Antitrust/Intellectual Property Interface
Under U.S. Law

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ANTITRUST AND INTELLECTUAL PROPERTY LAWS – IN CONFLICT OR COMPLIMENTARY?

- Patents confer a “monopoly” by giving the patent holder a right to exclude others from making or selling the invention.
- Copyrights protect the owner from unauthorized copying of the author’s expression of ideas.
- Early U.S. court decisions saw intellectual property law in conflict with antitrust law – Antitrust law condemns monopoly; while IP laws confers a “monopoly”.
- Modern thinking is that Antitrust and IP law are complimentary – they both provide incentives to innovate – IP law by protecting new inventions and antitrust law by removing improper barriers to the introduction of new products and by protecting the competitive process.
The 1995 “Antitrust Guidelines for the Licensing of IP” (http://www.justice.gov/atr/public/guidelines/0558.pdf) established three basic principles:

- First, that intellectual property should be treated like any other property.
- Second, there is no presumption that a patent creates market power (this was a change from the prior view that a patent creates a “monopoly”). The DOJ/FTC will look at alternatives to the patented product to properly define the relevant market.
- Third, intellectual property licensing is generally pro-competitive.
- The IP Guidelines discussed three potential kinds of markets – goods markets; technology markets; and innovation markets. These types of markets are relevant to market definition issues in merger analysis, Section 2 cases, etc.
UNDER § 2.2, Having a patent generally does not “impose on the intellectual property owner an obligation to license the use of that property to others.”

UNDER § 2.3, Field-of-use, territorial, and other limitations on intellectual property licensing may be pro-competitive.

UNDER § 3.1, The “Agencies will not require the owner of intellectual property to create competition in its own technology”.


NO PRESUMPTION OF MARKET POWER FROM A PATENT

- The Supreme Court in *Illinois Toolworks, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), overruled prior precedent and ruled that there should be no presumption of market power from a patent.

- In the IP 2 Report, the DOJ/FTC reaffirmed that “antitrust doctrine does not presume the existence of market power from the mere presence of an intellectual property right.”
Antitrust liability for refusal to assist competitors – whether by licensing patents or otherwise – is a rare exception to the ordinary rules of antitrust. Under *U.S. v. Colgate*, 250 U.S. 300 (1919), the Sherman Act generally does not restrict the right of a manufacturer to decide who it will do business with; however, a refusal to cooperate with a rival can give rise to Section 2 liability in limited circumstances. *Aspen Skiing Co. v. Aspen Highlands*, 472 U.S. 585 (1985).

In *Verizon Communications v. Trinko*, 540 U.S. 398 (2004), the Supreme Court summarized the reasons why antitrust law generally should not require a firm to cooperate with rivals:

1. This will reduce incentives to innovate;
2. Enforced sharing requires antitrust courts to act as regulators; and
3. Compelling negotiation between competitors may facilitate collusion.
There is still a conflict between the 9th Circuit and the Federal Circuit regarding the consequences of a unilateral refusal to license. In *Image Technical Services, Inc. v. Eastman Kodak Co.* (“Kodak”), 125 F.3d 1195 (9th Cir. 1997), the 9th Circuit allowed a jury to determine whether a refusal to license patented parts was a mere “pretext” and affirmed a jury verdict of antitrust liability.

In *Re Independent Service Organizations* antitrust litigation (“CSU”), 203 F.3d 1322 (Fed. Cir. 2000), the Federal Circuit granted summary judgment for defendant, declining to consider the patent holder’s reason for refusing to sell or license patent products.

The Federal Circuit ruled that a “patent holder may enforce the statutory right to exclude others… free from liability under the antitrust laws” except under very narrow circumstances where there is proof of illegal tying, fraud on the Patent Office, or sham litigation.

In the IP 2 Report, the enforcement agencies concluded that there is little chance of antitrust liability for “mere unconditional unilateral refusals to license”.

However, a patent holder’s imposition of certain conditions on the right to license, including tying arrangements and exclusive dealing – may still give rise to antitrust claims.

For example, in *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), the D.C. Circuit rejected Microsoft’s argument that since it had a valid copyright on Windows, it could prevent PC manufacturers from changing the appearance of the Windows desktop. “This is no more correct than the proposition that one’s use of personal property such as a baseball bat can not give rise to tort liability.”
THE “ESSENTIAL FACILITIES” DOCTRINE

- The “essential facilities” doctrine is a subset of “refusal to deal” cases. The “essential facilities” doctrine is a label sometimes used by plaintiffs or by courts to describe a situation where a dominant firm (or group of firms) is required to cooperate with rivals or make facilities available to rivals. The concept originally arose out of cases involving the collective action of a group of horizontal competitors denying access to a disfavored rival. *U.S. v. Terminal R.R. Ass’n.*, 224 U.S. 383 (1912).

- In *MCI Communications v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), the Court extended the theory to unilateral conduct and identified four requirements to establish liability under an “essential facilities” theory:
  1. Control of the essential facility by a monopolist;
  2. A competitor’s inability practically or reasonably to duplicate the essential facility;
  3. The denial of the use of the facility to a competitor; and
  4. The feasibility of providing the facility.
THE “ESSENTIAL FACILITIES” DOCTRINE (CONT.)

- The continued viability of the “essential facilities” doctrine (at least involving unilateral conduct) is in question after the Supreme Court’s ruling in *Verizon Communications v. Trinko*, 540 U.S. 398 (2004).

- In any event, the applicability of the “essential facilities” doctrine to intellectual property has been questioned. In the case of *In Re Microsoft Antitrust Litigation*, 274 F. Supp. 2d 743 (D. Md. 2003), the Court rejected plaintiff’s argument that the Application Programming Interfaces (“APIs”) to the Windows Operating System were an “essential facility”. The Court stated, “to require one company to provide its intellectual property to a competitor would significantly chill innovation.” *See also Daisy Mountain Fire District v. Microsoft Corporation*, 547 F. Supp. 2d 475 (D. Md. 2008) (Dismissing “essential facilities” claim against Microsoft, ruling that “essential facility claims involving tangible assets are quite different from claims involving technical innovation …”) But see Pitofsky, “The Essential Facilities Doctrine Under U.S. Antitrust Law,” 70 Antitrust L.J. 443, 452-454 (2002) (arguing that the “essential facilities” doctrine should apply to IP).
ANTITRUST ISSUES IN PROSECUTING INFRINGEMENT LITIGATION

- Bringing a legitimate patent or copyright infringement suit should not give rise to antitrust liability.
- However, there are two theories of antitrust liability that may be asserted if an infringement suit is based on a fraudulent patent or is a “sham” litigation.
- First, there is a *Walker Process* claim, named after the Supreme Court case of *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). In a *Walker Process* claim, the plaintiff must prove that:
  1. The patent was procured by knowing and willful fraud;
  2. The party asserting the patent was aware of the fraud when it initiated the lawsuit;
  3. The patent would not have been granted to the defendant absent the fraud.
- “Deliberate fraud” to trigger *Walker Process* liability can be shown either by a fraudulent misrepresentation to the Patent Office or a fraudulent omission, as long as the misrepresentation or omission is material. *Nobelpharma v. Implant Innovations*, 141 F.3d 1059 (Fed. Cir. 1998).
The second theory of potential antitrust liability is that a plaintiff has filed or prosecuted a “baseless” or “sham” patent or copyright infringement suit with the purpose of hurting a competitor.

In *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), the Supreme Court addressed the question of how to define “sham” litigation, which would not be entitled to immunity from antitrust suit.

The Supreme Court held that litigation can not be deprived of immunity as a “sham” unless the litigation is “objectively baseless” in the sense that no reasonable litigant could realistically expect success on the merits. Thus, if a court finds that an objective litigant believes that the claim has a chance of prevailing, then bringing the claim is not “objectively baseless”.

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**ANTITRUST ISSUES IN PROSECUTING INFRINGEMENT LITIGATION (CONT.)**
Only if the challenged litigation is found to be “objectively baseless” should a court get to the second step of examining the litigant’s subjective motivation. Under the second part of the definition of “sham”, the court focuses on whether the baseless suit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process – as opposed to the outcome of that process.

Under the “objectively baseless” prong of this test, a lawsuit that wins by definition is legitimate. Even a losing claim would be protected as long as the law or the facts were in doubt when the case was filed so that filing the suit was an objectively plausible effort to enforce a party’s rights.
Abuse of The Standard Setting Process

- Collaborative setting of industry standards by competitors can be enormously procompetitive, particularly where products need to interoperate.

- However, the standard setting process presents opportunities for anticompetitive conduct.

- “[A]ntitrust law historically has been concerned with the risk of one or a small number of participants in a standards setting organization capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power.” Rambus Inc. v. Infineon Techs., 330 F.Supp. 2d 679, 696-97 (E.D. Va. 2004); see also Amer. Soc. of Mech. Eng’rs, 456 U.S. 556 (1982).
Abuse of The Standard Setting Process (CONT.)

- Most cases relate to collusive activities to protect colluders from rival’s innovation. But problematic unilateral activities include:
  - Misrepresenting or failing to disclose the existence or scope of intellectual property that covers a proposed standard.
  - Failing to abide by a FRAND commitment.
In the Matter of Dell Computer, 121 F.T.C. 616 (1996), the FTC first considered the anti-competitive consequences of the belated assertion of intellectual property rights after the IP had been incorporated into a standard developed through the collaborative efforts of different companies in a standard-setting organization. A Dell representative allegedly certified in writing, under the standard-setting rules of the organization, that the proposed standard did not infringe on any of Dell’s intellectual property rights. After the standard was adopted, however, Dell informed several companies utilizing the standard that Dell’s patent rights were infringed. The FTC alleged that Dell had engaged in anti-competitive conduct by failing to disclose its patent rights and then threatening to enforce those rights after the standard had been adopted and achieved wide market acceptance. This issue has come to be known as the “patent hold-up” problem.
In *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 209 (3rd Cir. 2007), the 3rd Circuit recently addressed one variant of the "patent hold-up" problem – whether the antitrust laws applied to actions of a company that allegedly breached its promise to license patented technology incorporated in a standard on fair and reasonable ("FRAND") terms. The 3rd Circuit reversed the district court’s dismissal of Broadcom’s complaint against Qualcomm, holding that a patent holder’s intentionally false promise to license essential intellectual property on FRAND terms within the context of a standard-setting organization is actionable anti-competitive conduct where the standard-setting organization relied on that promise when including the IP in a standard.
Another recent variant of this theory is the claim that a company engages in anticompetitive conduct, as well as a breach of contract, when it fails to license IP on FRAND terms. This claim was raised in Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788 (N.D. Tex. 2008). There RIM brought a Section 2 monopolization and breach of contract claim against Motorola based on Motorola’s alleged failure to license patents essential to WLAN standards, as well as other standards, on FRAND terms. The court suggested that a holder of an “essential patent” incorporated into a standard possesses monopoly power in the relevant market, at least for purposes of a motion to dismiss. Id. at 793. The court also suggested that a holder of “essential patents” becomes a “gatekeeper” in the use of technologies necessary to the standard, and abusing that “gatekeeper” role causes antitrust injury. Id. at 794-95. Finally, the court stated that the complaint alleged that “by misrepresenting its intentions” in the standard-setting process, Motorola committed “anticompetitive conduct” to achieve or maintain its monopoly power. The court found such allegations sufficient to withstand a motion to dismiss a Section 2 monopolization claim. The court also ruled that RIM’s contract claim, based on a “intended beneficiary” theory, stated a valid cause of action.
Similarly, in *Ericsson v. Samsung Electric Co.*, Ltd. 2007 WL 12027828 (N.D. Tex Aprl. 20, 2007), the court permitted Samsung’s breach of contract claim against Ericsson to proceed based upon an alleged failure to honor a FRAND commitment with respect to the WCDMA standard.

Microsoft recently asserted a similar case against Motorola on breach of contract, waiver, and estoppel theories, based on Motorola’s alleged breach of its commitments to standard setting organizations to license “essential patents” on FRAND terms. See complaint, filed in *Microsoft Corporation v. Motorola, Inc.*, Case 2:10-cv-01823-JCC (W. D. Wash. Filed Nov. 9, 2010) (Doc. 1).
In *Rambus v. FTC*, 522 F. 3d 456 (D.C. Cir. 2008), the Appellate Court reversed a finding of the Federal Trade Commission that Rambus had engaged in “exclusionary conduct” within the meaning of Section 2 of the Sherman Act and Section 5 of the FTC Act by failing to disclose patents and patent applications during the course of its participation in meetings of a standard-setting organization, and by using information gained from its participation in the standard-setting proceedings to modify patent applications to insure that its issued patents would apply to those industry standards. The Appellate Court reached this conclusion because there was no evidence in the record that the standard-setting organization would have adopted different technologies instead of the technologies owned by Rambus had Rambus made full disclosure. This decision rested on the lack of a causal connection between the challenged conduct and the decisions of the SSO.
One of the FTC’s latest action in the standard-setting context was the announcement of a proposed consent judgment on January 23, 2008 with Negotiated Data Solutions LLC (also called “N-Data”). In this case, the FTC alleged that N-Data had acquired technology from another company which had promised to charge only $1,000 for a paid-up license if the technology was included in an Ethernet standard. The FTC alleged that N-Data’s action in attempting to renege on this promise constituted in “unfair act or practice” and an “unfair method of competition” within the meaning of Section 5 of the FTC Act.

By order dated September 22, 2008, the FTC approved the entry of a consent judgment under which N-Data agreed not to attempt to collect higher royalties for use of the patented technologies incorporated into the Ethernet standards.
The Antitrust Enforcement agencies have encouraged SSOs to adopt clear rules so companies “know up-front, what they are getting into when they choose to participate in the SSO, when they choose to disclose or not disclose potentially relevant or intellectual property, and when they choose whether to implement a standard.” Varney speech at p. 5.

The Antitrust Enforcement agencies have also clarified that they will not pursue SSOs on a *per se* price-fixing theory if the SSOs adopt rules which require or encourage the pre-disclosure of maximum royalty rates and other licensing terms by patent holders while their patented technologies are being considered for inclusion in a standard. See letter from Thomas O. Barnett, Assistant Attorney General, U.S. Dept. of Justice, to Robert A. Skitol, Esq. (Oct. 30, 2006) (Referred to as the VITA Business Review letter) (Available at http://www.justice.gov/atr/public/busreview/219380.pdf) and letter from Thomas L. Barnett, Assistant Attorney General, U.S. Dept. of Justice, to Michael A. Lindsey, Esq. (April 30, 2007) (IEEE Business Review letter) (Available at http://www.justice.gov/atr/public/busreview/222978.pdf)
As Assistant Attorney General Christine Varney recently stated, “the Division has recognized that in choosing among competing technologies, SSOs may benefit from knowing not only the performance trade-offs but also the cost of using these various technologies, including any royalty costs. Moreover, those costs should be known before technologies become incorporated into the standard, not after.” Varney speech at p. 5.
Reverse Payments In the Pharmaceutical Industry

- Over the past decade, the Antitrust enforcement agencies have been particularly concerned with pharmaceutical patents settlements involving “exclusion payments” – payments to delay entry of a lower-cost generic drug – and have challenged agreements believed to violate the antitrust laws. See generally, “Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions,” (FTC Staff Report January 2010) (Available at http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf).
Reverse Payments In the Pharmaceutical Industry (CONT.)

- Such “reverse payment” settlements usually take place within the framework for generic entry established by the Hatch-Waxman Act (codified in 21 U.S.C. § 355). Under that Act, a generic competitor may seek entry prior to the expiration of the patents on a brand-name drug. The Act creates an incentive for generic companies to challenge brand name patents because the first generic to file its application can obtain 180 days of marketing exclusivity during which it is the only generic on the market (subject to limited forfeiture provisions in 21 U.S.C. § 355(j)(5)(D)). To seek FDA approval for entry before patent expiration, a generic must declare that its product does not infringe the relevant patents or that the relevant patents are invalid. Typically, brand-name pharmaceutical companies file infringement actions challenging the generic’s declaration, and litigation ensues between the brand-name and generic pharmaceutical manufacturers to determine the relevant patents are valid and/or infringed. For the brand-name manufacturer to prevail and block entry, it must successfully defend the validity of its patents and demonstrate that the generic’s product would infringed those patents. Given the cost and potential uncertainty of patent litigation, brand name and generic manufacturers often settle their patent litigation before a final court decision. In some circumstances, the settlement involves payments from the plaintiff – the brand-name manufacturer – to the defendant – the generic manufacturer. The settlements have been called “reverse payment” settlements. Since amendments to the Hatch-Waxman Act effective in January 2004, settlements of Hatch-Waxman litigation between a brand-name manufacture and a generic manufacture must be reported to the FTC and Department of Justice. See Pharmaceutical Agreement Filing Requirements (available at http://www.ftc.gov/os/2004/01/04106pharmrules.pdf).
Reverse Payments In the Pharmaceutical Industry (CONT.)

- However, a number of appellate courts have rejected the claims of the enforcement agencies and private plaintiffs, upholding “reverse payment” patent settlements as long as they are within the scope of the challenged patents. See *Schering-Plough Corporation v. Federal Trade Commission*, 402 F. 3d 1056 (11 Cir. 2005); *Valley Drug Co. v. Geneva Pharms.*, 344 F. 3d 1294 (11th Cir. 2003); *Arkansas Carpenters Health & Welfare Fund v. Bayer AG*, 604 F. 3d 98 (2d Cir. 2010), cert. denied March 7, 2011; *Federal Trade Commission v. Watson Pharmaceuticals, Inc.*, Case No. 1:09-cv-00955 (N.D. Ga. Feb. 22. 2010) (On appeal to 11th Cir.); *In re Ciproflaxacin Hydrochloride Antitrust Litigation*, 544 F.3d 1323 (Fed. Cir. 2008).
Reverse Payments In the Pharmaceutical Industry (CONT.)

- Under the approach of these courts, “reverse payment” settlements that do not exceed the scope of the challenged patents should be upheld because (1) patents are presumed valid, (2) patent law bestows the patent holder with the right to exclude others from profiting by the patented invention, (3) a settlement is not unlawful if it serves to protect that to which the patent holder is legally entitled – a monopoly over the manufacture and distribution of the patented invention. *Arkansas Carpenters*, 544 F.3d at 1337.

- Under this approach, “reverse payment” settlements of patent litigation between brand name manufacturers and generic manufacturers do not violate the antitrust laws unless one of three circumstances is shown to be present: (1) the patent-in-suit was procured by fraud, (2) the suit for its enforcement is shown to be “objectively baseless”, or (3) the exclusionary effects of the settlement exceed the scope of the patent-in-suit.
The one appellate case where the “reverse payment” settlement was invalidated involved a situation where the settlement did exceed the scope of the patents in question. See *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003); see also *King Drug Co. of Florence, Inc. v. Cephalon*, 702 F.Supp. 2d 514 (E.D. Pa. 2010) (Motion to dismiss denied where complaint alleged the patent was invalid; the settling generic company refused to surrender its 180 day exclusivity period and the settlement exceeded the exclusionary scope of the patent.)