U.S. Enforcement Update

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FTC Closes Google Conduct Investigation

On January 3, 2013, the Federal Trade Commission ("FTC") announced the conclusion of its investigation into various Google business practices.[1] In a 5-0 vote, the FTC closed, without action, its investigation of Google's alleged practice of "search bias", while simultaneously accepting certain voluntary commitments from Google related to its search and advertising business. With respect to search bias, the FTC investigated allegations that Google displayed its own properties more favorably in response to certain searches, such as those for shopping or travel, and also designed its search algorithms to demote certain competing websites when returning results.[2] On the whole, however, the FTC concluded that any harm to competition was done with the "legitimate justification" of "improv[ing] the user experience."[3] "[T]he evidence suggests that Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information."[4] Then Chairman Leibowitz also noted in his statements about the investigation that "[t]ellingly, Google's search engine rivals engaged in many of the same product design choices that Google did, suggesting that this practice benefits consumers."[5]

Concurrent with the close of the search bias investigation, Google made a five-year, binding commitment to the FTC regarding two other business practices, and did so by letter rather than the more traditional consent decree.[6] One practice at issue, known as "scraping," involved Google's use of content from other sites, such as restaurant reviews, in its search results. The other practice at issue involved Google's tools for managing online advertising campaigns and whether Google's terms and conditions limited "multi-homing" or the ability to use multiple advertising platforms simultaneously. Google agreed to allow websites the ability to opt out of Google's use of their content on Google's vertical search offerings while still having their content appear in Google's general web search results. Google also agreed to remove restrictions on its online advertising platform, AdWords, that had made it more difficult for advertisers to coordinate campaigns across multiple platforms.

Separate from search practices, the FTC also investigated the conduct of Google's subsidiary Motorola Mobility, Inc. in pursuing patent litigation for infringement of its standards essential patents ("SEPs").[7] In a 4-1 vote, the FTC entered into a consent decree whereby Google agreed to accept certain licensing practices for these SEPs. Motorola had made a prior commitment to license these SEPs on fair, reasonable and non-discriminatory ("FRAND") terms, but the FTC expressed concern that willing licensees were being denied such an opportunity. The consent requires Google to withdraw all claims, worldwide, for injunctive relief on SEPs where Motorola has made FRAND commitments and offer licenses through a six-month negotiation framework set forth in the consent.[8] This framework is one that the Commission hopes will become a "template" for future SEP licensing disputes.[9] Under the terms of the consent, Google is still able to seek injunctive relief, but not without first making certain efforts to license under the proscribed framework. Chairman Leibowitz remarked that the FTC's decision to pursue this case under Section 5 of the FTC Act – violations of which are not necessarily a coextensive basis for follow-on private litigation under the Sherman Act – was "a sensible and practical way" for the FTC to enforce what it saw as problematic conduct in light of what some believe to be an "overly litigious" society.[10]

DOJ & PTO Release Joint SEP Policy Statement

On January 8, 2013, the U.S. Department of Justice and Patent and Trademark Office issued a joint "Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary

[1] Press Release, Federal Trade Commission, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (FTC Jan. 3, 2013), *available at* http://www.ftc.gov/opa/2013/01/google.shtm [hereinafter FTC Press Release].

[2] Statement of the Federal Trade Commission Regarding Google's Search Practices, *In re Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchstmtofcomm.pdf [hereinafter Search Practices Stmt.].

[3] Google Press Conference, Opening Remarks of Federal Trade Commission Chairman Jon Leibowitz (Jan. 3, 2013), at 1, 5, *available at* http://www.ftc.gov/speeches/ leibowitz/130103googleleibowitzremarks.pdf [hereinafter Leibowitz Stmt.].

[4] Search Practices Stmt. at 2.

[5] *Id.* at 5.

[6] Letter from David Drummond, Sr. VP of Corp. Devel. & Chief Legal Officer to Jon Leibowitz, Chairman, Federal Trade Commission (Dec. 27, 2012), http://www.ftc.gov/os/2013/01/130103google-seps.pdf.

[7] Statement of the Federal Trade Commission, *In re Google Inc.*, FTC File No. 121-0120, Jan. 3, 2013, *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf [hereinafter FTC Motorola Stmt.].

[8] Decision and Order, *In re Motorola Mobility LLC and Google Inc.*, *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

[9] FTC Motorola Stmt. at 1.

[10] Leibowitz Stmt. at 3.

F/RAND Commitments."[11] The policy statement asserts that injunctive relief and exclusion orders may not be appropriate remedies for the infringement of an SEP due to their potential impact on competition. While each case is different, the statement explains that "the public interest may preclude the issuance of an exclusion order in cases where the infringer is acting within the scope of the patent holder's F/RAND commitment and is able, and has not refused, to license on F/RAND terms." This is because in some circumstances the SEP holder may be seeking to reclaim its voluntarily forsaken market power by attempting to seek terms that would be more "onerous" than it is entitled to under F/RAND commitments.[12] This would harm competition and consumers by undermining standards-developing organizations' ability to "mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards."[13] At the same time, the policy statement acknowledges that an exclusion order may sometimes be an appropriate remedy, "such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms."[14]

In a related speech given on February 8, 2013, Renata Hesse, Deputy Assistant Attorney General at the Antitrust Division, commented that DOJ is "focused on the role that Section 2 of the Sherman Act might play in protecting competition in high-technology industries from certain exclusionary practices involving patent licensing."[15] In this regard, DOJ is concerned that SEP holders may engage in "hold-up" activity, such as attempting to exclude a competitor by seeking an "unjustifiably higher royalty" on its SEP, "than would have been possible ex ante."[16] Other concerns of hold-up activity include delayed incorporation of the standardized technology and slowing adoption of the new standard, as well as harming other SEP owners through reduced royalties.

Federal Circuit Finds That Purchasers of Covered Products Have Standing to Bring Walker Process Claims

On November 20, 2012, the Federal Circuit held in *Ritz Camera & Image, LLC v. SanDisk Corp.*[17] that direct purchasers of products embodying patents have standing to bring *Walker Process*[18] antitrust claims for damages. *Walker Process* claims are claims that allege the patent holder maintained an illegal monopoly by obtaining and enforcing its patents through fraud on the U.S. Patent and Trademark Office ("PTO"). *Walker Process* claims are typically brought as counterclaims by defendants in patent infringement suits who also seek declaratory judgment for the invalidity or unenforceability of the patent at issue. *Walker Process* claims require proof that the patent holder procured the relevant patent by knowing and willful fraud on the PTO and proof of all the elements to establish monopolization under Section 2 of the Sherman Act.[19] The court held that *Walker Process* claims are "governed by principles of antitrust law" and are not bound by the standing requirements for declaratory judgment actions because *Walker Process* claims do not directly seek invalidity of the patent at issue.[20]

FTC Settles Challenge to IDEXX Laboratories' Exclusive Distribution Arrangements

On February 12, 2013, the FTC announced it had entered into a consent decree with IDEXX Laboratories ("IDEXX") resolving claims of monopolization in the market for certain point-of-care diagnostic products used by veterinarians.[21] The FTC alleged that IDEXX abused its monopoly power to impose exclusive distributor agreements that foreclosed competing suppliers from accessing top tier distributors whose sales account for more than 85% percent of all products and supplies purchased by small-animal veterinarians.[22] In the consent, IDEXX agreed to cease and desist from having concurrent exclusive distribution agreements with national distributors and that going forward it will license only on a non-exclusive basis. IDEXX further agreed not to otherwise induce those distributors to limit sales of

[11] DEP'T OF JUSTICE & PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf.

[12] *Id.* at 6, 8-9.

[13] *Id.*

[14] *Id.* at 7.

[15] Renata B. Hesse, Dep. Asst. Atty. Gen., Antitrust Division, Dept. of Justice, IP, Antitrust and Looking Back on the Last Four Years, Presented at Global Competition Review, 2nd Annual Antitrust Law Leaders Forum, at 15 (Feb. 8, 2013).

[16] *Id.* at 16-17.

[17] *Ritz Camera & Image, LLC v. SanDisk Corp.*, 700 F.3d 503 (Fed. Cir. 2012).

[18] *Walker Process Equip., Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

[19] *Ritz Camera*, 700 F.3d at 506.

[20] *Id.* at 508.

[21] Press Release, FTC Approves Final Order Settling Charges of Anticompetitive Conduct Against IDEXX Laboratories, Inc. (Feb. 12, 2013), *available at* http://www.ftc.gov/opa/2013/02/idexx.shtm.

[22] Complaint, *In re IDEXX Labs., Inc.*, Dkt. No. C-4383, *available at* http://www.ftc.gov/os/caselist/1010023/130212idexxcmpt.pdf.

competing products, nor retaliate against them for any such sales.[23]

Section 2 Claims Survive in Commodities Manipulation Litigation

On December 21, 2013, the defendants' motion to dismiss Section 2 claims in *In re Crude Oil Commodity Futures Litig.* was denied in the Southern District of New York.[24] Plaintiffs' Section 2 theory involved several steps: they alleged that first defendants acquired positions in the futures market for West Texas Intermediate grade ("WTI") crude oil; second, defendants made purchases in the physical or cash market for the same product; third, defendants sold the futures contracts when the price went up as a result of their physical market purchases; fourth, the defendants purchased short positions in the physical market; and finally, defendants dumped its holdings on the physical market (those that had been used to drive up the prices of the futures contracts) to make a profit on the short positions.[25] The court held that allegations of defendants' acquisition of over 90% of the next month's WTI followed by its acquisition of positions that it knew would respond favorably to its trading activities in the physical market were a sufficient showing of monopoly power to allow the case to continue.[26] The court also addressed the harm alleged from purchases made during the "artificial market conditions" and described it as one not where plaintiffs were in search of "a handout stemming from . . . superior performance" but rather one that is "a quintessential antitrust injury . . . from artificial prices caused by anticompetitive conduct."[27]

[23] Decision and Order at 4, *In re IDEXX Labs., Inc.*, Dkt. No. C-4383, *available at* http://www.ftc.gov/os/caselist/1010023/130212idexxdo.pdf.

[24] *In re Crude Oil Commodity Futures Litig.*, Master File No. 11 Civ. 3600, 2012 WL 6645728 (S.D.N.Y. Dec. 21, 2012).

[25] *Id.* at *3-*4.

[26] *Id.* at *7.

[27] *Id.* at *12,