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Federal Trade Commission

A Pragmatist's Approach to Navigating the Intersection of IP and Antitrust

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Good afternoon. I am pleased to be here today and to update you on the recent work of my agency, the Federal Trade Commission, at the intersection of the intellectual property and antitrust laws in the United States. The FTC's activities include research, market education, advocacy, as well as enforcement, and I will address three controversial areas: ***first***, whether seeking an injunction on a FRAND-encumbered standard essential patent (SEP) is a competition law violation; ***second***, whether "patent assertion entities" (PAEs) are harming competition, innovation, and the economy; and, ***third***, how "reverse-payment" settlements should be treated after the U.S. Supreme Court's ruling for the FTC in *Actavis*[2] earlier this year.

Each of these three issues arise from the intersection, or perhaps it would be better to say "collision," of the intellectual property and antitrust laws. Each issue presents complex questions about fundamental rights of property and of access to the courts, the relative scope of competition and intellectual property laws and, from a policy perspective, how best to balance the short and long-run consumer welfare trade-offs between favoring one set of laws over the

[1] The views expressed in this speech are solely those of Commissioner Ohlhausen and are not intended to reflect the views of the Commission or any other Commissioner.

[2] FTC v. Actavis, Inc., 133 S.Ct. 2223 (2013).

other. Reasonable minds can, and do, disagree on each of these subjects. Ultimately, however, our goal at the FTC is a simple one: to protect consumer welfare by using all of our tools. I think some of our efforts at the intersection of the antitrust and intellectual property laws have served this mandate well, like our successful decade-long campaign of research, advocacy, and litigation to combat anticompetitive reverse payment settlements in the pharmaceutical industry. But, as I will explain today, I have serious concerns about the Commission's handling of several other issues at this legal crossroads, in particular the majority's sometimes one-sided approach to patent hold-up in the context of SEPs and PAEs.

I. <u>Wealth Creation Requires Both Innovation and Commercialization; The Economy Therefore Also Needs Both Antitrust and Intellectual Property Law.</u>

Let me begin with some observations on the FTC's goal of consumer welfare. The pursuit of ever-greater consumer welfare, or, put another way, the pursuit of wealth, requires a society to focus both on expanding its capacity to innovate and its ability to commercialize innovation. Management visionary Peter Drucker once wrote, "Innovation is the . . . . means by which the entrepreneur . . . creates new wealth-producing resources or endows existing resources with enhanced potential for creating wealth."[3] Innovation expands society's potential to create wealth, particularly over the long term, and commercialization is the way we can transform that *potential* to create wealth into *actual* wealth today. A sophisticated and prosperous modern economy requires that we recognize the need for both and balance one with the other – so that we can both produce the widgets of today efficiently and at the same time invest in creating the widgets of tomorrow. Both our competition and intellectual property laws play a valuable role in

[3] Peter F. Drucker, *The Discipline of Innovation*, HARVARD BUSINESS REVIEW (Aug. 2002), *available at* http://hbr.org/2002/08/the-discipline-of-innovation/ar/1.

finding this balance between innovation and commercialization; between our goals for today and the others just over the horizon.

Nations with the legal and economic heritage of the United States and the United Kingdom historically have designed their intellectual property laws as the main way to promote innovative risk-taking for the common good. The Constitution wisely provides that "Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[4] The U.S. Court of Appeals for the Federal Circuit, which handles patent matters, has noted that if one were to eliminate the right to exclude from the basket of rights attached to patents that "the express purpose of the Constitution and Congress, to promote the progress of the useful arts, would be seriously undermined."[5] Note the inclusion of "useful" arts among the drafters' goals – their intent clearly was to entice inventors with the lure of "exclusive" rights, rights that may well lead to monopoly profits in commercial enterprises. The Supreme Court in 1974 recognized the important role of this system to provide "an incentive to inventors to risk the often enormous costs in terms of time, research and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy . . . ."[6] In exchange for this "reward for inventions" the patent laws require the inventor to disclose his or her idea, so that after the period of exclusivity expires, "the knowledge of the invention enures [sic] to the people, who are thus enabled without

[4] U.S. Const. Art. 1 Sec. 8(8).

[5] Patlex Corp. v. Mossinghoff, 758 F.2d 594, 600 (Fed. Cir. 1985), *quoting* Smith Int'l v. Hughes Tool Co., 718 F.2d 1573, 1577-78 (Fed. Cir. 1983), *abrogated by* Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142 (2011) (recognizing that a presumption of patent harm was no longer valid after *Ebay Inc. v. MercExchange*, L.L.C., 547 U.S. 388 (2006)).

[6] Kewanee Oil v. Bircron Corp., 416 U.S. 470, 480 (1974).

restriction to practice it and profit by its use . . . ."[7] They knew then what some seem to be overlooking today: strong intellectual property rights promote consumer welfare by encouraging innovation and commercialization.

Our competition laws also play a valuable role in promoting consumer welfare, although their main objective is to promote commercialization, with an eye in particular on short-run efficiencies. Securing a level playing field for the provision of products, technologies, and services to consumers by monitoring, punishing, and eliminating anticompetitive conduct that would otherwise place stress on the market creates incentives for businesses to enter a market and to compete as efficiently and aggressively as possible. This vigorous competition translates into short-term gains for consumers in the form of lower prices and higher quality. In addition, this unfettered competition can yield long-term consumer welfare gains by reinforcing the drive to innovate, because competitive markets force suppliers to offer superior products and services today *and* develop *newer* and *even better* products and services tomorrow, lest they lose the contest for tomorrow's customers and perish.

The FTC and its sister agency, the Antitrust Division of the U.S. Department of Justice (DOJ), have recognized that promoting consumer welfare is the common ground between the intellectual property and antitrust laws. The agencies observed in a 2007 report that these laws "share the same fundamental goals of enhancing consumer welfare and promoting innovation[,] . . . [by] work[ing] in tandem to bring new and better technologies, products, and services to consumers at lower prices." And, just this summer, the FTC testified before Congress that the "[m]odern understanding of these two bodies of law recognizes that intellectual property and

[7] *Id.* at 480-81 (internal citations omitted).

competition law can work together to bring new and better products, technologies, and services to consumers more efficiently and at lower prices."

Knowing at a theoretical level that our competition and intellectual property laws must coexist to promote consumer welfare is important and, frankly, took all of us in the bar probably a bit too long to recognize. But the nagging question for enforcers is how to handle specific situations in which we see a competition problem rooted directly in a facet of the patent regime. This question is at the heart of the discussion today over SEPs, PAEs, and reverse payment drug settlements. And there is no easy answer. Before I give you an overview of the FTC's attempts to solve this problem, let me offer you what I consider to be the next best thing to an answer – a framework of leading priorities that guides my analysis of these problems. This will illuminate how I examine these issues and why I have dissented from several recent FTC actions.

II. <u>Taking the Pragmatic Road to Navigating the Intersection of IP and Antitrust.</u>

First, I believe good government requires transparency, predictability, efficiency, and well-informed decision-making focused on enhancing consumer welfare and responding to the needs of market participants. Before the government chooses a course of action it should understand the problem it is trying to address and the implications of its actions for the market. In short, an agency like the FTC should think carefully before it acts and be open about what it is doing. To deliver a consistent and fair message to the consumers and businesses under its jurisdiction, it should also whenever possible avoid contradicting the work of other agencies. This type of agency transparency, predictability, efficiency, and informed decisionmaking encourages self-regulation, helps businesses run smoothly, makes enforcers' jobs easier, and renders our enforcement actions more effective.

To this end, I commend to all of you the FTC's work as a competition advocate and expert agency, particularly at the intersection of the intellectual property and antitrust laws. We regularly host workshops and actively solicit input from consumers, businesses, and other government agencies. For example, if you haven't already, I would suggest you look at our 2011 report on *The Evolving IP Marketplace, Aligning Patent Notice and Remedies With Competition*, which explores issues related to patent hold-up based on input from a 2010 workshop;[8] or visit our website for information submitted as part of our December 2012 workshop on PAEs, which contains insights and contributions on these issues from some of the leading minds in academia and the business world.[9] I often argue that as an agency we should try to use our full range of tools in addressing potentially problematic conduct. This includes engaging in research and advocacy before taking enforcement actions in controversial legal terrain where our expertise and guidance is most needed.

Second, I believe dynamic markets need a lighter touch to allow them the flexibility to develop. Government bureaucrats, while well-intentioned – many of my best friends are bureaucrats – simply are not businesspeople. The danger of hindering dynamic efficiency with government intrusion is especially high in technology businesses, which are fluid, fast-paced, and very sensitive to regulatory intervention. They are also the most likely to create legal issues implicating both the antitrust and intellectual property laws. I am therefore generally circumspect about injecting the government into these markets. This is a principle I have referred to as "regulatory humility." Overly aggressive or undisciplined enforcement in these markets can stifle the incentive to innovate. On the other hand, I recognize that lax enforcement can increase

[8] FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE (March 2011), *available at* http://www.ftc.gov/bc/workshops/ipmarketplace/.

[9] Fed. Trade Comm'n, *Patent Assertion Entity Activities Workshop*, http://www.ftc.gov/opp/workshops/pae/.

barriers to entry or permit other conduct that risks failure for disruptive innovators trying to break into industries and challenge incumbents. My tendency, though, is to err on the side of allowing the market to self-correct.

Third, although it is true that the intellectual property and antitrust laws are largely consonant in their overall aim of improving consumer welfare, it is important to recognize the natural tension between them; between pursuing mainly long-term social gains under the intellectual property laws by promising monopoly rents to the people and businesses willing to take risks while at the same time emphasizing a level competitive playing field under the competition laws for other participants in the same market. Recognizing this tension allows me as an enforcer to view competition problems involving intellectual property in part as a trade-off between the long-term goals of the intellectual property laws and the more immediate short-run efficiency goals of the competition laws. We understand that society is willing to exchange some level of potential competitive harm in the form of a state-sanctioned exclusivity and higher prices for patented products to reward and encourage innovative efforts. The question we all struggle with is how much incentive is enough? Is the proverbial "billion dollar" or, maybe here in England, the "billion pound" idea really worth it if it took the inventor little time or money to come up with it and get a patent? Or what if the person asserting the patent merely bought the patent and did not develop it? Or what if it has been more than a certain number of years since the invention? Certainly these are hard questions to answer.

It troubles me, however, that these days I am hearing more and more arguments that tend to derogate the value of patents. Examples abound: from limiting the availability of injunctive relief on SEPs without first finding a clear FRAND commitment contemplating this relief – I think Judge Posner was incorrect in his assessment on this point last year in *Apple v. Motorola* – to proposals to change the rights associated with a patent simply depending upon who owns it.

The conventional wisdom today seems to be that competition means cheap products; cheap products require cheap patents; and cheap patents are those with fewer rights – so let's start pruning away those rights. Supporters of this world view point to patent litigation as a drag on the economy. But patent litigation is only a drag if it is not upholding valid patent rights and a patented product is only truly more expensive if the higher price does not reflect what is needed to subsidize the development of future products. Making these decisions requires policy judgments about the value of ideas and the nature of intellectual property that, in my opinion, are beyond the scope of the competition laws. But recognizing the inherent tension between these two bodies of law animates my search for the proper balance of incentives that will propel innovation and dynamic efficiency while keeping markets efficient today.

Fourth, the world's most innovative economies tend to be those with strong intellectual property protections, like the United States and the nations of Europe. And, in case you hadn't guessed it by now, I do not believe that our leadership in innovative technologies is merely a happy coincidence. Although this success has many ingredients, chief among them is a strong patent system, which gives patent holders a basket of rights, including the right to exclude others from practicing, a presumption of patent validity, and the ability to pursue potential infringers in court. This system offers fair reward for insight and hard work and the right incentives to take the necessary risks in pursuing new ideas. What's my proof?: the United States and Europe. Our strong pro-patent legal climates have for centuries provided the staging area for inventions like the telegraph, telephone, the electronic computer, and, of course, Thomas Edison's long-burning filament for the electric light bulb (although I understand the original light bulb was invented in the UK, which has its own rich history of innovation). My belief in the long-term benefits of a strong intellectual property regime lead me to be very cautious about taking actions that could chip away at patent rights, particularly under the banner of promoting competition. Before I vote for an action to limit these critical rights, even indirectly, I look for strong competitive justifications for the need to act and for clear limiting principles to narrowly define the scope of any such action.

With this framework in mind, let me walk you through the key recent FTC advocacy and enforcement actions and give you my perspective on each.

III. Recent Advocacy and Enforcement by The FTC.

A. Standard Essential Patents.

I will begin with our work on patent hold-up in relation to standard essential patents, or SEPs. Many technology and telecommunications products require hundreds, thousands, or even hundreds of thousands of patented inventions to interact seamlessly. The patents relevant to the product often are owned by many different companies, requiring them to work together to allow for interoperation of their respective technologies. Companies can deal with their need for interoperability in several ways – for instance, they can cross-license their patent portfolios or pool their patents, but such bilateral or narrow multilateral solutions often cannot resolve industry-wide interoperability issues. Instead, consensus-based voluntary standard-setting organizations (SSOs) operate to review submitted technologies and determine standards to govern interoperability, including the patented technologies to be covered by the standard.

As you know, a patent is considered "standard essential," or a SEP, when it is declared or incorporated by an SSO into an industry standard. Once a patent is deemed a SEP, implementers must license the patent for any technology using the standard. For example, a manufacturer that wants its routers to interoperate with other wireless devices must license the patents essential to the relevant 802.11 WiFi standards, which are agreed on by the Institute of Electrical and Electronics Engineers, or IEEE, the relevant SSO. There are many SSOs out there, each with its own focus, terms and membership.

The FTC has done a lot of research and advocacy work related to SEPs, including a workshop and related report with DOJ in 2007, a 2010 hearing with the DOJ and the Patent and Trademark Office (PTO), and a comprehensive 2011 report on competition policy. The agency acknowledges the important pro-competitive value of SSOs and has said that "industry standards are widely acknowledged to be one of the engines of the modern economy." We also recently told the Senate that "standards can create enormous value for consumers by increasing competition, innovation, product quality, and choice. Standards lower costs by increasing manufacturing volume, and they increase competition by eliminating switching costs for consumers who want to switch between products manufactured by different companies."

The possible competition issue the FTC and others have identified after studying the SSO process is that SEP holders can use the bargaining power they may gain after having a patent designated "standard essential" either to charge higher royalties for the SEPs or to refuse a license to competitors. Many refer to these practices as forms of "patent hold-up." That is, once an SSO has adopted a standard, implementers across the industry invest to comply with the standard, increasing their switching costs and nearly ensuring industry lock-in to the standardized technology. This lock-in theoretically enhances the bargaining ability of SEP holders, allowing them to charge more in royalties than they could have before the patent was designated essential, in an amount reflecting the increased cost for implementers to switch to another technology. The FTC for years has focused on patent hold-up as a possible competition problem, summarizing its concerns in testimony to Congress in 2012 as follows: "Simply put, the FTC is concerned that a patent holder may use the threat of an [International Trade Commission (ITC)] exclusion order, or an injunction issued in district court, to 'hold up' or demand higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before its [intellectual property] was included in the standard."

Although I agree with my fellow Commissioners that patent hold-up is a theoretical possibility that the FTC, the ITC or a court should consider, I am not convinced that we have made the case yet that merely seeking an injunction, without more, is a competition law violation. In keeping with my philosophy of strong protection for intellectual property rights, transparency, predictability, and fairness, and my reluctance to have government inject itself into free markets needlessly, I have spent my tenure advocating for a more detailed examination of the facts surrounding possible hold-up and for a more balanced treatment of the issue that includes analysis of the several market-based factors that could mitigate hold-up.[10]

This advocacy is finally having some effect. This year, the Commission delivered testimony to the House of Representatives refining its position on patent hold-up and SEPs by explaining that the "Commission acknowledges that several market-based factors may mitigate the risk of hold-up, and this understanding informs our enforcement activity in this complex field." Thus, for example, the Commission now expressly recognizes that "patent holders that are frequent participants in standard-setting activities may incur reputational and business costs that could be sufficiently large to deter fraudulent behavior. Patent holders may also enjoy a first-mover advantage if [their] technology is adopted as the standard. As a result, patent holders

[10] For a critical analysis of the potential risks and downsides to minimizing patent rights in an effort to mitigate patent hold-up, see Richard Epstein, F. Scott Kieff, & Daniel F. Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, JOURNAL OF COMP. LAW & ECONOMICS (March 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907450.

[that] manufacture products using the standardized technology 'may find it more profitable to offer attractive licensing terms in order to promote the adoption of the product using the standard, increasing demand for its product rather than extracting higher royalties.' Finally, patent holders that have broad cross-licensing agreements with the SEP-owner may be protected from hold-up." The Commission also acknowledged the possibility that holdout, that is the "elimination of competition among the potential licensees for the patented technology," may also raise competitive issues.

In addition to these market-based factors that are now being taken into account in analyzing hold-up, the Commission also has recognized that SSOs may mitigate hold up by requiring agreements from their members to license their patents on fair, reasonable, and non-discriminatory, or FRAND, terms should those patents ever become essential to a standard. But most SSOs have not formally defined the exact meaning of their FRAND commitments. In particular, most SSOs have never clearly established whether a SEP owner must always try to negotiate a FRAND license or whether there are times the SEP owner can try to enjoin a manufacturer from using a SEP. Today, this issue is being litigated by private parties – mainly large technology companies – in federal courts around the country and before agencies like the ITC. Some of these courts, as well as the SSOs, have begun to acknowledge the problems in suing for breach of a vague FRAND commitment.

But the record here in the federal courts and at the ITC is inconsistent and, even within the FTC, I fear that my advocacy has not always prevailed. In the past year, I voted against and issued dissents on each of the two major Commission enforcement actions in this area.

Each of these actions involved SEPs and the use of Section 5 of the FTC Act, which prohibits, among other things, "unfair methods of competition." In the first matter, *Robert Bosch*

GmbH (Bosch),[11] the agency investigated a proposed acquisition by Bosch that raised competitive concerns in the market for certain automotive air conditioning repair equipment. During the course of the investigation, FTC staff uncovered evidence indicating that the acquired company, SPX Service Solutions (SPX), had sought injunctive relief against competitor firms that were interested in licensing certain SPX patents that may have been standard-essential and that SPX allegedly had offered to license on reasonable and non-discriminatory (RAND) terms.[12] The FTC settled this matter with Bosch, requiring Bosch to divest certain assets to address the proposed merger.[13] To address the alleged patent-related conduct, the FTC required Bosch, first, to agree not to seek injunctions on its standard-essential patents against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis.[14]

In the second matter, the FTC investigated and ultimately entered a settlement with Google and its recently acquired subsidiary, Motorola Mobility.[15] As in *Bosch*, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act – but not the antitrust laws – by seeking injunctive relief against competitors that were willing to license certain standard-essential patents that Motorola had agreed to license on RAND terms through its participation in several standard-setting organizations.[16] In *Google*, the remedy imposed by the FTC was more complex than the flat prohibition on seeking injunctive relief imposed in *Bosch*. Rather, the

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[11] *In re* Robert Bosch GmbH, FTC File No. 121-0081.

[12] *Id.*, Analysis of Agreement Containing Consent Orders to Aid Public Comment, at 4 (Nov. 26, 2012), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf.

[13] *See id.* at 3-4.

[14] *See id.* at 4-5.

[15] *In re* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120.

[16] *See id.*, Analysis of Proposed Consent Order to Aid Public Comment, at 3-6 (Jan. 3, 2013), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

FTC's consent order established a multi-step process that Google must undertake before it is permitted to seek injunctive relief on its standard-essential patents.[17]

In my dissents in the *Bosch* and *Google* matters, I took issue with, among other things, the lack of transparency and guidance that the FTC's decisions provided to patent holders and others subject to our jurisdiction.[18] In particular, I raised concerns about the FTC enforcing Section 5 without providing sufficient information about the relationship between that statutory provision and the antitrust laws, including the Sherman and Clayton Acts. Without such information, it is unclear what the term "unfair method of competition" means or how the Commission will use its enforcement discretion under Section 5. The inherent ambiguity in the FTC Act makes it all the more important that the agency provide meaningful limiting principles to application of Section 5. I proposed a set of principles this summer and have been advocating for dialogue on this point.[19]

A related point I raised in my *Bosch* and *Google* dissents is that one of the effects of those decisions was to create conflict between the FTC and other U.S. government institutions.[20] The first such conflict arises between the FTC on the one hand and the ITC and the federal courts on the other as a result of our prohibiting holders of standard-essential patents from seeking injunctive relief before these institutions. Our decisions effectively tell holders of standard-essential patents that they cannot go to the ITC, where the only available relief is an exclusion

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[17] *See id.* at 6-8.

[18] *See In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3-4 (Nov. 26, 2012) [hereinafter Ohlhausen *Bosch* Statement], *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf; *In re* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1-3 (Jan. 3, 2013) [hereinafter Ohlhausen *Google* Dissent], *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

[19] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Remarks at the U.S. Chamber of Commerce, Section 5: Principles of Navigation (July 25, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

[20] *See* Ohlhausen *Bosch* Statement, *supra* note 18, at 1-2; Ohlhausen *Google* Dissent, *supra* note 18, at 5-6.

order. I would note that I am not saying that competition policy should take a secondary position to other industrial policy concerns. Quite the contrary, the FTC has correctly advocated for a greater role for competition in U.S. industrial policy decisions. However, as I have noted, I believe we need to exhibit a certain amount of regulatory humility and recognize that we may not be the best-positioned governmental entity to act in a particular area if other government institutions have the authority and expertise to address the relevant issues.[21]

The second institutional conflict created by these two decisions is between the FTC and the DOJ. When we rely on Section 5 of the FTC Act, which only the FTC can enforce, rather than the antitrust laws, which both agencies enforce, we potentially create two different standards for patent holders, depending on which agency happens to review any alleged misconduct. One wonders how this institutional conflict is viewed by industry, as well as foreign competition authorities.

An additional key concern for today's topic raised by these cases is what may be perceived as insufficient recognition of intellectual property rights. In both *Bosch* and *Google*, the FTC placed significant restrictions on the ability of holders of standard-essential patents to seek injunctions, which is a critical intellectual property right.[22] In my view, the FTC did this in each case with very little, if any, evidence that the patent holder agreed to waive this right when it participated in the standard-setting process. Further, in *Bosch*, the FTC required Bosch to grant royalty-free licenses on its patents as a remedy for seeking injunctions on its potentially standard-essential patents.[23] No matter how good the intentions may have been in these cases,

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[21] *See* Ohlhausen *Bosch* Statement, *supra* note 18, at 2.

[22] *See In re* Robert Bosch GmbH, FTC File No. 121-0081, Decision and Order, at 13-14 (Nov. 26, 2012) [hereinafter *Bosch* D&O], *available at* http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf; *In re* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, Decision and Order, at 6-12 (Jan. 3, 2013), *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

[23] *See Bosch* D&O, *supra* note 22, at 13.

my concern is that they may send a message to the market and to our foreign counterparts that we do not place a very high value on intellectual property rights. Any such perception is clearly inconsistent with the appreciation for IP rights that we typically hold in the United States. Thus, I would recommend that any agency or party interested in relying on these decisions proceed with caution and consider all of the Commissioner statements that were issued in connection with those decisions.

Let me share with you an example of where I have seen foreign enforcers potentially misinterpreting the ambiguous message on intellectual property rights we may be sending at the FTC. Earlier this year, I was in China attending a conference and meeting with Chinese competition officials. At the conference, I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. In addition, it was suggested that when read in light of this doctrine, the FTC's Google decision implies that a SEP is an essential facility and an unreasonable refusal to license that SEP constitutes monopolization. It was further suggested that the best remedy for monopolization with a SEP would be compulsory licensing because permitting more parties to use the SEP would facilitate competition.

This is not an accurate reading of relevant U.S. law or, in my opinion, of the FTC's decision in Google. This sort of misinterpretation is troubling on two levels. First, it undercuts the value of intellectual property rights and gives our counterparts abroad the misperception that we support wide application of compulsory licensing, which is completely incorrect. Second, if these misperceptions about our SEP enforcement actions here in the U.S. are implemented elsewhere in the world, the resulting harm to patent rights would create serious disincentives for investment in research and development and ultimately harm innovation.

B. Patent Assertion Entities.

Let me turn now for a few minutes to another major topic implicating patent hold-up, the conduct of patent assertion entities. A patent assertion entity, or PAE, is typically understood to mean a firm that owns patents but does not practice them, and that did not contribute to the research and development of those patents. The business model for many PAEs is to broadly assert and litigate the patent claims and thereby derive licensing and other revenues from entities already practicing the patented technology. Here are a few facts for context:

- Nearly 5,000 patent lawsuits were filed in 2012; this is up from roughly 2500 in 2010.[24]
- It has been estimated that PAE-generated revenue cost defendants and licensees $29 billion in 2011 – 400% more than in 2005.[25]
- As of December 1, 2012, PAEs brought roughly 60% of patent infringement lawsuits for the year. This is up from 45% in 2011 and just 19% in 2006.[26]
- PAEs make 100 or more demands for each lawsuit filed.[27]
- Studies show that NPE/PAEs buy and litigate the patents of small companies (50%) and individual inventors (28%) more than the patents of others.[28] This means they may serve a pro-competitive benefit of protecting the little guy in monetizing patents. Other studies

[24] Executive Office of the President, Patent Assertion and U.S. Innovation, June 2013, at 5 [hereinafter PAE Report].

[25] James Bessen and Michael J. Meurer, *The Direct Costs from NPE Disputes* (Boston Univ. School of Law and Economics Research Paper No. 12-34, 2012); Jon Leibowitz, Chairman, Fed. Trade Comm'n, Opening Remarks at Patent Assertion Entity Workshop (Dec. 10, 2012) at 3, *available at* http://www.ftc.gov/speeches/leibowitz/121210paeworkshop.pdf.

[26] Colleen Chien, Patent Assertion Entities (Presentation at 2012 FTC/DOJ PAE Workshop) (Dec. 2012) at 23, *available at* http://www.justice.gov/atr/public/workshops/pae/presentations/290073.pdf.

[27] *Id.* at 25.

[28] *Id.* at 47.

show, however, that the targets of PAE lawsuits are more often than not small companies on whom the impact is potentially more harmful.[29]

- Studies also have shown that the legal costs exceed the settlement 90% of the time.[30]
- Finally, another recent study showed that PAEs lose 92% of the time when litigated to trial on the merits.[31]

Many people are sounding the alarm on PAEs and calling for swift and far-reaching action in this area, including President Obama, whose office issued a report in June, claiming that PAE activity "significantly retard[s] innovation in the United States and result[s] in economic 'dead weight loss' in the form of reduced innovation, income, and jobs for the American economy."[32] The report calls for three action items: (1) "clearer patents with a high standard of novelty and non-obviousness," (2) "reduced disparity of litigation costs between patent owners and technology users," and (3) "greater adaptability of the innovation system to challenges posed by new technologies and new business models."[33]

Congress also is considering action and has been evaluating several pieces of patent reform legislation. Most of the bills are directed to modifying the litigation system, some more broadly than others. The bills include the End Anonymous Patent Act, the Patent Quality Improvement Act, the Patent Abuse Reduction Act, the Patent Litigation and Innovation Act, and probably several others that have been likely drafted and co-sponsored since I began this speech.

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[29] *Id.* at 49-52.

[30] *Id.* at 68.

[31] John. R. Allison, Mark A. Lemley, and Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L. J. 677, 694 (2011).

[32] PAE Report, supra note 24, at 12.

[33] *Id.* at 13.

One of the earliest bills garnering attention that is still being discussed is the SHIELD Act ("Saving High-tech Innovators from Egregious Legal Disputes"). This bill, one of the narrowest in its scope but most severe in its treatment of PAEs, calls for specifically increasing the cost for PAEs to litigate by shifting the fees of litigation to the losing party if it is a PAE and requiring PAEs to post bond.[34]

Another leading bill, perhaps the one with the most support right now, is the "Innovation Act," which was introduced in October by House Judiciary Chairman Bob Goodlatte of Virginia.[35] This bill offers sweeping changes to our patent litigation system in the hopes of reducing patent abuse. For example, it would impose tougher pleading requirements, require courts to shift fees to the losing party, except where the party was "reasonably justified" in bringing its case, allow lawsuits against customers to be stayed where a manufacturer intervenes and the customer agrees, and limit discovery to certain core materials until after claim construction. In addition, the bill provides for changes to the patent laws, including better recordation of patents and other changes more technical in nature. Recent amendments to the bill provide that sending purposely evasive demand letters to end users of patented products is an abuse of the patent system and call for a study of bad faith demand letters.[36] This bill, which initially received praise from the head of the PTO and enjoys bipartisan support, is now raising concerns because of the potential implications for non-PAE patent litigation, as well as for the specific changes this bill would make to the federal rules of civil procedure.[37]

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[34] Saving High-tech Innovators from Egregious Legal Disputes (SHIELD) Act of 2013, H.R. 845, *available at* http://beta.congress.gov/bill/113th-congress/house-bill/845/text.

[35] See H.R. 3309, Mark-up of The Innovation Act, *available at* http://judiciary.house.gov/hearings/Markups%202013/mark_11202013.html.

[36] *Id.*

[37] Such specific changes in these rules of procedure normally lay mainly within the province of the judiciary under the Rules Enabling Act, specifically its policymaking body, the Judicial Conference.

There are companion bills in the Senate, including the Patent Transparency and Improvements Act, introduced in late November and sponsored by Senators from both parties, including Senate Judiciary Chairman Patrick Leahy of Vermont, Senator Mike Lee of Utah, and Senator Sheldon Whitehouse of Rhode Island. This Senate bill contains several litigation and patent law reform provisions similar to the House's Innovation Act, but goes a step further by expanding the authority of my agency, the FTC, to pursue any demand letters issued in bad faith by PAEs. The bill characterizes these demand letters as unfair or deceptive acts and practices in violation of the FTC Act, so long as the letters would be likely to mislead a reasonable recipient.

Although I see possible value in these proposals, like recordation of parties in interest, and I believe that a patent litigation issue may exist, I am concerned we may be acting precipitously with these bills and with the general call to action against PAEs from so many influential people. I would counsel caution before making any sweeping changes, because, if you look closely, you will find mixed and incomplete evidence on the economic effects of PAE activity and on the causes of the recent surge in patent litigation.

For example, although several studies point to a rise in patent litigation brought by PAEs, like those I cited earlier, others seem to indicate just the opposite. The U.S. Government Accountability Office (GAO) in August issued the results of its in-depth study into patent infringement litigation, just a couple of months after the President's report.[38] The GAO report revealed that in many respects the conventional wisdom out there about PAEs, including much of what was cited to by the President in his June report, may be off base. Let me read you a portion of what they concluded: "Operating companies [which they define as those that produce products] brought most of the patent infringement lawsuits from 2007 to 2011. According to our

[38] GAO, Intellectual Property: Assessing Factors That Affect Patent Litigation Could Help Improve Patent Quality (Aug. 22, 2013), *available at* http://www.gao.gov/assets/660/657103.pdf [hereinafter GAO Report].

analysis of data for this period, operating companies and related entities brought an estimated 68 percent of all lawsuits. PMEs [GAO's term for PAEs, which stands for Patent Monetization Entities] and likely PMEs brought 19 percent of the lawsuits. PMEs and likely PMEs brought 17 percent of all lawsuits in 2007 and 24 percent in 2011, although this increase was not statistically significant. In contrast, operating companies and related entities filed 76 percent of the lawsuits in 2007 and 59 percent in 2011, a statistically significant decrease."[39]

Although I certainly do not expect uncontroverted proof of harm before I move forward with a case – one of my jobs is to exercise prosecutorial discretion in determining when there is "reason to believe" a harm is or could likely occur that my agency needs to address – the findings from GAO, an independent, nonpartisan agency that works for Congress, almost directly contradict the studies offered as proof of a problem by those now calling for sweeping changes to our litigation system. This gives me pause.

Perhaps even more important, GAO concludes the increased patent litigation we are seeing has almost nothing to do with PAEs. GAO writes: "Public discussion surrounding patent infringement litigation often focuses on the increasing role of NPEs. However, our analysis indicates that *regardless of the type of litigant*, lawsuits involving software-related patents account for about 89 percent of the increase in defendants between 2007 and 2011, and most of the suits brought by PMEs involved software-related patents. This suggests that the focus on the identity of the litigant—rather than the type of patent—may be misplaced."[40] GAO is not alone in this opinion – both the PTO and the FTC identify patent quality as one of the main possible causes of increased patent litigation, particularly software patents.[41]

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[39] GAO Report, August 2013, at 17 (internal citations omitted).

[40] *Id.* at 45.

[41] *Id.* at 40.

Moreover, PAEs actually have some fans – and I'm not just referring to the PAEs themselves. Those supporting PAEs contend they help promote innovation and resolve inefficiencies in the patent system. PAEs offer a means for small companies and individual inventors to more efficiently protect and monetize their inventions. This sounds like a not unreasonable contention and, if it is correct, some PAEs actually could be addressing a market inefficiency – large companies with deep pockets infringing the patents of smaller companies with little independent recourse.

The key question is whether PAEs are distorting competitive dynamics in technology markets and chilling innovation by buying patents and asserting them on unsuspecting victims. The FTC has acknowledged the potential issues created by PAEs, but I believe we cannot yet answer this question conclusively. There are many types of PAEs with many different business plans of varying levels of success and no one can say for certain what net effect these businesses are having on the economy. We must therefore take steps to understand whether there is a problem with PAEs and, if so, the nature and scope of the problem. Otherwise, other policymakers could be wasting time and resources solving the wrong problem. And, worse, in the process they could end up doing more harm than good by chilling legitimate infringement litigation and diminishing the basket of rights that have successfully fueled our innovative economy for so many years.

The FTC, answering calls to action by members of Congress, announced this Fall a proposed comprehensive study of PAEs.[42] The agency has as part of its statutory mandate under Section 6(b) of the FTC Act the authority to conduct such industry studies, including through the issuance of subpoenas to market participants for their confidential information. The agency

[42] Fed. Trade Comm'n, Notice and Request for Public Comment on PAE Activity, 78 Fed. Reg. 61,352 (Sep. 27, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24230.pdf.

plans to use its unique power to address questions that others have been unable to answer thus far, including:

1. How do PAEs organize their corporate legal structure, including parent and subsidiary entities?

2. What types of patents do PAEs hold, and how do they organize their holdings?

3. How do PAEs acquire patents, and how do they compensate prior patent owners?

4. How do PAEs engage in assertion activity (i.e. demand, litigation, and licensing behavior)?

5. What does assertion activity cost PAEs?

6. What do PAEs earn through assertion activity?[43]

This will likely be the most comprehensive and in-depth analysis of this issue, with more than 25 PAEs operating across a variety of industries likely to receive information requests. We also are planning a benchmarking exercise in which we will be sending out information requests to another 15 entities that assert patents.[44] This latter group will be concentrated in the wireless telecommunication sector and include manufacturers, patent pools, and other entities in this space that license and assert patent rights. In keeping with my philosophy of transparent, predictable, and well-informed government action, I would urge any interested parties to send in your comments – we recently extended the comment period until December 16th – and I would counsel anyone pushing for strong action directed against PAEs to wait for the results of our work, particularly if they are looking to make sweeping changes to the patent system or the litigation system. We do not know what the root issue is here and therefore any legislative or executive actions at this point run a significant risk of doing more harm than good.

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[43] *Id*. at 61,353.

[44] *Id.*

Personally, I support the FTC's efforts to examine the PAE issues and advocate for greater clarity and certainty in the patent system. But given the absence of concrete evidence out there of harm, I have serious questions about whether this is a competition law problem or whether it is an issue in the patent system itself. One recent study indicates 82% of PAE defendants were sued for infringing software patents.[45] Another study estimates that it is five times more likely a software patent will be the subject of a lawsuit as a chemical patent.[46] It is even worse for business method patents, which are roughly fourteen times as likely to end up in litigation.[47] This suggests to me that we may be experiencing a problem in how to adequately define strong patents in terms of their nonobviousness, novelty, or other characteristics, which may not necessarily be a competition law problem. I hope the agency's 6(b) study will better help us understand this matter and inform people on all sides, before Congress passes legislation or the White House and other federal agencies take actions that may have unintended consequences.

As is probably obvious from what I have said about the agency's enforcement actions relating to patent hold-up in *Google/SEPs* and *Bosch*, as well as my philosophy of transparency, predictability, and fairness, I would be very cautious about expanding Section 5 unfair methods of competition liability to attach to basic claims of infringement by PAEs. Only where there is some evidence of additional conduct by a PAE that tends for instance to undermine the patent process or that falls within a recognized exception to the basic right to seek relief in court, like sham or repetitive litigation, would I be compelled to intervene. But, as with SEPs and other issues at the frontier of the intellectual property laws and competition policy, I am still evaluating

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[45] PAE Report, *supra* note 24, at 5.

[46] *Id.*

[47] *Id.*

these issues and will continue to refine my position on the nature of this problem and the appropriate remedy as we get more insight into the roots and scope of the problem.

C. Reverse Payment Settlements.

The last issue I would like to present involves so-called reverse payment patent settlements among pharmaceutical companies – also referred to as pay-for-delay agreements.

In a typical pay-for-delay agreement, the branded manufacturer pays the potential generic entrant to delay its entry into the market. An FTC staff study has estimated that a ban on such agreements would result in approximately $3.5 billion in annual savings to drug purchasers.[48] It is important to note that the number of these patent settlements continues to rise year after year.

After more than a decade of FTC challenges to these agreements in the courts, last year the Third Circuit Court of Appeals, in the *K-Dur* decision, found that pay-for-delay payments are presumptively unlawful, adopting the position that, when compensation flows from the brand to the generic and the generic delays entry, the burden shifts to the parties to show that the compensation was not paid in exchange for that delay.[49]

The *K-Dur* decision created a split among circuit court decisions in pay-for-delay matters, and set the stage for the Supreme Court's review of the *FTC v. Actavis, Inc.* matter. At issue in this case was the validity of the legal standard applied by the Eleventh Circuit Court of Appeals to reverse payment settlements. That standard, which is often referred to as the "scope of the patent" test, holds that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effect falls

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[48] FTC Staff Study: How Drug Company Pay-Offs Cost Consumers Billions 7-8 (Jan. 2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[49] *In re* K-Dur Antitrust Litig., 686 F.3d 197 (3d Cir. 2012).

within the scope of the exclusionary potential of the patent." The FTC strongly disagreed with the Eleventh Circuit's view.

As some of you may know, the Supreme Court issued its decision this year ruling that the FTC should be allowed to proceed with its case – under the rule of reason. The Court held that, although there is support for a legal policy that favors the settlement of private disputes, this factor alone cannot override other antitrust policy considerations. According to the Court, those considerations include, among others, that reverse payments have the potential for genuine adverse effects on competition, large payments may be indicative of market power, and branded and generic companies can still settle on terms that do not involve reverse payments – for example, by agreeing to an earlier generic entry date.

Nonetheless, the Court rejected the FTC's argument that reverse payments should be reviewed under a so-called quick look approach, finding that the courts must apply a standard rule of reason analysis.

The dissent in this matter, authored by Chief Justice Roberts, would have upheld the Eleventh Circuit's scope of patent test. Among other things, the dissent argued that taking the prospect of settlements off the negotiating table may very well dampen the incentives for generic manufacturers to challenge pharmaceutical patents in the first place.

Looking ahead, as Chairwoman Ramirez mentioned in a recent statement, the FTC is moving forward with the Actavis litigation itself. The Commission is also studying the Court's opinion and assessing how best to protect consumers' interests in other pay-for-delay cases. The Commission recently submitted an amicus brief in a reverse payment case involving the drug Effexor. We argue there that even certain non-cash settlements, like a promise by the branded pharmaceutical company not to introduce its own generic drug to compete with the third party generic, should be treated as reverse payment settlements subject to the analysis under *Actavis*.[50]

IV. Conclusion.

As you can see, the FTC is actively mapping the terrain at the intersection of the intellectual property and antitrust laws. We are developing a nuanced approach to analyzing and enforcing patent hold-up issues related to SEPs and PAEs, including consideration of mitigating factors, as well as pushing forward to challenge anticompetitive agreements involving patents. We will continue to pursue a deeper understanding of how we can work within our mandate to balance the innovation investments we need for tomorrow with the efficiency demands of the dynamic and increasingly cost-conscious economy of today. Thank you for your time.

[50] FTC, Amicus Brief, In re Effexor XR Antitrust Litig. (D. N.J., Aug. 14, 2013), *available at* http://www.ftc.gov/os/2013/08/130816effexoramicusbrief.pdf.