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**Contribution**

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The views expressed are those of the author(s) and do not necessarily reflect the views of  
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# Antitrust Analysis of Intellectual Property



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# Competition Policy and Intellectual Property



“The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare”

- Antitrust Guidelines for the Licensing of Intellectual Property

# Competition and Intellectual Property



- Patent rights provide incentives for innovation by establishing enforceable property rights which:
  - allow intellectual property owners to appropriate value derived from their intellectual property;
  - facilitate the commercialization of inventions and ideas;
  - encourage public disclosure.
- Competition promotes innovation by creating incentives for firms to engage in research and development in order to:
  - be the first to create a new market or
  - produce a more attractive product to consumers and gain market share.

# U.S. Antitrust Agencies' Approach



- U.S. Agencies' approach to antitrust enforcement with respect to IP is well-settled and well documented
  - *Antitrust Guidelines for Licensing of Intellectual Property*, 1995 (Proposed Update 2016)
  - Enforcement Actions, Amicus Briefs
  - DOJ Business Review Letters
  - Agency Reports and Statements
  - Agency Speeches and Testimony

# Core Principles of U.S. Agencies' Analysis



- Same general antitrust analysis for IP right as for other forms of property
- No presumption that IP right confers market power
- Recognition that licensing of IP right is generally procompetitive
- Antitrust laws are intended to protect competition, not individual competitors

# Procompetitive Aspects of IP Licensing



- Provides inventors with cash flow, stimulating innovation
- Disseminates technologies
- Encourages development and marketing of technology
- Reduces production costs
- Increases efficiency by allowing IP to be combined with other production factors

# Horizontal vs. Vertical Licenses



- Licensing agreements may be horizontal (between competitors) or vertical (between parties at different levels of manufacturing chain) or may contain aspects of both
- The nature of the licensing relationship is a key factor in analyzing the potential competitive implications



# Effects-Based Analysis



*Vast majority of cases involving IP licensing restraints are analyzed under the rule of reason*

- What is the relevant market affected by the licensing agreement?
- Is there market power in a relevant market?
- What are the potential anti-competitive effects?
- What are the efficiencies or other justifications of the restraint?
- Do the anti-competitive effects outweigh the pro-competitive benefits?

# Example: Grantbacks



- A licensing restraint is a clause in an IP license that limits the actions of the licensee
- Licensee must grant a license back to the patentee/licensor for improvements to the patented invention developed by the licensee
  - Promotes further innovation by the licensee that is based on, or informed by, the licensed patent by enabling the licensor to practice improvement to the patent it licenses
  - Potential concerns about harm to licensee's incentives to innovate unlikely if grantback is non-exclusive and tailored to scope of the licensed technology

# Licensing Freedom and the Limits of Antitrust



- Choosing not to share an intellectual property right is a form of exercising that right
- U.S. experience is that there are very limited instances in which a unilateral unconditional refusals to license will be, on balance, anticompetitive
- Relatedly, the U.S. does not use antitrust enforcement to regulate royalties
- Price controls interfere with competition and blunt incentives to innovate

# Remedies and Process



- Remedies should be tailored to stopping the anticompetitive practice, preventing its reoccurrence and restoring competition lost as a result of the restraint
- Transparency in decision-making processes (1) assists in enhancing the legitimacy of the agency's outcome and (2) encourages investment in innovation and development of intellectual property

# Conclusion



- We must calibrate enforcement work to ensure competition and intellectual property laws each play their complementary role in encouraging innovation and enhancing consumer welfare
- In U.S., we have found that, in almost all cases, an effects-based analysis based on sound economic principles and remedies tailored to address the competitive harm are the best tools to achieve this end
- Transparency and consistent procedures for all parties lead to better results