Is the FTC Changing Its Intellectual Property Rights Policy?

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Steven J. Cernak (Bona Law PC)

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Commissioner Josh Wright of the U.S. Federal Trade Commission certainly is the gift that keeps on giving to antitrust commentators. Rarely do many weeks go by without a Wright speech or dissenting opinion that cogently takes on an interesting competition issue, often one captured in an action by his fellow commissioners. Last month's example was a speech to the New York City Bar Association provocatively titled, "Does the FTC Have a New IP Agenda?" Wright believes the answer to his question is "yes," and that the shift is not helpful. Much of the support for Wright's assertion of a change comes from two FTC matters that predate his tenure and alarmed the business community when decided.

Wright summarizes the FTC's "old agenda" as the "symmetry principle": the application of the antitrust laws to Intellectual Property Rights (IPRs) is in parity with the approach applied to real property. While it might be necessary to consider some characteristics of IPRs when applying the antitrust laws, special rules – whether in support of or hostile to IPRs – are not necessary. This principle can be found in the 1995 Department of Justice/FTC Antitrust Guidelines ("1995 Guidelines") for the Licensing of Intellectual Property as well as recent speeches by DOJ officials. The principle helps explain the change from antitrust's hostility toward the exercise of IPRs, infamously captured in the "Nine No-No's" list of per se illegal uses of IPRs, to the current understanding that both antitrust law and IPRs work to encourage innovation that is good for consumers.

Wright sees evidence that support of the "symmetry principle" is crumbling at the FTC, mostly from the *Bosch* and *Google/Motorola Mobility* matters. Both of these FTC challenges were before Wright's time on the FTC and were pursued over the dissent of Wright's fellow Republican Commissioner, Maureen Ohlhausen. Both alleged that the holder of a standard essential patent encumbered by an obligation to license it on "fair, reasonable and non-discriminatory" basis (FRAND) violated FTC Act Section 5 merely by seeking an injunction against use of the patents by potential licensees. Both matters resulted in consent orders in which the parties agreed to no longer pursue such injunctions. It is not clear to Wright that use of an injunction as part of the FRAND rate negotiation is a violation of the FRAND commitment and, even if it is, whether such a contractual violation is necessarily an antitrust violation.

More specifically here, though, Wright sees both actions as "open and notorious rejection[s] of the symmetry principle . . . [and] the basic economic proposition that the exercise and enforcement of presumptively valid property rights promotes economic exchange." After all, absent other factors that might create a duty to deal, would it violate any antitrust laws if a bridge owner used an injunction to stop a traveler from crossing if no agreement on a toll could be reached? Wright acknowledges the literature that supports the possibility that seeking such an injunction against patent infringement could be anticompetitive – although only under certain conditions and through an analysis that could apply equally to real property, like bridges. His objection is to the presumption embodied in these FTC actions that simply seeking an injunction against infringement of IPRs is actionable exclusionary conduct without any offsetting competitive virtues that could facilitate economic exchange and growth.

So, if Wright is correct and the FTC's "IP agenda" is changing, why does it matter? First, any "drift toward ad hoc antitrust analysis of IPRs" that treats them differently than real property rights would create uncertainty because of the conflict with the 1995 Guidelines and other FTC and DOJ actions. Uncertainty adds costs to businesses and others who use, buy and sell IPRs and want to have a clear understanding of the standards that will be applied to their activities. Second, any change hostile to IPRs that is not justified by economic evidence on consumer welfare grounds could signal to new antitrust regulators in jurisdictions without a history of support of IPRs that special rules hostile to IPRs are desirable. In particular, the fear is that jurisdictions like China will see these FTC moves as

supporting a presumption that business arrangements involving IPRs are anticompetitive without economic analysis or proof of harm to competition.

Wright does not support abandoning the “symmetry principle” and does not think the FTC needs “a new IP agenda.” More fundamentally, the Commission should only make such policy changes consciously and while fully cognizant of the potential global risks to competition, innovation and consumer welfare that go well beyond any particular case.