Patent Law

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Class 25 – Patent misuse and antitrust

Recap

Recap

- → Inventorship
- → Inequitable conduct
- → Continuation practice and prosecution laches

Today's agenda

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- → Background
- → Tying arrangements
- → Patent exhaustion
- → Reverse-payment settlements

Background

Background

→ Patents and antitrust law are in tension

- Antitrust law is designed to encourage competition
- Patent law is designed to suppress competition in limited circumstances
- So the law tries to limit the scope of patent rights to "legitimate" exercises

Background

→ The basic patent-misuse theory

- Patents provide market power
- Market power can be abused
- If you use your patent monopoly to extend it beyond what you have legitimate rights to, that's an abuse of your patent rights

Background

→ Ten seconds of antitrust law

- Sherman Act § 1: Contracts "in restraint of trade" are illegal
- Sherman Act § 2: Efforts to "monopolize" are illegal
- Clayton Act § 3: "Tying" is illegal if it lessens competition

Background

→ The problems:

- Every contract restrains trade
- Every effort to sell products or increase market share is an effort to monopolize in some sense
- It's hard to know what lessens competition

Background

→ The solutions:

- Antitrust law is essentially common law
- Some practices are "per se illegal," when there's no legitimate reason to permit them
- Most practices are subject to the "rule of reason," under which the plaintiff has to prove the practice is anticompetitive

Background

→ So the big question, then, is when you go beyond the legitimate scope of your patent right

- Fraudulently acquired patents
- Sham litigation
- Trying to extend the patent term
- Assessing royalties on nonpatented products

Tying arrangements

Tying arrangements

→ Tying: Only selling one good if the buyer also buys another good

- Example: "I will only sell you a left shoe if you also buy the right shoe"

→ For a long time, tying arrangements were almost always seen as problematic

→ That has changed in the last few decades: 1988 amendments; changed views on economic issues

(post-AIA) 35 U.S.C. § 271 — Infringement of patent

* * *

(d) **No patent owner** otherwise entitled to relief for infringement or contributory infringement of a patent **shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following**:

(1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent;

(2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent;

(3) sought to enforce his patent rights against infringement or contributory infringement;

(4) **refused to license** or use any rights to the patent; or

(5) **conditioned the license** of any rights to the patent **or the sale of the patented product on** the acquisition of a license to rights in another patent or **purchase of a separate product**, unless, in view of the circumstances, the patent owner has **market power in the relevant market for the patent or patented product** on which the license or sale is conditioned. * * *

Tying arrangements

→ The innocent story: tying gives the monopolist no competitive advantage

- Example: The marginal cost of shoes is $10 per shoe; consumers value them at $100 per pair
- A monopolist in left shoes will sell the pair for $100 – or the left shoe for $90
- This is the case whenever the two products are sold in <u>fixed ratios</u>

Tying arrangements

→ The not-so-innocent story: tying can matter when the two goods are not sold in fixed ratios

- Examples: printers and paper; razors and blades
- These tying arrangements can be anticompetitive or not

Tying arrangements

→ The not-so-innocent story, part II: tying can be strategic

- Branding
- Quality control
- Marginal returns
- Supply chain

Tying arrangements

→ In antitrust law, tying is subject to the rule of reason

→ Historically, in patent law it was per se illegal

Illinois Tool Works v. Independent Ink

→ The tying arrangement

- Patented: print head for barcode printers
- Unpatented: ink

Illinois Tool Works v. Independent Ink

→ The concern:

- Will Illinois Tool Works be able to leverage its print-head monopoly into an ink monopoly?

→ Holding?

Illinois Tool Works v. Independent Ink

→ The concern:

- Will Illinois Tool Works be able to leverage its print-head monopoly into an ink monopoly?

→ Holding?

- We don't actually know if Illinois Tool Works has market power in print heads
- Patents aren't enough to infer market power
- So we apply the rule of reason

Illinois Tool Works v. Independent Ink

→ How would a patent holder not have market power?

Illinois Tool Works v. Independent Ink

→ How would a patent holder not have market power?

- The traditional antitrust concern: monopoly power over a market
- Patents don't necessarily define a market
- Many patents compete with other patents to solve a problem
- So if you don't want to use Illinois Tool Works ink, don't buy an Illinois Tool Works print head

Illinois Tool Works v. Independent Ink

→ Timing problem: Once you buy one product, you're locking yourself into the tied product

Illinois Tool Works v. Independent Ink

→ Timing problem: Once you buy one product, you're locking yourself into the tied product

- Sometimes you can consider this when you buy the first product
- Otherwise, this would factor into the rule-of-reason analysis

Illinois Tool Works v. Independent Ink

→ So why do companies demand tying arrangements, other than for anticompetitive purposes?

Illinois Tool Works v. Independent Ink

→ So why do companies demand tying arrangements, other than for anticompetitive purposes?

- Metering rationale: Price discrimination against users who use more capacity
- Quality rationale: A user who uses low-quality inputs might harm the reputation of the maker

Patent pools

→ Another form of tying: patent pools

- Philips and Sony had competing patents on CD players
- Eventually they cooperated to form one standard, the "Orange Book" standard, that used Philips' patents
- Third-party makers of CD players could only license the patents if they licensed the complete pool, including the (useless) Sony patents

Patent pools

→ *Princo Corp. v. ITC*

→ Princo's argument: Bundling Sony's and Philips' patents is patent misuse

→ Court: It might be an antitrust violation, but it's not patent misuse

- Patent misuse is the leveraging of patent rights to "impose over-broad conditions … that are not within the reach of the [patent] monopoly"

Patent pools

→ DOJ / FTC review of patent pools: Generally okay, with safeguards

- Only standards-essential patents
- RAND licensing terms
- Royalties based on actual use
- Licenses available in- or outside pool
- Freedom to develop alternative tech

Patent exhaustion

Patent exhaustion

→ Basic theory: Once you have sold a patented product, you can't control what happens downstream

- Similar to the first-sale doctrine in copyright law
- This is why, when you buy a car, you don't have to get licenses for all the patents that cover the parts

Patent exhaustion

→ Examples:

- Resale restrictions
- Reuse restrictions
- Repair restrictions

Quanta Computer v. LG

→ The license arrangement:

- Intel makes microprocessors
- LG owns patents on (common) methods and systems for using microprocessors in connection with other components (memory)
- LG licenses its patents to Intel, but only for use with Intel memory
- Intel sells microprocessors to others

Quanta Computer v. LG

→ Three questions:

- Does exhaustion extend to method patents?
- Does exhaustion extend to products that don't embody the complete patent?
- Is exhaustion avoided by the terms of the Intel-LG license?

Quanta Computer v. LG

→ Does exhaustion extend to method patents?

Quanta Computer v. LG

→ Does exhaustion extend to method patents?

- Sure, why not?

Quanta Computer v. LG

→ Does exhaustion extend to products that don't embody the complete patent?

Quanta Computer v. LG

→ Does exhaustion extend to products that don't embody the complete patent?

- Yes
- Otherwise, it would be easy to get around exhaustion – just sell a product that contains all but one element
- Sort of similar to patentable subject matter – we're looking to the "core" of the patent claim

Quanta Computer v. LG

→ Is exhaustion avoided by the terms of the Intel-LG license?

Quanta Computer v. LG

→ Is exhaustion avoided by the terms of the Intel-LG license?

- No
- Exhaustion is triggered only by a permitted sale, but Intel was explicitly permitted to sell the products (M&D 1207)

Quanta Computer v. LG

→ So couldn't LG just have restricted Intel's ability to sell the parts for use with non-Intel memory?

- Yup
- But Intel has a lot of bargaining power
- LG has less

Quanta Computer v. LG

→ Does it make economic sense for LG to separately license Intel and other computer makers?

Quanta Computer v. LG

→ Does it make economic sense for LG to separately license Intel and other computer makers?

- Maybe
- Intel might have little information about downstream users, so it'd be easier to go after them directly
- BUT, each computer presumably uses one microprocessor – Intel has good volume information, at least!

Reverse-payment settlements

Hatch-Waxman Act

→ Grand bargain between branded drug manufacturers and generic manufacturers

- Branded makers: Longer patent terms
- Generic makers: Can file ANDAs (abbreviated new drug applications)
- Cost to develop generic drug: $millions, not $billions

Hatch-Waxman Act

→ ANDAs:

- Branded maker must list all patents applicable to a drug in the Orange Book
- Generic maker must show drugs are bioequivalents
- Generic maker must assert that all listed patents have expired, are not infringed, or are invalid

Hatch-Waxman Act

→ ANDAs:

- If generic maker asserts patents are invalid or not infringed (Paragraph IV), filing ANDA is technical infringement that allows patent holder to sue
- Court then determines if patent would be invalid or not infringed
- Only remedy: declaratory judgment that lets generic maker enter the market

Hatch-Waxman Act

→ ANDAs:

- First generic to file a Paragraph IV certification gets a 180-day period of generic exclusivity if it can show the patents are invalid or not infringed

Reverse-payment settlements

→ Common scenario in pharma cases:

- Branded maker has patent that expires in 2020
- Generic maker asserts the patent is invalid
- Branded maker sues Generic maker under the Hatch-Waxman Act
- Parties settle: Generic agrees not to enter until 2020; Branded agrees to pay Generic money

Reverse-payment settlements

→ Various theories:

- These agreements are per se illegal as restraints on competition
- These agreements are per se legal because patents are legal monopolies
- These agreements can be procompetitive or anticompetitive — rule-of-reason analysis

FTC v. Actavis (2013)

→ Supreme Court: these agreements are subject to rule-of-reason antitrust analysis

- Not immunized by existence of a patent – the patent might be invalid
- Settlements are favored, but reverse-payment settlements have troubling effects on competition

Next time

Next time

→ There is no next time.