

The Patent System as Instrument to incentivize Research and Development and enable Fair Distribution of R&D Results to Humanity

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Contextual Overview

- Patents with monetary value and their use as currency/commodity
 - ◆ How to put a price-tag at a patent
 - ◆ Use of patents in Merger & Acquisition (M&A)
 - ◆ Valued patents as collaterals/securities
 - ◆ Valued patents in joint ventures
- Patents as business instruments
 - ◆ Enforcement/litigation
 - ◆ Licensing
 - ◆ Cross-licensing
 - ◆ Developing/opening/closing technologies (patents in standards)
 - ◆ Patents as incentives for R&D
 - ◆ Patents and price differentiation

Patents and „goods of need“ – pharma as an example

- Affordable medicine for everyone – the necessity of incentives for R&D
- The problem with international exhaustion of patents

Requirements for availability of Pharmaceuticals - I

- Creation of new, effective pharmaceuticals
 - ◆ R&D by researching pharma companies pre-condition
 - ☞ investment cost high, sometimes several 100 Mio. USD from detection of molecule/entity to NDA approval
 - ☞ expected Return Over Investment (ROI) driving force for R&D

Requirements for availability of Pharmaceuticals - II

- Distribution/sale of new, effective pharmaceuticals
 - ◆ high prices necessary at least in certain high-price countries
 - ◆ low prices necessary in low-price (less/least developed) countries
 - ☞ Price differentiation between high-price and low-price countries a “must”

How to achieve price differentiation

- Outside the European Union (EU)
 - ◆ Patent System with national/regional exhaustion
- Inside the EU
 - ◆ Patent System of no use, because of EU-wide “regional” exhaustion
 - ◆ Sales restrictions (“quota system”) a solution?
 - ◆ The problems with Art. 82 EC (Syfait I/Syfait II)

National vs. International Exhaustion of Patents – a matter of principle

- Pro international exhaustion:
 - ◆ Remuneration/Award for inventors only justified once
- Pro national exhaustion: national/territorial character of patents – remuneration/award per patent/country justified

Licensing under specific conditions a solution for Pharma?

- Royalty schemes could be structured in such a manner that exportation from license territory unattractive
 - ◆ Increasing, volume-dependent running royalty rates instead of usually, otherwise, used decreasing royalty scheme
- Direct export restrictions in license agreements

„Modified“ International Exhaustion a solution for Pharma?

- Even for pharma, “modified” international exhaustion could in principle be accepted
 - ◆ In pharma, special conditions should justify use of parallel patents for restricting re-importation and parallel imports, respectively
 - ◆ Prevention of parallel importation by patents could/would be permitted if sales price in less/least developed country/countries less than
 - ☞ 10% of average sales price in all (or selected) OECD countries (or country of origin), prevention of parallel imports by patent(s) permitted or
 - ☞ average sales price in all (or selected) OECD countries (or country of origin), multiplied by

GDP-per-capita in country of sale

GDP-per-capita in OECD-country/countries

Patents and Standards – Accessibility to Technology in Cyber World

- Essential Patents in Standards
- Accessibility of technologies for “pool members”
- Accessibility of technologies for “newcomers”

The Role of Patents in Standards

- de iure standards (set by SSO)
 - ◆ Essential patents must be used by everybody in order to fulfill the standard
 - ◆ Non-essential patents may be used by any standard member and/or newcomer in order to comply with the standard and to make e.g. mobile phones „speaking“ with each other
 - ◆ Non-essential patents may be used by everybody, in order to achieve preferred features, but are not necessary to fulfill the standard as such

- de-facto (industry/market) standards
 - ◆ Essential patents are created market-driven, therefore not using them makes standard unaccessible
 - ◆ Non-essential patents may be used by everybody, but lack of use thereof may make products unattractive

Benefits of Essential Patents

- In SSO-Standards:
 - ◆ Can make standard accessible for everybody, provided that they are openly disclosed in SSO as well as to the public and are licensable under FRAND conditions for both members and newcomers
- In de-facto standards beneficial, if openly disclosed and licensable under FRAND conditions

Problems with Essential Patents

- In SSO often not openly disclosed
- FRAND promise often not reliably transferred in case of change of ownership
- Overall FRAND condition often not available because of royalty stacking

Solutions

- FRAND promise/undertaking must stick to the patent like an exclusive license
- FRAND obligation therefore transferrable automatically with patent
- One-stop shop for overall FRAND license
- Patents under FRAND obligation not enforceable by automatic injunction, rather balancing of interest necessary
- Compulsory license in case of any violation of FRAND promise or because of competition restriction

Compulsory Licensing

- Under patent law conditions according to TRIPS
- Enhanced compulsory licensing in case of important improvement over essential patent(s) already in standards?
- Additionally compulsory licensing in case of abuse of market power (i.e. competition driven)

Enforceability of FRAND Conditions

- „Orange-Book-Standard“ decision of German Federal Court of Justice (GFCJ), KZR 39/06, of May 6, 2009, important
 - ◆ Essential patents subject to compulsory licensing for competition law reasons
 - ◆ No injunctive relief if „newcomer“ pays royalties “as if already licensee”
 - ◆ Refusal to license in case of essential patents abuse of dominant position

Advisable Legal Conditions

- One-stop shop for overall FRAND license in SSO
- Eliminating of automatic injunction possibility of essential patents in case of FRAND obligation
- Publication mechanism in SSO to grant, in a binding form, overall FRAND license, particularly for newcomers
 - including license conditions offered?
- Registration of FRAND obligation in Patent Register

Licensing into less/least developed Countries

- Patent system useful for incentive purposes
- Patent system useful for price differentiation
 - ◆ National/regional exhaustion a “must“?
- Modified international exhaustion possible solution
 - ◆ Patentees (owners of essential patents) would enjoy national/regional exhaustion only if licensing to less/least developed countries takes place under “adjusted”, i.e. more favourable conditions than in case of OECD newcomers

Conclusions

- Patents increasingly used as currency surrogate
- Patents increasingly used for litigation purposes
- Patents as instruments for cross-licensing
- Patents as incentives
- Patents for price differentiation