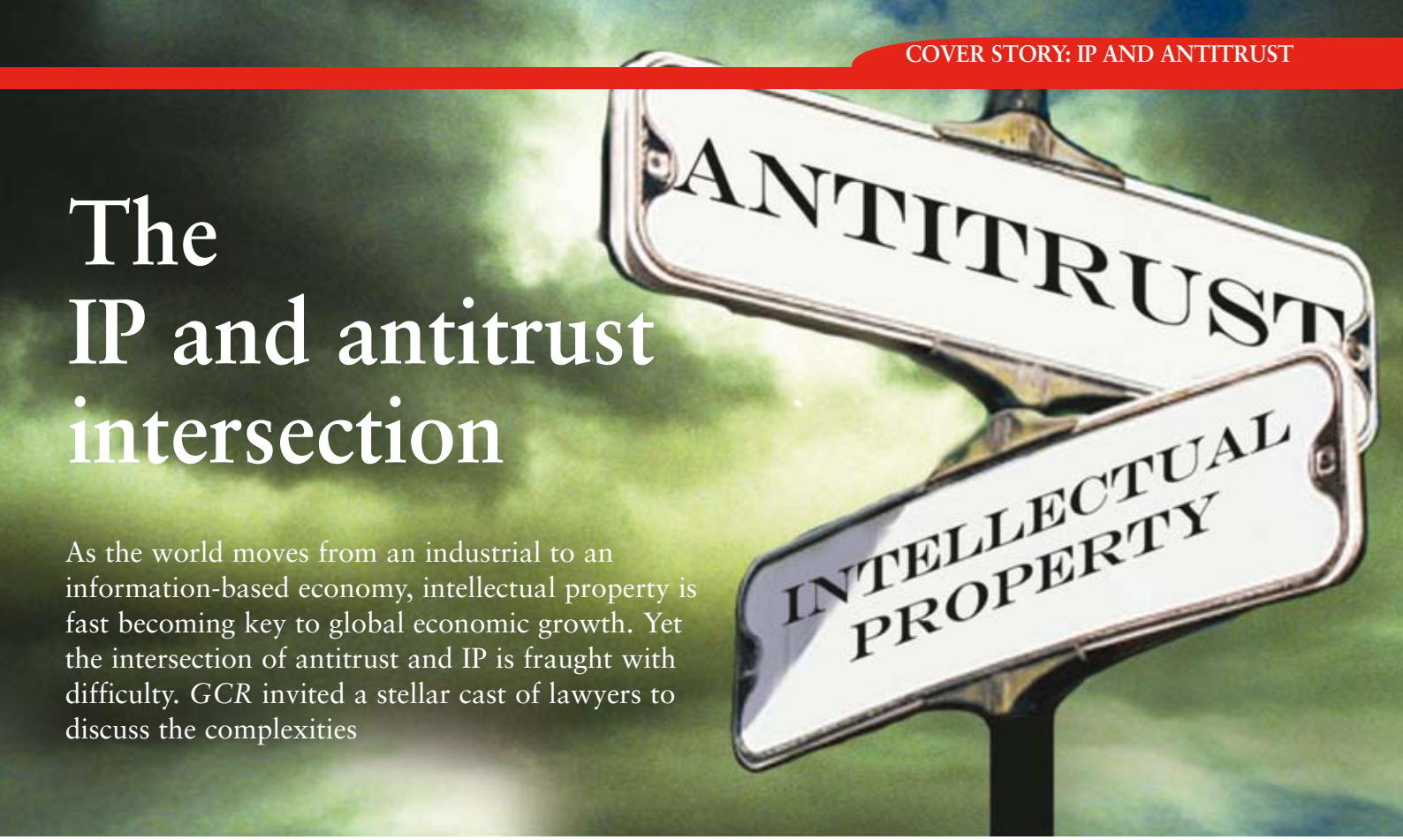

The IP and antitrust intersection

As the world moves from an industrial to an information-based economy, intellectual property is fast becoming key to global economic growth. Yet the intersection of antitrust and IP is fraught with difficulty. *GCR* invited a stellar cast of lawyers to discuss the complexities

WALDMAN: What are the most complex areas of intellectual property and antitrust that you struggle with?

OSTRAU: It's often a struggle to convince companies whose lifeblood is intellectual property that there are limits on what they can do with their IP. Once you get beyond that, several areas have been rather difficult to talk about recently; one of them is in the area of package-licensing and tying.

OHANA: I agree – the state of tying law in the United States is fairly confusing at the moment. There are still people who think that tying is per se illegal once you reach a certain market share; yet if you look at actual cases, it's very hard for plaintiffs to win tying cases where both products are technology products. You sometimes have to tell clients that, if they want to meet certain business goals, they can be more aggressive than they think; that's especially true of non-antitrust lawyers who don't track antitrust developments closely enough to see how the law in this area has evolved.

WALDMAN: How do you factor into the analysis – if at all – that, although you might be successful in an antitrust defence, there's a long road between the complaint and victory?

OHANA: You certainly have to mention that to people, that you're doing something that may wind up in court, and that you are likely, ultimately, to win – but only after going through the headache of the litigation. It's certainly something that clients have to be aware of.

WALDMAN: One thing I struggle with is that, unlike when there's actually a product in the marketplace about which you can ask elasticity and other questions relevant to competition, it's not as easy to get the same sense of what competes with what on the technology side – especially when patents are involved. When you're in-house, how do you work with your company to undertake that complex analysis?

OHANA: It's tough – to quote the title of an article by Professor Mark Lemley, patents are probabilistic; they don't necessarily have a fixed scope until they've been evaluated in what may be several rounds of litigation. So, judging whether technologies are complementary or competitive at a particular point in time depends on how you read the patent. You may be right, you may be wrong – but once you sit down and read one, you realise that patents are very carefully drafted. They often contain multiple claims, and the claims relate to each other in interesting ways. You may not know much about the underlying technology – and, frankly, you may never be able to learn much about the application of the patent and how it relates to a product market that may or may not exist yet. That can be very challenging. This is especially true for high technology products. Look at a Sun server or a Cisco router – they both embody thousands of patents, and figuring out the antitrust analysis where you have that many patents can be particularly challenging.

STEWART: Yes, but the fun thing about competition, and the innovation that arises from it, is that you don't know where it's going to go and you don't know where it's going to take you. That's why there's such a premium on people who – purposely or accidentally – bring their creativity to bear and assemble

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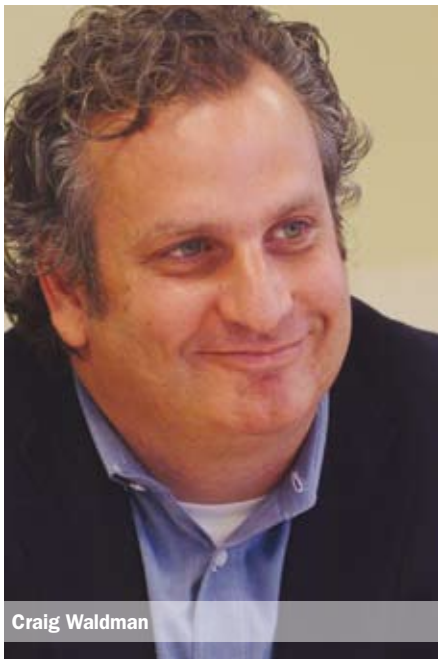

Craig Waldman

something that's going to be huge in the future. In terms of counselling clients at an early stage, the best you can hope for is to have a credible relationship with the people developing the technology and with the engineers, and to get involved as early as you can. There's no substitute for digging in and understanding as best you can the dynamics involved in the technology and what the developers are thinking. This goes back to what we were just talking about. Seattle and Brussels aren't the only places that are grey – nothing is clear. You don't get a hypothetical that's really neat, where this is vertical and that is complimentary – it's not like that. There is no substitute for digging in and thinking hard, and applying the principles you've got to the facts at hand.

LEVINE: I agree with that, and think it applies to in-house counsel, too. Now that we're in this world where so much conduct at the intersection of antitrust and intellectual property is reviewed under the rule of reason, you have to know the facts. You have to question your client until you know whether there really is market power here, how the conduct is likely to affect competition now and next year, and more. There's no substitute for getting your hands dirty and finding out the facts.

STEWART: Right, but you can't go to a bunch of engineers and say: "Is there market power here?", because you're going to get a blank stare. You have to go beyond the labels and concepts you traditionally apply, and dig in and go a level deeper to the real things that they have to deal with.

WALDMAN: As an in-house counsel, you're better placed than outside counsel to be brought in at an earlier stage of analysis. Hopefully, you have a sense of what the corporate strategy is and where it's going. More proactive clients may have outside counsel involved early in the process too, but in-house counsel are probably a little better positioned. How early, though, do you find yourself involved in antitrust issues? At the early concept stage? Patent stage? Or do you first get involved when clients say "fix my problem" after the product has been launched?

OHANA: Much depends on the sophistication with antitrust of the IP lawyer who is prosecuting the patent, the licensing lawyer who is supporting that business unit, or the sales lawyer who is dealing with the issue in a transactional context – which is why it's a good idea for legal departments to train people to spot antitrust issues and know when something is serious enough to make a phone call and bring someone in.

WALDMAN: Let's bounce back to something we just discussed, because I'd like to get Frances's perspective. We were talking about the problem of assessing competition between patents, technology and products. Is the Department of Justice at a similar disadvantage, in that it's not like a typical merger or investigation, where you can call consumers and ask about competition among products? Is the department equally hamstrung in some ways when assessing how patents and the underlying technology compete?

MARSHALL: Like everybody else, there's no getting around having to dig into the facts in each particular industry; we're definitely in the same boat. Every time a case comes in, we dig very hard; we rely on our people who have competence in the particular field, and we investigate; we talk to as many people in the field as we can, and try to figure out what the competing technologies are, who has them, who might have them and what's on the horizon.

WALDMAN: It sounds like we're in equally poor positions to assess these issues.

MARSHALL: I wouldn't say it's about being in a poor position; you have to inform yourself and, at a certain point, you can figure out generally where things lie; you become an expert and start to feel more comfortable with patents and other forms of IP; but there are never any perfect answers.

WALDMAN: One area where I suspect that private parties may be better off than the agencies is in their ability to tap patent expertise. In terms of reading patents, how much patent expertise is there at the DOJ's antitrust division? If you don't have enough expertise, do you just walk over to the patent and trademark office and ask them for an opinion?

MARSHALL: It's definitely an area where we struggle, because it's hard to retain for any decent length of time registered patent attorneys who also practise antitrust law. Those lawyers are so marketable that, generally speaking, they stay for a while and leave. But we make great efforts to recruit people. We reach out and hire experts whenever we need them, and we find the appropriate patent attorney to give us the advice we need. We generally don't rely on the PTO, though we could refer a patent for re-examination; that's about the only way we'd get direct expertise from them.

WALDMAN: Business is becoming increasingly globalised – as is antitrust, intellectual property and the exploitation of it. How does the layering of the global economy make antitrust and IP more complicated?

OSTRAU: The complexity is focused in specific areas. There's a tendency for people to assume that 'global' means 'heterogeneous and multi-headed', but that's not always the case in law – particularly in antitrust law, where there is increasing convergence. But there are still some areas that highlight the tension, the most important of which is probably in the refusal-to-deal area. In fact, even within the US, there's arguably still a struggle within and between the agencies about how to deal with refusals-to-deal in the context of intellectual property. And there's certainly a chasm – or maybe an ocean – between the US and European antitrust authorities on how far you can push refusal-to-deal. It's important because technology is global now, and companies really can't choose which law they are going to deal with.

WALDMAN: Do you find companies are better off adopting a certain business policy based on the region with the most risk – ie, establishing the lowest common denominator? Or should companies split policies among various regions, if possible?

OHANA: When I was with Cisco, lowest common denominator counselling was very appealing: it's simple, and business people are sometimes willing not to go as far as the law may allow in return for simplicity. They are dealing with global partners and global programmes. They want to create one set of marketing collateral, not six or eight or 10 or 20 different sets that respond to nuances of local law. On the other hand, settling for the lowest common denominator means not being as aggressive as you could be in particular places. You have to make sure that

clients understand the trade-off and are willing to live with the consequences.

STEWART: But that presents a wonderful opportunity to those lawyers with the knowledge and resources to provide their clients in a timely manner with rigorous advice spanning many jurisdictions, enabling their clients to anticipate how regulators are going to approach these issues around the world. That creates opportunities as well as for companies that aren't going to be satisfied with the lowest common denominator, but instead are going to craft their actions and push their positions aggressively, to be better informed on how to stay within the law and to understand where the risks lie in potential courses of action.

OHANA: Where it get less wonderful is in responding to specific counselling questions and telling a client that you'll get back to him within 20 days, after you've done a 60-country survey of the law. Business people don't want to wait that long. That's a challenge. It would be nice if we could wave a magic wand, get convergence and provide one-stop shopping for advice. But it's not going to happen in our lifetime. It may be a great opportunity for lawyers, but I wonder whether it's a great opportunity for business people, because they struggle with the complexity in this area, particularly as the world becomes more multipolar in this respect.

WALDMAN: Frances, countries around the world have been pretty keen to coordinate their activities in cartel enforcement and, increasingly, in merger enforcement. Intellectual property is much more amorphous, but are countries trying to come up with some common platforms in the IP/antitrust field – or at least talking to one another about it?

MARSHALL: This has been an area of major concern and interest for the Department of Justice, and we've spent a great deal of time and energy trying to work toward principled convergence. I've been involved in several IP working groups between the DoJ and other antitrust agencies around the world, some through video conferences, others face-to-face at conferences. We've engaged one another on a number of the issues that appear in our IP guidelines and that arise around the world, in order to get both sides to understand our similarities and differences. There has been a big increase in the number of people thinking about these issues around the world, particularly as antitrust agencies incorporate economists into their structure and start to grapple with issues of efficiencies and the interplay between the scope of intellectual property rights and preserving competition through competition laws.

WALDMAN: In terms of the tug-of-war between IP and antitrust, are there any countries that jump out as being strongly in favour of one or the other?

OHANA: In the United States, we're very deferential to intellectual property rights and it has served us well. But it's an important wake-up call for people to learn that that isn't always the case in various places around the world, either in terms of the mechanisms for enforcing intellectual property rights in those countries, or in terms of being able to argue in an antitrust context that businesses should be allowed to do something because it has good long-term effects for innovation, when the local enforcement agency is focused on the short-term effects of the practice or the harm it is said to be causing to a valuable local industry, for example. So you often want to be cautious when you're in those places about making the kind of arguments that Frances and her colleagues at the DoJ, and Gail's former colleagues at the FTC, would intuitively accept.

WALDMAN: So the lesson is know your audience?

OHANA: Very much so.

STEWART: There is also a real benefit for a US practitioner to go to countries where concepts that you would normally consider to be clear, obvious and sacrosanct may be challenged, and looked at from a different direction. It makes you think about issues more deeply and to question long-held assumptions. It can also provide new, rich insights to regulators in other countries, whom I've found to be very open to hearing arguments on the merits. So the interplay can help make our individual understanding of issues richer, which could ultimately feed into contributions that could make American law better, could contribute to and enrich consideration of antitrust issues in other countries as well, and help promote convergence internationally.

WALDMAN: That's a perfect segue to a question about becoming better lawyers – a goal for all of us. Frances, what are the best and worst things that lawyers can do when dealing with these issues before the agencies?

MARSHALL: From my perspective, the best thing you can do when you come to the DoJ with a complaint about someone else's activities is to have thought through the problem and to have put it in the context of a viable antitrust theory. We sometimes see people who are concerned about a particular practice make a vague attempt to try to link it to some theory, and then expect us to identify the competitive harm.

Gail Levine

For the most part, that's not going to be persuasive. It was brought home to me in the IP context when I started to see how people were interpreting the patent-pooling letters. Some would come in and say: "Here's the pool. There's the substitute patent in this pool. It's illegal." They would not explain why it is that, in this particular pool, having substitute patents is harmful to the competitive process. And then, on the defence side – and this is particular to the IP/antitrust practice – I've seen people who are concerned about an antitrust investigation coming to the DoJ with a phalanx of IP lawyers assuming that we don't have the expertise to deal with these issues. The IP lawyers give an elaborate presentation and throw IP jargon around left, right and centre, perhaps thinking that we are going to say: "Boy, this situation is far too complex. We just don't understand it well enough to go forward." That sort of interaction destroys your credibility – and once you've destroyed your credibility with the agency, it's very hard to get it back. The department has the expertise to understand sophisticated arguments based on IP law. Once they leave and we have a chance to talk, we say to ourselves: "Wow, what is that they're really trying to tell us? What are they hiding?" It makes us that much more interested in figuring out the story that isn't being put on the table.

OHANA: To echo Frances's point about credibility, when I was at the antitrust division, there was a very well-functioning rumour mill within the division – and plenty of cross-pollination between the division and the FTC, as agency staff talked about which lawyer at which firm didn't tell the truth on a particular merger five years ago. That stuff gets passed on and on; and – fairly or


Frances Marshall

unfairly – people get reputations that are very hard to shake off. It's certainly something you want to think about when you approach the agencies.

LEVINE: At the FTC, they generally take a dim view of people who complain about their rivals, saying: "You won't believe what this company has done." The story may be true, and there may well be a problem – but the agencies are far more likely to take action if you can show them how it harms consumer welfare. If you can't bring in the facts to support your story, it's not going to be very persuasive.

WALDMAN: Let's shift gears again. The US antitrust agencies' joint IP report was recently published, and most people view it as a great step in understanding the policies of both the FTC and the DoJ on IP and antitrust. Frances, how did the report come about?

MARSHALL: We started the process in the summer of 2001. Thanks to the leadership of former chairman Robert Pitofsky, the FTC had a history of holding hearings in areas that particularly interested antitrust practitioners; it was also interested in looking at the intersection of intellectual property and antitrust. The FTC invited the DOJ to jointly hold hearings in ths area. Together, we held about 28 days of hearings and covered a wide variety of topics that can be divided into two different spheres – understanding the underpinnings of the patent system and ways in which it could be reformed to make it more pro-competitive; and examining how antitrust law should be applied to intellectual property rights. There were over 300 participants and more than a hundred written submissions which generated reams of information that is all online. We held hearings throughout 2002, finishing in November, and then in July 2003 the FTC issued a report that addressed balancing the need for innovation and competition in reforming US patent laws. It sparked a large debate within the IP community about how to reform the patent system. We worked diligently on a second report, which was issued this April and which focused on the intersection of IP and antitrust. It has six chapters, each of which addresses a particular subject in detail, including: refusals to license patents; standard-setting issues; cross-licensing and patent-pooling; particular licensing restraints that people have concerns about – such as reach-through royalty agreements, non-assertion clauses and grant-backs – bundling and tying; and extending the duration of market power conferred by a patent. I've heard many positive things about the standard-setting chapter, in terms of moving things forward and providing information that wasn't previously available about the agencies' position on those issues. There has also been interest in the refusal-to-license chapter, and people have found the patent-pooling chapter to be both a good summary of the agencies' approach and a place for all of it to be pulled together. A number of people have summarised the other three chapters as being a general statement that the agencies are going to use the 'rule of reason' in looking at these various practices. But these issues are hard to grapple with and the report is helpful in terms of indicating how the federal agencies will be analysing these sorts of issues.

WALDMAN: Great summary. Were there any surprises or disappointments in the report?

LEVINE: I thought it reflected the two major shifts in antitrust law over the past couple of decades. First, it restates that there's no presumption of market power from the mere holding of a patent. Second, it clarifies that IP licensing can be pro-competitive. The report isn't announcing new truths – the agencies have, to their credit, made these points forcefully before – but it's good to have it put together with plenty of detail and examples and testimony to support those principles.

OSTRAU: In some ways it's not so much what the report says, but the fact that it says it at all. That follows what we were saying about the uncertainty of counselling clients in the areas of IP and antitrust. Anything that provides a little more certainty guards against over-caution; because, when you're uncertain, you're naturally going to do what many standards organisations did, which is not seek a lower price for a technology that might be part of a standard – and that's suboptimal. So providing some clarity means the line may be further along than you think it is, which contributes to the law's pro-competitive goal.

LEVINE: I agree. And it's also important that the report carries the imprimatur of the two federal antitrust enforcement agencies. It's one thing to give industry guidance through speeches or business review letters; but any single speech is necessarily limited in its force, and business review letters are limited by the facts of the business situations presented. This report, by contrast, gives both agencies the chance to weigh in on an array of issues that go beyond what has been seen within the narrow confines of any business review letter, and with more force than any single official's speech could convey.

STEWART: I have a different perspective. The report certainly reflects the hard work of people in the agencies, but whenever you base a report on hearings held, and the state of the academic literature as it was, five years ago – particularly in the IP area – there are inherently going to be issues where the most recent and current thinking isn't completely reflected. Chapter two, which dealt with standard-setting, was one of those areas. Pervading the chapter is this notion that there is a hold-up problem we have to address because it is somehow undermining the work of standard-setting organisations. The fact is that the case law and empirical evidence do not support the notion that hold-up is a big problem. Standard-setting brings together people from divergent backgrounds and with very different interests – whether they are purely technology companies, or manufacturers, or vertically integrated companies – and the fact that, in so many cases, standard-setting bodies have been able to bring these people together to reach a consensus, notwithstanding their divergent interests, is incredibly impressive. There is no major hold-up problem looming over the system, stopping it from doing good work, and I'm disappointed that the report's treatment of the hold-up concept wasn't sufficiently cautionary. Standard-setting organisations with engineers focusing on technology alternatives and technological quality work very well; if you open this focused process up to broader, ex ante negotiations and, potentially, price issues – all to address a non-existent hold-up problem – there is a real risk of letting the fox into the hen-house, which could undermine not only the effectiveness of standard-setting bodies but also the public policy goals that competition law and intellectual property are meant to promote. Competition is not just about lowering prices – more broadly it is about driving innovation, whether that's quantum leap innovation inventing something the world hasn't had before, or incre-

mental innovation, or the sort of innovation that enables companies to become more efficient and introduce cheaper products.

WALDMAN: Have the standard-setting organisations that you have dealt with directly or through your clients been held back, either by a lack of clarity or by what they perceive as over-attention to the hold-up issue?

STEWART: Well, the lack of aggressive action in that area by standard-setting organisations reflects the fact that hold-up hasn't been a big problem. One criticism we often hear about standard-setting organisations is that RAND terms are vague. But what's vague is also what's flexible. It's clear that if you impose a cookie cutter approach on different industries with differing competitive dynamics, it's not going to work. One of the reasons that standard-setting bodies have worked so well is that flexible concepts such as RAND have driven, and allowed, people to put aside the most extreme views of their self-interest to some extent and to try to reach a consensus which works better for everybody, including consumers.

LEVINE: To come to the defence of chapter two of the agencies' report – the standard-setting chapter – I would note that there isn't anything in the chapter, or in any of the two agencies' speeches on standard-setting, that indicates that joint ex ante negotiations are required. It would be a mistake if they said that, for all the reasons that Dave just mentioned. In some contexts hold-up isn't a risk; in other contexts it might be a more significant risk. This is one of those situations where there isn't a one-size-fits-all answer. In some standard-setting organisations, joint ex ante negotiations might make a lot of sense as a useful tool to stave off hold-up and to preserve competition in the technology market. In other situations, it might not be economically sensible and shouldn't be compelled by the antitrust laws or anything else.

OHANA: It seems to me that, in their business review letters and in the IP report, the agencies got it exactly right – which is to say that they're not telling standard-setting organisations what rules they should adopt, but they are helping standard-setting organisations and their participants understand how far they can go, should they choose to.

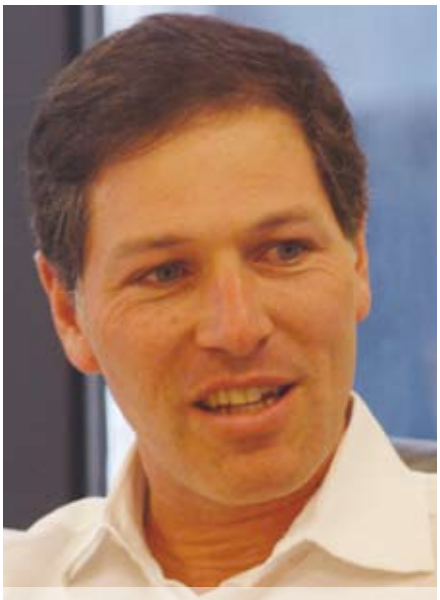
WALDMAN: We all wear two hats, as IP lawyers and antitrust lawyers – and we wear multiple hats as counsel, litigator and everything else in between. What is the antitrust lawyer's role, either in a classic intellectual property litigation case or in general, when you're participating on a case team?

OSTRAU: In intellectual property litigation, if there's an antitrust counter-claim, then obviously the antitrust lawyer gets involved from the get-go. Something that hasn't previously been noticed, however—but is becoming increasingly noticeable—is the overlap in analysis done in intellectual property cases and in antitrust cases, such as defining what the market is, for example. That kind of evaluation is obviously important to the antitrust lawyer, but it's also very important to the IP lawyer, in terms of establishing damages. Evaluating whether there is competition at the technology market level, or at the product market level – something that antitrust lawyers are steeped in – certainly has some benefit in a classic IP case.

MARSHALL: Overlap issues come up in merger cases that arise out of patent litigation. Company A sues company B for patent infringement and company B files an answer that says: "We're not infringing and, even if we were, your patent is invalid." Litigation continues for a while, but there's no decision from a court on any of the major issues. The companies decide to settle the case, and company A buys company B, which comes to the attention of the agencies. Both parties say: "There's nothing for you to worry about here – company B was infringing company A's patent, and so was in this market illegally. If we merge, there's no loss of competition." Then the agency has to try to evaluate those points. Often you have to take a hard look at the patent and determine whether the merging companies were valid competitors in that market.

OHANA: We're now seeing the plaintiffs bar getting involved in IP/antitrust issues, and bringing consumer class actions – particularly in California, where we not only have direct purchaser damages but indirect purchaser damages too. So there's another interesting example of where antitrust lawyers can be helpful in intellectual property disputes.

STEWART: There are three aspects. First, of course, antitrust law is suffused with economic theory and a careful practitioner is always drawing insight from that discipline. So, when an antitrust litigator looks at IP issues, that approach should carry through more broadly into an appreciation of the need to gather insight from other disciplines, whether it's economics, engineering or another complementary area. The second aspect is structural. We've all had clients who come along with the argument that a competitor is doing something or other and it's not fair; and you have to take that information and deconstruct and restructure it, figuring out the nature of the relationships, the precise markets and so forth. Only by



Mark Ostrau

providing the correct doctrinal framework can you really make sense of it. And clients generally aren't naturally equipped to help you in that regard – you have to get them to think about the problem in a real-world way, so that they give you the raw material to enable you to think about it in those terms. And that's an important skill whenever you're approaching any problem – to think more explicitly about the structural aspects of how to answer a question and what makes the analysis coherent. The third aspect is just being goal-driven. We're not dealing with the Internal Revenue Code here – we don't get much guidance from the statute book. It comes down to the question of what your particular issue does for consumer welfare and competition – whether it's innovation, efficiency or whatever. Looking at the problem is not so much a case of mapping section so-and-so of some statute, but rather thinking in terms of the larger goals that antitrust laws are meant to promote. And that's a great perspective to be thinking about – particularly if you're in a jury trial, to be able to ask yourself the question: "What is going to resonate with the jury, what is going to make sense to them, and what is going to seem like the right thing to do?" And antitrust lawyers are uniquely equipped to bring those skills to an IP problem – or indeed to any problem.

WALDMAN: Part of the skill you bring to the table is making evidence usable and capable of being studied in a way that makes some sense to a juror. But it must be challenging to take a jury into very complex patent areas. How do you find juries deal with the patent concept and the difficulty of the technology involved? Do they struggle with it?


David Stewart

STEWART: Taking a concept and making it simple is what any trial lawyer does. It's a difference in degree, but it's similar to what you do when you go to the agencies: you've got to be credible and you have to tell a story that is relevant to what they're concerned about at the decision-making phase. If you're before a jury and you've got a Harvard professor and an MIT professor as duelling expert witnesses talking about god-knows-what, if the jury can't understand and apply what they're saying to the merits of the case, then the jury's going to resort to factors it can understand and apply to determine credibility, like which expert seems nicer and which lawyers are treating the paralegals with more respect in the courtroom. My experience in jury trials is that the value of digging more deeply into the facts and applying them to the relevant legal issues is the same as when we were dealing with the regulatory agencies in the Microsoft case. We were always more credible because we dug into the facts more. Microsoft might have had the slick PowerPoint presentations – but we analysed and worked with the actual software products at issue, and demonstrated, for example, how Microsoft's own engineers identified the separation between the operating system and applications. If you're simply battling with PowerPoints, you've lost an opportunity to be more credible and to provide more insight. You should try to take the product at issue and show how it works – and where the innovation is – and frame it in simple enough terms that the jurors can say: "Yeah, that makes sense to me, I understand that." But that's always our task; it is just a matter of degree and matching the message and appropriate level of detail and sophistication to the particular decision-maker.

WALDMAN: What are your predictions about the future of antitrust and IP in the next five to 10 years?

OSTRAU: I think there will be more pressure to go back to the first FTC IP report and make some changes to the process that the patent and trademark office uses. Many of the problems in antitrust counselling stem from uncertainty over patents and, in particular, over what many would say are patents that are granted too easily. Just having a patent doesn't mean it's actually something that is enforceable. I also predict a move inexorably towards rule of reason and looking at the competitive effects of all IP-related restrictions. We're also going to start seeing a divergence between different types of intellectual property and how they're treated. Historically, patents and copyrights have been kept together, either assuming that they both carry market power or, today, assuming that they don't carry market power. Yet, if you start looking at them, you begin to see that perhaps one has a little more market effect than the other – or vice versa, depending on the particulars of the industry.

LEVINE: Since we've been talking about federal agencies and the important roles they play in shaping intellectual property law, I'll mention another agency that is starting to play an increasingly important role: the International Trade Commission. Because of the workings of the Smoot-Hawley Tariff Act of 1930, the ITC presides over important patent disputes today, and that raises significant questions. When there's an adequate remedy available in US district court – as there often is when the patent dispute is between two US companies – it's unclear what is gained by having a kind of parallel patent-infringement action at the ITC, where patent-holders can seek an exclusion order that is tantamount to an injunction. So we need to examine the activities not just of the antitrust agencies and the PTO, but also of this other agency that hasn't previously received much attention.

STEWART: I'll make five predictions, starting with an area of IP law that has gotten short shrift today – copyright law and, in particular, digital media. We're going to see many fascinating developments, because our regulatory and legal structure is wholly inadequate to deal with a world in which you can hold in your hand a device that provides access to millions of songs at any given moment. The law that's in place right now simply can't deal with that effectively, and it's holding back innovation. Content providers such as music companies haven't been strangers to antitrust law in the past, and this is an area of interaction that will be very interesting. Second, where you see people trying to involve antitrust principles more actively in the patent laws, it reflects the fact that there are many problems in patent law and that people are looking to the antitrust laws to solve them. The real answer, though, is to give the PTO the resources it needs so that it can do a better job at the outset in issuing patents, which could help eliminate some of these other problems that arise on the back end. Third, the globalisation of antitrust and IP law isn't going away, but is instead going to become increasingly fundamental; that's going to be good for the US bar, the US authorities and the European Commission, which is increasingly doing things that resonate with the rest of the world. Fourth, in a world where technology is increasingly important, the US is going to have to deal more fully, in terms of antitrust law and IP, with the increasing importance of interoperability. Finally, we're all going to have to deal more effectively with remedies. A great deal of effort is put into antitrust litigation, and there had better be results at the end of the process that makes all that effort worthwhile. It's not easy, but how do you put in place remedies that justify the vast public and private resources expended in the process?

WALDMAN: And also catches up on the six years it took you to get to that resolution! Thank you all for participating.

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Gil Ohana