

Enforcement Issues Regarding Pooling and Cross-Licensing

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Issues to Consider

- Pools as an aspect of managing the intersection between antitrust and IP
- Comparative advantage is the only kind: Pooling compared to competition for the market and SSOs
- How should enforcement officials assess pools?

Managing the IP/Antitrust Intersection

- Comparing legal regimes
 - IP risks focusing too much on incentives in the abstract and to little on effects of grants
 - Antitrust risks focusing too much on *ex post* effects and too little on incentives
- Analytical tools
 - IP draws on rate of return analysis; financial economics
 - Antitrust draws on price theory and IO

Pooling and other approaches

- Example of product where standardization is desirable
 - Pooling may imply choice to compete within an agreed-upon standard. Alternatives include:
 - Competition for the market; firms compete to make incompatible technologies dominant; infringement litigation possible competitive tool
 - Standardization through standard-setting organization (SSO)
 - Or some mixture (MPEG-2)

Pooling and other approaches

- Competition for the market may lead to single-firm antitrust issues
 - Intel/Intergraph; Image Technical; In re ISO
 - Refusal to license and related issues

Pooling and other approaches

- Use of standard-setting organizations presents some issues similar to pools
 - Misconduct in standard-setting
 - Possible market effect from adoption as standard

Assessing pools

- Goals
 - Cooperative space large enough to arrange IPRs for production at lowest combination of transaction and administrative costs, but no larger
 - Which facilitates one path of competition without foreclosing others, either by licensors or licensees
 - And which does not skew competition through discrimination

Assessing pools

- Enforcement posture: pool proponents should justify deviations from preferred conditions with rigorous (and parsimonious) reasoning; however
- The test should not be whether the pool is perfect. In the final analysis, the test should be whether competition is better with the pool offered than without (including probability of modification through enforcement)
- Comparative advantage is the only kind

Assessing pools

- Where pool implies a choice of competitive model, do not reject pool as a means of forcing a different model
 - Enforcement should not presume competition for the market is superior to competition within a standard
 - Efficiency justifications for pool should be scrutinized on their own terms
- Different story where model is to avoid competition

Assessing pools

- Validity
 - Invalid and expired IPRs should be excluded
 - Incentives for pool members to test validity?
 - Expert analysis of validity disputes, either for admission to the pool or to resolve disputes?
 - Persuasiveness of expert analysis depends on how independent the expert is and whether the processes warrant trust
 - Probable trade-off with ease of challenge and administrative cost of pool (note loser-pays provision in Toshiba pool)

Assessing pools

- Are pooled IPRs necessary for production?
 - If not, reasons justifying pools do not justify inclusion
 - Practical, market-conscious approach to necessity
- How to determine necessity?
 - Trust expert hired by licensors?
 - Trust licensors?
 - Investigate yourself?
 - Licensee input?
- Do not mandate method but confidence in pool rests heavily on effectiveness of method

Assessing pools

- Exclusivity
 - Ability to license outside the pool very important
 - Applies to both members and improvers
- Improvements/innovation
 - Important that licensors and licensees are free to combine technology either to improve or compete with pooled technology
 - What do pool terms imply for improvements by pool members?
 - Grantbacks should be non-exclusive and bear royalties (Guidelines §5.6)

Assessing pools

- Royalties
 - RAND-like system to licensees
 - MFN provision desirable
 - How does royalty vary with value of IPRs? Compare Toshiba pool's detailed pricing with Philips's per-unit structure
 - Does royalty decrease over time?
 - Significance of royalty relative to the product?

Assessing pools

- Information
 - Should screen information necessary to operate pool from business side of individual firms.