



European Commission

Competition

WIPO Symposium on Intellectual Property and
Competition Policy, Geneva, 11 May 2010

IPRs and Competition Policy

Per Hellström

(Speaking in a personal capacity – the views expressed are
not necessarily those of the European Commission)

European Commission, DG Competition,
Antitrust: IT, Internet and Consumer Electronics



IPRs and Competition

“ *Both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.*”

(Commission Guidelines on technology transfer agreements, para. 7)



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Role of competition authorities

- Provide solid legal framework
- Protect the competitive process
- Reward present innovation, without stifling future innovation
- Take account of facts and specificities of different sectors



Trends in patenting

- Steep increase in patent applications and granted patents (e.g. in IT, Telecom and Pharmaceuticals)
- Pharma sector inquiry (2009)
- Strategic patenting (Harhoff study 2007)
 - Bargaining chips
 - Blocking patents
- Probabilistic patents (Lemley/Shapiro 2004)
 - 50 % of the litigated patents are found invalid
 - Patents resemble lottery tickets
 - Right to exclude/Right to try to exclude



Microsoft case

- Withholding interoperability information
 - Refusal to license IPR not in itself an abuse, unless there are exceptional circumstances
 - IPRs as such no objective justification
- Incentives to innovate – for Microsoft and third parties

"Essentially what we are permitting is more innovation around our products, more interoperability...but it's a path that we commit ourselves to because it's good for customers, and it's consistent with our legal obligation"

(Steve Ballmer, 2008)



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Rambus case

- Standard-setting context – disclosure obligations and FRAND
- Patent Ambush - non-disclosure of essential patents/patent applications, charging unreasonable royalties
- Commitment decision December 2009 – royalty cap
- Prevention better than cure – guidance and ex ante mechanisms



Merger analysis

- **Challenges for merger assessment**
 - market definition
 - value of market shares
 - potential competition, future product market competition,
 - impact on innovative effort
 - barriers to entry/expansion; "tipping effect" in network industries or patent blocks,
 - devising an effective remedy
- **Merger rules apply fully to innovative sectors, but assessment depends on specific facts in each case**



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Conclusion

- Key role for competition policy
- Promotes innovation, for the benefit of consumers
- Continued enforcement of EU competition rules based on solid analytical tools



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