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Round Table on:

"Examining the interface between the objectives of competition policy and intellectual property"

Contribution

by

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The views expressed are those of the author(s) and do not necessarily reflect the views of UNCTAD
Antitrust Analysis of Intellectual Property

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“The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare”

- Antitrust Guidelines for the Licensing of Intellectual Property
Competition and Intellectual Property

- Patent rights provide incentives for innovation by establishing enforceable property rights which:
  - allow intellectual property owners to appropriate value derived from their intellectual property;
  - facilitate the commercialization of inventions and ideas;
  - encourage public disclosure.

- Competition promotes innovation by creating incentives for firms to engage in research and development in order to:
  - be the first to create a new market or
  - produce a more attractive product to consumers and gain market share.
U.S. Antitrust Agencies’ Approach

- U.S. Agencies’ approach to antitrust enforcement with respect to IP is well-settled and well documented
  - Enforcement Actions, Amicus Briefs
  - DOJ Business Review Letters
  - Agency Reports and Statements
  - Agency Speeches and Testimony
Core Principles of U.S. Agencies’ Analysis

- Same general antitrust analysis for IP right as for other forms of property
- No presumption that IP right confers market power
- Recognition that licensing of IP right is generally procompetitive
- Antitrust laws are intended to protect competition, not individual competitors
Procompetitive Aspects of IP Licensing

• Provides inventors with cash flow, stimulating innovation
• Disseminates technologies
• Encourages development and marketing of technology
• Reduces production costs
• Increases efficiency by allowing IP to be combined with other production factors
Horizontal vs. Vertical Licenses

- Licensing agreements may be horizontal (between competitors) or vertical (between parties at different levels of manufacturing chain) or may contain aspects of both.

- The nature of the licensing relationship is a key factor in analyzing the potential competitive implications.
Effects-Based Analysis

Vast majority of cases involving IP licensing restraints are analyzed under the rule of reason

- What is the relevant market affected by the licensing agreement?
- Is there market power in a relevant market?
- What are the potential anti-competitive effects?
- What are the efficiencies or other justifications of the restraint?
- Do the anti-competitive effects outweigh the pro-competitive benefits?
A licensing restraint is a clause in an IP license that limits the actions of the licensee. The licensee must grant a license back to the patentee/licensor for improvements to the patented invention developed by the licensee. This promotes further innovation by the licensee that is based on, or informed by, the licensed patent by enabling the licensor to practice improvement to the patent it licenses. Potential concerns about harm to licensee’s incentives to innovate are unlikely if grantback is non-exclusive and tailored to scope of the licensed technology.
Licensing Freedom and the Limits of Antitrust

- Choosing not to share an intellectual property right is a form of exercising that right

- U.S. experience is that there are very limited instances in which a unilateral unconditional refusals to license will be, on balance, anticompetitive

- Relatedly, the U.S. does not use antitrust enforcement to regulate royalties

- Price controls interfere with competition and blunt incentives to innovate
Remedies and Process

- Remedies should be tailored to stopping the anticompetitive practice, preventing its reoccurrence and restoring competition lost as a result of the restraint.
- Transparency in decision-making processes (1) assists in enhancing the legitimacy of the agency’s outcome and (2) encourages investment in innovation and development of intellectual property.
Conclusion

- We must calibrate enforcement work to ensure competition and intellectual property laws each play their complementary role in encouraging innovation and enhancing consumer welfare.

- In U.S., we have found that, in almost all cases, an effects-based analysis based on sound economic principles and remedies tailored to address the competitive harm are the best tools to achieve this end.

- Transparency and consistent procedures for all parties lead to better results.