

Introduction

BY ANTONIO BAVASSO AND DAVID EVANS

The CPI Autumn 2013 issue features contributions from some of the participants to two roundtables on the intersection between intellectual property and antitrust that we organized in London (in June 2013) and Washington, DC (in November 2013) with the Jevons Institute for Competition Law and Economics of University College London. The theme remains controversial and, during the two roundtables, participants exchanged strong and diverging views under the Chatham House rule. This divergence of views, a veritable intellectual divide, is well reflected in the articles published in this issue, although perhaps not the intensity of the heat.

Let's start with the common ground: both antitrust and intellectual property (IP) law “are concerned with promoting economic welfare.” Both systems of law aim at providing incentives for innovation. But they do so from fundamentally different vantage points. IP law has evolved from a policy judgment in that the way to promote innovation is, in some cases, to provide inventors with property rights that could allow them to capture a return from their efforts and prevent others from encroaching on their creations—for some time and with some limitations. Antitrust law is concerned with establishing rules for the game of competition that prevent businesses from rigging the outcome in ways that exclude competition and harm consumers.¹ Neither approach is necessarily inconsistent with the other but, then again, neither approach ensures that either is consistent with the other.

Herbert Hovenkamp's article looks at the common grounds and at the divergences that flow from the welfare standards that typically inform competition policy enforcement. He concludes that implanting a consumer interest consideration onto the IP system would require a major overhaul of the system, and it is not clear that this is needed or is the solution to the perceived problems.

Antitrust has the ability to introduce consumer welfare considerations in relation to unilateral behavior of the IP right holder or indeed any agreement relating to the IP right. But is that interference or oversight required or warranted? On the one hand, Tim Wu appears to welcome a certain degree of “legal experimentalism.” He regards the Supreme Court's *Actavis* judgment as an endorsement of “the use of competition laws to examine the potential excesses of the current patent regime.” On the other hand, Robin Jacob rejects competition law's interference in his forceful article. He starts with the well-known fable of the grasshopper and the ants and concludes that competition authorities help grasshoppers (i.e. those who only look for profits for today and do not contribute to the future) “positively helping them sing in the summer” (i.e. gather the profits now) rather than the ants (i.e. those who use part of their income of today to build for the future). He looks specifically at pharmaceuticals and telecoms and concludes by asking competition authorities to “leave the ants alone” and let the patent system do the job that it was designed to do.

A key aspect of the intellectual divide relates to the question of whether there is something special about the characteristics of intellectual property which means that general rules on property or antitrust should not apply. Epstein and Kappos, in their piece, look at legal instruments under common law and patent law, at the

legal dynamic on contract formation and breach, negotiation post breach, and damages and injunctions in patent cases, including recent litigation under FRAND standards in relation to standard setting organizations (SSO). They recognize that there is a risk of hold up between contracting parties and hold out with strangers. They also recognize the danger of strategic behavior from deliberate breaches but conclude that those dangers rest with both parties, not just one. They therefore think that it would be “unwise to tailor liability rules on the assumption that either a landowner or a patent holder is filled with guile, while an actual or potential trespasser or infringer acts with purely virtuous motivations.” They would leave these issues for contract law to sort out generally.

Patents, Epstein and Kappos note, are probabilistic nature of patent—that is, until it is challenged, and kicked around by a finder of fact, it is not clear whether a patent really is worth the paper it is printed on. Securing a patent is not like buying a farm. This characteristic has been explored in the work of Shapiro and others over the last decade and has formed a strong basis for the antitrust intervention. The relevance of this characteristic features prominently in the articles by Fiona Scott-Morton and Kai-Uwe Kühn that focus on, respectively, the pharmaceutical and the information and communication technology (ICT) sectors.

In relation to the pharmaceutical sector, the pieces by Fiona Scott Morton and Pierre Regibeau should be read in tandem. They both address the question of pay-for-delay in light of the *Actavis* judgment while also taking into account the different regulatory regime in the US than in the European Europe. Scott Morton is far more skeptical of reverse payment settlements than Regibeau.

With regard to the ICT sector, Kai-Uwe Kühn claims that—from an economic perspective—there is a strong and convincing body of theory indicating that, as a result of the probabilistic nature of patents, hold-up is likely to occur. His view is that the objection that hold-up needs to be anchored in a proof of hold-up in individual cases ignores the importance of the counterfactual and would make antitrust enforcement not viable.

He recognizes that these theories sit better within a legal system, such as the European one, which outlaws abuse of a dominant position and accommodates exploitative abuses rather than a monopolization standard such as Section 2 of the Sherman Act.

In essence, as explained in Kühn’s piece, the policy that emerges from the ICT cases on the use of injunctions by SEP patent holders that are FRAND encumbered is as follows: the alleged harmful effect (the hold up) is strongly grounded in theory and therefore a behavior that fits that pattern is *per se* unlawful under Article 102. In some respects the *per se* nature of this approach could be seen as turning an *ex post* enforcement tool into a form of *ex ante* regulation.

Many have been worried about the impact that this might have on the attempt to introduce an “effects based” standard to unilateral practices abuses, particularly Article 102 enforcement.

Moreover this approach—which is limited to the specific issues of SEP agreed in the context of SSO—raises an important question of principle as to whether there is something unique about those cases that requires a different form of presumption. The article by Ginsburg and Wright raises that question mostly from a US law perspective, but similar reconsideration would apply in other legal regimes. They conclude that antitrust enforcement in relation to intellectual property and other property rights should be based on a principle of

symmetry, including in relation to presumption with respect to use of injunctions with regard to FRAND encumbered SEPs.

Finally, the piece from Eliana Garcés Tolón argues that antitrust intervention is not a big enough fix. Some would argue that that is because it is not the right fix. Eliana Garcés Tolón does not take issue with the question of whether the current theoretical approach side-steps the effects analysis of proving the harm caused by each individual case of alleged abuse. Rather, she notes that antitrust authorities deliberately avoid getting involved in FRAND determination, and they limit their intervention to arguing that the value attributable to hold-up cannot be taken into account in determining the FRAND value as that would be abusive. She notes that antitrust policy has probably neared the limit of its reach and SSO can help clarifying the boundaries of FRAND terms with the help of the courts.

In fact, if the role of public antitrust enforcement is to indicate that any hold-up value should be discounted in FRAND determination, an adjudicator or a court would be much better suited to resolve that point by interpreting a FRAND standard as shown most recently by Judge Holderman's opinion in the *Innovatio* case. Antitrust (consumer or total welfare) considerations do not add much to the notion of fairness and/or reasonableness that is intrinsic in the FRAND standard. But the European Commission brings the question of FRAND back into the frame (albeit indirectly): it takes issue with seeking injunctions against a "willing" licensee and it is difficult to see how a licensee can be characterized as willing unless one determines whether his offer was truly FRAND.

The different positions are quite well delineated on the battleground but the controversy is likely to remain. Shall we go to Court? The CJEU is on the case.

The editors of CPI have had their own little saga with intellectual property rights in the weeks leading up to this issue. As dedicated readers know, in every issue we publish a classic article—often an important one that is seldom read anymore but should be. For this issue, we thought an interesting one would be Fritz Machlup and Edith Penrose's "The Patent Controversy in the Nineteenth Century."² They wrote their article at a time, around 1950, when there was considerable debate over reforming the patent system. They wanted to remind the world that much of the debate was a redo of similar heated discussions that occurred during the 19th century. And that economic theory and empirical evidence were no more advanced in the mid 20th century than it had been a century before. Machlup, in particular, took the view that there was not enough economic support to adopt a patent system, but given that we had one, not enough to dismantle it either. It is a very nice article. Unfortunately, for the first time in 9 years, we have been unable to reach an agreement to reprint a classic. Cambridge University Press said no. But if we have piqued your curiosity, you can buy it³ or go to the University of Texas Law Review⁴, which has apparently snubbed its nose at copyright or had better luck with Cambridge.

Our failed negotiation with Cambridge University Press led us, however, to a much younger but still exceptional work. In 1987, Richard Levin, Alvin Klevorick, Richard Nelson, and Sidney Winter published a pioneering empirical study of how companies appropriate the returns for research and development. Surprisingly, they found that companies used multiple methods to protect their returns and that patents, while taken, were not viewed as important safeguards of returns in some industries. Their research added a great deal to our empirical knowledge on the role and use of patents and is still frequently cited today. Unfortunately, in our view at least, this article did not change Machlup and Penrose's 1950 conclusion concerning the lack of solid

empirical information to guide the policy debate over the proper role of patents.

Finally, to add some counterweight to the patent debate we have included, for our regular deep dive into a case, an article by Julie Bon, Pietro Crocioni & Francesca Sala on the merger of the UK operations of Anglo and Lafarge. The UK Competition Commission blocked the merger based on concerns over coordinated effects arising from vertical aspects of the combination of these entities, which were involved in the production of both cement and RMX. The case is unusual as the authors point out because it is rare to block a merger because of coordinated effects and rarer still because of vertical considerations.

Thanks to all of the authors for their excellent contributions. And to the Brookings Institution for allowing us to reprint the Levin et al. article. ▲

1. Evans, David and Keith Kylton, "The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust," 4(2) *Competition Policy International* (Autumn 2008).
2. Machlup, Fritz, and Edith Penrose, "The Patent Controversy in the Nineteenth Century," *The Journal of Economic History* 10 (1950): 1-29.
3. <http://www.jstor.org/discover/10.2307/2113999?uid=3739256&uid=2&uid=4&sid=21103143317301>
4. [http://www.utexas.edu/law/journals/tlr/sources/Volume 92/Issue 2/Hemel/Hemel.fn002.machlup.thepatentcenturyin-nineteenthcentury.pdf](http://www.utexas.edu/law/journals/tlr/sources/Volume%2092/Issue%202/Hemel/Hemel.fn002.machlup.thepatentcenturyin-nineteenthcentury.pdf)