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Apple, Intel Try To Storm A DOJ-Backed Patent 'Fortress'

By **Bryan Koenig**

Law360 (April 30, 2020, 5:40 PM EDT) -- A California federal judge is mulling whether to dismiss Apple and Intel's lawsuit accusing investment management firm Fortress Investment of funding an anti-competitive patent aggregation scheme, a case that's also pitted the technology giants against the U.S. Department of Justice.

Briefing has finished and a hearing is scheduled for June on Fortress Investment Group LLC's bid to dismiss the antitrust lawsuit, and one of the biggest proponents of tossing the case is the Justice Department's Antitrust Division.

Even before the DOJ's intervention, the case was already a high-profile test of monopolization claims against what Apple and Intel say is a new strategy from Fortress and its so-called "patent trolls." By coupling litigation funding from Fortress, the IP owners are allegedly engaging in a broad patent aggregation scheme to force major technology companies to pay exorbitant licensing fees despite holding only a portfolio of "weak" patents.

Now, thanks to the DOJ's involvement, U.S. District Judge Edward M. Chen is not only evaluating the legality of this alleged strategy but also weighing much broader debates about the proper role of standard essential patents and the importance of market definition to antitrust cases.

Apple and Intel started the fight by accusing Fortress and patent assertion entities it owns or controls of using "ill-gotten power" to extort excessive royalty fees for weak patents and asserting the patents against a variety of major tech companies.

According to the complaint, Fortress and its PAEs, sometimes referred to derisively as "trolls," have acquired a massive patent portfolio to take a scattershot approach of repeat infringement suits in the hopes that some will stick, either through a court win or settlement. The companies say the power of the portfolio is being used to "extract and extort exorbitant revenues unfairly and anti-competitively from Intel, Apple and other suppliers of electronic devices or components or software."

The complaint counts more than 130 patent infringement lawsuits filed by Uniloc, one of Fortress's alleged PAEs since its formation in February 2017. The suits target companies including BlackBerry Corp., Cisco Systems Inc., LG Electronics USA Inc., Samsung Electronics America Inc., Netflix Inc. and others.

The suit says PAEs have had to evolve their strategy to overcome obstacles imposed by court rulings and legislation that made it harder for them to seek inflated damages or assert invalid patents. Their new strategy, Intel and Apple said, is teaming up with investment firms with deep pockets like Fortress to fuel aggressive litigation.

Fortress's alleged monopoly conduct has been employed before by other PAEs, according to Florian Mueller, an app developer and former intellectual property activist who blogs about competition and intellectual property.

"But it does appear that their scale is unmatched at this stage," Mueller said.

Fortress, which is owned by Japan-based SoftBank, hit back against the suit in early February, arguing in a dismissal bid that it did nothing more than make loans and equity investments that allowed patent owners to enforce rights they acquired "when the original inventors and owners might not have been able to withstand plaintiffs' high-priced defenses and refusals to pay for the technology they are using."

Without Fortress' backing, such entities "would often lack sufficient resources to enforce their constitutionally enshrined patent rights" against companies such as the technology giants that "refuse to pay a fair price" to license the technology, according to the brief. Enforcing those rights is not anti-competitive but is instead "a lawful and publicly beneficial business practice," Fortress said.

The lawsuit drew the attention of the DOJ Antitrust Division, whose current leadership has argued that antitrust law generally should not stand in the way of patent owners exercising their rights.

Those arguments have manifested in particular for disputes of standard essential patents, which are patents necessary to make competing products interoperable. Companies that submit their patents to industry standards must commit to licensing their technology on fair, reasonable and nondiscriminatory, or FRAND, terms. The DOJ has argued that patent holders who break those commitments should not be held liable under antitrust law — a position that contradicts Apple and Intel's lawsuit.

"DOJ has consistently taken the position that breach of a FRAND commitment is a contractual matter," not an antitrust violation, said Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group and a Federal Trade Commission alum.

The DOJ Antitrust Division has been making those and other arguments in a variety of competition cases in which it's not involved as the agency under Assistant Attorney General Makan Delrahim — a former patent lawyer and lobbyist for chipmaker and patent heavyweight Qualcomm — steps up its amicus participation, which has included filings at the district court and appellate level.

"Obviously the DOJ for the last couple of years has been increasingly intervening in private lawsuits," said Jorge L. Contreras, a law professor at the University of Utah's S.J. Quinney College of Law.

When the DOJ does weigh in on patent cases, according to Contreras, it's always on the side of the patent owner, more specifically the company asserting its patent rights. "That I think is unique," he said.

Among the DOJ's arguments on Fortress's behalf: "intermediaries, including those that acquire and license patents, can play a valuable role" by connecting independent inventors with manufacturers who want to use their technology.

"This may be the first time that DOJ weighed in on the potential procompetitive benefits of patent assertion entity activity and spurring innovation," Kimmel said.

"But we know the DOJ has been very active in weighing in, in federal courts, antitrust and other matters that affect intellectual property rights," she continued. "They seem to be looking for opportunities to really ... influence what the courts are doing in this area. This seems very much in line with what they've been doing on those broader issues."

Despite its overarching stance on SEPs, the DOJ's statement in the current case focused on market definition and relegated its licensing commitment arguments to only a few paragraphs. The thrust of the brief argued that the technology companies had failed to properly define a market that's being hurt by the alleged scheme.

Apple and Intel base their market definition on an electronics patent market. But according to the DOJ, that market is entirely too broad because it appears to encompass "an indefinite number of patents utilized by or licensed to an unknown number of end users for an untold variety of purposes."

Apple and Intel hit back, asserting that the DOJ contradicted itself in arguing that claims under Section 7 of the Clayton Act — which targets anti-competitive mergers and acquisitions — require a market to be defined. They pointed to a filing the agency made in a case seeking to block Oracle's purchase of PeopleSoft in 2004.

The DOJ doubled down on its opposition to their claims in a reply brief filed April 23, saying that a market does need to be defined and that the controlling precedent is a Ninth Circuit decision from 2015 in St. Alphonsus Medical Center-Nampa Inc. et al. v. St. Luke's Health System Ltd.

Apple and Intel — backed by outside groups warning of anti-competitive impacts from PAEs and SEP abuse — additionally argued that the DOJ's statement was internally inconsistent in contending that the conduct at issue could only violate Section 2 of the Sherman Act, which bars monopolization. The companies allege that Fortress violated Section 7 of the Clayton Act and Section 1 of the Sherman Act, which bars restraints on trade, as well as California state law.

In prior cases, the DOJ has said market share and definition aren't always needed to establish antitrust liability, according to Apple and Intel. They quoted the DOJ as saying that Section 7 deals with a transaction's likely effects in the future rather than its current market realities.

The companies further said their suit targets Fortress' aggregation of the patents, not litigation surrounding them, and they argued that the DOJ recognized this distinction when it said in its statement that Noerr-Pennington immunity could apply to litigation of the patents but not their aggregation.

Noerr-Pennington provides immunity from the antitrust laws for attempts to influence the government in certain circumstances and can include efforts to enforce patent rights.

But the DOJ has argued since filing its initial statement that the companies had failed to show any reduction in competition resulting from Fortress' aggregation of the patents. It argued further that if the court disagreed and found that competition had in fact been reduced, Noerr-Pennington protections should not apply.

Market definition, Kimmel noted, is key to most antitrust cases but tracing the scope of that market can be challenging for plaintiffs who need to identify potential "substitutes" to show what products can be swapped within that market.

"So I think that's why DOJ focused on that issue of market definition," said Kimmel, because it's essential to a case based on a large patent portfolio.

Here, Kimmel said Apple and Intel clearly grappled with a market defined simply to cover electronics patents, much broader than the normal, very tight definitions of technology markets.

"These plaintiffs completely avoid that kind of detailed analysis," she said.

Market definition also proved crucial in what is perhaps the current case's closest parallel: Capital One's antitrust claims against Intellectual Ventures accusing the patent licensing giant of monopolizing the banking technology market, filed in response to a patent infringement lawsuit that fizzled out.

The case was tossed by two different judges in two different district courts. The first judge found that Capital One didn't propose a relevant market, while the second concluded that the claims were barred by collateral estoppel, which blocks parties from relitigating issues already decided in another proceeding.

In tossing Capital One's allegations based on collateral estoppel, U.S. District Judge Paul W. Grimm said that if not for that bar and Noerr-Pennington, he would have permitted the case to move forward, saying it's "hard to deny that there is something concerning from an antitrust perspective about the way in which [Intellectual Ventures] engages in its licensing business."

On appeal, the Federal Circuit upheld the toss on the collateral estoppel basis, meaning the court never addressed the market definition that the first judge found too broad for covering "common" U.S. banking industry technology.

Apple and Intel's case may represent another shot at addressing broad market definitions based on a PAE's portfolio, this time covering "patents for high-tech consumer and enterprise electronic devices and components or software therein and processes used to manufacture them."

The case is Intel Corp. v. Fortress Investment Group et al., case number 3:19-cv-07651, in the U.S. District Court for the Northern District of California.

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