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BLOG

DOJ Antitrust Division Files Statement of Interest Against Intel's and Apple's Antitrust Claims Arising from FRAND Licensing Dispute

MARCH 31, 2020

As part of its focus in recent years on the antitrust implications of standard setting and the licensing of standard essential patents (SEPs), the Antitrust Division of the Department of Justice (DOJ) has recently been monitoring private litigations and intervening to make courts and the parties litigating SEP licensing disputes aware of the DOJ's position—*i.e.*, that allegations that patent owners unlawfully refused to license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms do not state an antitrust claim, and are instead more properly asserted as a breach of contract.

As an example of this, on March 20, 2020, the DOJ filed a statement of interest in Intel Corp. and Apple Inc.'s lawsuit against Fortress Investment Group LLC and a "web" of patent assertion entities (PAEs) that Fortress allegedly owns or controls. Intel and Apple allege that Fortress and its web of PAEs launched a "campaign of anticompetitive patent aggregation" and bring "endless, meritless litigation" asserting patent rights against potential licensees. These practices allegedly enabled Fortress and the PAEs to evade commitments made to standard setting organizations to license the relevant SEPs on FRAND terms.

Consistent with its prior statements of interest in other cases and the public remarks of AAG Delrahim, the statement in the Fortress case explains the DOJ's position that allegedly supra-FRAND royalties alone do not run afoul of federal antitrust laws. Instead, according to the DOJ, "these claims are contractual pricing disputes that are properly vindicated through contract law remedies and do not state an antitrust claim."

The DOJ statement also took issue with Intel and Apple's relevant market definition of an "Electronics Patents Market." Specifically, the DOJ argued that this market definition is too broad and "facially unsustainable" because "it would include any patent covering any aspect of the operation or production of any component or software of any piece of consumer or business electronics." The DOJ also explained that the market definition improperly encompasses "an indefinite number of patents utilized by or licensed to an unknown number of end users for an untold variety of purposes" while also including "complementary products as well as substitutes and, apparently, unrelated products." Finally, the DOJ asserted that Intel and Apple failed to show that Fortress had aggregated substitutes for patents in its portfolio, and that, at best, there has only been harm to particular individual firms, instead of to competition itself.

While the DOJ has taken the position that Fortress's conduct, as alleged by Intel and Apple, does not give rise to an antitrust claim, a number of other non-parties filed statements in support of Intel and Apple, arguing that Fortress's PAEs are patent aggregators that harm competition and can trigger antitrust laws through their "serial enforcement campaigns."

Regardless, parties engaged in FRAND licensing disputes relating to SEPs should be aware of the DOJ's active interest in this issue, and parties defending against antitrust claims arising out of their SEP licensing conduct could have a powerful ally if they are able to pique the Antitrust Division's interest.

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