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Third Circuit Finds False FRAND Commitments Actionable Under the Antitrust Laws

September 2007

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Last week, the Third Circuit held that in a consensus-oriented private standard setting environment, a patent holder's intentionally false promise to license essential proprietary technology on fair, reasonable and non-discriminatory terms, coupled with the standard setting organization's reliance on that promise when including the technology in the standard, and the patent holder's subsequent breach of that promise, is anticompetitive conduct actionable under the Sherman Act.^[1]

The Court of Appeals opinion reversed an earlier decision of the District Court for the District of New Jersey dismissing Broadcom's antitrust suit against Qualcomm. In its complaint, Broadcom alleged that Qualcomm monopolized certain markets for cellular telephone technology through intentionally deceiving ETSI, a private standard-setting organization (SSO), and its members by making false promises to license its patented technology on fair, reasonable, and non-discriminatory (FRAND) terms, and then reneging on those promises by licensing its technology on non-FRAND terms after the technology was incorporated into the standard.

The District Court found that Broadcom's monopolization allegations should be dismissed for failure to state a claim upon which relief can be granted, determining that Qualcomm's alleged conduct – inducing an SSO to adopt a standard that incorporates its patents by promising to license them on FRAND terms and then refusing to honor that promise – is not anticompetitive for purposes of the Sherman Act. Finding that Qualcomm's right to control the licensing of its patents derives from the rights it enjoys as a patent holder, the District Court concluded that Qualcomm's free exercise of its right to decide with whom and on what terms it will deal is not a violation of the antitrust laws. In its opinion, the District Court declined to recognize the argument that a standard may create market power that otherwise would not exist.

The Third Circuit reversed, concluding that conduct that undermines the procompetitive benefits of standard setting may be, in some circumstances, anticompetitive under the antitrust laws. Like the Federal Trade Commission's case against Rambus,^[2] Broadcom's claims against Qualcomm involved a variation of what is known as "patent hold-up" – conduct where an owner of intellectual property holding patents essential to a given technological standard is able to utilize its considerable bargaining power to "hold up" (*i.e.*, extract supracompetitive royalties from) the industry participants practicing the standard. Rambus, the FTC found, intentionally deceived the SSO by failing to disclose its ownership of patents and applications until after the standard had been chosen. In the Qualcomm case, in contrast, Broadcom alleged that Qualcomm induced the SSO to incorporate its patented technology into the standard by making false promises to the SSO participants that it would license its technology on FRAND terms.

The Third Circuit found that "misrepresentations concerning the cost of implementing a given technology may confer an unfair advantage and bias the competitive process in favor of that technology's inclusion in the standard." It therefore concluded that deceptive FRAND commitments, as much as deceptive nondisclosure of intellectual property rights in the SSO context, may result in

the type of “patent hold-up” anticompetitive harm that is actionable under the antitrust laws. Slip Op. at 23-24.

Footnotes:

[1] *Broadcom Corp. v. Qualcomm Inc.*, No. 06-4292 (3d Cir. Sept. 4, 2007), available at <http://www.ca3.uscourts.gov/opinarch/064292p.pdf>.

[2] *In the Matter of Rambus, Inc.*, No. 9032 (F.T.C. Aug. 2, 2006), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

For additional information on the *Rambus* case, see our previous updates at:
<http://www.mofo.com/news/updates/files/update775.html>,
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