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The Media & Technology Committee is pleased to present the third issue of our E-Bulletin, providing updates and information on media and technology industry-related antitrust developments and policy. Please send any comments, suggestions, and items to be noted in the next issue by e-mail to:

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Apple Found Liable For Conspiring With Major Publishers To Raise E-Book Prices

By Justine K. Donahue, Frommer Lawrence & Haug LLP

On July 10, 2013, Judge Denise Cote found Apple liable for conspiring with book publishers to raise the retail price of e-books. *United States v. Apple Inc.,* 12 Civ. 2826 (DLC), 12 Civ. 3394 (DLC) (S.D.N.Y. July 10, 2013). The ruling came in the closely watched case filed by the Department of Justice and 33 states alleging that Apple's distribution deals in 2010 with five top publishers—Simon & Schuster Inc., Penguin Group USA, Macmillan Publishers USA, Hachette Book Group Inc., and HarperCollins Publishers LLC—raised the prices for digital books, allegedly costing consumers hundreds of millions of dollars. The publishers settled their claims prior to trial by agreeing to pay a total of just over $166 million, leaving Apple as the sole defendant in the nearly two-week bench trial.

In sum, the court found that the publishers conspired "to eliminate retail price competition in order to raise e-book prices," and that Apple "played a central role in facilitating and executing that conspiracy." Significantly, the court determined that the conspiracy would not have succeeded without Apple's "orchestration."

Background

According to the Court's recitation of the facts, two events were occurring in the e-book market in 2009 and 2010 that led to Apple's antitrust liability. First, Apple was set to unveil the iPad in January 2010. With that announcement, Apple hoped to include its competing e-book offering, the iBookstore. Second, Amazon—the dominant retailer of digital books—was selling its e-books to consumers for the low price of $9.99. The publishers were distraught with Amazon's $9.99 price point and actively pursued ways, both independently and collectively, to pressure Amazon into raising its prices. The publishers, however, were not successful in their tactics until Apple entered the scene.

The court found that in December 2009, Apple knew of the publishers' collective attempts to pressure Amazon to abandon its pricing strategy and increase e-book prices. Apple, therefore, saw an opportunity to convince the publishers to sign up with Apple by providing higher e-book prices and simultaneously launch its iBookstore without having to price-compete against Amazon. To achieve these goals, Apple told publishers that it was willing to sell e-books at prices up to $14.99 as long as the publishers moved all of their retailers (Amazon included) from a "wholesale model" to an "agency model." The traditional wholesale model allowed retailers to set prices, hence Amazon's ability to charge $9.99. The agency mode would allow the publishers to set the retail prices but required them to pay a commission to the retailers (i.e., Apple and Amazon). Apple was already familiar with the agency model since it used this model to sell apps through its App Store. Although the publishers were reluctant to adopt the agency model because the wholesale model was more profitable for them, the publishers ultimately adopted the agency model because they saw it as the only long-term solution to deal with Amazon's low prices.

The agency-model contracts Apple entered into with the publishers included provisions regarding pricing tiers, pricing caps, and MFNs. The MFN provisions—insisted upon by Apple—guaranteed that the e-Books in Apple's iBookstore would be sold for the lowest retail price available in the market. This clause had the intended effect of eliminating any risk that Apple would ever have to compete on price when selling e-books.

The Court's Decision and Rationale

The court concluded that there was "overwhelming evidence" that the publishers entered into a horizontal price-fixing conspiracy, and that the conspiracy allowed the publishers to raise many of their e-book prices above the $9.99 price at which they had previously been selling through Amazon. The court also determined that there was "compelling direct and circumstantial evidence" that Apple "participated in and facilitated a horizontal price-fixing conspiracy" in violation of Section 1 of the Sherman Act.

The court applied per se treatment to Apple's conduct, despite the vertical nature of its agreements with the publishers. According to the court, the fact that Apple was in a vertical relationship to the publishers did not remove the conduct from per se treatment because the agreement between Apple and the publishers was "at root, a horizontal price restraint" subject to per se analysis. The court covered its bases, however, explaining that even if the conduct was analyzed under the rule of reason, plaintiffs would still prevail because Apple did not show that the agreements had any pro-competitive effects. Rather, it found, the agreements "destroyed" competition by compelling the publishers to switch Amazon and other retailers to an agency model for the distribution of e-books which removed the retailers' ability to set and compete on prices. The agreements also relieved Apple of the need to compete on price and allowed publishers to raise e-book prices, which they did.

The court stressed that although Apple was found liable for violating the antitrust laws, its opinion should not be read to mean that agency distribution models, or contracts that include MFN provisions, price caps, or pricing tiers are inherently unlawful. Rather here, the evidence taken as a whole painted a "clear portrait" of a conscious commitment by Apple to cross a line and engage in illegal behavior with the publishers to eliminate retail price competition in order to raise prices, the court found.

The court's July 10, 2013 decision addressed only Apple's liability. The scope of injunctive relief and any damages are yet to be determined, though details of a proposed settlement were released on August 2. Apple has said it would appeal the liability ruling, meaning the court will likely put the damages phase of the trial on hold. The settling publishers have agreed to pay a total of $166 million. In addition, a related private class action is currently pending seeking damages on behalf of consumers. *See In re Elec. Books Antitrust Litig.*, 11-md-02293, 859 F. Supp. 2d 671 (S.D.N.Y. 2012) (denying motion to dismiss).

European General Court Hears Cisco's Appeal of the EC's Decision in Microsoft/Skype Deal

On May 28, the European General Court in Luxembourg heard arguments on Cisco's challenge of the European Commission's ruling regarding Microsoft's $8.5 billion acquisition of Skype. The Commission decided in October 2011 not to oppose the acquisition, and the US agencies granted early termination of the deal that June. In a blog post published at the same time as its appeal before the General Court, Marthin De Beer, Cisco's Senior Vice President of the Video and Collaboration Group, noted that Cisco did not oppose the merger, but believed that the Commission should have imposed interoperability conditions on Microsoft as part of the Decision.

Cisco's appeal has two substantive bases, one relating to the "consumer unified communications market" and one relating to the "enterprise unified communications market." In each case, "unified" markets refers to the idea that the communications markets affected by the transaction comprise a number of technologies that customers might use to communicate and that are provided by the parties. The unified

communications market for consumers includes voice calls, video calls and instant messaging. The unified communications market for enterprise includes those technologies and others used in the enterprise communications business such as voice and videoconferencing, advanced telephony, and collaboration tools.

But as De Beer's blog post commented, the appeal "is about one thing only: securing standards-based interoperability in the video calling space." De Beer noted that Microsoft's plan to integrate Skype with its Lync Enterprise Communications Platform "could lock-in businesses who want to reach Skype's 700 million account holders to a Microsoft-only platform."

On the consumer side, the deal did appear to significantly increase concentration in the video call market, at least on initial inspection. The Commission had noted in its decision that the transaction would provide the combined entity with a market share of eighty to ninety percent of video calls, and acknowledged that the transaction created a "market leader." The transaction left the combined company with significant market shares in the other technologies in the consumer unified communications market as well. But unlike the other technologies in the unified market, prior to the transaction both parties to the transaction had significant market shares in providing the video call service in the EU, particularly between Windows computers.

The Commission rejected the idea that this increased concentration would harm competition in the video call market based on a number of considerations. First, the Commission noted that the market shares were likely to overstate the true market power of the parties because they provide free services to consumers. The Commission seemed particularly impressed by a Skype internal document that had noted that more than seventy-five percent of its customers would switch to an alternative provider if it started charging for its services. It was not clear from the Commission Decision whether the internal memo had assumed the existence of Microsoft's competing product in its analysis, but the Commission noted that there were a number of new rivals to the merging parties in the space, including Google and Facebook (although Facebook currently uses Skype for its video calling services to consumers). The Commission also noted that firms like Facebook and Google have an advantage over Microsoft because they provide their services as part of a broader social networking service that the Commission found consumers preferred.

The Commission also noted that the use of Microsoft's video call service was declining prior to the merger, including a decline of up to thirty percent between November 2010 and May 2011. The Commission did not identify how many of those consumers had moved to Skype however, and did not identify any facts to indicate that the Microsoft product was part of a failing/flailing division or that Microsoft was thinking about cancelling or reducing the scope of its service. The Commission also indicated that consumers were increasingly moving to tablets and smartphones for video calls and that Microsoft's product did not participate in that part of the market.

In evaluating the importance of network effects in the transaction as a whole and with respect to video calls in particular, the Commission appeared to minimize the importance of network effects as a source of market power in these markets. The Commission noted with respect to network effects that consumers generally only contact their "inner circle" which is a small enough number of people to limit the costs of switching a consumer's entire network of contacts to another network. Also making switching easier, according to the Commission, is the fact that many consumers "multi-home." That is to say that many already use other services so switching requires less effort.

The Commission's decision does little to tell parties when network effects are important and when the "inner circle" effect will dominate. It is generally true that consumers'

private networks are far smaller than the networks provided by the services they use. But conceptually, a user's inner circle in video calling would likely not be much different from the telephone system run by AT&T in the US prior to its break-up, or any other network. In a sense, the Decision appears to allow the exception – consumers' inner circles – to swallow the rule where network effects seem prevalent. It will be interesting to see if the court identifies factors relevant to the decision of when the inner circle effect dominates over factors that would indicate that network effects make it hard for consumers to switch.

On the enterprise side, the appeal is focused on the ability of enterprise competitors to Microsoft to interoperate with the services and allow their customers to communicate with Skype users. The Commission evaluated a number of arguments relating to the impact on markets of Microsoft's allegedly reduced incentives to interoperate as a result of the deal. Among the arguments it considered were claims by "providers of enterprise communications services" that the acquisition would reduce Microsoft's incentives to interoperate with them.
Because Skype did not appear to compete strongly in the enterprise market prior to the transaction, the most salient competitive effect seemed to be on markets where enterprise customers wanted to communicate with their customers through video calling, specifically the market to supply technology to call center operations. The Commission rejected arguments that the transaction would reduce competition in these markets, noting that Skype did not offer a call center product pre-merger, and that the services it did provide were poorly suited for call center use for a variety of reasons. Further, the ability of competitors to reach customers using Skype would not change as a result of the merger as it was likely that Microsoft would continue to freely distribute the software used for Skype calls, and even if it did not, there were a number of free options that call centers could use instead.

Given that the transaction, by allowing Microsoft to integrate its enterprise products with the user base of Skype, would appear to make Microsoft a tougher competitor against the other enterprise providers, the challenge for Cisco is to find a way to demonstrate that the transaction will lead to reduced competition and not simply a better Microsoft product against which it will be harder to compete. Since Cisco might appear to be requesting that the services affected by the transaction should be more interoperable after the order than they were in the marketplace before the deal, it will be interesting to see whether they get traction with the court.

FTC Investigates Google's Consummated Acquisition of Waze

By Rebecca Tracy Rotem, Davis Polk & Wardwell LLP

On June 11, 2013, Google Inc. ("Google") announced that it had closed its acquisition of Waze, an Israeli company that has developed a popular social map app. Through the app, Waze can access its 45 million users' smart phones, enabling it to measure traffic, update its maps, and show users faster routes. Google has its own Google Maps product, which includes a mobile app, and has declared that this transaction brings with it the "prospect of enhancing Google Maps with some of the traffic update features provided by Waze and enhancing Waze with Google's search capabilities." Brian McClendon, *Google Maps and Waze, outsmarting traffic together*, Google Official Blog (June 11, 2013), *available at* http://googleblog.blogspot.com/ 2013/06/google-maps-and-waze-outsmarting.html.

While the specific terms of the deal are not public, sources report that Google purchased Waze for $1 billion in cash. In this case, it appears that Google and Waze did not file Hart-Scott-Rodino Act ("HSR") premerger notifications prior to

consummating the deal. Some have speculated that, if the parties did not make HSR filings, they may have relied on the foreign issuer exemption, as Waze is an Israeli company, in determining that such a filing was not required. Acquisitions by U.S. persons of voting securities of a foreign issuer are exempt from HSR reporting unless the issuer has assets in the United States valued over $70.9 million or has annual sales in or into the United States valued over $70.9 million. Waze most likely did not meet the requirement of having over $70.9 million worth of annual sales in or into the United States. Whether Waze has over $70.9 million of assets in the United States is potentially a trickier question. For HSR purposes, the buyer is responsible for determining the fair market value for the acquired assets or securities, and Federal Trade Commission ("FTC") informal guidance indicates that the buyer should take the value of intangibles (such as intellectual property and good will) into account when determining the fair market value. In a deal reportedly valued at approximately $1 billion, it is plausible that one might attribute at least a $70.9 million value to Waze's intangible assets in the United States. For example, the FTC's Premerger Notification Office has suggested that a reasonable method of allocating a company's intangibles between the United States and other countries is to use a percentage based on the source of the company's revenues. Using this method, if 50% of the foreign issuer's revenues were to U.S. customers, 50% of the company's intangible value could be similarly allocated to the United States, for HSR purposes.

In late June 2013, Google confirmed that the FTC is investigating the deal but did not provide additional details. The FTC could be considering whether an HSR filing was required and/or, as more commonly is the case, simply investigating whether the deal presents a risk of harm to competition. Indeed, consumer groups had urged the antitrust agencies to investigate the merger, noting that prior to the acquisition, Waze publicly stated that apparently it considered Google to be its only competitor. Letter from John M. Simpson, Privacy Project Director, Consumer Watchdog, to William J. Baer, Assistant Attorney General, Antitrust Division, Department of Justice (June 12, 2013), *available at* http://www.consumerwatchdog.org/resources/cltrdojwaze061213.pdf. Facebook Inc. and Apple Inc. were also rumored to have been considering an acquisition of Waze, and the FTC may consider whether Google acquired Waze in order to thwart a competitor's purchase of the company.

While it is seen as harder to unwind a transaction that has already been consummated, in this case the investigation began shortly after closing, and Google had planned to operate Waze separately, at least initially. It remains to be seen whether the FTC will take any action. Even if the FTC ultimately determines that the transaction does not have anticompetitive effects, the parties could face penalties for failure to make an HSR filing if the FTC determines one was required but not made. The FTC, however, has not, to date, sought penalties for such a failure to file solely on the ground that the buyer made an improper determination of fair market value.

Lucasfilm Ltd., Pixar Settle High Tech Employee Antitrust Claims

By H. Holden Brooks, Foley & Lardner LLP

Following a denial of class certification in April 2013, and just a few weeks in advance of an August hearing on a supplemental certification motion, Lucasfilm Ltd., and Pixar Animation Studios ("Pixar"), have agreed to settle plaintiff's claims that the high-tech firms entered into anticompetitive anti-poaching agreements with their Silicon Valley peers. On July 19, parties reported to Judge Lucy Koh that while a June 26 mediation failed to produce a global settlement, post-mediation negotiations between plaintiffs and Lucasfilm Ltd. and Pixar, respectively, yielded settlements in principle on July 12.

Complete details of the settlements have not yet been filed with the court, or otherwise been made public, although in filings made on July 26, plaintiffs and the remaining defendants agreed that the settlements should not affect consideration of the supplemental certification motion. In their joint brief, the remaining defendants noted that only 2.3% of the proposed settlement class (which is coextensive with the proposed litigation class) are Pixar and Lucasfilm Ltd. employees. And plaintiffs' brief clarified that the settlements preserve the right to litigate against the remaining defendants for all damages pursuant to joint and several antitrust liability.

In advance of the closely watched, second-round class certification hearing on August 8, Judge Koh requested that parties—including non-settling defendants Adobe, Apple, Google, Intel, and Intuit—submit simultaneous briefing, due July 26, on the issue of how the settlements may affect consideration of plaintiffs' supplemental class certification motion. That motion proposes certification of a narrowed class of technical employees only, arguing that defendants suppressed competition for the services of these employees by agreeing not to make recruiting "cold calls." Plaintiffs have supported their motion with expert testimony—challenged by defendants—purporting to show that compensation of the technical employees in the class would have risen and fallen in sync over time due to the formalized compensation structures in place at the defendant companies, in addition to "internal equity" concerns.

In an unrelated suit brought by the Office of the Attorney General of the State of California, *People v. Intuit, Inc.*, 13-CV-02933 (N.D. Cal.), on June 26 Intuit settled claims that it had entered into similar anti-poaching agreements with eBay. eBay continues to defend claims by California and the Antitrust Division of the U.S. Department of Justice based on the same alleged conduct; Intuit settled federal regulators' claims in an earlier 2010 action.

Supreme Court to Review CAFA Circuit Split in LCD Case

By Kelly Smith, Arnold & Porter LLP

The Supreme Court granted *certiorari* at the end of May on a case brought by the attorney general of Mississippi against manufacturers, marketers, sellers, and distributors of liquid crystal display ("LCD") panels. In *Mississippi ex. rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012), the attorney general alleged that the defendants engaged in a price fixing scheme in violation of the Mississippi Consumer Protection Act and the Mississippi Antitrust Act. It is one of many related cases arising out of a 2006 Department of Justice price fixing investigation of firms involved in the manufacture and sale of LCD panels, which are used in flat panel computer monitors and televisions, among other things. The issue for the Supreme Court is whether this case belongs in federal court. Unlike related LCD class actions with private plaintiffs, this case was initiated by the state attorney general on behalf of consumers in the state of Mississippi.

The Class Action Fairness Act ("CAFA") grants to federal courts jurisdiction over class actions and "mass actions" meeting certain qualifications, and surviving certain exceptions. 28 U.S.C. § 1332(d). What is unclear is whether the act applies to class actions filed by state attorneys general on behalf of citizens in that state. The Seventh, Ninth, and Fourth Circuits have all determined that removal to federal court under CAFA is not warranted in such circumstances. *See LG Display Co. v. Madigan,* 655 F.3d 768 (7th Cir. 2011); *Nevada v. Bank of America,* 672 F.3d 661 (9th Cir. 2011); *West Virginia ex. rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011). Indeed, the Seventh Circuit's decision on this question involved antitrust allegations by

the Illinois attorney general regarding the same alleged LCD price fixing. *See Madigan*, 655 F.3d 768.

The Fifth Circuit, by contrast, reversed the district court for the Southern District of Mississippi where the district court had refused to remove the case to federal court. The Fifth Circuit held that "this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court). . . . Because this suit is a mass action under the terms of CAFA, removal is proper." *AU Optronics*, 701 F.3d at 803.

The Fifth Circuit reasoned that the suit qualifies as a "mass action," because, among other reasons, the case involves the claims of "100 or more persons." *Id.* at 799. According to the court, "the real parties in interest are numerous - far in excess of 100. Contrary to the state's assertions, Mississippi is thus not the sole party in interest. Instead, the state (as a purchaser of LCD products) and individual citizens who purchased the products within Mississippi possess 'rights sought to be enforced.'" *Id. at* 800. True class actions, in addition to "mass actions," quality for removal under CAFA, but *AU Optronics* could not qualify as a class action because class actions are explicitly prohibited under Mississippi law.

The Fifth Circuit also considered, and rejected, the possibility that CAFA's "general public" exception would prevent removal to federal court. The court reasoned that "[t]he requirement that 'all of the claims' be asserted on behalf of the public is not met here. . . . individual consumers, in addition to the State, are real parties in interest, so there is no way that 'all of the claims' are 'asserted on behalf of the general public.'" *Id.* at 802.

The other circuits that have considered whether a case brought exclusively by the state qualifies for removal to federal courts under CAFA reached the opposite conclusion. The Seventh Circuit said that a similar case "was brought by the Attorney General, not by a representative of a class." *Madigan*, 665 F.3d at 722. And the Fourth Circuit explained that "[a]ll class actions are representative in nature; but not all representations are necessarily class actions." *McGraw*, 646 F.3d at 175 n.1.

Federal courts are perceived as less friendly to class-action plaintiffs than many state courts. Thus, the Supreme Court's decision in the case is likely to have important implications for antitrust defendants facing (or anticipating) civil suits pursued by state attorneys general or similar state authorities on behalf of consumers in their states.

Patent "Troll" Activity under Increasing Scrutiny—May Become Subject of FTC Study

By Charles E. Dickinson, Hogan Lovells

The Federal Trade Commission ("FTC") looks poised to launch a broad study of the costs and benefits of patent assertion entities ("PAEs"), or patent trolls as they are often known. These entities, which the FTC defines as having a business model focused primarily on purchasing and asserting (rather than practicing) patents, already face a chorus of vocal critics, from major high-tech companies to influential politicians of both political parties and even President Obama. Now the Chairwoman of the FTC, Edith Ramirez, has announced her support for the Commission to use its authority under Section 6(b) of the FTC Act to develop its own views on PAEs. Lessons learned from the study could be used to inform future enforcement actions. Although a formal

Commission vote still is required to authorize a 6(b) study, the public support of the Chairwoman for the idea is a significant development.

In a speech delivered at a program by the American Antitrust Institute, Ramirez described some of the ways in which PAEs "raise red flags for competition and consumers." She noted, for example, that the aggressive litigation tactics of PAEs can divert important R&D resources and distort incentives to innovate. PAEs are now responsible for filing as much as 50% of all infringement lawsuits. Their targets are increasingly retailers and small businesses that merely use allegedly infringing products and may be more likely to view settlement as cheaper than litigating even a non-meritorious lawsuit.

Although the scope of the 6(b) study may well be far-reaching, Ramirez pointed to certain specific conduct, like patent "privateering," as likely topics. "Privateering" is the practice in which an operating firm agrees with a PAE on the transfer of patents that may read on a competitor's products. The agreement may give the PAE an incentive to seek licensing fees from the competitor, which raises the rival's costs. Reports of privateering are becoming more numerous as firms seek to monetize the extraordinary value of patent portfolios in today's marketplace.

To be sure, most observers appreciate that PAEs aren't always bad. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, for his part, recently noted that even the word "troll" isn't necessarily pejorative—he considers trolls to be "charming" and "magical." Chairwoman Ramirez's speech detailed certain upsides of PAEs, especially for small inventors and start-ups, which can benefit from the enforcement capabilities and liquidity provided by PAEs. Still, Ramirez considers such benefits to be merely "plausible…at least in principle" and lacking strong empirical support. Given the apparent harms and uncertain benefits, Ramirez committed that the FTC will not only lead the ongoing policy debate on PAE activity, but it will also take enforcement action where appropriate. With the possibility of a 6(b) study and the Chairwoman's commitment to continue the debate and take enforcement action, PAE activity is under more scrutiny than ever before.

Some commentators and even commissioners have called for a moderate approach to regulating PAE activities. Ramirez, on the other hand, countered that the FTC is certainly not moving too fast on the issue. She noted that regulators and academics have studied issues related to patent trolls for years, citing the FTC's March 2011 Report on the Evolving IP Marketplace and a "growing body of academic literature" as evidence that these issues are "not new" to the Commission. Even those commentators who support the use of the Commission's 6(b) authority acknowledge that a study would be slow to address the perceived problems and at best only part of the solution. These arguments may blunt the opposition to at least studying the issue.

In addition to the possibility of action by the FTC, a growing, bi-partisan cast of politicians continues to push for further patent reform to address harms caused by PAEs. At least six bills intended to curb what are perceived as the most harmful PAE activities are currently pending before the Congress. On the same day as Ramirez's speech, the chairman of the Senate Judiciary Committee, Patrick Leahy (D-VT), wrote a letter to Ramirez urging the FTC to investigate and take action against some of what he sees as the most troublesome tactics of PAEs, such as the mass sending of unsupported demand letters, often to the retailers and small businesses that are least likely to or capable of adequately defending themselves. Days after Leahy's letter to the FTC, the Chairwoman of the Senate's subcommittee on antirust, competition policy and consumer rights, Senator Amy Klobuchar (D-MN), similarly called on the FTC to bring enforcement actions against trolls and launch a 6(b) study. Klobuchar has vowed to hold hearings on Capitol Hill to discuss the consumer harm allegedly done by trolls.

What's more, the White House has extended its support to certain elements of the bills pending in Congress by announcing several legislative recommendations to address PAE activity on June 4, 2013. And now states are joining the attack on the most egregious PAE activities. Sen. Leahy's home state of Vermont recently captured the news when the attorney general filed the first lawsuit by a state against a PAE under consumer protection laws, accusing the firm of launching baseless threats of patent infringement against retailers and small businesses implementing patented technology. The same PAE is under investigation by Nebraska's attorney general for conduct that may violate that state's laws as well. Taken together, the recent actions and statements by the antitrust regulators, Congress, the White House, and the states underscore how PAE activity is under increasing scrutiny, and likely will be for some time.

Is Major League Baseball's Antitrust Exemption in Jeopardy?

By Swathi Bojedla, Hausfeld LLP

In *City of San Jose v. Major League Baseball*, the courts may get another chance to reexamine the long-standing antitrust exemption currently enjoyed by Major League Baseball ("MLB").

The case revolves around the City of San Jose, CA's desire to acquire the Oakland Athletics (better known as the Oakland A's), an MLB franchise that currently resides in Oakland, CA. According to the complaint's allegations, the A's currently play in an outdated, multi-purpose stadium which simultaneously serves as a football stadium occupied by the Oakland Raiders, and in which attendance has plummeted over the past two decades. In 2013, Oakland was ranked 25 out of 30 teams in terms of attendance, while their across-the-bay rival San Francisco Giants were ranked 2nd.

Given these constraints, the A's have repeatedly stated their desire to explore other options in order to boost attendance and corresponding revenues. The City of San Jose has worked with the A's on exploring a move to San Jose for years, culminating in a 2011 option agreement between the San Jose City Council and the Athletics Investment Group. Under the agreement, the A's were granted a two-year option to purchase discounted land in downtown San Jose to build a new stadium.

Complicating matters for both parties is the MLB Constitution. Article VIII, Section 8 states: "No franchise shall be granted for an operating territory within the operating territory of a member without the written consent of such member." Operating territory is defined as follows: "Each Member Club shall have exclusive territorial rights in the city which it is located and within fifty miles of that city's corporate limits." This has prevented the A's from moving to San Jose, despite the fact that they currently reside within those territorial restrictions anyway.

According to the City of San Jose's allegations, the purpose of those provisions is to "unreasonably restrain trade by granting *de facto* exclusive territories to the MLB Clubs and allowing Clubs to protect their respective monopolies by preventing new team entry into operating territories previously assigned to an MLB Club." Compl. ¶87. San Jose alleges that these provisions are facially anticompetitive, serving no purpose other than to protect MLB clubs from competition. This type of restraint stands in contrast to other pro-competitive actions resulting from concerted action that have been deemed acceptable for the MLB and other sports leagues in the past—*i.e.*, cooperating to schedule and produce games.

While there are other claims being advanced in this litigation, the antitrust implications are especially interesting. Baseball has enjoyed an antitrust exemption since 1922, when the Supreme Court ruled in *Federal Baseball Club of Baltimore v. National League* that baseball was not an activity in interstate commerce and therefore was exempt from antitrust law. The ruling was based in part on a nostalgic description of baseball as a game and not a business, and therefore not part of the stream of commerce. According to the Court, "personal effort not related to production is not a subject of commerce." Thereafter, baseball was not subject to the country's antitrust laws.

Despite this questionable legal reasoning, two intervening cases, *Toolson v. New York Yankees* in 1953 and *Flood v. Kuhn* in 1972, failed to alter this state of affairs, with the former decision arguing that Congress should act if such an exemption was deemed unwarranted and the latter relying on *stare decisis*. President Clinton signed the Curt Flood Act in 1998, which added an exception to the antitrust exemption stating that it did not apply to player employment issues, but otherwise to this day the exemption largely stands.

However, the issue may be ripe for extra innings. In the time since the *Flood* decision was reached in 1972, the issue of team relocation was raised in the context of the National Football League, which admittedly does not enjoy a broad antitrust exemption like that of the MLB. The result of that case could foreshadow a changed climate for the MLB in the courts today.

In the 1984 case *Los Angeles Memorial Coliseum Com'n v. NFL*, the Ninth Circuit Court of Appeals upheld a lower court ruling that the NFL had violated antitrust laws when it prohibited the Oakland Raiders from moving to Los Angeles. At issue was NFL rule which required unanimous approval of all franchises when a team sought to relocate into the home territory of another team, defined as the surrounding territory within 75 miles of the corporate limits of the original team. At the time, the L.A. Rams were the home team, and the NFL sought to block the move of the Raiders to the L.A. area under this rule. The Ninth Circuit upheld the jury verdict against the NFL, finding that while there may have been some pro-competitive justification for the relocation rule, a jury could find that the anticompetitive harm outweighed the necessity of the rule. The Raiders ultimately moved to L.A. (but later returned to Oakland).

Given that intervening ruling, and the questionable basis for the initial grant of an antitrust exemption to baseball, *City of San Jose v. Major League Baseball* could finally put a dent in the longstanding antitrust protection enjoyed by the MLB. The pro-competitive justification for blocking the A's move from Oakland to San Jose is not evident where the A's already play in close proximity to the San Francisco Giants, the team whose presence in the Bay Area has served to block the A's move. The case is currently pending in the Northern District of California, and Major League Baseball will undoubtedly be gearing up for an important battle.

Digital Advertising Alliance Releases New Mobile Guidance

By Julia Kernochan Tama, Venable LLP

The Digital Advertising Alliance ("DAA") published new guidance applying its Self-Regulatory Principles to the mobile app and Web environments on July 24, 2013. The DAA is a consortium of trade associations and companies led by the American Association of Advertising Agencies, the Association of National Advertisers, the American Advertising Federation, the Direct Marketing Association, the Interactive Advertising Bureau, and the Network Advertising Initiative.

The new mobile guidance, available at http://www.aboutads.info/DAA_Mobile_Guidance.pdf, is the product of nearly two years of discussion among DAA stakeholders representing major sectors of the mobile ecosystem. It comes in response to consumers' increasing embrace of mobile devices, which has enabled companies to interact with consumers seamlessly across multiple channels. The guidance makes clear that the DAA's Self-Regulatory Principles likewise apply consistently across channels.

Specifically, the guidance explains for covered companies how the DAA's existing Self-Regulatory Principles for Online Behavioral Advertising (issued in 2009) and Self-Regulatory Principles for Multi-Site Data (issued in 2011), collectively known as the DAA Self-Regulatory Principles, apply to certain data collection practices that may occur on mobile or other devices.

The "Overview" section of the new mobile guidance notes that commentary within the existing Principles applies in the mobile Web site and application environments where relevant, and that standards and definitions restated in the mobile guidance should also be interpreted consistently across documents. The guidance goes on to provide more specific instructions on certain data collection practices. Following an initial section that sets out relevant definitions, Section II of the guidance states that the existing DAA Self-Regulatory Principles apply to the mobile Web site environment as well as the desktop browsing environment, although implementation may vary.

Section III of the guidance addresses the obligations of entities that are "Third Parties" under the guidance to provide notice, enhanced notice, and choice for "Cross-App Data," a term that means "data collected from a particular device regarding application use over time and across non-Affiliate applications." Sections IV and V describe the obligations of "Third Parties" to provide transparency and consumer control for "Precise Location Data" (as defined in the guidance) and "Personal Directory Data," a term that encompasses "calendar, address book, phone/text log, or photo/video data created by a consumer that is stored on or accessed through a particular device." "First Parties" that own or control applications are also discussed in the guidance.

Following these sections, Section VI enumerates certain routine business purposes for which, consistent with the Self-Regulatory Principles for Multi-Site Data, data can be collected and used without meeting the transparency and control provisions of the preceding sections. The guidance also extends to the mobile Web site and application environments those elements of the existing Self-Regulatory Principles that address sensitive health and financial data; data security; and prohibitions on the use of data for eligibility purposes.

The release of the mobile guidance marks the beginning of an implementation period during which the DAA will work to educate companies about the document and to develop (or otherwise specify) a mechanism or setting that companies can use to implement the Consumer Control Principle with respect to Cross-App Data. During this time, the guidance will not be in effect or enforceable against companies. This approach parallels the implementation period that followed the release of the initial Self-Regulatory Principles for Online Behavioral Advertising, during which the DAA launched its Advertising Options Icon and uniform consumer choice page located at www.AboutAds.info.

Venable LLP serves as counsel to the DAA.

Ofcom Launches Investigation of BSkyB's Sports Channel Offerings

By Seth Wiener, Arnold & Porter LLP

The Office of Communications ("Ofcom"), the British competition authority for the communications industries, initiated an investigation of satellite television provider British Sky Broadcasting Group plc ("BSkyB") over alleged anti-competitive practices involving sports broadcasts. The investigation came at the behest of BT Group plc ("BT"), which lodged a complaint with Ofcom on May 24, 2013. The complaint alleges that BSkyB leveraged the "dominant" market position of its sports stations, Sky Sports 1 and Sky Sports 2, to extract unfair terms from BT. According to the complaint, BT wanted to offer Sky Sports 1 and 2 as part of the YouView digital television platform, but BSkyB refused to provide these channels wholesale unless BT also supplied wholesale its BT Sport channels to BSkyB for retail on the BSkyB satellite platform. *See* Ofcom, Complaint from British Telecommunications plc ("BT") against British Sky Broadcasting Group plc ("Sky") alleging abuse of a dominant position regarding the wholesale supply of Sky Sports 1 and 2 ("SS1&2"), *available at* http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/ cw_01106/.

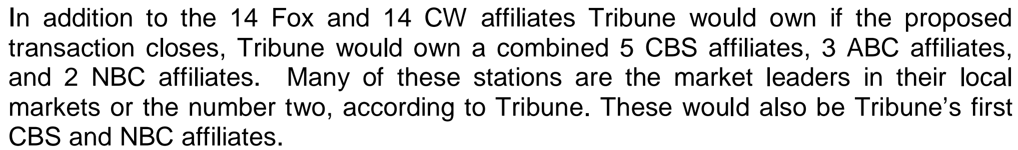
The BT Sport channels began airing only recently, which BT argues allows BT to refuse to provide these channels to BSkyB. In addition, the YouView platform is a partnership between BT, TalkTalk Telecom Group plc ("TalkTalk"), Arquiva, The BBC, ITV, Channel 4, and Channel 5. BSkyB offers Sky Sports 1 and Sky Sports 2 on TalkTalk's YouView offering. BT argues that failure of BSkyB to offer Sky Sports 1 and Sky Sports 2 to BT on substantially similar "fair terms" to those already provided to TalkTalk constitutes "unreasonable and discriminatory behavior." BSkyB, in turn, has declared the complaint "entirely without merit."

The Ofcom investigation will determine whether the terms BSkyB offered to BT violate UK and/or EU competition law. Ofcom refused BT's application for interim relief on August 1, but will continue its initial investigation of the matter. It expects to determine whether to proceed further this fall or winter.

Tribune Company to Acquire 19 Local Television Stations, Spin off Newspapers

By Seth Wiener, Arnold & Porter LLP

On July 1, The Tribune Company ("Tribune") announced a deal to acquire 19 local televisions affiliates from Local TV Holdings, owned by Oak Hill Capital Partners, for $2.7 billion. Tribune currently owns 23 local television affiliates, the WGN America superstation, and a stake in Food Network. This deal would almost double Tribune's local television holdings and make Tribune the single largest commercial television station operator in the U.S. Tribune would also become the largest owner of Fox local affiliates with 14 total (7 pre-existing and 7 as part of the acquisition). Tribune is already the largest owner of CW affiliates with 14, including the New York (WPIX), Los Angeles (KTLA), Houston (KIAH), Washington, D.C. (WDCW), and Dallas (KDAF) affiliates.



In addition to the 14 Fox and 14 CW affiliates Tribune would own if the proposed transaction closes, Tribune would own a combined 5 CBS affiliates, 3 ABC affiliates, and 2 NBC affiliates. Many of these stations are the market leaders in their local markets or the number two, according to Tribune. These would also be Tribune's first CBS and NBC affiliates.

On the heels of this television deal, Tribune announced on July 10 that the newspapers properties it owned, including the Los Angeles Times and the Chicago Tribune, are being spun off as Tribune Publishing Company. Not included in spin off are the related digital properties, which will remain with Tribune. Tribune expects to separate the companies within the next year.

The Tribune-Local TV Holdings transaction is subject to review by the FCC.

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