

**ENFORCEMENT ISSUES REGARDING
POOLING AND CROSS-LICENSING**

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1. **Uncontroversial Points**

- A. Licenses and pools involving complementary or blocking technologies are presumptively efficient where IPRs are valid and agreements extend only to technology needed to facilitate production
- B. IPRs presumptively valid
- C. Scope of licenses/need for license present risk of licensing substitute technology but identifying such cases presents significant technical questions; parties have better information than enforcers; so long as there is a facially plausible reason to license technology, scope should be presumed legitimate; ergo:
- D. Licensing and Pools presumptively efficient
- E. Presumptions may be rebutted, using rule of reason methods in most cases

2. **Potential benefits**

- A. Reduce transaction costs
- B. Lower cost of production/increase output of technology*
- C. Enable production of complementary technologies
- D. Align incentives for R&D*
- E. Coordinate R&D efforts (competition within rather than for standards)
- F. Avoid litigation

3. **Potential Risks**

- A. Pretext for price-fixing (eliminate competition between substitute technologies)
- B. Extend reach of IPR beyond statutory grant
- C. Squelch innovation

4. **Enforcement Issues**

- A. ***Consider Economics of Relevant Markets***
 - 1. History of competition in market (*e.g.* pricing, innovation, standardization, history of pools and licensing, etc.)
 - 2. Growing vs. declining; are there reasons to believe firms are trying to extract revenues from an obsolete technology, or preserve an intermediary role rendered less necessary by technology? (Compare DVDs & minicomputers)
 - 3. Rate of change in technology; potential for entry or transition to substitute technology

4. Need for coordination (NE's; cost of maintaining standard; risk of blocks)

B. *Consider purposes and scope of IPRs*

1. Producer surplus legitimate concern, but surplus derived from exploitation of technology covered by IPRs rather than by agreements using IPRs as focal points for price-fixing (*cf* blocking vs. non-blocking issues)
2. Intent to exclude non-parties from use not conclusive (*cf Image Technical and In re ISO*)

C. *Enforcement rules of thumb*

Link enforcement analysis to reasons for presumptive validity:

Theory of the firm implies licensing and integration may be treated similarly; most products represent combinations of IPRs whether within or among firms

Goal is to distinguish strategic licensing of substitute technology from licensing of complementary or genuine blocking technology

PRACTICAL INQUIRIES

1. How does agreement treat validity? Particularly where pooled technology has significant market power, invalidity implies termination of agreement or exclusion from pool (MPEG/DVD-Toshiba)
2. Is there an incentive within the pool to test validity? (per-IPR royalty or blanket royalty?) (*cf* DVD-Toshiba & DVD-Philips)
3. Are parties free to license outside the agreement? (Exclusivity facilitates cartel behavior more than non-exclusivity)
4. Are licensed/pooled IPRs necessary for production?
 - a. Industry expertise (DVD-Toshiba; weight given expert should correspond to structural independence of expert's position; imperfect but practical procedure; would face evidence in litigation anyway)

- b. Technically essential (MPEG) vs. practically (economically) essential (DVD-Toshiba)? Enforcement should be driven by realizing efficiencies, which implies economic as opposed to purely technical test
- 5. How does agreement treat improvements/innovation? Lower monetary incentive than with no license for improvements, but may be higher incentive than with strong risk that other IPRs will prevent exploitation
- 6. How is the royalty set, does it change (and why), and how high is it relative to sales price?
- 7. What information will be shared under the agreement, and how will it be treated?
- 8. Duration/termination provisions?

D. ***Things to avoid***

- 1. Beware penalizing negotiating behavior or compulsory dealing that might interfere with bargaining: *Intel*
- 2. Beware favoring particular types of competition—i.e., competition for the market rather than in the market
- 3. Do not try to temper scope of IPRs or PTO behavior using antitrust principles