HARMONIZING COMPETING LEGAL THEORIES IN PATENT LAW, ANTITRUST LAW AND THE FIRST AMENDMENT

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ABSTRACT

The Supreme Court held in Walker Process Equip. Co. v. Food Mach. & Chem. Corp. (1965) (Walker Process) that enforcement of a patent procured by fraud on the U.S. Patent and Trademark Office can violate Section 2 of the Sherman Act. However, Walker Process left open who had standing to sue and the burden of proving such a claim. Recently, appellate courts have made large sweeping rulings on these issues. The author suggests that this trend has departed from the language of Walker Process, which left open the ability of lower courts to create nuanced rulings to reflect an effective melding of the jurisprudential theories underlying patent law, antitrust law, and the First Amendment.

INTRODUCTION

Patent law complements antitrust law. The patent system seeks to "promote the progress of science" by adjusting investment-based risk (U.S. Const. art. I, § 8, cl. 8). Likewise, the antitrust laws seek to foster competition in industry. Using civil actions to enforce the patent law and antitrust laws are complicated by the First Amendment of the U.S. Constitution. Likewise, antitrust law seeks to foster competition in industry. However, using civil actions to enforce patent and antitrust laws are complicated by the First Amendment of the U.S. Constitution.

The primary reason for this complication is that patent law antitrust law and the First Amendment have very different underlying jurisprudential theories that have guided their respective interpretations in American courts since the beginning of the twentieth century. Patent law has been formed and guided by property theories. Patent law seeks to determine when a property right is created, when that property right is misappropriated, and what remedies are available for such misappropriations (O'Brien, 2009). In contrast, antitrust law is formed and guided by microeconomic theory and, in particular, industrial organization. Industrial organization asks how firms set prices in a market economy (Fisher & Monz, 1991). A part of industrial organization regards either causing a deviation from an equilibrium market price, or punishing such a deviation when it occurs. The former is commonly called regulation, and the latter is commonly referred to as competition policy or antitrust. Antitrust often involves balancing society's interests with the interests of a particular firm; this utilitarian balancing is similar to that used in First Amendment analysis. The First Amendment protects certain kinds of expression from interference by the government. In doing so, courts consider "competing private and public interests at stake in the particular circumstances shown." (Barenblatt v. United States, 1959).

Consequently, patent law, antitrust law, and the First Amendment intersected in a unique variety of antitrust laws that developed over the last few decades. This article examines the interplay of these laws and their underpinnings in the context of direct purchasers, typically retailers, suing sellers of patented products for deceiving the U.S. Patent and Trademark Office while their patents are being obtained. This is commonly referred to as a Walker Process claim. This article argues that allowing retailers' broad standing to sue disregards the nuance that Walker Process embraced. The article concludes with recommendations to balance the antitrust policy considerations of purchasers with property rights of patentees and the First Amendment.

Patent Law: a Primer

An inventor may obtain a patent for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof" (35 U.S.C. § 101). In order to do so, an inventor must apply to the U.S. Patent and Trademark Office (USPTO) and explain how to make and use the invention (35 U.S.C. § 112). A person is entitled to patent on a device, unless the device was "in public use or on sale [for] more than one year prior to the date of the application for patent," or the applicant "did not himself invent the subject matter sought to be patented" (35 U.S.C. § 102(b)). Additionally, an applicant has a "duty to disclose information material to patentability" such as prior sales, previous public uses, and other inventors (37 C.F.R. 1.56). Therefore, a patent application often contains more than just a description of the invention, since it must also contain information that could negatively affect patentability.

Once a patent issues, the patentee has the right to prevent others from making, using, or selling the patented invention anywhere in the United States and the patentee can obtain money damages for an infringement of these rights (35 U.S.C. § 271). An action for infringement requires 1) an act of infringement, and 2) a valid patent (35 U.S.C. § 271). When a patent represents an entire market, and that patent is enforced, the patent holder has an opportunity to gain a monopoly in that market in and obtain monopolist profits. Such large rewards have tempted some patent applicants to avoid disclosing information that could negatively affect patentability. Unfortunately, when an applicant fails to disclose known information that is material to patentability, an issued patent could later be cancelled.

In this regard, the creation and modification of a property right manifests the moral underpinning of the Patent Act. People have ownership rights to the fruits of their labor that result in an added value to society (Locke, 1986, p.8). Once ownership is established, society has the prerogative to create rules regarding modification (Epstein, 1998, p.30). The primary modification to ownership that society seeks to prevent is theft (Exodus 20:15). Without protections to prevent theft, individuals would have limited incentive to add value to society out of fear that this value may be stolen from them (Aquinas, II-II, q.66).

Wrongfully obtained property is equally troubling. The action requiring one to return wrongfully obtained property has been recognized at Common Law since the time of King Henry III (Statute or Marlbridge). Likewise, a prohibition against stealing from the sovereign has been recognized since time immemorial (Genesis 42:29-43:15 King James Version). It follows reasonably then, that patents are property rights that should be protected – unless the patent is a product of deceit on the USPTO, in which case, the patent should be cancelled. However, the extent of the ramifications of the monopoly power, in the context of patent enforcement, is the subject of antitrust law, which is discussed in the next section.

The Intersection of Patent Law and Antitrust Law

A patent enables the patentee to prevent others from making, using, or selling the patented device anywhere in the United States (35 U.S.C. § 271). However, there can be no monopoly until a patent is enforced. For example, through patent enforcement, competition can be removed from the marketplace by using the threat of an infringement lawsuit (35 U.S.C. § 281). Once competition has been removed, the firm with the patent is able to charge a cartel price – an artificially high price that is well above the market price of the invention. (Sexton, R. 2010, p. 370).

Cartel prices can cause two possible antitrust injuries. The first possible injury is a competition injury that applies to either those persons about to enter, or those persons who are presently in, the marketplace. Typically, this injury is calculated as the business loss of the plaintiff who was unable to enter the marketplace and is independent of any profits of the defendant (Foer & Cuneo, J. 2010, pp. 84-86). The second possible injury is an overcharge injury that applies to the direct purchaser and is calculated as the difference between the cartel price and the market price (Foer, A. pp. 84-86). Practically, direct purchasers typically suffer very minor and speculative injuries – perhaps only a few pennies (Crane, 2010, p. 12-14). This minimal injury is because most of the injury to the direct purchaser is passed through to the consumer (Crane, p. 12-14).

Section 2 of the Sherman Antitrust Act prevents the willful acquisition or maintenance of monopoly power in a market (Sherman Antitrust Act). However, obtaining a patent gives the patent holder an exception to Section 2 and the ability to charge cartel prices without facing criminal penalties under the Sherman Act or civil penalties under the Clayton Act (United States v. General Electric Co., 1926). This exception would appear to comport with the moral underpinnings of the Patent Act, by creating a property right for the inventor, and then giving the inventor the opportunity to enforce the property right. However, the termination of a property right, specifically by the sovereign, raises First Amendment issues.

Utilitarian Balancing Under the First Amendment

In Walker Process Equip. Co. v. Food Mach. & Chem. Corp., (1965) (Walker Process), the U.S. Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present". In that case, Walker Process Equipment sued Food Machinery & Chemical for infringing its patent for knee-action swing diffusers used in aeration equipment for sewage treatment systems. Food Machinery & Chemical counterclaimed, claiming that Walker Process Equipment "illegally monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining . . . its patent . . . well knowing that it had no basis for . . . a patent" (Walker Process Equip. Co., at 175). In particular, Food Machinery & Chemical stated that Walker Process Equipment, in its patent application, failed to report sales that would qualify as prior art, thereby violating the duty to disclose information material to patentability (Walker Process Equip. Co., at 175). In short, the defendant counterclaimed that Walker Process Equipment, by suing Food Machinery & Chemical, was seeking to enforce a patent that should not have been issued by virtue of the previous undisclosed sale.

The Supreme Court recognized that the counterclaim in Walker Process involved balancing conflicting interests between the Sherman Act and the First Amendment of the U.S. Constitution. The Sherman Act prevents willful acquisition or maintenance of monopoly power in a relevant market (Sherman Antitrust Act; United States v. Grinnell Corp., 1966). Simultaneously, Americans can "petition the Government for a redress of grievances" under the First Amendment (U.S. Const. amend. I). This "right to petition extends to all departments of the Government," (Cal. Motor Transp. Co. v. Trucking Unltd, 1972) and thus creates an "antitrust immunity" from liability under the Sherman Act for such petitions, including patent applications (Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 1961 (Noerr)). In Noerr, a group of rail companies lobbied the Pennsylvania State Legislature for an advertising campaign that disparaged the trucking industry in the state. The statute was vetoed, but the trucking companies claim to have suffered some losses from the debate surrounding the law and sued under the Clayton Antitrust Act (1914). The U.S. Supreme Court dismissed the case, stating that under the First Amendment, the rail lobby had the right to lobby for whatever it wanted. Therefore, Noerr (1961) created an antitrust immunity existed for activities that were protected under the First Amendment, even if those activities would otherwise incur liability under the Clayton Antitrust Act (1914).

However, the Supreme Court held that this "antitrust immunity" does not extend to petitioning considered to be "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," (Noerr, 1961). In Cal. Motor Transp. Co. v. Trucking Unltd (1972) (Cal. Motor Transp. Co.), one group of highway carriers sought to prevent a second group of carriers from obtaining permits for operation on highways by filing "a pattern of baseless, repetitive claims…." (Cal. Motor Transport Co. 1972). This abuse of administrative and judicial processes was found to be outside of the Noerr antitrust immunity. The U.S. Supreme Court allowed an action under the Clayton Antitrust Act (1914) to proceed against the first group of highway carriers.

A similar exception from Noerr's antitrust immunity exists in "the enforcement of a patent procured by fraud on the Patent Office" (Walker Process Equip. Co., 1965). Thus the Court ruled that a viable claim (hereafter a "Walker Process claim") arises when one party claims that another party, which has obtained a patent based on fraud, is trying to enforce that fraudulent patent to obtain a monopoly in the market, in violation of the Sherman Act.

Interestingly, the issue of who has standing to assert a Walker Process claim was not raised in Walker Process. Similarly, the requirements for successfully pleading a Walker Process claim were not enumerated in that case either. The Court's decision to leave the issue open-ended resulted in a plethora of divergent views, applying different principles on the matter. This was arguably done by design to afford lower courts more flexibility to reach nuanced rulings. A few of these rulings are discussed in the following sections.

Who Can Assert a Walker Process Claim and How?

The battlefield for stating a viable Walker Process claim is often found in the Federal Rules of Civil Procedure (hereafter "Rules" or "Rule"). In particular, Rule 12(b)(1) permits a defendant to dismiss a case for a lack of standing. Standing is an injury that is sufficiently significant in order for a lower court to hear a case. Additionally, Rule 12(b)(6) permits a defendant to dismiss a claim when a plaintiff has failed to adequately plead enough facts to show that the claim is plausible.

Turning first to standing as a constitutional matter, a plaintiff must have standing in order to sue. Constitutional standing exists where a plaintiff suffers an injury in fact, which is caused by the defendant, and can be remedied by a favorable court decision (Lujan v. Defenders of Wildlife, 1992). However, the Supreme Court, in Assoc. Gen. Contractors of Cal., Inc. v. Carpenters (1983), explained that "the focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action" (Assoc. Gen. Contractors of Cal., Inc. v. Carpenters, 1983).

Generally speaking, U.S. Supreme Court precedent seeks to provide for economic efficiency by allowing fewer potential plaintiffs in antitrust cases than in other cases because antitrust damages can quickly become fractured if too many plaintiffs assert overlapping injuries. Too many plaintiffs asserting overlapping injuries would create the unfavorable situation where there are fewer antitrust lawsuits and less antitrust enforcement.

As a practical matter, private parties, or those who are not the government, enforce the Sherman Act through the Clayton Act. In particular, Section 4 of the Clayton Act allows for money damages, including treble damages, and has very strict standing requirements, while section 16 of the Clayton Act allows for injunctive relief and has comparably lesser standing requirements than Section 4 (Schoenkopf v. Brown & Williamson Tobacco Corp., 1980 (Schoenkopf). Schoenkopf explained that Section 16 relief more encompassing because language is less restrictive than Section 4 and because injunctive remedy is flexible, adaptable tool for enforcing antitrust laws (Schoenkopf, 1980). However, both Sections 4 and 16 require a plaintiff to meet a higher standard of standing than constitutional standing by showing a favorable balance of five factors: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages" (Amarel v. Vonnell, 1996; Assoc. Gen. Contractors of Cal., Inc. v. Carpenters, 1983). In the context of Walker Process claims, the question of how direct the injury must be to assert standing has been the most controversial.

Theoretically, both competition injuries and pricing injuries are actionable in antitrust actions. This is because pricing injuries can also affect consumers who purchase products from direct purchasers. However, federal antitrust injuries cannot be remedied by indirect purchasers, (Illinois Brick v. Illinois, 1977). This rule applies to pricing injuries for indirect purchasers in Walker Process claims as well (In re Relafen Antitrust Litig., 2005)). It follows that, standing for Walker Process claims has historically been reserved for those parties who suffer a competition injury and wish to utilize a Walker Process claim as a counterclaim in a patent infringement case.

A question of law that has, until recently, remained unresolved is whether a direct purchaser may have standing to assert a freestanding Walker Process claim for an overcharge injury. As with many cases, the issue of whether or not a direct purchaser has standing to assert a Walker Process claim, was first tackled by the federal district courts. This district-level discussion resulted in two distinct lines of reasoning from the East and West Coasts of the United States – the first from the District of New Jersey, and the second from the Northern District of California. We turn now to the former, or what is referred to herein as the "New Jersey approach," which is characterized by giving the property rights of the patent holder, more weight than the likelihood of injury to the direct purchaser.

The New Jersey Approach to Walker Process Standing

The New Jersey approach is encapsulated in the legal theory espoused by former Federal Judge Orlofsky in In re K-DUR Antitrust Litig. (2007) (In re K-DUR). In that case, Judge Orlofsky determined that a competition injury, caused by an antitrust violation, is best litigated by a competitor (who is the party closest to the harm), and that direct purchasers do not have standing to bring a Walker Process claim for pricing injuries (In re K-DUR, 2007).

To arrive at this result, Judge Orlofsky examined a series of cases that discussed the issue of Walker Process standing in terms of both competition injuries and pricing injuries. The first word on the matter was by Judge McCurn in Indium Corp. of Am. v. Semi-Alloys, Inc., 1984. Indium Corp. of Am. involved a declaratory judgment action for patent invalidity, where the plaintiff raised a Walker Process claim for a competition injury. The court in Indium extended Walker Process standing to producers who "were ready, willing, and able to produce the article and would have done so but for the exercise of exclusionary power by the defendant" (Indium Corp. of Am., 1984).

Two years later Judge Thompson, in Carrot Components Corp. v. Thomas & Betts Corp. (1986) (Carrot Components), reached the exact opposite conclusion. Carrot Components, much like Indium, sought a declaratory judgment of invalidity of two of the defendant's patents, and damages for competition injury under a Walker Process claim (Carrot Components, 1986). However, in Carrot Components, the court ruled that with respect to declaratory judgment claims, only parties that have been directly threatened with suit, or parties who can demonstrate that they reasonably anticipate a patent infringement suit or some other effort by the patent holder to enforce a patent, might have standing to bring such a claim for relief.

Next to speak on the matter was Judge Posner, sitting by designation in Asahi Glass Co. v. Pentech Pharma., Inc., 2003 (Asahi Glass Co.) In Asahi Glass, the plaintiff was a supplier of paroxetine, the active ingredient in a generic version of the drug Paxil. Asahi sued the defendant, GlaxoSmithKline (Glaxo), in a declaratory judgment action similar to Carrot Components, in an effort to have the patent for Paxil declared invalid. To show the "directness of injury requirement," Asahi argued that its potential customers were not purchasing its paroxetine product because they feared being sued by Glaxo for infringement (Asahi Glass Co., 2003). Judge Posner observed that if the plaintiff's potential customers were deterred by Glaxo's threat of suit, then those customers had a cause of action against Glaxo based on competition injuries. However, Asahi itself had no right to bring an action on that basis. With regards to direct purchasers, Asahi Glass notes, in dicta, that direct purchasers who face an infringement lawsuit have standing to pursue Walker Process claims, but a supplier who is not the target of a suit by a patent holder does not have standing to bring a Walker Process claim.

After the Asahi Glass decision was In re Remeron Antitrust Litig (2005), where direct purchasers claimed they suffered an overcharge injury after Remeron published its patent for mirtazapine (In re Remeron). Judge Orlofsky noted that Remeron consolidated Indium and Carrot Components to create what would become the majority rule: "Plaintiffs, as direct purchasers, 1) never had the '099 patent enforced against them, 2) were never threatened with such enforcement, and 3) were not in a position to manufacture a competing generic version of mirtazapine" (In re Remeron, 2005). Essentially, under Remeron, at least one of these three conditions must be satisfied to have Walker Process standing for money damages. Remeron went on to explain that direct purchasers could seek injunctive relief under Section 16 of the Clayton Act, but that the speculative nature of the overcharge injury was too vague for Section 4 money damages (In re Remeron, 2005; Clayton Antitrust Act, 1914).

The only case Judge Orlofsky could find that granted direct purchasers standing to bring a Walker Process claim based on an overcharge injury was Molecular Diagnostics Labs. v. Hoffman-LaRoche, Inc., (2005) (Molecular Diagnostics) which departed from all existing case law at the time. In Molecular Diagnostics, the plaintiff, a direct purchaser of the subject patented product, brought suit under Section 1 of the Sherman Act. The plaintiff charged that it had been forced to pay artificially inflated prices for the product as a result of the defendants' enforcement of the patent, which the plaintiff alleged was obtained by fraud on the USPTO. In his opinion for Molecular Diagnostics, Judge Kennedy distinguished Carrot Companies from the present case, because here, the plaintiff was a direct purchaser, and not a competitor. Judge Kennedy also dismissed Remeron for its poor reasoning (Molecular Diagnostics, 2005). As he explained, the rationale behind heightened standing requirements was not to limit antitrust plaintiffs, but to ensure the correct plaintiff was in court.

> Examining these factors, the court sees no reason to limit standing to competitors. While entities facing enforcement actions are more likely to rely on Walker Process, this reflects more that they are in a stronger position to detect wrongdoing than a Congressional preference. If one believes that one of the primary purposes of a treble damages action is deterrence, then increasing the number of parties scrutinizing the actions of potential monopolists will further that goal. Moreover, because direct purchasers have frequent interactions with the defendants, they have a strong incentive to discover and litigate the offense. See William H. Page, The Scope of Liability For Antitrust Violations, 37 STAN. L. REV. 1445, 1488 (1985). Those against whom a patent is enforced, by comparison, will generally have limited contact with a defendant unless there is the suspicion of infringement (Molecular Diagnostics, at 281-82).

Thus, the court in Molecular Diagnostics ruled that direct purchasers and competitors are equally well-suited to pursue Walker Process claims against both patent holders whose patents are obtained through fraud or "inequitable conduct" on the USPTO and against those who collude with them.

However, Judge Orlofsky rejected Judge Kennedy's reasoning.

> Against the backdrop of this case law, I conclude that Molecular Diagnostics is an isolated anomaly. The fact that the Molecular Diagnostics court found an exception to the general rule of antitrust standing in that case certainly does not mean that the "rule" has lost sway in cases where antitrust claims are based on Walker Process-type allegations (In re K-DUR, at 2007).

In short, the New Jersey approach adopts the majority rule, which reserves standing for Walker Process claims for competitors alleging competition injuries, and rejects the reasoning in Molecular Diagnostics as it "created an unnecessary … split of authority, without any compelling reason" (Fisher v. San Jose, 2007). But was Molecular Diagnostics really "an isolated anomaly" (In re K-DUR, 2007)? The Northern District of California answered that question in the negative.

The Northern District of California Approach

As referred to herein, "the Northern District of California approach" is the legal theory adopted by Judge Alsup in In re Netflix Antitrust Litig. (2007) (In re Netflix), in which direct purchasers were granted standing to bring a Walker Process claim. This theory adds a new dimension for plaintiffs to attack not only the property rights of patentees who allegedly use deception to obtain patents, but to punish such patentees for their ill-gotten gains on both the competitor level and the direct purchaser level.

As a matter of background, Netflix operates an online DVD rental business covered by two patents: U.S. Patent Nos. 6,584,450 and 7,024,381. On April 4, 2006, Netflix sued Blockbuster for infringement of the '381 patent and the case went into discovery before settling (Netflix, 2007). Dennis Dilbeck, a consumer who rented DVDs from Netflix, tried to intervene in the action, stating that he suffered an overcharge injury as a result of Netflix's patent, which was obtained by fraud. The court denied Mr. Dilbeck's request and the parties subsequently settled. Undaunted, Mr. Dilbeck filed suit, alleging a Walker Process antitrust violation based on the Blockbuster lawsuit. He claimed that the Netflix patents prevented others from entering the market and that the Blockbuster lawsuit was a sham, resulting in a price injury for direct purchasers like him. In granting Mr. Dilbeck standing in Netflix, Judge Alsup found Molecular Diagnostics persuasive because he believed that in some antitrust cases, the consumer suffers most directly. Judge Alsup determined that the New Jersey cases were not dispositive in Netflix because those cases were dealing with issues different than in the current case:

> This order finds Molecular Diagnostics persuasive. Even though Walker Process claims are predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers. Competitors are excluded from the market allowing the patentee to create or maintain an unlawful monopoly (Netflix, Inc., 2007).

However, Judge Alsup ultimately dismissed the claims for failure to plead with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) requires that allegations of fraud be stated with particularity. This requires that adequate allegations to be present to show that relief is plausible. Where relief is not plausible the claim will be dismissed.

This issue recently came before the Northern District of California again in Ritz Camera & Image, LLC v. SanDisk Corp. (2008) (Ritz Camera I). By way of background, in SanDisk Corp. v. STMicroelectronics, Inc., (2008) (SanDisk) SanDisk sued STM and others for patent infringement (SanDisk, 2008). The case was eventually consolidated with Ritz Camera and another case, and STM settled. Presently, SanDisk is not suing anyone for patent infringement relating to the patents in this case. The issues in Ritz Camera and STMicroelectronics are essentially identical, and only the parties differ. In Ritz Camera, the plaintiff alleged that Eliyahou Harari tortuously converted flash memory technology from his former employer, STM, which led to SanDisk obtaining U.S. Patent Nos. 5,172,338 and 5,991,517. Further, Ritz Camera alleged that SanDisk failed to disclose prior art to the Patent Office, making the patents procured by fraud. Moreover, SanDisk's effort to enforce the '338 and '517 patents against STM and others, created a cartel price for flash memory above the market price. This created an overcharge injury to Ritz Camera, who purchased chips containing the patented flash memory technology for its cameras from SanDisk. Ritz Camera argued that it should have direct purchaser standing to remedy the overcharge injury with a Walker Process claim.

Unlike Netflix (2007), where there was no pleading support for a Walker Process claim, Judge Fogel found sufficient support in STMicroelectronics. Thus, the only question in Ritz Camera, was whether or not direct purchasers could assert a Walker Process claim for a price injury (Ritz Camera I, 2011). Judge Fogel answered that question in the affirmative, but only for the very narrow reason that SanDisk's patents were tainted from STM's Walker Process claim in STMicroelectronics. In that case, STM had alleged a competition injury and its Walker Process claim survived summary judgment before the case eventually settled. Thus, with regards to Ritz Camera's direct purchaser standing for an overcharge injury in the present case, Judge Fogel opined:

> However, because viable Walker Process claims are rare, it is unlikely that many direct purchasers will be in the same position as Ritz is here. Moreover, as the Supreme Court observed in Walker Process, "the interest in protecting

> patentees from 'innumerable vexatious suits' [may not] be used to frustrate the assertion of rights conferred by the antitrust laws" (Ritz Camera I, 2011).

Further, the court noted that "because of the heightened evidentiary requirements necessary for a showing of fraud, few Walker Process claims survive summary judgment," putting Ritz Camera in a very unique position (Ritz Camera I, 2011). While Judge Fogel cited no authority for the proposition that a Walker Process claim surviving summary judgment is rare, his citation to In re DDAVP Direct Purchaser Antitrust Litig., (2009) (DDAVP) made it clear that he sought to make a narrow ruling based on the facts of the particular case.

In re DDAVP dealt with a patented antidiuretic drug that was patented as a result of declarations made of the drug's novelty during the patent application process. However, those declarations were made by employees of Ferring, the drug's maker, who did not disclose their financial interest in the transaction. In subsequent litigation, the district court found that the non-disclosure of the employees' interest in Ferring amounted to inequitable conduct and declared the patent invalid. Shortly thereafter, a number of retailers who sold DDVAP sued Ferring for a direct purchaser Walker Process claim. The Second Circuit allowed the claim to go forward stating that Ferring's situation was unique as another court had found the patent invalid. (DDAVP, 2009).

With DDAVP (2009) in mind, Netflix and Ritz Camera raise the question of which individuals antitrust statutes are intended to protect. In both cases, the Northern District of California held that direct purchasers should be protected alongside competitors. By embracing the reasoning found in Molecular Diagnostics, these cases rekindled the debate about the scope of permissible Walker Process claims, which was absent just five years ago. The debate raged on as SanDisk sought an interlocutory appeal before the U.S. Court of Appeals for the Federal Circuit on its denied motion to dismiss. That appeal is discussed in the next section.

The Federal Circuit Takes on Direct Purchasers and Walker Process Standing

In Ritz Camera & Image, LLC v. SanDisk Corp. (2012) (Ritz Camera II), Ritz Camera argued that Walker Process left open the possibility that anyone could assert a Sherman Act claim, and that the Supreme Court only discussed the matter in the context of a counterclaim due to the procedural posture of that particular case (Walker Process Equip. Co., 1965). SanDisk countered that the Second Circuit had ruled in DDAVP that only in circumstances where a patent had already been found to be invalid was a fraud sufficient to assert a Sherman Act claim (DDAVP, 2009). Further, SanDisk argued that its patents had not been "tainted" by STMElectronics the same way as in DDAVP, because its patents had never been found to be invalid (Ritz Camera II, 2012). Therefore, SanDisk concluded that, Ritz Camera could not assert a valid Sherman Act claim. Ritz Camera responded that, by surviving a motion for summary judgment, STM's Walker Process claim in STMElectronics had "tainted" SanDisk's patents in a manner similar to DDAVP and, therefore, its Walker Process claim was valid.

SanDisk also argued that, in terms of direct injury, a direct purchaser should lose standing in favor of a patent infringement defendant who has a substantial monetary stake in the outcome (Ritz Camera I, 2011). Thus, SanDisk asserted that STM was in the best position to assert a Walker Process claim in this situation, not Ritz Camera (Ritz Camera I, 2011). As previously mentioned, STM had indeed asserted a "substantially identical" Walker Process claim as a counterclaim in its initial litigation against SanDisk that survived summary judgment, but which ultimately resulted in a settlement. This settlement concerned the Federal Trade Commission

(FTC), which noted in an amicus brief that settlements of this variety allowed the market dominant company to settle claims in order to continue dominating the market. Due to this unfavorable result, the FTC sided with Ritz Camera and argued in favor of direct purchaser standing.

In reaching its ruling the Federal Circuit noted in its opinion that two appellate courts had found direct purchasers to have standing, while none had ruled to the contrary.

> [T]he Second Circuit has held that direct purchasers had standing to pursue their Walker Process claim despite the fact that, as purchasers, they could not directly challenge the patent's validity (In re DDAVP, 2009). The D.C. Circuit has likewise allowed a Walker Process claim to proceed even though the patentee had disclaimed the patent and thus the plaintiff faced no risk of an infringement suit (Oetiker v. Jurid Werke, GmbH, 556 F.2d 1 (D.C. Cir. 1977). (Ritz Camera II, 2012).

Thus, the Court ruled that direct purchasers, who face no threat of an infringement lawsuit, have standing to pursue Walker Process claims regardless of the procedural posture of the case. There is, however, still a requirement for the defendant to enforce the patent and to have that enforcement result in an unreasonable restraint of trade. That is, direct purchasers may have standing, but only by standing on the shoulders of competitors.

Consequently, in Ritz Camera II (2012), the Federal Circuit essentially adopted the Northern District of California approach, instead of the New Jersey approach, by granting direct purchasers standing to bring Walker Process claims arguably at the expense of efficiently enforcing antitrust statutes. This is because direct purchasers are in a poor position to pursue antitrust litigation in this context, except as a class action, which presents its own problems – namely, providing meaningful relief to victims. Because the majority of the injury suffered by the direct purchaser is passed on to the consumer, allowing direct purchasers the ability to sue causes one corporation to receive a windfall from another corporation, while consumers are the ones who suffer as a result of cartel prices. As a result, providing direct purchasers with standing to bring a Walker Process claim does not accomplish the goals of antitrust enforcement – to create a more competitive marketplace, nor does it provide consumers with any meaningful relief.

On the other hand, unlike direct purchasers, competitors have a keen knowledge of the marketplace that puts them in a strong position to detect and remedy antitrust violations by pursuing competition injuries. As a practical matter, price fixing is only found a small portion of the time it occurs – perhaps 13-17% of the time – making direct purchasers ineffective plaintiffs (Crane, D., 2010, p. 13). On the other hand, competitors who have a patent enforced against them have a very tangible stake in litigation and can seamlessly enforce the Walker Process claims as part of the infringement litigation. Judge Posner came to such a conclusion in Asahi Glass, which was similar to the majority opinion articulated in Walker Process, when he considered the nature of adjudication at the trial level, and implored the trial court on remand to examine "the injurious consequences to Walker of the patent's enforcement" (Walker Process, 1965). Judge Posner reasoned that fraud on the USPTO was an injury that was directed to competitors of the patented device and not to others affected in the supply and marketing chains. "The claim of fraud on the patent office fails for the reason just given: if patent 723 was obtained by fraud, it was a fraud aimed at competing manufacturers of drugs…" (Asahi Glass Co., 2003). In other words, fraud on the USPTO is a competition injury and thus, only competitors should have standing to remedy this injury (Asahi Glass Co., 2003).

Furthermore, to the extent that direct purchasers are oppressed by the marketplace, injunctive relief under Section 16 of the Clayton Act is sufficient to address their harm, as discussed above in Section II. Remeron (2005) explains that while direct purchaser injuries may be too speculative for money damages, they may be appropriate for an injunction under section 16 of the Clayton Act. To that end, Remeron (2005) cites In re Warfarin Sodium Antitrust Litig. (2000), which held that the class plaintiffs could sue for antitrust violations under Section 16 for three reasons. The first reason was that the class plaintiffs alleged injury by unlawful restraint on market competition, which is a type of injury that can be redressed by antitrust statutes. Second, because the class plaintiffs could only obtain an injunction, and not money damages, there was no risk of duplicative recovery. The last reason was that the class plaintiffs were necessary and foreseeable victims of defendant DuPont's effort to exclude generic competition and an injunction allowing generic competition would address this injury. Thus, in the cases of Ritz Camera I (2009) and Ritz Camera II (2012), an injunction allowing others to practice SanDisk's patents would have opened the market to competition in a more efficient manner than granting money damages to Ritz Camera.

In the rare circumstance where money damages for direct purchasers might be appropriate, a more nuanced approach for standing determination left open by the Supreme Court in Walker Process could accommodate such a circumstance instead of a broad rule – a fact that Ritz Camera II (2012) failed to acknowledge. While the issue of direct purchaser standing itself has fractured the trial courts and birthed several different of views on the matter, this is precisely the fact intensive result that Walker Process intended. With its emphasis on the "examination of market effect and economic consequences," Walker Process urged courts to look at the unique posture of each case, and determine injuries through the lens of economic data (Walker Process, 1965). Such an approach grants courts a great deal of flexibility, but also leads to a variety of outcomes. This is why the Second Circuit, in DDAVP, ruled that the enforcement of a patent after it is found to be invalid could violate the Sherman Act, while the Northern District of California narrowly granted direct purchaser standing to Ritz Camera, despite the fact that SanDisk's patents had never been invalidated in Ritz Camera I. By broadly ruling that all direct purchasers have standing to bring Walker Process claims, the Federal Circuit in Ritz Camera II disregarded the careful analysis urged by Walker Process to the detriment of the efficient enforcement of antitrust laws.

Harmonizing Legal Theories in the Walker Process Claim

Ritz Camera II (2012) deviated from Walker Process in that it broadly embraced the antitrust principal of providing recovery for an overcharge injury at the expense of adequately considering the social value of the property interest of the patent and the limitations imposed on sham litigation created by the First Amendment. One way to rebalance the nuance embraced by Walker Process can be found in other kinds of intellectual property civil actions that invoke antitrust law.

As noted above, an action for patent infringement requires 1) a valid patent and 2) an act of infringement. The antitrust claim arises when patent infringement litigation is pursued either without a valid patent or without good faith belief of an act of infringement. At a high level, this is the same kind of vexatious litigation that created a claim under the Clayton Antitrust Act (1914) in Cal. Motor Transp. Co. (1972) as an exception to Noerr immunity discussed above. More specifically, when a plaintiff files a complaint for patent infringement without a valid patent, a Handgards claim results. Where there is no act of infringement, a Loctite claim results.

Both Handgards and Loctite claims are embodiments of the sham litigation exception to Noerr immunity and are explained in more detail below.

In Handgards Inc. v. Ethicon Inc., the Ninth Circuit ruled that engaging in patent infringement litigation when the plaintiff knew that the patent at issue was invalid was a violation of Section 2 of the Sherman Act (Handgards Inc., 1979). Today, this kind of action is widely called a Handgards claim and has been broadly construed to include a variety of intellectual property where trademarks, copyrights, and so on, were the subject of suits in bad faith. However, a Handgards claim utilizes the nuanced balancing of Walker Process and fails as a pleading matter if the patent was affirmed, or was even considered close to valid, in another hearing.

This reasoning provides respect for the property right of the patent holder and espouses the idea that an established property right should be protected by society and not cast away. This prevents theft of intellectual property rights, or, infringement. For instance, in Bio-technology Gen. Corp. v. Genentech, Bio-technology General Corp. (BTG) sued Genentech for infringement of U.S. Patent No. 4,601,980, and Genentech counterclaimed with a Handgards claim based on ongoing litigation at the International Trade Commission (ITC) (BTG, 2001). The District Court dismissed the counterclaim because the ITC had issued an initial determination that the claims were valid and infringed. While this decision was not final, it was sufficient to prevent an antitrust claim from being pleaded under Rule 9(b).

The reciprocal of Handgards is Loctite, which held that Noerr immunity to a Sherman Act suit would be lost if one filed a patent infringement lawsuit knowing that no infringing act occurred. In Loctite Corp. v. Ultraseal Ltd., Loctite sued Ultraseal for infringement of two patents directed to holding wood together with a substrate (Loctite Corp., 1985). Like in BTG, the parties had an ongoing action at the ITC, in addition to the Federal Circuit, where eventually Loctite would drop its infringement claims arguing it now believed them to be invalid. Ultraseal counterclaimed with a Sherman Act claim, here with a modified Handgards claim, where Ultraseal argued that it was implausible for its substrate to be the one claimed in Loctite's patents given their chemical differences. The Court found that the chemical differences existed, but did not agree that Loctite had acted in bad faith; rather, the Court found that Loctite had done some testing and found enough similarity to make its original claim for infringement, even if that claim failed.

Both BTG and Loctite, in affirming the property rights of patent holders, demonstrate the fundamental idea behind patent law jurisprudence – that society ought to defend property rights. And in these narrow instances allows for a deviation from an equilibrium price and enforcement of a patent that would otherwise cause a Sherman Act claim to arise under antitrust law. Nuanced rulings like BTG and Locite also supports the free speech rights of patentees to assert good faith claims to defend their property without having to fight off an antitrust lawsuit every time they do so.

Another example of nuanced rulemaking can be found in In re Lipitor Antitrust Litig. (2013) (In re Lipitor), which can in the wake of the Federal Circuit adopting the broad ruling on direct purchaser standing in Ritz Camera II. With the exception of DDAVP, the value of the patent as a property right was not considered in the viability of the Walker Process claim under Rule 12(b)(1). Rather, the focus was on the overcharge injury. In re Lipitor took a totally different approach on this matter under Rule 12(b)(6) by looking at a patent as a property right in the first instance. This antitrust litigation showed how direct purchasers pounced on patented products where the patent was enforced and then challenged. This was the unfortunate result theorized by SanDisk in Ritz Camera II (2012). After a patent was successfully defended in a series of court proceedings, direct purchaser drugstores Walgreens and Meijer sued Pfizer with a Walker Process claim, arguing that Pfizer's patent for its drug, Lipitor, was procured by fraud on the USPTO.

Lipitor is a drug that lowers cholesterol by inhibiting a liver enzyme. The drug was covered by a large number of heavily litigated patents, but the litigation primarily dealt with U.S. Patent Nos. 4,681,893 and 5,273,995. The patent examiner initially rejected the '995 patent as not being patentably different than the '893 patent. Pfizer appealed to the Board of Patent Appeals and Interferences, arguing that the '893 patent did not disclose preferred quantity ranges of two primary compounds in the drug, and that those quantity ranges resulted in the drug in the '995 patent being ten times more effective than the drug in the '893 patent. The Board remanded the case to the examiner to consider whether the '995 patent was obvious in view of the '893 patent (Ex parte Roth, 1993). The examiner responded by simply issuing the '995 patent. The plaintiffs claimed that Pfizer had lied in a table in the '995 patent, which contained "cherry-picked" and deceptive results.

As the lives of the '893 patent and the '995 patent were winding down, Ranbaxy, on August 19, 2002, filed an Abbreviated New Drug Application (ANDA) to market generic Lipitor. Ranbaxy then asserted that the generic Lipitor did not infringe the '893 patent or the '995 patent, and that neither patent was valid at all. Infringement litigation proceeded for the next two years, with the District Court subsequently finding the '893 and '995 patents valid, enforceable, and infringed (Pfizer, Inc. v. Ranbaxy Labs. Ltd., 2005). Relevantly, Ranbaxy raised the "cherry-picked" data allegation, and it was rejected by the District Court. Similar proceedings between Ranbaxy and Pfizer were instituted in Canada, Australia, and at the USPTO (Ranbaxy Australia Pty Ltd. v. Warner-Lambert Comp., 2006; Pfizer Canada Inc. v. Novopharm Ltd., 2006). These proceedings went on until April 2008, when Ranbaxy and Pfizer entered into a settlement agreement, which the plaintiffs characterized as a reverse payment agreement.

A reverse payment agreement is where the patentee offers to pay an alleged infringer to not produce the patented product until the patent's term expires (FTC v. Actavis, 2013). These agreements only violate antitrust laws when their effect is an unreasonable restraint of trade (FTC v. Actavis, 2013). Here, Meijer and Walgreens alleged that Ranbaxy agreed to settle its claims with Pfizer and that Pfizer agreed to waive its outstanding judgments against Ranbaxy creating an unreasonable restraint on trade in violation of the Sherman Act. This cleared the way for the Ranbaxy product to enter the market the day the '893 patent expired. Other competitors could only enter the market if they could show they were not infringing on Pfizer's numerous other patents for Lipitor. It is on these facts that the direct purchaser plaintiffs based their Walker Process claim.

Judge Sheridan began his analysis in Lipitor (2013) by noting that the direct purchasers did have standing because they alleged they suffered an overcharge injury. Here, he distinguished Remeron (2005) and Carrot Components (1986) by applying the overcharge injury rule in Ritz Camera II (2012). Judge Sheridan, however, dismissed the Walker Process claims for failure to allege claims that plausibly showed an antitrust violation. A Walker Process claim requires:

> (1) the patent at issue was procured by knowing or willful fraud on the USPTO; (2) the defendant was aware of the fraud when enforcing the patent; (3) there is independent evidence of a clear intent to deceive the examiner; (4) there is unambiguous evidence of reliance, i.e., that the patent would not have issued but

> for the misrepresentation or omission; and (5) the necessary additional elements of an underlying violation of the antitrust laws are present (Nobelpharma AB v. Implant Innov., Inc., 2008).

With regard to the first four elements, the claim could not plausibly be argued because these same arguments for invalidity had already been tried, and had failed in a plethora of courts around the world. That is, since the property right had been firmly established, it could not be taken away. This is a reciprocal of the rule in DDAVP (2009). In DDAVP (2009), the patents' proven prior invalidity grounded the antitrust claim. In Lipitor (2013), the patents' proven validity foiled the antitrust claim. Pleading an antitrust claim based on the fraud exception to Noerr immunity fails as a pleading matter under the First Amendment when any prior proceeding indicated that either 1) the intellectual property was valid, or 2) there was a reason to believe infringement had occurred.

This failure results because the fraud exception to Noerr immunity claims "sound in fraud," and must be pleaded with particularity under Rule 9(b) (In re DDAVP, 2009). This requires explaining both the circumstances and the results of the fraud. Where the pleaded facts indicate that the outcome was not fraudulent, that is, a valid patent issued or there was an act of infringement, then the claim fails in the first instance because there was no fraudulent outcome.

Judge Sheridan embraced the nuance that Walker Process allowed while weighing the competing concerns of antitrust law, patent law, and the First Amendment. The vindication of Pfizer's patents' in three proceedings reaffirmed the property right and foreclosed the retailer's challenge under Walker Process as a pleading matter. This represents the same kind of jurisprudential balancing that created workable rules in BTG and Ultraseal.

CONCLUSION

Walker Process represents an opening for lower courts to balance three areas of law with very different jurisprudential underpinnings. The best way to balance patent law, antitrust law, and the First Amendment is with a nuanced approach to forming rules. To contrast, Ritz Camera II created too broad of a rule and prevented the flexibility available from making nuanced rules in the lower courts. These nuances can permit plaintiffs who have suffered antitrust injuries to recover damages, while at the same time allowing courts to dismiss claims where the patent in question has been affirmed in another proceeding. This approach enables litigants to have their day in court while preventing vexatious litigation at the onset.

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