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IP and Competition Law : An Interface between Phases?

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2009 – A lot of cases solved

- During the past year many of the big disputes that have defined the interface of IP and competition law have been resolved or dropped
  - *Qualcomm* – Settlements with complainants led to EU case being dropped and quantification of FRAND not being addressed
  - *Rambus* – Article 9 commitments / the patent ambush issue
  - *Microsoft* – Article 9 commitments / unilateral compliance efforts
  - *IPCom* – Acquiror of patents agreed to abide by FRAND commitments of the transferor
  - *CISAC, BUMA/CELAS* – Decision on agreements among licensees to limit territorial scope of licensing, but no action on refusals to license

Can the lawyers go home?

- As everything has been decided or settled, is everything now clear and the lawyers can go home?
- No, several of the cases of the recent years were based on
  - conduct going back to 1990s
  - before the technology transfer guidelines
  - with often fairly crude facts (*Rambus, IPCom*) and
  - Contested procedures
- What will the next generation of IP competition cases look like?
- The more difficult problems remain
  - Patenting practices and non-use of obtained patents
  - How to compute FRAND? (*Qualcomm* was not resolved and pool cases)
  - Defining FRAND in cross-licensing situations (*DVD and Bluray* cases)
  - Offering partial bouquets and pricing parts of an IP offering (*Microsoft* and progeny of the music licensing cases)

The focus today

- The presentation is in five parts
  - The wider implications of the Pharmaceutical Enquiry
  - Standard-setting and FRAND
  - Royalty prices outside of standards
  - CISAC and its progeny – music rights licensing
  - *Microsoft* three years on – has the expanded exceptional circumstances test opened the floodgates?
- This is about looking forward and not questioning the procedures and facts of the cases of past years

Implications of the Pharmaceutical Enquiry

- "Patent thickets" and "defensive patenting" are not unique to pharmaceuticals
  - From legal perspective, the cleanest approach would be to limit Art 102 to *Magill* "refusal to supply" cases
  - Finding abuse of dominance based on "intent" and "effect" tests is inherently dangerous and should be limited (e.g., *Rambus*),
  - It would be unfortunate if a policy driven by perceived need to speed up entry of generic pharma changed the law for IP in other areas where this need does not exist
- Same concern applies to strategic infringement litigation
- Trade-offs in settlements can be resolved with existing Art 101 tools

Standard Setting and FRAND

- *Rambus & Qualcomm* leave big questions unanswered
- Article 102 is an imperfect tool in standards cases
- When did dominance begin?
  - In standards cases, firm may achieve dominance only at point when its technology is incorporated in standard
  - *Rambus* Article 9 decision
    - Can conduct during standards process - resulting in technology forming part of standard - lead to *ex ante* dominance finding? (Incipient dominance)
    - Or was the dominance the day of assertion of royalty claim?
  - "Intrinsic essentiality" would create dominance – but then conduct is irrelevant since technology would be in the standard anyway

Royalties in standard-setting -- The limits of Art 102(a)

- *United Brands* test – no reasonable relationship to economic value – does not necessarily correspond to FRAND
- *Rambus* commitments decision evades this requirement
  - Abuse is charging royalties at a level which could not have been reached absent the abusive conduct
- Commission also relied on Article 102(b)
  - Deceptive conduct impacted confidence in integrity of standard-setting process
    - ***"claiming such royalties was [abusive of dominant position] in [..] specific circumstances of this case, including […] intentional breach of [SSO] policy and the underlying duty of good faith in […] standard-setting"***
    - ***"actual breach of the precise rules of a [SSO] is not necessary [but] the conduct has necessarily influenced the standard process"***
  - Deception makes standard-setting less effective – limiting technical progress
- But – What was the evidence for provisional assessment ? (*FTC* proceeding)

Is Art 101 the future of FRAND analysis ?

- Future cases may reflect increased reliance on Art 101
- FRAND is an Article 101 concept
  - It was designed to ensure fair access to markets where competitors reach agreements that create barriers to entry
  - A FRAND price (a level where an efficient competitor could compete effectively) is different from an Article 102(a) unfair price (and usually lower)
- In joint pricing cases (e.g. pooling agreements) treating collective adherence to pricing policy as a concerted practice avoids Article 101(2) voidness (see *CISAC*)
- Article 101 will, however, only work if FRAND obligations follow patents when they are sold (*IPCom*)

FRAND a pre-requisite for no Art 101 restriction?

- A key question may be whether the FRAND obligation derives from Article 101(1) or from Article 101(3)
  - There is a strong argument that the FRAND obligation derives from Article 101(1)
  - A standardisation agreement with a FRAND obligation will often not be restrictive – but an agreement without a FRAND obligation will be restrictive (*DVD, Bluray, MPEG2*)
  - This puts the burden on the participants to show that joint pricing *is* FRAND (in contrast to the burden of proving unfairness under Article 102)

Unresolved Issues I - Royalties and standards

- How to compute FRAND?
  - *Qualcomm* did not resolve this, and patent pool cases are being settling rather than litigated
  - Is *ex ante* disclosure of royalty rates a panacea? (Kroes 10/2009)
- FRAND over time / *Caveat or "Captive" Emptor?*
  - A royalty that was fair in 1998, is it also fair in 2010? (*MPEG2*)
- Defining FRAND in cross-licensing situations
  - *DVD* and *Bluray* cases left this open
  - Value of reciprocal cross-licensing / must there be a "payment"?

Unresolved Issues II - Royalties and standards

- Can a FRAND royalty be calculated as a percentage of the value of a downstream product
  - *MPEG2* litigation settled in some cases; *RAMBUS* para 66
  - What is chip built into a car? Is that a Art 102(a) issue?
- Offering partial bouquets / pricing parts of an IP offering
  - *Microsoft* and the progeny of the music licensing cases
- How do *Technology and Horizontal Guidelines* apply to patent pools created for joint exploitation of a standard
  - Do such pools impede alternative technologies and cement the market position of the standard?

Royalty pricing outside standard-setting

- Article 102(a) will remain prominent in pricing cases that do not involve standard-setting or FRAND
- *DSD* case (finally affirmed in ECJ last year) establishes that forcing payment for something customer does not use infringes Article 102(a)
  - Excessive price as value to customer is zero when not "making use" of the service
  - Commission is now apparently using this theory to investigate Standard & Poors bundling of financial reporting services
- How does this precedent impact on IP licensing?

Pricing of IP "bundles"

- Can licensees claim that they are entitled pay less than the full "pool" price because they will not be using all the IP in a package license?
- In *STIM/KANAL 5*, the ECJ ruled that copyright societies must attempt to relate their fees to actual usage of their repertoire, if there is a viable cost-effective means to do so
  - The Court bases this on the "no reasonable relationship" language in *United Brands*
  - This works in the copyright society case, since the societies have always embraced the fiction that all works in their portfolio are of equal value
  - It follows that if you have taken some of the rights from one source, you don't have to pay twice to a collecting society that offers the full global repertoire
- But does this work for patent pools?

Pricing of "parts" of Patent Pools and Packages

- For patent pools, the "*STIM*" rule does not work
- The patents in a pool are not of equal value
  - Some may have no economic value at all
  - If some patents in a package are essential to the licensee, those patents establish the economic value for the licensee
  - Pricing of the pool according to the use only of the essential patents is not abusive, even if additional patents are made available
  - There is therefore no basis for dividing price by number of patents in the bundle

Music rights management after CISAC

- CISAC Decision – 2008 (under Appeal)
  - Reciprocal cross-licensing system creates global repertoire pool
  - Concerted practice to delimit territories on reciprocal basis
- Separately, major owners withdrew their rights
  - No pool containing the global repertoire
  - *BUMA/CELAS* – cut-off of repertoire access by other societies
  - *CELAS/Clipfish* – CELAS had unlawful exclusivity
- In essence, a mess on the licensing side
  - Commission cannot force a new licensing model if the owners and intermediaries (collecting societies) do not support it

Music rights – What are the solutions ?

- Ensuring non-exclusive licenses to collecting societies ?
  - Allows societies to offer repertoire in parallel with other licensing sources (such as publishers and other right owners)
  - But it assumes that owners want to grant on non-exclusive basis
- Users “mix and match” repertoire from different sources?
  - It works for uses that require less than all repertoire *(I-Tunes)*
  - But how does it work for broadcasting and film industries
    - Take some repertoires directly from the owners/CELAS etc?
    - Take the “rest” from societies (only charge for part used *DSD* / *STIM*)
- This would be consistent with the US experience and what the Commission called for in CISAC?

Microsoft and Licensing: The Floodgates have Opened -- Where's the Flood?

- The key aspect of the 2007 *Microsoft* judgment was the CFI's reworking of the *Magill*/*IMS* refusal to license rule
- Many commentators have argued that *Microsoft* weakened this test in a way that will encourage numerous claims and undermine incentives for IP development
- So far, however, there does not appear to be a mass of post-*Microsoft* refusal to license claims

Microsoft and Licensing

- Why not?
  - Some of the suggestions that *Microsoft* "diluted" the previous legal test are not consistent with those previous judgments
  - For example, it is clear from *IMS* (and particularly from the Advocate General's opinion) that the "elimination of competition" requirement was a borrowing from the general Article 102 law (*Commercial Solvents*, *Bronner* etc.)
  - it was never an IP-specific requirement
  - Indeed, it is clear from *IMS* that the only IP specific departure from the general law on refusal to deal was the "new product" requirement

Microsoft and Licensing

- The addition of a general "limitation on economic progress" standard to the "new product" requirement is indeed a departure from the previous law
- It is not necessarily, however, a standard that is easy to satisfy
  - The legal standard established in *Microsoft* should not be confused with the various findings of fact made by the Commission (*e.g.*, the reference to features that some customers would find attractive).
  - The CFI referred to these findings in finding that the Commission had not made a manifest error of assessment in concluding that Microsoft had limited the technical development of an entire market
  - This does not mean that any of these findings by itself would support a showing of abuse

Compulsory Licensing – the Future?

- We may have more *Magill/IMS/Microsoft* refusal to license cases (or we may not)
- We will almost certainly have more cases where a license of intellectual property is a remedy for another abuse
  - This was arguably case in *DSD* (although ECJ did not reach those issues)
  - Key point is that policy issues of *Magill* etc, are not present where remedy under consideration
  - Issue is proportionality – would a less onerous remedy be equally effective in addressing competition law concern

Want to know more?

- This presentation and earlier presentations and articles on related topics available at: http://www.lw.com/Attorneys.aspx?page=AttorneyBio&attno=01263

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