

# Intellectual Property Rights and Competition Policy

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IPRs and Competition Policy  
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October 18, 2012

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# Outline

- A Few Principles
- A Map
- US and the EU
- SSOs, SEPs, CEPs and Patent wars: the issues
- SSOs, SEPs, CEPs and Patent wars: some solutions?
- Policy-making through competition cases: a few remarks

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## A FEW PRINCIPLES

- Not all IPRs confer significant market power
- IPRs should be treated like any other source of market power → what matters is abusive conduct
- With some additional “efficiency” defences due to the public good nature of IPRS
- With a few exceptions, all sectors of activity have access to the same IP protection...although the effectiveness of this protection may differ across sectors.

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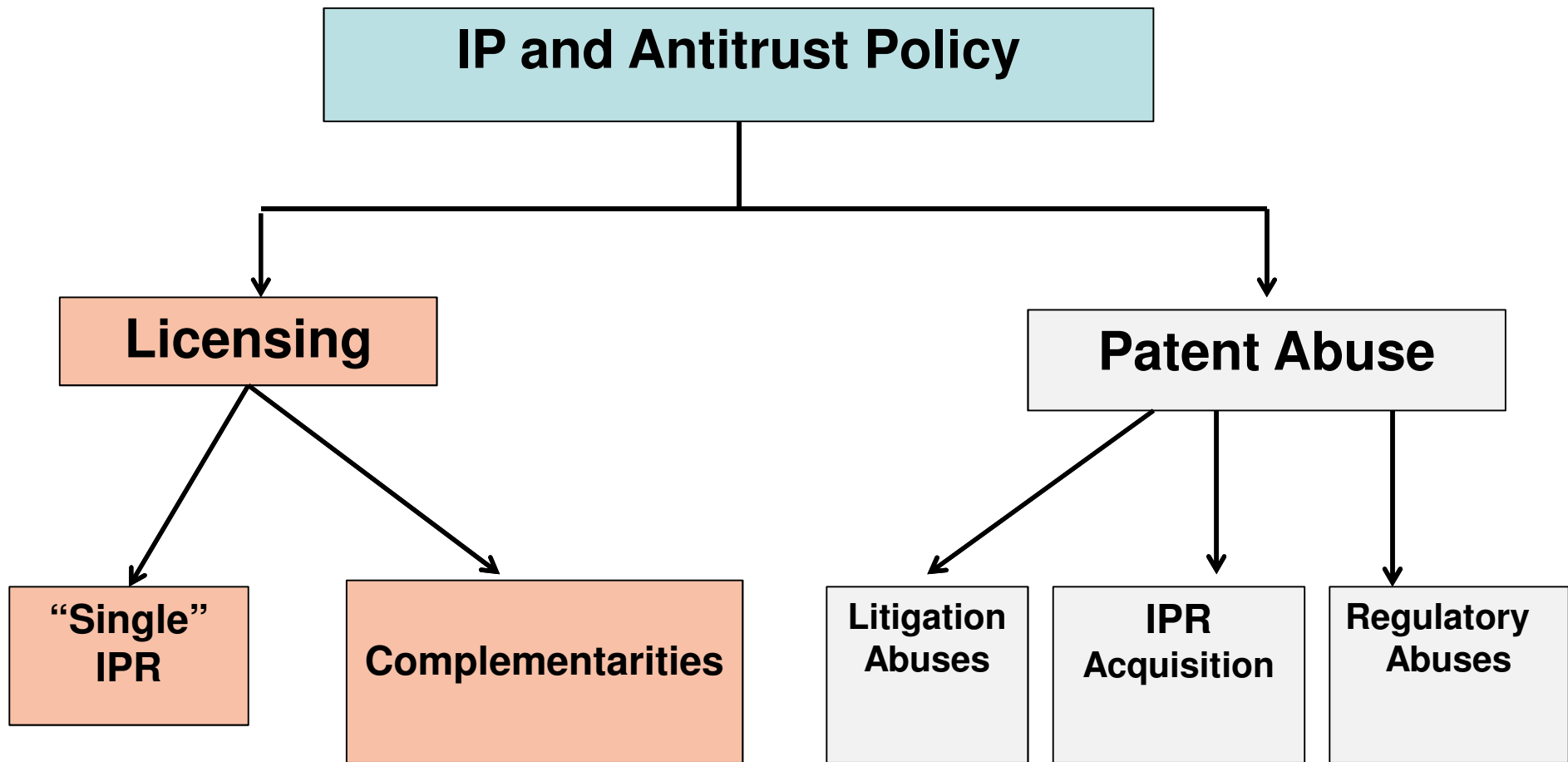
## A FEW PRINCIPLES

- The role of the IP system is to assign property rights, taking into account the trade-offs between the incentives to innovate of both initial and follow-on innovators, static welfare losses from higher product prices and the diffusion of knowledge.
- The role of competition policy is to regulate the use of IP-based market power when IPRs do give rise to market power.

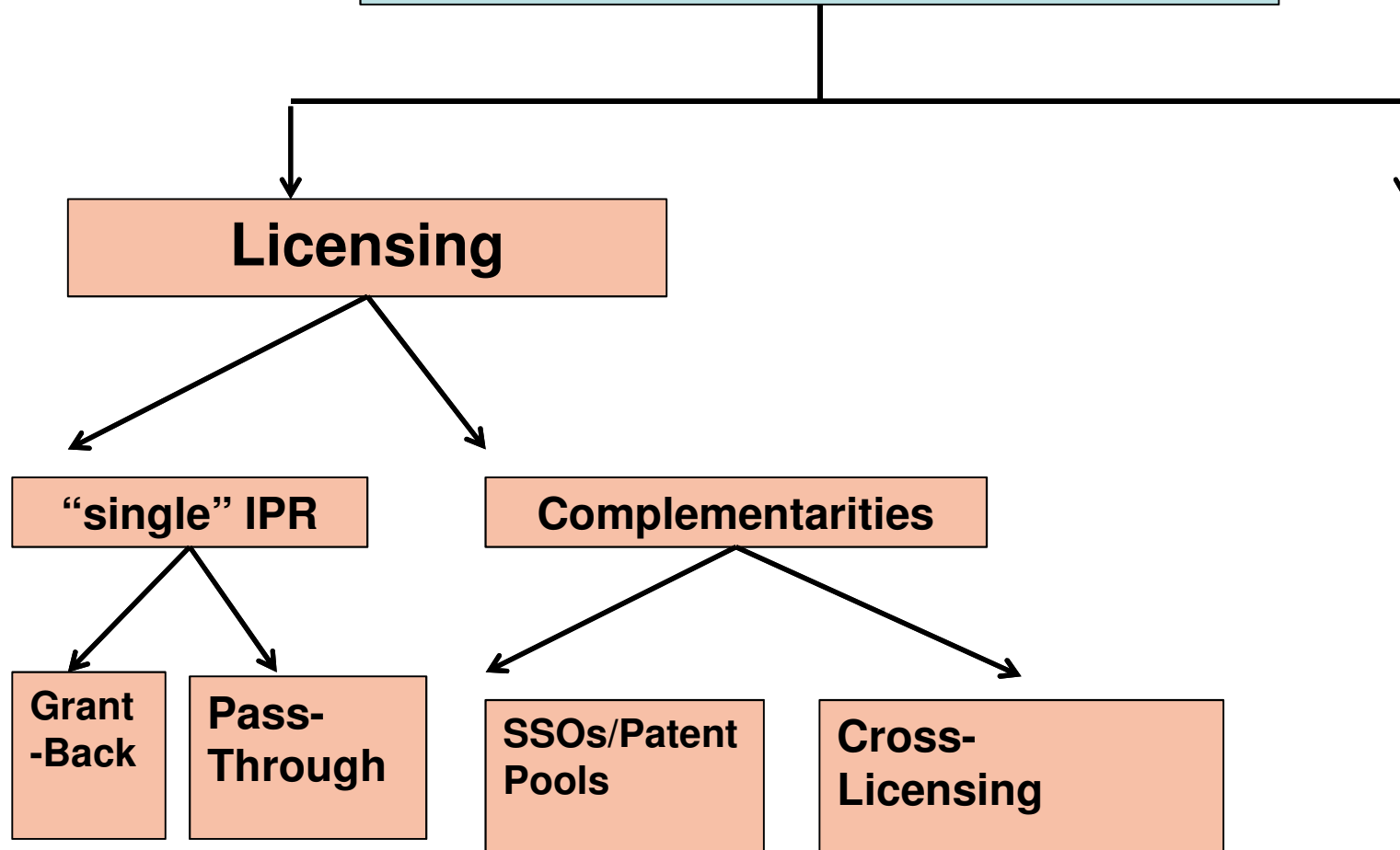
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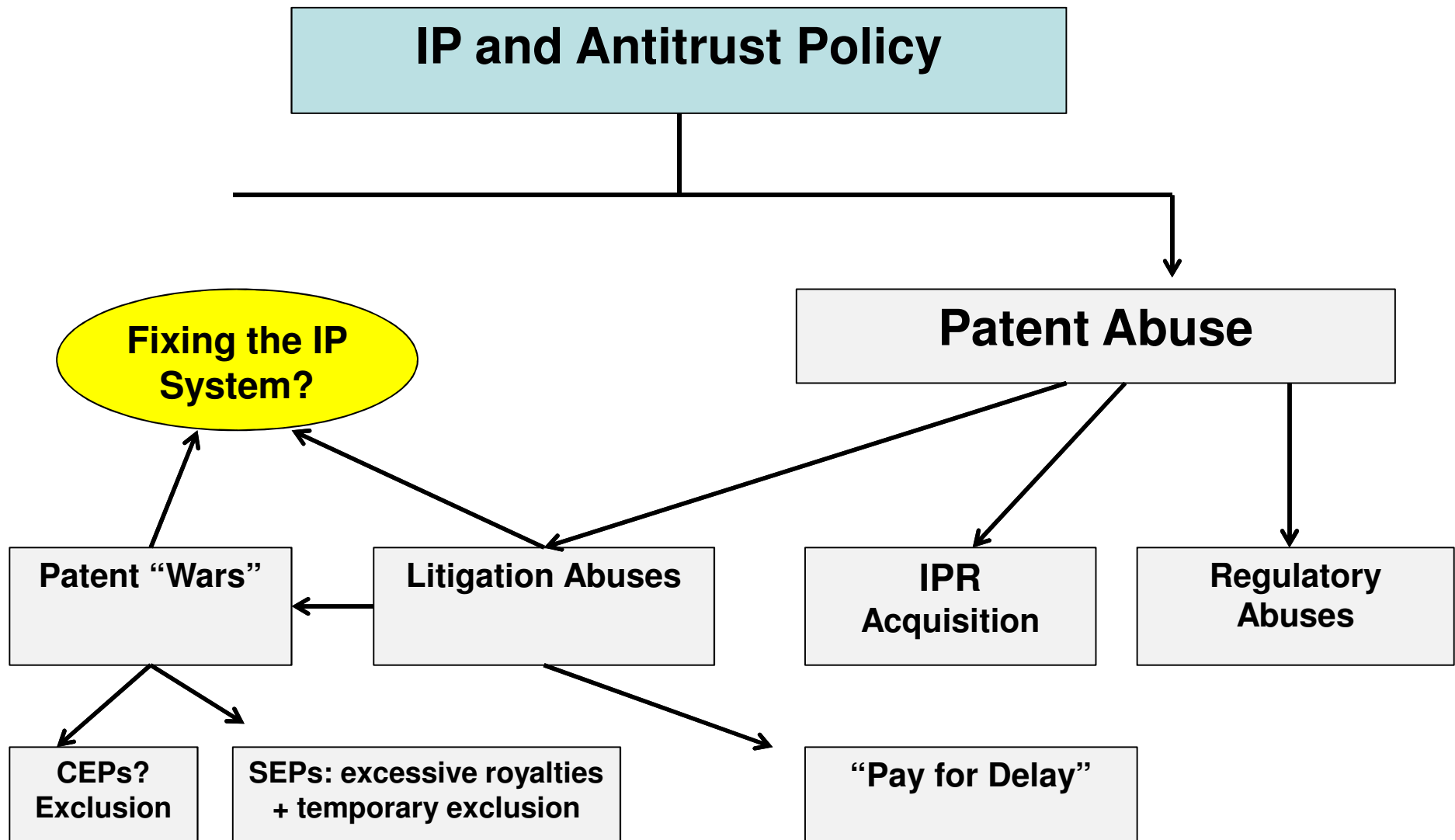
## A FEW QUESTIONS

- IP law already strikes a balance between reward, static efficiency and diffusion of information  
→ Should competition policy explicitly care about innovation ?
- Should competition policy modulate the application of IPRs across different sectors?
- Should competition policy address the perceived failures of the IP system?



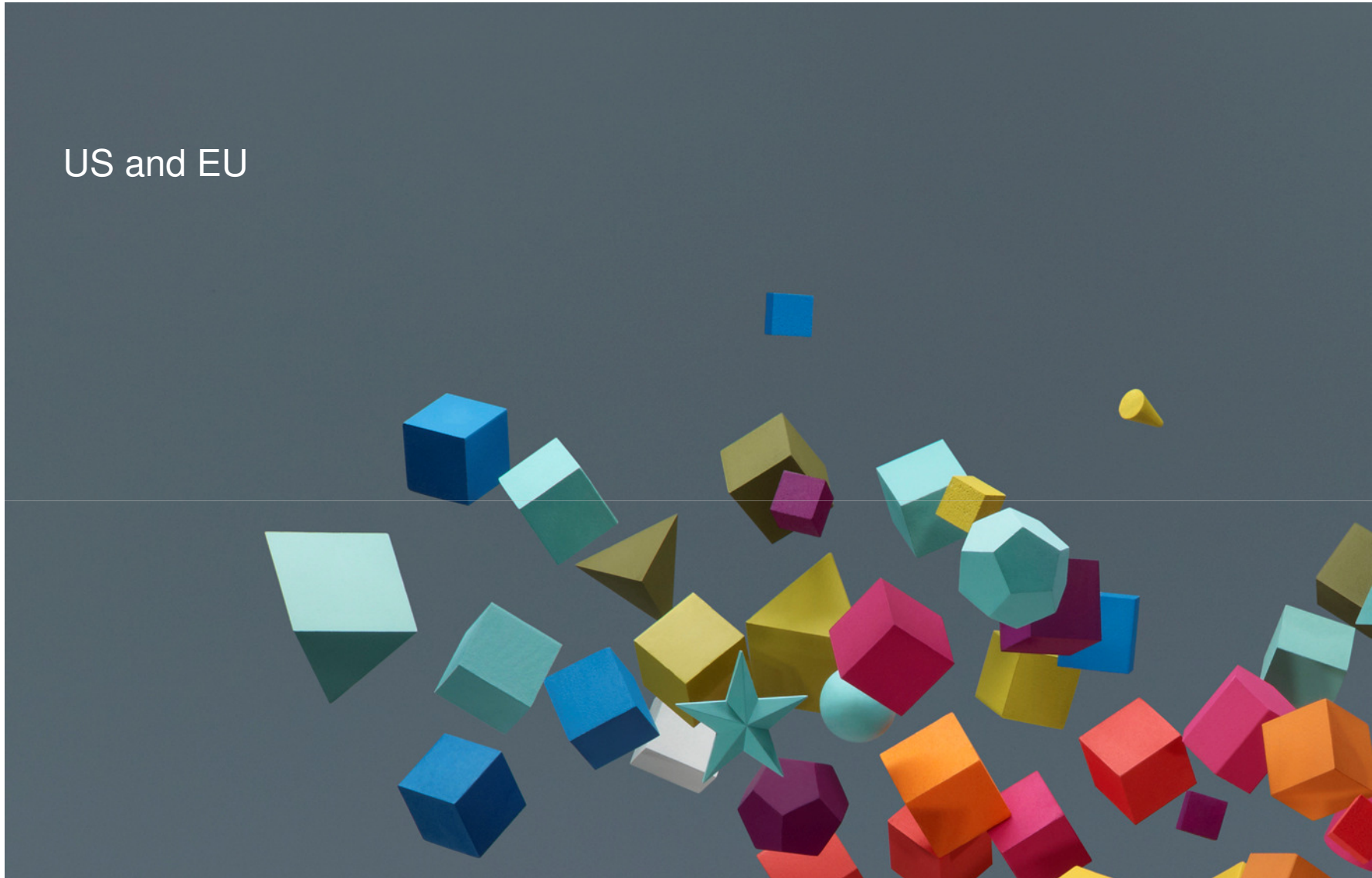
# IP and Antitrust Policy







# US and EU



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## MANY SIMILARITIES

- IPRs are just one source of market power like any other  
..... Although US Courts are somewhat more “pro-IP”
- Broad agreement on licensing.
- Pursuit of “Pay for delay” cases.
- Simultaneous involvement and coordination on “patent wars” cases.

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## SOME DIFFERENCES

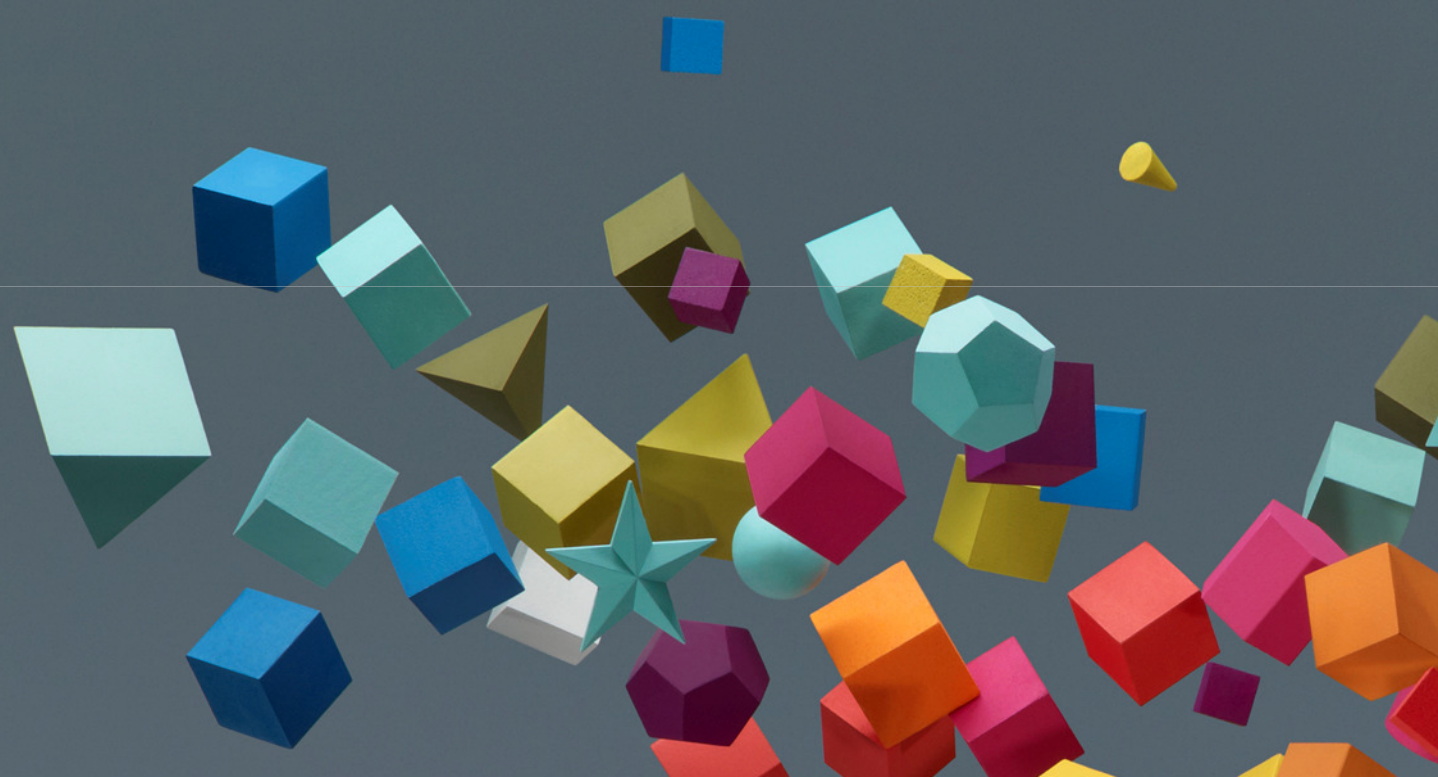
- Court system:
  - Diversity of IP law and procedures across member states
  - Specialised courts?
  - Juries
  - Treble damages
  - Exploitative Abuse
- Precedent
  - Many US rulings on “pay for delay”... the Supreme Court awaits.
  - US willful infringement doctrine
  - *eBay Vs MercExchange*

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# SOME DIFFERENCES

- IP System
  - Perceived weakness of USPTO
  - Lack of administrative review process
  - Design patents stronger than EU design rights

# SSOs, SEPs , CEPs and Patent Wars: The issues



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## SSOs AND SEPs: 4 MAIN ISSUES

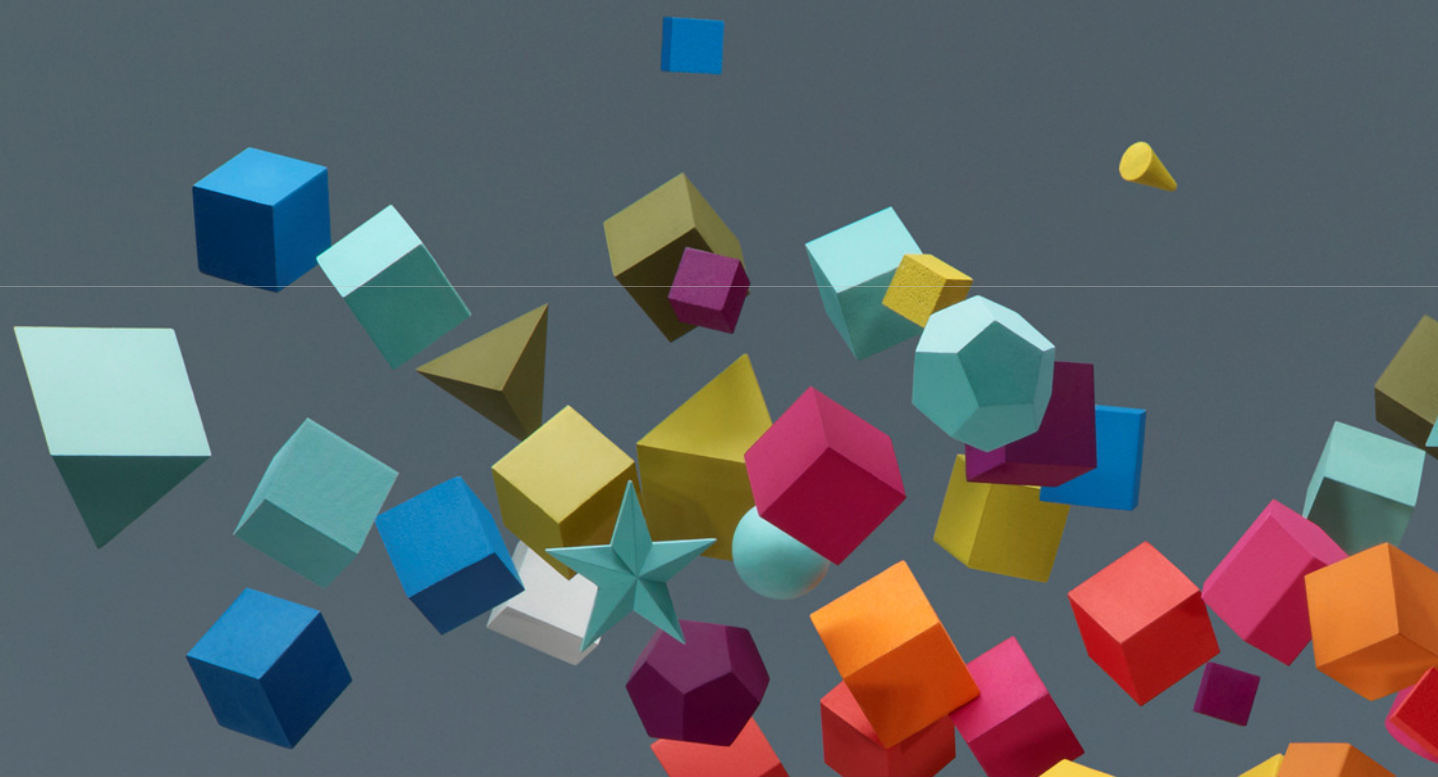
- Issue # 1: collective action between (potential) rivals within the SSO can increase the market power of the selected IPRs → this additional market power cannot be legitimately exploited → FRAND commitments.
- Issue # 2: royalty stacking....is it an antitrust issue?
- Issue # 3: “Shapiro” Hold-Up: combination of uncertainty about patent validity and preliminary injunctions → excessive royalties and/or licensing conditions
- Issue # 4: Sequential complementarity: appropriation of rents from future innovation.... An antitrust issue?

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# SEPs, CEPs AND PATENT WARS

- What are “Commercially Essential Patents” or “De Facto Essential Patents”?
- An essential facility standard?
- A broader standard because of complementarities?
- Only issue # 1 is specific to SEPs
- Why treat CEPs differently for preliminary injunctions?
- SEPs → FRAND → no permanent injunctions → would an “eBay” approach to permanent injunctions for CEPs help?
- Why wield the stick on only one side on the patent wars front?

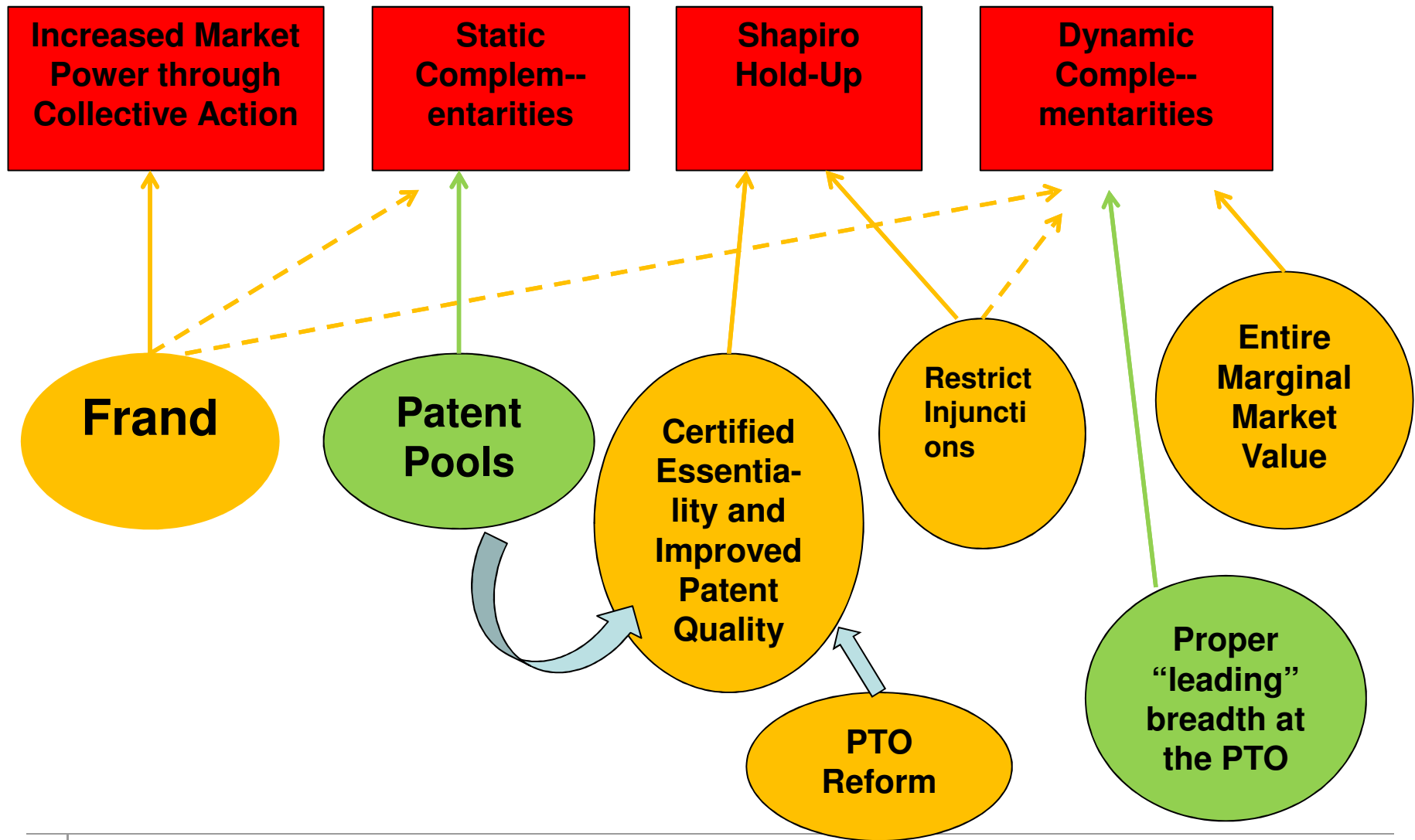
# SSOs, SEPs , CEPs and Patent Wars: Possible Solutions



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## DYNAMIC COMPLEMENTARITIES

- IPRs should be rewarded based on the value that they contribute to create = value with – value without = EMMV.
- This difference includes future innovation/features that are enabled or improved by the IPR as well as increase in sales of complementary goods.
- “leading breadth” provides the correct reward with respect to *substitute* technologies. A share of EMMV provides the correct reward with respect to complementary technologies.

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# DYNAMIC COMPLEMENTARITIES AND ROYALTY BASE

- Economically correct base is EMMV ...but can be hard to determine in practice.
- → entire market value? [EMV rather than EMMV]
- ..... corrected by rates that decrease over time?
- ..... Or by “freezing up” the base after a pre-set period?
- Is the true problem that patent life is too long given the pace of innovation in the industry?.....but then is it for competition authorities to fix this problem?

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## WAITING FOR PTO?

- All four issues would still arise even if the average quality of patents increased significantly.
  - IPR reform moves slowly
  - ..... And lacks sector-specificity
- there is a role for competition authorities

.....HOWEVER

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# COMPETITION AUTHORITIES

- The Competition Law Process is not always very swift either.
- Should competition authorities really judge whether patent IPR protection is “excessive” in some sectors?
- How would such an approach square with commitments under the WTO?
- The old “rule” restricting competition authorities to the use of IPRs wielding market power and keeping it away from IPR design does not look so bad.

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# USING COMPETITION CASES TO MAKE POLICY

- Importance of relying on a sufficient number of cases covering a sufficient range of circumstances and behaviour → cannot move very fast.
- Clarity is paramount → “kitchen sink” SOs and overly terse decisions are unhelpful.
- Cases → precedent: how easily can “case-based” policy be changed when circumstances change?

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