

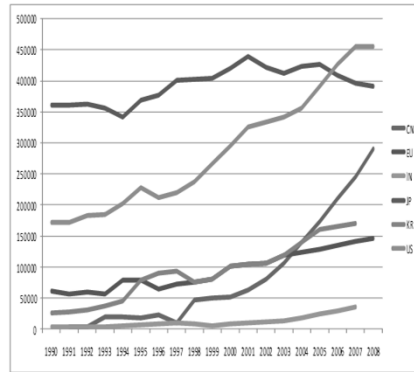
THE COMMISSION'S REVIEW OF THE RULES FOR
THE ASSESSMENT OF LICENSING AGREEMENTS
FOR THE TRANSFER OF TECHNOLOGY- Points For
Consideration

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Outline

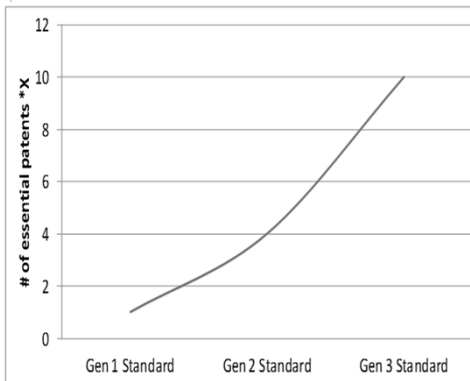
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- The Changing IP/ Antitrust Landscape
- Patent Thickets and licensing of SEPs
- Scope of the TTBER
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- Cross- licensing
- Grant-backs
- Patent Pools

The Changing IP/ Antitrust Landscape – Patents Filings on the Rise



- Since mid '80's protection and enforcement of patents improved
 - Patents have become strategic asset that can be leveraged for business benefits
 - In the CT area patent density has increased over time, in particular on technology standards
- Originally patents were in hands of US, EU companies. Over time JP, KR, TW entered the patent arena; CN may become the largest patent owner

The Changing IP/ Antitrust Landscape – Standards and IP



- Originally few companies involved in standard setting; Nowadays large number of companies, universities and research institutes are involved
- IP owners understand the value of essential patents on standards and file many patents during the standardization process
- Increase in number of essential patents per standard has reduced value per patent, but companies have larger number of essential patents to maintain their leveraging/competitive position

Above trend applies for example to:

Gen 1 Standard	Gen 2 Standard	Gen 3 Standard
CD (~100)	DVD (>400)	Blu-ray (~2000)
GSM (~100)	3G /UMTS (~1000)	4G / LTE (Not yet known)
MPEG-1 Video (~50)	MPEG-2 Video(~700)	MPEG 4 Video(~850)

Patent Thickets and licensing of SEPs

- A patent thicket exists if many IP rights are required to manufacture a given item and these rights are owned by a large number of different economic entities. This “requirement” can be technological or legal (litigation avoidance)

- Why Are Thickets a Potential Problem?
 - Royalty-Stacking: independent pricing of complementary goods may lead to high prices that hurt both profits and consumers.
 - Increase both the time (and cost) of reaching agreements and the probability that negotiations break down and no agreement is reached.

- But there is no systematic evidence of the magnitude of the private and social harm resulting from patent thickets (Régibeau & Rockett, p. 16)

Patent Thickets and licensing of SEPs

- Patent pools and cross-licensing are possible solutions to patent thicket issues, but may raise antitrust issues on their own. This implies a trade-off between different categories of welfare effects.

- The law is not yet sufficiently developed with regard to the treatment of SEPs. For instance: when does a SEP confer (significant) market power, if at all? And how does one reliably calculate the market share on the affected relevant technology and product market under Articles 3 and 4 of Regulation 772/2004? And what about paragraph 131 of the TT Guidelines?

Scope of the TTBER

- Exemption under Regulation 772/2004 applies to “TT agreements between two undertakings permitting the production of contract products.”
 - Does the right of reproduction and distribution of copies under a software license qualify as a license for the production of contract products and is therefore exemptible?
 - Technology pools: problematic in light of Regulation 19/65, but sufficiently dealt with in TT Guidelines?

Treatment of Intra-Technology Restraints

- Is there sufficient justification for harsh treatment of intra-technology restraints under Article 4 Regulation 772/ 2004 if inter- technology competition is strong and technology transfer is likely to bring benefits?
- Treatment of passive sales restrictions under Article 4(2)b(i) and (ii)
- Clarification of “technical field of use restriction” under Article 4(1)c

Cross-licensing

- Current treatment: relatively light (GLs 204-208). But see GL 143 (collusion) and 80 (cross-licenses with reciprocal running royalties as price-fixing) and 143 (application of Article 101 TFEU if clearly disproportionate running royalties)
- Régibeau & Rockett: larger catalogue of potentially negative effects, but mostly theoretical, dependent on multiple conditions and difficult to apply in practice.
 - Unilateral effects in the event of complementary, not-SEPs
 - Tacit collusion
 - Negative effect on innovation incentives
 - Exclusionary effects on “have-nots”

Grant-backs

- 43% of licensing agreements include grant back clauses
- Régibeau & Rockett suggest that exclusive grant-backs regarding non-severable innovation are unjustifiably exempted and should be excluded from the exemption (Article 5).
- No indications that exempted exclusive grant-backs regarding non-severable cause significant consumer harm.

Patent Pools

- Régibeau & Rockett suggest a more lenient approach with regard to the inclusion of less absolute complementary patents: SSO oriented pools may need to include some non-essential patents.
- Selective membership is not necessarily anti-competitive.
- Low royalty levels are not required for a pool to be welfare-enhancing; governance rules and type of IP included are determining factors.

Patent Pools