

CLIENT ALERT

Court Dismisses Patent Troll Attack on Patent Aggregator RPX (For Now)

Feb.05.2013

A court in California has issued the first decision to address the question of whether the activities of patent aggregators – entities formed to shield operating companies against infringement suits by non-practicing entities ("NPEs," or so-called "patent trolls") – raise anticompetitive concerns. Operating companies seeking to fend off suits by patent trolls have increasingly looked to one another for "collective" solutions to the threat posed by NPEs, and this recent decision offers some guidance about how those solutions will be analyzed under the antitrust laws.

On January 24, 2013, the Northern District of California dismissed – with leave to amend – antitrust claims brought by Cascades Computer Innovation LLC ("Cascades"), an NPE and alleged patent troll, against RPX Corporation ("RPX"), a patent aggregator and so-called "anti-troll," and several of its members.

RPX is also an NPE, but, according to RPX, rather than acquiring patents for the purpose of asserting them against operating companies, it purchases patents on behalf of its operating company members, and then licenses the technology to all of its members. RPX has been characterized as an "anti-troll" because it aims to neutralize trolls by providing its members with a "broad-based defense" and enhanced economic leverage against the "patent-litigation-as-a-business-model" commonly employed by trolls.¹

Among RPX's more than 110 members are operating companies in sectors including consumer electronics and PCs, e-commerce, mobile devices, networking, semiconductors, software, and telecommunications. Specific members include AMD, AOL, Cisco, eBay, Google, Intel, Microsoft, Oracle, and RIM.

The recent decision in the Northern District of California arises out of the breakdown of license negotiations between Cascades and RPX (on behalf of its members) for various patents owned by Cascades and allegedly infringed by devices that use the Android operating system. After those negotiations broke down, Cascades initiated an infringement suit against several of RPX's members in the Northern District of Illinois, alleging that the members were "serial infringers" of one of its patents.² In a separate suit in the Northern District of California, Cascades brought price-fixing and monopolization claims against RPX, Dell, HTC, LG Electronics, Motorola Mobility, and Samsung Electronics, alleging that they formed a buying cartel and entered into a group boycott not to license Cascades' patents. Specifically, Cascades alleged that RPX and its members conspired to "jointly refuse to license Cascades' patents; none would negotiate a license with Cascades independently; and all would infringe Cascades' patents without paying royalties."³

Although LG settled, the remaining four operating companies and RPX moved to dismiss Cascades' antitrust claims.

Addressing the conspiracy claim, the court held that Cascades had failed to allege the necessary specifics, *i.e.*, "who, did what, to whom (or with whom), where, and when?"⁴ According to the court, Cascades' allegations that the defendants participated in "agreements with RPX, joint defense agreements, NPE insurance, common counsel, meetings, phone calls, emails, and

discussions with RPX" and otherwise agreed not to accept licenses from Cascades did not satisfy the standard articulated in *Bell Atl. Corp. v. Twombly*.⁵

In addition, the court held that Cascades did not adequately define the relevant market. The court noted that Cascades' complaint described the relevant market as broadly as "licenses" and as narrowly as "Cascades' patents," and characterized Cascades' pleading as "subterfuge." Thus, the court granted RPX's motion to dismiss on that basis as well.⁶

The court noted as further grounds that Cascades failed to explain how the alleged harm resulted from a group boycott theory rather than "individual business disputes" between Cascades and the defendants.⁷

Finally, the court held that Cascades' theories lacked economic sense: "Without clarification and specificity, the Court will not presume economic rationality where the circumstances giving rise to the lawsuit plausibly suggest nothing more than a tactical ploy to regain economic leverage that [Cascades] lost in the licensing negotiations."⁸

The defendants made additional arguments for dismissal: First, that Cascades' antitrust complaint should have been brought in Illinois as a compulsory counterclaim in the infringement litigation; the Court held that the suits did not "arise out of the same transaction or occurrence" so as to be compulsory. Second, that their concerted activity was undertaken in response to the Illinois infringement litigation and thus protected under the *Noerr-Pennington* doctrine. The court held that it could not resolve a *Noerr-Pennington* argument based on the facts available from the pleadings.

Although the court dismissed with leave to amend, the opinion demonstrates that patent trolls may not be able to use the antitrust laws to stop operating companies from engaging in collective activity based on vague and general allegations of collusion, but only where they can make very specific factual allegations regarding conduct and relevant market.

¹ RPX Website, <http://www.rpxcorp.com/> (last visited Feb. 4, 2013).

² After Cascades filed its third amended complaint, the Northern District of Illinois denied the defendants' motion to dismiss. Discovery is currently underway.

³ Order Granting Motion to Dismiss at 4 (citing Complaint at ¶¶ 28, 39).

⁴ Order at 10 (internal citations omitted).

⁵ Complaint ¶ 39.

⁶ Complaint ¶¶ 28, 35, 46, 52, 54.

⁷ Order at 17.

⁸ Order at 20.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Mark A. Klapow

Partner – Washington, D.C.

Phone: +1 202.624.2975

Email: mklapow@crowell.com