

THE SEDONA CONFERENCE'S PATENT  
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INVENTION, ENTREPRENEURSHIP,  
ECONOMIC GROWTH,  
AND JOB CREATION

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COVINGTON

ONE CITY CENTER

850 TENTH STREET, NW

WASHINGTON, DC





**United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580**

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**Closing Remarks of Commissioner Rebecca Kelly Slaughter  
FTC Hearing #4: Innovation and Intellectual Property  
October 24, 2018**

I am so pleased to be here to close two productive days of hearings about innovation and intellectual property. Before I begin, I want to note the usual disclaimer that I will be expressing my own views only and not those of the Commission or any other commissioner.

I want to commend all of the FTC staff who worked very hard to put together these thoughtful panels. And thank you to the many panelists and presenters for contributing to the Commission's reexamination of the state of antitrust and consumer protection law.

I am particularly pleased that Drew Hirshfeld, the Commissioner of Patents, and the Honorable Scott Boalick, the acting chief PTAB judge, joined us earlier today. The FTC and PTO have had a long-standing and invaluable working relationship. We have much to learn from each other so that we can both improve how we use our tools to foster innovation.

The conversations at these hearings over the past two days were extremely animated. As I learned working on IP issues on the Hill for many years, IP can get pretty spicy.

I used to find the depth of emotion and passion around IP perplexing; at first glance, these issues seemed like they should be much less emotionally and politically fraught than the policy areas that more directly implicate life or liberty, and yet I found them to be equally if not more charged.

But intellectual property is fundamentally about the right and incentive to create, and the potential to foreclose others from the fruits of that creative process. It is hard to imagine anything that is more personal than the ability to have an ownership right in the work of one's own mind. Whether you believe IP needs to be strengthened to promote creativity or that IP rights are abused to stifle it, you are likely to care very much about the policy being applied properly to allow human intellectual potential to thrive.

All of that is to say, I get the passion and I appreciate the energy we have seen displayed here today. One of the many reasons why I am so excited to be here—both at the Commission generally and today at these hearings specifically—is because the FTC has long been at the forefront of tackling difficult questions of how intellectual property rights intersect with competition and consumer protection.

At the heart of these questions is something of a paradox. IP law and antitrust law share a common goal: the promotion of innovation. But at the same time, IP can seem in conflict with competition policy because intellectual property is fundamentally about the opportunity to exclude competitors, a concept that generally invites scrutiny under antitrust law.

Let me start by saying a word about the common goal of IP and antitrust: innovation.

Each type of IP protection grants an exclusive ownership interest to the rights-holder, with the level of exclusivity tailored to the specific nature of each type of IP in order to encourage innovation without stifling competition. The balance is not the same for research-intensive patent inventions as it is for the creative arts in copyright, for example.

Whatever the nature of the specific right, each type of intellectual property promotes innovation and benefits consumers – and competition law is designed to do the same.

Our competition laws promote innovation by ensuring that firms do not exercise their market power – whether it is supported by intellectual property or otherwise – to thwart competition through anticompetitive conduct or consolidation.

Often this work does not involve IP specifically, such as in many merger reviews. The FTC and DOJ first recognized that a merger could harm innovation when they included a section on innovation effects in the 2010 Horizontal Merger Guidelines.<sup>1</sup> Since then the FTC has brought several cases that include allegations of harm to innovation.<sup>2</sup>

A good example of these efforts is the Commission's challenge to the merger of CDK Global and Auto/Mate – two firms that provide business software for car dealerships. CDK Global was attempting to acquire Auto/Mate, a competitor that, while smaller in terms of market share, was a particularly innovative and disruptive challenger to the two market leaders.

In this case, harm in the form of reduced innovation was a prominent feature of the FTC's inquiry, alongside allegations that the merger would result in increased prices and diminished quality of services. In the face of this court challenge from the FTC, the parties abandoned the deal.

The FTC should continue its careful scrutiny of deals with the potential to reduce innovation and be ready and willing to challenge a merger even when the facts show that the prevailing – and perhaps only – harm is to innovation.

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<sup>1</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §6.4 (2010).

<sup>2</sup> *In the Matter of Verisk Analytics, Inc., Insurance Service Office, Inc., and EagleView Technology Corporation*, Docket No. 9363, (Dec. 16, 2014), *Federal Trade Commission v. Steris Corporation, et al.*, No. 15-cv-1080, (N.D. Ohio Sept. 24, 2015), *In the Matter of CDK Global, Inc., a corporation; CDK Global, LLP, a limited liability company; Auto/Mate, Inc., a corporation; Robert Eustace, an individual; Elsa Eustace, an individual; G. Larry Colson, Jr., an individual; Michael Esposito, an individual; and Glen Eustace, a representative*, Docket No. 9382 (Mar. 20, 2018).

In many cases, competition law and IP law run peacefully in tandem and are even complementary in promoting innovation and competition. However, we wouldn't be here today discussing innovation and IP if that was the end of the story.

The most interesting and difficult questions to me arise when there is an overlap or a conflict between the application of intellectual property rights and the healthy operation of a competitive marketplace.

In examining restraints of competition, the FTC considers not only the IP matter at hand – whether that be patent, copyright, trademark, or trade secret related – but it focuses on the impact the exercise of that property right will have on *competition and consumers*.

As the Supreme Court held in *Actavis*, a patent does *not* provide a free pass from antitrust scrutiny.<sup>3</sup>

Patents aren't the only area of challenge. Yesterday, we had a terrific panel about copyright law – the Commission's first of this kind – with discussions about how copyright law intersects with competition and consumer issues in various forms of media and online platforms. As content is increasingly and often exclusively digital, there are many new challenges that I am glad to see these hearings addressing head on.

How properly to identify the line between where the right to exclude promotes innovation and where it inhibits competition (and therefore innovation) is extremely challenging, and extremely important.

Those questions have become only more difficult with 21<sup>st</sup> century innovations in data sharing, online platforms, and the ubiquity of software. And I'm not the only one who thinks it's hard – we've seen case after case out of the Supreme Court on IP that raise more questions than they answer.

That is why I am so glad these hearings devoted two days to difficult IP questions, and so grateful our panelists have donated their time and intellect to helping us think through these issues.

While the Commission has been very engaged in some very specific areas of IP study, advocacy, and enforcement, this week's sessions have been an opportunity to take a step back and reconsider the fundamental questions of competition, innovation, and intellectual property.

Participants throughout both days have shared their views on major trends in the IP landscape – including how businesses make IP decisions, copyright challenges, patent quality, and patent litigation. Some of the debates sounded very familiar from my days working on these issues in the Senate, but there are of course new developments, new law, and new empirical studies that are continuing to inform the conversation.

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<sup>3</sup> *F.T.C. v. Actavis*, 570 U.S. 136 (2013).

This week's hearings reaffirm the critical role the FTC plays in bringing its consumer protection and competition expertise to help tackle key innovation and intellectual property questions. As I said when I opened the second day of hearings, it is simply not plausible that we conclude this effort with a pat on the back, telling ourselves we have gotten everything right.

Surely, we will be able to distill key lessons that will inform our enforcement and policy priorities, and certainly, there will be more to consider as IP markets and competition evolve.

Thank you for having me and again thank you to all who provided us with two days of thought provoking and spirited discussions.