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US: Recent Developments in Intellectual Property Antitrust Law

Susan E Foster, Shylah R Alfonso and Barry J Reingold
Perkins Coie LLP

United States antitrust laws seek to encourage free and open competition by preventing exclusionary conduct that threatens the competitive process. Intellectual property rights (IPR) laws, by contrast, are designed to encourage innovation by granting IPR holders a limited statutory right to exclude competition. Compared to many jurisdictions, US law balances this tension more frequently in favour of the IPR holder. Here, IPR holders are allowed to generally enforce their statutory right to exclude and to unilaterally decide with whom (if anyone) they will license their IPR[1] and on what terms.[2] Still, IPR does not confer a privilege or immunity to violate the antitrust laws.[3] IPR holders risk violating those laws when they unlawfully acquire IPR (eg, through fraud on the rights-granting agency, typically the United States Patent and Trademark Office), or with respect to lawfully acquired IPR by:

- enforcing those rights in bad faith (for example, against parties as to whom there is no colourable infringement claim);
- leveraging IPR to obtain competitive benefits not attributable to those rights; or
- acting collectively, rather than unilaterally, when enforcing those rights.

The interface between antitrust and IPR law has been a subject of continuing interest to the US antitrust agencies (the Department of Justice (DoJ) Antitrust Division and the Federal Trade Commission (FTC)). Through enforcement efforts, advocacy filings and legislative outreach,[4] the agencies have sought to 'determine the correct balance between the rightful exercise of patent rights and a patent holder's incentive and ability to harm competition through the anti-competitive use of those rights'.[5]

This article will provide a general background regarding the laws governing the IPR/antitrust interface (with particular emphasis on patents),[6] then focus on three areas of current interest: patent acquisitions, standard setting and reverse payment settlements.

The antitrust/IPR interface

Antitrust claims are typically asserted by an alleged infringer (typically a competitor or potential competitor) as an affirmative defence ('patent misuse'), and/or as a claim or counterclaim under the Sherman Antitrust Act 15 USC section 1 et seq. Occasionally, an IPR-related antitrust claim is brought by a direct or indirect consumer of the patent holder's products or the antitrust agencies.

A patent misuse defence, if successful, prevents the patent holder from enforcing the patent during the period of misuse; it does not provide a basis for affirmative relief through an award of damages. And the Federal Circuit's recent decision in *Princo Corp v ITC* significantly limited the scope of antitrust-related misuse claims.[7] In *Princo*, the accused importer claimed the patent holder's efforts to suppress technology that was competitive with the patents in suit constituted misuse of those patents. Rejecting the claim, the Federal Circuit limited the defence to actions that a patent holder may have taken to enlarge the physical or temporal scope of the patent in suit (eg, tying).[8] Because the alleged anti-competitive conduct at issue related to technologies other than the patents in suit, it could not form the basis of a patent misuse defence.[9]

The Federal Circuit's decision in *Princo* has limited alleged infringers' ability to assert antitrust-related patent misuse claims, and made antitrust claims under the antitrust laws potentially more attractive. Such challenges address the defendant's anti-competitive conduct within an economically defined relevant market, and are not necessarily limited to the scope of any patent asserted by the defendant. The antitrust laws also provide for injunctive relief and the award of treble damages and attorneys' fees.[10] The following are the most common patent antitrust claims:

- the patent holder seeks to enforce patents that were obtained by fraud on the Patent and Trademark Office (a *Walker Process* claim); [11]
- the patents were unlawfully obtained in violation of section 7 of the Clayton Act, which prohibits acquisitions that substantially lessen competition, or section 2 of the Sherman Act, which prohibits monopolisation;[12]
- the patent holder's infringement claims are objectively baseless 'in the sense that no reasonable litigant could realistically expect success on the merits' and the enforcement efforts conceal an attempt to interfere directly with a competitor's business relationships through the use of the governmental process, as opposed to the outcome of that process, as an anti-competitive weapon (the sham exception to the *Noerr Pennington* Doctrine);[13]
- the patent holder has engaged in licensing or other conduct (eg, settlement activity) that exceeds the scope of the patent;[14] or
- there has been fraud or other unfair conduct attendant to standard setting activities.[15]

Traditionally, *Walker Process* and sham litigation have been the most frequently asserted claims. But claims relating to standard setting, patent acquisitions and reverse settlement patent cases have recently received increased attention by the antitrust agencies and private plaintiffs.

Standard setting

Although industry-wide standards typically facilitate the advancement of technology by lowering prices and switching costs, they may also facilitate the exercise of market power by standard setting organisations (SSOs) and their members.[16] For interoperability standards in networked product and service markets (for example, mobile wireless telecommunications systems), IPR laws pose additional challenges because such standards typically require use of one or more patents held by SSO members. SSO reliance on these patents may lead to 'patent holdup' or 'patent ambush' – the ability of a patent holder to exercise market power by imposing royalties higher than the competitive rate – or excluding competitors.[17]

SSOs typically address this concern by requiring member patent holders to commit to:

- disclosing patents and patent applications implicated by any proposed standard (declared essential patents); and

- offering firms who wish to practise those patents licences on 'reasonable and non-discriminatory' (RAND) or 'fair, reasonable and non-square mandatory' (F/RAND) terms. Alleged violations of these commitments may constitute patent misuse. And where the patent holder enjoys market power in a properly defined relevant market, they may also constitute monopolisation in violation of the Sherman Act.

Rambus and its progeny

Many of the leading SSO cases (some of which are still being actively litigated) involve claims by or against Rambus Inc, a non-operating entity engaged in technology research and development. In the late 1990s, Rambus participated in the proceedings of an SSO (the Joint Electron Devices Engineering Council, or 'JEDEC') convened to establish standards governing dynamic random access memory technology. Rambus's representative to the SSO committee did not disclose the existence of Rambus patents and applications likely to be implicated by the proposed standards. Rambus formally withdrew from the SSO court before the standards were adopted, then asserted patent rights against the numerous firms whose products had been designed to comply with the standards. Rambus coerced higher-than-market-level royalties from many of the firms and sued the non-settling firms for infringement.

The Federal Trade Commission brought suit against Rambus, finding after an administrative trial that Rambus's deceptive conduct constituted monopolisation in violation of section 5 of the FTC Act and section 2 of the Sherman Act.[18] The agency held that Rambus's deception had resulted in one of two mutually exclusive scenarios, each of which alone was unlawful. First, the agency found that alternative technologies had been available that JEDEC might have adopted had Rambus disclosed its patent rights. (Although, as discussed below, this was a factually plausible scenario, there was no record evidence to prove that, had Rambus disclosed its patent rights, JEDEC would have adopted any of those alternatives.) The agency also found that had JEDEC known of Rambus's rights, it might have required Rambus to make F/RAND commitments as a condition of JEDEC's adoption of a standard implicating those rights.

The United States Court of Appeals for the District of Columbia Circuit reversed.[19] As the holder of lawfully obtained patents, the court observed, Rambus could have charged any royalty rate it wanted. Deceptive conduct to increase those rates did not of itself violate the federal antitrust laws. And although deceiving JEDEC to exclude rival technologies might have violated those laws, there was no evidence in the record that JEDEC would have employed another technology had Rambus disclosed its patent rights. Absent such evidence, the agency had not proved anti-competitive exclusion.

Rambus and alleged infringers have continued to litigate cases in which Rambus's deceptive conduct before JEDEC has formed the basis of defendants' patent misuse defence. In a recent decision, however, the United States Court of Appeals for the Federal Circuit held that Rambus's misconduct before JEDEC did not bar it from enforcing its patent rights.[20] This should put an end to that argument.

Recent District Court standard-setting decisions

Lower courts in SSO-related cases have continued to struggle to balance competing antitrust and IP principles. In *Apple Inc v Samsung Electronics Company*,[21] Samsung had sued Apple for patent infringement. Apple asserted as a counterclaim that Samsung had abused its position as a member of the European Telecommunications Standards Institute (ETSI), which, as a participant in the Third Generation Platform Partnership (3GPP), set standards for mobile wireless carrier technology, including the Universal Mobile Telecommunications Standard (UMTS). During its participation in the SSO proceedings, Apple claimed, Samsung had disclosed some but not all of its patents essential to UMTS and undertook F/RAND obligations without intending to honour them. This conduct, Apple argued, induced the organisation to adopt a standard based on Samsung technology. Samsung moved to dismiss the counterclaims, arguing first that Apple had failed to define the relevant market. The court disagreed. It found that Apple had sufficiently pleaded a relevant market consisting of the technologies that, before the standard was adopted, 'were competing to perform each of the various functions covered by each of Samsung's purported essential patents for UMTS'.[22]

Samsung also argued that Apple had failed to allege unlawful anti-competitive conduct. Again the court disagreed. It found 'an SSO can be used to obtain monopoly power and create anti-competitive effects in the relevant markets when '(1) a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with a [standard setting organisation's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anti-competitive conduct.'[23] Because it had identified alternative technologies known to the SSO at the time it adopted UMTS, Apple had stated a claim.

In *Apple, Inc v Motorola Mobility, Inc*,[24] Apple, again a defendant in an infringement action, brought counterclaims arising from Motorola's involvement in 3GPP standard-setting. Apple alleged the patent holder had failed to disclose essential patents and made false FRAND licensing commitments (in this regard, Motorola had refused to offer Apple licences on terms comparable to those offered other firms designing products to the standards). The court held that Apple had stated a claim under section 2 of the Sherman Act noting that 'by making false commitments that led to the establishment of worldwide standards incorporating its own patents and eliminating competing alternative technologies, Motorola has become a gatekeeper, accruing the power to harm or eliminate competition' in relevant markets that include 'various technologies competing to perform the functions covered by Motorola's declared-essential patents'.[25] The court also rejected Motorola's contention that Apple's allegations failed to satisfy the heightened pleading requirement for fraud imposed by Federal Rule of Civil Procedure 9(b). By 'identifying the specific patents that Motorola allegedly failed to disclose, the specific patents for which Motorola made fair, reasonable and non-discriminatory commitments, to whom the commitments were made and the dates on which they were made,'[26] Apple had stated a claim.

Plaintiffs in SSO cases have not always survived motions to dismiss, however. In *Trueposition, Inc v LM Ericsson Telephone Company*,[27] the plaintiff, a designer and marketer of geopositioning technology for mobile telephones, alleged that Ericsson, Qualcomm and Alcatel-Lucent USA had conspired to exclude its technology by manipulating standards adopted by 3GPP. And 3GPP itself, the plaintiff alleged, had violated the antitrust laws by failing to ensure the corporate defendants complied with the organisation's rules.

The complaint focused on the corporate defendants' roles and activities during meetings of the 3GPP working group, the chairman of which was an Ericsson representative. The plaintiff claimed the working group had always followed a practice in which technology that had been included in an earlier version of a standard under consideration was automatically forwarded for review in connection with subsequent releases. Here, although plaintiff's technology had been included in an earlier version of the geopositioning standard, it was not included in the subsequent release.

The plaintiff also contended the chairman improperly required the plaintiff to prove that its technology would deliver benefits over other technologies under consideration, delayed evaluation of the plaintiff's technology for three months to provide its competitors a 'head start,' and imposed unfair and discriminatory technical requirements on the plaintiff.[28]

The court dismissed the complaint for failure to state a claim. Central to the court's analysis was that the actions about which the plaintiff complained had been supported by nine SSO member firms other than the three corporate defendants. Also, each defendant had an independent economic reason to oppose adoption of the plaintiff's technology. Ericsson, for example, wished to preserve the profits it was earning from patents that were used by technologies other than the plaintiff's. Alcatel was not yet ready to incorporate the plaintiff's technologies in its geopositioning hardware. Under these circumstances, the court held, the plaintiff was required to identify direct evidence of an agreement by defendants to exclude the plaintiff's technology. Because the plaintiff failed to do so, the court dismissed the complaint.

Patent acquisitions and the use of patents to foreclose competition

Technology markets have recently been characterised by sales of very large patent portfolios. In late 2011 and early 2012, the DoJ investigated three significant portfolio acquisitions relating to wireless devices:

- Google's acquisition of Motorola Mobility Holdings (MMH) patents;
- Apple, Microsoft and Research In Motion's acquisition of certain Nortel Networks patents; and
- Apple's acquisition of certain Novell patents.

All of the acquisitions included standard essential patents (SEPs) that were subject to SSO-imposed F/RAND commitments.

On 13 February 2012 the DoJ issued a closing letter that it has described as representing the agency's current view of the competitive effects of patent acquisitions. At the outset, the DoJ recognised the acquisition of SEPs could enable the acquirer to engage in anti-competitive conduct such as: demanding supracompetitive licensing rates, compelling prospective licensees to grant cross-licences, charging licensees the entire portfolio royalty rate when licensing only a small subset of the acquirer's portfolio, seeking to prevent or exclude products practising the SEPs from the market, or threatening an injunction or exclusion order through litigation as a means to preclude competition. In its analysis of the likelihood of any of the three acquisitions substantially lessening competition, the agency examined factors important to traditional merger analysis, including market share and concentration. The DoJ also considered the likely impact of cross-licensing agreements related to the portfolios. But the key factor that led the agency to conclude the acquisitions were unlikely to substantially lessen competition was the existence of the F/RAND commitments attendant to the SEPs, and Apple's and Microsoft's pledges to publicly honour those commitments by licensing on F/RAND terms and not seek injunctions in SEP-related disputes.

The agency's analysis of Google's acquisition of MMH's patents was more interesting. Google's public F/RAND commitments were not as direct as Apple's and Microsoft's. The DoJ observed, however, that because MMH had been aggressive in engaging its rivals in intellectual property disputes over its patents, their acquisition by Google was unlikely further to roil IP markets. The agency cautioned, however, that it was reserving judgment on whether Google's future use of the patents would be appropriate and warned that it would continue to monitor the use of SEPs in the wireless device industry.

Courts adjudicating challenges to patent acquisitions generally acknowledge that under certain circumstances, acquisitions (or a series of related acquisitions) may violate the antitrust laws.[29] Nevertheless, for a patent acquisition to be anti-competitive, it must do more than simply replace one patent monopolist with another.[30] In *Digital Sun v The Toro Co*,[31] the Northern District Court of California recently reiterated this point in granting a motion to dismiss an attempted monopolisation claim based on an alleged patent monopoly acquisition. The court explained that the plaintiff failed to adequately plead anti-competitive conduct where the defendant did not acquire patents in their entirety but rather received certain exclusive and non-exclusive licences from the plaintiff.[32] For the exclusive licences, the court observed, the licences simply replaced one patent monopolist (plaintiff) with another (defendant), which alone could not amount to a substantial lessening of competition. And the effect of the non-exclusive licences was to create an additional competitor (defendant), thereby increasing competition.

In *Digital Sun v The Toro Co* there was no allegation that the defendant had undertaken a strategy of patent accumulation to create a monopoly. Those allegations were made and recently withstood a motion for summary judgment in *TriQuint Semiconductor, Inc v Avago Technologies Limited*.[33] In *TriQuint*, the plaintiff asserted that the defendant, with 80 to 95 per cent of the markets for certain bulk acoustic wave products, had pursued a patent accumulation strategy and, to foreclose new competition, refused to license the acquired patents on competitive terms. Denying summary judgment, the court recognised that such conduct may create substantial barriers to entry,[34] and result in antitrust injury to the patent holder's competitors and customers in the relevant product markets.[35]

Reverse payment or 'pay for delay' settlements

Reverse payment or 'pay for delay' settlements continue to attract the attention of the antitrust agencies and plaintiff's bar. These cases arise when a patent holder (typically, a brand-name pharmaceutical company) settles patent litigation by paying the defendant (a generic pharmaceutical competitor) to delay or abandon its plan to launch a competing drug. The FTC has estimated that because, on average, the price of generic drugs is 85 per cent less than that of their brand-name counterparts, such settlements cost American consumers $3.5 billion a year. As a result, the FTC has made investigation of reverse payment settlements a priority.

Although the FTC and DoJ view such agreements as presumptively anti-competitive, virtually all of the courts hearing such cases have ruled reverse payments settlements valid to the extent they do not include restrictions beyond the scope of the patent and are not otherwise the result of anti-competitive conduct. In 2011, the Supreme Court, despite the efforts of amici comprising state attorneys general, the American Antitrust Institute and various law professors and economists, declined to clarify the law surrounding reverse payments by denying certiorari in *Louisiana Wholesale Drug Co v Bayer AG*.[36] The case involved an agreement by Bayer to pay generic drug maker Barr Labouratories $398 million for an agreement not to market its generic Cipro until Bayer's patent was near expiration. On appeal, the Second Circuit held that such agreements were not per se illegal and were not subject to challenge so long as they did not exceed the scope of the patent.[37] Subsequent cases have been consistent. In the most recent appellate decision, *Federal Trade Commission v Watson Pharmaceuticals, Inc*,[38] the Eleventh Circuit rejected the FTC's argument that 'an exclusionary payment is unlawful if, viewing the situation objectively as of the time of settlement, it is more likely than not that the patent would not have blocked generic entry earlier than the agreed-upon entry date'.[39] To the contrary, the *Watson* court held, 'absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anti-competitive effects fall within the scope of the exclusionary potential of the patent' as of the date of settlement.[40] State courts have similarly declined to condemn such settlements.[41] Nevertheless, the antitrust agencies have continued to attack 'pay for delay' settlements by continuing to challenge such agreements in court[42] and participating as amici in consumer class actions.[43] Additionally, legislative efforts to curb such agreements continue.[44]

Private plaintiffs in class actions have tried to navigate around the adverse judicial precedent by alleging fraud in the acquisition of patents or sham litigation, but have met with limited success.[45]

Further judicial authority will be forthcoming during the next year with the California Supreme Court's decision in *Cipro* and the Third Circuit's decision in *K-Dur*.

Notes

1 *In re Indep Serv Orgs Antitrust Litig*, 203 F.3d 1322 (Fed. Cir. 2000) (upholding patent holders' refusal to deal and refusing to consider subjective motivation). But see *Image Tech Servs v Eastman Kodak Co*, 125 F.3d 1195 (9th Cir. 1997) (articulating a rebuttable presumption in refusal to deal cases).

2 *Gen Talking Pictures Corp v W Elec Co*, 304 US 175 (1938) (upholding field of use restrictions), *aff'd on reh'g*, 305 US 124 (1938); *Brulotte v Thys Co*, 379 US 29, 33 (1964) ('A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly').

3 *Integraph Corp. v Intel Corp*, 195 F.3d 1346, 1362 (Fed. Cir. 1999).

4 See, eg, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (March 2011, available at www.ftc.gov/opa/2011/03/patentreport.shtm.

5 www.justice.gov/atr/public/press_releases/2012/280190.htm.

6 The agencies have indicated that they will apply the same antitrust principals to patents, copyrights and trade secrets. DoJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1 (1995). However, the courts have been less uniform in their treatment of different forms of intellectual property. See, eg, *Data Gen Corp v Grumman Sys. Support Corp.*, 36 F.3d 1147, 1184-87 (1st Cir. 1994) (adopting different standards for copyright and patent claims).

7 *Princo Corp v Int'l Trade Comm'n*, 616 F.3d 1318, 1334 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 2480 (2011). The court further held that a party asserting misuse must establish an anti-competitive effect.

8 35 U.S.C. § 271(d) (prohibiting a patent misuse claim based on tying unless 'the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned'). In 2006, the Supreme Court abandoned the presumption that intellectual property confers market or monopoly power. *Ill. Tool Works Inc v Independent Ink, Inc*, 547 US 28 (2006).

9 *Princo*, 616 F.3d at 1331, 1334.

10 Depending on the jurisdiction, some claims may be lost if not asserted in the original patent case. *Compare Critical-Vac Filtration Corp v Minuteman Int'l, Inc*, 233 F.3d 697, 703-04 (2nd Cir. 2000) (predatory patent filing claim compulsory) *with Hydranautics v Filmtec Corp.*, 70 F.3d 533, 536 (9th Cir. 1995) (predatory patent claim not compulsory).

11 *Walker Process Equip v Food Mach & Chem Corp*, 382 US 172 (1965). See also *Ritz Camera & Image, LLC v SanDisk Corp.*, 772 F. Supp. 2d 1100 (N.D. Cal.), *cert. granted*, 2012 WL 833598 (Fed Cir. 2012) (cert. granted to assess whether direct purchasers of patented products may bring *Walker Process* claim with no threat of an infringement suit).

12 *Atari Games Corp v Nintendo of N Am Inc*, 897 F.2d 1572 (Fed Cir. 1990); *SCM Corp v Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981); *Kobe, Inc v Dempsey Pump Co*, 198 F.2d 416 (10th Cir. 1952). See also DoJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1 (1995). The acquisition of IPR (including the grant of an exclusive licence) may trigger the obligation to file a pre-merger notification and report form with the FTC and wait the statutory waiting period prior to consummation of the transaction. 15 USC § 18a.

13 *Prof'l Real Estate Investors v Columbia Pictures Industries, Inc (PRE)*, 508 US 49 (1993). The *Noerr-Pennington* doctrine immunises legitimate efforts to petition the government and in this context relates to efforts to enforce a patent holder's rights through the judiciary. *Noerr* and the sham exception set forth in *PRE* have also been applied to demand letters. *Globetrotter Software, Inc v Elan Computer Group, Inc,* 362 F.3d 1367 (Fed. Cir. 2004). Other market communications may not be so protected. *Id.* See also *Experience Hendrix, LLC v HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122, 1146 (W.D. Wash. 2011)*; Soilworks, LLC v Midwest Indus. Supply, Inc*, 575 F. Supp. 2d 1118, 1126 (D. Ariz. 2008).

14 *United States v Krasnov*, 143 F. Supp. 184 (E.D. Pa 1956), *aff'd per curiam*, 355 US 5 (1957) (horizontal refusal to deal per se illegal where dominant market participants settled patent infringement lawsuit by executing a cross licence that prevented each of them from granting a licence to a third party absent the consent of the other); *United States v Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (affirming tying allegation and rejecting allegation that restrictions were justified by copyrights).

15 *Broadcom Corp v Qualcomm Inc*, 501 F.3d 297, 314 (3rd Cir. 2007).

16 See generally ABA Section of Antitrust Law, *Handbook on the Antitrust Aspects of Standard Setting* (2d ed. 2011) (ABA Handbook).

17 See *In re Dell Computer Corp*, 121 FTC 616 (1996); *ABA Handbook*, *supra*, at 95.

18 www.ftc.gov/opa/2006/08/rambus.shtm.

19 *Rambus Inc v FTC*, 522 F.3d 456 (D.C. Cir. 2008).

20 *Hynix Semiconductor Inc, v Rambus Inc*, 645 F3d 1336 (Fed Cir. 2011).

21 2012 WL 1672493 (N.D. Cal. May 14, 2012).

22 Id. at *5.

23 Id. (quoting *Broadcom Corp. v Qualcomm Inc*, 501 F.3d 297, 314 (3rd Cir. 2007)).

24 2011 WL 7324582 (W.D. Wis. June 7, 2011).

25 Id. at *13.

26 Id. at *14.

27 2012 WL 33075 (E.D. Pa. Jan. 6, 2012).

28 Id. at **6-7.

29 *Atari Games Corp v Nintendo of Am.,* 897 F.2d 1572, 1576-77 (Fed. Cir. 1990); *Image Tech Servs, Inc v Eastman Kodak Co*, 125 F.3d 1195, 1216 (9th Cir. 1997); *Dairy Foods Inc v Dairy Maid Prods. Co-op.*, 297 F.2d 805, 807-08 (7th Cir. 1961); *Kobe, Inc v Dempsey Pump Co*, 198 F.2d 416, 423-24 (10th Cir. 1952); *IGT v Alliance Gaming Corp*, 2008 WL 7071468, at **13-14 (D. Nev. Oct. 21, 2008).

30 See *Columbia River People's Util. Dist. v Portland Gen Elec Co*, 217 F.3d 1187, 1190-91 (9th Cir. 2000); *Brunswick Corp. v Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984).

31 2011 WL 1044502, at *5 (N.D. Cal. Mar. 22, 2011)

32 Id. at *3.

33 Id. at *7.

34 Id. at *10.

35 *TriQuint Semiconductor, Inc v Avago Technologies Ltd.*, 2012 WL 1432529 at **3-7 (D. Ariz.) (vacated by agreement of parties). Perkins Coie LLP was counsel to TriQuint.
36 *La. Wholesale Drug Co v Bayer AG*, 131 S. Ct. 1606 (2011).
37 Id. at 604 F.3d 998.
38 *FTC v Watson Pharm., Inc*, ___ F.2d ___, 2012 WL 1427789 (11th Cir. 2012).
39 Id. at *11.
40 Id.; See also id. at *12–13.
41 *In re Cipro Cases I & II*, 269 P.3d 653 (Cal. 2012).
42 The FTC presently has two such actions pending: *Federal Trade Commission v Cephalon*, Civil Action No. 08-cv-2141-RBS and *FTC v Watson Pharm.*
43 See, eg, In Re: K-Dur Antitrust Litig., Nos. 10-2077, 10-2078, 10-2079 (3rd Cir. 2010) at www.ftc.gov/opa/2011/05/kdur20 and www.justice.gov/atr/cases/kdur.html (DoJ Amicus Brief) and www.ftc.gov/opa/2011/05/kdur20.shtm (FTC Amicus Brief) (appeal pending).
44 112th Congress, 1st Session, S. Bill 1882, FAIR Generics Act (November 16, 2011) (defeated May 24, 2012).
45 *Compare In re Plavix Indirect Purchaser Antitrust Litig.*, 2011 WL 335034 (S.D. Ohio Jan. 31, 2011) (granting motion to dismiss for lack of antitrust injury); *SigmaPharm v Mutual Pharm. Co*, 772 F. Supp. 2d 660 (E.D. Pa. 2011) (granting motion to dismiss for lack of standing; but finding that complaint adequately pled a per se agreement), *aff'd*, 2011 6145370 (3d Cir. Dec. 17, 2011), *petition for cert. filed*, 80 U.S.L.W. 3613 (US Apr. 20, 2012) *with In re Metoprolol Succinate End-Payor Antitrust Litigation*, 06-071 (2011 and 2012 settlements).

Perkins Coie LLP

1201 Third Avenue
Suite 4900
Seattle, Washington 98101
United States
Tel: +1 206 359 8000
Fax: +1 206 359 9000

700 Thirteenth Street NW
Washington, DC 20005-3960
United States
Tel: +1 202 654 6200
Fax: +1 202 654 6211

Susan E Foster
sfoster@perkinscoie.com

Shylah R Alfonso
salfonso@perkinscoie.com

Barry J Reingold
breingold@perkinscoie.com

www.perkinscoie.com

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Susan E Foster
Perkins Coie LLP

Susan E Foster is the firm-wide chair of the Perkins Coie antitrust, consumer protection and unfair competition practice and has almost 25 years of experience counselling and litigating antitrust, unfair competition and intellectual property matters with the Federal Trade Commission, the Department of Justice, state attorneys' general foreign competition authorities and private parties. She routinely represents clients in merger clearance, conspiracy, monopolisation, price discrimination, patent infringement, false advertising, trade secret, trade association, joint venture, distribution and licensing matters across a range of industries including aeronautics, computer software, semiconductor, medical equipment, food processing and general retail, manufacturing and entertainment.

Shylah R Alfonso
Perkins Coie LLP

Shylah R Alfonso is a partner in the commercial litigation group. She focuses her practice on antitrust and consumer protection counselling and litigation, intellectual property litigation, antitrust clearance for mergers and acquisitions, class action and complex commercial litigation. She has represented clients on a variety of antitrust matters, such as litigation matters in front of the Federal Trade Commission, as well as bringing and defending antitrust claims in state and federal courts. She also provides counselling and training to companies on the antitrust aspects of joint ventures, pricing, distribution agreements, IP licensing and acquisitions, trade association participation, involvement in standard-setting organisations, and other transactions or trade activities. Shylah works with clients involved in various industries, including telecommunications, semiconductor, computer software, retail and the internet. Representative clients have included TriQuint Semiconductor, Intel, REI and Costco.

Barry J Reingold
Perkins Coie LLP

Barry J Reingold is a partner in Perkins Coie's Washington, DC, office, with more than 25 years of experience as an antitrust and consumer protection litigator and counsellor. His practice includes cases involving antitrust, mergers and acquisitions, false advertising and privacy matters in courts and before the United States Department of Justice and the Federal Trade Commission. He also litigates intellectual property cases in court and before the United States Patent and Trademark Office. A former assistant to the director of the FTC's Bureau of Competition, he joined Perkins Coie in 1981. He is a graduate of Amherst College and the George Washington University Law School.

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