The AIPLA Antitrust News

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Chairs' Corner

It is again my privilege to provide some thoughts that may be of interest to the Committee, specifically regarding current developments involving the interrelationship of IP and antitrust law. This issue of the Committee's Newsletter addresses two recent developments in this regard, and there are others.

One such development is the recently filed petition for certiorari filed in the *Princo* case. Ken Frankel and Jim Sherwood of Finnegan Henderson provide comments regarding the case and the current status. As was the case with the *en banc* appeal in the Federal Circuit, there will no doubt be much activity especially if certiorari is granted. Given the significance of the issues raised in *Princo* we are also contemplating a possible session at the Spring Meeting to address these issues. If you have any thoughts on this, please let us know.

Jeffrey Blumenfield and Brinkley Tappan of Crowell & Moring provide comments on the European Commission's recently issued guidelines on horizontal collaboration agreements, and specifically on Chapter 7 of the guidelines addressing standardization issues. As they explain, the guidelines reflect significant changes from the draft made available earlier in the year, and reflect changes based on a large number of comments submitted during the consultation period. As they also point out, however, there remain aspects of the guidelines that will be understood only as time goes by. In light of the guidelines we are considering expanding the enforcement agency speakers at the Annual Meeting to include a representative of the European Commission. Here, too, your thoughts and input are welcome.

Thanks also to Paul Ragusa and Jeremy Merling of Baker Botts for their comments on the use of antitrust evidence in patent cases.

Other developments have occurred or are soon expected of interest. For example, Senator Kohl recently announced the reintroduction of legislation relating to reverse payments. The vibrant discussion at our session during the Annual Meeting suggests that this is something that warrants watching, regardless of which side of the issues you may be on. In addition, word has it that the Federal Trade Commission will be issuing its IP Report shortly. This report will be the result of the FTC's series of workshops on IP and competition issues, and the report will also likely attract much comment.

Finally, we encourage your input on issues that you think might improve our Committee. We are looking for volunteers to organize activities that may serve your interests better. This includes, but without limitation, in connection with future programs at AIPLA meetings, webinars, dialogue through listServs, and certainly continued contributions to the Newsletter. We look forward to your involvement.

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Patent Misuse After Federal Circuit's *Princo* Decision *En Banc*

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The Federal Circuit's August 2010 *en banc* decision in *Princo Corp. v. Int'l Trade Comm'n*,[1] 616 F.3d 1318 (Fed. Cir. 2010) ("*Princo II*"), interpreted the patent misuse defense narrowly. It required proof of both leveraging of an enforced patent and an anticompetitive effect outside the scope of the patent right, absent *per se* misuse. The six-member majority concluded that Princo had not met its burden to show each element and rejected Princo's misuse defense, while two judges concurred and two judges wrote a vigorous dissent. Princo recently filed its petition seeking Supreme Court review based heavily on that dissent. The Federal Circuit's *en banc* decision will govern all assertions of a misuse defense in patent infringement cases, unless reversed or modified by the Supreme Court.

I. Facts

The Federal Circuit reviewed the International Trade Commission's Final Determination in an investigation into Princo's infringement of U.S. Philips Corporation's patents by the importation of CD-Rs and CD-RWs. According to the Federal Circuit majority's opinion, CD-R/RW technology was developed in the 1980s and 1990s, principally by Philips and Sony Corporation working in collaboration with each other. They and others involved in the development of that technology set a technical standard for CD-Rs and CD-RWs known as the "Orange Book" standard. *See Princo II* at 1322.

Engineers at Philips and Sony each developed solutions for encoding position information in a disc. Philips' engineers proposed using an analog method to encode that information, while Sony's engineers proposed a digital method. They patented their respective approaches, Philips in the "Raaymakers" patents and Sony in the "Lagadec" patent. The companies' engineers agreed that the Raaymakers technology provided a better approach, and the companies incorporated the Raaymakers technology in the Orange Book as the standard for making CD-R/RW discs. *See id.*

To commercialize CD-R/RW technology, the companies developing the technology and standard pooled their Orange Book-related patents and Philips administered a licensing program for the pooled patents. Philips offered package licenses that included licenses to patents regarded as potentially necessary to manufacture Orange Book-compliant discs, and included both the Raaymakers and Lagadec patents. The licenses included a field of use restriction limiting the scope of the licenses to the technology for Orange Book-compliant discs. *See id*. at 1322, 1344.

Princo entered into a license agreement but soon stopped making payments. In response, Philips filed a complaint with the Commission under 19 U.S.C. § 1337(a)(1)(B), alleging that Princo's importation of discs infringed the Raaymakers patents. Philips did not allege infringement of Sony's Lagadec patent. *See id.* at 1323.

II. Procedural History

Princo asserted patent misuse as an infringement defense. As one misuse theory, Princo argued that Philips improperly

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required licensees to accept licenses on patents that were not essential to comply with the Orange Book standard as a condition for receiving licenses on essential patents. In its first decision in the case, the Commission agreed, holding that Philips' tying practice constituted patent misuse. *See id.*

On appeal, the Federal Circuit reversed the Commission. *See U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179 (Fed. Cir. 2005). The court held that Philips' patent-to-patent tying arrangement did not constitute *per se* misuse, because Philips did not require licensees to use any particular technology. The court also rejected the Commission's analysis under the rule of reason, holding that the Commission had an insufficient basis for finding Philips' licensing program anticompetitive. The court remanded the case to the Commission to address Princo's remaining patent misuse theories. *See id.* at 1197-99.

On remand, the Commission rejected the remaining misuse theories, including theories concerning the Lagadec patent. More specifically, it rejected the theory that Philips improperly tied the Lagadec patent to the pool license because that patent was not essential to Orange Book-compliant discs. It also rejected the theory that the Lagadec and Raaymakers patents covered potentially competing technologies, and that Philips and Sony foreclosed potential competition between them by agreeing that the Lagadec patent would be available only through package licenses for Orange Book-complaint discs. *See Princo Corp. v. Int'l Trade Comm'n*, 563 F.3d 1301, 1302 (Fed. Cir. 2009) ("*Princo I*") (vacated in part in *Princo II*); *Princo II*, 616 F.3d at 1324-25.

III. The Panel Opinion

Princo appealed the Commission's second decision, and a three-judge Federal Circuit panel vacated the Commission's decision in part. The panel rejected Princo's theory of patent misuse based on tying essential and non-essential patents. The panel held that one claim of the Lagadec patent reasonably might be necessary as a blocking patent to the Orange Book standard, even if it did not necessarily cover the standard, which was sufficient to reject Princo's tying claim. *See Princo I,* 563 F.3d at 1309-12. The panel concluded that a "blocking patent is one that at the time of the license an objective manufacturer would believe reasonably might be necessary to practice the technology at issue." *Id.* at 1310. For the same reason, the panel rejected Princo's argument that Philips' package licensing arrangement was improper because Sony would receive royalties under the parties' joint licensing agreement, even though the Lagadec patent does not necessarily cover Orange Book-compliant discs. *See id.* at 1312-13. The subsequent *en banc* decision did not modify this part of the panel's decision. *See Princo II*, 616 F.3d at 1326.

The panel agreed, however, with Princo's misuse theory based on Philips' alleged agreement with Sony not to license the Lagadec patent in a manner that would permit competition between the Lagadec and Raaymakers technologies. The panel held that the essential nature of the Lagadec patent could not be used to justify an alleged joint refusal to license the Lagadec patent for non-Orange Book purposes. The panel also rejected the Commission's reliance on a lack of evidence that Sony and Philips would have competed in a market to license the Raaymakers and Lagadec technologies. The panel held that the alleged agreement between Sony and Philips was unlikely to have any efficiencies that they could not achieve through an agreement that would have allowed individual licensing of the Lagadec patent. The panel also rejected Philips' argument that no misuse occurred because the Lagadec patent did not cover a commercially viable technology, concluding that the law should not permit patentees to suppress technologies before they become viable. *See Princo I*, 563 F.3d at 1313-21.

Judge Bryson dissented. He rejected Princo's tying and package licensing theories, and would not have allowed Princo's theory of patent misuse based on an alleged agreement between Sony and Philips not to license the Lagadec patents by including competing patents in the pool. Judge Bryson concluded that the record contained sufficient evidence to find that the package licenses did not include competing patent rights. In his view, Princo failed to present sufficient evidence that the Lagadec patent covered a substitute technology that might compete with Orange Book-compliant technology. *See id.* at 1321-26.

IV. The *En Banc* Decision

Philips, Princo, and the Commission filed petitions for rehearing *en banc*. In its *en banc* decision, the Federal Circuit addressed only whether the alleged agreement between Philips and Sony to suppress the Lagadec technology would constitute misuse and provide a defense to Philips' claim of infringement of the Raaymakers patents. *See Princo II*, 616 F.3d at 1326. Judge Bryson now wrote for a majority of the court, affirming the Commission's decision and finding no misuse.

Narrowly construing the misuse defense, the court explained that patent misuse is a "judge-made doctrine that is in derogation of statutory patent rights against infringement," and noted the court had not applied the doctrine "expansively." *Princo II*, 616 F.3d at 1321-22. The court reviewed the case law and legislative history related to the misuse doctrine. *See id.* at 1326-31. While it observed that the need for the doctrine has been questioned, the court noted that the Supreme Court has not overruled its patent misuse cases. *See id.* at 1329 n.2. The court concluded, however, that this case presented a "completely different scenario." *See id.* at 1331. It had applied the doctrine of patent misuse to prevent a patentee from "impermissibly broaden[ing] the 'physical or temporal scope' of the patent grant with anticompetitive effect." *See id.* at 1328 (quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir. 1986)). In contrast, Princo based its misuse claim on an alleged agreement to restrict the availability of a patent that Philips had not asserted against Princo, i.e., Sony's Lagadec patent. *See Princo II.* at 1331.

The court explained that a key element of patent misuse is "patent leverage," which requires that the asserted patent significantly contribute to the misconduct at issue. Princo had failed, however, to establish the required connection between any misconduct and the enforced Raaymakers patents. *See id.* at 1331-33. The court rejected Princo's argument that Philips leveraged its patents by using the licensing program to effectively pay Sony to suppress the Lagadec technology. The court held that using funds from a lawful licensing program is not the type of conduct against which patent misuse protects. Further, it held that Philips' licensing program did not restrict the availability of Philips' patents and therefore did not use Philips' patents for leverage. *See id.* at 1332.

The court also rejected Princo's argument that Supreme Court cases do not support a requirement for "leveraging" a patent to establish misuse. In response to Princo's reliance on *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), and *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), the court concluded that those cases involved antitrust claims, not patent misuse. Any antitrust violation based on an alleged side agreement between Philips and Sony to suppress the Lagadec technology was unrelated to the issue of misuse of the enforced Raaymakers technology patents. It concluded that the theoretical existence of an antitrust violation based on the Lagadec technology did not yield a defense of misuse of the Raaymakers patents. *See Princo II*, 616 F.3d at 1332.

The court further held that Princo failed to prove the required anticompetitive effects resulting from the alleged agreement to suppress the Lagadec technology. *See id.* at 1334-40. The record supported the Commission's finding that the Lagadec technology was not a "viable potential competitor" to the Raaymakers technology. *Id.* at 1334. The court rejected Princo's argument that patent misuse did not require an anticompetitive effect, and that the court should overturn its line of cases requiring a factual determination of anticompetitive effect for conduct that is not a *per se* antitrust violation or *per se* misuse. *See id.*[2] Rejecting Princo's argument, the court pointed to, *inter alia*, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 38 (2006), which described patent misuse as a patentee using its patent "as the effective means of restraining competition with its sale of an unpatented article." *Princo II*, 616 F.3d at 1334.

The court also rejected Princo's argument that the alleged agreement between Philips and Sony was a naked restraint on competition with no procompetitive justification. The court observed that research joint ventures, the activities of standards setting organizations, and ancillary restraints resulting from agreements between collaborators are analyzed under the antitrust rule of reason. *See id.* at 1334-36.

Applying a rule of reason analysis, the court concluded that substantial evidence supported the Commission's factual finding that the alleged agreement between Philips and Sony did not suppress a potentially viable alternative to the Orange Book standard. The Commission found that the Lagadec technology was error-prone and did not work well, and that Philips and Sony entered into their pooling arrangement for technical reasons, not as a means for Philips to provide royalties to Sony to suppress the Lagadec technology. In addition, the Commission had found a lack of evidence to support Princo's contention that Philips' licensing program avoided competition from non-Orange Book-compliant discs by including a license to the Lagadec patent in the package licenses. The Commission also had found no evidence that a potential licensee would develop a disc based on the Lagadec technology to compete with Orange Book-compliant discs. *See id*. at 1336-40.

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[2] *See U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179 (Fed. Cir. 2005); *Monsanto Co. v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004); *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860 (Fed. Cir. 1997); *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419 (Fed. Cir. 1997); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992); *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995 (Fed. Cir. 1986)).

The court further explained that Princo had the burden to demonstrate an adverse effect on competition, i.e., at least a reasonable probability that the Lagadec technology would have developed into a competitive technology in the market. Based on the Commission's findings, however, Princo had failed to carry its burden. *See id.* at 1338-39.

Accordingly, the court affirmed the Commission's decision and found no patent misuse. *See id*. at 1340.

V. Concurring Opinion

Judge Prost concurred in part with the majority, in an opinion joined by Judge Mayer. The concurring opinion agreed with the court's conclusion that the evidence did not support a finding of anticompetitive effect based on the alleged agreement between Philips and Sony, and agreed that Princo had failed to meet its burden of proof. *See id.* at 1340. The concurring opinion questioned, however, the court's conclusions that patent misuse requires leveraging, and that misuse of the Raaymakers patents is a different issue than the antitrust issue of the alleged suppression of the Lagadec technology. In the concurrence's view, an antitrust violation based on an agreement regarding the Lagadec patent could be relevant to expansion of the scope of the Raaymakers patents. The concurring opinion saw no need to address the precise scope of the patent misuse doctrine, however, because the court could affirm the Commission's decision based on Princo's failure to prove that the alleged agreement between Philip and Sony was anticompetitive. *See id.* at 1341.

VI. Dissenting Opinion

Judges Dyk and Gajarsa dissented from the majority, in an opinion authored by Judge Dyk. The dissent disagreed with a narrow view of misuse, concluding that Supreme Court cases and legislation support a "vigorous misuse defense." *Id.* at 1342.

The dissent disagreed with the court's holding that the alleged anticompetitive conduct did not involve any misuse of the Raaymakers patents. *See id.* at 1345-51. In the dissent's view, the court ignored Supreme Court precedent holding that patent misuse occurs when a patentee uses a patent licensing agreement to "control conduct by the licensee not embraced in the patent monopoly" (quoting *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456-57 (1940)), or to fix prices and suppress competition from alternative technologies (citing *United States v. United States Gypsum*, 333 U.S. 364 (1948)). *Princo II* at 1346. The dissent disagreed with the court's view of *Gypsum* as just an antitrust case, concluding that *Gypsum* was one of "the series of decisions in which the Court has condemned attempts to broaden the physical or temporal scope of the patent monopoly." *See id.* at 1347 (quoting *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343 (1971)). The dissent further concluded that other courts had cited *Gypsum* for patent misuse, and that some had applied similar reasoning in copyright misuse cases. According to the dissent, the alleged agreement between Philips and Sony was part of the pooling agreement between the companies that developed CD-R/RW technology. *See Princo II* at 1347-49.

The dissent also rejected the court's limiting the doctrine of patent misuse to cases in which a patentee leverages a patent. The dissent concluded that the cases requiring leveraging only involved tying and improper patent term extension. In the dissent's view, no leveraging requirement should exist for all misuse. *See id.* But even if leveraging were required, the dissent found sufficient evidence of leveraging in Sony's alleged agreement not to license the Lagadec technology. It found leveraging in, *inter alia*, the field of use limitations in the pool licenses that limited the license grant to use of the patents to manufacture Orange Book-complaint discs. *See id*. at 1344, 1349-50. The dissent concluded that the field of use limitations in the license "preclude[ed] the licensees from developing alternatives to the Orange Book." *Id*. at 1344.

The dissent further disagreed with court's requiring evidence of anticompetitive effect. Citing *Illinois Tool Works*, the dissent viewed the doctrine of patent misuse as broader than antitrust law, and concluded that evidence sufficient to establish anticompetitive effect under antitrust law is sufficient to establish anticompetitive effect for patent misuse. *See id*. at 1351-57.

According to the dissent, the court erred in placing the burden of proof on Princo. In the dissent's view, the burden rested on Philips, because competitive harm is presumed in a "quick look" rule of reason analysis that courts apply to inherently suspect agreements, such as an agreement not to compete. Further, the dissent concluded that, under a conventional rule of reason analysis, Philips still bore the burden of proving a lack of anticompetitive effects. The dissent questioned the court's reliance on the procompetitive benefits of joint ventures, stating that the suppression of the Lagadec patent was not necessary to the joint development of the Orange Book standard. Finally, the dissent disagreed with requiring proof that the Lagadec technology had a reasonable probability of commercial viability. In the dissent's view, the suppression of new technology has no procompetitive benefits, regardless of a technology's prospects. *See id.* at 1353-55.

VII. Princo's Petition for a Writ of Certiorari

On January 5, 2011, Princo filed a petition for a writ of certiorari. *Princo Corp. v. Int'l Trade Comm'n*, No. 10-898 (U.S. Jan. 5, 2011). In its petition, Princo challenged the requirements for both leverage and anticompetitive effect. In addition, Princo contended that the misuse doctrine should apply broadly, while the Federal Circuit construed it narrowly. As of the date of this article, Philips' had not yet filed its brief.

The Use of Antitrust Evidence in Patent Litigation

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Evidence relating to a party's antitrust violation s can be highly relevant to important infringement and damages issues in a patent litigation. For example, evidence establishing that a party knew its prices were higher than they would have been absent a constraint of trade may be probative of a party's expected profits under a reasonable royalty analysis. At the same time, however, antitrust evidence can be prejudicial, confusing, or misleading to a jury. A party intending to rely on such evidence in a patent case is certain to face a battle, in the form of an *in limine* challenge by the defendant to exclude such evidence from being introduced. This article will present strategies for increasing the likelihood of a court permitting the use of antirust related evidence in patent litigation.

I. Applicable Law for Determining Admissibility of Antitrust Evidence

Under Federal Rule of Evidence 403, relevant evidence should be admitted unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *U.S. v. Matera*, 489 F.3d 115, 120-21 (2d Cir. 2007) (upholding finding that probative value of evidence of bad acts outweighed potential for unfair prejudice). Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context. *Worthington v. County of Suffolk*, No. 02-cv-723, 2007 WL 2115038, at *6 (E.D.N.Y. July 20, 2007) (where court found evidence could be damaging but was relevant, determination on exclusion was best deferred to trial); *see also Leopold v. Baccarat, Inc.*, 174 F.3d 261, 270 (2d Cir. 1999) (evidence properly admitted where both probative value and danger of unfair prejudice were significant but not overwhelming).

In particular, evidence of previous actions are admissible when relevant and probative of an issue in the second case, such as a party's knowledge or intent. *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94-cv-5587, 2002 WL 31780188, at *2-3 (S.D.N.Y. Dec. 11, 2002) (admitting Federal Trade Commission settlement agreement on issue of intent); *see also U.S. v. Pepin*, 514 F.3d 193, 208-09 (2d Cir. 2008) (finding abuse of discretion where evidence probative of intent was excluded).

II. Potential Relevance of Antitrust Evidence in Patent Litigation

Antitrust evidence can be relevant to a number of different issues in a patent case, depending upon the particular facts and circumstances of the case. Litigation counsel should seek to determine what the opposing party plead or was found guilty to in a prior antitrust action, and how such a plea or finding is relevant to the facts of the patent litigation. What fact admissions did the party make that can be used against it in the patent litigation?

One particular area of the patent litigation where the antitrust evidence may be probative is damages. The Patent Statute provides that on a finding of infringement of a valid patent, the patentee should be entitled to damages "in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." 35 U.S.C. § 284. A reasonable royalty is determined on the basis of a "hypothetical negotiation" occurring between the parties at the time just before infringement began. *See Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995)

In order to determine that royalty, the parties' respective damages experts will testify concerning various facts the parties would have known during the hypothetical negotiation. *See Id.* Under this analysis, an accused infringer's knowledge and future expectations concerning competition and profits is highly probative. *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir. 1983) (holding that infringer's expected profits at the time it commenced infringement, rather than its actual profits, are relevant to a reasonable royalty), *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120

(S.D.N.Y. 1970) (listing the established profitability, commercial success, and current popularity of the patented invention, as factors).

Therefore, if a party was involved in antitrust violations at the time of first infringement, there may be no more relevant information with regard to the issue of the hypothetical negotiation than the antitrust evidence. In such cases, the accused infringer would have expected it could set prices high and could make extraordinarily large profits, and would therefore be willing to pay a higher royalty rate in the hypothetical negotiation. Notably,

> [T]he reasonable royalty rate does not reflect the infringer's actual profits, but rather the parties' expectations and bargaining positions at the time of the first infringement.

Micro Motion, Inc. v. Exac Corp., 761 F.Supp. 1420, 1434 (N.D. Cal. 1991); *see Hanson*, 718 F.2d at 1081.

Furthermore, the antitrust evidence may well include admissions by the party concerning the size of the affected market or the amount of sales the defendant made, which is likewise relevant to the size of the damages base that the plaintiffs would be entitled to. Other potential admissions could include evidence of knowledge and/or intent to sell products to a particular company or particular location, which could be relevant to any issues requiring such knowledge or intent, such as induced infringement. Finally, the antitrust evidence could include bad faith character evidence that could be used to negate any good faith defenses relied upon by party, such as a lack of willfulness.

III. Why Antitrust Evidence may be Excluded from a Patent Litigation

Assuming the antitrust evidence is relevant and probative to issues in the patent litigation, the opposing party will likely move the court *in limine* to exclude such evidence on the basis that the resulting prejudice would substantially outweigh any probative value of such evidence. *Park west Radiology v. Care Core Nat'l LLC*, 675 F. Supp. 2d 314, 329 (S.D.N.Y. 2009) (excluding evidence of other litigations because "any probative value of references to the Other Litigations is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, and waste of time under FRE 403."). Such prejudice could result if a juror misuses the antitrust evidence. For example, if the jury hears the defendant is guilty of antitrust violations, the jury may conclude that the party's propensity to commit crimes must mean that it is guilty of patent infringement.

In addition to prejudice, allowing the jury to hear the antitrust evidence could confuse and/or mislead the jury. For example, the jury would have to be instructed on the elements required under antitrust laws and how such requirements differ from the elements of a claim for patent infringement, which may result in confusion and unnecessary waste of time. For these reasons, a judge may exclude the evidence because the harm or prejudice that could result may outweigh the probative value of the evidence.

IV. Impeachment

Another avenue for potentially introducing the antitrust evidence in a patent litigation is for impeachment purposes. While this area of law is not settled and can depend upon a particular district's rules, Federal Rule of Evidence 609 provides that in certain circumstances, evidence that a witness has been convicted of a crime can be admitted for the purpose of attacking the character for truthfulness of a witness. For example, in *State of Oklahoma v. Allied Materials Corp.*, the state was allowed to cross-examine defendant's witnesses and to introduce evidence of defendant corporation's prior criminal antitrust conviction to impeach witnesses who were themselves convicted, or if such witnesses were officers, directors, or managing agents of the convicted corporation. 312 F.Supp. 130, 133 (W.D.Okla. 1968).

Federal Rule of Evidence 609(a)(1) states that evidence that a witness has been convicted of a crime punishable by death or imprisonment in excess of one year shall be admitted for the purpose of attacking the character for truthfulness of the witness, if the court determines that the probative value of admitting the evidence outweighs the prejudice. Fed. R. Evid. 609. Because antitrust violations of the Sherman Act are punishable by fine and/or imprisonment up to 10 years, evidence of such violations likely can be introduced for the purpose of impeachment so long as the court believes the probative value is greater than any potential prejudice. 15 U.S.C. §§ 1-3.

Federal Rule of Evidence 609(a)(2) states that evidence that a witness has been convicted of a crime shall be admitted regardless of punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. Importantly, evidence of such crimes is automatically admissible regardless of any potential prejudice. According to the committee notes to Rule 609, crimes requiring proof or admission of an act of dishonesty or false statement include "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Federal Rule of Evidence 609, Committee Notes to 2006 Amendments.

While the antitrust statutes, *e.g.* sections 1-3 of the Sherman Act, do not appear to indicate the deceitful nature of the crimes, the committee notes to Rule 609 state that "where the deceitful nature of the crime is not apparent from the statute and the face of the judgment … a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted." *Id.* A party attempting to introduce evidence under Rule 609(a)(2) should review the indictment, statement of admitted facts, plea agreement, and related materials to determine if the opposing party had admitted or was found to have made any false statements or acts of dishonesty that were necessary for the conviction.

V. Steps to Increase Likelihood of Admissibility

A party in a patent litigation intending on relying upon antitrust evidence should take proactive measures during fact discovery and expert discovery to build a strong foundation for introduction of such evidence at trial. Document request and interrogatories that explore the facts and circumstances of the antitrust evidence should be explored, and depositions of suitable witnesses taken. At a minimum, counsel will be able to determine which of the opposing party's employees are knowledgeable about the relevant facts, and use that information in preparing trial strategy. Additionally, relevant expert witnesses, such as the patent owner's damages expert, should be informed of the facts as early as possible, so that the expert can analyze the information in reaching his or her opinions.

The European Commission Guidelines on Horizontal Cooperation Effective from January 15, 2011[3]

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The European Commission first issued guidelines concerning horizontal cooperation in June 2001. Although these 2001 Guidelines contained a section addressing standards, that section defined standards broadly, and offered only brief and generic guidance about how to navigate Article 81(1) (now Article 101) of The Treaty On The Functioning Of The European Union ("TFEU" or "Treaty").

Since 2001, standards setting activities, as well as the number of standard setting organizations ("SSOs," also called "standard development organizations" or "SDOs"), have increased dramatically. This growth results from the acceleration of technology innovation in such fields as audio and video compression, wireless, and television, as well as the transformation of the wireless device sector to include smartphones and the devices being developed to take advantage of 4G broadband wireless, all of which are dramatically enhanced, more capable, and more feature-rich than earlier generations of mobile phones and other wireless devices. These technology innovations created a need to develop, and in turn depended on the development of, interoperability specifications for the underlying technologies. At the same time, the conduct of these organizations – and often, of their patent-holding participants – has drawn increased scrutiny from antitrust regulators in both the US and the EU, and, in the US, from civil plaintiffs as well.

In April 2010, the European Commission published greatly-revised draft "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements." Taking into account the increased importance of SSOs, and the concomitant need for additional guidance regarding their activities, the Commission included a dramatically enlarged chapter (Chapter 7) on standardization agreements in the draft Guidelines.

The new draft Guidelines addressed for the first time such topics as patent holders' disclosure of essential IP as part of the standard setting process, the terms on which patents should be licensed after they are incorporated into a standard, and how to assess the reasonableness of the royalties collected for patents included in a standard. The Commission invited written comments to be filed within approximately two months, and then engaged in an intense consultation period with interested entities. The Commission received hundreds of

[3] The full text of the final Guidelines can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF

comments, and met with many of the parties who had filed.

In December 2010, the Commission issued a final version of the Guidelines, which went into effect as of January 15, 2011. The final version clearly shows the effects of the comment and consultation process, in several important differences from the June 2010 draft that are worth noting.

Safe Harbor Provisions

The final Guidelines outline a set of conditions under which standards agreements "would normally fall outside the scope of Article 101(1)." (Para. 278) In setting out these safe harbor provisions[4] – which provide useful guidance for entities and their legal advisors – the Commission makes clear that these safe harbor provisions (Paras. 280 – 286) are not mandates, and, most importantly, that the "non-fulfilment[5] of any or all of the principles set out in this section will not lead to any presumption of a restriction on competition." (Para. 279)

Substantively, the safe harbor provisions describe conduct generally in line with a conservative approach to competition concerns in the standard-setting context. For example:

- All competitors in a given market should be invited to participate in selecting a standard, and participants should have objective and non-discriminatory voting rights. (Paras. 280-281)

- Participating entities should make good-faith disclosure of essential IP rights ("IPR") resulting from "reasonable endeavors" to identify IPR reading on a potential standard. (Para. 286)

- Participants may declare that they are "likely to have IPR claims over a particular technology," rather than identifying specific claims or applications. (Para. 286)

To be within the safe harbor, participants in standards setting should provide "good faith disclosure" of IPR "that might be essential" to the standard. (Para. 286) The Commission also addresses the scale of the obligation to become informed about the existence of such IPR, requiring "reasonable endeavours to identify IPR reading on the potential standard." (*Id.*) A new part of this obligation, in the final Guidelines, is that the disclosure obligation must be "based on ongoing disclosure as the standard develops," a point that is not always clear in SSO requirements. The Commission, however, does not address whether the knowledge underlying the disclosure obligation is that of the participating entity, or its representatives. Nevertheless, it seems clear that the "reasonable endeavours" standard does apply at least to a participating entity's representative to the SSO, and therefore would seem at least to disallow the tactic of choosing a representative specifically because he or she is not knowledgeable about the entity's IPR holdings and who makes no effort to overcome that ignorance, for example by speaking with the entity's engineers working in the relevant area. At the same time, a "reasonable endeavours" standard would seemingly not require an exhaustive and expensive file search; such a requirement could negatively impact the standards process by excluding the most

[4] The concept of safe harbor from stricture under Article 101(1) is found in TFEU Article 101(3).

[5] We have retained the British spellings in quotations from the Guidelines.

innovative companies, which might have the largest patent portfolios.

These disclosure requirements underlie the FRAND requirements of the safe harbor provisions. Participants must provide an irrevocable commitment to license, on fair, reasonable and non-discriminatory ("FRAND") terms, all their essential IP that they disclosed and that were incorporated into the standard. (Para. 285) New in the final Guidelines, and an important contribution to the analysis, is the requirement that to benefit from the safe harbor, IPR owners must also ensure that their FRAND commitments are transferred to subsequent owners of the IPR. (*Id.*) This last is a change from the similar provision in the draft Guidelines, which required only that entities with a FRAND obligation "take all necessary measures to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment." (Draft Guidelines Para. 286) And this is an increasingly important point, given the realities of today's liquid marketplace for IPR, and the Guidelines make an important contribution in this area, among others.

Nevertheless, the FRAND requirement in the safe harbor provision begs several questions, some of which are answered elsewhere in the Guidelines, and some of which are not. For one thing, it is not entirely clear from the text whether participants who only declare themselves "likely" to have relevant IPR – but do not disclose specific IPR – are obligated to honor the FRAND requirements. The Guidelines' discussion of the FRAND obligation, however, provides strong evidence that the intent was that the FRAND obligation should apply equally to all IPR incorporated into the standard from participating companies. (Para. 285)

Further, while the FRAND requirement has long been an important measure of procompetitive licensing terms, it also has suffered consistently from a lack of specificity in quantifying "fair and reasonable." Not surprisingly, there can be significant differences between patent owners and potential licensees over the meaning of the term, especially in the specific context in which they are negotiating (or litigating over) what constitutes "reasonable and non-discriminatory" license terms. The Guidelines suggest several alternative approaches to making this determination, while cautioning that "cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents." (Para. 289)

One method suggested in the Guidelines is comparing the license fees charged by the licensor for the relevant patents under the standard with the license fees charged by that licensor for the same patents in a competitive environment before the industry was locked into the standard. (Para. 289) This benchmark approach makes both intuitive and competitive sense. But there are likely to be issues with its application. For example, it may not be clear when a particular industry was "locked in" to the standard at issue.[6] And of course this method will not be available unless the patent at issue was in fact offered for licensing in a competitive (and comparable) setting prior to – or apart from – its licensing in implementation of the standard.

Another method suggested in the Guidelines is to "obtain an independent

[6] In this area we observe one of the significant changes between the draft guidelines and the final Guidelines, which will be discussed further below.

expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio." (Para. 290) This suggestion comports with experience, as those involved in standards-related activities are well aware that some patents are central to the standard and others less so. Put another way, it is not lost on standards participants that, with respect to a particular standard, some patents (and the features to which they are essential) could not be excluded from the standard without significantly diminishing the value of the standard, while others could be excluded with little if any effect on the value of the standard. A related issue is that the functionality of some features of a particular standard (and associated patents) may have been chosen from among two or more alternatives with similar functionality (and associated patents). In such a case, the chosen functionality (and associated patents) may be of less value than would be the case if the technology enabling the feature had been the only available technology to enable that functionality. As the Guidelines suggest, this may be an appropriate area in which to rely on an independent expert, in the event of a dispute, but that approach is unfortunately a costly one, requiring a licensee to use funds better spent on implementing the standard than litigating over licensing terms.

Acknowledging the difficulty of fleshing out the FRAND requirement in the context of particular patents in a particular standard, the Guidelines frankly admit that the suggested methods may not be sufficient: the Guidelines state that they "do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive." (Para. 290)

Additional Guidance for Agreements Outside the Safe Harbor.

To assist practitioners in analyzing agreements that do not meet the requirements set forth in the safe harbor section of the Guidelines, the Commission has included additional guidance outside of those provisions; indeed, the bulk of the text is devoted to this topic. Some of the additional guidance simply restates and expands the principles incorporated into the safe harbor section. For example, the Guidelines state that if participation in the standard-setting process is open in that it allows all competitors in the market affected by the standard to take part in choosing the standard, the risk of restrictive effects on competition will be lower. (Para. 295)

Other sections of the non-safe-harbor provisions are illustrative of how the Commission will analyze competitive effects more generally. The starting point for the analysis is, as usual, an assessment of market power, which the Commission analysis begins by examining the share of the market affected by the agreement. The Guidelines suggest that "in many cases the relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard." At the same time, the Guidelines note a number of caveats to this approach, including that because effectiveness of a standard is "often proportional to the share of the industry involved in setting" the standard, the mere fact of high shares held by the participants "will not necessarily lead to the conclusion" that the standards agreement is likely to have anticompetitive effects. (Para. 296) And this approach is also of much less value in situations where the participants have a presence in multiple markets, or where the standard will result in a new product for which there is not yet a market in which the participants could have participated.

Related to the issue of market share is the question of whether the standard being analyzed faces competition for adoption from another competing standard, or from other sources. According to the Guidelines, when there are effectively-competing standards, or when there is competition between the "standardized solution and a non-standardized solution," the standard being analyzed is less likely to have market power, and, in the absence of market power "a standardization agreement is not capable of producing restrictive effects on competition." Therefore, the Guidelines conclude, the rules associated with a standard facing competing standards or from "non-standardized solutions" will be less likely to result in harm to competition. (Paras. 277, 294)

An additional important issue addressed in the non-safe-harbor provisions is the treatment of *ex ante* disclosure of most restrictive licensing terms. Joining its counterparts in the US, the Commission explicitly states that unilateral *ex ante* disclosure "will not, in principle, restrict competition within Article 101(1)." (Par. 299)

Even more interesting is what the final Guidelines do *not* say about *ex ante* disclosure. In the draft Guidelines, the Commission similarly committed that *ex ante* disclosure of maximum licensing terms was not problematic under Article 101(1), but with an important caveat:

> [S]hould a standard-setting organization's IPR policy require, or allow, IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard this will not lead to a restriction of competition within the meaning of Article 101(1) *as long as the rules do not allow for the joint negotiation or discussion of licensing terms in particular royalty rates*.

(Draft Guidelines Par. 287) (emphasis added)

This was an important insight into the Commission's analysis, indicating the Commission would have regarded explicit *ex ante* negotiation of most restrictive licensing terms as problematic under Article 101(1). Even in light of that specific caveat, the guidance in the draft Guidelines might have proven less useful than it seemed, because of the reality of the way in which *ex ante* disclosure is likely to work. In practice, unilateral *ex ante* disclosure by a single patent owner could lead to an iterative process: the patent owner proposes a maximum royalty rate, and the SSO – if it considers the proposed rate "too high" – tells the patent owner that the technology is unlikely to be incorporated into the standard at that price; the patent owner then unilaterally discloses a lower royalty rate with the expectation that the SSO would again react. Thus, it may be difficult in practice to distinguish such a series of exchanges – and serial unilateral disclosures – from a negotiation.

Even more significant is that comparing the comparable paragraphs – paragraph 287 of the draft Guidelines with paragraph 299 of the final Guidelines – shows that the sentence from the draft Guidelines expressly condemning *ex ante* negotiation does not appear in the final Guidelines. Instead, the only conduct in the context of *ex ante* disclosure that the final Guidelines describe as a potential infringement of Article 101 is that in which *ex ante* disclosures serve "as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies." (Para. 299, n. 123). It seems clear from this change that the Commission would not necessarily regard *ex ante* negotiation of the most limited terms as problematic under Article 101(1). Whether it indicates that the Commission is further willing to regard *ex ante* negotiations as potentially procompetitive, as the competition authorities in the US do,[7] will become apparent as the Commission implements its Guidelines analysis.

IPR, Standards Setting, and Market Power

The final Guidelines bring greater clarity to the intersection of these issues than did the draft guidelines. Both the draft guidelines and the final Guidelines observe that adoption of proprietary technology into a standard "can create or increase the market power of those IPR holders." (Draft Guidelines, Para. 275; Guidelines Para. 269) But there is a real difference between those discussions.

In the draft Guidelines, the Commission stated flatly "the establishment of a standard . . . can create or increase the market power of those IPR holders and in some circumstances lead to abuses of a dominant position." (Draft Guidelines, Para. 275) The draft Guidelines further stated that "[a]n abuse of the market power gained by virtue of IPR being included in a standard constitutes an infringement of Article 102." (Draft Guidelines, Para. 284)

This led to some confusion, because it appeared to suggest that the owner of IPR adopted into a standard had market power, and therefore dominance in EC terms, simply by virtue of that adoption, and without regard to whether the standard (or rather implementations of the standard) had achieved any significant penetration in the relevant downstream market. Indeed, the language quoted above from paragraph 284 of the draft Guidelines appeared to say that charging excessive royalties in such a setting constituted an abuse of dominance that infringed Article 102, without further inquiry into the state of competition in the downstream market for implementations of the standard. Such a view would have been at odds with modern economic competition analysis.

The Guidelines clarify a Commission position that is within the mainstream on dominance analysis, by stating that the Commission will look to the downstream markets for a measure of market power and dominance for determining an infringement of Article 102. (Para. 269)

At the same time, the Guidelines recognize that the adoption of proprietary technology into a standard gives the owners of those patents real market power in setting terms and conditions of access to them. On the latter point, the Commission states that a holder of IPR incorporated into a standard could acquire control over the right to implement a standard (presumably if the patent in question were essential to practice of the standard), and that where the standard constituted a barrier to entry, such IPR ownership

> could allow companies to behave in anti-competitive ways, for example by "holding-up" users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees, thereby preventing effective access to the standard.

[7] VITA letter, DOJ/FTC report

> (*Id.*).

But the Guidelines then go on to explain

> However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.
>
> (*Id.*)

This discussion clarifies the Commission's analysis: The owners of patents for technology incorporated into a standard can acquire market power over potential licensees of that patent, simply by virtue of its adoption into the standard. However, determining whether conduct by owners of patents for technologies in the standard can be held to harm competition under Article 102 requires an analysis of the particular facts of the downstream market. Put another way, while the adoption of its patent into a standard can give a patent holder market power over a potential licensee such that the patent holder can charge excessive royalties for use of that patent in a standards-compliant product, the question whether charging excessive royalties is anticompetitive under (infringes) Article 102 requires an analysis of the downstream markets:

> High royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled.
>
> (*Id.*, n. 106)

Illustrative Examples.

The final Guidelines contain several hypothetical situations to illustrate the principles set forth by the commission. Most applicable to SSOs is "Example 3: Standardization agreement without IPR disclosure." (Para. 327) The hypothetical describes an SSO which does not require disclosure of IPR, on the grounds that "all technologies potentially relevant for the future standard are covered by many IPR." The Guidelines analysis concludes that

> The amount of IPR reading on a technology will often have a direct impact on the cost of access to the standard. However, in this particular context, all available technologies seem to be covered by IPR, and even many IPR. Therefore, any IPR disclosure would not have the positive effect of enabling the members to factor in the amount of IPR when choosing technology . . . and a disclosure obligation might in this context lead to additional costs for participants."
>
> (Para. 327)

While this example addresses an important facet of the Guidelines – the policy around disclosure – it lacks the detail required to explicate a truly illuminating "close question." Those with experience in standard setting can imagine a situation in which a representative attending an SSO meeting knows that his or her company has pending a patent application for IPR essential to the standard, such that disclosure is essentially "costless." In assessing whether to include that IPR in the standard, an SSO might wish to take into account the likely licensing terms and conditions of the IPR in question, and familiarity with the IPR holder might well be a relevant factor for the SSO. Under those circumstances, one can imagine that the benefits of disclosure would easily outweigh the costs. All of this is to say that it is difficult to conceive of an illustrative example in the absence of detail, because, as the Guidelines themselves acknowledge, inquiries into the competitive effects of standard-setting activities are necessarily fact-intensive.

* * *

Overall, the new Guidelines make significant contributions to the analysis of these issues in several areas.

First, they explicitly take the position that owning IPR essential to a standard does not equate to the possession or exercise of market power constituting dominance under Article 102. Instead, the Guidelines say that such market power determinations will be made on a case by case basis in analysis of the downstream market for implementations of the standard. This is consistent with the position taken by government authorities in other areas of competition law and in other jurisdictions. At the same time, the Commission unequivocally states – as is evident to practitioners in this area – that the adoption of a patent into a standard can create market power in the sense that the patent owner could obtain excessive royalties for the patent in licensing for standards-compliant devices or services.

Second, to meet the requirements of the safe harbor, the Guidelines explicitly require not only that owners of proprietary technologies incorporated into a standard license on FRAND terms, but also that the FRAND obligations must be passed on to subsequent owners of the IPR. This latter point is a notable advance in procompetitive license terms, especially given the increasing liquidity of the market for patents and the growing role of non-practicing entities in the world of IP. Underlying the FRAND obligations, the Guidelines require a "reasonable endeavor" to find relevant IPR, a standard that seemingly would not require an exhaustive and expensive file search that could negatively impact the standards process by excluding the most innovative companies, which might have the largest patent portfolios

Finally, the Guidelines evidence increased acceptance of *ex ante* disclosure by providing that unilateral disclosure will not itself infringe Article 101[8], and go further by not condemning (and possibly condoning) *ex ante* negotiation of maximum licensing terms under Article 101, in the absence of evidence of an attempt to fix the price of downstream products or substitute IPR.

It will be interesting to see how the Commission applies the new Guidelines in its enforcement activities, the extent to which the new Guidelines affect the development of law in the European Union, and the extent to which the new Guidelines influence competition analysis in the United States and other jurisdictions.

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[8] This view is consistent with that of the US authorities U.S. Dep't of Justice and Fed. Trade Comm'n, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) at 53-55 (available at http://www.justice.gov/atr/public/hearings/ip/222655.pdf).

EDITOR'S NOTES: RELEVANT MARKETS OF MATTRESSES, COMPUTER GAMES AND PINEAPPLES

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A number of interesting cases and developments have occurred since the last newsletter. There are three in particular that I wish to comment on, all including interesting relevant market and market power analyses as part of the dispute.

In *Jacobs v. Tempur-Pedic International, Inc.*,[9] the manufacturer of Visco-elastic Tempur-Pedic foam mattresses was sued for an alleged violation of Section 1 of the Sherman Act. The claim was that Tempur-Pedic, the manufacturer, was enforcing vertical retail price maintenance agreements with its distributors. The manufacturer successfully moved to dismiss for failure to state a claim for relief.

At initial glance, this case does not seem that surprising. If the relevant market is that of mattresses, there was no showing that the manufacturer had any particular market power at all. Accordingly, nothing indicated any corresponding harm to competition.

The unusual thing about the case is the way the court handled the argument that these foam mattresses were in fact a relevant submarket for purposes of this case. The court said that even if this was recognized as a relevant submarket, that dismissal of the claim would still be appropriate. This was despite the fact that the allegations in the complaint indicated that the manufacturer had 80% to 90% of the sales in this foam mattress category. The court said that market share could be used as an indicator of market power, but went on to say that there was no direct evidence of harmful use of market power in this case. The court said that very specific allegations concerning harm were needed to withstand the motion to dismiss, even with this very high market share.

In the *In re Webkinz Antitrust Litigation*,[10] a different approach to relevant market power was taken with regard to another motion to dismiss an antitrust claim. The Webkinz toy manufacturer was accused of conditioning the sale of its line of Webkinz toys, plush stuffed animals sold with a computer code giving access to an interactive game website, on the purchase of other products made by the same manufacturer.

In refusing to dismiss the case, the court stated that there is no need for an extensive market analysis in a case involving an allegation of tying. The court said that plaintiffs must simply define a relevant market that is plausible, which they had done, and that no more market analysis was needed. Moreover, a purchaser alleging that it was buying less from competitors because of the additional products they now had to buy to get Webkinz was a sufficient allegation of injury.

Finally, in the *In re Pineapple Antitrust Litigation*,[11] there was a dispute involving the market for fresh whole extra-sweet pineapples. The defendant was accused of monopolizing that market and was successful in its motion for summary judgment.

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[9] 626 F.3d 1327(11th Cir. 2010)

[10] No. C08-1987 RS, 2010 WL 4168845 (N.D. Cal. Oct. 20, 2010)

[11] No. 09-4561-cv, 2010 WL 4342217 (2d Cir. Nov. 3, 2010)

The court concluded that the two different types of pineapples involved belong in separate markets. Although not an obvious result, it was apparently conceded. The interesting part of the case involves the treatment of the allegations of sham patent litigation. Even though some letters were sent that allegedly falsely threatened litigation for patent infringement, the court did not think that mattered in this case.

Essentially, the court determined that there was no evidence that the threatened sham litigation had any effect on delaying the entry into the marketplace of a competitor. The court concluded that the competitor's delays were solely due to its own production problems. In fact, the court concluded that everybody knew the patents did not cover this separate type of pineapple so there could not have been any harm to competition. That seems rather unusual, having the sham litigation argument rejected in part because it was determined to be such an obvious sham.

Our next newsletter will be published for the AIPLA spring meeting in May. If anyone is interested in contributing, please contact me at the address listed above.