Business and Patent Litigation Advisory

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The FTC-Intel Settlement

On August 4, 2010, the Federal Trade Commission (FTC) announced a settlement with Intel Corp. resolving its complaint filed last December under Section 5 of the Federal Trade Commission Act. The settlement, which was subject to public comment until September 7, prohibits Intel from using certain rewards and threats to induce computer makers to buy only Intel chips or to refuse to buy chips from others. It also prohibits Intel from altering its chip design with the intent of hampering competitors. In addition, Intel must alter license agreements that it has with other manufacturers.

The Intel case and its settlement are noteworthy on several fronts.

For one thing, the filing and rapid resolution of the action reflect the campaign pledge of then-Senator Obama "to reinvigorate antitrust enforcement." After the election, President Obama appointed antitrust agency heads—Jon Leibowitz as Chairman of the FTC and Christine Varney as Assistant Attorney General for the Antitrust Division—known to favor aggressive enforcement. Since then, the federal agencies have begun reshaping the antitrust landscape. For example, in announcing the Intel settlement, Chairman Leibowitz stated: "This case demonstrates that the FTC is willing to charge anticompetitive conduct by even the most powerful companies in the fastest-moving industries." Indeed, according to reports, the FTC's complaint against Intel was its first significant antitrust action under Section 5 in nearly thirty years.

Section 5 is broader than the Sherman Act and prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." Accordingly, the new willingness of the FTC to flex its muscles under Section 5 means that antitrust compliance programs based solely on the Sherman Act are no longer sufficient. As the Intel case shows, the FTC's expansive view of Section 5 requires companies with significant market shares to review their loyalty discount programs, offers of bundled products, and product designs.

Finally, the Intel case casts a spotlight on the increasingly important intersection of antitrust and intellectual property laws. The FTC's complaint alleged that Intel's license agreements unduly restricted competitors and identified "intellectual property" as a barrier to entry into the market for computer chips. Moreover, the settlement requires Intel to modify its intellectual property agreements with three competitors so that they can more easily consider mergers and joint ventures with other companies without the threat of litigation by Intel. The Intel case is thus a warning to all patent holders that the FTC will take action against the use of intellectual property rights to limit competition, even if the conduct does not violate the Sherman Act.

CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

Gaspare J. Bono
202.496.7211

Stephen M. Chippendale
202.496.7789

Song K. Jung
202.496.7413

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