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# United States: IP and Antitrust

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United States antitrust law seeks to encourage free and open competition by preventing exclusionary conduct that threatens the competitive process. Intellectual property rights (IPR) laws, by contrast, are designed to encourage innovation by granting IPR holders a limited statutory right to exclude competition. Compared to many jurisdictions, United States law balances this tension more frequently in favour of the IPR holder. In the United States, IPR holders are generally allowed to enforce their statutory right to exclude and to unilaterally decide to whom (if anyone) they will license their IPR<sup>1</sup> and on what terms.<sup>2</sup> Still, holding IPR does not confer a privilege or immunity to violate the antitrust laws.<sup>3</sup> IPR holders risk violating those laws when they unlawfully acquire IPR (eg, through fraud on the rights-granting agency, typically the United States Patent and Trademark Office), or with respect to lawfully acquired IPR by:

- enforcing those rights in bad faith (eg, against parties to whom there is no colourable infringement claim);
- leveraging IPR beyond the scope of the rights granted to obtain competitive benefits not attributable to those rights; or
- acting collectively, rather than unilaterally, when enforcing those rights.

Beyond these more common areas of antitrust risk, the interface between antitrust and IPR law has been a subject of increasing interest to the Department of Justice (DoJ) Antitrust Division and the Federal Trade Commission (FTC). Through enforcement efforts, advocacy filings and legislative outreach,<sup>4</sup> the agencies have challenged the acquisition and assertion of IPR rights in an effort to determine the correct balance between the rightful exercise of patent rights and a patent holder's incentive and ability to harm competition through the anti-competitive use of those rights.<sup>5</sup>

This article will provide a general background regarding the laws governing the IP-antitrust interface (with particular emphasis on patents),<sup>6</sup> with a focus on three areas of current interest: potential competition law solutions to the 'patent troll' problem; reverse payment and 'pay-for-delay' settlements following the Supreme Court's *Federal Trade Commission v Actavis* decision;<sup>7</sup> and judicial analysis of fair, reasonable and non-discriminatory (FRAND) royalty rates.

## The antitrust-IP interface

Antitrust claims are typically asserted by an alleged infringer (typically a competitor or potential competitor) as an affirmative defence (patent misuse) or as a claim or counterclaim under the Sherman Antitrust Act, 15 USC section 1 et seq. Occasionally, an IP-related antitrust claim is brought by a direct or indirect consumer of the patent holder's product or the antitrust agencies.

A patent misuse defence, if successful, prevents the patent holder from enforcing the patent during the period of misuse; it does not provide a basis for affirmative relief through an award of damages. The Federal Circuit's decision in *Princo Corp v ITC* identified the elements and significantly limited the scope of the defence.<sup>8</sup> In *Princo*, the accused importer claimed the patent holder's efforts to suppress

technology that was competitive with the patents-in-suit constituted misuse of those patents. Rejecting the claim, the Federal Circuit limited the defence to actions that a patent holder may have taken to enlarge the physical or temporal scope of the patents-in-suit (eg, tying).<sup>9</sup> Because the alleged anti-competitive conduct at issue related to technologies other than the patents-in-suit, it could not form the basis of a patent misuse defence.<sup>10</sup>

Because *Princo* has limited alleged infringers and the ability to involve patent misuse as a defence, some parties have turned to antitrust claims under the Sherman or Clayton Acts. Such challenges address the defendant's anti-competitive conduct within an economically defined relevant market, which may be broader than the scope of any patent asserted by the defendant. The antitrust laws also allow for the award of injunctive relief, treble damages and attorneys' fees.<sup>11</sup> The most common patent antitrust claims arise as follows:

- the patent holder seeks to enforce patents that were obtained by fraud on the United States Patent and Trademark Office (a *Walker Process* claim);<sup>12</sup>
- the patents were unlawfully obtained in violation of section 7 of the Clayton Act, which prohibits acquisitions that substantially lessen competition, or section 2 of the Sherman Act, which prohibits monopolisation;<sup>13</sup>
- the patents holder's infringement claims are both objectively baseless, 'in the sense that no reasonable litigant could realistically expect success on the merits'; and subjectively baseless, because the patent holder's actual purpose in filing suit was to interfere directly with a competitor's business relationship through the use of the governmental process, as opposed to the outcome of that process (the sham exception to the *Noerr-Pennington* doctrine);<sup>14</sup>
- the patent holder has engaged in licensing or other conduct (eg, settlement activity) that exceeds the scope of the patent;<sup>15</sup> or
- there has been fraud or other unfair conduct attendant to standard-setting activities.<sup>16</sup>

Competition law solutions to the 'patent troll' problem

During the past year, the courts, competition enforcement agencies and Congress have devoted increased attention to 'patent assertion entities' (PAEs or 'trolls') – and their impact on consumers, technology markets and the United States economy. PAEs do not develop or commercialise patented technologies. Rather, they acquire from other entities by purchase or assignment patent rights covering existing products or processes. They then monetise their investments by demanding licence royalties from alleged infringers who make or use the products or processes that read on the patents (referred to as 'ex post' licensing).<sup>17</sup> PAE revenue consists of royalty payments by those parties through settlements or judgments.

As non-practising entities, PAEs are not subject to patent counterclaims or the substantial costs attendant to providing large volumes of their own data in discovery. Thus, in litigation against alleged infringers, PAEs have the benefit of 'litigation risk asymmetry'.<sup>18</sup>

The PAE may function autonomously, picking or choosing its own targets. Or it may operate as a 'privateer' secretly under service to an operating company that has sponsored it to bring infringement actions against third parties, typically the sponsor's competitors.<sup>19</sup> The PAE and its sponsoring entity typically share the revenues from such actions.

By enforcing its rights through a privateer, the operating company seeks the benefits of the privateer's risk asymmetry. But the use of a privateer does not render the sponsor immune from patent claims by the privateer's targets. If the target learns the sponsor's identity and has its own patents and resources to enforce them, it can bring infringement actions against the sponsor.

Some PAEs limit infringement claims to practising entities that use the patent to make commercial products. But where weak patents are at issue and allegedly infringed by commercially successful products, the PAE may pursue commercial users of those products by sending 'patent demand letters' to hundreds of them.<sup>20</sup> Individual settlements (though typically small in dollar value) are common because many users are small businesses that cannot afford to defend themselves in litigation, regardless of the lack of merit underlying the PAE's threatened suit. By 2012, PAEs accounted for over 60 per cent of patent lawsuits. There is no reason to believe that percentage has since declined.

Whether these suits serve or disserve consumer welfare is the subject of debate. For the most part, PAEs have been criticised as fostering baseless litigation, thus effectively imposing a 'tax' on innovation harming the United States economy. Defenders of PAEs, however, consider them entities that foster innovation by providing a reward for inventors who lack the means to practise their inventions, including universities, individual inventors and non-profit entities. Defenders also contend that PAEs promote consumer welfare by facilitating broad dissemination of technology, rather than exclusive use by a single competitor.<sup>21</sup>

During 2014, draft legislation was introduced in both houses of the United States Congress to amend the Patent Act by curtailing PAE activity, typically through mandated fee-shifting and imposition of sanctions against PAEs found to have brought groundless patent actions. These bills stalled in Congress because of strong opposition by segments of the technology community, some of whom argued legislation is unnecessary because of recent Supreme Court decisions that have lowered the burden of proof under section 28 of the Patent Act, 35 USC section 285, which authorises trial courts to award attorney's fees to prevailing parties in infringement actions in 'exceptional cases'.<sup>22</sup> On the policy side, in September 2013, the FTC announced its intention to open an investigation of PAE activities, which will be followed by an agency report about the extent to which PAEs affect competition and innovation.<sup>23</sup>

Whether competition – as distinct from patent – law offers solutions to the PAE problem is unclear.<sup>24</sup> The primary hurdle to antitrust enforcement is the *Noerr-Pennington* doctrine, which provides antitrust immunity to activities seeking redress of grievances through government action, including complaints filed in courts and before administrative agencies. Grounded in the First Amendment of the United States Constitution, the doctrine requires the alleged infringer to show that a plaintiff's claim was a sham – that it was both objectively and subjectively baseless.<sup>25</sup> This is a very high standard.

Because false advertising is not constitutionally protected, several states and the FTC have used false advertising statutes to challenge PAEs. A leading target of enforcement has been MPHJ Technology Investments LLC (MPHJ), a firm that sent patent demand letters to dozens of commercial users of alleged infringing products. These

letters, the agencies claim, included 'false and misleading' statements about the validity of the patents at issue, the likelihood they had been infringed by the letter's recipient, and the likelihood that, absent payment by the recipient, MPHJ would actually sue. Investigations were opened by the FTC and state enforcement officials in New York, Nebraska, Vermont and Minnesota. Results have been mixed. In January 2013, MPHJ entered into a settlement with the New York Attorney General that bars the company from using 'deceptive tactics' in demanding patent use licences from New York businesses ([www.law360.com/articles/500980](http://www.law360.com/articles/500980)).<sup>26</sup>

In January 2014, MPHJ filed a suit against the FTC in a Texas federal court seeking to enjoin the agency from continuing its investigation of MPHJ, which, the company argued, was chilling its First Amendment rights.<sup>27</sup> The agency has filed a motion to dismiss the complaint, which awaits decision.

In contrast with false advertising challenges such as those described above, antitrust challenges confront doctrinal difficulties because a PAE is not an actual or potential competitor of any of the alleged infringers, and has no interest in impairing the competitive dynamics of the infringers' markets or excluding any infringer from those markets. Although PAE enforcement imposes economic costs on the alleged infringers (and indirectly their customers), it provides no competitive advantage to a PAE in the underlying market or, assuming the PAE offers roughly comparable licences to all alleged infringers, to any one infringer.<sup>28</sup> This doctrinal hurdle is distinct from the *Noerr-Pennington* immunity that PAE infringement claims may also enjoy.

In *Intellectual Ventures I LLC v Capital One Corp.*,<sup>29</sup> the plaintiff was a PAE that had acquired 80,000 patents and patent applications, including 3,500 business process patents for technologies used by financial services firms. Capital One, an alleged infringer, filed counterclaims, arguing that Intellectual Venture's (IV) attempt to 'hold up' the defendant by filing baseless waves of patent infringement claims constituted monopolisation and attempted monopolisation in violation of section 2 of the Sherman Act, 15 USC section 2. Capital One also alleged that IV's original acquisition of its patent portfolio had substantially lessened competition in violation of section 7 of the Clayton Act (15 USC section 18).

Capital One contended that 'by forcing its victims to either face endless, costly and disruptive patent litigation or accept licenses to thousands of potentially irrelevant, invalid, and/or unenforceable patents,' IV had unreasonably restrained competition by 'eliminate[ing] the economic incentive of its coerced licensees to challenge the validity of the individual patents within the portfolio,' and by 'reduc[ing] the incentive to innovate, since companies such as Capital One foresee that if they achieve success by selling a product with enough revenue to attract [IV], [IV] will seek to "tax" it'.<sup>30</sup> This conduct, Capital One argued, will cause 'an increase in prices to consumers, a reduction in the rewards for successful innovation, and a decline in the quantity, quality and rate of innovation'.<sup>31</sup>

The court granted IV's motion to dismiss. Central to the court's analysis was its observation that Capital One had failed to allege an economically valid 'proposed market [that] consists of an 'area of effective competition' between IV and the commercial banks who are the alleged victims of IV's anti-competitive conduct'.<sup>32</sup> This was fatal to its Sherman Act claims because, absent a properly defined relevant market, the plaintiff cannot prove that the defendant enjoyed the monopoly or market power. The court rejected Capital One's argument that IV's alleged ability to exact supra-competitive royalty rates was direct evidence of IV's market power, thus making relevant market allegations unnecessary.<sup>33</sup>

Similarly lacking, the court found, were allegations that IV had acted wilfully to acquire or maintain its power in a relevant market by using it 'to foreclose competition, to gain a competitive advantage or to destroy a competitor'.<sup>34</sup> Indeed, the court observed, such allegations would have flown in the face of Capital One's position that 'IV not only does not compete [with Capital One], it also does not engage in any commercial operations at all'.<sup>35</sup>

Finally, the court dismissed Capital One's Clayton Act claim, finding that the defendant had not alleged that IV's patent acquisitions themselves had lessened competition (eg, by affording IV control over all substitute or competing technologies). Because the alleged competitive harms arose not from the acquisitions, but from conduct that post-dated them, Capital One had failed to state a Clayton Act claim.<sup>36</sup>

Although antitrust liability for the filing of meritless infringement cases by a PAE has not yet been found, no immunity attaches to patent settlement agreements that include ancillary restrictions that impair competition in a relevant market.<sup>37</sup> In the context of PAE activity, one example would be agreements that include provisions barring the licensee from licensing third-party technology competitive with the PAE's patent and thus impairing competition in technology and innovation markets.<sup>38</sup> Another example would be an agreement between the PAE and the primary infringer (Company A) that obligates the PAE to pursue A's competitors and demand from them materially higher royalties than are paid by A, thus impairing competition between A and those competitors.

Antitrust claims under the Sherman Act and the Federal Trade Commission Act, 15 USC section 45, may also be available if the troll is acting as a 'privateer' sponsored by an operating company that has deputised it to bring infringement actions against the company's competitors to raise their costs and impair competition with the sponsor. The privateer's status as an agent of the operating company may not deprive the privateer of its *Noerr-Pennington* immunity unless the claims themselves are objectively and subjectively baseless. But the antecedent transfer of patents by the operating company to the PAE and any agreements relating to their future enforcement may be subject to challenge as an unlawful conspiracy in restraint of trade by the operating company and the PAE, 15 USC section 1, or an attempt to monopolise by the operating company. 15 USC section 2.<sup>39</sup>

### Reverse payment or 'pay-for-delay' settlements after *FTC v Actavis*

In recent years, reverse payment or 'pay-for-delay' patent settlements have been challenged by the antitrust agencies and the plaintiffs' bar as anti-competitive. These cases arise when a patent holder (typically, a brand-name pharmaceutical company) settles patent litigation by paying the defendant (a generic pharmaceutical competitor) to delay or abandon its plan to launch a competing drug. On average, the price of generic drugs is 85 per cent less than that of their brand-name counterparts, and in 2010 the FTC estimated that such settlements cost American consumers US\$3.5 billion a year. As a result, the antitrust agencies have repeatedly attacked pay-for-delay settlements in court,<sup>40</sup> participated as amici in private actions,<sup>41</sup> and supported legislative efforts to curb such agreements.

Before the Supreme Court's decision in *FTC v Actavis*, the legality of these settlements, and the standard to be applied to them, was the subject of a significant federal circuit split. In June 2013, the Supreme Court resolved this split, holding that the rule of reason would apply to reverse payment settlements. The case arose in 2003, when Actavis, Inc (then Watson Pharmaceuticals) filed an Abbreviated New Drug

Application seeking approval to market a generic drug modelled on a patented synthetic testosterone, AndroGel. The owner of the patent, Solvay Pharmaceuticals, filed suit against Actavis and others for patent infringement. In 2006, the parties' entered into a settlement whereby Solvay (the patent owner) agreed to pay Actavis (the alleged infringer) US\$19 million to US\$30 million a year for nine years. Additionally, Actavis agreed to delay entry into the market until 31 August 2015, about five years before expiration of the patent. In 2009, the FTC and the attorney general for the State of California sued Actavis in the Central District of California. The case was transferred to the Northern District of Georgia where the district court dismissed the complaint. On appeal, the Eleventh Circuit affirmed applying the 'scope of the patent' test: 'absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anti-competitive effects fall within the scope of the exclusionary potential of the patent'.<sup>42</sup>

In applying the 'scope of the patent' rule, the Eleventh Circuit rejected the FTC's argument that 'an exclusion payment is unlawful if, viewing the situation objectively as of the time of the settlement, it is more likely than not that the patent would not have blocked generic entry earlier than the agreed-upon entry date'.<sup>43</sup> This ruling conflicted with that of the Third Circuit in *In re K-Dur Antitrust Litigation*, where the court rejected the scope of the patent test, holding that such agreements should be analysed under a quick-look rule of reason and that reverse payments to generic competitors should be deemed presumptively anti-competitive and unlawful.<sup>44</sup>

The Supreme Court's decision rejected both tests. The Court first rejected any presumption of anti-competitive effect or application of a quick-look test, noting that the likelihood of a reverse payment bringing about anti-competitive effects may depend on the industry in which it is adopted, the relative size of the payment (ie, in comparison to expected litigation costs) and any other justifications for the payment.<sup>45</sup>

Conversely, the Supreme Court expressly rejected the Eleventh Circuit's holding that reverse-payment agreements are immune from antitrust scrutiny where the agreement's 'anti-competitive effects fall within the scope of the exclusionary potential of the patent'.<sup>46</sup> 'For one thing,' reasoned the majority, 'to refer, as the Circuit referred, simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed'.<sup>47</sup> The Court further noted that settlements of this type tend to have significant adverse effects, and it is inappropriate to measure the settlement's anti-competitive effects solely against patent law policy: 'Patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly' – and consequently antitrust law immunity – that is conferred by a patent'.<sup>48</sup> Thus, the Court held, 'Whether a particular restraint lies 'beyond the limits of the patent monopoly' is a conclusion that flows from that analysis and not ... its starting point'.<sup>49</sup>

Although the Supreme Court thus rejected the 'scope of the patent' rule, it acknowledged that the Eleventh Circuit's conclusion found some support in general policy considerations favouring settlement – particularly the practical concern that antitrust scrutiny of reverse payment settlements would prove time-consuming, complex and expensive. These considerations, however, were outweighed by:

- the potential for adverse effects on competition (exclusion and supra-competitive profits);
- the possibility that these adverse effects may be unjustified;
- the fact that such settlements are more likely to be entered into by companies with important patents and potentially significant market power;

- the Court's view that the administrative burdens may not be as difficult as perceived (ie, the size of the reverse payment may act as a surrogate for a patent's weakness, thereby avoiding a trial on validity or infringement); and
- the fact that the Court's ruling and the increased risk of liability will not prevent litigants from settling their lawsuits.<sup>50</sup>

The Supreme Court's *Actavis* decision left several questions to be resolved by the lower courts. Some of these, such as the central question of how the rule of reason will in fact be applied in such cases, have not yet been directly addressed by the courts outside the motion to dismiss context.<sup>51</sup> Others, however, have provided fertile ground for controversy. For example:

- What is the implication to patent settlements other than reverse payment settlements? While the FTC has advocated that the courts review all patent settlements that may have anti-competitive potential,<sup>52</sup> in the year following the Supreme Court's *Actavis* decision, this suggestion has not been adopted by the courts.<sup>53</sup> The *Actavis* decision itself specifically stated that it did not intend the ruling to apply to 'ordinary patent settlements,' but it is clear that defining the boundary of such settlements will be the subject of additional test cases.
- Does liability under *Actavis* turn on the existence of a monetary payment? On this issue, the lower courts have been split. Some courts have allowed the claim to proceed if there is some allegation of additional value being exchanged for the agreement to stay out of the market,<sup>54</sup> while others have stated that there is no valid claim absent an allegation of some form of monetary payment (a 'large monetary payment').<sup>55</sup> Additional consideration or value in these cases has taken the form of an agreement to refrain from introducing a generic version of the product for a period of time or excess consideration being paid in connection with the settlement of counterclaims or unrelated litigation.<sup>56</sup>
- What is a 'large' monetary payment? On this question, courts and commentators appear to be guided largely by the Supreme Court's statement that 'the likelihood of a reverse payment bringing about anti-competitive effects depends upon its size, its scale in relation to the payors' anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.'

While we await additional clarifying decisions, parties entering into any patent settlement are advised to carefully identify the pro-competitive rationale for any payments and to take appropriate steps to confirm that the settlement is reasonable. The courts have continued to affirm that other strategies, such as obtaining judicial approval for the underlying settlement, will not bar a subsequent antitrust claim.<sup>57</sup>

### Judicial analysis of FRAND royalty rates

As reported last year, requests for injunctive relief based on FRAND encumbered patents or claims that FRAND obligations had been breached raise several issues, including whether the patent user is a 'willing' licensee and whether the patent holder's offer was 'reasonable.' Judicial decisions this past year have provided additional guidance in answering both of these questions.

In *Ericsson, Inc v D-Link, Systems, Inc*,<sup>58</sup> Ericsson sued several defendants alleging willful infringement of a number of patents related to the 802.11n wireless standard. The jury found for Ericsson and awarded it approximately US\$10 million in damages. In response, the defendants moved for judgment as a matter of law based in part on the claim that Ericsson breached its RAND obligations.<sup>59</sup>

In ruling on the motion, the Eastern District of Texas first explained that RAND licensing entails a negotiation.

*A patent holder does not violate its RAND obligations by seeking a royalty greater than its potential licensee believes is reasonable. Similarly a potential licensee does not violate its RAND obligations by refusing a royalty the patent holder believes is reasonable. Instead, both sides' initial offers should be viewed as a starting point in negotiations.*<sup>60</sup>

To that end, the court held that the negotiation is 'a two-way street,' with both parties obligated to negotiate in good faith.<sup>61</sup>

Turning to the dispute before it, the court denied the defendants' motion, holding that the defendants were not willing licensees and that Ericsson had not breached its RAND obligations.<sup>62</sup> With respect to one of the defendants, Intel, the court explained that because Ericsson had offered Intel a licence prior to trial at the same rate and on the same terms as Ericsson's offers to other defendants, which it then amended to reflect the jury verdict, Ericsson had satisfied its good faith efforts to negotiate a RAND licence. Conversely, because Intel had 'never meaningfully engaged in licensing talks with Ericsson after Ericsson's initial offer,' Intel had not fulfilled its good faith efforts to negotiate and thus, was not a willing licensee.<sup>63</sup> Importantly, the court explained that 'Intel cannot rely on its failure to negotiate to prove Ericsson's failure to make a legitimate offer.'<sup>64</sup>

A twist on this analysis came in *InterDigital Communications, Inc v ZTE Corp*.<sup>65</sup> In this case, InterDigital brought patent infringement claims against defendants, to which defendants counterclaimed that InterDigital had breached its obligation to license the patents on FRAND terms.<sup>66</sup> The District of Delaware granted a motion to dismiss the counterclaim, explaining that addressing the counterclaim would serve 'no useful purpose.'<sup>67</sup> The court reasoned that because defendants had not agreed to be bound by whatever FRAND rate the court set (which could be construed to mean that defendants were not willing licensees), the process would not help resolve the infringement case against them. As a result, the court concluded that it did not have subject matter jurisdiction to consider the counterclaim.<sup>68</sup>

Assuming the patent user is a willing licensee, the next step is to evaluate whether the patent holder complied with its FRAND obligations. To determine whether the patent holder had breached its duty of good faith negotiation, the trier of fact must compare the licence offer to a reasonable FRAND rate or range. However, until recently, there was no guidance on what was a true FRAND rate or how it was determined.

That changed with the *Microsoft Corp v Motorola, Inc* case,<sup>69</sup> wherein the Western District of Washington (Robart, J) became the first court in a 207-page opinion to set the applicable FRAND rate. Microsoft claimed that Motorola had breached its duty to offer a licence on FRAND terms for patents essential to practise the 802.11 standard (related to wireless local area networks, commonly known as 'WLAN' or 'Wi-Fi') and the H.264 standard (related to video coding technology).<sup>70</sup> The court began its analysis by setting up the hypothetical negotiation and adopted an ex ante incremental value approach. The court started with the *Georgia-Pacific* factors and then made several adjustments to reflect the purpose of the FRAND commitment – that a patent embodied fully or partially within a standard should be accessible without undue constraints, thereby promoting the widespread adoption of the standard.<sup>71</sup> For example, the court excluded *Georgia-Pacific* factors 4 (licensor's policy and marketing programme to maintain its patent monopoly) and 5 (commercial relationship between licensor and licensee) because they did not

apply in the FRAND context where the patent holder is obligated to license the patent and must do so under FRAND terms.<sup>72</sup> The court made further adjustments to the analysis, including:

- ex ante – any value associated with the incorporation of the patented technology into the standard should be factored out because the hypothetical negotiation takes place before the standard is implemented;<sup>73</sup>
- royalty stacking – to address the risk of royalty stacking, the court considered the aggregate royalties that would apply if other standard essential patent (SEP) holders made royalty demands of the user;<sup>74</sup>
- relative value of patented technology – the court considered both the importance of the features covered by the patented technology to the standard and the importance of the standard and the patented technology to the ultimate product.<sup>75</sup> In making these evaluations, the court considered:
  - whether the patents-in-suit were essential to the standard's optional or peripheral features, or the standard's core features, noting that those essential to optional features would be valued less than those essential to core features;<sup>76</sup>
  - the extent to which the accused product practices specific features of the patents-in-suit as opposed to the standard generally;<sup>77</sup>
  - the total number of SEPs under the standard and the total number of patent holders related to the standard;<sup>78</sup>
  - the patent holder's level of involvement in the standard-setting process;<sup>79</sup>
  - the quantifiable value of the contribution of the patents-in-suit to the standard, including any efficiency gains or improvements over prior or alternate technology; and<sup>80</sup>
  - the existence of alternate technologies and whether the alternatives could have been integrated into the standard;<sup>81</sup>
- comparable licences – to qualify as a comparable licence, the licence must have been negotiated under a FRAND obligation (or some type of comparable obligation) or must follow the customary practice of a business licensing FRAND patents.<sup>82</sup> The court added that:
  - licences that result from the settlement of litigation, even if they involve FRAND-obligated patents, are not a reliable indicator of a FRAND royalty rate; and<sup>83</sup>
  - portfolio licences may be considered, but only the apportioned value of the FRAND-obligated patents within the portfolio; and<sup>84</sup>
- patent pooling agreements – these agreements may be a reliable indicator of the applicable FRAND rate if they are both comparable and appropriately adjusted.<sup>85</sup>

Whether a patent pooling agreement is comparable turns on the timing of the formation (agreements formed after the standard was adopted but before there was widespread adoption of the standard are more reliable),<sup>86</sup> the number and diversity of pool participants as licensors and licensees (the greater the number and diversity the greater the reliability),<sup>87</sup> and whether and the extent to which the potential licensor participated in the pooling agreement.<sup>88</sup>

A patent pooling agreement may be adjusted up or down based on the following considerations:

- whether the pooling rates tend to be lower than two-party negotiated rates;<sup>89</sup>
- whether the pooling agreement allocates royalties based on the quantity of the licensor's patents in the pool, not necessarily the quality of those patents;<sup>90</sup> and

- whether members receive value from the pool membership other than royalties (in which case such value should be factored out of the analysis).<sup>91</sup>

Under this framework, the court determined the FRAND rate as a range between 0.555 and 19.5 cents per unit (depending upon the product or standard at issue).<sup>92</sup> Because Motorola's licence offer was for approximately US\$3.00 to US\$4.50 per unit, the jury found that Motorola had breached its FRAND obligations and awarded Microsoft damages in addition to US\$3 million in attorneys' fees and costs as breach of contract damages.<sup>93</sup> By prevailing on the breach of contract claim, Microsoft was able to recover its fees and costs for the infringement litigation without having to prove the exceptional case requirements of 35 USC section 285.

The second court to set a FRAND rate was the Northern District of Illinois (Holderman, J) in *In re Innovatio IP Ventures, LLC Patent Litigation*.<sup>94</sup> Innovatio sued coffee shops, hotels, restaurants and other users of its standard essential Wi-Fi patents. Cisco Systems Inc and other manufacturers of the Wi-Fi equipment used by the defendants filed a declaratory judgment action seeking a determination that the Wi-Fi patents were invalid and that the equipment did not infringe the patents.<sup>95</sup> Innovatio made initial licence offers for its technology ranging from US\$3.39 per access point, US\$4.72 per laptop, and up to US\$36.90 per barcode scanner.<sup>96</sup>

In an effort to encourage settlement, the court held a bench trial to set the applicable FRAND rate before ruling on infringement so the parties could evaluate potential damages. The *Innovatio* court followed much of the *Microsoft* court's methodology, noting that it 'provide[s] a framework for any court attempting to determine a RAND licensing rate for a given patent portfolio.'<sup>97</sup> However, the *Innovatio* court made some modifications: it used the price of the Wi-Fi chip imbedded in the equipment (the smallest saleable unit), not the end product itself, as the royalty base.<sup>98</sup> By doing so, the analysis of the importance of the patent to the standard and the accused product merged into one.<sup>99</sup>

The court also modified the ex ante hypothetical negotiation by including ex post considerations. Although the hypothetical negotiation takes place before the patents-in-suit are incorporated into the standard (ex ante), where the patents-in-suit were subsequently determined to be essential to the standard (ex post), the FRAND rate may not be discounted based on uncertainty about the essentiality of the patents-in-suit as the *Microsoft* court did.<sup>100</sup> In addition, although alternative technologies may be considered, only those reviewed by the standard-setting body will be factored into the analysis.<sup>101</sup> The court further noted that patented alternatives will not discount the hypothetically negotiated royalty as much as public domain technology might.<sup>102</sup>

With these modifications, the court determined that the patents-in-suit were of 'moderate to moderate-high importance' to the Wi-Fi standard.<sup>103</sup> Despite that finding, the court set the reasonable FRAND rate at 9.56 cents per Wi-Fi chip, an amount significantly lower than that initially offered by Innovatio.<sup>104</sup>

While these cases are helpful in establishing a roadmap for determining whether a user is a willing licensee and what is a reasonable FRAND rate or range, they also demonstrate the fact-intensive nature of these determinations. As this framework continues to develop in future cases, patent holders and users will need to reevaluate the value of FRAND-obligated patents and the reasonableness of their licensing demands.

## Notes

- 1 *In re Indep Serv Orgs Antitrust Litig*, 203 F.3d 1322 (Fed Cir 2000) (upholding patent holders' refusal to deal and refusing to consider subjective motivation). But see *Image Tech Servs, Inc v Eastman Kodak Co*, 125 F.3d 1195 (9th Cir 1997) (articulating a rebuttable presumption in refusal to deal case).
- 2 *Brulotte v Thys Co*, 379 US 29, 33 (1964) ('A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly'); *Gen Talking Pictures Corp v W Elec Co*, 304 US 175 (upholding field of use restrictions), *aff'd on reh'g*, 305 US 124 (1938).
- 3 *Intergraph Corp v Intel Corp*, 195 F.3d 1346, 1362 (Fed Cir 1999).
- 4 See, eg, FTC, 'The Evolving IP Marketplace: Aligning Patent Notice and remedies with Competition (March 2011), available at [www.ftc.gov/os/2011/03/110307patentreport.pdf](http://www.ftc.gov/os/2011/03/110307patentreport.pdf).
- 5 Press release, DoJ, 'Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc' (13 February 2012), available at, [www.justice.gov/atr/public/press\\_releases/2012/280190.htm](http://www.justice.gov/atr/public/press_releases/2012/280190.htm).
- 6 The agencies have indicated that they will apply the same antitrust principals to patents, copyrights and trade secrets. DoJ & FTC, 'Antitrust Guidelines for the Licensing of Intellectual Property', section 1 (1995). However, the courts have been less uniform in their treatment of different forms of intellectual property. See, eg, *Data Gen Corp v Grumman Sys Support Corp*, 36 F.3d 1147, 1184-87 (1st Cir 1994) (adopting different standards for copyright and patent claims).
- 7 133 S. Ct. 2223 (2013).
- 8 *Princo Corp v ITC*, 616 F.3d 1318, 1334 (Fed Cir 2010). The court further held that a party asserting misuse establish an antitrust competitive effect.
- 9 35 USC section 271(d) (prohibiting a patent misuse claim based on tying unless 'the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned'). In 2006, the Supreme Court abandoned the presumption that intellectual property confers market or monopoly power. III. *Tool Works Inc v Indep Ink, Inc*, 547 US 28 (2006).
- 10 *Princo*, 616 F.3d at 1331, 1334.
- 11 Depending on the jurisdiction, some claims may be lost if not asserted in the original patent case. *Compare Critical-Vac Filtration Corp v Minuteman Int'l, Inc*, 233 F.3d 697, 703-04 (2d Cir 2000) (predatory patent filing claim compulsory) with *Hydranautics v Filmtec Corp*, 70 F.3d 533, 536 (9th Cir 1995) (predatory patent claim not compulsory).
- 12 *Walker Process Equip, Inc v Food Mach & Chem Corp*, 382 US 172 (1965). See also *Ritz Camera & Image, LLC v ScanDisk Corp*, 700 F.3d 503 (Fed Cir 2012) (direct purchasers of patented products may bring Walker Process claim).
- 13 *Atari Games Corp v Nintendo of Am, Inc*, 897 F.2d 1572 (Fed Cir 1990); *SCM Corp v Xerox Corp*, 645 F.2d 1195 (2d Cir 1981); *Kobe, Inc v Dempsey Pump Co*, 198 F.2d 416 (10th Cir 1952). See also DoJ & FTC, 'Antitrust Guidelines for the Licensing of Intellectual Property', section 1 (1995). The acquisition of IP (including the grant of an exclusive licence) may trigger the obligations to file a premerger notification and report form with the FTC and to wait the statutory waiting period prior to consummation of the transaction. 15 USC section 18a.
- 14 *Prof'l Real Estate Investors v Columbia Pictures Indus, Inc*, 508 US 49, 50 (1993) (*PRE*). The *Noerr-Pennington* doctrine immunises legitimate efforts to petition the government and in this context relates to efforts to enforce a patent holder's rights through the judiciary. *Noerr* and the sham exception set forth in *PRE* have also been applied to demand letters. *Globetrotter Software, Inc v Elan Computer Grp, Inc*, 362 F.3d 1367 (Fed Cir 2004). Other market communications may not be so protected. *Id*. See also *Experience Hendrix, LLC v HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1146 (WD Wash 2011); *Soilworks, LLC v Midwest Indus Supply, Inc*, 575 F. Supp. 2d 1118, 1126 (D Ariz 2008).
- 15 *United States v Krasnov*, 143 F. Supp. 184 (ED Pa 1956) (horizontal refusal to deal per se illegal where dominant market participants settled patent infringement lawsuit by executing a cross-licence that prevented each of them from granting a licence to a third party absent the consent of the other), *aff'd sub nom. Oppenheimer v United States*, 355 US 5 (per curiam), and *aff'd sub nom. Comfy Mfg Co v United States*, 355 US 5 (1957); *United States v Microsoft Corp*, 253 F.3d 34 (DC Cir 2001) (affirming tying allegation and rejecting allegation that restrictions were justified by copyrights).
- 16 *Broadcom Corp v Qualcomm Inc*, 501 F.3d 297, 314 (3d Cir 2007).
- 17 See *Intellectual Ventures I LLC v Capital One Fin Corp*, No. 1:13-cv-00740 (AJT/TRJ), 2013 WL 6682981 (ED Va, 18 December 2013).
- 18 Michael Carrier, 'Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take', *CPI Antitrust Chron*, Winter 2013.
- 19 Tom Ewing, 'Indirect Exploitation of Intellectual Property Rights by Corporations and Investors', 4 *Hastings Sci & Tech LJ* 1 (2012).
- 20 Ryan Davis, 'ArrivalStar Tops List of Most Litigious Patent Trolls', *Law360* (13 May 2014).
- 21 'The Great Troll Debate – 2 Perspectives: Part 2' (Interview with Cascades Ventures CEO Tony Brown), *Law360* (14 May 2014).
- 22 *Octane Fitness, LLC v Icon Health & Fitness, Inc*, 134 S Ct 1749 (2014); *Highmark Inc v Allcare Health Mgmt Sys, Inc*, 134 S Ct 1744 (2014).
- 23 Press release, FTC, 'FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition' (27 September 2013), [www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact](http://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact).
- 24 See Ilene Gotts et al, 'Antitrust Concerns of Patent Acquisition', *CPI Antitrust Chron*, September 2012.
- 25 *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49 (1993).
- 26 David McAfee, 'NY AG to Bar "Patent Trolls" Deceptive Practices' (13 January 2014).
- 27 *MPHJ Tech Invest, LLC v FTC*, Civil Action No. 6:14-cv-11 (WD Tex, 13 January 2014), available at [http://assets.law360news.com/05000000/500773/mnt/rails\\_cache/https-ecf-txwd-uscourts-gov-doc1-181112640882.pdf](http://assets.law360news.com/05000000/500773/mnt/rails_cache/https-ecf-txwd-uscourts-gov-doc1-181112640882.pdf).
- 28 See generally 'Symposium: Patent Assertion Entities,' 79 *Antitrust Law Journal*, Issue 2 (at pp395–555) (2014). Cf *Rambus Inc v FTC*, 522 F.3d 456, 464 (DC Cir 2008) (monopolist's efforts 'to obtain higher prices [from its downstream licensees] normally has no particular tendency to exclude rivals and thus to diminish competition').
- 29 2013 WL 6682981.
- 30 *Id* at \*3 (internal quotation marks and citations omitted).
- 31 *Id*.
- 32 *Id* at \*5 (citing *Intergraph Corp*, 195 F.3d at 1353).
- 33 *Id* at \*6.
- 34 *Id* at \*6 (quoting *United States v Griffith*, 334 US 100, 107 (1948)).
- 35 *Id* at \*7.
- 36 *Id* at \*9.
- 37 *FTC v Actavis, Inc*, 133 S Ct 2223 (2013).
- 38 DoJ & FTC, 'Antitrust Guidelines for the Licensing of Intellectual Property', section 3.2 (1995) (defining and differentiating technology and innovation markets).
- 39 *United States v Singer Mfg Co*, 374 US 174 (1963) (transfer of patent from Swiss firm to US licensee to facilitate infringement actions against Japanese competitors held unlawful conspiracy in restraint of trade); *Clean Conversion Techs v CleanTech Biofuels, Inc*, 2012 US Dist LEXIS 117279 (SD Cal 2012) (acquisition of competing patent portfolios

- plus effort to terminate only licence create dangerous possibility of defendant obtaining monopoly power); see also Mark Popofsky & Michael Laufert, 'Patent Assertion Entities and Antitrust: Operating Company Patent Transfers', *Antitrust Source*, April 2013.
- 40 See, eg, *FTC v Cephalon*, Civil Action No. 08-cv-2141-RBS, 2014 WL 982848 (ED Pa, 13 March 2014); *FTC v Watson Pharm, Inc*, 677 F.3d 1298 (11th Cir 2012).
- 41 See, eg, *FTC Amicus Brief, In re Lamictal Direct Purchaser Antitrust Litig*, No 14-1243 (3d Cir 28 April 2014), available at [www.ftc.gov/system/files/documents/amicus\\_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf](http://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf); FTC Amicus Brief, *In re Effexor-XR Antitrust Litig*, No. 3:11-cv-05479 (DNJ, 14 August 2013), available at [www.ftc.gov/sites/default/files/documents/amicus\\_briefs/re-effexor-xr-antitrust-litigation/130816effexoramicusbrief.pdf](http://www.ftc.gov/sites/default/files/documents/amicus_briefs/re-effexor-xr-antitrust-litigation/130816effexoramicusbrief.pdf); FTC Brief, *In re Wellbutrin XL Antitrust Litig*, No. 2:08-cv-2431-MAM (ED Penn, 26 September 2013), available at [www.ftc.gov/policy/advocacy/amicus-briefs/2013/09/wellbutrin-xl-antitrust-litigation-re](http://www.ftc.gov/policy/advocacy/amicus-briefs/2013/09/wellbutrin-xl-antitrust-litigation-re); DOJ Amicus Brief, *In re K-Dur Antitrust Litig*, Nos. 10-2077, 10-2078, 10-2079 (3d Cir May 18, 2011), available at [www.justice.gov/atr/cases/f271300/271395.pdf](http://www.justice.gov/atr/cases/f271300/271395.pdf); FTC Amicus Brief, *In re K-Dur Antitrust Litig*, Nos. 10-2077, 10-2078, 10-2079 (3d Cir 18 May 2011), available at [www.ftc.gov/os/2011/05/110518amicusbrief.pdf](http://www.ftc.gov/os/2011/05/110518amicusbrief.pdf). See also FTC Amicus Brief, *In re Lamictal Direct Purchaser Antitrust Litig* (exclusive license and noncompete can trigger rebuttable presumption under *K-Dur*) (position rejected in *In re Lamictal Direct Purchaser Antitrust Litig*, Civ. No. 12-995 (WHW), 2012 WL 6725580 (DNJ, 6 December 2012)).
- 42 *Watson Pharm*, 677 F.3d at 1312. The Eleventh Circuit noted that the scope of the patent rule had previously been adopted by its prior decisions as well as the Federal Circuit, the Second Circuit and California. See, eg, *Ark Carpenters Health & Welfare Fund v Bayer AG*, 604 F.3d 98 (2d Cir 2010) (following *In re Tamoxifen Citrate Antitrust Litig*, 466 F.3d 187 (2d Cir 2006)), cert denied, 131 S Ct 1606 (2011); *In re Ciprofloxacin Hydrochloride Antitrust Litig*, 544 F.3d 1323, 1336 (Fed Cir 2008); *Schering-Plough Corp v FTC*, 402 F.3d 1056 (11th Cir 2005) (following *Valley Drug Co v Geneva Pharm, Inc*, 344 F.3d 1294 (11th Cir 2003), cert denied, 543 US 939 (2004); *In re Cipro Cases I & II*, 269 P.3d 653 (Cal 2012).
- 43 *Watson Pharm*, 677 F.3d at 1312.
- 44 686 F.3d 197, 217 (3d Cir 2012).
- 45 *Actavis*, 133 S Ct at 2237.
- 46 *Id* at 2230-31.
- 47 *Actavis*, 133 S Ct at 2227.
- 48 *Id* at 2231.
- 49 *Id*.
- 50 *Id* at 2244.
- 51 But see *In re Nexium (Esomeprazole) Antitrust Litig*, 968 F. Supp. 2d 367 (D. Mass. 2013) (applying a rule of reason analysis in motion to dismiss context).
- 52 FTC Amicus, *In re Effexor XR Antitrust Litig* at 9.
- 53 See, eg, *In re Lamictal Direct Purchaser Antitrust Litig*, No. 12-cv-995 (WHW), 2014 WL 282755, at \*6-7 (DNJ, 24 January 2014). Cf *Intellectual Ventures*, 2013 WL 6682981 (declining to apply *Actavis* to allegations of coerced settlements).
- 54 *In re Lipitor Antitrust Litig*, No. 3:12-cv-2389 (PGS), 2013 WL 4780496, at \*26 (DNJ, 5 September 2013) (finding that amendment of complaint to assert reverse payment through unrelated settlements was not futile; 'nothing in *Actavis* strictly requires that the payment be in the form of money'); *In re Nexium*, 968 F Supp 2d at 392 ('Nowhere in *Actavis* did the Supreme Court explicitly require some sort of monetary transaction to take place'; *Actavis* did not 'limit ... its principles to monetary-based arrangements alone.').
- 55 *In re Lamictal*, 2014 WL 282755, at \*6-7 (limiting *Actavis* to reverse payments of money; finding that brand name companies agreement not to sell an authorised generic during the first filer exclusivity period was not subject to antitrust challenge) (distinguishing *In re Nexium* and *In re Lipitor*).
- 56 *Actavis*, 133 S Ct at 2237. See, eg, *In re Nexium (Esomeprazole) Antitrust Litig*, 2014 WL 585827 (D Mass, 12 February 2014) (dismissing action where plaintiff failed to present an economic evaluation of the payment, including a reasonable royalty analysis).
- 57 See, eg, *In re Androgel Antitrust Litig (No. II)*, No. 1:09-MD-2084-TWT, 2014 WL 16000331 (ND Ga, 21 April 2014); *In re Nexium*, 968 F Supp 2d at 398.
- 58 No. 6:10-cv-473, 2013 WL 4046225 (ED Tex, 6 August 2013).
- 59 *Id* at \*2.
- 60 *Id* at \*25.
- 61 *Id*.
- 62 *Id* at \*16.
- 63 *Id*.
- 64 *Id*.
- 65 Nos. 1:13-cv-00009-RGA, 1:13-cv-00010-RGA, 2014 WL 2206218 (D Del, 28 May 2014).
- 66 *Id* at \*2.
- 67 *Id* at \*3.
- 68 *Id*.
- 69 No. C10-1823JLR, 2013 WL 2111217 (WD Wash, 25 April 2013).
- 70 *Id* at \*1-2.
- 71 *Id* at \*7, \*10, \*12, \*18.
- 72 *Id* at \*18.
- 73 *Id* at \*12, \*18-19.
- 74 *Id* at \*12, \*20, \*73, \*86.
- 75 *Id* at \*18-20.
- 76 *Id* at \*51.
- 77 *Id* at \*18-20, \*56, \*58.
- 78 *Id* at \*27, \*63.
- 79 *Id* at \*85, \*90.
- 80 *Id* at \*24, \*32, \*34-36, \*40.
- 81 *Id* at \*19, \*85.
- 82 *Id* at \*18-19.
- 83 *Id* at \*69, \*71-72.
- 84 *Id* at \*69.
- 85 *Id* at \*20, \*90.
- 86 *Id* at \*75.
- 87 *Id* at \*82-83, \*89.
- 88 *Id* at \*75, \*82, \*88.
- 89 *Id* at \*80.
- 90 *Id* at \*74-75, \*88-89.
- 91 *Id* at \*81, \*89.
- 92 *Id* at \*4.
- 93 *Microsoft Corp v Motorola Inc*, No. C10-1823JLR, 2013 WL 6000017, at \*2 (WD Wash, 12 November 2013).
- 94 No. 11C 9308, 2013 WL 5593609 (ND Ill, 3 October 2013).
- 95 *Id* at \*1.
- 96 *Id* at \*12.
- 97 *Id* at \*6.
- 98 *Id* at \*14.
- 99 *Id* at \*8.
- 100 *Id* at \*7-8.
- 101 *Id* at \*20.
- 102 *Id*.
- 103 *Id* at \*36.
- 104 *Id* at \*3, \*43-45.





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