Developments in Antitrust Law: From the Sherman Act to SEPs

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I. Introduction

The landmark Sherman Antitrust Act of 1890, 15 U.S.C. §§1-7 criminalized anti-competition. Like the controversial criticism it faced since its inception, over 100 years later, the ideals of the Sherman Act are central to the controversy today over Antitrust investigations and litigation, particularly as it relates to global technological companies like Google, Apple, and Microsoft. The Sherman Act requires the Department of Justice (DOJ) and Federal Trade Commission (FTC) to investigate possible violations of the Act. The Act makes illegal any agreement in restraint of trade or industry monopolization. (Title 15 U.S.C. §§1-2.) The Act was enacted to prohibit companies from acquiring monopolies or cartels over entire industries, such as the oil industry. However, as technological innovations have expanded on a global scale, faster than case law can be made, much of Antitrust law focus has shifted to large corporations who control key technologies around the world.

These technological companies, including giants like Google, Apple, and Microsoft, participate in Standard Setting Organizations (SSOs). SSOs set standards for the industry in order to ensure that products from different companies are compatible with each other.[1] SSOs also ensure that patents are licensed to other companies in order to preserve and maintain the standard. This protects the consumer and simultaneously allows for competition and innovation within the market. Once a patent is included in a

market standard it is known as a Standard Essential Patent (SEP).[2] The licensing of SEPs in the technology industries are currently a focal point of government interest. The recent decisions by the DOJ and the FTC to not criminally prosecute Google and others for suspected Antitrust violations has sparked a serious debate in the Antitrust community as to how these decisions will affect the national and global legal landscape of Antitrust law.[3]

II. Background

SSOs play a major role in the technological industry by ensuring innovation and overall consumer benefits from industry-wide set standards.[4] Many of these SSOs have bargaining and agreement requirements that require patent holders to engage in fair agreements with licensees. [5] "Fair, Reasonable, and Non-Discriminatory Terms" (FRAND) are typical requirements in the United States and Europe Community. When SSOs select a given SEP as an industry standard, the patent holder has a greater market power and can demand fees from licensees for its use. The reasonableness of these fees is often a contested issue.[7]

SEPs can be worth millions of dollars, exactly how much is the crucial question in current litigation amongst various patent holders and interested licensees. For instance, the smartphone industry alone is worth $293.9 billion, so potentially SEPs in this platform may be worth many millions or even billions of dollars.[8]

III. Federal Government Moves Away From Prosecution While Resolutions of SEP Disputes Move to the Courts

On February 13, 2012, the DOJ announced its decision to close three investigations of both national and international interest: Google Inc.'s acquisition of

Motorola Mobility Holdings, Inc.; Apple Inc., Microsoft Corp.; and Research in Motion Ltd. acquisition of Nortel Networks Corporation's patents; and, the Apple Inc. acquisition of some Novell Inc. patents.[9] The focus of these investigations was on the legality of the SSOs FRAND commitments; specifically, whether they prevented innovation and competition in violation of the Sherman Act. The DOJ's investigation and analysis considered whether the patent holders were improperly raising rival costs, improperly compelling licensees to grant them the rights to use licensee's intellectual property, improperly charging licensees entire royalty rates when licensing a small subset of the SEP, or improperly seeking to exclude products from the market developed by licensees who use the patent holder's SEPs. The DOJ noted that the crucial issue was whether the patent holder had the incentive or ability to hold up competitors, especially by seeking injunctions or exclusion orders.[10]

In its decision, the DOJ noted that Research In Motion and Microsoft have such a small amount of market shares that seeking injunctions would be unprofitable for them. Conversely, the DOJ concluded that Google and Apple could harm competitors, because they possess a large amount of market shares, however, the DOJ did not find the patents at issue could substantially lessen competition in this particular instance. The DOJ determined that Motorola Mobility has a long history of seeking to capitalize on its intellectual property, and Google's acquisition of Motorola was unlikely to alter this policy. The DOJ also concluded that Apple's acquisition of Novell was unlikely to harm competition because Novell's Open Invention Network (OIN) commitments required patent holders to have royalty free use of its Linux-system. The DOJ found that Apple

would not be able to avoid Novell's OIN commitments and was further assured by Apple's commitment to honor Novell's OIN commitments.

The commitments made by Apple and Microsoft, in public statements, to abide by FRAND terms, and thereby to not seek injunctions, supported the DOJ's decision to close the investigation. However, the DOJ observed that Google was not as clear on its commitments. Five days before the DOJ's decision on February 13, 2012, Google made a statement to the Institute of Electrical and Electronics Engineers (IEEE) regarding its policy on injunctive relief.[11] Google stated that its policy was to refrain from seeking injunctive relief for SEPs infringement only when it involved future license revenues and if the counter-party was willing to forgo certain defenses, pay the full disputed amount into escrow, and agrees to a reciprocal process for injunctions.[12] Despite Google's ambiguous commitments about its injunctive relief policy, the DOJ ultimately decided to not criminally prosecute Google based on the finding that the specific patents at issue would not substantially lessen competition.

In the wake of the DOJ decision, the FTC continued its independent investigation of Google's acquisition of Motorola Mobility Inc. On July 24, 2013, the FTC finalized a consent decree in the Google FRAND Antitrust matter which placed limits on Google's ability to seek injunctive relief on SEPs held under FRAND terms.[13] The consent decree makes clear that going forward SEP holders who have made FRAND agreements may be subject to investigation and possible penalties if they seek injunctions against other SSO members. [14] The FTC explicitly stated that seeking an injunction under these circumstances could be seen as a Section 5 violation of the FTC ACT.[15]

How the DOJ and FTC decisions will impact future investigations and litigation is a topic of major debate. Google is being closely watched by consumers and the Antitrust community after having been the subject of several investigations and litigation. Most recently, Google suffered a $14.5 million loss on September 4, 2013 in the Western District of Washington in litigation against Microsoft Corp. The jury found that Google did not act in good faith when it demanded high royalties from Microsoft for use of its SEPs and threatened Microsoft with a court order for injunctive relief.[16] Google's royalty demands from Microsoft were estimated to have been about $4 billion a year. In agreement with Microsoft, the court determined the appropriate amount was $1.8 million a year.[17] In another matter, Apple is in litigation with Google over issues relating to patent infringement. This matter is pending before the Seventh Circuit and is so far looking like another loss for Google.[19]

IV. Future Affects on Case Law, the EC, and FRAND Bargaining Processes

There is much debate about how the statements and orders issued by the DOJ and FTC that SEP holders seeking injunctive relief are violating FRAND commitments and Section 5 of the FTC Act, will affect the ability to seek remedies in court and the functioning of the bargaining process. Although neither the DOJ nor the FTC expressly prohibited seeking injunctive relief under FRAND, it seems that the courts may agree with the DOJ and FTC by disallowing SEP holders to gain court orders against competitors as we have seen in the Google cases discussed here. At the same time about seven cases are currently pending filed by FRAND parties, both patent holders and licensees.[21] Given the recency of the DOJ and FTC decision at issue here, the rulings in those cases will be closely watched.

The close working relationship between the FTC and the EC on Antitrust issues relating to Google's acquisition of Motorola, confirms that the international community is likely to be influenced by future DOJ and FTC decisions, although the long term impact on the EC is presently unclear.[22]

How the DOJ and FTC decisions will alter the bargaining process between FRAND SEP holders and licensees also remains unclear. It is possible that SEP holders will resort to seeking royalties as opposed to injunctive relief to avoid DOJ and the FTC scrutiny, but like the recent decisions in the Google cases have shown, it does not seem the courts are willing to award these royalties.

V. Conclusion

The DOJ and FTC have clearly expressed their disapproval of parties governed by FRAND agreements in seeking injunctive relief. The future effect on the bargaining process between SEP holders and licensees has been a matter of much recent debate. The DOJ and FTC decisions to not prosecute Google, and their explicit statements of disapproval of SEP holders seeking injunctive relief against SSO members, are too recent to come to any well-founded conclusions as to what effect they will have on future Antitrust investigations and litigation amongst SEP holders and licensees. However, it seems fair to say that courts will not be very willing to grant injunctive relief, at least to parties governed by FRAND terms. For now, we will have to pay close attention to the SEP matters being litigated, and DOJ and FTC investigations, directives, and action, for more definite answers in the future.

ENDNOTES:

[1] Google Inc., DOJ (Feb. 13, 2012), http://www.justice.gov/atr/public/press_release/2012/280190.htm (press release on decision).

[2] *Id.*

[3] Motorola Mobility LLC, FTC File No. 121-0120 (Jan. 3, 2013), http://www.ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf (agreement containing consent order).

[4] U.S. Dep't Of Justice & Fed. Trade Comm'n, Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition 6-7 (2007).

[5] Layne-Farrar, Anne; Padilla, A. Jorge; Schmalensee, Richard (2007). "Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments." *Antitrust L.J.* 74: 671.

[7] Knut Blind & Tim Pohlmann, *Trends in the Interplay of IPR and Standards, FRAND Commitments and SEP Litigation*, 48 Les Nouvelles 177 (2013).

[8] Todd Shields & Susan Decker, *Microsoft Wins Trial on Google's Patent Licensing Tactics* (Sep. 4, 2013), http://www.bloomberg.com/news/2013-09-05/microsoft-wins-trial-on-google-s-patent-licensing-tactics.html.

[9] Google Inc., DOJ, supra note 1.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Motorola Mobility LLC, FTC File No. 121-0120. http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaagree.pdf (Consent Order).

[14] Elyse Dorsey & Matthew R. McGuire, *How the Google Consent Order Alters the Process and Outcomes of FRAND Bargaining*, 20 Geo. Mason L. Rev. 979, 980-81 (2013).

[15] Motorola Mobility LLC, supra note 3, FTC File No. 121-0120.

[16] Todd Shields & Susan Decker, *Microsoft Wins Trial on Google's Patent Licensing Tactics* (Sep. 4, 2013), http://www.bloomberg.com/news/2013-09-05/microsoft-wins-trial-on-google-s-patent-licensing-tactics.html.

[17] *Id.*

[19] Florian Mueller, *Apple Winning Posner Appeal—Chief Judge describes Google's royalty demands as 'crazy,'* http://www.fosspatents.com/2013/09/apple-winning-posner-appeal-chief-judge.html.

[21] Dorsey & McGuire, supra note 12, at 993.

[22] Rick Rule, *FTC's Pass on Google Opens the Door for the Justice Department: The FTC is allowing Google to preserve its advertising monopoly* (Jan. 9, 2013) http://www.usnews.com/opinion/articles/2013/01/09/ftcs-pass-on-google-opens-the-door-for-the-justice-department?page=2.

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