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DOJ and FTC consider NPE antitrust issues

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Over the last decade, the patent landscape has been dramatically altered by the rise of entities whose business model is to acquire significant patent portfolios and aggressively pursue license fees from businesses selling products that may infringe on some of those patents. Such companies are known as “non-practicing entities” (NPEs) or “patent assertion entities” (or, in some circles, “patent trolls”) because they do not manufacture or sell any products to consumers. The U.S. antitrust agencies are considering how the antitrust laws should apply to NPEs, and one news organization has reported that the agencies intend to hold a workshop later this year to address the issue.

Senior officials from both the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have made recent public statements that the antitrust agencies should evaluate the behavior of NPEs and their effects on consumers. FTC Chairman Jon Leibowitz recently acknowledged that practicing entities have complained to the agency about NPEs, and the FTC’s chief economist said at a recent conference that NPEs are “worthy of some very serious attention.” Similarly, Joe Wayland, the head of the Antitrust Division, stated in a recent speech that NPEs raise “a number of competitive concerns” and the DOJ is “looking at the exercise of intellectual property rights” by NPEs.

Most significant technology companies own a large portfolio of patents, which means that they each have a strong incentive not to assert those patents liberally against their competitors because other practicing entities will be able to counter with their own infringement claims. In other words, practicing entities typically have a vested interest in ensuring that patent infringement lawsuits are brought sparingly and not on frivolous grounds, and disputes between such companies frequently are resolved through cross-licenses. NPEs, on the other hand, do not sell any products that could infringe on another company’s patents, so they may have no incentive to moderate their litigiousness or enter into cross-licenses. Practicing entities argue that NPEs therefore may have a unique ability to obtain unnecessarily high license fees from practicing entities, which ultimately harms consumers who have to pay more for the practicing entities’ products. Some practicing entities also argue that NPEs extract license fees that exceed the actual value of the patents in the portfolio because if the practicing entity refuses the license, the NPE can file infringement suits that will cost millions of dollars to defend. In many cases, they say it is simply cheaper to pay the NPE than to litigate the (possibly weak) infringement claims for thousands of patents in the NPE’s portfolio.

NPEs counter these arguments by saying that they enhance the incentive for others to innovate

because they facilitate a more robust and fluid market for intellectual property rights. Moreover, since NPEs do not compete with practicing entities, they have no reason to discriminate between licensees. Finally, not all NPEs are alike; obviously, there are some NPEs that bring tangible benefits to consumers. For example, as the DOJ's chief economist pointed out in a recent speech, some entities that develop new technologies but do not sell any products to consumers (e.g., research universities) do not implicate any of the antitrust complaints raised by practicing entities. And some NPEs argue that they simply focus on fair licensing and resort to litigation only if an alleged infringer refuses to negotiate in good faith for a license.

The DOJ and FTC have not publicly discussed how they would apply the antitrust laws to NPEs. But they may explore several possible theories. First, the transfer of patents to an NPE may raise unique issues under Clayton Act § 7, which prohibits acquisitions that may tend to substantially lessen competition in a relevant market. If NPEs use a series of patent acquisitions to create a portfolio that enables the NPE to charge a supracompetitive price for its patents for the reasons discussed above, the DOJ or FTC could possibly block or undo those transactions. Second, NPEs that force practicing entities into package license agreements for thousands of the NPE's patents (even though the NPE may not have a colorable basis to believe that the practicing entity actually infringe many of those patents) arguably may violate the Sherman Act § 1 prohibition on anticompetitive "tying" contracts. A third relevant theory may be Sherman Act § 2, which prohibits anticompetitive conduct that creates or maintains monopoly power (e.g., an NPEs likely pursuit of sham litigation, or use of deceitful or unethical conduct). Finally, the FTC may be able to use § 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices," to enjoin certain NPE behavior.

While the antitrust agencies may find that one or more of these theories apply to NPEs, NPE behavior does not fit squarely into any of the traditional boxes for antitrust claims. For example, the traditional analysis under Clayton Act § 7 focuses on the closeness of competition between the merging parties and the likelihood that the transaction will facilitate coordination between the remaining competitors. Acquisitions by NPEs do not implicate those issues because NPEs do not manufacture or sell any products, so they do not have any "competitors" in the traditional sense. Therefore, the DOJ and FTC will have to be creative if they want to apply the antitrust laws to NPEs' conduct. Based on the spate of public comments about NPEs by the most senior officials in both agencies, it seems that the agencies may be examining these issues more closely. It has been reported that the agencies are planning to host one or more public workshops later this year to help clarify the potential antitrust theories that may be implicated by NPEs. Those workshops should provide clues on how the agencies intend to proceed, and they will also help clarify the arguments on both sides of the issue. NPEs and practicing entities should watch closely to see what the DOJ and FTC may do in this area.

This entry was posted on Friday, October 19th, 2012 at 9:30 am and is filed under Source: OECD“>Antitrust
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