

Intellectual Property Rights and Competition Policy

Lunchtalk at Bruegel, 18 October 2012

Speakers

- **Pierre Regibeau**, CRA (Charles Rivers Associates) and Imperial College
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The discussion opened with the presentation of a few basic principles related to the nature of Intellectual Property Rights and to the trade-off between the IP system and competition policy:

- When dealing with IPRs, one has to keep in mind that not all of them confer significant market power. There is broad agreement that IPRs should be treated like any other source of market power, as what matters is the abusive conduct. Moreover, there appears to be uniformity across sectors in terms of access to IP protection, but the actual level of protection depends on the sector itself, as for instance IP protection in the pharmaceutical sector is more effective than in the technological sector;
- 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, the static welfare losses from higher product prices and the diffusion of knowledge. On the other hand, the role of competition policy is to regulate the use of the market power that might be associated with IPRs.

Based on the nature of IPRs and on the distinct role of the IP system and competition policy, a few questions arise on the topic of further development of competition policy. The first question deals with the possibility of competition policy to explicitly care about innovation and reconsider the effects of IP protection. The second question asks whether competition policy should modulate the application of IPRs across different sectors as, despite the apparent uniformity, IPRs discriminates across sector; under this perspective, competition policy would be useful as a “fine-tuning” tool for the application of the IP system. Another interesting question is whether competition policy should address the perceived failures of the IP system.

The discussion proceeded with an overview of the different interactions between IP and antitrust law within two broad classes of cases, i.e. licensing and patent abuses:

- Concerning licensing, two different cases were considered. The first one was that of “single” IP licensing, in which the IPRs are held by single parties. The different clauses included in this kind contracts might raise some concerns, the most important being the so called “Grant-back” and the “Pass-through”. The second and more appealing case was that of “complementarities”, in which the IPRs are held by a variety of parties; they can be related to “patent pools” or SSOs and to cross licensing.
- Patent abuse was presented in three different forms: Litigation abuses, IPR acquisition and Regulatory abuses. Litigation abuses, that can qualify as “pay for delay” or as “patent wars”, are of particular importance in the debate on the role of the IP system and competition policy, as they question the assignment of the rights.

Another point of the discussion dealt with the differences between the US and the EU systems, in terms of the court systems and of precedents.

The topic was further developed with the discussion of four main issues and their potential solutions:

- The first issue concerned the possibility that collective action between potential rivals within the SSO (Standard-setting organization) can increase the market power of the selected IPRs, generating market power that cannot be legitimately exploited. *Potential solution*: FRAND (Fair, reasonable and non-discriminatory) commitments.
- The second issue was that of royalty stacking, a situation in which a single product potentially infringes on more than one patent, being thus capable of bearing multiple royalty burdens. *Potential solutions*: patent pools, FRAND (Fair, reasonable and non-discriminatory) commitments.
- The third issue concerned the “Shapiro” Hold-up problem, i.e. the combination of uncertainty about patent validity and preliminary injunctions might lead to excessive royalties and/or licensing conditions. *Potential solutions*: certified essentiality and improved patent quality, restriction of injunctions and PTO (Patent and Trademark Office) reforms.
- The fourth issue was that of “Sequential Complementarity”, i.e. the appropriation of rents from future innovations. *Potential solution*: IPRs should be rewarded based on EMMV value (Entire marginal market value); for substitute technologies the correct rewards should be provided by “leading breadth”, while for complementary technologies a share of the EMMV provides the proper reward; FRAND (Fair, reasonable and non-discriminatory) commitments.

The fact that the four issues would still arise even if the average quality of patents increased significantly, together with evidence that IPR reform moves slowly and the lack of sector-specificity, increase the scope for competition authorities to play a relevant role. However, the competition law process is not always very swift and it is not clear whether competition authorities should judge whether patent IPR protection is excessive in some sectors.

The second part of the discussion focused on the concrete problems and policy instruments related to IPRs. The trade-off between patent width and patent length was discussed. One important implication of the imperfections in the patent system is that they sometimes provide more market power than intended. Empirical trends in patenting were highlighted during the discussion, being the most relevant ones the increase in the number of patent application and grants after 1992 (mostly from ICT industries), and the decrease in the quality of patents. As for the ICT sector, the discussion also underlined the hold-up problem arising from the multiple patents that often protect complementary parts.

Event notes by Francesca Barbiero