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The Patent-Antitrust Interface: Are There Any No-No's Today?

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Antitrust law and patent law are legal tectonic plates – always in motion, occasionally converging, occasionally diverging, and occasionally moving in parallel relation. As patent suits have recently multiplied, the antitrust enforcement policies have again responded – for example, imposing pro-competition rules on patent case settlements, on abuses in standard setting situations, and on practices used to obtain patents in the first instance.

When the two disciplines' plates converge, we see the direct clash of the constitutional grant of a patent monopoly confronting the statutory edict against monopoly. When the plates diverge, we see that antitrust law has no bearing on many of the important patent doctrines of obviousness, anticipation, best mode, claims construction and the like. And when the doctrines transform – moving sideways in relation to each other – we see often compatible principles in royalty calculation, innovation promotion, and licensing practices.

The Supreme Court could say in 1902 that the "general rule" was the "absolute freedom in the use or sale of rights under the patent laws… The very object of these laws is monopoly." E. Bennett & Sons v. National Harrow Co., 186 U.S. 70 (1902). But 60 years later, antitrust law treated intellectual property rights more skeptically, leading to perhaps the zenith of antitrust's dominance in 1970.

We will use that latter era as our discussion jump-off point, referencing a set of doctrines issued at the time when the antitrust tectonic plate was dominant, when patents and patent licensing practices – mostly of a vertical nature – were viewed with anti-competitive suspicion. It was the era of the "Nine No-Nos," articulated by the Antitrust Division in 1970. Over time, these *per se* illegal prohibitions succumbed to the free market thinking of antitrust enforcers in the Reagan and Bush administrations. Yet just when patent law appeared to be on a long run of domination, we are now again witnessing a renewed pushback against patents – a pushback led by the Supreme Court rulings, by defendants in suits brought by non-practicing entities, and by the Federal Trade Commission. Could a Reagan era antitrust enforcer ever have imagined that today's FTC would hold hearings on whether the assertion of weak patents in infringement litigation brought by "Non-Practicing Entities" (aka "trolls") could constitute unfair competition?

The two regimes are ever moving, often in conflict, and always creating new challenges for intellectual property and antitrust lawyers. What we shall observe is that the Nine No-Nos of the 1970's were a collective condemnation of larger, vertical patent licensing practices as per se illegal. That per se prohibition is absent in contemporary antitrust law. Today, vertical restraints – whether involved in a patent license or not – are never per se illegal. However, we do see in the Nine No-Nos some foreshadowing of practices that the modern antitrust enforcer may challenge – practices that use patent powers to extend market power. The Nine No-Nos asked the right question – how does a patent holder unlawfully extend the patent grant – but may not have provided the right answers. Today, an antitrust analysis requires more than a rote incantation of a patent to prove market power. A patent is important to consider, but is not determinative.

Let us proceed, then, to discuss some current antitrust issues looking through the lens of the Nine No-Nos. The Nine No-Nos were:

- **Tying of purchase of unpatented materials as a condition of a patent license**;
- **Requiring the licensee to assign back or grant an exclusive grant-back license of subsequent patents obtained by the licensee**;
- **Restricting the right of the purchaser of the product in the resale of the product**;
- **Restricting the licensee's ability to deal in products outside the scope of the patent**;
- **Promising a licensee that the licensor would not grant further licenses**;
- **Mandating that the licensee take a "package license"**;

- **Imposing royalty provisions not reasonably related to the licensee's sales**;
- **Restricting a licensee's use of a product made by a patented process**; and
- **Requiring a minimum resale price for the licensed products**.