



Can the Antitrust Laws Be an NPE's Secret Weapon?

By Jay L. Levine and David Vance Lucas

One firm believes so. On March 7, Cascades Computer Innovation LLC (CCI) launched another salvo in the high-tech patent infringement wars—but not for infringement. Rather, it sued various smartphone and tablet makers for conspiring not to negotiate with it. In antitrust lingo, defendants entered into a “concerted refusal to deal.” According to the complaint, the defendants refused to negotiate for a patent license with CCI, which holds the rights to 38 patents, at least one of which claims to facilitate the installation and use of applications on Android-based devices.

CCI is a patent holder who is a “non-practicing entity” (“NPE”), i.e., someone that does not manufacture or produce products covered by the patents they own or control. Sometimes pejoratively referred to as “patent trolls,” NPEs seek to monetize patents by licensing them to entities that make the products covered by the patent, enforcing the patent rights through patent infringement actions, or through subsequent sale of the patent.

As alleged in the complaint, CCI is an NPE whose patent portfolio consists of patents owned by Elbrus International Limited, which were developed by an inventor who designed and developed Russian supercomputers for Russia's space program. CCI claims that its '750 patent increases the speed and use of applications on Android devices, and that the defendants collectively manufacture over 95% of the Android devices in the United States.

CCI has also initiated patent infringement actions against the defendants, none of which has yet been resolved. Nevertheless, CCI brought this action in a different forum (this case is in California while the infringement actions are in Illinois), claiming that each of the defendants has essentially violated the antitrust laws by playing hardball and refusing to negotiate with CCI. This, despite the fact that defendants were “offered terms that could effectively result in a zero royalty,” under a formula devised by CCI that credited defendants with license fees CCI collected from other future licensees. According to CCI, this “uniformity of action (indeed, of inaction) strongly demonstrates a group effort to refuse to license, thereby forcing license prices below a competitive level at monopsony prices. Such actions are buyer or licensee boycotts and illegal *per se*.”

The case is interesting both for what it alleges, as well as the implications for other complex, multi-defendant cases, particularly patent cases. For instance, the vehicles through which the conspiracy was achieved are non-traditional. The complaint spends a great deal of time castigating RPX, a spin-off of Intellectual Ventures and the patent aggregation firm to which the defendants subscribe. The complaint asserts that RPX's business model is to put NPEs out of business by (i) allowing prospective licensees to deal with patent holders collectively, rather than individually, (ii) facilitating cross-license arrangements, and (iii) offering patent insurance to protect against actions filed by NPEs. The complaint claims that with, and through, RPX the defendants were able to achieve their unlawful conspiracy. The complaint also asserts that the conspiracy was achieved by use of common counsel by some of the manufacturing defendants. The firm, not named as a defendant, purportedly facilitated the collusion because not only did it coordinate the patent infringement defense efforts, but it also created uniform action among the defendants in refusing to consider or accept (or, for that matter, even discuss) a license under the CCI-patented technology.

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AUTHORS



Jay L. Levine

202.719.8215

jlevine@babbc.com



David Vance Lucas

256.517.5131

dvlucas@babbc.com

The complaint attacks another staple of multi-defendant complex litigation by claiming that the defendants were able to conspire “through the mechanism of a joint defense arrangement . . . to present a unified, concerted effort to oppose licensing and enforcement of the Cascades patents, with the objective of causing Cascades to abandon its efforts, accept a below-market-value offer by RPX or go out of business by virtue of the expense of litigation.”

One hurdle CCI is likely to encounter is the fact that an antitrust plaintiff is required to allege and prove “antitrust injury” —namely, that the challenged conduct impaired competition, the competitive process, and not simply the plaintiff itself. Towards that end, CCI alleges that the conspiracy devalued the patents it held and that such “artificial devaluation has the purpose and effect of reducing plaintiffs’ and any NPE’s incentives to innovate or support innovation,” and otherwise inhibiting the development of technology for new and useful products that would compete in the marketplace, especially with the products manufactured by the defendants. It is unclear, however, whether the inability to monetize patents would truly inhibit innovation and the development of new technologies. Moreover, CCI claims that by “refusing a license at any price and further concentrating market power (through the accumulation of patents), RPX and the other defendants have effectively raised prices and reduced output in products covered under the relevant patents.” Again, it is unclear how the refusal to take a license, even if undertaken collectively, would raise prices for the products covered by the patents in dispute.

Over and above the fact that an NPE is utilizing a new weapon in its war to get prospective licensees to the table, and despite potential deficiencies in the complaint, the case raises several interesting issues that patent holders, aggregators and licensees will need to focus on in the future as infringement wars escalate. These include:

- Does the fact that an aggregator’s subscribers/members hold collective market power in a cognizable antitrust market subject the aggregator’s normal business operations to potential antitrust scrutiny? One may be able to analogize such aggregators to a trade association that includes all of the competitors within a market. Trade associations always tread carefully because they are “walking antitrust conspiracies.”
- Does an aggregator run the risk of being sued for an antitrust violation if it refuses to accept a prospective member? The firm that was not allowed to join could argue that its competitors engaged in a “joint boycott” to deny it access to something that is required for effective competition. Furthermore, removal of a firm from the membership could subject it to antitrust enforcement.
- Similarly, the function of many aggregators is to facilitate the cross-licensing among its members of their respective technology. While this arrangement has clear procompetitive value, access to the patents under the control of the aggregation firm may be considered an “essential facility” for effective competition and its collective denial could subject the aggregator (and its members) to antitrust scrutiny. This would be somewhat analogous to the claims brought by local telephone companies that argued that denial to the telephone communication infrastructure by the various Bell Operating Companies violated the antitrust laws and denied them the ability to compete. If the patents controlled by the aggregator are essential to downstream competition, a similar claim may be considered given the fact that the patents are being cross-licensed to some and not others.

No doubt the complaint has its pleading challenges. Nevertheless, the case demonstrates that there might be an extra arrow in the NPE quiver, and raises important issues regarding how aggregators (and their subscribers) might be attacked in the future.



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