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The DOJ And FTC Issue Their Second Report On The Interface Of IP And Antitrust Law

April 18, 2007

Yesterday, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued their long-awaited second report on the interface between Antitrust and Intellectual Property laws. In 2002, the agencies held hearings on this issue, receiving testimony from more than 300 panelists and more than 100 written comments. In October, 2003, the FTC issued the first report entitled "To Promote Innovation: The Proper Balance Of Competition And Patent Law And Policy." *See* http://www.ftc.gov/os/2003/10/innovationrpt.pdf. The FTC Report focused on recommendations for improving the performance of the patent system. It has since been cited by Justices of the U.S. Supreme Court with respect to the proliferation of so-called "patent trolls," and for the question of whether the patent system as currently administered strikes the proper balance between IP and Antitrust law.

The agencies' most recent report, entitled "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," contains 123 pages of text and many attachments. *See* http://www.usdoj.gov/atr/public/hearings/ip/222655.htm. Its focus is the antitrust side of the IP-antitrust interface, noting that in the vast majority of cases, the agencies will evaluate IP issues "using the flexible rule of reason." In summary, the report concludes that:

- There is generally no antitrust liability for unilateral, unconditional refusals to license patents. However, conditional refusals to license patents which may cause competitive harm are subject to antitrust scrutiny.
- Joint negotiation of licensing terms by standard-setting organization (SSO) participants prior to setting a standard can be procompetitive and are likely to be subject to a rule of reason. The Report also recounts the three cases brought by the FTC challenging an SSO participant's failure to disclose relevant IP.
- Combining complementary patents into a pool is generally procompetitive. However, the agencies have challenged certain pools incorporating substitute technologies because they may tend to raise royalty rates.
- The agencies will continue to apply a rule of reason analysis to assess intellectual property licensing agreements, including non-assertion clauses, grantbacks, and reach-through royalty agreements.
- The agencies reaffirmed their use of the Antitrust-IP Guidelines (*see* http://www.usdoj.gov/atr/public/guidelines/0558.htm) to analyze intellectual property tying and bundling issues. They reported on a number of concerns expressed by business participants during the hearings, but reiterated their view that such issues should be evaluated based on whether there is market power in the tying product and whether there are strong efficiency justifications to support the bundle.

In evaluating the competitive effects of practices that extend beyond a patent's expiration, the agencies will begin by determining whether the patent in question confers market power. If so, these practices will generally be evaluated under a rule of reason analysis, unless the agencies believe the practice is merely a sham to cover naked price fixing or market allocations.

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