Joint DOJ/FTC Hearings May Change Relationship between IP and Antitrust Laws

2002-06-12

The Department of Justice and the Federal Trade Commission have been conducting joint hearings concerning the interaction between antitrust and intellectual property laws in a knowledge-based economy. The hearings, which began in February 2002, are expected to extend through June 2002. The information and perspectives received by the agencies during these hearings could significantly affect future enforcement actions, substantive legislative proposals and the issuance of agency guidelines.

At a fundamental level, the intellectual property laws and the antitrust laws both seek to promote innovation and enhance consumer welfare. IP laws preserve incentives for innovation by rewarding the inventor with certain rights. Antitrust laws, on the other hand, promote innovation by eliminating unreasonable restraints on competitive activity. Notwithstanding these similar goals, however, a recognized tension exists between these two sets of laws because protecting one interest at times comes at the expense of the other. These hearings were designed to provide a forum for consideration of the relationship between these laws, at a time when there is an increased dependence on products and services that are the embodiment of ideas, the so-called “New Economy.”

The hearings were the inspiration of the immediate past FTC Chairman, Bob Pitofsky. He re-introduced the concept of public hearings on policy issues as a basis for assisting in the formulation of antitrust policy. Then, in a widely publicized speech in March 2001, he expressed concerns that the balance between these two sets of laws needed to be re-examined. Although he believed that antitrust enforcement agencies had made significant

progress in adjusting their policies to account for the “New Economy,” in his opinion it was necessary to assess whether IP protection “has gotten out of hand.”

A number of provocative issues are being debated during the hearings, including:

1. The increasing number of issued patents, growing from 66,000 in 1980 to over 175,000 in 2000. Has this development created a “patent thicket” constituting a disincentive to innovation because of fears of infringement, or are those fears overcome by cross-licenses or pooling arrangements?
2. The changing scope of patents: Are important patents, especially in biotech and software, overbroad, thereby inhibiting follow-on innovation, or are they necessary in order to encourage high-risk research in new fields?
3. The role of the Federal Circuit: Originally created to promote uniformity in the development of patent law, its jurisdictional reach extends to all non-patent claims, including antitrust claims, as long as at least one original claim in the case arose under the patent laws. How has that broad jurisdictional reach affected the balance between the antitrust and IP laws?
4. What is the appropriate antitrust analysis to be applied to specific intellectual property licensing practices, such as package licensing, grant backs, patent pools and cross licensing?
5. What restrictions should exist, if any, on the unilateral right of a patent or copyright holder to refuse to license to others?
6. What industry standard setting practices promote competition and innovation, and what practices might result in an abuse of market power or constitute disincentives for innovation?

The agencies continue to welcome participants at the hearings and/or commentators on these and other relevant subjects. Instructions for interested parties, as well as copies of the schedule and many of the delivered papers, are available on the FTC’s web site.

John Christie, Jr.

john.christie@haledorr.com

James Burling

james.burling@haledorr.com