

Abuse of dominance and intellectual property rights: substance and remedies

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Is there a difference between intellectual and physical property?

- Inventions and innovations are public goods: no rivalry in consumption and no appropriability
- The objective of IP rights is to exclude others from exploiting a non physical asset. The same principles of exclusion holds for physical property.
- Like with physical property, the right to exclude associated with IP rights does not imply market power and indeed most patents are of little use. See Independent Ink (2006)
- IP rights (patents) provide an incentive for R&D (is that right outside pharmaceuticals?). More importantly they make it possible to publicize an invention and facilitate licensing

Innovation and merger control

- The problem is that a merger may affect the ability of firms to bring innovations to the market
- Genzyme-Novazyme (FTC 2004): both firms active in the treatment of Pompe disease. The problem was whether R&D would diminish as a consequence of the merger . The FTC approved it (but two years after it had been completed)
- Shell-Basf (EC 2000) JV likely to create a dominant position in markets associated with polypropylene and polyethylene. The EC approved with commitments to license third parties. Know-how to produce was insufficient and nobody entered

Standard agreements

- Portfolio cross licenses and patent pools favor the commercialization of new products (especially patent pools that are open to licensing). They are pro-competitive when patents are complementary. The problem is that very often patents are both complementary and substitutes.
- Rambus (FTC 2006, EC 2007 SO) monopolized 4 markets of computer memory technologies (Standard for DRAM chips) by hiding the existence of its patents in the process of standard setting. The case was lost in appeal and the Supreme Court refused certiorari. In the EC the case is against the high royalties charged after the patent ambush.

Refusal to deal

- It may be prohibited if a firm has market power and refuses to deal with competitors.
- In the US (Kodak, 1992 and Aspen, 1985) an indication for the existence of an abuse is that access be denied when it had been granted in the past. Plus of course that there are no satisfactory business justifications for it. Nothing on pricing. Trinko (2004): no antitrust case if access is regulated.
- In the EC a refusal is an abuse when it is likely to eliminate competition in a market and access is indispensable (Oscar Bronner, 1999). Nothing on pricing.
- In the EC Magill (1995), IMS (2004): a new product must be denied to consumers. Microsoft (2004): refusal to supply information for interoperability in the group server market. Nothing on pricing.

Tie-ins and bundling

- US Microsoft case (1994): PC manufacturers had to pay Microsoft in any case. The remedy was pricing to consumption
- US Microsoft case (2001): bundling Windows with Internet Explorer. Remedy: disclosure of information for middleware applications (free of charge) and freedom to install them.
- EC Microsoft case (2004): bundling of Windows with Media player. Remedy: obligation to commercialize an unbundled version. No pricing indications.
- South Korea Microsoft case (2004): bundling of Windows with messenger services. Remedy: version of Windows XP without messenger (the consumer can then download).

Pricing remedies in the Microsoft case

- Scherer (2009) infers Microsoft dominance from very high returns on investment (almost 90%). Since the marginal cost of supplying media player to the last customer is zero, he suggests that the Commission should have imposed a price reduction of 15% (based on the ratio between R&D expenditures for developing the media player and the total).
- I would in general prefer ECPR as the market friendly solution. If a competitor develops a better product it can price it at a higher price. However cases, like Microsoft, where MC is very close to zero, may be an exception.
- On interoperability the Commission decided on February 2008 that Microsoft has charged unreasonable prices for providing the necessary documentation for work group servers. Only starting October 2007, when Microsoft started a 10000 € flat fee charge, it actually complied with the EC 2004 decision. Microsoft was fined 899 million € for the 3 years delay in compliance.

Other exclusionary conduct

- Shering Plough (FTC, 2003): reverse payment in a case on counterfeiting. *Shering Plough paid (60 and 10 million \$) 2 generic manufactures in order for them not to produce (formally in exchange for the use of 2 irrelevant licenses). The FTC blocked the agreement. The 11th circuit reversed. US DOJ not in line with FTC in the Supreme Court.*
- Astra Zanecca (EC 2005): abused its dominant position with its product Losec (anti-ulcer) by misleading representation with patent offices for supplementary protection certificates and deregistration. Astra Zanecca was fined 60 million €
The case is under appeal

Conclusions

- IP is not different from physical property and antitrust law fully applies. Outside pharmaceuticals we should not worry too much of the incentive effects.
- The EC new product standard is a good way forward however it needs a more precise definition.
- Pricing in the case of refusal to deal is a big unresolved issue. The recent Microsoft decision does not solve all the problems and some guidance is needed.
- Reverse payments in pharmaceuticals should prima facie be prohibited