

Recent Developments in Antitrust Guidance for IP Licensing: Implications for the Internet of Things

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Introduction

Firms operating in the media and technology sector often require access to multiple patents or copyrights—often held by multiple owners. These complex licensing issues are sometimes resolved through “package licensing” or “blanket licensing” (*i.e.* the aggregation of licenses to multiple IP rights into a package). The United States Department of Justice Antitrust Division (“Division”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”) have long acknowledged that package licensing can raise antitrust concerns,² but their enforcement approach to package licensing has evolved significantly over the last century, informed by a number of prominent decisions.³ One of the most influential events in the development of antitrust enforcement policy towards package licensing has been the set of consent decrees entered into between the Division and the performance rights organizations (“PROs”) that aggregate and license certain music performance rights, as well as the Supreme Court’s decision in *Broadcast Music, Inc. v. CBS, Inc.*⁴ (the “BMI Decision”). Two recent developments add to the enforcement guidance in this area: the Division’s response to requests to modify the historic ASCAP and BMI copyright consent decrees and the Agencies’ 2017 update to the joint 1995 Antitrust Guidelines for the Licensing of Intellectual Property (“1995 IP Guidelines”).⁵

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² See 1995 IP Guidelines, Section 3.1–2 (“While intellectual property licensing arrangements are typically welfare-enhancing and procompetitive, antitrust concerns may nonetheless arise” and “Licensing arrangements raise concerns under the antitrust laws if they are likely to affect adversely the prices, quantities, qualities, or varieties of goods and services either currently or potentially available.”). The 2017 IP Guidelines contain identical language.

³ See, e.g., *Cont’l Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908) (refusal to license a patent is not a violation of the Sherman Act); compare *United States v. Univis Lens Co.*, 316 U.S. 241 (1942) (unlawful to fix the resale price of patented product) with *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (resale price maintenance agreements should be evaluated under the rule of reason, overturning a nearly century-old view of per se illegality); see also *International Salt Co. v. United States*, 332 U.S. 392 (1947) (per se violation of Sherman Act to tie sale of patented product to sale of product over which the seller does not have a patent), *abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (no presumption of market power from the mere fact that the defendant has a patented product).

⁴ 441 U.S. 1 (1979) [hereinafter the BMI Decision].

⁵ U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (April 6, 1995), www.usdoj.gov/atr/public/guidelines/0558.htm [hereinafter 1995 IP Guidelines].

These coinciding events touch issues in both the intellectual property and antitrust fields and will likely prompt evolution in what the Federal Circuit has described as “two bodies of law [that] are actually complementary, as both are aimed at encouraging innovation, industry, and competition.”⁶ In particular, both recent developments raise two fundamental questions cutting across antitrust and IP law: under what circumstances may unrelated IP rights holders aggregate their rights, and on what terms may they license these packages of aggregated rights? These questions are particularly salient in light of recent developments in patent licensing platforms. These new platform models allow companies to obtain a single license to the many standard essential patents (“SEPs”) necessary to offer interoperable Internet of Things (“IoT”)⁷ products and services.

In this article we discuss these recent developments in Agency guidance and consider their implications for licensing in this growing sector. Although the Division’s response to the PROs’ request and the updated IP Licensing Guidelines do not signal a significant shift from established policy, important questions remain. How antitrust policy ultimately addresses these questions will impact both innovation and commercialization in the IoT sector for decades to come.

Performance rights organizations: ASCAP & BMI

Package licensing has received significant antitrust attention in the context of copyrights in the music industry. To perform music publicly, it is necessary to obtain permission from the holders of the relevant copyright. In the United States, a small number of PROs have aggregated the rights to perform music publically. Typically, songwriters and publishers are members of a PRO, and grant to that PRO a warranted and indemnified right to license the performance rights to any work in which such person may own the copyright. That is, PROs pool the public performance rights of numerous copyright holders and license this library of music, made up of songs by different composers, for one flat fee. The American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), founded in 1914 and 1939, respectively, are the two largest PROs in the United States.

In the 1940s, the United States brought claims against ASCAP and BMI alleging that each organization had unlawfully exercised market power acquired through the aggregation of public performance rights in violation of the Sherman Act. The parties resolved these antitrust suits, entering into civil consent decrees⁸ (the “Consent Decrees”) requiring, among other things, that ASCAP and BMI offer licenses for their full catalogs (*i.e.* all the works in their repertoires) to services and venues on non-discriminatory terms. These licenses must be non-exclusive, and members of the PROs (*i.e.* the songwriters/publishers) retain the right to individually license their works.

⁶ *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990).

⁷ The International Telecommunication Union has described the IoT as “a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies.” ITU-T Recommendation Y.2060, *Overview of the Internet of Things*, § 3.2.2 (June 2012).

⁸ Each consent decree has been modified several times.

The Consent Decrees also established “rate courts,”⁹ to which both the PROs and licensees can turn in the event they are unable to agree on the price for a license. Although numerous courts have acknowledged that blanket licensing raises antitrust concerns,¹⁰ in the 1979 BMI Decision, the Supreme Court emphasized that blanket licensing has procompetitive virtue, including reducing transaction costs by avoiding the delay and expense of individualized negotiations.¹¹ Specifically, the Court explained that blanket licensing provides for “unplanned, rapid, and indemnified access to any and all of the repertory of [musical] compositions, and [provides rights owners] a reliable method of collecting for the use of [] their copyrights.”¹²

As a result, the Supreme Court held that the PROs’ blanket licensing practice was not *per se* illegal price fixing, meaning the challenged restraint was not so obviously anticompetitive as to excuse proof of an anticompetitive effect. Instead, the Court held that blanket licensing, which on its face could, in some circumstances, constitute horizontal price fixing, should be evaluated under the rule of reason framework—a case-by-case, fact-based analysis—given the significant procompetitive effects PROs can provide.¹³

BMI & ASCAP request that DOJ revise the Consent Decrees

In 2014, BMI and ASCAP requested that the Division open an investigation into modifying the Consent Decrees to permit their members to “withdraw” certain rights from the PRO with respect to their works. Currently, the Consent Decrees prohibit such withdrawal of rights. For example, members are not entitled to withdraw from the PRO rights associated with electronic transmission of works (*i.e.* rights essential to the operation of services like Pandora).

⁹ The rate courts themselves have been subject of significant litigation brought by private parties. *See, e.g.*, the BMI Decision (finding that blanket licensing for copyrighted musical compositions at a price determined by the PROs or their rate courts was not *per se* illegal price-fixing under antitrust law).

¹⁰ Specifically, competing patent owners may raise horizontal antitrust concerns if they agree to jointly license their patents on an agreed set of terms. Package licensing, even when the rights are owned by a single firm, may also raise exclusionary or tying concerns. As such, the antitrust treatment of package licenses depends to some extent on whether the arrangement involves tying-like coercion. When the licensee is not coerced to accept unwanted licenses, such consensual package licenses are generally lawful. *Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*, 339 U.S. 827 (1950), *overruled in part on other grounds by Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Int’l Mfg. Co. v. Landon Inc.*, 336 F.2d 723 (9th Cir. 1964). In some cases, the Agencies will treat package licensing under tying principles. However, even in those cases, unless the arrangement is facially anticompetitive, the Agencies will apply a rule of reason analysis. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY: PROMOTING INNOVATION AND COMPETITION at 11–12 (April 2007), <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>.

¹¹ BMI Decision at 21–22.

¹² *Id.* at 20.

¹³ *Id.* at 16–24.

In the course of the investigation into the Consent Decrees, the Division faced the question of what effect withdrawal might have on licenses when the songwriter/publisher owned only a fraction of such work(s). That is, under the Consent Decrees, must the PROs grant the right to perform the whole work, or may they grant something less in cases where all the performance rights to a work are not entirely controlled by the same members? Traditionally under copyright law, co-owners of a work share a tenancy-in-common by default; individual co-owners may offer non-exclusive licenses to the whole work, but are liable to one another in accounting. Copyright law also, however, permits co-owners to impose contractual limitations on one another's right to license their jointly-owned work. Thus, the question raised in the course of the investigation was whether BMI and ASCAP do, or must, license multi-owner works on a whole-work basis.

In early 2016, after several rounds of public comment, the Division informed BMI and ASCAP that it would not support modification of the consent decrees to permit withdrawal. After further discussion with ASCAP, BMI, and other interested parties, on August 4, 2016, the Division released its Closing Statement explaining its justifications for refusing to seek modification of the Consent Decrees to permit withdrawal and interpreting the decrees as requiring full-work licensing.¹⁴ The Division also offered suggestions for how ASCAP and BMI might continue compliance with the consent decrees in a manner minimizing any potential disruption that may result from its decision.

Shortly following the Division's release of its Closing Statement, BMI applied to the Southern District of New York for a construction of its Consent Decree, seeking a declaratory judgment that, contrary to the Closing Statement, the Consent Decree did not require full work licensing.¹⁵ The parties then filed pre-briefing letters on the motion, but did not fully brief the issues. Following a hearing, the court ruled that the Division's interpretation of BMI's consent decree was erroneous, and that fractional licensing was permitted. The Division has appealed this decision, and the case is now before the Second Circuit.¹⁶ The outcome of this appeal will affect the music industry's licensing practices, and also, given the shared characteristics of copyrights with other forms of intellectual property, will likely affect the Agencies' broader treatment of aggregated IPR licensing practices.

Antitrust guidelines for IP licensing

The Consent Decrees and their progeny (including the BMI Decision) have had a significant influence on the evolution of the Agencies' antitrust policy towards the exercise of IP rights. For example, in the 1970s, before the BMI Decision, a Deputy Assistant Attorney General of the Antitrust Division articulated a list of "Nine No-Nos"—patent

¹⁴ U.S. DEPT. OF JUSTICE, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* (Aug. 4, 2016), <https://www.justice.gov/atr/file/882101/download>.

¹⁵ *United States v. Broadcast Music Inc.*, No. 1:64-cv-03787-LLS, Opinion and Declaratory Judgment, at 3, ECF No. 100 (S.D.N.Y. 2016).

¹⁶ *United States v. Broadcast Music, Inc.*, No. 1:64-cv-03787-LLS, Notice of Appeal, ECF No. 103 (S.D.N.Y. 2016).

licensing practices that the Division would likely view as presumptively unlawful.¹⁷ One of these “No-Nos” was “requiring mandatory package licensing.”¹⁸ By 1981, however, in part informed by the BMI Decision’s recognition of the procompetitive virtues of package licensing, the Division characterized the “No-Nos” as “contain[ing] more error than accuracy” when viewed through the lens of “rational economic policy.”¹⁹

In April 1995, the Agencies formalized their new approach to the intersection of antitrust and IP rights by issuing the 1995 IP Guidelines.²⁰ These Guidelines were based on a strong economic foundation that recognized the procompetitive value of intellectual property rights and the combination of complementary assets through licensing. In 2007, a joint Division-FTC report on antitrust and IP, entitled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*,²¹ affirmed the 1995 Guidelines’ principles and applied them to conduct beyond licensing.

Since then, courts have steadily reiterated the procompetitive benefit of reduced transaction costs and have acknowledged that package licensing also promotes patent peace by indemnifying licensees and lowering monitoring costs for licensors.²² Together these efficiencies promote continued innovation by licensors and licensees alike. For example, with the reassurance of patent peace, a technology contributor may have greater incentive to continue to contribute to the development of a new or incremental industry standard, while technology implementers are more likely to make the dedicated investments necessary to bring new products to market more quickly.

¹⁷ See Bruce B. Wilson, Deputy Assistant Atty. Gen., Address before the Michigan State Bar Antitrust Section and the Patent, Trademark and Copyright Section (Sep. 21, 1972), partial text reprinted in 4 Trade Reg. Rep. (CCH) para. 13,126.

¹⁸ *Id.* at 3–9.

¹⁹ Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515, 517 (1982) (text of remarks before the American Bar Association Antitrust Section, Washington, D.C. (Nov. 5, 1981)).

²⁰ 1995 IP Guidelines.

²¹ U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 2007), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

²² See, e.g., *U.S. Phillips Corp. v. ITC*, 424 F.3d 1179, 1193 (Fed. Cir. 2005) (“[P]ackage licensing provides the parties a way of ensuring that a single licensing fee will cover all the patents needed to practice a particular technology and protecting against the unpleasant surprise for a licensee who learns, after making a substantial investment, that he needed a license to more patents than he originally obtained. Finally, grouping licenses in a package allows the parties to price the package based on their estimate of what it is worth to practice a particular technology, which is typically much easier to calculate than determining the marginal benefit provided by a license to each individual patent. In short, package licensing has the procompetitive effect of reducing the degree of uncertainty associated with investment decisions.”); *Tex. Instruments, Inc. v. Hyundai Elecs.*, 49 F. Supp. 2d 893, 901 (E.D. Tex. 1999) (highlighting that portfolio licenses are preferable because they “avoid the costly and inefficient endeavor of a patent-by-patent licensing scheme”).

More than twenty years after they were first adopted, in August 2016 the Agencies solicited comments on proposed revisions to the 1995 IP Guidelines.²³ Following extensive public comment, the Agencies’ released updated Guidelines in January 2017 (“2017 IP Guidelines”), largely reaffirming the core enforcement philosophy first announced in 1995.²⁴

The 2017 IP Guidelines embody three principles, all of which were basic tenets of the 1995 IP Guidelines:

- (a) The Agencies apply the same antitrust framework to intellectual property as any other form of property;
- (b) The Agencies do not presume that intellectual property confers market power; and
- (c) The Agencies recognize that intellectual property licensing is generally procompetitive and welfare-enhancing because it allows firms to combine complementary factors of production.²⁵

The 2017 IP Guidelines also highlighted that “[a]lthough there are clear and important differences in the purpose, extent, and duration of protection provided under the intellectual property regimes of patent, copyright, and trade secret, the governing antitrust principles are the same.”²⁶ As such, the music industry’s bundling of copyrights under PROs and aggregating rights for patents and other forms of intellectual property are evaluated under the same framework. Acknowledging the concern that bundling could, in some instances, present horizontal restraints, the Agencies also explicitly recognized the procompetitive and welfare-enhancing effects of licensing IPRs. The 2017 IP Guidelines reaffirmed this stance, stating:

Licensing, cross-licensing, or otherwise transferring intellectual property . . . can facilitate integration of the licensed property with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. Such arrangements increase the value of intellectual property to consumers and owners.²⁷

Former FTC Chairwoman Edith Ramirez, addressing the Agencies’ proposed updates to the 1995 IP Antitrust Guidelines emphasized that “[l]icensing is a cornerstone of a strong

²³ Press Release, Fed. Trade Comm’n, *FTC and DOJ Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property* (Aug. 12, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-doj-seek-views-proposed-update-antitrust-guidelines-licensing>.

²⁴ See Press Release, Fed. Trade Comm’n, *FTC and DOJ Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-doj-issue-updated-antitrust-guidelines-licensing-intellectual>.

²⁵ 2017 IP Guidelines § 2.0.

²⁶ *Id.* § 2.1; see also *id.* § 2.3 (“These benefits of licensing restrictions apply to patent, copyright, and trade secrets licenses, and to know-how agreements.”).

²⁷ *Id.* § 2.3.

system of IP rights” and that the “updated guidelines reaffirm [the] view that U.S. antitrust law leaves licensing decisions to IP owners, licensees, private negotiations and market forces unless there is evidence that the arrangement likely harms competition.”²⁸ This echoes the requirements under the rule of reason burden-shifting framework for analyzing cases involving licensing arrangements. In addition, the Division’s former Acting Assistant Attorney General, Renata Hesse, noted that the new 2017 IP Guidelines “continue to apply an effects-based analysis . . . and support procompetitive intellectual property licensing that can promote innovation.”²⁹

Package licensing for the Internet of Things—the broad teach of BMI and the updates to the 1995 IP Licensing Guidelines

The Second Circuit’s forthcoming decision on the Consent Decrees and the new 2017 IP Guidelines will have implications for markets far beyond the music industry. These developments are likely to prove particularly relevant to the information and communications technology sector broadly, and the rapidly growing Internet of Things sector in particular. The IoT functions by using sensor-based data gathered from ambient technologies and smart environments (e.g., Wi-Fi in cars, thermostats controlled via smartphone applications, wearable technology) to create analytically rich datasets.³⁰ The significance of a fully-networked society becomes apparent from market growth predictions including that the IoT market will roughly double from an installed base of 15.4 billion devices in 2015 to 30.7 billion devices in 2020.³¹ In dollar terms, one estimate puts the IoT market at \$900 million for 2015 with a growth prediction to \$3.7 billion in 2020.³²

Because of the networked nature of IoT devices, their interoperability depends on the ability to use others’ IPRs. It comes as no surprise then that in a market where more and more multi-right or multi-invention devices “come online” each day, companies are turning to what proved to be an efficient mechanism for licensing intellectual property rights in the past: package licensing. For example, in 2015, Ericsson advanced the idea of a joint licensing group aimed at cooperatively licensing standard essential patents for wireless connectivity at a “flat per unit licensing fee[] that reflect[s] the value of the connectivity technology for the

²⁸ Press Release, Fed. Trade Comm’n, *FTC and DOJ Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property* (Aug. 12, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-doj-seek-views-proposed-update-antitrust-guidelines-licensing>.

²⁹ Press Release, Fed. Trade Comm’n, *FTC and DOJ Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-doj-issue-updated-antitrust-guidelines-licensing-intellectual>.

³⁰ Although discussions of the IoT commonly focus on consumer goods, it is worth noting that an industrial IoT operates connecting critical machines and sensors in high-stakes industries such as aerospace, defense, healthcare, and energy.

³¹ Louis Columbus, *Roundup Of Internet Of Things Forecasts And Market Estimates, 2016*, FORBES (Nov. 27, 2016), <http://www.forbes.com/sites/louiscolombus/2016/11/27/roundup-of-internet-of-things-forecasts-and-market-estimates-2016/#54fa1bfc4ba5>.

³² *Id.*

[particular] device.”³³ And just last year, Avanci launched what it has coined the “one-stop licensing platform to accelerate wireless connectivity for the Internet of Things.”³⁴ Avanci, just like BMI and ASCAP do in the music industry, aggregates various intellectual property rights to facilitate licensing—in this case standard essential patents from companies including Ericsson, Qualcomm, InterDigital, KPN and ZTE. Its motto: “one place, . . . one agreement and . . . one fair, flat rate.”³⁵

Given these developments, the patent licensing community is likely soon to confront similar issues around fractional licensing that the music industry is grappling with in the BMI rate court dispute. But, while the Agencies substantially revised the technology and research and development markets sections of the 1995 IP Licensing Guidelines, suggesting perhaps that they may focus on these areas more intently in the context of emerging technologies, they did very little to revise the package licensing section. Even in the face of recent developments in the IoT space, the Agencies’ sole modification to the package licensing section in the 2017 IP Guidelines was replacing the word “product” with “intellectual property right.”³⁶ This change reflects the Agencies’ response to the rapid growth of increasingly commonplace multi-invention products by placing the focus on the distinct intellectual property rights utilized in these products for the Agencies’ analysis of impacted markets and competitive effects.³⁷ But ultimately, the Agencies missed a chance to provide clearer guidance to industry participants who are making decisions regarding investment in and contribution to technologies in the information and communications technology sector, which directly impacts technology and research and development markets like the IoT. Including citations to specific precedent, such as the BMI Decision itself as the genesis for recognizing the efficiencies inherent in package licensing, could have further articulated and cemented the Agencies’ views as to the incentives at play in portfolio licensing.

³³ Press Release, Ericsson, *Ericsson Invites Industry Players to Join its Licensing Effort for Internet of Things (IoT)* (Sept. 10, 2015), https://www.ericsson.com/news/150910-ericsson-invites-industry-players-to-join-its-licensing-effort-for-internet-of-things_244069645_c.

³⁴ Press Release, Avanci, *Avanci Launches One-Stop Licensing Platform to Accelerate Wireless Connectivity for the Internet of Things* (Sept. 14, 2016), <http://avanci.com/release/avanci-launches/>.

³⁵ *Id.*

³⁶ Thus, the 2017 IP Guidelines read as follows:

[T]he licensing of multiple items of intellectual property in a single license or in a group of related licenses - may be a form of tying arrangement if the licensing of one intellectual property right is conditioned upon the acceptance of a license of another, separate intellectual property right. Package licensing can be efficiency enhancing under some circumstances. When multiple licenses are needed to use any single item of intellectual property, for example, a package license may promote such efficiencies. If a package license constitutes a tying arrangement, the Agencies will evaluate its competitive effects under the same principles they apply to other tying arrangements.

2017 IP Guidelines, § 5.3.

³⁷ The American Bar Association Sections of Antitrust Law and Intellectual Property Law lauded the Agencies for overall more clearly emphasizing the boundaries within which competitive effects for licensing arrangements are evaluated. AMERICAN BAR ASSOCIATION, *Comments of the ABA Sections of Antitrust Law and Intellectual Property Law to Proposed Update to Federal Trade Commission and U.S. Justice Department Antitrust Guidelines for the Licensing of Intellectual Property* (Sept. 26, 2016), <https://www.justice.gov/atr/file/897761/download>.

The pending Second Circuit case adds an additional dimension, as its outcome (*i.e.* permitting or prohibiting fractional licensing) will affect one of the chief pro-competitive efficiencies cemented by the Consent Decrees and the BMI Decision--namely, giving licensees stable access to full bundles of intellectual property rights and guaranteeing licensors that they are adequately compensated for their research and development efforts. Importantly, this pro-competitive stability was one of the chief reasons that the practice of aggregating intellectual property rights of one or multiple rights-holders was granted rule-of-reason treatment in the first place. Accordingly, while a decision in favor of the PROs would allow PRO members to exercise greater control over their intellectual property, it may undermine the efficiencies associated with package licensing and impede the development of standards and technology that have a net social benefit. As the parties have not yet submitted their briefs and oral arguments have yet to be scheduled, it is difficult to opine on the likely outcome.

Conclusion

Although the state of antitrust regulation of the licensing of aggregated IPRs is in flux, a few things are clear. First, in light of the rapid technological development of millions of networked devices in the IoT, the operation of which depend on the interoperability of their respective technologies, the ability to efficiently access the rights to use the underlying IPRs is becoming increasingly important. Patent licensors and licensees are in a position analogous to that of the music industry and are pioneering new ways to capture efficiencies of the sort generated by PROs. Second, the resolution of the Second Circuit appeal and how the Agencies will put into practice the new 2017 IP Guidelines will have important implications on intellectual property licensing practices. If the Second Circuit finds that the Consent Decrees permit fractional licensing, one of the chief pro-consumer benefits associated with the ASCAP and BMI licenses may be diminished; licensees will be less certain of their right to use the whole work. Although this decision on the interpretation of the Consent Decrees is unlikely to mandate broader IP licensing practices, its effects will surely be felt throughout the IPR licensing community.



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