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Monopolization charges rise after hacking scandal

The revelation that reporters for the British tabloid News of the World illegally hacked cellphones belonging to a 13-year-old murder victim, among others, last month continues to play a large role in global business practices. One of the most unexpected results may be its effect on the new scrutiny global IP licensing practices are facing under anti-monopoly laws.

The phone hacking scandal that has engulfed News Corp., the owner of the tabloid at issue, had predictably led to increased scrutiny of journalistic practices and the scope of legal protection for private cellphone messages. Less predictably, however, is the resulting increased scrutiny of News Corp.'s potentially monopolistic control of news media in various countries. In the U.K., it was forced to withdraw an attempted acquisition of British Sky Broadcasting, the largest satellite network in the U.K. In Australia, its attempt to acquire its major cable rival Austar was similarly blocked over concerns that the acquisition would result in a "substantial lessening of competition." While these actions appear largely based on traditional concerns over reduced competition in the telecommunications industry, they are simply one aspect of a growing trend toward reinvigorating anti-monopoly considerations in a wide variety of global business practices, including intellectual property ownership and licensing. The European Union and countries as diverse as the United States, Australia, South Korea and Japan are revising antitrust practices which include potentially heightened scrutiny of IP licensing and marketing practices. The State Administration of Industry and Commerce (SAIC) of China is presently working on draft guidelines for the application of China's relatively new anti-monopoly laws to intellectual property practices. Old assumptions about the pro-competitive nature of granting "monopoly" patents and copyrights are being reconsidered, while new rules that equate "abuse of a dominant position" with perceived high prices for IP-protected products may be on the horizon.

The uncertain role of intellectual property rights in the marketplace is not a new phenomenon. As early as the 1970s, even the U.S. Department of Justice took a dim view of patent licensing practices. It created a list of nine "No-No's" that included such acts as grant-backs of subsequent patents acquired by the licensee and mandatory cross-licensing of patents that could lead to potential antitrust liability. Although this hostile approach to patent licensing was later amended, there is increasing evidence globally that the perceived "safe harbor" of acceptable monopoly rights based on intellectual property ownership may no longer be viewed so benignly. Linking of software operating systems to proprietary Internet browsers, marketing agreements that remove generic versions of patented drugs from the market and even the prices charged for software have all been the focus of recent antitrust investigations internationally.

At the heart of most of these investigations has been the critical question of the extent to which a patent or copyright grants the owner a "dominant market position" which is thereafter "abused" by the holder. Clearly, both copyright and patent owners are granted exclusive control over their intellectual property. What is less clear is the extent to which such exclusivity results in actionable market dominance. Article 8 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) plainly recognizes that intellectual property can form the basis for an anti-monopoly claim. It allows governments to take "appropriate measures ... needed to prevent the



Global IP

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abuse of intellectual property rights by right holders." Article 40 of TRIPS further recognizes that such abuse may include licensing practices "having an adverse effect on competition in the relevant market." Among the types of practices which it lists are: exclusive grant-backs, "coercive package licensing" and provisions that prevent validity challenges. This list, however, is not an exclusive one. Problematically, a definition of what qualifies as "abuse" remains one of domestic law.

The renewed scrutiny of potential monopolistic practices by content owners such as News Corp. may become the center of a perfect storm that re-energizes efforts by developing countries to reconfigure anti-monopoly laws to control practices perceived to interfere with their own economic development plans. In the past year alone, companies as diverse as Microsoft, Google and AstraZeneca have faced anti-monopoly scrutiny for a variety of IP-related practices. One newly emerging issue is the negative role which IP rights and perceived high prices can have on an anti-monopoly analysis. In upholding the European Commission's fine against AstraZeneca for abuse of a dominant position based on its efforts to hinder the marketing of a generic drug, the European General Court specifically cited both AstraZeneca's patent and the high prices it charged as evidence of its "dominant position."

Pricing has also come under scrutiny in China where an anti-monopoly claim against Microsoft for abuse remains pending. According to published reports, the claim is based on alleged abuse of Microsoft's market position to manipulate software prices in China. It is not clear to what extent the draft guidelines which SAIC is expected to release will address the relationship between intellectual property and pricing activities. Given past practices, however, at least IP owners will be given an opportunity to comment on the draft before it is finalized. One of the most convenient locations to find an English language version of the draft guidelines when it appears, as well as an opportunity for comment, should be the website for the Global Regulatory Cooperation Project of the U.S. Chamber of Commerce at uschamber.com/grc/competition-policy-antitrust.

Based on these developments previously acceptable or at least unchallenged licensing practices may come under future scrutiny in the wake of the phone hacking scandal. For those companies doing business internationally, particularly in the European Union and Asia, now is the time to examine past practices to avoid future red flags for costly anti-monopoly investigations.