

Aftermarket Monopolization Claims Dismissed as Afterthought

July 11, 2011 by Don T. Hibner, Jr.

Plaintiff *Océ North America, Inc.* ("Océ") brought an action against a service market supplier for copyright infringement. Defendant *MCS Services, Inc.* ("MCS") filed a *Kodak*-style "aftermarket" monopolization counterclaim, in addition to a series of common law torts, including tortious interference with contractual relations, and prospective advantage. Finding the antitrust allegations of the counterclaim to be "implausible", the district court for the District of Maryland dismissed that claim, while allowing the tortious interference claims to continue. *Océ North America, Inc. v. MCS Services, Inc.*, D.Md., No. 1:10-CV-984-WMN, 6/14/11.

Océ manufactures high speed continuous form printers. Such printers utilize large spools of perforated paper. Continuous form printers are capable of printing hundreds, or even thousands, of pages per minute. They range in price from a mere \$100,000 to in excess of \$1 million, with a lifespan of approximately 20 years. MCS does not manufacture printers. However, both Océ and MCS are competitors in the business of providing maintenance services and replacement toner for high-speed printers. Océ filed a complaint alleging that MCS had misappropriated its trade secrets. MCS retaliated by filing counterclaims alleging monopolization and attempted monopolization, and several species of state tort claims, including tortious interference with contractual and prospective advantage.

In dismissing the antitrust counts, the court noted that the monopolization and attempted monopolization claims were based upon the "aftermarket relevant market theory" of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) (*Kodak-I*). In *Kodak*, the Supreme Court sustained a reversal of summary judgment dismissing claims that *Kodak* had imposed an illegal tying arrangement and had monopolized and attempted to monopolize the aftermarket for sales and service of its own original equipment sales. On the facts of *Kodak-I*, the Court found sufficient allegations of market power where there was an "asymmetry of information" about "product life cycles," and where competing suppliers of sales and service in the original equipment aftermarket had been the victims of exclusionary conduct. In a change in position by the OEM, it required that its purchasers utilize Kodak parts and services for repair and maintenance. This change in position, coupled with the lack of information on the product life cycle, "locked-in" uses of the Kodak OEM machines at supracompetitive prices for parts and services. This form of "post-sale opportunism" excluded competitors and/or entrants from providing substitutable choices to OEM purchasers, by which they could avoid supracompetitive pricing opportunities from Kodak. However, most courts have limited *Kodak-I* type cases to situations where there has been an after the fact tie of the parts and services to the original equipment sales, thus "locking-in" the purchasers, and "locking-out" competitors and/or new potential entrants. See, e.g., D. Goldfine & K. Vorrasi, "The Fall of the Kodak Aftermarket Doctrine: Dying A Slow Death In The Lower Courts," 72 ANTITRUST L.J. 209 (2004); B. Klein & L. Saft, "The Law and Economics of Franchise Tying Contracts," 28 J. LAW & ECON. 345 (1985) (franchisor lacks market power where competitive information concerning competing franchises is reasonably available prior to the issuance of the franchise.)

After discussing the ritualistic application of *Iqbal* and *Twombly*, the court dismissed the antitrust claims. MCS defined two relevant aftermarkets. The first was the market within the United States for maintenance services and parts replacement for Océ high speed continuous form printers. The second was for a special toner that was recommended for use in the Océ printers. The complaint

alleged that the printers required maintenance services that were "unique" from services required by other competing printers. Thus, MCS alleged that the market for the servicing of Océ printers was the relevant "service aftermarket". Proper servicing of the Océ printers required access to proprietary service technology, only available from Océ. While Océ had generally allowed MCS to utilize much of its proprietary technology in the past, it changed course, and brought an action for injunctive relief against further misappropriation and/or infringement. MCS argued that this was a *Kodak-I* change of position. The court held that it was not. Océ was free to allow use of its aftermarket technology, or to assert its proprietary rights, within its discretion. The court held that there was no estoppel on the part of Océ. Thus, this was not a *Kodak-I* "change of position".

In its attempted antitrust counterclaim, MCS was careful to allege all of the *Kodak-I* "buzz words", including "life cycle cost information asymmetry", "high switching costs", and "lock-in". The court was receptive to Océ's argument, however, that the fact that the printers were so expensive and of high technology, implied or permitted an inference that the customers were large, highly sophisticated, and knowledgeable purchasers who would have taken the necessary steps to ascertain the necessary life cycle information, in order to make an intelligent appraisal of switching costs. In an athletic leap of logic, the court then concluded that there were no "plausible" *Twombly*-type allegations that the OEM purchasers were "locked-in" and vulnerable to anticompetitive behavior and supra competitive aftermarket opportunism exploitation. As to the aftermarket for toner, the court noted that the use of the Océ approved toner was an improvement of the state of art, and was thus procompetitive. The development and use of the toner was efficient, and so promoted customer and consumer welfare. The court also noted that there were no allegations that Océ had refused to allow its customers to seek maintenance services from non-Océ providers, or that it had taken any steps to "tie" its OEM sales to the aftermarket parts and servicing of its printers. Océ is certainly free, the court noted, to compete with independent companies by leveraging its own intellectual property. As to its equipment purchasers, there were no allegations of a change in position

relative to aftermarket servicing that could have "locked-in" its customer base or allowed Océ to engage in "aftermarket opportunism".

The *Kodak-I* aftermarket doctrine thus continues its death spiral in the lower courts.

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