

COMPETITION, PATENTS AND INNOVATION

-- Note by the United States --

1. Introduction

1. In October 2006, the U.S. Federal Trade Commission ("FTC") and U.S. Department of Justice submitted a Note to the OECD Roundtable on Competition, Patents, and Innovation that discusses the relationship between patent policy and competition policy in promoting innovation, the role of competition policy in promoting reforms within the patent system, developments and proposals for changes to the patent system in the United States, and considerations when formulating antitrust policy involving patent and innovation issues. This Note describes key policy developments between October 2006 and May 2009 and presents some background on the recently concluded FTC Hearings on the Evolving Intellectual Property Marketplace ("2009 FTC Hearings").¹ The FTC will prepare a public report reflecting what it has learned from these hearings.

2. Recent Developments and Proposals for Changes to the Patent System in the United States

2.1 Supreme Court Litigation

2. Significant U.S. appellate decisions were among the most important patent policy developments

person of ordinary skill in the art to combine the elements found in the prior art to create the claimed invention.

4. In *KSR*, the Supreme Court rejected the Federal Circuit's application of this test, calling it a

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patentee to extend its rights through contractual restrictions after a product embodying its patented

authority, would have limited proceedings in the PTO by requiring applicants, after they have received two

relevance of the reference and pay a fee to defray PTO expenses. This provision is intended to improve the quality of patents by giving examiners greater access to prior art when deciding patentability and has the added benefit of discouraging frivolous submissions.

15. In addition, both bills would change the way in which district courts calculate reasonable royalties in patent infringement actions. At this stage, it is too early to know which legislative proposal, if any, will be enacted, and thus it is too early to predict the effects of the legislation on innovation.

3.2 *Patent Hold-ups Involving SSOs*

20. In recent years the FTC has actively pursued alleged anticompetitive “hold-ups” by patentees that obtained monopoly power as part of a collaborative standard-setting process. In 2006, the FTC ruled that the technology firm Rambus anticompetitively ~~ab~~used monopoly power over certain computer chip technologies by misleading an SSO as to its patent

23. In 2009, the FTC challenged such an agreement between Solvay Pharmaceuticals, Inc., the maker of AndroGel, and two generic drug manufacturers in

27. The Department analyzed the patent pooling arrangement under the rule of reason, examining both the pool's expected competitive benefits and its potential to restrain competition. It found that the proposed licensing arrangement was "reasonably likely to yield some tangible cost savings by limiting the threat of hold up and royalty stacking and by lowering transaction costs," even though it likely will not offer a license to all essential UHF RFID patents.³⁹

28. The Department also found that the Consortium planned to implement a number of safeguards that would reduce concerns about the ability of the pool's licensing program to harm competition. First, the Consortium will remove patents from the pool that have been found invalid or unenforceable. Second, the Consortium is likely to exclude substitute patents, those that cover competing technologies, because it intends to include in the pool license only patents that are essential to the UHF RFID standard. Including substitute patents in the pool could permit the price of such technologies to rise. Third, the Consortium's commitment to license its essential patents on RAND terms means that potential downstream competitors of Consortium members will be able to access the technology for uses compliant with the standard. Fourth, using an independent licensing administrator will preclude the Consortium's members from accessing confidential business information of the Consortium's licensees. Finally, the grantback requirement imposed on licensees was narrowly tailored, requiring them to grant back to the Consortium a nonexclusive right to license only patents that are essential to the standard.⁴⁰

3.5 *Ex Ante Licensing within Standard-Setting Organizations*

29. In October 2006, the Department issued a business review letter to the VMEbus International Trade Association ("VITA") stating that it does not presently intend to challenge VITA's proposed patent policy for its standard-setting activities. Under the terms of the proposed policy, patent holders will declare their own most restrictive licensing terms, meaning that the policy has the potential to decrease the price of licenses for use under the standard if patent holders compete to increase the chance that their patented technology would be selected by the working group setting the standard. The Department concluded that the policy would preserve the benefits of competition between alternative technologies, helping VITA to avoid hold up and to improve its decision making by broadening the basis on which working group members decide which technologies to include in its standards.⁴¹

30. The Department also concluded that the policy's prohibition on joint negotiation or discussion of licensing terms among the working group members (or ~~with~~ parties) meant that the price of licenses would not be anticompetitively depressed by the concerted action of working group members. The Department noted that it likely would evaluate any antitrust concerns about such negotiations or discussions under the rule of reason because such actions could be procompetitive.

31. Pursuant to the VITA policy, actual licensing terms will continue to be determined bilaterally between the patent holder and each potential licensee, subject to the cap declared by the patent holder during the standard-setting process. If SSO members use the patent policy procedures to fix the prices of downstream products, or if patent holders decide ~~their~~ their declarations of most restrictive licensing terms the Department would not hesitate to challenge such activities as per se illegal.

32. After the Department issued its business review letter to VITA, the Department received a request for a busce TcofT the

consumers and their use of economic analysis in determining remedies. The third panel assessed legal doctrines that affect the value and licensing of patents, such as holdings in recent Supreme Court cases and doctrines that make the scope and enforcement of patents unpredictable. The third panel also considered whether the notice function of patents operates to support an efficient marketplace.

37. The second session of the 2009 FTC Hearing addressed remedies for patent infringement.⁴⁵ The February 11 hearing addressed patent damages, including the standards that govern the assessment of damages, the application of these standards in court proceedings, and the impact of the resulting awards on