

# IP and Antitrust

Helsinki, 22 & 24 October 2007

## Dan Eklöf

The sessions address the IP/antitrust intersection, with emphasis on the latter regime. Although IP law, on the one hand, establishes far-reaching exclusive rights and institutes legal monopolies while EU competition law, on the other hand, curtails the undue exercise of market power, there is really no fundamental incongruity between the two regimes. They share the same goal: to enhance consumer welfare and innovation. Due to their deep-seated conformity with free market principles, IP's rarely gives rise to entry barriers and market power. Legal monopoly does not automatically translate into economic monopoly.

However, given that legal monopolies are created, there is an inherent and continuous risk of the emergence of destructive substantial market power. The general harmony between IP and antitrust hence does not preclude the occasional existence of glaring dissonances. Tension does exist on the fringe.

Antitrust law is hence invoked to curtail the exercise of IP rights. License clauses and conditions are scrutinized under Articles 81 and 82 of EC Treaty, as is e.g. horizontal cooperation in patent pools and standard setting. IP rights often form a prominent feature when evaluating mergers and acquisitions under the EC Merger Regulation. At the extreme, antitrust law imposes compulsory licensing, forcing a dominant undertaking to share his property with competitors.

Why and when antitrust law is warranted and how it applies to the exercise of IP rights constitutes the core issue and will be discussed throughout the sessions.

The examination consists of the writing and presentation of a research paper. The paper should be 6.000 words ( $\pm 10\%$ ). The paper is to be submitted by **Thursday, 18 October 2007, 9.00 o'clock p.m.**, and will be presented at the seminar on **Wednesday, 24 October 2007**. The paper must be sent by e-mail to **Dan Eklöf (dan.eklof@juridicum.su.se)**.

The presentations will be followed by a general discussion, where everyone is expected to raise questions and share positive or critical views.

### General Introductory Reading

Lemley, *A New Balance between IP and Antitrust*, Working paper, Stanford, 2007

Ritter, *Refusal to Deal and Essential Facilities: Does Intellectual Property Require Special Deference Compared to Tangible Property?*, 2005

(Although addressing U.S. law, Lemley's line of argument – mutatis mutandis and for sure on a principal level – can be applied to European conditions. The same goes for other U.S. sources referred to below)

### Assignments:

#### **1. Standard Setting, Competition and IP**

Identify, analyze, discuss and critically reflect on the appropriate role for competition law in a standard-setting context. (**Introductory reading:** Weiser, *Standardizing the Law of Antitrust Oversight of Standard Setting in a Global Economy*, Working Paper, U of Colorado, 2007; Geradin et al, *The Logic and Limits of Ex Ante Competition in a Standard-Setting Environment*, CPI 2007; Layne-Farrar, *Viewpoint on Rambus*, Feb. 2007.

## 2. Market Power Stemming from IP Rights

Against the backdrop of EC jurisprudence, identify, analyze, discuss and critically reflect on the relationship between, on the one hand, IP rights and, on the other, market power/substantial market power/dominance in the “antitrust sense”. In addition to a general analysis, the paper should address the issue of “aftermarkets” (complementary products such as spare parts, repair and maintenance services, upgrading etc.) and the implications of IP presence on such markets. **(Introductory reading:** Katz, *Intellectual Property, Antitrust, and the Presumption of Market Power: Making Sense of Alleged Nonsense*, U of Toronto Research Paper, 2005 (please note the subsequent ruling by U.S. Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S.\_\_\_\_ (2006); DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at [ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf](http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf)) (Section 10, i.e. pp. 243 et seq., on aftermarket issues)

## 3. Refusal to Licence as Abusive Conduct under Competition Law

Identify, analyze, discuss and critically reflect on the state of the law under Article 82 EC with respect to a unilateral refusal to license **(Introductory reading:** Dolmans et al, *Are Article 82 EC and Intellectual Property Interoperable? The State of the Law Pending the Judgment in Microsoft v. Commission*, CPI 2007; Arezzo, *Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared*, 2007. (Please note that CFI’s judgement in *Microsoft* (T-201/04) is expected on 17 Sept. 2007).

## 4. Anti-Competitive Licensing Provisions? – Grant Backs and No Challenge Clauses

Identify, analyze, discuss and critically reflect on the rationale of grant backs and no challenge provisions in licence contracts and how such provisions are addressed in EC’s Technology Transfer Block Exemption Regulation (Reg. 772/2004).

**(Introductory Reading:** Relevant parts in Anderman/Kallaugher, *Technology Transfer and the New EU Competition Rules*, 2006, and in Korah, *Intellectual Property Rights and the EC Competition Rules*, 2006; Ørstavik, *Technology Transfer Agreements: Grant-backs and No Challenge Clauses...*, International Review of Intellectual Property and Competition Law, 1/2005 p. 83 (Suggested readings under assignment 4 not available in digital form)