

Time to set patent pools free

GCLC lunch talk, 22 June 2012

*The Commission's Review of the Rules on
Transfer of Technology Agreements*

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Patent pools mostly viewed as a problem

Competition policy toward patent pools has focused on the prevention of anticompetitive practices by patent pool members [...] and has generally paid little attention to the question of how to encourage the formation and stability of patent pools that benefit consumers

Gilbert, Ties that bind: Policies to promote (good) patent pools, 77 Antitrust L.J. 1 (2010), 3

TT Guidelines: Focus first on risk of competitive harm (§ 213), and only then recognise efficiencies (§ 214)



In dubio contra pools: Restrictive analytical framework

- Essential/Non-essential divide hard to apply outside standardised technologies
- On-going review of essentiality: cumbersome, costly and counter-intuitive
- Guidelines recognise that Complement/Substitute divide can be hard to apply
- Case for inclusion of non-essential, partially substitutable patents, yet solution of separate pooled packages can be extremely difficult to apply (valuation of each patent and package) and costly



Straightjacket effect

- 50-60 pools (outside Pharma)
 - All existing pools are based on standardised technology
 - Focus on identifying essential patents
 - Non-essential patents excluded, despite legal uncertainty
 - Limited number of pools, protracted negotiations
- => Many patent thickets remain unsolved



Little scientific justification for suspicion

Regibeau and Rocket, Assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection, Competition Reports COMP/2010/16, November 2011

Jeitschko and Zhang, Adverse Effects of Patent Pooling on Product Development and Commercialization, EAG 12-5, April 2012