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Themes

- Reassessment of the Relationship of Antitrust and IP
- New Conception of Competition Policy: Aims and Means
- Significant Institutional Implications
Agenda

- Past: Life Before the 1995 Guidelines
- Present: 1995 Guidelines and Their Influence on Law and Policy
- Future: Directions for Competition Policy Making
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Resources


Antitrust and IP Before the 1995 Guidelines

The Hostility Tradition

- IPRs presumed to create market power
- Skepticism about many licensing practices (and refusals to license)
  - “Nine No-Nos” (Bruce Wilson, DOJ, 1970)
- Expansive application in litigation
  - *Xerox Corp.*, (FTC 1975)
1980s and Early 1990s: Changing Circumstances

- Intensified Global Innovation Races
- Greater Awareness of Importance of Economic Innovation to Growth
- DOJ 1988 International Operations Guidelines
- Establishment of Federal Circuit
1995 DOJ/FTC IP Licensing Guidelines

- General Principles for IP
  - Comparable to other forms of property
  - Not presumed to create market power
  - Licensing generally is procompetitive
- Retreat from Per Se Prohibitions
- Recognition of Safety Zones
- Broad and Deep Policy Making Legacy
Catalyzes Rethink of Proper Content of Competition Policy

- Correct Policy Failures at Their Source
- Use Best Policy Tool or Mix of Tools
- Expand Research to
  - Reduce knowledge gaps
  - Increase speech in policy adaptation
- Improve the Institutional Framework
Fosters Development of An Integrated CP Strategy for IP

- Law Enforcement
- Research
- Reports and Guidelines
- Advocacy
- Public Consultation
- Cooperation at Home and Abroad
Investment in Non-Litigation Policy Instruments

- Competition Policy “Research and Development”
- Public Consultation
- Interdisciplinary and Interjurisdictional Cooperation
Research and Development

- Remedies: structure, conduct, hybrids
  - Ex post assessment
Public Consultation, Reporting, and Guidance

- Hearings: FTC 1995-96, 2002-03
- FTC/DOJ Reports
  - FTC, To Promote Innovation (2003)
  - DOJ/FTC, Antitrust and IP (2007)
  - FTC, Patent Remedies (2011)
- Amicus Role
  - Competition Cases: e.g., *Independent Ink*
  - Patent Cases: e.g., *ebay*
Litigation

- Standard Setting
  - Rambus, N-Data
- Payments for Delayed Entry
  - Schering, Watson
Institutional Framework: The CP/IP Policy Archipelago

- Competition Agencies
  - US: DOJ/FTC/states
  - Global: Over 100 jurisdictions

- Collateral Regulators: E.g., FDA

- Rights-Granting Bodies: US and Global
Interdependence and Equilibration

- Perceptions of Flaws in Rights-Granting Process Elicit Equilibrating CP Response
  - The “patent monopoly”
  - EU examples: *Magill* and *IMS*

- Perceptions of Faulty CP Rules Elicit CP Tribunal Equilibrating Responses
  - *CSU v. Xerox* (Fed. Cir. 2001)
Policy Aim: First Best Solutions

- Improve Rights Granting Process
  - PTO
  - Amicus filings: e.g., *Ebay*
- Cure flawed CP policies and doctrines
Future

- Guidelines as Crucial Source of International Influence
  - CP “operating systems” and “applications”

- Contributions from “Co-producers”
  - Integration with research institutions
  - 1995 Guidelines: Rick Gilbert
  - 2010 US Merger Guidelines: Farrell/Shapiro
Convergence at Home/Abroad

- Networks within Disciplines
  - Domestic competition networks
  - Bilateral international discussions
  - Multilateral: OECD, ICN, law societies

- Networks across Disciplines
  - Domestic: CP agencies and USPTO
  - Multinational: OECD (CP/IP)
Investments in Building Knowledge

- Public Consultations
- Ex Post Evaluation
- Agency Human Capital
Concluding Thoughts

- Institutional Design Shapes Outcomes and Demands Greater Attention
- “Competition Policy” for IP Increasingly Involves More than “Antitrust” Policy
- Reassessment of Human Capital Needs