Clarifying Competition Law: Interface between Intellectual Property Rights and EU/U.S. Competition/Antitrust Law

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This webinar will examine:

1. Relationship between Competition/Antitrust Law and IPRs
2. Refusal to License
3. Abusive Litigation and Standard Essential Patents
5. Settlement Agreements
6. Key Points
Relationship between EU Competition Law & IPRs

• Uncomfortable bedfellows?

• Fundamental Principles
  – IPRs: legal monopoly granted by Member States
  – EU Principle of Free Movement: need to create a single EU Market
  – EU Competition Law: uniform conditions of competition

• Leading European court cases: existence vs exercise dichotomy

• Article 101 & 102 TFEU: Anti-competitive behaviour in connection with IP can come under either prohibition

• Affects distribution, licensing and policies and practices of entities with market power
Relationship between U.S. Antitrust Law and IPRs

• IPRs are fundamental in the United States
  – U.S. Constitution, Art. I, § 8, Clause 8

• Jurisprudence has been developing a balance between IP and Antitrust Objectives

• Relevant Antitrust Statutes
  – Sherman Act 15 U.S.C. §§ 1, 2
Refusal to License
EU Perspective

- Article 102 - abuse of dominant position
- Refusal to supply (non IPR) an abuse – Cases 6/73 and 7/73, ICI and Commercial Solvents v Commission
- Oscar Bronner v Mediaprint, case C-7/97
- Could a refusal to licence be an abuse?
- When must an IP owner grant a license or refrain from withdrawing a license for their IP?
  - Joined cases C-241/91 and C-242/91, known as Magill
  - IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. Preliminary ruling, Case C-418/01
  - Microsoft Corp v Commission T-201/04
  - Commission Article 102 Guidelines (2009/C45/02)
Refusal to License cont’d
EU Perspective

• Issues
  – High barrier to surmount: other approaches/discriminatory licensing
  – Always relate to downstream markets (c/f IMS Health)
  – Can you stop licensing previously licensed IPRs as part of a change in business practice/objective justification?
Refusal to License
U.S. Perspective

• Generally there is no duty to license IP to others
  – Absent illegal tying, fraud and sham litigation, unilateral refusal to deal principle
    applies (even with monopoly power) CSU,L.L.C. v. Xerox Corp., 203 F.3d 1322 (Fed. Cir. 2000)
  – Excessive royalties relating to IP generally ok

• Refusal to license is not absolute
  – A refusal to license that terminates a voluntary and profitable course of dealing,
    forsaking short-term profits to achieve an anticompetitive end may result in antitrust liability
  – Limited situations where such conduct may be reviewed under a rule of reason analysis
Refusal to License cont’d
U.S. Perspective

• Guidance from the DOJ and FTC
    • Provides guidance on horizontal and vertical licensing issues
    • Antitrust safe harbor provisions
Abusive Litigation
EU Perspective

• When does an IPR owner abuse their dominant position when protecting their IPRs?
• Background
  – Highly topical-patent wars over smartphones/tablets in both U.S. and EU
  – What are Standard Essential Patents?
  – Why are they important?
  – Various court challenges by patent holders against potential licensees
• Litigation as an abuse
  – ITT Promedia NV v. Commission, Case T-111/96 - litigation is abusive when manifestly unfounded
• When will dominant IPR owner infringe competition law when seeking injunctions to protect their SEPs
  – Commission Decision in Motorola (no challenge clause included)
  – Commitments Decision-Samsung –minimum negotiating period
• Beginnings of a Safe Harbour?
Abusive Litigation cont’d
EU Perspective

• Huwei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH (Case C-170/13) Advocate General Opinion (20th November 2014) what is willingness?

• Issues:
  – What is FRAND and who fixes it?
  – What is a willing licensee?
  – When can a dominant IPR holder ever be safe taking injunction proceedings?
  – Competition treatment of SEP and non SEP: Should there be a difference?
  – Could the Commission’s Horizontal Cooperation Guidelines on standardization be helpfully supplemented

Abusive use of Patent Procedures
EU Perspective

• Series of cases at both EU and Member State level about the improper use of patent protection system
• Recent cases
  – AstraZeneca v Commission, Case C-457/10 P
  – Reckitt Benckisser (2010 OFT investigation)
• Intention to block cheaper generic products
• Caution required
Abusive Litigation
U.S. Perspective

• Abusive Litigation
  – Objectively reasonable litigation is immune from antitrust liability--Noerr-Pennington and Walker Process doctrines
  – Objectively baseless and/or attempt to interfere with competitor business relationship (i.e. with knowledge of invalidity of patent, non-infringement) is not immune from the antitrust laws

• Standard Essential Patents
  – U.S. antitrust agencies: injunctive relief on FRAND-encumbered SEPs should be granted only in rare circumstances
  – Using the standard-setting process to obtain or maintain monopoly power, may violate section 2 of the Sherman Act or be challenged by the FTC under section 5 of the FTC Act
    • Theory asserted by FTC
    • No definitive civil antitrust litigation
    • Courts have addressed the issue of failure to adhere to a commitment to license on FRAND terms under contract law principles
Abusive Litigation/Patent Misuse cont’d

U.S. Perspective

- Patent Assertion Entities ("PAEs")
  - AKA nonpracticing entities or patent trolls
  - Own and license IP, but do not manufacture products or supply services.
  - Use to obtain licensing fees from accused infringers
  - Should antitrust law be used to curtail this litigation?
  - FTC and DOJ considerations
  - SCOTUS decision may impact PAE litigation, albeit without antitrust law
    - Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014)
    - Octane Fitness v. Icon Health, 134 S Ct 1749 (2014)
Settlement Agreements
EU Perspective

• Pay for delay and when an agreement to settle litigation can be considered anticompetitive
  – Lundbeck v Commission. (Case T-472/13)

• Issue for both U.S. and EU Regulators
Settlement Agreements
U.S. Perspective

• Pay for Delay
  – Pharma “reverse payment” settlements
  – Antitrust agencies: reverse payment settlements are presumptively unlawful, unless the settling parties establish the contrary
  – SCOTUS: settlements should be judged under the rule of reason--FTC v. Actavis 570 U.S. ___ (June 2013)
    • Payments that don’t comport with litigation risk assessment and/or value of ancillary services may be illegal
    • No specificity on how such an inquiry should be structured in this context
      – Lower courts providing the structure
Key Points

• Both EU and U.S. regulators grappling with similar key issues
  
• In the EU:
  – Balance between IPRs and competition law heavily influenced by single market goal
  – Commission and ECJ ready to order compulsory licenses to free up key downstream markets
  – Commission and ECJ take strong line on SEP litigation: Patent wars should not be fought at the expense of consumers
  – Pay for delay looks to be a settled competition law infringement

• In the U.S.:
  – Courts will continue to balance IPRs and antitrust law, resulting in a procompetitive, pro-innovation legal framework
  – PAE litigation will continue to be an issue that will need to be addressed, either through the courts or legislative action
  – Reverse payments settlements will continue to be developed, post-Actavis
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