Silicon Flatirons Center Conference:
The Intersection of Patent Law and Competition Policy
Wednesday, October 3rd, 2012
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BACKGROUND

In the America Invents Act, the U.S. Congress made the decision to focus on the institutional arrangements of patent law, focusing intently on how the U.S. Patent and Trademark Office (PTO) operates, with little focus on substantive patent law doctrines. This decision reflects the strategy of allowing the courts—with the aid of guidance from the PTO—to develop the substantive rules of patent law. With regard to the important questions of the breadth of patents—notably, whether business methods, software, or human genes should be covered by patents—Congress is, in effect, authorizing, indeed requiring, the common law approach.

INTRODUCTION

KEYNOTE: Julie Brill, Commissioner, Federal Trade Commission

Phil Weiser, Dean of the University of Colorado Law School and Director of the Silicon Flatirons Center for Law, Technology, and Entrepreneurship, began the "The Intersection of Patent Law and Competition Policy" conference with a quick welcome before ceding the lectern to the conference's keynote speaker. The Commissioner of the Federal Trade Commission, Julie Brill, opened her keynote address with a light joke: as ubiquitous and useful as smartphones are there must be a way to motivate developers to install a corkscrew. Leveraging the joke as a segue into the afternoon's more serious discussion, Commissioner Brill reflected on the myriad of patent, licensing, and cross-licensing disputes surrounding smartphones, and called for agency actions grounded in law and reality, policies that protect both IP and advance competition. Commissioner Brill ended her address with a tweet: "FTC will continue w/robust enforcement at intersection of patent & comp laws to protect innovation in hi-tech industry. – Brill #flatirons."

PANEL ONE: The Institutional Roles of the PTO, the Federal Government, and the Judiciary in Shaping Patent Law

The conference's first panel then took the stage for a discussion of "The Institutional Roles of the PTO, the Federal Government, and the Judiciary in Shaping Patent Law." Moderator Michael Drapkin, a partner at Holland & Hart and adjunct professor at Colorado Law, first asked the panel to consider the interplay between the Patent and Trademark Office ("PTO") and the Federal Circuit in sculpting the patent system. Judge Allan D. Lourie of the United States Court of Appeals for the Federal Circuit had a simple response: the Federal Circuit decides cases according to the law. Robert McManus, an attorney from the PTO and the Commerce Department Attorney of the Year, offered a more nuanced response. According to McManus, the PTO attempts to influence patent policy by teeing up certain issues (and

matters of law) for resolution by the Federal Circuit that is in accordance with the view of the PTO.

Drapkin's next question asked the panel to discuss what level of deference should be given to PTO policies and decisions. Judge Phillip Brimmer, U. S. District Judge for the District of Colorado, mulled the implications of the America Invents Act ("AIA") but figured, just as things have evolved in the last fifteen years, district court judges like him will leave that determination up to the Federal Circuit. McManus responded to the "loaded question" with the quip, "It's not your grandfather's PTO anymore," before suggesting that the AIA will hopefully result in more deference while acknowledging the agency already gets serious consideration from the judiciary now. Judge Laurie suggested, especially since *Zurko*, the judiciary gives tremendous deference to the PTO on questions of fact while questions of law remain de novo. Adding his thoughts, Professor Duffy, Armistead M. Dobie Professor of Law at the University of Virginia School Of Law, suggested that, given the different deference levels between facts and law—clearly erroneous versus de novo—the PTO would argue for more muscular, *Chevron*-type deference in the near future. This would be terrible, according to Professor Duffy, because applying a clearly erroneous standard as to matters of law would subject patents and trademarks to the political winds—a devastating reality for a property rights regime. Bill Cavanaugh, a partner at Patterson Belknap Webb & Tyler, responding to the original question and relying on his trial experience, suggested that deference to the PTO has steadily eroded over the last twenty years in district courts and he thought it would be interesting to see if the AIA will change that.

Moving on, Drapkin asked how the tone and signals of the Supreme Court affect policy issues. Noting the PTO's substantial role, in conjunction with the Solicitor General, on cases before the Supreme Court, McManus pointed to *KSR* and revealed that the PTO is very sensitive to the Supreme Court's ruling and also pays close attention to the Federal Circuit's interpretation of Supreme Court precedent. Judge Brimmer, bringing more of an outsider's response, acknowledged the PTO's unique position in making policy but said that, ultimately, the Supreme Court decides the law—it has been that way for a long time and will remain that way. Judge Lourie made the point that *KSR* was a unique case but, like Judge Brimmer before him, fell back on the law—the Federal Circuit does not get together and decide a policy in light of a new Supreme Court decision; it decides cases in three judge panels and it is left to those judges to apply the law in each case. Professor Duffy made the important point that the Supreme Court asks the Solicitor General (the Executive branch) whether or not to grant certiorari. Following up on this point, McManus explained that the Solicitor General asks the FTC, PTO, DOJ, and a number of other agencies for their input in this interactive law-making process.

Building off the last question, which included remarks by Professor Duffy that noted that in patent cases, unlike in most cases, the Supreme Court cannot look for credible diverging opinions from the different circuit courts, the panel addressed what role district courts and the Federal Circuit should have in deciding whether or not the Supreme Court should grant certiorari. Judge Laurie said that the district court should decide the case and the appellate court should interpret the law but at times Federal Circuit dissents will argue for cert. Echoing Judge Laurie, Cavanaugh said the potential grant of cert got little attention at the

trial level and mentioned there was even an ethical dimension to such attention. Judge Brimmer similarly said that he did not tee up cases for downstream review but thought Federal Circuit dissents may be another point of view that leads to Supreme Court review. Professor Duffy, noting a case of his that received a sought-after dissent from Federal Circuit Judge Dyk, said that dissents from the Federal Circuit, which may essentially be briefs, help inform the Court's consideration and decision. When the conversation came back to Judge Brimmer he expressed skepticism as to whether or not a district court's role should include advocating for personal beliefs and hoping for grant of certiorari. At the same time, Cavanaugh countered, in many areas of law although less so in patent law, district court judges will decided a case but nonetheless express and advocate for their viewpoint.

Prompted by Drapkin to discuss how Inter Parte Reviews ("IPR") proceedings will impact patent disputes, including the grant of stays on injunctions by district courts, McManus noted IPR proceedings would be much different than examination and would take advantage of the adversarial system by mimicking the setting but hopefully resulting in faster resolution. It is yet to be seen how much the proceedings will be taken advantage of, he admitted. Judge Brimmer, like McManus, was waiting to see how such a proceeding would be utilized but noted that the review boards have up to eighteen months to issue a decision, which in some cases would be enough time for a district court decision. As an aside, Judge Brimmer noted the option of administrative closure of cases, if agreed to by the parties, in the District of Colorado, which would allow for quicker resolution of patent disputes. Professor Duffy wrapped up this panel's discussion by expressing his high hopes for the IPR proceeding, hopes that included better, more in-depth, rational evaluation of patents.

PANEL 2: Scope of Patentability and Other Patent Policy Levers

The second panel of the conference was moderated by the law school's own Harry Surden, an associate professor at Colorado Law specializing in intellectual property issues. Professor Surden provided context for the panel, "Scope of Patentability and Other Patent Policy Levers," through a brief introduction: patents are supposed to "incentivize or promote overall level of commercialization, research, and competition" but a number of factors, such as broad language, early inventions which prohibit downstream research, and patent thickets stand in the way. The purpose of this panel, he said, was to explore what can and should be done to increase the freedom to operate and research, and what doctrinal or policy tools are necessary to make that happen.

Opening up the discussion, Professor Surden asked the panel for their take on what some of the more important patent scope issues of the day are. Judge Reyna of the Federal Circuit began with an example. Recently on a plane he heard someone remark, "you should get a patent on that," which brought him back to his days as a little boy and the "inventions" he made with rocks and sticks. Elaborating, he said that from an early age he realized the value of a patent but also that not everything could be patented—for example, the rocks and sticks he was "inventing" with. Moving forward to the present day, he said one of the big issues before his court was patent scope eligibility under 35 U.S.C. § 101, the code provision which lists what can be patented but does not list exceptions. However, he

explained, exceptions exist and their boundaries are very difficult to define. Judge Reyna examined a few cases to make the point that abstract methods cannot be patented and it is important to look at underlying methods to ensure abstract methods are not within the scope of a granted patent so that they may be used as tools for continued advancement. Yet, while many cases have a defined abstract idea, he thought answers resulting from such definitions are not likely to be definitive as technologies advance.

When Professor Surden opened the question to the rest of the audience Eugene Kim, Senior Patent Counsel at Zynga, ran with it. According to Kim, over the last five years the landscape of patent law has changed dramatically. Whereas patents use to be primarily for defensive positioning, they are now used more aggressively to bring in revenue. Therefore, scope of patentability has major implications for an industry like Big Pharma which uses patent portfolios as a means of revenue, and similar implications to the IT industry although the industry is more concerned with effects on innovation. Accordingly, scope of patentability lends itself to an "ROI" question: What is the "return on invention" going to be? Along the same line, a very important tool to enforce scope of patentability is litigations brought under §§ 101, 102, and 103. However, such litigation is quite expensive. Therefore, one recommendation he put forward was making post-grant review longer. That way, post-grant review challenges under § 101 might be brought more effectively. Arti Rai, a professor of law at Duke University, thought the Supreme Court, noting Justice Breyer particularly, viewed the doctrine surrounding § 101 as an important tool to limit the scope of patents—albeit mistakenly in the her eyes and in the eyes of many practitioners.

Mindy Sooter, a partner at Faegre Baker Daniels, coming at the question from a boots-on-the-ground perspective, said that from a litigation standpoint it is always a question of certainty—as patent litigation is currently structured many defendants do have the information required to make educated decisions as to whether or not to settle a case until well into litigation. Following a prompt from Professor Surden asking what government actors could do about that Sooter responded with a few ideas. First, she said, to add stability in patent cases district courts could step up and construe claims earlier. Second, she suggested making fee shifting from defendants to plaintiffs a reality—if plaintiffs knew they would be responsible for fees if they lost the case, she suggested, they would be less likely to construe claims broadly and creatively when asserting infringement. Weighting back in, Rai thought that Congress had probably exhausted their will to legislate in the patent arena after the AIA was passed but that maybe § 112 might provide useful policy levers, specifically enablement, definiteness, and written descriptions. To support her position, Rai pointed to some of her preliminary research in software and bioinformatics and the current use of such levers to invalidate broad patents. Kim echoed Sooter by suggesting earlier mechanisms for learning what is accused and how the other side is interpreting the claim would be very helpful. Asked by Rai if he thought the IPR proceedings would help by allowing for earlier claim construction Kim said it was yet to be seen.

Professor Surden's last question considered if there are any ethical dimensions to following a client's request for aggressive enforcement when, on the merits, such an approach is not reasonable. Responding, Sooter said that in most instances, business considerations temper

any ethical dimension that may exist—Do we want to risk our central technology being invalidated? Do we want to dirty the sandbox we live in?—but that non-practicing entities have less incentive to take that hard look and are thus more willing to take that aggressive approach in hopes of monetizing an infringement charge.

Finally, the audience members weighed in with a few questions of their own. First came a question about the Federal District Court for the Northern District of California and whether or not their expedited process, in which patent infringement claims and invalidity claims are required to be made early on so that claim construction and summary judgment motions can be ruled on expeditiously, went far enough. Kim noted that the Northern District of California's local rules were a step in the right direction but not enough and noted that many cases take place in other districts. Judge Reyna spoke up in favor of districts that narrow the scope of litigation early on through such measures. The final question of the night concerned the tension in determining scope between § 101 and considering the preclusive effect of patents. Answering quickly, Rai said that while the Supreme Court has not provided the necessary clarity yet, she expects them to weight in and illuminate what § 101 means more clearly and, assumedly, resolve any tension that might exist between it and the preclusion test.

PANEL 3: Competition Policy and Patents

The third panel observed the relationship between competition law and patent policies. Phil Weiser, Dean of University of Colorado Law School and Executive Director of the Silicon Flatirons Center, moderated the discussion of the third panel. The panel was comprised of Terrell McSweeny, Senior Counsel of the Antitrust Division in the United States Department of Justice; Scott Partridge, Chief Deputy General Counsel at Monsanto; John Ryan, Chief Legal Officer at Level 3 Communications; and Greg Sivinski Assistant General Counsel of the Antitrust Group at Microsoft. Competition, or Antitrust, law prohibits certain actions that make monopolies, while patents, by definition, create lawful limited monopolies. This panel observed how these two principles intersect and ways in which the tension between the two can be alleviated.

Antitrust Oversight v. Patent Power to Exclude:

Dean Weiser began the discussion by looking at the difference between the two regimes of Antitrust oversight and the inherit property and purpose of a patent to exclude. He looked to panelists to reconcile these differences.

Partridge first argued that the tension between these two policies comes from the question of social welfare. When looking at the social welfare question Monsanto looks to predictability and stability. As an agriculture company they look at crop years, so the need for predictability in their patents is very high. Further, since the yield is something to be seen in the future, the question of how stable this product is will also be raised. To illustrate this point, Partridge gave an example with soils and crops. The population on our planet is increasing and with that so are many social problems including: food and water shortages, land deprivation, global warming, etc. Partridge contended that we must find a

way to increase yield while using less resources so that we can serve an increasing population. To do this though, biotechnologists need to set standards for predictability and stability in the patents that they are creating. These standards are important because many of these yields will not be seen for years. There is also a need to know how stable these products will be in the future and if they will be helpful to us in the years to come.

Ryan next discussed the harmonization between patents and antitrust law. He contended that because the availability of injunctive relief in patent claims has become more difficult, companies are negotiating more. He argued that in practice there is "a duty to deal". In most patent cases courts are evaluating the social costs of an injunction, in the same way that non-patent courts are evaluating the social costs of an injunction. Because of this parties are forced to be more reasonable and negotiable with each other.

Sivinski and Sweeny both discussed the idea of standard setting patents in the industry. Sivinski explained that there has been a lot of light shed on the intersections between patents and antitrust law in the past year. This is due to the setting of standards in the industry. Sweeny, an agent of the government, confirmed this comment. She discussed that our government has many questions about standard setting organizations and standard essential patents and ways in which they can enrich the system. The Department of Justice is particularly looking at reasonable and non-discriminatory terms (RAND); fair, reasonable, and non-discriminatory terms (FRAND); and the licensing terms of patents to see how they are affecting the system.

<u>Standard Setting Bodies:</u>

Dean Weiser next veered the discussion toward these standard-setting bodies. He explained how they deal with various patent issues. One of these issues being the particular situation when a person has a small patent and holds onto it, not telling anyone that he has the patent until an invention comes out that uses said patent. That person then comes forward seeking royalties. Standard setting organizations correcting situations such as this would be prime, and Dean Weiser asks the panelists for their thoughts.

Sivinski first commented that standard setting processes create market power. He argued that patents are not worth much until they are in a standard. Once in a standard a patent cannot easily be worked around. This is not the case when a patent stands alone. He contends that there is power in numbers. He notes, though, that there needs to be antitrust scrutiny. There still has to be competition even when dealing with standards.

Sweeny also commented that there is a role for antitrust law the space of standard setting. Recently the department has had standard setting organizations come in for evaluations. During meetings the department would "OK" patent standards, give advice on ways to improve both keeping with the spirit of competition and ways in which to reduce ambiguity in standard essential patents. She explained that the department does not dictate, but they do highly encourage implementation of these suggestions.

Partridge explained that in agriculture there is not a great use of standard setting organizations, as there are not a great number of different corporations making the same types of patents. He spoke more about the idea of broad licenses and with them the

security of knowing that your patent may have predictive value. He explained that the Patent and Copyright Act convey the right to exclude. So there should be antitrust oversight, but there should be exceptions in time and price-fixing compulsory licensing.

Finally, Ryan explained that a major problem came with individuals holding the same patent. He contended that there should be policies for not giving injunctions where injunctions are not due. The major issue, he argued, is that trivial patents are going to court and people are seeking gratuitous amounts of money. He explained how at Microsoft, they look more at the power of patents to exploit than to exclude. Microsoft does this by giving licenses for their products, and obtaining reasonable royalties for their products.

PANEL 4: Case Study of the Changing Wireless Landscape: Patent Portfolio Development and Acquisition and Litigation

The fourth panel combined the elements of each of the aforementioned panels applying these principles to the wireless industry. Jonathan Sallet, Silicon Flatirons Senior Adjunct Fellow and Partner at O'Melveny & Myers LLP, moderated the discussion of the fourth panel. The panel was comprised of John L. Cooper, Partner at Farella Braun & Martel LLP; Fabian Gonell, Vice President and Legal Counsel and Qualcomm; Chad Hilyard, Chief IP Counsel for Rockstar Consortium US LP; Suzanne Michel, Senior Patent Counsel for Google; and Sharis Pozen, Partner at Skadden, Arps, Slate, Meagher & Flom LLP. This panel focused on how the wireless landscape is changed or shaped based on the principles of competition and patent law.

Trends:

Sallet began the discussion by noting the scope of patent transactions, patent litigation, and global scope of governmental review on patents and antitrust law. He first asked the panelists what their views were on the current trends in the industry.

Cooper spoke first on the nature of non-practicing entities (NPEs). He contended that when another person is suing a client, he could assume that it is a competitor. If it is a competitor then the client can look at the market and see how he can assert his own patents to defend himself. Cooper argued that the dynamics change when the party suing your client is an NPE. There is not a defense that you can assert against an NPE. The problem that the industry is facing is that many NPEs are buying patents to "check them out" and use them against other parties. The only way to really defend against these NPEs is to settle. If not, one could face a $3 million trial. He concluded by noting that the implementation of standards could help this process.

Hilyard next gave more perspective from the view of NPEs. He explained that some NPEs, including Rockstar, were actually former patent entities with patents that they had left over from their practice. He noted that one of Rockstar's main goals was to monetize its assets. He asserted a view shared by Ryan in the panel before that inherent in patents is a right to exploit. He contended that corporations have a right to extract value from their patents, and that they can do this by entering into licensing deals. He concluded by noting that there is not always a reason to go into litigation.

Michel next argued that some companies within the industry are "compelled to engage in behaviors not good for consumers and society," and that this was a major problem for the system. She argued that because there are so many trivial suits over patents and corporations seeking injunctions over one patent in major products, lawyers are winning and the consumer is losing. Remedies, she contended, come from looking at root causes. The industry has divorced the value of technology from the value of patents, and this needs to be reconciled. She argued that instead of looking at the patents, we should look at the value of the technology behind the patent. One patent out of several patents is very difficult to value, the value of the technology is much more important though. She concluded by noting in the end it is about the consumers and furthering innovation.

Pozen next gave more insight from the antitrust division and how there was a trend in patent mergers and transfers. She explained that the antitrust division, when evaluating transfers would look at patents on a patent-by-patent basis. They would then decide whether the transfer between holders would hurt the market. There was a problem, however, with the sheer number of patents. The division then began to narrow the focus to mergers instead. She explained that under the Clayton Act the division found that the transfer of assets did not lesson competition. In concluding, she did explain that the division would keep watching this process, and looking at other parts of the statute.

Next, Gonell spoke more about the problem of injunctions. He explained that there is a big question in the industry about when injunctions are and are not appropriate. A patents right to exclude should not be taken lightly. However, corporations can give up the right to exclude on their own through licensing. Gonell also explained that the only way to show market power for standard essential patents is "for them to be in an essential facility and this is difficult to be shown in many situations." Because of this there is a limit to how much antitrust agents can intervene in the system.