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Google's FTC agreement may bring help to Apple

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In the legal war to bolster their positions in the smartphone market, Google Inc. and Apple Inc. remain sworn enemies.

So it may seem odd that a legal move by Google may bolster Apple's chances in a separate legal fight the iPhone-maker currently faces with Samsung Electronics at the International Trade Commission (ITC).

A local patent lawyer and law professors said a settlement Google reached last week with the Federal Trade Commission (FTC) could do just that.

Google agreed with the FTC not to seek sales bans on competitors' products that infringe the standard-essential patents it acquired through the purchase of Motorola Mobility last year. These patents become essential for companies in the same industry because they cover basic parts of a technology.

In a separate case at the ITC, Apple and a host of other technology companies argued that the ITC, as a rule, should not levy a sales ban on Apple's or any other company's products if they infringe standard-essential patents.

"(Google's agreement) should certainly serve as an additional

warning to all courts that it would be a tremendous mistake to grant an injunction against a product that infringes a standard-essential patent," said Jonathan Masur, a professor of patent law at the University of Chicago Law School.

"The FTC's decision is, of course, not binding on a judge at the ITC or any other court. ... But I hope that it will exert some sway."

In this case, standard-essential patents cover such technology that lets cellphones connect to wireless networks.

Companies that receive patents like this typically agree to license them to competitors on "fair, reasonable and nondiscriminatory" terms.

If regulators or courts grant injunctions, or sales bans, on products that infringe standard-essential patents, then holders of those patents could demand large licensing fees, the FTC said in a release accompanying the Google agreement. The FTC calls this scenario a patent "hold-up."

"This type of patent hold-up can lead to higher prices, as companies may pay higher royalties for the use of Google's patents because of the threat of an injunction, and then pass those higher prices on to consumers," the FTC said.

In a separate, ongoing case at



Daryl Lim

the ITC, Apple faces the threat of a potential sales ban on its iPod, iPhone and iPad products if the ITC finds Apple infringed Samsung's standard-essential patents.

David L. Newman, an intellectual property partner at Arnstein & Lehr LLP, said the ITC could rely on the FTC's agreement with Google as a basis not to place an import ban on Apple's products.

The FTC-Google agreement laid out an arbitration process as a way to agree on fair licensing terms for standard-essential patents. If a patent owner does not offer fair licensing terms and instead seeks a sales ban first, the FTC says that could consti-

tute a violation of the Sherman Antitrust Act.

"The ITC might rely on that reasoning to find that the conduct in the case of Samsung could rise to the level of a violation of the antitrust rules," Newman said.

"And so tying the logic of the FTC's ruling against Google could lead the ITC to determine that such an injunction on behalf of Samsung could hurt the public."

The ITC asked for public comment in the Apple case — No. 337-794 — on using sales bans as a remedy for infringing standard-essential patents.

The ITC expects to make a decision by Feb. 6.

While the FTC's agreement with Google makes clear its view on the issue, Daryl Lim, an assistant professor of patent law at The John Marshall Law School, said any impact on the Apple-Samsung case could face limitations by the two agencies' differing goals and mandates.

"The prevailing view is that the ITC, like the Federal Circuit, views patents as a property right which warrants injunctive relief as the norm," Lim said.

"The ITC and district courts, while cognizant of the public interest factor of the FTC-Google (agreement), will treat it similarly to a private settlement."