Competition vs. Innovation

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At the same time that the justices of the United States Supreme Court are considering the case of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, less than 10 blocks away the Federal Trade Commission is holding hearings on the intersection of the antitrust and patent laws. Although the forums are different, and the decision-making process could not be more divergent, both the Supreme Court and the FTC are wrestling with aspects of the same basic question: What best drives the United States' increasingly technological economy, innovation or competition? Does broad patent protection foster or hinder technological progress?

The forces who argue that innovation is the horse to be ridden believe that providing substantial rewards to individuals and companies that produce an innovative product or method is the surest way to cause a steady stream of new products to enter into commerce. The broader and surer the patent protection, they argue, the greater the amount of resources and energy that will be committed to the research and development, which ultimately can lead to the rewards afforded by a patent.

Their opponents, those who believe that old-fashioned competition is the elixir leading to sustained advances in technology, argue that broad patent protection impedes the competition, which causes new ideas to elbow out old ones.

Always skeptical of anything smacking of a monopoly, they argue that patents should be narrowly confined, and that competitors are entitled to the clearest statement of the metes and bounds of patent protection so that they can compete by "designing around" an issued patent or by charting their path to market without uncertainty as to the breadth of the patents

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that might lie in their way.

The two factions clashed headlong in February 2000 when the Court of Appeals for the Federal Circuit decided *CSU LLC v. Xerox Corp.* Although the Supreme Court had held that the decisions of manufacturers, such as Xerox, as to whether and how they would make replacement parts available to independent service providers were subject to traditional antitrust analysis, the Federal Circuit held there was an area where that traditional antitrust analysis did not apply.

In CSU the Federal Circuit held that a manufacturer's unilateral decision whether to make patented parts and copyrighted service manuals available to independent service organizations that competed with the manufacturer for service contracts could be made without fear of antitrust liability, or even an examination of the motives that lead a manufacturer to refuse to sell.

That did not escape the attention of the FTC. Then Chairman Robert Pitofsky called the decision a "striking example" of undue weighting of intellectual property protection, and charged that "the Federal Circuit has leaped from the undeniable premise that an intellectual property holder does not have to license anyone to the unjustifiable conclusion that it can select among licensees to achieve an anti-competitive purpose."

How will the balance between patents and antitrust, between innovation and competition get struck? Two important events are now under way that will help shape the debate.

On Jan. 8, 2002, the Supreme Court heard argument in Festo, where the issue was the extent that a patent holder can block the sale of a product not covered literally by the claims of a patent, by arguing that the product has something which, although not literally claimed in the patent, is its equivalent.

Obviously, to the extent that the so-called doctrine of equivalents is available as a possible barrier to entry, the zone of patent protection is broader and the impediment to competition is greater — just what those who favor innovation applaud, and those who favor competition condemn.

Although the Supreme Court saw lines rivaling Bush v. Gore for the argument, and the

traditional media and legal press have been awash with conjecture as to how the case will be decided, William Lee, who teaches intellectual property law at Harvard Law School, says only three things can be said with confidence:

“First, the fact that the Supreme Court has taken so many intellectual property cases in the last five years is a testament to how important that area has become to our economy. Second, the Supreme Court appeared to be more tentative in this argument than usual — the justices were genuinely groping for information to help them decide the case. Third, no matter what anyone hypothesizes the result will be, we’ll know for sure before the term closes in June.”

One month later, the FTC began hearings on where the balance should be struck, and provided a second forum for the debate. On Feb. 6, the first day of the hearings, the FTC offered two courses: intellectual property law for antitrust lawyers, and antitrust law for intellectual property lawyers.

Reports conflict as to which group was the more confused by the experience. But one thing is clear — the FTC is committed to a thorough analysis of every aspect of the intersection between patents and competition law, and is skeptical that anything can beat competition as a prescription for progress.

As the current chairman of the FTC, Timothy Muris, stated in a recent speech announcing the hearings, the FTC “will consider the implications of the competition and intellectual property law and policy for innovation”— including “the role of the Federal Circuit.”

Those hearings will be held here and at the University of California at Berkeley, where former chairman Pitofsky now teaches.

Washington, D.C., likes nothing better than a good policy fight — and this is shaping up to be a substantial, important and long-running one. Just as few would have predicted 20 years ago that students would sleep outside the Supreme Court to watch a patent argument, few would have predicted that the fight between patent and antitrust policy would become so visible. Given the central role that technology now plays in our economy, the policy fight is likely to be intense. As is almost always the case, the ultimate result will likely be to drive the policy

toward a middle position, where patent holders are required to clearly spell out the limits of their “No Trespassing” signs, the FTC continues to monitor the licensing of patents and the settlement of patent litigation, and competitors are encouraged to think creatively about getting from laboratory to product without trespassing.

Stay tuned, the fight is just beginning.

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