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The Wait Is Over: FTC and DOJ Issue Their Long-Anticipated Report on Antitrust Enforcement and Intellectual Property Rights

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Today, the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) issued their long-awaited report on Antitrust Enforcement and Intellectual Property Rights (“Antitrust-IP Report”), available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>. This report summarizes and synthesizes a series of hearings in 2002 conducted jointly by the FTC and DOJ (collectively, the “Agencies”), entitled “Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.” The hearings spanned 24 days over a 10 month period, incorporating submissions and testimony from more than 300 commentators, representing a wide range of interests and industries.

The Antitrust-IP Report is, in many ways, a reaffirmation of the Agencies’ existing practices and enforcement policies over the last several years, policies that are embodied in the 1995 DOJ-FTC Antitrust Guidelines for the Licensing of Intellectual Property (the “1995 Guidelines”). The fundamental theme of the report is that most uses of intellectual property — including tying, exclusive dealing, licensing terms (such as grantbacks and non-assertion clauses), and patent pools and cross-licenses — can enhance competition and benefit consumers. The Agencies will therefore evaluate the lawfulness of these kinds of agreements under the antitrust rule of reason, which requires courts and the Agencies to balance the procompetitive effects of specific agreements against their anticompetitive effects.

The Agencies announced a number of general policy views in today’s Antitrust-IP Report:

Unilateral Refusals to License. The Agencies conclude that § 271(d)(4) of the Patent Act does not create antitrust immunity for unilateral refusals to license patents. The Antitrust-IP Report reiterates the Agencies’ position, announced in the 1995 Guidelines, that unilateral, unconditional refusals to license patents will not “play a meaningful part” in the Agencies’ enforcement policies; however, certain conditional refusals to license, if they cause competitive harm, are subject to antitrust liability.

Standard Setting. In the Antitrust-IP Report, the Agencies have reiterated their recent guidance on the subject of prospective negotiation of patent licensing terms in the context of standard setting organizations (SSOs). The report makes clear that *ex ante* consideration of licensing terms by SSO participants can be procompetitive, and thus should be evaluated under the rule of reason. Although previously the FTC and the DOJ had each indicated a general view that prospective negotiation of license terms would not be considered *per se* unlawful, the Antitrust-IP Report extends this principle to joint negotiations involving many prospective licensees and also provides an enhanced explanation of the Agencies’ rationale for their views. While announcing that they will evaluate *ex ante* license negotiations under the rule of reason, the Agencies “take no position” on whether SSOs *should* engage in joint prospective discussion of licensing terms.

Cross Licensing and Patent Pools. The Agencies will continue to evaluate the competitive effects of cross licenses and patent pools under the framework of the 1995 Guidelines, *i.e.*, under the rule of reason. The Antitrust-IP Report reiterates the Agencies’ position that they will not generally assess the reasonableness of royalties set by a pool; rather, the focus of the analysis continues to

be on the pool's formation and whether its structure would likely enable pool participants to impair competition.

Extending Patent Rights Beyond the Statutory Term. In general, the Antitrust-IP Report follows the conventional view of the Agencies that standard antitrust analysis applies to practices that have the potential to extend the market power conferred by a patent beyond its expiration, and that the starting point for evaluating practices that extend beyond a patent's expiration is determining whether the patent in question confers market power.

Notably, however, the Antitrust-IP Report states, for the first time, the Agencies' view that there is no antitrust or economic basis for the patent law doctrine that prohibits patent holders from collecting royalties beyond the life of the patent. The report observes that this doctrine, established by the Supreme Court over 40 years ago in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), may actually reduce incentives to innovate and harm consumer welfare by depriving the patent holder of the full value of his invention. Specifically, the Antitrust-IP Report explains the Agencies' view that collecting royalties beyond a patent's statutory term can be efficient. Although *Brulotte* places some limitations on a patent owner's ability to collect royalties beyond a patent's statutory term, the Agencies believe that such a practice may permit licensees to pay lower royalty rates over a longer period of time, thereby reducing the "deadweight loss" associated with a patent monopoly, allowing the patent holder to recover the full value of the patent, and preserving innovation incentives. At least one court of appeals has suggested the Supreme Court should overturn *Brulotte*; the Agencies' view may provide support for that argument in future cases.