Policing the IP-competition frontier

Interview: Mozelle W Thompson, Federal Trade Commission
Mozelle W Thompson is a Commissioner with the Federal Trade Commission in Washington DC. A lawyer by profession, he worked at the US Treasury Department and was formerly general counsel at the New York State Finance Agency. The FTC, along with the Department of Justice, is holding hearings on the intersection between antitrust and IP law and policy. Sam Mamudi asked Thompson about his role.

How have the hearings gone?

We're coming down to the end of hearings now and we will be looking at what we've heard and trying to prepare a report summarizing what we've heard. I think one of things that we wanted to do was bring together not only the three government agencies that work in this area – DOJ, FTC and USPTO – so that we could hear a little bit about what was going on throughout the world of intellectual property and competition. One of the things we hear that arises is "do the experts know enough?", in other words do we know enough about the marketplace and have an understanding of it.

The second is to bring together the experts in each of these areas from the outside world so that we talk a little less about parochial issues and talk about the intersection of intellectual property and antitrust law. In other words, if the grant of IP rights is designed to incentivise innovation, do we see instances where that incentive is thwarted because of market conditions and other things about the industry, or how we're looking at the grant of patent rights and how we're looking at the law of antitrust.

I think what we were able to hear from industry experts is that there are a variety of ways that companies use intellectual property, not only in an offensive way – which is to assert essentially a monopoly right over a new idea – but also in a defensive way, patenting things not because they want necessarily to innovate, but they want to prevent other people from later claiming an IP as their own when it may not be.

What is your view on such an action; while the moral right is with the patentee, surely it is not in the public good for them to sit on potential innovation?

Yes I think that is true. One of things that we look at is whether some companies wind up sitting on innovations or entering into deals with other companies in order to prevent innovation getting to the marketplace. In certain circumstances that may be viewed as uncompetitive.

But in the end result I think that there are a lot of companies that open source the innovation they have but just as a precautionary measure they patent it anyway. They still feel they need the IP protection to defend themselves in future ways.

There has been comment in the mainstream press suggesting that IP protection has gone too far. Is this a sentiment you have noticed in the hearings?

I think there are some who walk into the hearings believing that. I think it depends a lot on the industry involved. For example, take patent rights: how they're used in the pharmaceutical industry is different to how patent rights are used in the computer industry.

The pharmaceutical industry is one that comes in for a lot of criticism.

That's true, and we have recently taken actions against companies who use their IP rights to try to thwart competition. Two weeks ago we voted to bring an action against Cytyc [on June 24 the FTC issued a preliminary injunction on Cytyc's proposed $420 million acquisition of Digene, fearing the acquisition would lead to reduced competition and increased prices in the market for

primary cervical cancer screening tests] and we also brought action against Rambus, [a complaint was issued against Rambus for seeking patents for technology that was meant to be part of an industry standard]. And by having all of us at the table, the PTO and DOJ as well as us, gives us an opportunity to say to the people granting IP rights, 'you should understand that this is the situation you're walking into'. In other words, that in some instances the grant of an intellectual property right may not be what you think it is, but instead may be something a little different. It may give the PTO people a chance to think about, for example, business method patents and other patents, to think a little bit more broadly – is this doing what they say they want it to do, or does it create another kind of problem; an anti-competitive problem.

So will some of the conclusions in your report cause a change in emphasis in some of the things the USPTO has been doing?

Well, I don't know. We've got a lot of information and I would hope that it would cause all of us to think a little bit more carefully about the work that we do and the impact that it has. So I would say yes, but I would say that's across the board. All of us will, with the additional information, be able to do the job a little better.

Could you please expand on that, in terms of in what way you think the agencies will be more careful and how they can do their jobs a little better?

I think the report we will put out will give everyone – FTC, DOJ, PTO – a better picture of how the work we do fits into the context of the industry we operate, maybe give us better tools, based on information, as to whether we think the markets we are operating under work the way we think they did.

There seems to be some concern among the IP community about the hearings and what the outcome will be.

Lawyers are very conservative people, namely they like the status quo. To the extent that they have built their practices on the ability to provide advice based on what they know about the situation now makes it easy. On the other hand, I think that on a regular basis it's important for the public policy makers to think about exactly the job their doing, and whether it's effective or not and whether it's in the public interest. I don't think that's inappropriate, and if that makes intellectual property lawyers, and for that matter the antitrust lawyers, a little nervous, then I guess that's too bad. I think that's our job. Our job is not necessarily to protect IP lawyers but to protect the public interest.

Have you been working with other countries' national agencies on this issue?

What's interesting is that they have been following our IP hearings closely. There are lots of people from different countries who have attended and listened. I can't give you any specifics, but I know that they are and I've had questions, when I travel internationally, from some of those government agencies, asking about the hearings and how they work.

Have there been any common themes that have cropped up throughout the hearings?

Well, there are three things that are important: one, it's overdue that we've had these hearings, because it's enabled us all to talk about how intellectual property rights are used and I think just a broad discussion is helpful. Second, I have been very pleased about the fact that the experts that we have had, including practitioners, have been surprisingly candid. We hear the common platitudes that 'antitrust people don't like IP people because they don't believe in monopoly', or for that matter that 'IP people don't like antitrust people because they believe that it thwarts innovation' and actually we've had people come and talk about those subjects in a broader context. We're tending to veer away from traditional positions to talk about larger issues and problems and what the future looks like.

Third, I've heard a lot of information that convinces me that, looking at it from a competition

standpoint, we have to be very fact-specific, looking at individual industries because how intellectual property is used, whether it's pro-competitive or anti-competitive, varies a lot according to the industry involved. There's been evolutions of practice, and that's very interesting. So fact-specific determinations are always going to be an important part of any process in determining if the public benefit or not.

Is this a change in your current practice and if it is, will the new approach take extra resources, in terms of time and manpower?

Well, I think it shows that in rapidly moving marketplaces and newly deregulated marketplaces – whether they're in areas of hi-tech, energy or in pharmaceuticals – what happens in those individual industries and what actions individual companies take is a very fact-specific analysis. Will that take additional resources? Yes it will, but I think we are already are dedicating more resources. If you look at our recent cases we're already taking some action that has demanded additional resources; for example, we have taken action against Rambus about their participating in a standard-setting organizations. We also had Cytyc-Digene which also has some implications for intellectual property.

Are there any industries that may, following publication of the report, have more reason to pause for thought than others?

For any industry undergoing rapid change – pharmaceuticals, biotechnology, the computer industry and software industry – I think the hearings have been helpful and have allowed them to put across exactly what they want to accomplish.

When will the report be published?

It's going to take a little while – we covered a lot of ground, so I can't say off-hand, but I know a lot of people are working on it right now.

Do you think that the balance between competition and intellectual property at the moment is fairly even?

I don't want to say that one way or the other. We're bringing cases and that obviously indicates that we feel there are some areas where there are real problems, where we see abuse of intellectual property regimes.

Is there any common thread in the abuse, any practice that stands out as being frequently used?

Well, I think people want to make money, and the desire to make money makes a lot of people do a lot of different things.