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Antitrust Agencies Right to Expand Scrutiny of Patent Transfers and Acquisitions

David Balto (Law Offices of David A. Balto) · Wednesday, October 31st, 2012

One of the most complex and daunting challenges facing competition regulators is the evolving intersection of antitrust and intellectual property law. Given that both antitrust law and patent law seek to enhance consumer welfare and promote innovation, but do so through very different mechanisms, it is natural for regulators to struggle when harmonizing monopoly-granting patent law with competition-enforcing antitrust law.

Notwithstanding these hurdles, representatives from the Department of Justice Antitrust Division, the Federal Trade Commission, and the European Commission made it clear in a recent series of speeches that they intend to broaden their patent and competition focus to go beyond traditional challenges such as patent misuse, or price fixing through licensing. I applaud the thought leaders within these organizations for recognizing that the intersection of IP and antitrust is not static, and I believe it is an encouraging sign for consumers that the agencies are stepping up to the plate on these issues.

There are at least five themes that regulators touched upon during presentations at the recent Georgetown Global Antitrust Enforcement Symposium and the Fordham Conference on International Antitrust Law and Policy that signal a broadened approach to regulators' analysis of competitive harm:

1. Unilateral aggregation of patents by a competitor;
2. Collaborative acquisition and aggregation of patents by competitors;
3. Business practices of non-practicing entities (NPE), whom the industry has described as "trolls" and which are sometimes referred to as "patent assertion entities";
4. Transfer of patent rights to trolls by legitimate competitors and the subsequent economic relationship between the competitor and the troll; and
5. Business practices of unwilling licensees within the standard-essential patents (SEP) context, and whether an unwilling licensee may be subject to equitable relief for failure to negotiate in good faith.

Fiona Scott Morton, the deputy assistant attorney general for economic analysis, commented at the Georgetown conference that there are two high-level concerns when companies acquire patents. First, there is the threat that the firm will use the patents to raise the operating costs of rivals. This

may occur in a variety of ways, but the most important element for regulators is to understand the context and business model of is the party acquiring the patent, at which point “you can apply the vertical harm theory of your choice.” Secondly, Dr. Scott-Morton explained that every transaction of intellectual property has the potential to distort the balance in the ecosystem, and that this threat is particularly present in high tech industries. FTC Chief Economist Howard Shelanski agreed with these views, and also stressed that the question of patent acquisition becomes increasingly more complicated when you introduce non-practicing entities into the equation, particularly when there may be a relationship between a NPE and a traditional competitor.

With respect to NPEs, Assistant Attorney General Joseph Wayland remarked “Some have raised concerns about business entities that do not develop patented technologies or incorporate them into their products, but purchase and assert patents, through licensing or litigation, against firms who manufacture products … While being respectful of the benefits of business models that facilitate the transfer of patent rights, we continue to monitor these activities and their effects on innovation and competition.” FTC Chairman Jon Leibowitz also acknowledged that his agency is receiving complaints about non-practicing entities.

On the issues of SEPs and fair, reasonable, and non-discriminatory (FRAND) licensing, many of the issues with respect to the patentee are well known, and the agencies appear committed to ensuring that companies do not wield undue market power as a result of SEP abuse. In her remarks prepared for an International Telecommunication Union patent roundtable, Department of Justice Deputy Assistant Attorney General Renata Hesse gave policy suggestions standards bodies could implement to promote competition. These suggestions included improving advance identification of patented technology that could be involved in a standard, making it clear that FRAND commitments apply to all future purchasers of the patent, and either establishing guidelines for what constitutes a FRAND rate or establishing an arbitration process to resolve FRAND rate disputes. In addition, Hesse suggested two bargaining limitations on companies that have agreed to license their patents on FRAND terms. First, these companies should have a limited ability to seek an injunction. Second, FRAND licensors should be prohibited from demanding mandatory cross-licensing agreements where FRAND licenses are exchanged for non-FRAND licenses.

It also appears that enforcers are beginning to more closely scrutinize the behavior of would-be licensees who take advantage of a FRAND encumbered patent without negotiating licensing terms in good faith. The European Commission’s Deputy Director-General for Antitrust Cecilio Madero Villarejo expressed concern that some technology companies who complain of being denied a license on FRAND terms never truly intended to acquire a license, but rather “wanted to create conditions for a competition case to be brought.” This reflects a more sophisticated understanding of the relationship between SEP holders and potential licensees, and bodes well for consumers who increasingly use products that rely on standards.

The approach suggested by the agencies in these statements demonstrates two important aspects of this field. First, firms are deploying intellectual property in new ways. Oftentimes this is proof of innovation, but sometimes firms use intellectual property rights and the idiosyncrasies of the patent system to gain undue advantages, unfairly harm competitors, and limit economic growth. Second, the harm that results from these practices is best prevented rather than dealt with after-the-fact. Regulators recognize the importance of framing behavior with respect to intellectual property before it harms competition. This is the best way to ensure that consumers reap the benefits of competition. Others have recognized the need for the antitrust agencies to take a stand on these issues, including Bert Foer of the American Antitrust Institute’s who delivered remarks before the

Seoul International Competition Forum. I am glad to see the agencies are listening to the voice of consumers.

Co-authored by Brendan Coffman.
Brendan Coffman is an attorney in Mr. Balto's office.

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