex” cases encourages the *creation* of complexity
- Base Rules On “Unambiguous” Conditions
- Focus Rule-Based Decisions On Aspects Characterized By The Greatest Uncertainty

Summary

- Agencies Should Consider:
 - Trying to Limit Role In Determining IP Status
 - Designing Rules That Address The Inherent Uncertainty Of IP Markets
- Agencies Need To Anticipate Strategic Responses When Designing Rules
- Will Drawbacks Of Rules Exceed The Drawbacks Of Individual IP Assessments?