Patents, Standards and Antitrust: Patent Pools

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History of Patent Pools
DOJ/FTC Guidelines
EU Guidelines
Patent Pools in the News
History of Patent Pools
1856
The Sewing Machine Pool
1890
Sherman Antitrust Act
1917
Manufacturers Aircraft Association
1945

Hartford-Empire
1964

International Manufacturing
DOJ Nine No-No’s (1960’s)

- Tying
- Assignment back
- Resale restrictions
- Horizontal restraints
- Mandatory package licenses
- Royalty provisions not tied to sales
- Post-sales restrictions
- Minimum resale pricing
1995
DOJ/FTC Guidelines
DOJ/FTC Guidelines
Section 5.5
Cross-Licensing and Patent Pools
Pro-Competitive Aspects of Pooling:

- Integrating complementary technology
- Reducing transaction costs
- Clearing blocking positions
- Avoiding costly litigation
- Promoting the dissemination of technology
Anti-Competitive Potential of Pooling:

- Collective price restraints (per se)
- Collective output restraints (per se)
- Exclusion (rule of reason)
- Arrangements discouraging R&D (rule of reason)
1997

MPEG-LA Business Review Letter
MPEG-LA Pool Activities:

• Non-exclusive license open to all
• Solicit licensees
• Enforce license agreements
• Collect and distribute royalties
MPEG-LA Pool – Positive Aspects:

• Option to license directly from holder
• Open membership
• Non-discriminatory licensing
• Limited to essential patents
• Essentiality determined independently
• Reasonable grantback provision
1999

Patent Pools and the Antitrust Dilemma

Steve Carlson
1998
Summit Technology/VISX Pool
Summit/VISX Issues:

• No independent licensing
• No licenses to others
• Price floor
2007
DOJ/FTC Guidelines Revised
Suggested closer scrutiny of pools
Primary Concerns with Patent Pools:

• Horizontal restraints
• Collusion
• Discourage R&D and new product development
Patent Pools – Pro-competitive Attributes:

• Only complementary patents
• Limited to essential technology
• Removal of invalid or unenforceable patents
• Non-exclusive license with right to license independently
• Other non-discriminatory attributes
Block Exemption excludes patent pools
EU Revisions:

• Pools still excluded from block exemption
• Essential means both in producing a product and complying with a standard
• Pool safe harbor
EU Patent Pool Safe Harbor:

- Open participation in standard and pool creation process
- Only essential patent pooled
- No exchange of sensitive information
- Licenses to pool are non-exclusive
- FRAND terms to third-parties
- No prohibition to validity or essentiality challenges
- Allows R&D for improvements
EU vs. U.S. Guidelines:

- EU – all judged under rule of reason
- EU more restrictive on grantbacks
- EU adopting U.S. approach to licensee estoppel
Patent Pools in the News
Defensive Patent Pools

RPX

Allied Security Trust

Open Invention Network
Pools Related to Major Portfolio Sales

Google acquisition of Motorola Mobility

Microsoft/Apple acquisition of Nortel patents

Apple/Oracle acquisition of Novell patents
Medicines Patent Pool
Biotech Patent Pools – Potential Concerns

- Few industry standards
- Patents tend to be both complementary and substitutional
- Need for licensing terms in advance of development/regulatory approval
Expect more patent pools, especially in biotech

Greater recognition of pro-competitive aspects

Continued monitoring for anti-competitive effects