

# IP Protection and Technology Licensing

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# The Patent Explosion

- Patenting has enormously increased as part of business strategies in USA and EU in many industries: e.g. pharmaceuticals, digital communications, semiconductors, engineering, electronic consumer products and biotechnology.
- This proliferation of patents has led to growth of “patent thickets” which arise from strategies doing more than simply protecting new technologies according to the individualistic patent model.

# The Patent Explosion II

- (I) Some patenting is designed to insulate ‘core’ inventions from competition by patenting surrounding technologies or compounds.
- (II) Some patenting is designed to provide a basis for aggressive litigation.
- These patent thickets have been assessed as threats to innovation: patenting turned on its head!

# The Patent Explosion III

- In the past decade, industry has also autonomously come up with strategies to deal with patent thickets in a pro-innovative way: certain types of patent/know-how licensing and cross licensing and patent pools. The proposed reform of TTBER and the Technology Transfer Guidelines in 2014 will raise important issues of balance in regulating these three areas of autonomous business activity.



# IP Licensing Strategies and Competition Law

- IP licensing, cross licensing and patent pools are in the main pro-competitive and pro-innovative activities. They are in fact some of the “drivers” of innovation. IP development and IP licensing are an integral part of the development and production of products.
- It is true that, in rare cases, they can be a “cover” for anticompetitive agreements.
- However regulators must draw the right line to make sure that the pro-competitive and pro-innovative activity has room to breathe.

# The Current TTBER and Guidelines

- The existing “modernized” TTBER and Guidelines have been broadly successful in regulating IP licensing. There have been few cases involving the competition authorities. Mostly arbitrations and breach of contract cases

# TTBER and ‘Vertical’ Agreements: The Success Story

- Owing to the greater involvement of economic thinking in the modernization of Article 101 generally, the 2004 TTBER has been relatively non-interventionist in respect of agreements between non-competitors recognizing the low likelihood of anticompetitive effects such as “coordinated effects,” i.e price fixing or market sharing, or unilateral effects, i.e.dominance.
- This has resulted in a sensible balance in regulating IP licensing agreements between non-competitors.



# Issues in the 2014 Reform

- There are at least four major IP licensing issues facing EU competition policy in its 2014 reform of TTBER and the Technology Transfer Guidelines:
- 1. The first issue is the treatment of agreements between competitors and “hard core” restrictions. There is a need to look again at the sweeping basis for assessing the overall effects of such agreements and to allow greater acceptance of ‘indispensable’ restraints in pro-competitive contracts



# Agreements Between Competitors

- The TTBER and Guidelines have been far too cautious in dealing agreements between competitors because of the possibilities of anticompetitive effects, particularly “coordinated effects.” The ‘learning curve’ of the regulators has been rather slow.
- The 2004 Guidelines say that when agreements between competitors contain hard core restrictions, even if those restrictions are indispensable, they will only “exceptionally” be justified under Article 81(3).

# Agreements Between Competitors (cont.)

- However, the issue is: what emphasis should be given to ‘exceptionally?’ Does it mean hardly ever or does it mean only when there is evidence that such restrictions occur in an agreement that is basically pro-competitive?
- There is a need to introduce a more neutral analysis of the facts to allow for pro-competitive possibilities

## Issues II: Cross Licensing

- The second issue is the treatment of cross licensing: There is a need to maintain the current balance in treating “reciprocal” cross licenses with running royalties, royalties that vary with units of output sold.. Today, the exemption is disallowed only ‘if such agreements are devoid of any pro-competitive purpose and therefore do not constitute a bona fide cross licensing arrangement.’ See TTG para 80
- In this case the balance seems right and offers a template for the treatment of other issues.



# Issues III: Patent Pools

- . The third issue is that of patent pools and ‘non-essential patents’: there is a need to rethink the treatment of non-essential patents! The rules today stipulate that if patent pools allow independent licensing by members of the pool and the pool itself deals only with ‘essential patents’ there is no difficulty under Article 101(1).

## Issues III: Patent Pools (cont.)

- In the case of non-essential patents, however, the test should allow more for pro-competitive and pro-innovative cases of the use of non-essential patents in patent pools. There must be an investigation of the facts and an assessment of the relevant factors (TTG para 222) but there is no need for too heavy a presumption of anti-competitive purpose or effect as in TTG paras 219 and 221.

## Issues IV: Grant-backs

- 4. The final issue is grant-backs and dynamic efficiency: there is a need to look again at 'non-severable' improvements to better protect 'follow on' innovation by licensees. This will require a change in the wording of TTBER and the TT Guidelines.



# Conclusions

- In the first three cases, the existing TTBER is broadly adequate; what is needed is a more nuanced set of guidelines. There is a need to give adequate recognition and show greater understanding of the pro-competitive features of the agreements and individual clauses and to more explicitly recognize the rarity of “rogue” licensing agreements.

# Conclusions

## (cont.)

- Business strategies in relation to the process of technology transfer are part and parcel of the autonomous growth of industry and services of modern economies. In the last decade, industry itself has come up with devices such as cross licensing and patent pools to deal with the patent thicket. Regulation needs to adjust to ensure that there is room for these legitimate responses to take an appropriate role in the innovation process.

# Grant-backs of Licensee's Improvements

- What are they? Assignment or Exclusive Rights to Licensor of Licensee's improvements
- Why does the licensor require them?
- What are the effects on licensees?
- To what extent should the new regulation and guidelines change the rules?



# Grant-backs II

- Distinction between severable and non-severable improvements: Severable improvements can be worked without infringing the licensor's patent?
- Severable improvements are protected by limiting contract to non-exclusive licenses from licensee to licensor
- Non-severable improvements are treated differently.

# Grant-backs III

- At stake is protection of “follow on” innovation vs. incentives to licensor to license.
- The regulation also protects the independent R&D of the licensee. TTBER 5(b)
- Some greater protection of the licensee’s interest in maintaining rights to non-severable improvements could be added.

# Cross Licensing

- An answer to the patent thicket?
- How treated in the Guidelines?
- What changes could be made?



# Cross Licensing II

- Undoubtedly, cross licensing allows firms to plough their way through patent thickets:
- (I) written agreements
- (II) unwritten agreements
- However, some competition concerns:
- § Cross licenses between competitors where royalties are calculated on the basis of individual product sales, I.e., with reciprocal running royalties, can assist in coordinating price fixing! (TTG para 80)

# Cross Licensing III

- However, even where reciprocal running royalties are involved, they will only be treated as caught by Article 81(1) if they are “devoid of any pro-competitive purpose and therefore does not constitute a bona fide cross licensing arrangement.” TTG para 80
- E.g. sham arrangements which create no value and therefore with no valid business justification.
- Considerable room for manoeuvre to parties.
- And, what about cross licensing which impose no royalties?

# Patent Pools

- Another answer to the patent thicket?
- How treated in the Guidelines?
- What changes could be made?



# Patent Pools II

- The three factors, now and always:
- (I) retention of the right to licence outside the pool
- (II) if the pool contains only “essential patents” not caught by Article 81(1) irrespective of the market power of the parties, but the conditions on which licences are granted may be caught by Article 81(1)

# Patent Pools III

- The inclusion of non-essential patents in patent pools increases anti-competitive risk TTG (paras 219,221):
  - (I) Collective bundling
  - (II) Too many suggests a sham
  - (III) Complementary technologies raise the royalty price
  - (IV) Risk of foreclosure

# Patent Pools IV

- Where a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 101(1) if the pool has a significant position on any relevant market.
- Moreover, technologies can become non-essential after the creation of the pool as new technologies develop.
- Yet, the Commission is correctly ambivalent. The issue can be exempted under Article 101 depending on facts and five listed factors in TTG para 222.