

Antitrust Law Blog

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Technology Sector Comes Under Increased Antitrust Scrutiny

Earlier this year, in her first speech as Assistant Attorney General in charge of the Department of Justice's (DOJ) Antitrust Division, Christine Varney referred to Americans' growing reliance on high-tech solutions in the home and workplace, and stated that her Department "planned to devote attention to understanding the unique competition-related issues posed by these markets". See Christine Varney, *Vigorous Antitrust Enforcement in This Challenging Era*, Speech Before the Center for American Progress (May 11, 2009), available [here](#). Less than six months later, DOJ has reportedly initiated an antitrust investigation into one of the nation's largest technology companies, IBM, and filed a brief detailing its concerns at a proposed book settlement that would allow the creation of a vast digital library by Google. During the same time period, the Federal Trade Commission (FTC) has been investigating the boardroom overlap between Google and Apple with respect to a breach of the prohibition on "interlocking directorates" and the Federal Communication Commission (FCC) has been investigating the state of competition in the wireless market. Together, these actions may evidence the beginning of a wider trend of antitrust scrutiny of the technology sector.

DOJ's IBM Investigation

In response to alleged "inadequate antitrust oversight" (*see id.*) during the previous Administration and in light of the comparative approach of the European Commission ("EC") over most of the past decade to monopoly-type cases against U.S. technology companies such as Microsoft and Intel, DOJ has reportedly launched an investigation into possible violations of Section 2 of the Sherman Act by IBM in the mainframe computer market. According to published news reports, the investigation stems from a complaint by the Computer and Communications Industry Association ("CCIA") that alleges that IBM has used its monopoly position to keep competitors out of the marketplace by refusing to license its operating system software to rival manufacturers of mainframe hardware. The CCIA alleges that IBM effectively blocked actual and potential competition by tying its operating system software to its mainframe computer hardware. IBM has reportedly stated that it intends to co-operate with any inquires from DOJ and has previously remarked with respect to an on-going EU investigation that it is "fully entitled to enforce our intellectual property rights and protect investments that we have made in our technologies".

DOJ's Concerns at Google's Digital Library

In mid-September, DOJ submitted a 32-page brief raising a number of antitrust concerns regarding a book settlement agreement that would allow the creation of a vast digital library of out-of-print books by Google. See Statement of Interest of the United States Regarding Proposed Class Settlement in *The Authors Guild, Inc. v. Google, Inc.*, available [here](#). While DOJ acknowledged that the proposed settlement has a number of significant potential benefits, DOJ stated that it also raised two serious antitrust issues.

First, DOJ is concerned that through collective action, the proposed settlement appears to give book publishers the power to restrict price competition among authors and publishers in at least three respects: (1) the creation of an industry-wide revenue-sharing formula at the wholesale level applicable to all works; (2) the setting of default prices and the effective prohibition on discounting by Google at the retail level; and (3) the control of prices for "orphan books" by known publishers and authors with whose books the orphan books likely compete. Although they arise in a unique context, DOJ submits that these features bear an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential *per se* violations of the Sherman Act.

Second, DOJ is concerned that other digital distributors may be effectively precluded from competing with Google in the sale of digital library products and other derivative products to come as a result of Google's *de facto* exclusivity of the digital rights of the large category books subject to the proposed settlement.

FTC's Investigation of Boardroom Ties Between Google and Apple

In May, it was reported that the FTC was investigating the close boardroom ties between Google and Apple under Section 8 of the Clayton Act, which prohibits the so-called "interlocking directorates" that occur when two competing corporations share one or more directors in common. It was widely considered that the FTC was investigating the extent to which both companies have become "competitors" within the meaning of Section 8 by virtue of their rapidly proliferating product offerings in high-tech markets. For example, Google is developing an operating system for computers based on its existing Chrome web browser, which would compete with Apple's own Mac OS X operating system. Google has also developed its Android software for cell phones while Apple offers applications for its own iPhone.

Since May, two individuals—each of whom served on the boards of directors of both companies—have resigned directorships. First, Google CEO and chairman Eric Schmidt resigned from Apple's board in August. Apple director Arthur Levinson then stepped down from Google's board on October 12. After Mr. Levinson's resignation was announced, the Chairman of the Federal Trade Commission, Jon Leibowitz, issued a statement remarking that both companies "should be commended for recognizing that overlapping board members between competing companies raise serious antitrust issues and for their willingness to resolve [the FTC's] concerns".

FCC's Inquiry of Wireless Competition

Finally, the FCC announced in late August that it would conduct an inquiry into competition in the US wireless industry. In an accompanying press release, the FCC stated that, “Wireless mobility has become central to the economic, civic, and social lives of over 270 million Americans...[and] [t]he FCC is seeking to ensure that competition in the mobile wireless market continues to bring substantial benefits to American consumers”. See *FCC Announces Notice of Inquiry on Mobile Wireless Competition* (August 27, 2009), available [here](#). It has been widely reported that the FCC inquiry is expected to look at various practices in the industry including exclusivity deals between handset makers and wireless carriers such as Apple's exclusive iPhone deal with AT&T.

Conclusion

It appears that the federal antitrust enforcers may be heeding Ms. Varney's call to take on the mantle of leading enforcement efforts in technology industries, including exploring vertical theories and other new areas of civil enforcement.

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