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From Microsoft to Google: Intellectual Property, High Technology, and the Reorientation of U.S. Competition Policy and Practice

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Cover Page Footnote

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From *Microsoft* to *Google*: Intellectual Property, High Technology, and the Reorientation of U.S. Competition Policy and Practice

William E. Kovacic*

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INTRODUCTION

The twenty-year history of Fordham Law School's annual Intellectual Property Conference spans a major reorientation of U.S. competition policy concerning technologically dynamic industries and intellectual property rights. This Article uses the twentieth anniversary of the Fordham Conference to describe five developments that have altered the relationship between the policy domains of antitrust and intellectual property. The article also uses

* Global Competition Professor of Law and Policy, George Washington University Law School. From January 2006 to October 2011, Professor Kovacic served as a member of the Federal Trade Commission. He chaired the agency from March 2008 to March 2009.

experience since the early 1990s to suggest what is to come in years ahead.

I. THE SHRINKING ZONE OF POTENTIAL SHERMAN ACT AND CLAYTON ACT LIABILITY

Firms face fewer risks of prosecution and liability today than they did two decades ago under the Sherman Act or Clayton Act for the exploitation of intellectual property rights. Two developments account for this condition. The first is that government policy has continued its retreat, begun in the 1980s, from a longstanding tradition of suspicion toward intellectual property rights.¹ In 1995 and again in 2007, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued policy documents that disavowed reliance on expansive theories of enforcement and acknowledged the benefits of intellectual property protection for innovation and economic growth. Both the words and the “music” of these documents provided assurance to firms and to the IP community that the antitrust system was not incorrigibly hostile to patents and other forms of intellectual property rights.

When government agencies or private plaintiffs have filed antitrust cases involving the application of IP rights, they have found the path to success more difficult than they did twenty years ago. In a number of respects, the U.S. jurisprudence has unfolded in ways that can be considered more sympathetic to the interests of rights holders. In some matters, the courts have backed away from earlier interpretations that treated the possession of a patent, copyright, or trademark as presumptive proof of substantial market power.² In others the courts generally have rejected efforts by public and private plaintiffs to challenge “reverse payments” between branded pharmaceutical producers and generic entrants as

¹ See 2 AM. BAR ASS'N SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1049–50 (7th ed. 2012) (describing antagonism toward IP rights expressed in judicial decisions and federal enforcement policy from the 1930s through the 1970s).

² See *Ill. Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28, 42–43 (2006) (rejecting presumption that intellectual property rights automatically confer monopoly power on their owners).

illegal restraints of trade under Section 1 of the Sherman Act. Three federal circuits have ruled that patent infringement settlements that provide for delayed entry by the generic entrant ordinarily are not illegal trade restraints and constitute violations only in limited circumstances.³ Owing to a circuit split highlighted by a recent decision of the Third Circuit,⁴ the Supreme Court has accepted certiorari to address the issue in an FTC case decided by the Eleventh Circuit.⁵

Amid trends toward relatively greater doctrinal permissiveness, plaintiffs have enjoyed some litigation success at the intersection of antitrust and intellectual property policy. Perhaps the most interesting developments have involved single-firm conduct. Matters involving Microsoft and Google provide bookends for the period covered by the Fordham IP Conference. The first conference took place during deliberations within the FTC about whether to bring an antitrust case against Microsoft. Fordham convened the twentieth conference in 2012 as the FTC investigated claims of anticompetitive conduct by Google.

The overall trend of antitrust doctrine involving improper exclusion by dominant firms has favored greater freedom for companies to choose pricing, product design, and distribution strategies. Against a backdrop of less-intervention-friendly doctrine, the DOJ nonetheless achieved an important doctrinal victory against Microsoft. The government alleged that the software producer improperly used a variety of tactics (including exclusive dealing agreements with original equipment manufacturers and Internet service operators and tying arrangements) to forestall Netscape and Java from functioning as a less expensive alternative to its own product. The district court found liability and ordered the company's divestiture into two

³ See *In re Ciprofloxacin*, 544 F.3d 1323, 1337 (Fed. Cir. 2008); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 206 (2d Cir. 2006); *Schering-Plough Corp. v. Fed. Trade Comm'n*, 402 F.3d 1056, 1072 (11th Cir. 2005).

⁴ See *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012).

⁵ See *Fed. Trade Comm'n v. Watson Pharm., Inc.*, 677 F.3d 1298 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 787 (2012). The Court has scheduled oral argument in this matter for late March. After the beginning of litigation, Watson Pharmaceuticals took the name Activis. Accordingly, the case is now called *Federal Trade Commission v. Activis*.

firms, one that would make operating systems and a second that would produce applications.⁶

A unanimous court of appeals upheld the finding of liability, albeit on more limited grounds.⁷ The court remanded some issues for reconsideration by the district court and cautioned that the choice of remedy must account for the narrowing of the basis of liability. In doing so, the D.C. Circuit brushed aside Microsoft's arguments that its IP rights entitled it to engage in the challenged conduct.⁸ Within months of the court of appeals decision, the DOJ, various state attorneys general, and Microsoft settled the case with conduct remedies that inspired bitter debate. Advocates of more expansive relief accused the DOJ of a politically motivated capitulation to Microsoft. The DOJ responded that demands for a broader remedy ignored the admonition from the court of appeals to tailor the remedy to fit the more modest grounds of liability. After contentious proceedings, the district court approved the settlement, and the court of appeals affirmed.

The *Microsoft* merits decision represented what many regard to be an important advance in antitrust doctrine, especially in creating a burden shifting framework for evaluating allegations of exclusion.⁹ The district judge's management of the case also demonstrated that a court could try complex claims of single-firm misconduct in a relatively short time—a key consideration in deciding whether antitrust law is a suitable means to oversee behavior in technologically dynamic sectors. At the same time, the settlement achieved in the case left a sour taste in the mouths of commentators who expected a considerably greater remedial return for the favorable result on liability.

The election of Barack Obama as President in 2008 seemed to foreshadow a significant expansion of DOJ efforts to bring single-firm conduct cases. During the presidency of George W. Bush, the DOJ initiated no Sherman Act section 2 cases. In 2008 DOJ also issued a report on single-firm conduct that endorsed analytical

⁶ See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

⁷ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

⁸ See *id.* at 62–63.

⁹ See ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE* 654–57 (2d ed. 2008).

standards that disfavored prosecution except in exceptional circumstances. Soon after her appointment, Christine Varney, President Obama's first choice to head the Antitrust Division, repudiated the DOJ section 2 report and appeared to indicate that expanded section 2 enforcement would be a significant DOJ priority. Since January 2009, DOJ has issued one single-firm exclusion case, a settlement involving a hospital's use of exclusive dealing arrangements to deter entry in Wichita Falls, Texas.

Nor has the low DOJ yield of Section 2 cases resulted from a want of effort. The DOJ has undertaken investigations, but found no additional suitable candidates. In recent months, the Antitrust Division closed the file on a long-running inquiry involving Monsanto and its use of patents to suppress rivalry in various agricultural products markets. External observers had speculated that the Monsanto investigation would lead to a major case involving Section 2 and the use of IP rights. The DOJ stood down, perhaps in recognition of difficulties imposed by the intervention skepticism embedded in modern Supreme Court decisions such as *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*¹⁰ Despite an evident inclination to pursue a larger number of single-firm conduct matters, the Obama Antitrust Division leadership seems to have concluded that successful cases of this type must run a particularly difficult doctrinal gauntlet.

II. ATTEMPTS TO APPLY SECTION 5 OF THE FTC ACT

As suggested earlier, the FTC has devoted extensive resources to attack reverse payment agreements between manufacturers of branded pharmaceuticals and generic entrants. These initiatives, which have relied on Sherman Act theories of liability, have not been the sole FTC litigation activities involving antitrust and intellectual property. The Commission has used section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition (UMC), to obtain a settlement with Intel to resolve allegations of improper exclusionary conduct, to investigate

¹⁰ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398 (2004).

Google's practices involving search, and to obtain settlements concerning efforts by Google and Robert Bosch to seek injunctions to enforce standard essential patents subject to commitments to license such patents on fair, reasonable, and non-discriminatory terms.

Congress intended the Commission to use its section 5 UMC authority to set business conduct norms more demanding than those established by judicial interpretations of the Sherman and Clayton Acts. In theory, the courts have recognized the FTC's authority to perform this norms-creation function. In practice, modern judicial decisions have tended to reject Commission efforts to use section 5's elastic power to move the perimeter of liability outwards. The Commission has not prevailed in a litigated matter premised solely on section 5 (i.e., with no reliance on Sherman or Clayton Act principles) since the late 1960s. The volume of defeats in the past forty-plus years is not immense (three adverse decisions in the court of appeals, and one loss in federal district court), but the setbacks collectively reflect skepticism about the agency's assessment of the conduct at issue and, one infers, its capacity to define meaningful standards for the application of its special authority.

The FTC's accomplishments with section 5, including its initiatives involving IP rights, have consisted entirely of settlements. These include settlements with Negotiated Data Solutions and Intel concerning improper exclusion, and settlements with Google and Bosch involving standard essential patents (SEPs). The Commission closed its investigation of Google's search practices without taking action, save for Google's written assurances of voluntary compliance with commitments to modify some elements of its conduct. From the somewhat incomprehensible Commission statement closing the case, it appears that Google refused to accept an order (the FTC's routine method of settling disputes with undertakings from respondents) and told the agency that, if the FTC wished to use section 5 or any other theory to obtain concessions, the Commission would have to gain them through adjudication.

As noted earlier, the SEP settlements involving Google and Bosch both rely on section 5. The form in which the Commission

announced these settlements was unconventional. Regarding Bosch, the FTC accepted the SEP settlement in tandem with an announcement that the company had agreed to divestitures and other relief to obtain clearance of a proposed merger. The Commission said it had discovered the SEP issues in the course of conducting the merger review, and it sought to resolve the merger and nonmerger questions as a package. One way to interpret the Bosch settlement is to conclude that the FTC used the leverage inherent in its gatekeeping function in the U.S. premerger notification regime to obtain concessions on issues unrelated to the merger itself. Because section 5 provided the basis for the Bosch settlement, the matter raises the possibility that parties whose mergers are reviewed by the FTC will face a greater likelihood of intervention than they would in a merger review by the DOJ. In an FTC review, the Commission may find collateral issues that it chooses to pursue under section 5 and may press for resolution of those issues in conjunction with the merger review. Because section 5's reach is broader than the Sherman or Clayton Acts, the possibility for intervention expands when the FTC is reviewing the merger.

III. EMPHASIS ON NON-LITIGATION POLICY TOOLS

The enforcement activities described above continue to provide the core of activity by the federal antitrust agencies concerning intellectual property. Since the early 1990s, however, there has been a marked orientation of policy toward non-litigation initiatives. In the past two decades, the U.S. enforcement agencies have adopted a broader, multidisciplinary perspective and applied a broader range of policy tools to address questions that arise at the intersection of the antitrust and intellectual property systems. The FTC took a large step in this direction in the mid-1990s by convening hearings on competition policy and innovation in the global economy. In 2002, the DOJ, the FTC, and the U.S. Patent and Trademark Office (PTO) held hearings on competition policy and the patent system.

The 2002 proceedings resulted in a formative FTC report, *To Promote Innovation*. The Commission followed this report a

decade later with an extensive study of remedies in the patent system. As a further element of advocacy, the FTC recently filed a letter with the Court of International Trade to caution against the issuance of exclusion orders in certain cases. The DOJ and the PTO later filed a joint statement on the application of injunctive relief and the use of exclusion orders.

All of these initiatives recognize that problems often observed in the competition policy realm have their roots in the intellectual property rights-granting process. First-best solutions to competition problems would consist of improvements in the rights-granting process. The prosecution of antitrust cases—for example, the application of monopolization concepts to expand access to IP rights—may be a crude, second-best solution to cure weaknesses that reside in the rights granting process.

IV. ASCENT OF EUROPE AS CENTER OF ANTITRUST LAW ENFORCEMENT

The European Union has not encountered the limitations faced by the U.S. antitrust agencies in using its law enforcement powers to address claims of exclusion involving intellectual property. EU doctrine governing abuse of dominance sets more stringent limits upon companies than prevailing judicial interpretations of the Sherman, Clayton, and FTC Acts. In *Microsoft* and *Intel*, the European Commission obtained remedies notably more substantial than DOJ or the FTC attained in their cases, respectively. In *Google*, the European Commission seems poised to gain concessions related to search practices that emerged from the FTC's inquiry unscathed.

The disparate results in the EU and the United States highlight the ascent of the EU competition law system to global preeminence in setting standards for single-firm conduct. The Google inquiries underscore this difference most starkly. Commentators have questioned the fortitude of the Bush administration antitrust agencies to prosecute instances of single-firm conduct. None have doubted the commitment of the Obama antitrust prosecutors. Yet, for all of its efforts, the Obama FTC leadership could not produce

a case involving Google search, nor could they obtain settlement concessions. If there were any question about the difference in the EU and United States doctrine and enforcement possibilities, *Google* resolved them.

V. CHANGE IN COMPETITION LAW PRACTICE

Since the early 1990s, we have witnessed another noteworthy change in the nature of competition law practice that goes beyond shifts in legal doctrine, enforcement policy, and reliance on non-litigation policy instruments. The strategy of companies and their external advisors in dealing with the regulatory state has changed significantly, as well. In its dealings with the FTC and then with DOJ in the 1990s, Microsoft was slow to build an extensive presence in Washington, D.C. Like many high-tech firms, Microsoft may have regarded the nation's capital as an alien and unimportant realm, unconnected with the urgent business of devising and producing new products.

Microsoft's experience changed all of that. Its opponents mobilized Washington-related resources more effectively and gained an advantage as a result. They opened larger Washington representation offices, hired more lobbyists, engaged more public relation specialists, and employed more media consultants. Google seems to have learned from Microsoft's experience, and it mobilized considerably greater resources in Washington to handle the FTC inquiry. It built a substantial Washington office and retained a large body of external advisors. It also enlisted the assistance of a large network of commentators and scholars to speak on its behalf. This helped mute opposition to the FTC's decision to end its case.

Google and other high technology companies have adopted an additional practice as a precaution against antitrust intervention and other regulatory measures. Rather than wait for an inquiry to being, companies now send officials to Washington more regularly for get-acquainted visits to agency leaders and to give briefings on new product development or policy initiatives. These measures perform what might be called a framing function (to set a favorable

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image of the company) and a de-biasing function (to identify and defuse possible concerns about the company's conduct).