Editor’s Note:  
IP Remedies and Big Data at the Antitrust-IP Interface  

BY GREGORY G. WROBEL

THE COVER THEME FOR THIS ISSUE focuses on antitrust law issues arising from enforcement of intellectual property rights. This Note comments briefly on two issues that relate to the cover theme and may command growing attention in the future.

IP Remedies in Global Markets

U.S. antitrust standards accommodate IP rights largely from the standpoint of U.S. IP law and procedure. This approach seems sensible given that U.S. antitrust laws apply to U.S. commerce and protect U.S. consumers, and because enforcement goals under U.S. antitrust law must be balanced with rights granted to IP owners under the Constitution and U.S. patent/copyright statutes.

Global markets and business models may challenge this domestic market focus, in particular when IP owners seek injunctive relief against alleged infringers. U.S. courts frequently address tensions between U.S. and foreign antitrust laws in private antitrust cases seeking damages, with rulings on the jurisdictional reach of U.S. antitrust laws and on whether (typically private) plaintiffs alleged or proved the requisite anticompetitive effect on U.S. domestic commerce and consumers.1

For IP owners with global business models, however, the ability to obtain injunctive relief blocking the sale of allegedly infringing products is an important tactical tool that may impact global markets and supply chains beyond the jurisdiction in which the relief is sought or granted. Injunctive relief is frequently sought in patent and copyright infringement cases filed in U.S. courts, and in proceedings at the International Trade Commission seeking to block allegedly infringing products from being imported to the United States. Alleged infringers often respond with antitrust claims asserting that the IP claims are a sham and that injunctive remedies (threatened or actual) eliminate lawful competition.

These disputes sometimes play out with standard essential patents (SEPs), where the alleged infringer is willing to license the SEPs on fair, reasonable, and non-discriminatory (FRAND) terms, but the parties dispute the appropriate royalty payment. The alleged infringer may challenge the IP owner’s royalty demands as an anticompetitive tactic aimed at excluding competition that would be viable if the royalty rate is set at a proper level.

U.S. courts most often face these disputes in claims among private parties focused on the domestic U.S. market; the FTC’s pending case against Qualcomm is a current example of agency antitrust enforcement challenging an IP owner’s licensing and FRAND royalty conduct.2 The DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property do not offer direct guidance on how courts should resolve disputes over IP remedies that are alleged to threaten or cause competitive harm. Nor do the Guidelines (or court decisions in agency enforcement actions) provide clear guidance to IP owners and users on when injunctive relief should be granted, or whether and how courts in antitrust cases should address FRAND royalty disputes.

On the U.S. domestic front, a public debate of sorts is unfolding through speeches by agency leaders and open letters by antitrust scholars, focused mostly on the U.S. antitrust-IP interface.3 As with consent decrees and orders in agency enforcement actions, this debate will not yield settled law on which courts can rely, but the debate still warrants careful attention by antitrust practitioners who must shape arguments in actual antitrust cases that present issues about IP remedies and FRAND royalty determinations.

On the international front, antitrust enforcement agencies do not appear to be actively engaged in working toward convergence over standards for injunctive relief to protect IP owners, or on whether and how courts (or enforcement agencies) should step into FRAND royalty disputes. This stance contrasts with merger enforcement, where a great deal of attention has focused on the need for convergence over both substantive standards and procedure, perhaps because antitrust enforcement oversight of merger transactions is almost exclusively the domain of government enforcement agencies.

Review of the case docket in FTC v. Qualcomm reveals the factual complexities that arise in antitrust disputes over enforcement of IP rights, which are magnified by global supply chains that drive the parties to other jurisdictions for document discovery and testimony. These complexities will be further magnified where antitrust disputes over IP remedies or FRAND royalties play out in multiple jurisdictions under potentially divergent local standards, where rulings in one jurisdiction may impact the rights and obligations of IP owners and users in other jurisdictions as well.4

Gregory G. Wrobel, Editorial Board Chair of ANTITRUST, is a shareholder and head of the Antitrust Practice Group of Vedder Price PC. All opinion expressed herein are his alone and do not necessarily reflect those of his firm or any of its clients.
Sorting out these complexities is beyond the scope of this Note, but we will look for opportunities to discuss these issues in future articles.

**IP Rights and Big Data**

The collection and use of data generated through Internet usage (and perhaps the Internet of Things), may be challenging conventional views of the IP rights that matter most at the antitrust-IP interface.

The U.S. case against Microsoft over bundling its web browser and operating system software may serve as a conventional example, where licensing practices for proprietary IP rights were shown to harm competition in markets for products that use the IP (i.e., personal computers, web browsers).

Antitrust enforcement is now focusing on business models that rely on the aggregation and use of Big Data through Internet search activity and social media platforms. Whether these services are viewed as two-sided platforms or more traditionally as outlets for advertisers of products and services to reach consumers, the focus of competitive concern is not the IP owner’s licensing practices for its own proprietary software (whether web browser, operating system, or proprietary data analytics algorithms), but rather on the use of Big Data, the accumulation of which is driven by network effects and/or general popularity that draw users to the IP owner’s website.

How does this new enforcement focus (and business model) fit within established standards for anticompetitive conduct involving the use and licensing of IP rights? The Microsoft case was grounded on licensing practices with businesses (computer makers), and the IP owner was shown to have unlawfully exercised monopoly power over operating systems software, through IP licensing conduct to exclude rival suppliers of Internet browsers. The competitive concerns in that case had little if anything to do with Microsoft’s collection or use of data generated by users of personal computers on which Microsoft operating system and web browser software were installed.

Are competitive concerns with Big Data business models grounded on similar concerns with IP licensing practices? If not, is there a comparable basis to show that the IP owner has

---


4. There appears to be little if any judicial guidance on IP remedies that may give rise to competitive harm outside the United States. See generally Developments, supra note 1, at 1154–55 (discussing equitable remedies in agency antitrust cases challenging IP licensing conduct, none of which involve global market considerations); id. at 1246–48 (discussing U.S. antitrust cases in which injunctive relief was imposed affecting conduct outside the U.S., most of which are agency consent decrees dating back 25 years or more); id. at 1249 (discussing policy of DOJ and FTC under International Guidelines for International Enforcement and Cooperation to consider impact on significant interests of foreign sovereigns in determining whether to seek particular remedies in a given case, and policy under 1991 EU bilateral agreement to consider comity-related factors for enforcement actions affecting the EU).

5. See, e.g., Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets, Remarks as Prepared for Delivery at the Jevons Colloquium in Rome (May 22, 2018), https://www.justice.gov/opa/speech/file/1065096/download (discussing application of consumer welfare standard for analysis of digital platforms and markets, including use of innovation, choice, and quality metrics to analyze competitive effects where price and output effects are difficult to measure; expressing need for careful evidence-based approach to analyzing entry barriers and exclusionary conduct).