“STEALTH LICENSING” — OR ANTITRUST LAW AND TRADE REGULATION SQUEEZING PATENT RIGHTS

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Goals

1. Compulsory licensing is advancing in disguise
2. Policies that squeeze patent rights, and that risk undermining technology creation and dissemination
3. Evolution not backed by cogent evidence
4. Threat because uncertainty harmful to investments, at a time where critical technologies must be rolled out

Structure

1. Definition of «stealth» licensing
2. Stealth licensing in motion
   1. The «Flexible Compulsory Licensing» doctrine in trade regulation
   2. «Undercover» licensing in antitrust policy
3. Effects of stealth licensing
4. Conclusion
DEFINITION OF STEALTH LICENSING
COMPULSORY V STEALTH LICENSING

“Compulsory” licensing

• Article 31 b) and k) TRIPS
  • Exception 1: “national emergency or other circumstances of extreme urgency or in cases of public non-commercial use”
  • Exception 2: “anticompetitive practices”

Practice
• No clear evidence of increased compulsory licensing activity in courts

“Stealth” licensing

• But subtle measures that enlarge scope or reduce threshold for intervention under exceptions 1 and 2
  • Policy calls to «flexibilise» compulsory licensing in international trade circles
  • Legal doctrines that ease application of antitrust enforcement in patent-intensive sectors

• Instruments
  • Soft law
  • Settlements and transactions
  • Press releases
  • Sunshine regulation

• Combination of discrete measures that altogether create a patent-adverse climate
1. « FLEXIBILITY » UNDER TRIPS

Inception of flexibility doctrine

- WTO Doha declaration in 2001: There should be “a right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose”.
- Public health purpose, for « least-developed countries »
- Turned into practice in Africa, Asia and India re AIDS treatment

Extension of flexibility doctrine

United Nations Framework Convention on Climate Change, 2009: China and India propose compulsory licensing of patented technologies or to introduce explicit derogations for green technologies in the text of the TRIPS agreement

World Bank, 2012: “Making it easier for countries to issue compulsory licenses”

Warsaw Climate Change conference in November, 2013: “removal of patents on climate-related technologies for non-Annex I Parties”
A CLOSER LOOK

Unlike in pharmaceuticals, most base technologies for green technologies were discovered long ago, and innovation is essentially incremental (Copenhagen Econ, 2009)

Empirical analysis shows that price of green-tech is far from anticompetitive (Barton, 2007)

A lot of technology transfer happens (WIPO, 2011)

Unlike in pharmaceuticals, « fundamental rights » angle is less obvious
2. UNDERCOVER LICENSING IN ANTITRUST LAW

The issue

• Compulsory licensing remains epiphenomenal under abuse of dominance law (article 102 TFEU)

• But slight, subtle relaxations of legal tests, standards, interpretations and doctrines, that bring patent owners one step closer to antitrust licensing orders

The evidence

• Patent = monopoly

• IP Atheism

• Presumptive weakness of patents

• Transactional licensing

• Phasing out of IP-Protective Case-Law

• « Estoppel » abuse

• « Use it or loose it » doctrine
CJEU, C-468/06 to C-478/06, Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE, [2008] ECR I-7139: §64 “a medicine is protected by a patent which confers a temporary monopoly”

Commission Decision, Google/MMI: §54 “The specificity of SEPs is that they have to be implemented in order to comply with a standard and thus cannot be designed around, i.e. there is by definition no alternative or substitute for each such patent. Therefore, each SEP constitutes a separate relevant technology market on its own”
Microsoft, §550: “intellectual property rights are not in a different category to property rights as such”

Microsoft, fn 249: “In any case, since the relevant specifications are not available for scrutiny, it is not possible for the Commission to determine to what extent Microsoft’s claims relating to various intellectual property rights are justified”

Thomson Reuters, §90: “The Commission does not take a view on whether RICs are protected by intellectual property rights”

S&P, §41: “the mere use of numbers for reference purpose is not capable of being subject to copyright”
PATENTS’ PRESUMPTIVE WEAKNESS

Pharmaceutical

• Burgeoning decisional practice on “pay-for-delay” settlements in the pharmaceutical sector
  • Lundbeck
  • Servier

• If originators settle before patent expiry, then inference that their patent is weak

High tech

Official citations of DG COMP officials in public talks after Motorola decision (and §382 of the decision)

<table>
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<th>Country</th>
<th>Infringement found</th>
<th>Ambiguous</th>
<th>Patent invalid</th>
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<td><strong>6.7%</strong></td>
<td><strong>30.7%</strong></td>
<td><strong>20.3%</strong></td>
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</table>
TRANSACTIONAL LICENSING

• Article 102 settlements with IP holders
  • 4 cases: Rambus; S&P; Thomson/Reuters; Samsung
  • Samsung’s commitments:
    • Patent holder will not seek injunctions on SEPs encumbered by FRAND with licensees that adhere to the following licensing framework
    • 12 months negotiation period
    • Third party determination if negotiations break down (court or arbitration)

• Merger control settlements
  • IPR licensing is the single most important remedy applied as an alternative to a corporate carve out
  • Shell/BASF

• Informal settlements
  • Google/Motorola Mobility
PHASING OUT OF IP-PROTECTIVE CASE-LAW

No reference to “exercise/existence” dichotomy in recent cases

No reference to “specific subject matter” in recent cases

Reversal of Magill/IMS Health in CFI, T-201/04, Microsoft Corp. v Commission (but reversed by GC, T-167/08, Microsoft Corp. v Commission)

No reference to Magill/IMS Health case-law in:
  • Horizontal Cooperation Guidelines
  • Draft Technology Transfer Guidelines

“Exceptional circumstances” referred to in latest 102 TFEU decisions (Samsung and Motorola) … but watered down in holding that standard setting + FRAND commitments constitute such circumstances
CATCH 22 SITUATION

« Estoppel » abuse doctrine

CJEU, C-52/09, Konkurrensverket v TeliaSonera Sverige AB

Once a dominant firm has voluntarily licensed, it can no longer refuse to license

K. Coates (DG COMP) talks of “Estoppel” abuse

« Use it or loose it » doctrine

S. Bowles (MEP)

“I also think that you could use compulsory licensing more. You should also remove injunctory rights if the patents are not being actually worked. […] Indeed I would even go so far as to say that if you are not working it, there should be compulsory licensing. […] Everybody argues that it is complicated to negotiate a license, but if the will was there it could be done. And I think the will - could be imposed though competition policy.”
“It’s important to remember that antitrust intervention in IP is very rare”; “Some of the cases [at the moment] are very high-profile, that’s why they get more prominence. But [antitrust intervention] is over-stated.”
A black swan is “An event that comes as a surprise, has a major effect, and is often inappropriately rationalized after the fact with the benefit of hindsight” (Wikipedia)

- September 2001, WW1, financial crisis, Fukushima meltdown
- Economic agents to make excessive, unnecessary ex post adjustments: traders on financial markets use models which overly anticipate bank defaults, and contribute to double dip recession

Illustrations:
- Samsung’s relinquishing of its right of access to court, April 2014?
- Motorola found in abuse of dominance for unlawful seeking and enforcing of injunctions on FRAND-pledged SEPS, April 2014?
- Dropped cases (Dupont/Honeywell in relation to patent ambush) are likely to be ignored, because competition agencies do not report on them
TOO “LIGHT” TO BITE?

Hypothesis

Most IP unfriendly statements from antitrust enforcers come in the form of soft instruments, such as:

- Guidelines
- Notices
- Press releases
- Speeches
- Etc.

Butterfly effect?
Global Climatic Interdependence

Edward N. Lorenz, 1972 “Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?”

Because of global climatic interdependence, a negligible event such as the flap of a butterfly in one region of the world can set off a cataclysm at the other end of the planet.

Global Antitrust Community

A soft law declaration by agency X may be transformed into hard decisional initiatives by authority Y.

A soft law declaration by agency X may well inspire a complainant in jurisdiction Y.

A soft law declaration by agency X may trigger decisional or regulatory intervention by non-antitrust organs in country Y.

A soft law declaration by agency X may be misunderstood by agency Y, and turned into erroneous enforcement activity.

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FTC Commissioner Olhausen, 2013:

“Recently, I was in China attending a conference and meeting with Chinese competition officials. At the conference, I heard people claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. In addition, it was suggested that when read in light of this doctrine, the FTC’s Google decision implies that a SEP is an essential facility and an unreasonable refusal to license that SEP constitutes monopolization. It was further suggested that the best remedy for monopolization with a SEP would be compulsory licensing because permitting more parties to use the SEP would facilitate competition. This is not a correct reading of relevant U.S. law or, in my opinion, of the FTC’s decision in Google”
VERIFICATION (2) — CASES

China: ongoing investigations into Qualcomm’s licensing practices by National Development and Reform Commission (“NDRC”)
- Qualcomm accused of charging patent fees based on the whole device

European Union: Motorola (2014), unlawful abuse of dominance to seek and enforce injunctions for SEPs encumbered by a FRAND commitment

Italy: Pfizer (Xalatan) (2014), abuse through the request for divisional patents and SPCs, an aggressive policy against generic companies, including threats and enforcement proceedings. For more, see: http://thespcblog.blogspot.de/2014/02/italy-consiglio-di-stato-reinstates.html

THEORETICAL DIVIDE ON SOCIAL FUNCTIONS OF PATENTS

Traditional views in econlit

Incentives theory and the creation function (Schumpeter; Arrow; Scherer)

Patent as a market institution and the dissemination function (Gallini and Long)

Patents as prospects for research efforts (Kitch)

Patents as signals for investors (Long)

Recent trends in econlit

IP abolitionists
  - Concerns of barriers to innovation
  - Authors: Boldrin and Levine; Tabarrok

IP reformists
  - Concerns of patent proliferation and patent probabilistic weakness
  - Authors: Lemley and Shapiro; Posner

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Words of wisdom

Joshua Wright, “Evidence-Based Antitrust Enforcement in the Technology Sector”, Speech delivered at Competition Law Center Beijing, China, February 23, 2013: enforcement should be “disciplined by empiricism”

Case-study: ICT sector

Public enemy №1 for both abolitionists – innovation is said to be hampered by patents – and reformists – in their view, weak patents and thickets plague the sector
In industries allegedly subject to hold up
R&D expenditures

![Graph showing R&D expenditures for various companies from 2008 to 2012](image)

**European Commission’s Joint Research Centre (JRC) - (IPTS)**

Data retrieved from EU Industrial R&D Investment SCOREBOARDS 2009-2013

- SAMSUNG ELECTRONICS
- MICROSOFT
- GOOGLE
- NOKIA
- HUAWEI
- APPLE
- MOTOROLA
Sales €million

EUROPEAN COMMISSION'S JOINT RESEARCH CENTRE (JRC) - (IPTS)

Data retrieved from EU Industrial R&D Investment SCOREBOARDS 2009-2013
Number of ICT firms in top 40 (and rank)

1. Samsung (2)
2. Microsoft (3)
3. Intel (4)
4. Google
5. Cisco
6. IBM
7. Nokia
8. Sony
9. Ericsson
10. Oracle
11. Huawei
12. Qualcomm
LAST REMARKS

Stealth licensing creates uncertainty

Uncertainty is adverse to investments

Technology investment contributes to long term growth
USEFUL LINKS AND REFERENCES
