Prevent Antitrust Suits from Undermining Intellectual Property Rights and Stifling Innovation

Long-term sustainable innovation requires a cycle of investment and re-investment that can only be achieved by offering firms an exclusive right to reap the benefits of their invention for a defined number of years, in return for disclosing their invention to the public. Yet, this cycle is threatened by efforts to undermine intellectual property rights within the antitrust context.

The DOJ/FTC's Antitrust Guidelines for the Licensing of Intellectual Property (1995) have recognized the complementary purposes of the intellectual property and antitrust laws. Despite this, competitors and some regulators have recently sought to use antitrust suits to force IPR holders to give up control over their protected works, as in the recent Microsoft case where several state Attorneys General proposed that Microsoft be forced to publicly provide the source code to Internet Explorer free of charge. Similarly, European regulators have shown increasing willingness to subject protected works to a compulsory license regime because of alleged competition concerns.

The precedents created by these intellectual property seizures will undercut intellectual property rules for ALL successful companies and reduce incentives for research and innovation in the future. Rather than simply continuing to innovate and invest, companies with successful products must consider the threat that their investments may be given away to their competitors.

It is imperative that the antitrust law avoid such unnecessary intrusions into IPRs. Employing compulsory licensing to restrict IPR for the stated purpose of promoting competition can actually have the opposite effect — deterring innovation and competition by encouraging those who benefit from the compulsory license to imitate existing products rather than innovating new products themselves.

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Ensuring That Antitrust Standards Governing Review of Joint Ventures Do Not Deter Disintermediation Initiatives

Under certain circumstances, the conduct of certain joint venture ("JV") operations may raise competitive concerns. Most JV's however, are pro-competitive, particularly those that reduce costs by eliminating middlemen in the product distribution chain. The development of the Internet has increasingly permitted this type of disintermediation by enabling companies to create a unique, direct retail experience for consumers, rather than having to work with distributors.

This is illustrated by the rise of such Internet ventures as Orbitz, Hotels.com, and Press Play. Each of these ventures was plainly pro-competitive because it reduced overhead and other distribution costs, thereby promoting efficiency, cost savings and, ultimately, consumer welfare. Yet these ventures were all subject to a level of antitrust scrutiny that threatens to deter similar ventures in the future.

In the case of Orbitz, for example, traditional travel agents and legacy reservation systems vendors invoked antitrust doctrine to challenge and significantly delay the launch of a supplier-funded distribution business that would threaten their privileged position as middlemen. Such delays can often cripple or kill a beneficial joint venture before it even gets off the ground.

Given this, ACT recommends the Commission consider whether the public would benefit from a rule requiring antitrust regulators to presume that joint ventures, particularly those that involve disintermediation, be considered presumptively pro-competitive, and approved unless they are affirmatively proven to be otherwise.

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Defining Product Markets

Market definition is especially critical in dynamic settings such as the information technology sector, where new technologies and network effects can quickly reduce entry barriers and where functionally similar products can blur market boundaries. For example, innovations in cell phone design and e-mail devices like the Blackberry became formidable competition for personal digital assistants such as the once-dominant Palm Pilot.

Competition can emerge quickly when nascent firms gain market acceptance through network effects and the frictionless distribution channel of the Internet. Linux, for instance, was dismissed by the Trial Judge in *Microsoft*. Today, however, Linux matches Microsoft and Unix on servers, and is poised to leverage its server success in the desktop environment, too.

The dynamic nature of technology innovation forces market leaders to be more competitive in pricing and design, to the benefit of consumers. Yet this is often overlooked by antitrust regulators in analyzing the lawfulness of single-company conduct and transactions such as mergers, acquisitions and joint ventures.

Accordingly, ACT encourages the Commission to recommend legislation directing regulators to include functional product substitutes and emerging technologies when determining the relevant product market, regardless of whether those substitutes are presently considered to be in the same business as the product or service at issue.

A more dynamic analysis would recognize the network effects at work in the technology sector, instead of focusing just on a static view of obvious competitors at that instant. In doing so, the Commission could remedy some of the concerns presented by cases like the Echostar/DirectTV merger, where regulators concluded that satellite TV did not compete with cable, a conclusion that would surprise most satellite viewers. The Commission could also promote certainty by recognizing that, although network effects may spur dominant market positions, this dominance—illustrated by the experience of Palm Pilot—is often fleeting.

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Promoting Regulatory Consistency and Cooperation/Harmonization

Businesses seeking to merge with or acquire other firms may be subject to antitrust scrutiny, exposing them to a daunting review process that may involve four distinct sets of regulatory bodies. For example, merging telecommunications providers may have their transaction reviewed by (1) the Department of Justice, (2) the Federal Communications Commission, (3) state public utilities commissions, and (4) state Attorneys General. They may also be subject to private rights of action. Even worse, transactions that have already run the gauntlet of U.S. antitrust enforcers may also be subject to review by international regulators with completely different laws.

Regulatory inconsistency promotes business uncertainty that deters companies from investing in new technologies or business models that may be subject to antitrust review. In addition, competitors may seek to improperly exploit different approaches in antitrust enforcement to maintain market share, rather than engaging in vigorous competition.

The European Commission's increasingly aggressive antitrust enforcement has highlighted the problems of international inconsistency. Even after approval by U.S. enforcers, the European Commission stepped in to prevent the merger of two American companies: General Electric and Honeywell. In defending its decision to impose radical remedies against Microsoft, the European Commission argues that its antitrust rules are significantly different from the U.S., and therefore should impose different remedies.

These multiple overlapping layers of review hamper competition and innovation. Accordingly, ACT recommends that the Commission consider how global companies can avoid conflicting rules and decrees and/or burdensome multiple filing and reporting requirements. In addition, ACT strongly urges the Commission to consider whether moving towards uniform antitrust filing and enforcement standards, both domestically and internationally, will better promote competition and consumer choice. And finally, the Commission should consider existing and additional means of achieving convergence of antitrust policy that is consistent with U.S. antitrust policy and jurisprudence.

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Tying Analysis/Product Integration Reform

Although the D.C. Circuit in the *Microsoft* case properly concluded that certain tying arrangements may be pro-competitive, the prospect of antitrust tying litigation may nonetheless deter companies from initiating beneficial product integrations. ACT therefore encourages the Commission to consider (i) requiring fact-finders to review allegedly anticompetitive tying arrangements under a standard other than the *per se* rule, and (ii) encouraging regulators to regard technology sector tying arrangements with care.

Requiring consumers to purchase a secondary product as a condition of purchasing a primary good or service may have anticompetitive effects. However, product integration more often promotes market efficiencies and benefits consumers, particularly in market sectors where the pressure to innovate is high.

For example, software developers must innovate constantly to drive customer upgrades, so they regularly add new features to existing products—often where these features were previously available separately. This integration simplifies consumers' software experiences, often to the point where a dis-integrated product would no longer attract consumer demand.

The threat of antitrust litigation, however, discourages integration, even when there is a demand for it. Firms considering pro-competitive integration are uncertain about how regulators will regard the potential displacement of competitors, and how that displacement will be weighed against efficiency benefits. In sectors where innovation occurs in a cumulative fashion—with new products building on prior work—any delay in this type of integration can slow innovation by generations.

Microsoft, for example, decided not to integrate anti-virus computer protection tools into its most recent version of the Windows XP operating system. Consumers, however, are clamoring for better computer security tools with simpler installation and automatic update to counter new viruses and security threats. Antitrust policy should encourage product integration that is so obviously pro-competitive, even if some competitors might be subsequently displaced.

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