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When A Blog Post Leads To Antitrust Liability

By **Daixi Xu and Julie Shepard** (October 12, 2018, 1:48 PM EDT)

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It is not uncommon for companies to issue statements about pending litigation. A recent decision issued in Arista Networks Inc. v. Cisco Systems Inc.[1] in the U.S. District Court for the Northern District of California, provides a cautionary tale that, in some circumstances, such statements may not be protected by the First Amendment and could be seen as part of an anti-competitive scheme giving rise to potential antitrust liability.

The statements at issue in Arista included a blog post by the senior vice president, general counsel and chief compliance officer of Cisco that was made on the same day that Cisco filed a pair of patent and copyright infringement actions against Arista, one of Cisco's competitors in the sale of Ethernet switches.[2] In one of the two lawsuits against Arista, Cisco alleged that Arista infringed on Cisco's copyrights and patents to its command line interface (CLI lawsuit).[3]

In the blog post made on the day Cisco initiated its lawsuits against Arista, the Cisco general counsel stated that Arista promotes the "theft" of Cisco's IP and that "the patented and copyrighted Cisco features and implementations being used by Arista are not industry standards."[4] During the course of the litigation, the Cisco officer continued to upload posts to his blogs discussing the parties' dispute. In addition, Cisco also directly communicated to customers about the litigation. In one instance, a Cisco salesperson sent a link of the blogs to a potential customer and shortly thereafter secured a sale.[5]

Going on the offensive, Arista sued Cisco, alleging that Cisco violated antitrust and unfair competition laws by engaging in an "open early, closed late" scheme in order to monopolize the Ethernet switches market. Arista alleged that Cisco maintained a long-time policy that its CLI was "open" to competitors,[6] but then later reversed that policy and "closed" the use of its CLI through litigation against Arista and statements concerning that litigation.[7]

Cisco moved for summary judgment on various grounds, including on the basis that its litigation and statements concerning that litigation are protected under the Noerr-Pennington doctrine, which allows private citizens to exercise their First Amendment rights to petition the government without fear of antitrust liability. There are two recognized exceptions to the Noerr-Pennington doctrine, both of which concern lawsuits that are not brought in good faith.[8] The Arista court found that Cisco's CLI lawsuit

was objectively reasonable and that neither exception applied.[9]

But that was not the end of the story.

Instead, the Arista court went on to consider Arista's theory that Cisco's "CLI lawsuit was the 'enforcement mechanism'" of its anti-competitive scheme, in which the "CLI litigation and conduct incidental to that litigation" were used "as tools to further the 'closing' step of the 'open early, closed late' scheme."[10] Arista argued that a two-part test announced in Hynix Semiconductor Inc. v. Rambus[11] applied and that Cisco's litigation and its "purported ['fear, uncertainty, and doubt'] campaign (including [the Cisco officer's] blog) was anticompetitive."[12]

The two-part test announced in Hynix addresses whether good faith litigation may be considered as part of an anti-competitive scheme.[13] The Hynix court arrived at the two-part test after concluding that the Federal Circuit and the U.S. Supreme Court "would recognize some 'scheme' antitrust allegations that include constitutionally protected litigation within the 'overall course of conduct,' but only those in which the patent litigation is 'causally connected' to anticompetitive harms."[14] Persuaded by the reasoning of Hynix, the Arista court joined other courts that had followed it, while acknowledging some courts had disavowed it.[15]

The first part of the Hynix test asks whether "aspects of the scheme" other than the litigation "independently produce anticompetitive harms."[16] Cisco argued that its blog posts and direct correspondence with customers regarding the litigation should not be considered in this part of the test, as they were protected by the Noerr-Pennington doctrine as "conduct incidental" to litigation. The Arista court, however, concluded that the Noerr-Pennington doctrine did not apply to the statements, as they were not related to the prosecution of the lawsuits, but instead were "merely statements about the status of the parties' litigation and Cisco's intellectual property rights" and "had little relevance to Cisco's ability to pursue its CLI lawsuit."[17] The Arista court contrasted these statements to those that "involved more than mere descriptions of the litigation," such as communications on settlement demands,[18] letters sent to companies to determine whether they should join litigation[19] and regulatory filings discussing litigation that were required by the U.S. Securities and Exchange Commission.[20] In concluding that Cisco's statements were not protected by the Noerr-Pennington doctrine, the court also noted that "a reasonable jury could find that Cisco raised the specter of the CLI lawsuit to persuade customers to abandon Cisco's competitors."[21]

The inquiry for step one of the Hynix test did not end there. The Arista court next looked at whether Cisco's statements amounted to exclusionary conduct and found there were triable issues of fact. In doing so, the court pointed to Cisco's blog posts that its CLI features are patented and copyrighted and "are not industry standards" as evidence that could support a jury, finding that Cisco reversed its purported open-CLI policy as part of an "open early, closed late" scheme. It also cited to the disputed facts of whether Cisco engaged in sales tactics that were exclusionary when sales personnel discussed the parties' litigation to potential customers.[22] Thus, the court found that there were disputed factual issues as to whether aspects of the scheme—here, the blog posts and statements to potential customers — would independently produce anti-competitive harms.

The second part of the Hynix test asks whether the "litigation was causally connected to [the] anticompetitive harms" produced by the conduct examined in the first part of the test.[23] If the answer is yes, then under Hynix, the good faith litigation may be considered as part of the anti-competitive scheme. The Arista court found there was a reasonable inference that Cisco's blog posts and communications to customers caused Arista to lose sales due to customers' concerns about the CLI,

leading to competitive harms in the forms of greater restrictions to customers' free choices between different products and fewer innovations in the market.[24] After finding that these competitive harms were arguably casually connected to the CLI lawsuit, the Arista court denied summary judgment.[25]

As this case illustrates, even when a company brings a meritorious lawsuit to enforce its IP rights, that may give rise to a claim that the lawsuit, along with any statements about that lawsuit, are part of an anti-competitive scheme. Although there remains the question of whether Hynix and Arista will be more broadly adopted, companies would be well-served to carefully consider their statements regarding pending litigation given the risk that such statements may not be protected by the First Amendment.

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[1] Order (1) Denying Plaintiff's Motion for Partial Summary Judgment and (2) Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, Arista Networks, Inc. v. Cisco Systems, Inc., No. 16-cv-00923-BLF, Doc. No. 281 (N.D. Cal. May 21, 2018) ("Order"). Portions of this Order are redacted.

[2] Id. at 2-3. In addition to these two lawsuits, Cisco also filed two actions against Arista at the US International Trade Commission two weeks later. Id.

[3] Id. at 2-3. A CLI is an interface used by engineers to enter commands to instruct Ethernet switches to perform specific functions. Id.

[4] Id. at 4.

[5] Id. at 4, 19.

[6] Id. at 4-5. The court noted that Cisco had made statements in 2003 that Cisco's CLI was the "current de-facto standard." Id. at 2.

[7] Id. at 4-5.

[8] Id. at 15-16.

[9] Id. In the CLI lawsuit, the jury found that Arista infringed on Cisco's copyright to its CLI but determined that the infringement was excused by the scènes à faire defense. Id. at 16.

[10] Id. at 16.

[11] 527 F. Supp. 2d 1084 (N.D. Cal. 2007).

[12] Order at 16. Cisco agreed with Arista that the Hynix test applied. Id.

[13] 527 F. Supp. 2d at 1097 (N.D. Cal. 2007). Prior to adopting its two-part test, the Hynix court

examined the spectrum of ways in which other courts have addressed the issue of whether patent litigation can be part of a broader antitrust scheme, but the court noted that none addressed the viability of a "scheme" claim in the context of a good faith lawsuit that is constitutionally protected. Id. at 1091-1096.

[14] Id. at 1096-97.

[15] Order at 17.

[16] Id. (quoting Hynix, 527 F. Supp. 2d at 1097).

[17] Id. at 17-22.

[18] Sosa v. DIRECTV, Inc., 437 F.3d 923, 936 (9th Cir. 2006).

[19] Matsushita Elecs. Corp. v. Loral Corp., 974 F. Supp. 345, 359 (S.D.N.Y. 1997).

[20] Nineteen Eighty-Nine, LLC v. Icahn Enterprises L.P., 99 A.D.3d 546, 547 (N.Y. App. Div. 2012).

[21] Order at 21-22.

[22] Id. at 22-24.

[23] Id. at 17 (quoting Hynix, 527 F. Supp. 2d at 1097).

[24] Id. at 35-36.

[25] Id. at 26.