Antitrust meets IP
Clash of cultures or complementary tools?

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Outline

• Tension between IPR and Competition policy and solution
• Patents, where Competition policy meets IPR - a European perspective
• Agreements and restrictions
  • Patent settlements
  • Cross-licences
  • Patent pools
• Abuse of dominance / monopolisation
  • Standard setting
  • Patent trolls
  • Refusal to license
• Conclusions
Tension between IP and Competition policies

**IP policy**
1. Confers temporary monopoly
2. Focuses on innovation
3. Needs to avoid overpatenting and underappropriation

**Competition policy**
1. Regulates and limits exercise of monopoly power
2. Focuses on consumer welfare
3. Needs to strike difficult balance between short and long run competition

“It is a longstanding topic of debate in economic and legal circles: how to marry the innovation bride and the competition groom”

Mario Monti, European Commissioner for Competition Policy, January 2004
Complementary tools?

“Contrary to what some might think, competition is a necessary stimulus for innovation”

Mario Monti, European Commissioner for Competition Policy, January 2004

Common goal: both IPR and Competition policy seek to facilitate vigorous innovation

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<td>Risk of overbroad IP protection</td>
<td>Risk of ‘expropriation’ of IPR</td>
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Solving the tension

1. Although IPR confers a monopoly, not per se anticompetitive

2. Division of responsibilities
   - IP policy should focus on breadth of protection
   - Competition policy should focus on “abuses” of IPR that confer additional market power
Current focus of competition enforcement

“Patent Wars” in the mobile / smartphone space
"European competition commissioner Joaquín Almunia has stressed that “good answers” are needed “soon” to patent-licensing disputes involving rival tech companies, to ensure consumers are not “held hostage to litigation.” He has also called upon industry players to elaborate “clear rules” through their standard-setting organisations, to stop essential patents being abused."

Two answers to this problem:

1. Facilitate pro-competitive agreements (while discouraging anti-competitive ones)
2. Prevent unilateral abuse of IPR
Agreements and restraints - framework

Agreements or restraints which may restrict or distort competitions can be captured by art. 101 TFEU

- In general – freedom to license
- Unless the licence agreement restricts actual or potential competition that would have existed without the agreement or restraint
- Potential anticompetitive effect balanced against the pro-competitive effects (art 101(3))

Mostly concerned about restrictions included in licensing contracts

- Fixing prices or output
- Certain market allocation (particular field of use restrictions)
- Restricting the licensee from exploiting its (or others’) technology (with some exemptions)
Patent settlements

Cases typically arise in pharmaceuticals (see Servier, Lundbeck, Cephalon, and Johnson & Johnson)

- Concern that they facilitate extension of IPR beyond expiry
- In exchange for a ‘payment’ not to enter the market
- Often part of a general ‘market protection strategy’ (patent clusters, litigation against generics, launch of follow-on products)
Cross-licensing

- Cross-licensing treated favourably
- Some commentators highlight potential anti-competitive effects of cross-licenses
  - May facilitate tacit collusion
  - May result in high royalties when cross-licensing complementary IPRs
- However, clear efficiency rationale (especially if royalty-free)
  - Cut through the patent thicket
  - Reduce “hold up” problems
  - Reduce “royalty stacking” and transaction costs
Patent pools

• The approach to patent pools is debated in economics and competition circles

• Potential anti-competitive effects of patent pools
  • May help set a collusive royalty rate (if substitutes included)
  • May foreclose innovations outside the pool

• However, same efficiency rationale as cross-licensing (especially if they include complementary patents which have no substitutes outside the pool)
  • Cut through the patent thicket
  • Reduce “hold up” problems
  • Reduce “royalty stacking” and transaction costs
Unilateral abuses of IPR - framework

Abuses of a dominant position can be captured by art. 102 TFEU, even when dominance derives from IPR

- In general – freedom to exploit IPR
- Unless the strategy creates additional market power, beyond the original IPR
- Or IPR allows company to foreclose competitors from the market (in extreme circumstances)
- No efficiency defence allowed

Mostly concerned about foreclosure of competitors through “strategic use” of IPR
Standard setting cases

Standards are pro-competitive
  - Allow interoperability (which may not arise from market forces)

However, standard setting can raise competition issue
  - Confers additional market power, beyond the original IPR
  - There may be strategic behaviour at the standard setting stage
    - Incentive to include own technology (stronger if weak tech / patent)
    - Incentive to exclude competitors from market (anti-commons)
    - Patent thicket
  - Ex-post opportunism
    - Hold-up
    - Royalty Stacking
Standard setting cases – possible solutions

EC Guidelines on the applicability of Article 101 to horizontal co-operation agreements

- Who sets the standard: open participation in SSOs, and decision process is unrestricted and transparent
- Encourages (but does not mandates) ex-ante disclosure and allows ex-ante licensing negotiations (individual, not joint)

Ex-ante disclosure and (F)RAND commitment as a safe harbour

FRAND cases are difficult, as they involve determining what is a (F)RAND royalty -> Competition authorities not always well-equipped to answer this question
Patent trolls

- Example
  - Non-Practicing Entities
  - Large portfolio of disparate patents
  - No standard
- Patent hold-up
- How does competition law address it?
  - Refusal to license?
  - Excessive pricing?
- How about through IP law?
Refusal to license / compulsory licensing

- Traditional approach: no duty to licence, except in exceptional circumstances (Magill)
- IMS, Microsoft suggest that exceptional circumstances may be more common
  - Not involving a ‘new’ product (as in Magill), merely ‘me too’ products
  - No previous relationship that was interrupted (common condition for ‘refusal to supply’ cases)

- The Commission’s view: balancing different innovation incentives
  “The major objective justification put forward by Microsoft relates to Microsoft’s intellectual property over Windows. However, a detailed examination of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft’s incentives to innovate is outweighed by its positive impact on the level of innovation in the whole industry (including Microsoft)...”
Conclusion

• Competition and IP policy are in an inherent state of tension

• Competition law should deal with IPR, when:
  • IPR are “abused”; and
  • the result is reduced competition in product markets

• Competition law should not attempt to deal with exploitation of IPR (e.g., determining (F)RAND)

• Difficult to determine what to do with the ‘intersection’ (e.g., compulsory licensing, patent trolls)
Thank you

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