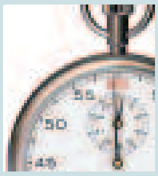
The latest trends in antitrust law

Antitrust lawyers and regulators are paying more attention than ever to they way in which IP owners use their patents. **James Brelsford**, **James Keyte**, **Sharis Pozen** and **Sean Tepe** explain what they are looking for

There has been a persistent notion that patents and patent-related activity enjoy a blanket immunity from the antitrust laws. Putting aside whether that notion has ever been entirely accurate, recent developments in the United States should put that belief to rest.

For patent holders seeking to enforce, license and monetise their intellectual property, we highlight two recent developments that could have a material impact on such efforts. One is a decision by the US Supreme Court that opines on the extent to which the antitrust laws can scrutinise patent infringement litigation settlements and licensing agreements that appear on their face to be permissible. The other is a decision by the Federal Trade Commission to launch an investigation into the activities of an increasingly favored vehicle for patent enforcement and monetisation, the patent assertion entity.

One-minute read



There has long been an interesting intersection between IP law and antitrust law. Recent court decisions and regulatory action have highlighted the need for IP lawyers to be more aware than ever of ensuring that their commercial activities do not violate antitrust rules. So-called pay-for-delay patent infringement settlements in the pharmaceutical industry have come under particular scrutiny, and the US Supreme Court's ruling on such arrangements could impact licensing arrangements in the technology sector. In the coming months, antitrust regulators will be putting the activity of patent assertion entities under the microscope. In this dynamic area of the law, it is important that IP owners are aware of past guidance provided by the Federal Trade Commission and the Department of Justice as well contemporary application of antitrust law by the country's courts.

Growing risk in patent licensing?

Although the antitrust laws treat licensing of intellectual property as generally pro-competitive, there can be instances in which licensing agreements may have anticompetitive effects or, more likely, create the perception of anticompetitive effects.

The licensing activity of SanDisk provides an illustration of this perception. SanDisk is a pioneer in flash memory technology and is supported by one of the strongest patent portfolios in the technology sector. Two companies that aggregate flash memory devices for resale as flash drives challenged SanDisk's standard practice of offering a worldwide, non-exclusive licence to a portfolio of flash memory patents confined to a specific field of use. Such licensing terms are common in the technology industry, yet one aggregator's suit was not defeated until trial and another aggregator's nearly identical suit is in discovery after having survived a motion to dismiss.

Part of the problem faced by patent licensors like SanDisk and licensees like the aggregators is a lack of definitive case law providing clear guidance regarding specific licensing terms. In light of that, we recommend that any drafting or consideration of licensing terms include a review of the guidance provided by the Department of Justice and the Federal Trade Commission in their joint publications *Antitrust Guidelines for the Licensing of Intellectual Property* (1995) and *Antitrust Enforcement and Intellectual Property Rights* (2007).

Yet, while these guidelines are helpful, they do not take into account recent case law, including the 2013 US Supreme Court decision in *Federal Trade Commission v Actavis*. It is too early to know the impact of *Actavis* on the intersection of antitrust and patent licensing, but *Actavis* has the potential to shift the willingness of courts to examine patent agreements and licensing conduct. Or, to state it differently, the headaches experienced by SanDisk could become more prevalent if courts take an expansive view of *Actavis*.

In *Actavis*, multiple generic drug manufacturers sought approval from the US Food and Drug Administration to market a generic version of a branded, and patent protected, testosterone replacement drug called AndroGel. The drug's maker, Solvay Pharmaceuticals, sued the generic manufacturers for patent infringement, which US law allows brand companies to do upon the submission of the FDA generic drug application. The generic companies counterclaimed that the patent was invalid. Eventually, the parties settled. The settlement allowed the generics to come to market in advance of the patent's expiration but not for nine years after the settlement. The FTC argued the generic companies agreed to abandon their challenges to the validity of the patent and to "delay" launching their generic drugs in exchange for millions of dollars in payments from Solvay. These payments allegedly were disguised through contemporaneous business agreements and allegedly constituted a

PAE Investigation FAQ

The US Federal Trade Commission has announced that it will conduct a study of the impact that Patent Assertion Entities (PAEs) have on competition and technological innovation. Here are answers to some basic questions about the FTC's plans.

Who is subject to the study?
The FTC intends to subpoena approximately 25 PAEs, defined as "firms with a business model based primarily on purchasing patents and then attempting to generate revenue by asserting the intellectual property against persons who are already practicing the patented technology." Another roughly 15 entities that assert patents in the wireless communications sector, including manufacturers and other organisations engaged in licensing, will receive a subpoena.

What is being requested?
The information requested falls generally into two categories: data (lists of patents, ownership interests, patent purchases, licensing revenue, etc.) and agreements (licensing agreements, patent infringement litigation settlements, patent purchase/sale agreements), although other business documents and communications are proposed to be requested as well.

What questions does the FTC hope to answer?
When the FTC held a joint workshop on PAEs last year with the Department of Justice, they found that there was insufficient public information to draw conclusions about the activities and impact of PAEs. Some of the questions the FTC will likely seek to answer include: How much money is generated by PAEs in assertions and then returned to inventors and investors? Are PAEs confirming the existence of infringement before sending demand letters or initiating litigation? Is there evidence that PAEs simply exploit the cost of litigation to reach a settlement? How successful are PAEs when their patents go to trial? What are the relationships between PAEs and operating companies, and do those relationships create incentives for the operating company to raise the costs of rivals (e.g., privateering), avoid FRAND commitments, or engage in royalty stacking?

What is the end result?
Based on past similar studies, the FTC likely will publish a report in a year or two recommending patent policy changes to be effected through legislation or executive agency action, such as by the Patent and Trademark Office. The report could also conclude that certain conduct is anticompetitive or deceptive and potentially subject to enforcement action.

portion of Solvay's profits resulting from its continued monopoly on AndroGel.

The Court authorised the lower courts to determine if the settlement amounted to an unlawful agreement not to compete. Even though the patents could be presumed valid and the exclusion of generic companies could be viewed as "within the scope of exclusionary potential of the patent," this was insufficient to ward off an antitrust inquiry.

The relevance of *Actavis* beyond settlements of pharmaceutical patent litigation is an open question. The Court was concerned primarily with what it believed to be "unusual" large cash payments to generic companies juxtaposed with the generics' agreement to drop their patent challenges and delay entry into the market. Consequently, it is possible that *Actavis* will be limited to its facts. However, there are two aspects of *Actavis* that may entice some litigants to try to expand its reach to other patent conduct, including patent licensing.

Before *Actavis*, most courts dismissed challenges to these types of settlements because any exclusion of competition had resulted from and was "within the scope of the patent". Thus, in order to justify its ability to apply antitrust law to conduct that a valid patent would seem to allow, the Court expansively interpreted its prior antitrust precedents involving patents. The Court ruled that these precedents teach that "procompetitive antitrust policies," and not just patent policies, must be considered in "determining the 'scope of the patent monopoly' – and consequently antitrust law immunity – that is conferred by a patent." It directed lower courts to "seek to accommodate patent and antitrust policies" when confronted with antitrust challenges to patent conduct.

Second, although pharmaceutical patent infringement settlements are in many respects unique, at a basic level they are no different than any other technology patent licence that arises from a patent dispute. For example, they both preempt a judicial ruling on the questions of patent validity and infringement, a ruling that could increase competition or lower costs if the patent was deemed invalid or if no infringement was found. They both require an agreement on the scope of the patent rights that the putative licensee can exercise and on the amount and form of consideration exchanged.

In the technology sector, a patentee may offer a licence that is restricted in any number of ways, including volume of product produced under licence, field of use, or a required grantback of rights to improvements on the patent. Could these restrictions amount to a restraint on competition? A patentee can adjust the consideration, such as the level of royalty rate, until a mutual agreement on the offered restricted licence is reached. Could this be considered a "payment" for the agreed-upon restriction? There are no clear answers. *Actavis* raises the question whether courts will have a freer hand to evaluate the terms of licensing agreements when a party thinks those terms are signaling anticompetitive conduct.

At the moment, we do not expect the US antitrust agencies will try to extend the reach of *Actavis* beyond pharmaceutical settlements. Private litigants, however, may try to exploit the decision's broad language and argue the case applies to other forms of patent agreements. Companies should be aware of this possibility when considering patent infringement settlements and licensing agreements.

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Potential exposure arising from PAE activity

The growth of patent assertion entities is a reflection of the increasing recognition of patents as assets to be monetised. The growth of PAEs is also being fueled by companies that are less inclined to enforce their patent rights directly. They have sold or transferred patents to PAEs with a greater willingness and ability to enforce and monetise those patents. The rise of PAEs and companies' use of them comes with some antitrust risks, although those risks may be overshadowed by the perceived advantages of PAEs as patent monetisers.

One advantage is structural. Since PAEs are non-practicing entities, a defendant cannot counterclaim against them for patent infringement or pressure the PAE to accept a cross-licence to the defendant's patents in lieu of paying the PAE royalties. In addition, many believe PAEs do not face the same reputational constraints on engaging in aggressive licensing demands and litigation that a practicing entity with business relationships would face.

PAEs also have not been effectively challenged under the antitrust laws, which a practicing entity might consider to be another advantage of outsourcing patent enforcement to a PAE. That advantage could change in the future as a result of an in-depth investigation of patent assertion entities that the Federal Trade Commission is about to launch. The FTC will not explore every issue or complaint with regard to PAEs or patent assertions generally. Rather, the FTC will focus on the impact of PAE activity on technological innovation and competition.

One of the areas of inquiry will concern the practice known as privateering. This is generally understood to refer to the outsourcing of patent enforcement by an operating company to one or more PAEs for the purpose of enforcing the patents against the operating company's rivals. To date, there has been much more speculation about the existence of privateering and resulting competitive harms than actual evidence of either. The most recent speculation centers on the patent infringement lawsuits filed by Rockstar, a consortium backed by Apple and Microsoft, among others, against Google and Android smartphone makers.

Nonetheless, because the antitrust laws are particularly concerned with collective, as opposed to unilateral, conduct that restrains competition, the FTC's investigation will carefully scrutinise the relationships between operating companies and PAEs. For example, when examining the agreements that transfer patents from operating companies to PAEs, the FTC will look for terms that could incentivise the PAE to target the operating companies' rivals. The FTC can then ascertain if the PAEs actually targeted the operating companies' rivals for enforcement and the effect, if any, that enforcement had on competition in the marketplace.

Even if the agreements between operating companies and PAEs lack any clear sign of an intent or incentive to target rivals, the FTC will still want to understand the competitive impact of distributing patents to PAEs. Some have expressed concern with patents being disaggregated to enable so-called royalty stacking. Instead of charging a rival one royalty for a portfolio of patents, the patentee can stack additional royalties on that rival through assertions made by one or more PAEs. Given the number of patents being implemented by modern devices, especially those essential to technology standards, there could be a competitive effect resulting from stacking. Of course, any analysis of competitive effects will have to consider all effects, including procompetitive ones.

We are not aware of any case law exploring the legality or illegality of a privateering relationship on antitrust grounds, but we do know of one case with similarities to a privateering model that survived an early effort to dismiss the suit. Television manufacturer Vizio brought a Section 1 conspiracy claim against its competitor Funai, which had sued Vizio for patent infringement. A third party, Thomson, had two standard-essential patents (SEPs) for digital TV that were both allegedly subject to a commitment that they would be licensed on fair, reasonable and non-discriminatory terms (known as FRAND). Thomson transferred one of the SEPs to Funai, and in exchange, Funai agreed to split its royalties with Thomson. Vizio alleged that Thomson and Funai agreed to fix prices by charging and sharing two royalties for patents that had been subject to one royalty previously. The suit survived a motion to dismiss before the parties settled.

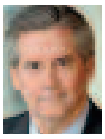
Of course, antitrust risks are not confined to patent enforcement activities. Efforts to avoid or mitigate enforcement can also invite antitrust scrutiny. A number of technology companies have responded to the rise in patent infringement suits by joining together in patent pools or becoming members of defensive patent aggregators, such as RPX or Allied Security Trust. The purpose of these vehicles is to acquire patents before they are acquired by PAEs and then typically license those patents to the pool or aggregator's members to avoid or defend against infringement suits.

Even defensive efforts to combat patent assertions carry some antitrust risk, as illustrated by a lawsuit against RPX. Cascades Computer Innovation, a PAE that purports to have a portfolio of Android mobile OS patents, offered a portfolio of patents for [sale or license] to RPX and certain of its Android members. RPX allegedly was negotiating on behalf of Android phone manufacturer members Dell, HTC, LG, Motorola Mobility and Samsung. When Cascades could not reach a licensing deal with RPX or the manufacturers individually, Cascades sued RPX and those manufacturer members. Cascades alleged that they entered into a group boycott, agreeing not to license Cascades' patents individually, and formed a buying cartel through RPX to drive down the cost of a licence from Cascades. The first lawsuit was dismissed, but the court allowed Cascades to amend and re-file its complaint. At the time of writing, the court had not ruled on whether to dismiss the amended complaint. Regardless of whether the Cascades suit is successful or not, it is an indication of one of the risks in joining this new and legally untested type of patent consortium.

The risk with any type of patent pool is that it provides competitors with an opportunity to collude in violation of Section 1 of the Sherman Act. To mitigate those risks, traditional patent pools – pools that aggregate and license complementary patents necessary to implement a technology standard – have asked the Department of Justice to review the pool's proposed conduct for compliance with the antitrust laws. In contrast to a number of traditional patent pools, the DOJ has not offered its guidance on the conduct of defensive patent arrangements in one of its publicly available business review letters.

We could go on, as the list of issues at the intersection of IP and antitrust is lengthy, but the simple message is this: Any company involved in licensing patents, either as a licensor or licensee, should seriously consider the increasing role that antitrust law is playing in this dynamic area.


James Brelsford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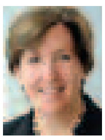
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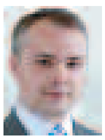
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