WITH ACTING FTC CHAIRMAN MAUREEN OHLHAUSEN[1]

Thank you, Acting Chairman Ohlhausen, for granting this interview to CPI.

1. As you see it, what are some of the most important evolving issues at the crossroads of IP and Antitrust law and policy today?

Innovation is a critical input to a successful economy. IP law promotes innovation by establishing enforceable rights for creators and visionaries, whether they develop new and useful products, more efficient product improvements or, in the case of copyright, original works of expression. Without IP protection, imitators could freely copy the work of others. This copying would reduce the incentives to innovate or invest in research and development, ultimately depriving consumers of the benefits of better goods.[2] Competition law likewise promotes innovation, by driving firms to produce new or improved products or services, with an eye towards entering a market, or improving a market position.

IP and antitrust law promote innovation most effectively when one does not undermine the effectiveness of the other. Antitrust enforcement must recognize the incentives to innovate created by the patent system. We cannot condemn efficient, legitimate, uses of patent rights because, in the end, this behavior is short-sighted. While everyone might like to get today's innovations at a lower cost, abridging patent rights through the antitrust laws will discourage the future investments needed to create tomorrow's advancements. At the same time, invalid or overbroad patents discourage follow-on innovation, prevent competition and raise prices through unnecessary licensing and litigation. Opaque patent notice and over- or under-compensation for infringing valid IP rights can likewise upset the balance of the IP marketplace.

As Acting Chairman, I will direct the FTC to engage with the intersection of IP and antitrust law in two ways. First, we should use our advocacy and policy tools to promote a functional IP marketplace. This is one where patent boundaries provide clear notice to all marketplace participants on issues of infringement and validity, and where patent remedies reproduce the compensation that a free market would have awarded, absent infringement. Second, we should use our enforcement authority to take a "sensible and balanced" approach to IP rights as facts and evidence dictate.

Below, I discuss each of these tools in more detail. In particular, I explain how the FTC's recent PAE report demonstrates my commitment to using evidence based analysis in the Commission's advocacy efforts in the IP space. I likewise explain how the Commission's revised IP Guidelines represent a functional and utilitarian approach to evaluating antitrust questions that arise in the context of IP licensing.

Finally, we do not operate in a vacuum. IP and antitrust law are dynamic regimes. The FTC must take account of how others — courts, the ITC and the USPTO, among others — are changing intellectual property law.

2. On January 13, 2017, the FTC and DoJ issued updated Antitrust Guidelines for the Licensing of Intellectual Property What are some of the key updates in the Guidelines and in what ways do they reinforce themes from the 1995 Guidelines?

The agencies' Antitrust Guidelines for the Licensing of Intellectual Property[3] state our enforcement policy with respect to the licensing of intellectual property. As you note, this is the agencies' first update since the Guidelines issued in 1995.

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1 The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

2 The United States government recently reported that IP-intensive industries support at least 45 million U.S. jobs and contribute more than $6 trillion dollars to, or 38.2 percent of, U.S. gross domestic product. U.S. Dep't of Commerce, Intellectual Property and the U.S. Economy: 2016 Update (2016), https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf.

3 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter 2017 Guidelines].

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IP licensing generally is procompetitive. Antitrust enforcers have a role to play, however, in protecting against competitive abuses. I have expressed concern when some overseas enforcers use their antitrust laws to dilute IP rights. This behavior inappropriately converts antitrust law into a tool for price regulation. It likewise creates harmful disincentives because it disrupts the complementary roles that antitrust and intellectual property law play in promoting innovation. Consequently, I have long favored an evidence-based approach towards evaluating potential IP abuses in the antitrust space.

The 2017 Guidelines, like the 1995 Guidelines before them, exemplify my evidence-based approach to the complex issues at the intersection of antitrust and intellectual property. In particular, they offer the following useful guideposts.

First, the Guidelines represent a modest update, embracing principles of commendable flexibility. Some commenters recommended that the agencies create new, specialized, guidelines to address FRAND-encumbered SEP, PAE or pay-for-delay issues. I opposed this suggestion. As I have said before, "IP issues are not a special case that requires a different competition jurisprudence."[4] We should not establish new standards absent compelling evidence to do so.

Second, the Guidelines continue to affirm that IP laws grant "enforceable rights," which have social value.[5] Intellectual property laws incentivize innovation by establishing enforceable boundaries to protect new products, more efficient processes, and original works of expression. Without IP rights, imitators could exploit investments in R&D without compensation. As the Guidelines recognize, "Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers."[6]

Third, the Guidelines state that "antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors."[7] Read together with the Agencies' 2007 IP Report, which stated that, "liability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections,"[8] it is clear that the Guidelines will continue to protect strong IP rights in the United States.

3. Today, intellectual property is, in many ways, international in scope. In the patent context, this globalization has arisen with a recent focus on the extraterritorial reach of patent remedies. Does the FTC have a position about this or a specific outlook for antitrust's reach for global markets in the near future?

International antitrust issues continue to be dynamic and fast-paced. In the past twenty-five years, the number of jurisdictions with competition laws has grown from a few dozen to more than 120. Competition, economic and political standards within these jurisdictions are diverse. Intellectual property law regimes likewise vary, sometimes broadly, across the globe.

Although governmental structures are national, companies commonly operate on a global scale. Trade — and the intellectual property licenses often necessary to facilitate that trade — frequently cross many borders. Within this worldwide arena, the FTC increasingly engages with our global antitrust colleagues to promote sound antitrust principles and practices. Global consumers and economies benefit from coherent and effective competition laws. Predictable enforcement also lowers unnecessary costs and improves results for consumers.

Turning from advocacy to enforcement, U.S. antitrust law — specifically the Foreign Trade Antitrust Improvements Act ("FTAIA") — recognizes that domestic agencies and courts can assert antitrust jurisdiction over behavior occurring outside of the United States when there are "direct, substantial, and reasonably foreseeable effects," on U.S. domestic commerce, U.S. import commerce, or the export commerce of a U.S. exporter.[9] In January, the FTC and DOJ issued revised "Antitrust Guidelines for International Enforcement and

4 ABA Section of Antitrust Law's Intellectual Property Committee, *Interview of Commissioner Ohlhausen*, PUBLIC DOMAIN 11-12 (Feb. 2016).

5 Id. at 1-2.

6 Id. at 2.

7 Id. at 3.

8 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights, Promoting Innovation and Competition 30 (2007) ("[L]iability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections."), www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

9 15 U.S.C. § 6a (2012).

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Cooperation,"[10] which address the agencies' approach to the FTAIA. The International Guidelines state that, "Whether an alleged effect on such commerce is direct, substantial, and reasonably foreseeable is a question of fact."[11] These Guidelines, and their balanced standards, apply to all extraterritorial conduct, which includes behavior at the intersection of antitrust and intellectual property. Going forward, the FTC will continue to promote convergence toward sound, economics-based competition policy and enforcement. We will keep building and maintain strong bilateral relations with foreign competition agencies, participating in multilateral organizations, such as ICN and the OECD, and facilitating dialogue on these important issues. Because intellectual property questions raise cross-agency issues within the United States, we will work with our U.S. government colleagues to promulgate consistent competition enforcement policies throughout the world.

4. In a recent paper, you wrote that the patent system is the object of unprecedented criticism and that the world of fast changing technologies distresses a one-size-fits-all patent system. Could you elaborate? Is additional patent reform necessary?

I have consistently advocated for the rights of legitimate inventors to monetize their innovations, cautioned against undermining IP rights, and sought targeted responses to problems within the contemporary patent system.[12] My most recent article, in the *Harvard Journal of Law & Technology*, explores the empirical and theoretical literature on the relationship between patents and innovation.[13] I posit that the most beneficial patent policy cannot overlook the strong theoretical or evidentiary justifications for property rights, especially in technology sectors. This does not mean that granting ever-stronger patent protection will inevitably lead to greater innovation. Limited patent reform may be appropriate to address identified problems such as insufficient quality control, the broad scope of certain method patents and inadequate disclosure.

Several findings in the economic literature inform my analysis. Park and Ginarte examined data from sixty countries between 1960 and 1990 to explore the relationship between IP rights and economic growth. They found that "IPRs affect economic growth by stimulating the accumulation of factor inputs like research and development capital and physical capital."[14] Following that study, Kanwar and Evanson dissected cross-country data on R&D investment and patent protection from thirty-two countries between 1981 and 1995, finding that "[t]he evidence unambiguously indicates the significance of intellectual property rights as incentives for spurring innovation." In particular, "[t]he strength of intellectual property protection is positively and significantly associated with R&D…
Thus, countries which provided stronger protection tended to have larger proportions of their GDP devoted to R&D activities."[15]

More current empirical work continues to find a statistically significant relationship between patent strength and R&D investment. A 2013 Brookings report observed, "Research has established that patents are correlated with economic growth across and within the same country over time" and "R&D spending since 1953 is highly correlated with patenting and the patent rate." Studying U.S. data between 1980 and 2010, the report concluded that "patenting is associated with higher metropolitan area productivity" and that "the most likely explanation is that patents cause growth."[16]

There likewise is evidence that changes in the strength of patent protection influences firm behavior. In a well-known study, Hall and Ziedonis examined the U.S. semiconductor industry between 1979 and 1995. They found that "large-scale manufacturers have invested far more aggressively in patents during the period associated with strong U.S. patent rights, even controlling for other known

10 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.

11 Id. at 21.

12 See, e.g. Maureen K. Ohlhausen & Joshua D. Wright, *Reply Submission on the Public Interest — In re Certain 3G Mobile Handsets & Components Thereof*, U.S. Int'l Trade Comm'n (July 20, 2015) [hereinafter *Reply Submission*]; Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Speech to the China Intellectual Property Law Association's IP and Antitrust Forum: Antitrust Oversight of Standard-Essential Patents: The Role of Injunctions (Sept. 12, 2015) [hereinafter Antitrust Oversight of Standard-Essential Patents]; Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Remarks Before the Second Annual GCR Live Conference: Antitrust Enforcement in China — What Next? (Sept. 16, 2014).

13 Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 Harv. J. L & Tech. 103 (2016).

14 Walter G. Park & Juan Carlos Ginarte, *Intellectual Property Rights and Economic Growth*, 15 Contemporary Econ. Pol'y 51 (1997).

15 Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technological Change?*, 55 Oxford Econ. Papers 235, 249-250 (2003).

16 Id. at 15.

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determinants of patenting."[17] This is only a short summary of the evidence presented in my paper. Nevertheless, it supports my view that strong patent rights should remain at the heart of U.S industrial policy.

A well-founded understanding of the importance of IP rights does not, however, replace the need for a critical eye to ensure that patents perform their optimal function. As I have said before, blind faith — either in promoting or abrogating patent rights — is "an irresponsible foundation for action by policymakers."[18]

So how does my approach apply in practice? Turning to your question on patent reform, the FTC's recent Patent Assertion Entity ("PAE") report provides a useful case study to explain my approach to course correction in the IP space.[19] PAEs are businesses that acquire patents from third parties and then try to make money by negotiating with, or suing, accused infringers who are already on the market. Because PAE activity focuses on post-development activity, it has raised policy questions about the role of PAEs in promoting innovation and economic growth.

Congress, the Supreme Court, the White House and the USPTO each have expressed significant interest in PAE activity. Still, before we began our research, little was known about non-public PAE behavior. Consequently, I supported the FTC's use of its statutory tools[20] to provide a greater understanding of PAE acquisition, litigation and licensing practice because more data on the non-public aspects of PAE activity improves the policy dialogue.

The PAE report presents a wealth of empirical research. Unfortunately, I cannot provide complete detail here. A few findings, however, are notable for their contribution to any patent reform debate.[21]

First, the FTC identified two distinctly different business models. Portfolio PAEs focused on negotiating licenses to large patent portfolios. Litigation PAEs, by contrast, focused on suing accused infringers and settling quickly. There was surprisingly little crossover in the behavior of these two groups. The Commission's policy recommendations are best understood within the context of Litigation PAEs.

Infringement lawsuits played a key role in the viability and success of the Litigation PAE business model. More than ninety-percent of their licenses followed litigation, and these cases settled quickly. Parties typically settled for less than $300,000, an amount that defendants could expect to pay through initial discovery. The Commission reasoned that, "[g]iven the relatively low dollar amounts of the licenses, the behavior of Litigation PAEs is consistent with nuisance litigation."[22]

To be clear, infringement litigation plays an important role in protecting patent rights. The ability to sue others for copying your invention, among other things, is crucial to establishing the property boundaries necessary to promote innovation. At the same time, nuisance litigation, which relies on estimated costs and not the strength of the patent claims, can tax judicial resources and divert attention away from productive business behavior.

Accordingly, the report presents tailored recommendations to alleviate potential litigation abuses. For example, the report proposes case management practices that could mitigate litigation cost asymmetries between PAE plaintiffs and defendants. The report also recommends that Congress pass rules increasing transparency and encourages courts to stay litigation by PAEs against end users when parallel proceedings already are underway against the manufacturer. I support these proposals because they are narrowly tailored to address observed behavior, without leading to unintended consequences well beyond PAE activity.

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17 Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the US Semiconductor Industry, 1979-1995*, 32 RAND J. Econ. 101, 104 (2001).

18 Ohlhausen, supra note 13 at 108.

19 Fed. Trade Comm'n, Patent Assertion Entity Activity: An FTC Study (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf. [hereinafter PAE Report].

20 15 U.S.C. § 46(b) (2012). While we had access to a significant volume of non-public information, we were unable to review the business practices of all PAEs. This is because, unlike other industries, the full universe of PAEs is not known. As a result, the report is a case study that focuses on the most economically important PAEs, as well as PAEs of various sizes. Overall, the FTC analyzed 22 PAEs, more than three-hundred asserting affiliates, and more than 2000 entities that held patents, but did not assert. Those Study PAEs accounted for over 75 percent of all U.S. patents that PAEs held at the end of 2013, and a substantial portion of PAE patent infringement litigation initiated during the study period.

21 Some have questioned the FTC's decision to include policy recommendations. I believe that, given the recurring interest in legislating changes in this area, the FTC has a responsibility to offer informed guidance to help ensure any changes have a positive impact in the IP marketplace.

22 PAE Report, supra note 19 at 4.

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As I concluded in my recent article, the United States economy stands out for its exceptional innovation policy. Patents are a pillar of this innovation platform. While some stake their ground at the poles of the patent reform debate, the real picture is more complex. Consequently, a careful approach to patent reform requires incremental adjustment based on evidence and sound reasoning.

5. Lastly, what is your approach to an expansion of the FTC's role in safeguarding consumer protection and privacy?

Protecting consumers, including their privacy, remains central to the FTC's mission, and we have long served a critical role in such efforts. Under the previous administration, parts of that role were cleaved off and handed to other agencies such as the FCC and the CFPB. Given the FTC's long record of using enforcement and other tools to protect consumers, I support the relevant functions being returned to the FTC. This would be a restoration of our role, not an expansion. And within our current role, I would like to refocus our efforts on bread and butter fraud enforcement, where we can use our limited resources to do the most for consumers. In the privacy area, as in other areas of consumer protection, I believe the FTC should focus enforcement on matters where consumers are actually injured or are likely to be injured, or where companies don't keep their promises. The agency should focus on cases with substantial harms such as monetary injury and unwarranted health and safety risks. The agency should not focus on speculative injury or on very subjective types of harm. When evaluating consumer harm rooted in the release of information, identifying substantial harms can sometimes be difficult. To help with this issue, I have started an internal working group to explore the economics of privacy and data security protections. This working group will help strengthen the foundation of our privacy and data security enforcement actions.

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