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Federal Circuit Patent Bulletin: *DSM Desotech, Inc. v. 3D Sys. Corp.*

April 18, 2014

"Even if a manufacturer does not have power in a primary market, it still may have power in an aftermarket [such as where] the high cost of a machine 'locks in' customers to using the manufacturer's parts and service. [But] a substantial number of customers must be locked in for a party to be able to exert market power."

On April 18, 2014, in *DSM Desotech, Inc. v. 3D Sys. Corp.*, the U.S. Court of Appeals for the Federal Circuit (Moore, Schall,* Reyna) affirmed the district court's summary judgment, inter alia, that 3DS did not violate the antitrust laws. The technology related to additive rapid prototyping such as stereolithography (SL), fused deposition modeling, laser sintering, 3D printing, direct metal laser sintering, and digital light processing. 3DS used radio frequency identification (RFID) to prevent its machines from operating if the liquid polymer resin starting material being used was not 3DS-approved. The Federal Circuit stated:

To prevail on its unreasonable restraint of trade claim, Desotech was required to show that the restraint had a substantially adverse effect on competition in the marketplace. For its attempted monopolization claim, Desotech was required to show "(1) [3DS's] specific intent to achieve monopoly power in a relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) a dangerous probability that the attempt at monopolization [would] succeed." Under its state law antitrust claim, Desotech was required to prove the same allegations as under its federal antitrust claims. . . .

For products to be substitutes for one another, they need not be identical or fungible. When products are not identical or fungible, they still may be in the same market as differentiated products: Products are differentiated when many buyers regard them as different though the products still perform the same essential function. . . . Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use, service, customer support, and other features. Nevertheless, they generally compete with one another sufficiently that the price of one brand is greatly constrained by the price of others. "Most courts correctly define the presumptive market to include similar products, though differentiated by brand or

features."

Differentiated products A and B may have a high cross-elasticity of demand and therefore be "good substitutes" for one another if enough customers would respond to a small but significant nontransitory increase in the price of product A by switching to product B, so that it would make the increase unprofitable for the seller of A. Department of Justice ("DOJ") guidelines suggest considering this question based on a 5% or more price increase. In determining whether products are "good substitutes" and therefore in the same market, . . . economic evidence [such as a]ctual data and analysis are necessary. Within a given relevant market, courts have also recognized submarkets in certain instances. These submarkets may on their own form the basis for antitrust liability. [I]n determining whether a valid submarket exists, courts consider "practical indicia" such as "(1) the industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors." [W]e conclude that a reasonable jury could not find an independent market for SL machines. . . .

As an alternative theory, Desotech argues that a distinct product market exists for SL resin. Even if a manufacturer does not have power in a primary market, it still may have power in an aftermarket and be liable under the antitrust laws for conduct in that market. However, "a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check." For example, if the high cost of a machine "locks in" customers to using the manufacturer's parts and service, the manufacturer could still exercise monopolistic power in the aftermarket, even though it competes in the primary market. Even so, "[i]t is an article of faith, for antitrust purposes, that unless a substantial number of preexisting customers are locked in, defections from the manufacturer's installed base, coupled with losses in the foremarket, in all probability will sabotage any effort to exploit the aftermarket." . . .

According to Desotech, materials other than SL resin cannot function in an SL machine. And, so the argument goes, because customers who have sunk hundreds of thousands of dollars into an SL machine are effectively unable to switch to alternative technologies, they are locked in to using that machine and the accompanying resins. [A] substantial number of customers must be locked in for a party to be able to exert market power. Here, only seven out of 268 customers purchased their equipment before learning of the RFID lock. In our view, seven out of 268 is not substantial. Accordingly, the district court did not err in granting summary judgment on Desotech's claims based on SL resin as the relevant market.

Because we conclude that Desotech failed to prove an independent market for SL machines or resins—as it acknowledged it must do—we affirm the district court's grant of summary judgment on Desotech's antitrust claims. Desotech also appeals the district court's rulings that it failed to show anticompetitive conduct and failed to show it suffered an antitrust injury. Because the failure to prove the relevant market is dispositive of the antitrust claims, we do not reach those additional rulings of the district court.