

OCEAN TOMO

ANTITRUST LITIGATION



Antitrust laws and Intellectual Property (IP) rights are inherently intertwined under a common goal of encouraging innovation and competition. In fact, the 2007 US Department of Justice (DOJ) and Federal Trade Commission's (FTC), *Antitrust and Intellectual Property Rights: Promoting Innovation and Competition* report states, "the patent laws effectively modify the antitrust laws to the extent, and only to the extent, of precluding liability for the mere exclusion of others from making, using, or selling the patented invention".

While intellectual property rights do bestow a limited and specific monopoly to innovators and creators, the ability to attain such IP protection promotes the commercial pursuit of innovation. Specifically, IP rights reward market participants for the often-risky R&D efforts that ultimately (1) improve product or service quality, (2) motivate competitive response from rivals, and (3) create new markets altogether. The FTC report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, "the award of patent rights can spur stand-alone innovations by limiting free riding, facilitating commercialization of innovations, and encouraging disclosure of new ideas."

Further, the DOJ and FTC explain in *Antitrust Guidelines for Licensing of Intellectual Property*, that IP licensing spurs integration and efficiencies that benefit consumers, and that the royalties associated with IP licensing provide "an incentive to invest in innovative efforts".

The intersection of antitrust and IP rights means that neither can be assessed comprehensively in a vacuum. Instead, it is necessary to consider the concepts together, particularly as the significance of intangible assets to corporations continues to grow.

Our Credentials as Antitrust Litigation and Intellectual Property Rights Consulting Experts

Ocean Tomo is uniquely qualified to support the assessment of interplay between antitrust and IP rights concepts. Ocean Tomo's experts rely on the firm's collective experience across practice areas to consider and address the economic impact of IP licensing in the normal course of business, the effects of IP infringement and enforcement actions, and the real-world business considerations underlying IP-driven transactions. The firm's expertise across all facets of the IP market enables a unique perspective on the role of IP in antitrust contexts.

Ocean Tomo intellectual property experts can:

- » provide context for competition by analyzing the patent and licensing landscapes to assess the significance of IP owned by the parties to the competitive environment,
- » identify other patent owners in the industry and the relative strength of IP portfolios,
- » evaluate the availability of alternative technologies, and
- » opine on competitive royalty rates and other licensing terms typical in the industry.

Such analyses may assist in court assess of the appropriate balancing of antitrust and intellectual property rights or establish the fact of damages and financial damages expert testimony.

Featured Engagements

Ocean Tomo services are built upon more than three decades of experience in the most rigorous venues – state, federal, and international courts – and spans more than 150 different industry segments. Because our past success provides the best indication of our capabilities, we are proud to feature a few representative engagements and encourage potential clients to seek references from both past clients and opposing counsel.

Huawei Technologies Co. Ltd. v. Verizon Communications, Inc., ET AL

United States District Court for the Eastern District of Texas, Case No. 2:20-CV-00030

Deposition Testimony | Technology: Optical Transport Network (OTN) | Case Issues: Patent Infringement assertion to standard-essential patents (SEPs) and Huawei's commitment to license such SEPs on reasonable and non-discriminatory (RAND) terms.

Results

Ocean Tomo was retained by counsel for Huawei Technologies Co. Ltd. to prepare expert report and provide deposition testimony. The matter settled three days into the jury trial before U.S. District Judge Rodney Gilstrap.

Fujitsu v Tellabs

United States District Court for the Northern District of Illinois, Eastern Division Civil Action No. 09-cv-04530

Trial and Deposition Testimony | Technology: Optical Network Signal Amplification and Routing | Case Issues: Patent Infringement and Reasonable and Non-Discriminatory ("RAND") Royalties

Results

Ocean Tomo prepared expert reports on both traditional and RAND royalties and testified as an expert in the field of damages and patent licensing, including the economics of RAND obligations. The jury found in favor of Ocean Tomo's opinions.

Bio-Rad Laboratories, Inc. and President and Fellows of Harvard College v. 10X Genomics, Inc.

United States District Court for the District of Massachusetts, Case No. 1:19-cv-12533

Deposition Testimony | Technology: Genetic Analysis Tools | Case Issues: Antitrust

Results

The parties settled during trial.



CONTACT

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James E. Malackowski is Co-Founder and Chief Executive Officer of Ocean Tomo, LLC.

Mr. Malackowski brings a truly unique experience base to his work as an expert drawing upon his role as a Certified Public Accountant, Certified Licensing Professional, adjunct MBA instructor and inventor of numerous issued U.S. patents and investor in IP assets.

He is widely recognized as a pioneer in the intellectual property field, receiving numerous awards and commendations, both in the United States and internationally.

On more than fifty occasions, Mr. Malackowski has served as an expert in U.S. Federal Court, U.S. Bankruptcy Court, State Court, Court of Chancery, the Ontario Superior Court of Justice and global arbitrations on questions relating to intellectual property economics including the subject of valuation, reasonable royalty, lost profits, price erosion, commercial success, corrective advertising, creditor allocations, Hatch Waxman Act market exclusivity, business significance of licensing terms including RAND obligations, venture financing, including expected risk / return, and equities of a potential injunction.



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About Ocean Tomo

Established in 2003, Ocean Tomo, LLC provides Financial Expert, Management Consulting, and Advisory services related to intellectual property (IP) and other intangible assets; corporate accounting investigations; regulatory and reporting obligations; solvency and restructuring; and contractual or competition disputes.

Practice offerings address economic damage calculations and testimony; accounting investigations and financial forensics; technology and intangible asset valuation; strategy and risk management consulting; mergers and acquisitions; debt and equity private placement; and IP brokerage.

Our services are built upon more than three decades of experience in the most rigorous venues – state, federal, and international courts. Our financial, market, and technical experts provide a unique understanding of the contributory value of proprietary innovation. This is the cornerstone of our business. This insight permeates every practice and client engagement.

Collectively, Ocean Tomo professionals have:

- Completed over 1000 engagements, including over 300 valuation and 500 financial damages expert testimony engagements;
- Consulted and provided expert testimony on some of the highest profile matters over the past decades;
- Successfully closed hundreds of IP sale transactions with a cumulative transaction value well in excess of \$1 billion; and
- Originated more successful IP monetization solutions than any other firm, including creation of the world's oldest and most successful live patent auction.

Our track record of results spans more than 150 different industry segments. Because our past success provides the best indication of our capabilities, we are proud to serve more than 80% of the AM Law 100® and encourage potential clients to seek references from past clients.

Intangible assets comprise 90 percent of business value but are also subject to significant impairment due to enterprise and regulatory compliance risk. Ocean Tomo assists clients – corporations, law firms, governments, and institutional investors – in realizing Intellectual Capital Equity® value broadly defined.

Headquartered in Chicago, Ocean Tomo has offices in Greenwich, Houston, Jacksonville, Reston (DC Metro), San Francisco, and Shanghai. Subsidiaries of Ocean Tomo include Ocean Tomo Investment Group, LLC, a licensed broker-dealer under Federal and State securities law (brokercheck.finra.org Broker Check CRD #: 172912), OTI Data Networks, LLC and Patent Marking, LLC.