Statement for the Record

Submitted by

Eagle Forum Education and Legal Defense Fund

Hearing of the U.S. Senate Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

"Protecting Competition and Innovation in Home Technologies"

June 15, 2021

Chairwoman Klobuchar and Ranking Member Lee, this hearing perhaps unintentionally spotlights the intersection of patents and antitrust. These areas of public policy may appear at odds. Patents grant exclusivity over an invention. Antitrust promotes consumer welfare through market competition. How can the right to exclude under patents promote competition? Should antitrust consider patent exclusivity a monopoly?

The answers to these questions lie in dynamic — rather than static — competition. Dynamic competition[1] is the prism for getting the right perspective on patent exclusivity and antitrust's competition imperative. In fact, patents and antitrust are complementary.

At this hearing are witnesses from Amazon, Google, and Sonos. In 2005, Sonos invented wireless speakers. Its wireless sound system and succeeding inventions led to 100 patents for Sonos. In 2013, Sonos began working with Google on a speaker.

The New York Times[2] has reported that in 2015, Google introduced an allegedly patent-infringing knockoff of Sonos's product. The Google Home speaker, a knockoff, followed, along with Amazon's Echo knockoff. When Sonos asked the Big Tech firms to license its patents, Amazon and Google reportedly refused. The Goliaths left Sonos little alternative except pursuing patent infringement lawsuits in federal court and at the U.S. International Trade Commission. Sonos's cases litigate on five of the patents, though the innovator believes most of its patents are infringed in these knockoff products.

Sonos is a prototypical innovator. Its innovation, a wireless speaker, was valuable and viewed as such by two large incumbent firms. Strong, reliable patents and intellectual

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[1] See Makan Delrahim, Assistant Att'y. Gen., Antitrust Div., U.S. Dept. of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law, Keynote Address at University of Pennsylvania Law School (Mar. 16, 2018).

[2] Jack Nicas and Daisuke Wakabayashi, "Sonos, Squeezed by the Tech Giants, Sues Google," New York Times, Jan. 7, 2020.

property rights — which Big Tech and special interests for which secure patents pose a threat[3] — have been undermined by Congress, courts, and administrative agencies.

Were important features of the U.S. patent system as robust as in the past, Davids like Sonos would have a fighting chance to compete against Goliaths and to force big firms that could be good-faith collaborators with small inventive companies to negotiate fair terms for licensing their IP. Such outcomes are a win for consumers, a win for innovators, a win for implementers and licensees of IP, and a win for our nation's economy and our standard of living. Thus, IP exclusivity in potential new markets serves the same goals as do antitrust laws in static markets.

Last fall, Eagle Forum Education and Legal Defense Fund convened a policy program titled "Inventing Dynamic Competition: Intellectual Property, Antitrust, and Competition."[4] Participants included Assistant Attorney General for Antitrust Makan Delrahim, U.S. Patent and Trademark Office Deputy Director Laura Peter, and General Counsel of the Federal Trade Commission Alden Abbott.

These and other experts assessed antitrust's proper application to dynamic new competitive markets arising from intellectual property-centered businesses and the protection of consumer welfare in established markets' static competition. Speakers considered where the balance lies between patent exclusivity and appropriate antitrust enforcement, including with standard-essential patents. Some of the takeaways from that event should prove informative to the subcommittee.

1) The inventions of innovators spark competition. Their innovation and entrepreneurship augur against monopolies and large incumbents. That is because the essence of patent and IP rights is the right to exclude.

2) Some inventions by R&D-based companies are adopted as a new technology's standard. Such innovative advancements lay the foundation for others (implementers) to build upon. We would not have a digital economy, with mobile apps that use GPS and seamless wireless connectivity to match riders with drivers and lodgers with B&Bs, without the standardized wireless infrastructure and components of the SEP owners.

3) Innovators bear the risks and deserve the rewards. Rewards come from patent exclusivity, includiong for those whose technology becomes the industry standard. The USPTO, the Department of Justice Antitrust Division, and NIST issued a "Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments"[5] in 2019 clarifying that FRAND and SEP status do not impede patent

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[3] See Rep. Thomas Massie, statement for the record, House Judiciary Comm., April 14, 2021.

[4] News release, "Phyllis Schlafly Eagles Honors Intellectual Property Defenders," Oct. 1, 2020.

[5] U.S. Dept. of Justice, U.S. Pat. & Trademark Off., and Nat'l. Inst. of Sci. & Tech., Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, at 6 (Dec. 19, 2019).

owners' IP rights. The joint policy statement affirms that SEPs are due such patent remedies as "injunctive relief, reasonable royalties, lost profits, enhanced damages for willful infringement, and exclusion orders issued by the U.S. International Trade Commission." Whereas SEP owners' FRAND commitments are contractual obligations, antitrust law is irrelevant. Whereas front-end, long-term R&D decisions never guarantee successful invention or commercialization, IP exclusivity, acceptance of a patented technology's contribution to a standard, and any earnings on that licensed technology are all part of the fruits of the patent owner's labor.

4) Innovators bear the up-front risks. They may be more likely to face "holdout" by implementers of standard-setting technologies than innovators are to hold up licensing their patents. Implementers of new technologies, whether standards-related or otherwise, make their spending decisions long after the innovative fact and with much greater knowledge of the value and potential of an innovation. That is, innovators have skin in the game; implementers do not. Thus, it is anticompetitive if implementers can get away with refusing to negotiate licensing agreements in good faith. If they then charge innovators with anticompetitive conduct, this adds insult to injury and is itself anticompetitive and disrespectful of intellectual property rights.

5) Antitrust enforcers and lawmakers do not have crystal balls. They do not know which invention is going to be a commercial success, which technology will contribute to a standard, which applications will be developed to implement a technology and serve consumer welfare. The chances of an innovator's commercial success are typically slim. Thus, making up novel antitrust laws to punish iterative invention or using antitrust enforcement imprudently against innovators engaged in dynamic competition is highly destructive to competition and to the incentive to innovate. Such legislating and regulatory enforcement ultimately harms consumer welfare.

6) Fostering dynamic competition through humility in antitrust enforcement where IP is involved is extremely important. It is important for respecting intellectual property rights, important for benefitting from all the potential innovation effects, important for America's industrial competitiveness, and important for progress of the useful arts.

7) As Sonos's experience with Amazon's and Google's unauthorized use of Sonos's patented technology in competing products illustrates, restoring our patent system's strength is the most important and effective thing for promoting innovation, sparking dynamic competition, and dislodging the vice grip of large dominant businesses. Congress must restore former features of our American patent system that have been diminished. These include at a minimum restoring section 101 of Title 35 to a broad, threshold question of patent-eligible subject matter, without confounding judicially created exceptions; restoring injunctive relief to patent owners whose patent has been proven in court to be valid and infringed; and restoring patent owners' access exclusively to Article III courts for matters pertaining to patents.[6]

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[6] James Edwards, "Restoring the gold standard of American innovation through patent legislation," Washington Times, July 26, 2020.