Issue 1 | March 2013

ABA Antitrust Section

Media &Technology E-Bulletin

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The Media & Technology Committee is pleased to present the inaugural 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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Ninth Circuit Clarifies Reach of State Antitrust Laws in LCD Case

By Robert Wierenga, Schiff Hardin LLP

In *AT&T Mobility LLC v. AU Optronics Corp*., 707 F.3d 1106, 2013 WL 540859 (9th Cir. 2013), the Ninth Circuit clarified the law relating to extraterritorial application of state antitrust laws in price-fixing cases. In *AT&T Mobility*, several AT&T entities have sued manufacturers of LCD displays, accusing them of fixing the prices of displays that the plaintiffs purchased for use in their mobile handsets. The *AT&T Mobility* plaintiffs have brought both direct purchaser claims under the Sherman Act and indirect purchaser claims under California's Cartwright Act. Among other things, the *AT&T Mobility* plaintiffs claim that the Cartwright Act applies to their indirect purchases of LCD screens regardless of whether those purchases were made in California, or in some other state.

The defendants moved to dismiss the Cartwright Act claims on the ground that the Due Process Clause of the Fourteenth Amendment prohibited application of the Cartwright Act to sales made outside of California. The Fourteenth Amendment prohibits the extraterritorial application of state law when the state "had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981). The district court granted the motion, holding that the relevant "occurrence or transaction" in a price-fixing case was the sale of the price-fixed goods. Since the plaintiffs' claims were not limited to LCD purchases made in California, the district court dismissed with leave to file an amended complaint that identified each state in which plaintiffs had purchased LCDs.

In their amended complaint, the plaintiffs added several factual allegations designed to show that defendants had reached, and implemented, the price-fixing conspiracy within California's borders. The plaintiffs argued that these allegations of a price-fixing agreement reached in California were sufficient to permit application of the Cartwright Act to their claims, regardless of where the price-fixed goods had been sold. The district court disagreed, holding again that applying the Cartwright Act to purchases made outside of California would violate the defendant's due process rights.

The Ninth Circuit granted plaintiffs' request for interlocutory appeal and reversed the district court's order of dismissal. The Ninth Circuit criticized the district court's conclusion that the location of the price-fixed sale was determinative as an inappropriate return to the "*lex loci delicti* doctrine" that *Allstate* had rejected. *AT&T Mobility*, 2013 WL 540859 at *5. It also criticized the district court's analysis for "severely truncat[ing] the scope of anticompetitive conduct that the [Cartwright] Act proscribes," which includes both "the sale of price-fixed goods in California" and "the initial agreement to fix those prices – without reference to where those goods will eventually be sold." (*Id.* at *3).

The Ninth Circuit instead held that "the relevant 'occurrence or transaction' in this case includes not only the sale of price-fixed goods, but Defendants' alleged agreements and conspiracies to fix LCD prices. Accordingly, the district court should have considered *all* of the Defendants' conduct within California leading to the sale of price-fixed goods outside the state when determining whether California law could be applied without offending Defendants' due process rights." *Id.* at *5 (emphasis in original). It concluded that "the Cartwright Act lawfully can be applied without violating a defendant's due process rights when more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California." *Id.* at *6. The plaintiffs' Cartwright Act claims were reinstated against all defendants.

It is worth noting that *AT&T Mobility* limited its analysis to the question of whether the Fourteenth Amendment prohibits extraterritorial application of the Cartwright Act (and, presumably, similar state antitrust laws) to price-fixed sales of goods. Even after *AT&T Mobility*, it is possible that, for example, application of state choice of law rules will result in indirect purchaser claims being governed by the law of the state where the goods were purchased, rather than the state where the conspiracy is alleged to have occurred. Nonetheless, by rejecting the argument that due process requires application of the "state of purchase" law in indirect purchaser cases, *AT&T Mobility* removes a potentially potent argument for defendants facing indirect purchaser class actions in the Ninth Circuit.

FCC & DOJ Clear T-Mobile Acquisition of MetroPCS

By Seth Wiener, Arnold & Porter LLP

On March 12, 2013, the FCC announced its approval of the proposed merger between wireless carriers T-Mobile and MetroPCS. The same day, the Department of Justice ("DOJ") issued a closing statement indicating its approval merger. Both the FCC and DOJ found the merger unlikely to harm competition or consumers. Upon completion of the transaction, the companies plan to combine under the T-Mobile brand.

Deutsche Telekom (parent of T-Mobile) and MetroPCS claimed that the post-merger T-Mobile would increase its subscriber base to 42.5 million subscribers, putting it within striking distance of number three carrier Sprint Nextel's ("Sprint") approximately 56 million subscribers. The parties also maintained that the merger would ensure a more competitive T-Mobile and would "address major spectrum constraints facing both T-Mobile USA and MetroPCS by combining their highly complementary spectrum portfolios." This would, in turn, enable post-merger T-Mobile to offer greater LTE coverage in a shorter time frame than either company is currently able to do, facilitated by the adjacency of their spectrum bands. Though the parties will need to work out the potential technological incompatibility between the networks (LTE for T-Mobile and CDMA for MetroPCS) prior to the combination, they reportedly expect to move to a uniform LTE standard over time. The companies also argued that the transaction should not trigger competition concerns because in each of the markets in which the two operate, AT&T, Verizon Wireless, and Sprint also compete. *See* T-Mobile & MetroPCS, *Public Interest Statement*, WT Docket No. 12-301, iii, v (FCC Oct. 18, 2012).

The FCC largely agreed, concluding that the merger would "enhance the competitiveness" of post-merger T-Mobile against its larger nationwide competitors -- AT&T, Verizon Wireless, and Sprint. The FCC believed that by combining, T-Mobile and MetroPCS would be able to deploy more quickly a "broader, deeper" nationwide LTE network than either could individually. The FCC also found consumer benefits, including greater service and handset options (MetroPCS customers) and improved service quality (T-Mobile customers). Because of MetroPCS' limited service area, the FCC found that the combination with T-Mobile would allow the post-merger company to expand MetroPCS service plans nationwide.

The Commission analyzed concerns about potential loss of competition in nineteen local markets, but concluded that in each such area, there would either be sufficient remaining competition post-merger, or the public interest benefits of the transaction would outweigh any potential reduction in such competition. As the smallest of the nationwide providers, and less than half the size of its two largest competitors, AT&T and Verizon Wireless, a post-merger T-Mobile would be "unlikely [to] have the ability to unilaterally raise price or otherwise harm competition at the national level." FCC, *Memorandum Opinion and Order and Declaratory Ruling*, WT Docket No. 12-301, ¶¶ 47–52, 55, 74 (FCC Mar. 12, 2013).

As it has in other recent merger orders, the FCC again analyzed a "mobile telephony/ broadband services" relevant product market. It declined to adopt the proposed "value wireless services" market definition proposed by the Greenlining Institute in its comment on the T-Mobile/MetroPCS transaction. If adopted, the proposed market would have included both T-Mobile and MetroPCS, but not their larger rivals, which would have been in a separate "premium wireless services" market. *See* Greenlining Inst., *Opening Comments of the Greenlining Institute*, WT Docket No. 12-301 (FCC Jan. 22, 2013).

In a brief closing statement, the DOJ also concluded that "the transaction is not likely to lessen competition substantially at local levels." In reaching that conclusion, the DOJ:

> considered whether the proposed combination of T-Mobile and MetroPCS might tend to lessen competition substantially in any particular local area, for instance by combining the two carriers with the best local coverage. MetroPCS has a network based on high frequency spectrum (i.e. advanced wireless services (AWS) and personal communications services (PCS) spectrum) that is less able to cover rural areas or penetrate buildings. It does not provide a particularly unique and competitively significant differentiated offering in the regions in which it operates. Each of the markets served by MetroPCS is also served by all four national carriers.

The merger, according to the DOJ, may even be a procompetitive outcome due to "improve[ments to] T-Mobile's scale and spectrum position" thanks to the complementary spectrum holdings of the two parties. Department of Justice Antitrust Division Statement on the Closing of Its Investigation of the T-Mobile / MetroPCS Merger (Mar. 12, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/294555.pdf.

On March 21, the Committee on Foreign Investment in the United States also approved the merger. This was the last regulatory approval the merger required, according to the parties.

Amazon, Big Six Book Publishers Sued over E-Book Sales Practices

By Rebecca Rotem, Davis Polk & Wardwell LLP

On February 15, 2013, in *The Book House of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, No. 13-CIV-1111 (S.D.N.Y. Feb. 15, 2013), three independent book sellers filed a class action lawsuit on behalf of themselves and other similarly situated independent brick and mortar bookstores against Amazon.com, Inc. ("Amazon") and the "big six" book publishers (Random House, Inc., Penguin Group (USA) Inc., Hachette Book Group USA, Inc., Simon & Schuster, Inc., HarperCollins Publishers LLC, and MacMillan Publishers, Inc.).

The suit relates to Amazon's sales of e-books for use on its Kindle e-reader device and the Kindle app. The complaint recounts that Amazon enters into contracts with the publisher defendants containing digital rights management ("DRM") technology that limits the use of the digital content after sale. According to the complaint, all e-books that Amazon sells contain Amazon's DRM. This DRM limits the use of the e-book in two ways. *First*, e-books with the Amazon DRM can only be read on the Kindle or the Kindle app (meaning that if a consumer buys an e-book from Amazon, she must read the book on the Kindle or Kindle app). *Second*, only books that have the Amazon DRM can be read on the Kindle device or app and consumers can only buy e-books with the Amazon DRM from Amazon (meaning that if a consumer would like to read on a Kindle or through the Kindle app, she must buy the e-book from Amazon). Plaintiffs allege that Amazon has over 60% market share in the e-book market.

Plaintiffs allege violations of the Sherman Act § 1 (against all defendants) and § 2 (against Amazon) based on the e-book sales contracts between Amazon and the publisher defendants allowing for the sale of e-books containing Amazon's DRM. Plaintiffs claim that these contacts unreasonably restrain commerce in the sale of e-books, violating § 1. They also claim that the contracts violate § 2 because they allegedly result in an e-book sales monopoly for Amazon. As a result of these contacts and sales practices, plaintiffs argue that they have been restrained from selling e-books, and thus competition on e-book price is constrained. They also allege that consumers are harmed due to decreased innovation and competition resulting from the foreclosure of independent book stores. The complaint also includes an attempted monopolization claim against Amazon under the same facts.

For relief, plaintiffs seek an injunction "prohibiting Amazon and the big six from publishing and selling e-books with device and app specific DRMs." They also ask that the publisher defendants allow independent bookstores to sell open-source DRM e-books (readable on any open-source device) and for an injunction preventing Amazon from selling DRM-specific e-readers in the future.

This private action comes on the heels of the Department of Justice's ("DOJ") e-book price-fixing suit against Apple and five of the six publisher defendants here (Random House is not named as a defendant in the DOJ suit). The DOJ e-books case does not focus on the use of DRM, as here, but rather involves allegations that Apple and the publishers colluded to prop up e-book prices by switching to an agency model designed to set Apple's price as the price floor for e-books, thereby preventing discounting by Amazon. All of the publisher defendants in the Apple e-books case have settled, but the suit continues against Apple and is scheduled for trial in June 2013. *See* Press Release, Dep't of Justice, Justice Department Reaches Settlement with Macmillan in E-Books Case (Feb. 8, 2013), *available at* http://www.justice.gov/opa/pr/2013/February/13-at-171.html.

Recent Developments in F/RAND Issues

By Charles E. Dickinson, Hogan Lovells US LLP

If 2012 was a year of debating the applicability of antitrust law to so called "fair, reasonable and non-discriminatory" or "F/RAND" licensing commitments, recent developments suggest 2013 may bring the beginning of stricter enforcement in this burgeoning area of the law. Antitrust regulators in the United States and Europe have made clear that injunctive relief and exclusion orders may be inappropriate remedies for patent holders asserting standard essential patents ("SEPs"). Three noteworthy developments highlight this emerging trend:

- the European Commission's ("EC") issuance of a Statement of Objections to Samsung alleging misuse of mobile phone essential patents;
- the joint policy statement of the U.S. Department of Justice, Antitrust Division ("DOJ") and the U.S. Patent & Trademark Office ("PTO") on remedies for SEPs subject to F/RAND commitments; and
- Deputy Assistant Attorney General Renata B. Hesse's speech at the Global Competition Review's Law Leaders Forum addressing competition issues related to patents in high technology areas.

EC Statement of Objections to Samsung's Enforcement of SEPs

On December 21, 2012, the European Commission announced allegations that Samsung abused its dominant position by seeking injunctions against Apple, a willing licensee, based on alleged infringements of SEPs in the mobile phone industry. With the announcement of the Statement of Objections, Samsung now must defend its conduct in a formal investigation before the Commission makes a final decision.

Although the Commission's action states only a preliminary view of the merits and purports to apply to the specific facts of the case against Samsung, the move may have broader implications. Specifically, the press release announcing the Statement of Objections warns that recourse to injunctive relief may violate Article 102 (the EU's parallel to Section 2 of the Sherman Act) if two facts are present: (1) the alleged infringement concerns SEPs where the holder has made a commitment to license on FRAND terms, and (2) the potential licensee is willing to negotiate on FRAND terms. It remains to be seen what level of commitment is required for the licensee to be considered "willing to negotiate." For example, must the potential licensee state its intentions in writing or in sworn testimony, as the FTC required in its consent decree with Google? Or will evidence of good faith negotiations suffice, as some commentators and DOJ staff have proposed?

Interestingly, Samsung's apparent efforts to avoid an enforcement action by announcing the withdrawal of its injunction requests failed to keep the enforcers at bay. Three days before the issuance of the Statement of Objections, Samsung announced that it would withdraw all of its European injunction requests against Apple, declaring such action to be "in the interest of protecting consumer choice." The Commission acknowledged the withdrawal, but determined that Samsung already had committed anti-competitive conduct, suggesting a view that the damage caused by launching an injunction request is not easily undone. This decision may portend a desire by the Commission to ensure that a willing licensee is free to compete knowing the SEP is subject to a FRAND commitment.

See Memorandum, Eur. Comm'n, Samsung -- Enforcement of ETSI Standards Essential Patents (SEPs) (Dec. 21, 2012), *available at* http://europa.eu/rapid/press-release_MEMO-12-1021_en.htm.

DOJ/PTO Joint Policy Statement

In the U.S., the DOJ and PTO issued a joint policy statement on January 8, 2013 on the subject of appropriate remedies for the infringement of SEPs encumbered by F/RAND commitments. The agencies directed the joint policy statement to the U.S. International Trade Commission, urging that body to consider the impact of exclusionary relief on competition and consumer welfare in cases involving voluntarily F/RAND-encumbered patents. The statement began by acknowledging the benefits to consumer welfare of the patent system and standards-developing organizations ("SDOs"). It also conceded that injunctive or exclusionary relief may be appropriate where the prospective licensee is not willing or able to take a F/RAND license or acts outside the scope of the patent holder's commitment to license on F/RAND terms (for example, the licensee is not implementing the standard and thus is not an intended beneficiary of the F/RAND commitment).

But the DOJ and PTO statement focused primarily on the inherent risks to competition created when SDOs confer substantial market power on certain patent holders by incorporating their patented technology into industry standards. The agencies believe that SDOs attempt to minimize such risks by relying on voluntary licensing commitments of their participants, who agree to license SEPs on F/RAND terms. When a firm violates this F/RAND commitment, it acts inconsistent with the public interest, potentially harming competition.

According to the joint statement, holders of F/RAND-encumbered SEPs have "acknowledged voluntarily" that money damages, and not injunctive or exclusionary relief, is the appropriate remedy for infringement. This viewpoint appears to be slightly more qualified than the standard espoused by the FTC, which found in a recent enforcement action against Google that the holders of SEPs have *committed* to not seek injunctive or exclusionary relief. Nevertheless, the DOJ clearly believes that granting injunctive or exclusionary relief for infringement of SEPs may harm competition and consumers.

The joint statement articulates a principle that the DOJ may be expected to apply to future cases: when an alleged infringer of a SEP (1) acts within the scope of the F/RAND commitment and (2) is willing and able to negotiate a license on F/RAND terms, injunctive or exclusionary relief may harm competition.

See U.S. Dep't of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf.

DAAG Hesse Addresses DOJ's Role in Regulating F/RAND Breaches

While the FTC has at times relied on its authority under Section 5 of the FTC Act to regulate anti-competitive conduct involving F/RAND commitments, the DOJ appears focused on the application of Section 2 of the Sherman Act to prevent the same behavior. A February 8, 2013 speech by Deputy Assistant Attorney General Renata B. Hesse analyzed the role that Section 2 might play in protecting competition and consumers when F/RAND-encumbered SEP holders breach a F/RAND commitment.

Describing the issue as a "challenging and complex area of the law" that is "particularly worthy of thoughtful exploration," Hesse noted that recent advocacy efforts and a reliance on contract law may not go far enough to protect competition from the opportunistic behavior of some SEP holders. In those cases, the DOJ will not hesitate to resort to judicial remedies, she said.

Hesse acknowledged some disagreement regarding the applicability of Section 2 in this area of law. Some commentators would apply Section 2 only where the patent holder intentionally deceived the SDO by making false promises to license on F/RAND terms in order to have its patent selected in the standard-setting process. Others would extend the reach of Section 2 even absent deception, such as the case were the patent holder intended to license its SEP on F/RAND terms but later decided to seek injunctive relief.

One might imagine the latter scenario applying particularly in the case of patent acquisitions, an area of growing concern among antitrust agencies and many private parties. For example, a patent assertion entity with a greater incentive and ability to enforce patents may acquire SEPs and then renege on the good faith promise of the prior holder to encumber the patents. Notably, Hesse argued that in either case—deception or not—competition and consumers appear to suffer and the DOJ will continue to look closely at its enforcement options.

See Renata B. Hesse, Deputy Assistant Att'y Gen., Dep't of Justice, Antitrust Division, Address at the Global Competition Review 2nd Annual Antitrust Law Leaders Forum: IP, Antitrust and Looking Back on the Last Four Years (Feb. 8, 2013).

Google: U.S. Investigation Concludes - Ongoing Investigations in Europe

By Cara Dearman, Wheeler Trigg O'Donnell LLP

On January 3, 2013, the FTC announced a settlement bringing to an end its investigation into whether Google unlawfully biased its search results by intentionally ranking websites owned by Google higher than other websites in its Google search engine results, in an attempt to generate more revenue for its vertically-integrated companies, among other issues. The FTC did not find sufficient evidence of biased search rankings to bring a case against the search giant, but Google did make several commitments in the negotiated settlement that relate to other potential antitrust issues. Foremost among these is that Google has agreed to not seek injunctions against prospective licensees willing to license what the FTC calls "standard-essential" patents on fair and reasonable terms, as explained below.

When Google acquired Motorola Mobility in 2012, it found itself the owner of a number of important technology patents in the areas of smartphones, tablets, gaming systems, or high definition video. The FTC settlement attempts to ensure that Google will not use these standard-essential patents ("SEPs") to restrict access to such vital technology. Google agreed to a consent order that prohibits it from seeking an injunction against a willing licensee of an SEP. *In re Motorola Mobility and Google Inc.*, Decision and Order, File No. 1210120 (FTC Jan. 3, 2013) (proposed consent order). In a separate agreement, Google has agreed to create an application programming interface ("API") that will allow customers of Google's AdWords service to coordinate their advertising campaigns across different search platforms. Google's new terms of service for its AdWords API states that users may now use the same ad copy in AdWords campaigns, regardless of the search platform used. *See* Letter from David Drummond, Chief Legal Officer, Google, Inc. to Chairman Jon Leibowitz, FTC (Dec. 27, 2012), *available at* http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf.

The FTC settlement has generally been seen as a positive development for Google. But while the U.S. investigation by the FTC has concluded, the European Commission continues to investigate Google on the basis of similar antitrust allegations, reportedly having set a deadline for fall 2013 to reach an agreement with the company. Google reportedly presented a number of concessions in February to try to settle the two-year long investigation. These likely included clearer labeling of what services it owns, so that users recognize when search results include Google-owned commercial sites, and imposing fewer restrictions for advertisers, possibly in line with its agreements with the FTC regarding cross-platform advertising. *See* James Kanter, *Google Makes Offer in 3-Year European Antitrust Case*, N.Y. TIMES, Feb. 2, 2013, at B2. Before agreeing to the concessions, European regulators have reached out to industry participants for feedback. In a letter to the Commission on March 21, 2013, a group of Google's competitors, primarily providers of targeted search services such as travel booking sites, urged the Commission to issue a statement of objections to Google's search practices. Whatever the result, Commissioner Joaquín Almunia has stated that an agreement will certainly not be reached until after the Commission's summer break.

Meanwhile, Google also faces ongoing pressure in Europe relating to its privacy practices. In October 2012, EU authorities, led by the French CNIL, published a letter they sent to Google with twelve recommendations for privacy improvements. These included modifying practices regarding location data, combining personal data gathered on a large scale from across different Google services such as YouTube, Gmail, and Google+, and keeping track of users' browsing records. Regulators stated that Google must clearly tell users what information it collects about them, must gain user consent prior to collecting information, and have an opt-out mechanism for users other than

simply not using Google services. Additionally, Google must reduce the amount of user information it collects and limit how long it keeps this information. The authorities claim that Google has provided no effective response to these requests and has given no indication that it is considering changing its policies due to the letter.

Now, the Article 29 Group, the European Union's Data Protection Authority has voted to summon Google to explain its alleged lack of action. The Group demanded substantial progress from Google on privacy concerns by this summer. The main priority of EU regulators seems to be providing for some kind of opt-out function for users of Google's many services to prevent their information from different services being combined. *See* Jeff Gould, safegov.org, *Google's New Battle with Europe: Who Will Win?*, WIRED, Feb. 26, 2013, *available at* http://www.wired.com/insights/2013/02/googles-new-battle-with-europe/.

Google, for its part, has stated that its privacy policy complies with EU law, and that it is reviewing the Group's recommendations. It remains to be seen whether the Article 29 Group actually has the authority to summon Google to appear before it, and whether it has sufficient leverage to induce Google to change its practices.

Toshiba Reaches Direct Purchaser Settlement in CRT Antitrust Litigation

By Wilson Mudge, Arnold & Porter LLP, with contribution from Katherine Clemons

Japanese electronics manufacturer Toshiba Corp. has agreed to settle some of the price-fixing claims against it in the multidistrict cathode ray tube ("CRT") antitrust litigation pending in the Northern District of California. Under the proposed settlement, one group of plaintiffs (direct purchasers of Toshiba CRTs and CRT products) has agreed to release Toshiba from all claims in exchange for $13.5 million.

Cathode ray tubes, or CRTs, are the primary functional component of "tube" televisions and monitors, which dominated the viewing display market for over 50 years, until the advent of the now-common LCD and plasma screens. Plaintiffs, direct and indirect purchasers of CRTs and CRT products, brought this putative class action in 2007 against Toshiba and several other CRT manufacturers, alleging that the manufacturers conspired to restrain trade in violation of the Sherman Act. The direct purchaser plaintiffs allege the CRT manufacturers conspired to fix prices and reduce output of both CRTs and CRT products between 1995 and 2007. They seek damages for overpayment, claiming that CRT prices should have fallen during the class period based on reduced demand, but instead remained stable as a result of the defendants' collusion.

Toshiba continues to deny all wrongdoing. According to the settlement agreement, in addition to making a $13.5 million cash payment, Toshiba must also provide certain specified discovery-related assistance to the direct purchaser plaintiffs.

Toshiba is the fifth defendant to reach a settlement with the direct purchasers in this case. Defendants Chunghwa Picture Tubes and Philips settled for $10 million and $27 million, respectively, and both settlements have received final approval from the court. The court also has granted preliminary approval to direct purchasers' $17.5 million settlement with Panasonic and $25 million settlement with LG Electronics. The Toshiba settlement received preliminary approval from the district court on March 12, 2013. If finalized, the settlement would cover only the claims of the direct purchasers. Toshiba continues to face claims from indirect purchasers who bought Toshiba CRTs or CRT products from third parties, such as retailers.

China Approves Micron-Elpida Acquisition

By Wilson Mudge, Arnold & Porter LLP, with contribution from Katherine Clemons

U.S.-based semiconductor manufacturer Micron Technology, Inc. is now several steps closer to completing its purchase of bankrupt former rival Elpida Memory, Inc. after receiving antitrust clearance from the Chinese Ministry of Commerce and winning a key approval vote under Japanese bankruptcy law.

Dynamic Random Access Memory (“DRAM”) provides temporary, “working” data storage for many types of computers and mobile devices. While the global market for DRAM is large and growing, a number of factors -- including low margins, lack of brand loyalty, and difficulties in supply and demand predictions -- have led to a harsh business climate. Boise, Idaho-based Micron has operations across the globe, focused primarily on memory including “flash” storage. Elpida, the only major DRAM manufacturer still based in Japan, is a combination of the former memory manufacturing operations of NEC, Hitachi, and Mitsubishi. In spite of having a roughly 12% share of the multi-billion dollar DRAM market, Elpida was forced to file for reorganization under Japan’s bankruptcy regime on February 27, 2012, with liabilities of around $5.5 billion. Micron’s purchase of Elpida arises out of a reorganization plan under which Micron will purchase roughly $750 million of Elpida’s remaining equity and assume roughly $1.75 billion in debt.

Aspects of the proposed transaction might have drawn scrutiny from competition authorities, as much of the world’s DRAM is manufactured by a handful of large firms. This does not appear to have been the case, however, as on February 19, 2013, Micron and Elpida announced that Chinese antitrust authorities had approved the acquisition. China’s pre-merger clearance joins those previously issued by the United States, the Czech Republic, Japan, South Korea, Singapore, and Taiwan. The acquisition is still conditioned on final approval in Japanese and United States bankruptcy courts, but the parties expect that the transaction will be completed in the first half of 2013 and could be final as early as the end of March.

FTC Updates “Dot Com” Guidance For Online, Mobile, & Social Media Disclosures

By Jonathan L. Pompan and Ellen T. Berge, Venable LLP

On March 12, 2013, the Federal Trade Commission (“FTC”) issued fresh guidance designed to help advertisers meet basic truth-in-advertising principles when using the Internet, mobile, social media, and other new platforms to communicate with consumers.

The FTC’s new publication, titled “.com Disclosures: How to Make Effective Disclosures in Digital Advertising” (“.com Disclosures Guide” or “Guide”) is a revision of the agency’s Dot Com Disclosures Guide, which the FTC first issued in 2000 when smartphones, tablets, and social media marketing were not in wide use. The revised Guide emphasizes that consumer protection laws apply equally to marketers across all mediums, whether delivered on a desktop computer, a mobile device, or more traditional media such as television, radio, or print.

The Guide emphasizes established principles, including that “if a disclosure is needed to prevent an online ad claim from being deceptive or unfair, it must be clear and conspicuous.” The FTC says this principle means advertisers should ensure that the disclosure is clear and conspicuous on all devices and platforms that consumers may use to view the ad.

Like the original guidance, the updated .com Disclosures Guide calls on advertisers to avoid using hyperlinks for disclosures that involve information integral to the offer or claim, such as product cost or certain health and safety issues. The new guidelines also call for labeling hyperlinks as specifically as possible, and they caution advertisers to consider how their hyperlinks will function on various programs and devices. The Guide advises marketers to avoid conveying such disclosures through pop-ups, because they are often blocked. The Guide also explains that if an advertisement without a disclosure would be deceptive or unfair, or would otherwise violate a Commission rule, and the disclosure cannot be made clearly and conspicuously on a device or platform, then that device or platform should not be used.

Taking into account the increase in the use of small screens and mobile advertising, the Guide includes mock ads that illustrate the updated principles. For example, the Guide illustrates how disclosures may be incorporated into space constrained banner ads and “tweets.” The FTC also addressed disclosures required to explain the offer terms of a subscription program or other negative option program, suggesting that consumers should be required to affirmatively opt-in to the program before allowing the consumer to add a program to an online shopping cart.

Although the Guide does not have the force and effect of law, the failure to comply with a guide might result in an enforcement action alleging an unfair or deceptive practice in violation of the Federal Trade Commission Act.

General Background

Generally, advertisers are responsible for ensuring that all express and implied claims that an ad conveys to reasonable consumers are truthful and substantiated. When identifying these claims, advertisers should not focus only on individual phrases or statements, but should consider the ad as a whole, including the text, product name, and depictions. If an ad makes express or implied claims that are likely to be misleading without certain qualifying information, the information must be disclosed.

A disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive. In that situation, the claim itself must be modified.

The .com Disclosures Guide only addresses disclosures required pursuant to laws that the FTC enforces. It does not address disclosures that may be required pursuant to local, state (*e.g.*, many sweepstake requirements), or other federal laws or regulations (*e.g.*, regulations issued by the Consumer Financial Protection Bureau (“CFPB”) or the Food and Drug Administration (“FDA”)).

Guidance Highlights

- **Disclosure Standard** – Advertisers should make sure their disclosures are clear and conspicuous on all devices and platforms that consumers may use to view their ads. Whether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad. Additional guidance includes:

- Don’t assume that consumers read the entire website.
- Draw attention to the disclosure.
- If the disclosure can’t be made to be clear and conspicuous, modify the claim so the disclosure is not necessary or don’t use the claim.
- If the platform doesn’t support the appropriate placement of the disclosure, then don’t use it to disseminate the advertisement.

- **Design Considerations** – Disclosures should be “as close as possible” to the relevant claim. Hyperlinks should be avoided for disclosures involving key information and should not be used to bury advice or be buried themselves. Advertisers should label hyperlinks as specifically as possible. If there are indications that a significant portion of reasonable consumers are not noticing or comprehending a necessary disclosure, the disclosure should be improved. Hyperlinks should be used consistently and be obvious. Don’t use pop-ups or other means to convey a disclosure that can be bypassed.

- **Space Constraints** – Unique features in online ads including social media and mobile devices, may affect how an ad and any required disclosures are evaluated. Don’t assume that consumers will see each and every space-constrained advertisement if done in sequence, such as on Twitter. In addition, the Guide suggests that short-form disclosures might not be adequate to inform consumers of the essence of a required disclosure. Tweets, for example, could begin with “Ad:” and use “Sponsored” to convey when a message is sponsored. Consider what processes are in place to retain disclosures upon republication and if the content is printed.

- **Evaluation of Disclosures** – To evaluate whether a particular disclosure is clear and conspicuous, consider:

  - Proximity and Placement – evaluate proximity; hyperlinks may be used, but not for integral or inseparable information; consider the label and placement of hyperlink
  - Prominence – consider the size, color, device, and graphics.
  - Distracting Factors in Ads – don’t let other parts of the ad get in the way
  - Repetition – repeat as needed
  - Multimedia Messages and Campaigns – for audio claims, use audio disclosures; for written claims, use written disclosures, display visual disclosures for a sufficient duration
  - Understandable Language – avoid legalese or technical jargon, avoid diminishing the disclosure with extra material, icons and abbreviations cannot prevent a claim of misleading if a significant minority of consumers do not understand the meaning

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