Intersection antitrust law / Intellectual property law

Sources

- Bellamy, C., Child, G. European Community Law of Competiton. 6th Ed. London: Sweet & Maxwell, 2008.
- European Commission – Competition http://ec.europa.eu/competition/index_en.html

Intellectual property

- Patent, Trade mark, Copyright, Design, and similar rights
  - There is an effort of granting IP rights at Community level, but in fact IP rights are substantially governed by the laws of each Member State
- Intellectual Property rights (IP rights) may raise difficult problems under competition law
  - There may be a conflict between:
    - systems which confer **legal monopolies** (intellectual property law), on the one hand
    - systems which are intended to ensure **free competition** (antitrust law) on the other hand

→ **Protection of intellectual property rights or protection of competition?**

IP rights and Competition

- The Community approach has 4 main elements in resolving the issues which IP rights may pose for competition and the creation of the single market:

1. **Exercise of IP rights may be affected by Art. 101 (Cartels) and Art. 102 (Abuse of dominant position) of the TFEU**
2. **Block exemptions (Regulation 772/2004) – IP rights may be assigned or licensed without infringing Art. 101 of the TFEU**
3. Art. 33 and Art. 36 of the TFEU – the requirements of the free movement of goods and the right to IP
4. The effort to harmonize national laws on IP rights and create Community-based system for the grant of IP rights

IP rights and Art. 101 of the TFEU

- **The bringing of an infringement action** may contravene Art. 101 (1) where the proceedings are brought **as the object, the means or the consequence of an agreement**
  - E.g., the case ***Costen and Grunding*** *56,58/64 [1966] ECR 299* Costen had absolute territorial protection which was reinforced by the assignment of the „GINT“ trademark to Costen → Costen sued third parties, that obtained and imported Grunding products into France, for infringement in reliance on the French registration of the GINT trademark
    - Costen was ordered to refrain from using GINT trademark to hinder parallel imports
    - *„The injunction … to refrain from using rights under national trade mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Art. 81(1).“*

Licensing of IP rights
Application of Art. 101(1)

- The test for application of **Art. 101(1)**
  - whether the licence or any of its provisions may **affect trade between member States**

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  - whether the licence may **prevent, restrict or distort competition** within the common market to an appreciable extent
- The possibility of application of **Art. 101(3)** – exemptions
  - If the agreement fulfills the criteria of Art. 101(3) → contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit
  - Regulation 772/2004 – block exemption for certain types of technology transfer agreements

Licensing of IP rights
Application of Art. 101(1)

- 2 possible theoretical problem arising in relation with IP rights
  a. The limited licence theory
  b. Restriction and Encouragement of licensing of new technology

a. The limited licence theory

- IP right confers a legal monopoly on its owner (a third party cannot exploit the right without a licence) – the licence, when granted, “***opens a door***”
  - any limitation in the licence are not “restriction” under Art. 101(1), but merely define the ambit of licence

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  - but there is a partial rejection of this concept → the Commission stated that *“the fact that an undertaking which has granted licences to other undertakings is the proprietor of an industrial property right does not entitle it to control the market for the product under licence“*

    (Windsurfing v. Commission)

b. Restriction and encouragement of licensing

- The problem in assessing licence agreement under Art. 101(1) is that one party (licensee or licensor), may regard some restriction of the other party as essential if licence is to be entered into at all

- The possible conflict:
  - the licence may appear to be “restrictive”

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  - but the acceptance of the restriction may well lead to the successful conclusion of the licence with the prospect of the dissemination of new technology, increased innovation and better exploitation of the patented invention

IP rights and Art. 101
Commission guidelines

- **Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (2004) („Guidelines on Technology Transfer“)**
  - Technology transfer agreements:
    - the licensing of technology where the licensor permits the licensee to exploit the licensed technology for the production of goods or services (a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, …)
  - Most licence agreements **do not restrict competition** and **create pro-competitive efficiencies** (dissemination of technology and promotion of innovation).
    - Even licence agreements that restrict competition may often give rise to pro-competitive efficiencies and balanced against the negative effects on competition – Art. 101(3)

Guidelines on Technology Transfer

- **Posiible efficiencies of Transfer Technology agreements**
  - **Cost efficiencies**
    - development of new production technologies and methods,
    - an integration of existing assets (→ the combination of two existing technologies that have complementary strengths may reduce production costs or lead to the production of a higher quality product),
    - economies of scale and economies of scope,
    - agreements may allow for better planning of production, reducing the need to hold expensive inventory, …
  - **Qualitative efficiencies**
    - e.g., combinations of assets may create synergies that create efficiencies of a qualitative nature
- **Safe harbor**: four competing technologies
  - Where the licence does not contain hard-core restrictions – Art. 101(1) is unlikely to be infringed where there are 4 or more technologies which compete with the technologies controlled by the parties to the licence

Typical clauses in patent and know-how licences
Possible application of Art. 101(1) (1)

a. Clauses concerning **royalties**

- Price fixing - e.g., cross-licences are entered into between competitors where the royalties are disproportionate to the market value of the licence and have a significant impact on market prices
- Limitation of output - e.g., royalties in reciprocal licences (between parties with a market power) increase as output increase since

b. Clauses concerning the grant of **exclusive territories**

- Market sharing - e.g., if the parties to the licence are competitors and they enter into reciprocal licences under which each grants an exclusive licence to the other to use the licenced technology

Typical clauses in patent and know-how licences Possible application of Art. 101(1) (2)

c. **Restriction concerning the licensee’s production of goods**

- Limitation of quantities produced or sold which prevents the party accepting it from increasing of his output and may have effect similar to export ban (e.g., where is combined with exclusive territories)
- Hard-core restriction under Art. 101(1) – reciprocal output restrictions between competing undertakings

d. **Other restrictions on the licensee**

- E.g., tying and bundling obligations – where the licensor has significant market power in the tying product and the tie covers a significant proportion of the market for the tied product → possible foreclosure of competing suppliers of the tied product
- „Most favoured licensee“ clause (= an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into) - they may fall within Art. 101(1) if it leads to uniformity of pricing

Art. 101(1) - Horizontal guidelines

- **Standardization agreements**
  - **Important rule for licensing of IP rights:** FRAND (fair, reasonable and non-discriminatory) Commitments
    - The purpose is to ensure that essential IP right protected technology incorporated in a standard **is accessible to the users** of that standard on fair, reasonable and non-discriminatory terms and conditions
      - The assessment of whether fees charged for access to IPR in the standard-setting context are FRAND should be based on whether the fees bear a reasonable relationship to the economic value of the IPR.
    - In some cases - ex ante disclosures of licensing terms in the context of a specific standard-setting process.
    - In some cases - IPR holders should individually disclose their most restrictive licensing terms (= the maximum royalty rates they would charge) prior to the adoption of the standard
      - this will normally not lead to a restriction of competition within the meaning of Article 101(1)

The Block exemption for Technology Transfer Agreement

- **Regulation 772/2004**
  - Technology transfer agreements that concern the licensing of technology usually **improve economic efficiency** and is pro-competitive - as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.
  - Article 101(1) of the TFEU shall not apply to **technology transfer agreements entered into between two undertakings permitting the production of contract products**
    - Market-share thresholds
      - the combined market share of the competing undertakings - below **20 %** on the affected relevant technology and product market,
      - The combined market share of the non-competing undertakings – below **30%**
  - Withdrawal in individual cases
    - access of third parties' technologies to the market is restricted,
    - access of potential licensees to the market is restricted,
    - without any objectively valid reason, the parties do not exploit the licensed technology

Abuse of Dominant position and IP rights

- Ownership of IP right may constitute a **legal monopoly**
  - The ownership of an IP right may be an important contributory factor in establishing dominance but does not, of itself do so
  - The exercising of IP right in itself is not an abuse of dominant position (but in some circumstances may constitute an abuse)

- The most often types of abuses in respect of IP rights
  - Exclusionary abuses
    - Refusal to license, Refusal to access to essential facilities, …
  - Exploitative abuse – unreasonably high prices
    - High royalty rates

Exploitative abuse - Astra Zeneca

- **Astra Zeneca** (Case COMP/A.37.507/F3)
  - Astra Zeneca aimed to exclude competing generic firms in seven Member States by **providing the misleading information in the context of its applications** to several patent offices for extra protection for omeprazole (the active substance in AZ's product Losec) in the form of so-called supplementary protection certificates.

Refusal to license as an abuse of dominant position?

- Refusal to grant licence is not abusive in itself
  - **AB Volvo v Erik Veng - Case 238/87**

    an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that ***a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position***
- In some circumstances, refusal to license may be regarded as an abuse of a dominant position within the meaning of Art. 102 (1) of the TFEU
  - E.g., cases IMS Health, Astra Zeneca

Exclusionary abuse – IMS Health (1)

- **IMS Health – decision of ECJ C-418/01**
  - The case concerned a computer programme for representing regional pharmaceutical sales data in Germany („1860 brick structure“) which was protected by an IP right
  - The conclusion of this case: It is necessary to assessed whether a product or service is **indispensable for enabling an undertaking to carry on business in a particular market**

  *“it must be determined whether there are products or services which constitute **alternative solutions, even if they are less advantageous**, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, alternative products or services”*

Exclusionary abuse – IMS Health (2)

- *The refusal by a dominant undertaking owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking […] constitutes an* ***abuse of a dominant position*** *where the following conditions are fulfilled:*
  - ***the undertaking which requested the licence intends to offer****, on the market for the supply of the data in question,* ***new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand****;*
  - *the refusal is* ***not justified by objective considerations****;*
  - *the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by* ***eliminating all competition on that market****.*

Exclusionary abuse – Microsoft (1)

- **Commission decision - COMP/C-3/37.792**
  - Sun Microsystems complained that Microsoft had **refused to provide interface information necessary for Sun to be able to develop products that would "talk" properly with the ubiquitous Windows PCs** – this disabled Sun to compete on an equal footing in the market for work group server operating systems.
  - European Commission stated that these non-disclosures by Microsoft were part of **a broader strategy designed to shut competitors out of the market.**
  - The European Commission regarded this conduct as an abuse of dominant position → Microsoft abused its market power by deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers
  - The European Commission ordered Microsoft **to disclose complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers** – this should enable rival vendors to develop products that can compete on a level playing field in the work group server operating system market.

Access to „Essential facilities“

- **“Essential Facilities Doctrine”** - imposes on owners of essential facilities a duty to deal with competitors
  - the doctrine was originally developed in the United States
  - In the European case law – cases **Magill** (Joined cases C-241/91 P and C-242/91 P), **Bronner** (Case C-7/97)
- Refusal to access to ***the essential facilities*** is prohibited where 3 conditions are fulfilled
  - the refusal of access to a facility must **be likely to prevent any competition** at all on the applicant’s market → application of a forward looking test
  - the access must be **indispensable or essential** for carrying out the applicant’s business,
  - the access must be denied without **any objective justification**

The abuse of a patent as an abuse of dominant position

- **Patent ambush**

  = an abuse of patent in the context of standard setting process

  - A member of standard-setting organization withholds information about his/her patent - during participation in development of a standard - which is essential for the standard setting process. After the patented technology is adopted as a standard, the owner of the relevant patent enforces his/her patent or demands unreasonably high royalty rate.
  - The prevention – the rules of standard-setting organizations
    - Disclosure rules
    - FRAND commitments made by owners of essential patents (European Commission's Horizontal Guidelines)
    - Ex ante licensing negotiation
  - The unreasonably high royalties as a consequence of deceptive conduct in standard setting process may be regarded as an abuse of dominant position in the form of **excessive pricing**

Patent ambush - Rambus

- **Rambus (Case COMP/38.636)**
  - Rambus is the U.S. developer and licensor of computer memory technologies. Rambus was a member of standard-setting organization JEDEC that developed an industry wide standard for “DRAM” (Dynamic Random Access Memory)
  - Rambus intentionally concealed that it had patents and patent applications which were relevant to technology used in the JEDEC standard, and subsequently claimed royalties for those patents
  - The European Commission accepted commitments from Rambus lowering memory chip royalty rates
  - Competition Commissioner Neelie Kroes: *"An effective standard-setting process should take place in a non-discriminatory, open and transparent way to ensure competition on the merits and to allow consumers to benefit from technical development and innovation. Abusive practices in standard setting can harm innovation and lead to higher prices for companies and consumers”*