

Antitrust Law Blog

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Delay Caused by Court Injunction Is Not "Antitrust Injury"

Plaintiff flunks *Twombly-Sprewell* "two-step," as the court's judicial notice of admissions adduced during preliminary injunction discovery discloses facts the court found to be inconsistent with plaintiff's theory of the case. *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 2010-1 Trade Cas. (CCH) Para 76,877 (N.D. Cal. 1/6/10).

Realnetworks, Inc. ("Real") and its subsidiary Realnetworks Home Entertainment, Inc. ("Home") were in the business of developing, manufacturing and selling platforms for the delivery of digital media. Through Home, it developed and distributed several DVD products entitled, "Vegas" and "Facet". It engaged in negotiations with the DVD Copy Control Association ("DVD CCA"), which was a joint venture trade association of which a number of movie studios were members. The purpose of the joint venture was to develop, evaluate and license copy control and related technologies to participants in the DVD industry. The DVD CCA licensed its "Content Scramble System" ("CSS") which provided encryption protection for DVD audio-visual works. The stated purpose of DVD CCA was to prevent the illegal duplication of its member's movies, thus affording intellectual property protection to the manufacturers, producers and writers of such products. Real was unsuccessful in its negotiations with DVD CCA. DVD CCA and its member studios asserted that the CSS license agreement precluded the studios from entering into individual licenses granting the right to Real, and the others, to make digital copies of their respective DVDs.

Real, however, relied in part on a California trial court's ruling that another provider of DVD management technology, Kaleidoscope, did not violate the CSS license agreement by marketing a product that stored DVD content on its service. Accordingly, Real took the position that a CSS license was unnecessary. It planned to launch its "Vegas" product at a technology conference. However, in an attempt to address the studio's concerns about "Vegas", it delayed its launch.

Later in the same month, Real brought an action in the United States District Court for the Northern District of California seeking a declaratory judgment that Real had not, and would not, violate the Digital Millennium Copyright Act ("DMCA"), nor would it be in breach of the CSS license agreement with DVD CCA by manufacturing and distributing its "Vegas" product. On the same day, the studios brought an action in the United States District Court for the Central District of California seeking to enjoin Real from manufacturing, distributing or otherwise trafficking in its products. The studios alleged that Real was violating the DMCA, and had breached the CSS license agreement. The Central District action was transferred to the Northern

District, where both cases were deemed related and were consolidated.

The District Court granted the studio's request for a temporary restraining order to restrain Real from manufacturing, distributing or otherwise trafficking in its DVD product. The parties then engaged in discovery, which culminated in a bench trial hearing on the studio's request for the entry of a preliminary injunction. Based upon what the court found to be a demonstration of a strong likelihood of success on the merits, the court granted the requested relief and entered a preliminary injunction.

Meanwhile, Real filed a proposed second amended complaint alleging claims for a group boycott in violation of Section 1 of the Sherman Act, the California Cartwright Act, and the California Unfair Competition Law. The studios and DVD CCA moved to dismiss the claims.

In granting the motion to dismiss, the District Court went into a detailed analysis of the reasons why the court ruled that the plaintiff could not state a claim. First, the court noted that it was not bound to accept as true the conclusions and unwarranted deductions of fact or unreasonable inferences contained in the complaint, citing the Ninth Circuit's decision in *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court noted that it need not accept as true allegations that were contradicted by matters properly subject to the court's judicial notice. The court cited further authority in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court noted that pursuant to *Twombly*, it could "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Based upon its citation of *Sprewell* and *Twombly*, the court concluded that the plaintiff had failed to allege any anticompetitive conduct that could have caused it any cognizable injury under the antitrust laws.

It also noted that, contrary to the usual case, and certainly to *Twombly* itself, the court could take notice of the discovery conducted in the case from which it determined that the preliminary injunction should issue. The court noted that its preliminary injunction order included over 19 pages of factual findings. These included admissions that were irreconcilable with allegations of the second amended complaint.

In particular, the court stated that the only cognizable injury suffered by plaintiff was the delay caused to the launch of its DVD product "Vegas", by the entry of the court's preliminary injunction order. Thus, the court concluded that any injury to plaintiff had been caused by its own course of illegal behavior, and the court's resulting injunctive order, rather than any anticompetitive behavior of the defendants. Accordingly, there was no "antitrust injury, and accordingly, no "antitrust standing" that would enable a private plaintiff to meet the standards required by Section 4 of the Clayton Act. See *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (quoting *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 334 (1990)).

Next, the court ruled that, to the extent that the defendant studios had engaged in concerted activity and had cooperated with one another in the bringing of the action, such conduct would be *Noerr-Pennington* protected conduct. Such conduct would not even approach a "sham", as it was highly successful in securing the requested governmental action.

Finally, the court addressed plaintiff's argument that it was a violation of the antitrust laws for the studios to engage in a collective agreement not to license its technology individually. From this point, the plaintiffs argued that the "cartel" would be illegal under the antitrust laws and should be held to be unenforceable. The court decided, however, that the plaintiff's argument was circular, and assumed, contrary to fact, that it was not engaged in a violation of the DMCA, and was not subject to a preliminary injunction.

The court found this argument to be fatally flawed. First, it can only make sense if the antitrust analysis was restricted specifically to the technologies that copied content from CSS-encrypted disks. This assumed an improperly narrowed relevant market, as there was no allegation that the individual studios had refused to negotiate individual licensees for digital copies of its movies. Thus, in discussing plaintiff's "group boycott" claim, the court utilized a rule of reason analysis, at least impliedly, and found that the plaintiff's argument was fatally flawed, as there was no showing of downstream anticompetitive effects in a properly defined relevant market. As plaintiff Real could have negotiated individual agreements with the studios, it could not have suffered antitrust injury as a result of the group refusal to license. The court again concluded that plaintiff Real's only "real" injury stemmed from its own decision to manufacture and traffic in a device that was almost certainly illegal under the DMCA. Thus, "pooling" is not an illegal restraint where the alternative exists in acquiring individual rights through individual negotiations. In summation, and in denying leave to amend on the ground of futility, the court stated:

"The only injury Real has suffered in connection with its RealDVD product is the delay in the products release and accompanying lost profits. This delay is a result of this court's decision to enjoin the distribution of a product which the court has found likely to violate federal law and to breach the terms of Real license agreement with the DVD CCA." *Id.* at page 12.

The court's dispositive analysis might remind one of a basic tenant of California law, contained in the "Maxims of Jurisprudence" contained in the California Civil Code. Civil Code Section 3517 provides "no one can take advantage of his own wrong."

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