

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

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Robert Bell is head of the EU & UK competition team at Bryan Cave. He is a market-leading competition lawyer with over 20 years' experience in advising clients on their EU and UK competition law matters. He acts on a range of complex competition and regulatory matters and has been involved in some of the leading cases before the OFT, European Commission and the UK and European Courts.

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Robert is currently Chair of the City of London Law Society's Competition Law Committee, which liaises with the UK Government and the EU & UK competition regulators in connection with the reform of competition law and practice.

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Arindam Kar's antitrust practice encompasses antitrust compliance, counseling and litigation. Mr. Kar's compliance practice includes the development of robust antitrust compliance programs for clients and he regularly conducts comprehensive antitrust audits. His antitrust counseling practice focuses on mergers and acquisitions analyses, joint venture analyses, price discrimination issues, franchising and termination of distributorships. Mr. Kar's antitrust litigation practice includes representing clients against various forms of restraints of trade and monopolization claims. In addition, Mr. Kar is also involved in the representation of companies and individuals in federal and state antitrust investigations.

Introduction

This webinar will examine:

1. Relationship between Competition/Antitrust Law and IPRs
2. Refusal to License
3. Abusive Litigation and Standard Essential Patents
4. Abusive Use of Patent Procedures/Patent Misuse
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
 - The “very object of [patent laws of the U.S.] is monopoly.” E. Bement & Sons v. Nat’l Harrow Co., 186 U.S. 70 (1902)
- Jurisprudence has been developing a balance between IP and Antitrust Objectives
- Relevant Antitrust Statutes
 - Sherman Act 15 U.S.C. § § 1, 2
 - Clayton Act 15 U.S.C. § § 14, 18
 - FTC Act 15 U.S.C. § 45



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 Verizon Communications v. Trinko, 540 U.S. 398 (2004)
 - Limited situations where such conduct may be reviewed under a rule of reason analysis American Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010)



Refusal to License cont'd

U.S. Perspective

- Guidance from the DOJ and FTC
 - Antitrust Guidelines for the Licensing of Intellectual Property (1995)
 - 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

- Huawei 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
- Patent trolls – Is there a competition law solution? Distinction between dominant tech companies enforcing rights and vexatious organisations. European Commission alert to U.S. problems and monitoring the market.

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)
 - Biosig v. Nautilus, 134 S. Ct. 2120 (2014)
 - Limelight v. Akamai, 134 S. Ct. 2111 (2014)
 - Octane Fitness v. Icon Health, 134 S Ct 1749 (2014)
 - Highmark v. Allcare, 134 S Ct 1744 (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)
 - Johnson & Johnson and Janssen-Cilag B.V. and Novartis AG and Sandoz B.V. (2013 Commission investigation)
 - Servier S.A.S. (2014 Commission investigation)
- 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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The screenshot displays the website's interface. At the top, the browser address bar shows 'www.eu-competitionlaw.com'. Below it is the 'BRYAN CAVE' logo and a search bar. The main header reads 'EU & COMPETITION LAW' with social media icons for Twitter and YouTube. A large banner image shows various European national flags in front of the European Parliament building. Below the banner, there are navigation icons for Home, Archives, and Authors. The 'CATEGORIES' section lists 'ABUSE OF DOMINANCE', 'ANTI-COMPETITIVE AGREEMENTS', and 'CARTELS'. The featured article is titled 'Abuse of Dominance' and 'LITIGATION AS AN ABUSE: EU COMMISSION DRAWS A LINE UNDER "PATENT WARS" COURT ACTIONS'. The article text begins: 'On 29th April 2014, the European Commission issued two landmark competition Decisions relating to a series of disputes that have commonly become known as "patent wars". The Decisions are important because they clarify for the first time whether, and in what circumstances, a patent holder seeking to enforce Standard Essential Patents through litigation (and more particularly injunctive relief) can be'. On the right side, there is a 'CONTACT US' section with 'ROBERT BELL - EDITOR' and a 'SUBSCRIBE' section with RSS and email icons.

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