Issues at the Intersection of IP and Competition Policy

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The Big Picture

- IP and competition policy are mostly complementary, not opposing, forces
- Patents do not automatically create monopolies
- . . .

Different Incentives, Same (Ideal) Result: More Innovation

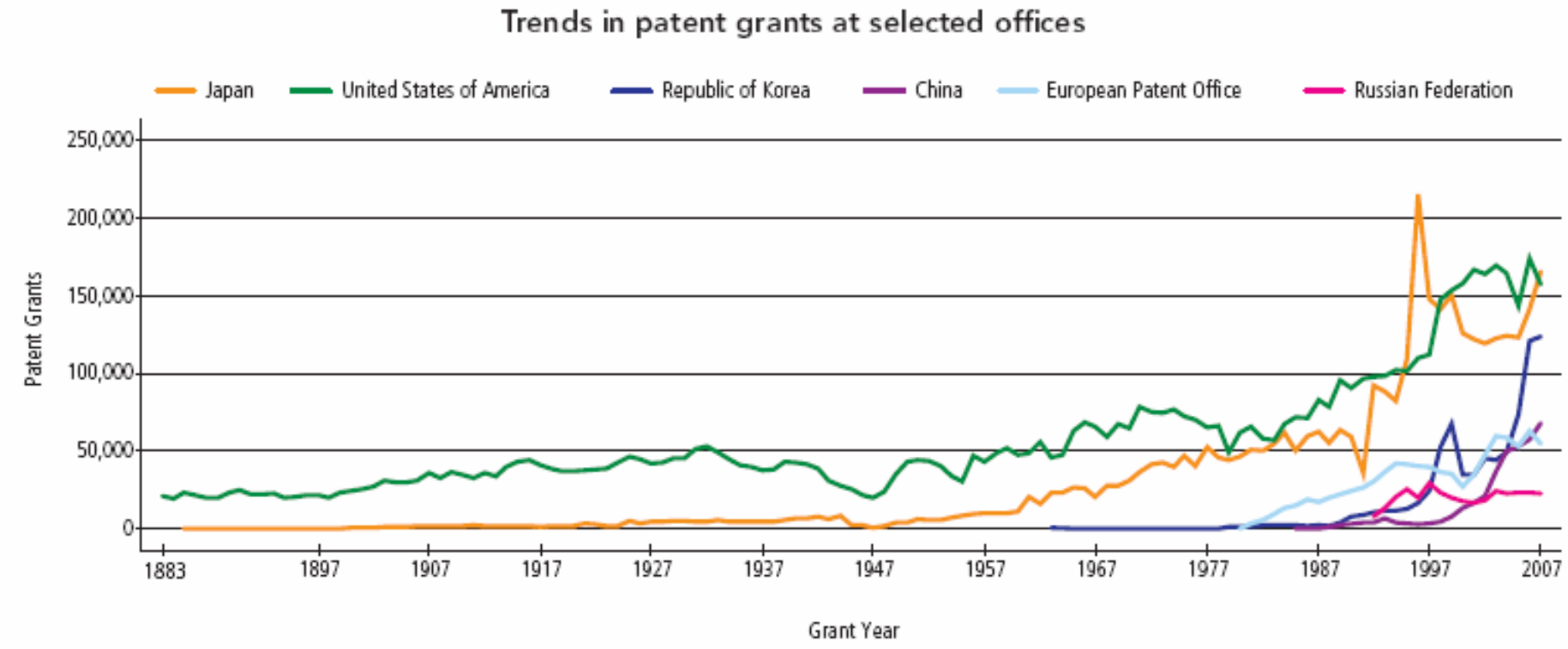
The Big Picture (cont'd)

- IP and competition policy are mostly complementary, not opposing, forces
- Patents do not automatically create monopolies
- Competition enforcement does not automatically destroy the value of IP
- But competition and IP do affect each other
- Problems arise when enforcement of either one is very weak or overzealous

Some expected results of imbalanced enforcement

	IP	Competition
Too strong	• Society awards more exclusive rights than necessary to procure the innovation it receives in return if it's too easy to obtain IP • Entry barriers rise higher than necessary if sanctions are too harsh • Research and investment in adjacent areas is deterred	• Innovation incentives are inefficiently low if IP holders are targeted just because they are financially successful • Same result if IP holders are automatically viewed as dominant just because of their IP • Efficient licensing arrangements are deterred
Too weak	• Innovation incentives are inefficiently low if infringement is too hard to prove or penalties are too lenient • Secrecy and intentionally complex designs increase, leading to a decline in efficient licensing and technological diffusion	• Licensing arrangements are used as devices to fix prices, destroy competition, and maintain market power • SSO ambushes, reverse payment settlements and other anticompetitive conduct increase

The patent surge



Source: WIPO Statistics Database

Addressing the patent surge

- If patents are granted too easily or too broadly, competition and innovation will both suffer
- There is a temptation for courts and competition agencies to use competition law to regain balance on the IP side, but competition law is a blunt instrument for that purpose
- Competition law enforcement is for remedying anticompetitive conduct in individual cases, not for solving systemic IP regime problems
- Better to fix patent systems ex ante and from within, not with widespread ex post competition law intervention

But perhaps competition agencies should be involved in the IP application review process?

- Definitely not.
  - Lack of relevant technical and legal expertise
  - Limited resources
  - Would increase delays
  - Overkill: most IP doesn't raise competition issues
  - Still, competition officials can help

Then what can competition agencies do to help?

Some success stories so far:

- Open dialogues with patent agencies to develop greater mutual understanding of each other's fields and concerns
- Commission expert reports that study a nation's patenting system to determine whether and how it is causing any undue competition problems.
- Hold hearings with academics, public and private practitioners, and industry participants to discuss problems at the intersection of IP and competition policies

When Competition Law Intervention Is Necessary: Some IP licensing arrangements may harm competition

- Most are pro-competitive and pro-innovation, but . . .
- Grant-backs – licensee must grant a license on any improvements that it patents which are related to original invention back to licensor
  - Competition analysis turns on whether the grant-backs cover distinct, severable improvements and whether the original licensor gets exclusive rights over those improvements.
  - Grant-backs of severable improvements may damage incentives for follow-on innovation
  - It's worse if such grant-backs are exclusive because the licensor will be even more insulated from competition, so any market power it has could last longer

When Competition Law Intervention Is Necessary: Some IP licensing arrangements may harm competition (cont'd)

- Patent Pools – two or more parties arrange to have their patents licensed as a package
  - Patent pools that include only patents that are **complementary** and **essential** are much less likely to cause competition problems
  - A pool that includes patents that are substitutes for each other may be a device for sharing markets and raising prices
  - A pool that includes non-essential patents (i.e. patents that have substitutes outside the pool) may foreclose third-party technologies
  - The EC and US antitrust agencies have developed similar criteria for analysing patent pools

Controversy: Are unilateral, unconditional refusals to license IP ever anti-competitive?

- Different OECD countries have different answers. In some jurisdictions (e.g. EU), RTLs may violate competition laws and compulsory licensing may be a remedy in such cases. Typically, elements include:
  - Whether the IP holder is dominant
  - If so, whether dominance is being used via an IPR to create conditions that reduce long run incentives to invest and compete dynamically
- In contrast, there are very few examples of competition law liability for unilateral, unconditional RTLs in certain other countries (e.g. US)

Controversy: Compulsory licensing as a remedy for unilateral, unconditional refusals to license IP

- Most CA's acknowledge that although compulsory licensing for RTLs can inject competition into a market, it has disadvantages that affect innovation, competition agencies and courts.
  - Policy Incoherence: Why ban the same behaviour that IP laws allow?
  - Sacrifice Workaround Innovation: Competitors no longer have the same incentive to find ways to invent around the original patent.
  - Courts and CA's as Regulators: Compulsory licensing requires competition authorities or courts to oversee the terms of the license and monitor its execution.

Controversy: Compulsory licensing (cont'd)

- Probably best to resort to compulsory licensing only when the facts clearly show an anticompetitive use of substantial market power.

Selection of Relevant OECD Materials

- OECD (2004), Intellectual Property Rights, (Best Practices Roundtable), available at http://www.oecd.org/dataoecd/61/48/34306055.pdf
- OECD (2005), Competition, Patents and Innovation, (Best Practices Roundtable), available at http://www.oecd.org/dataoecd/26/10/39888509.pdf
- OECD (2009), Competition, Patents and Innovation II, (Best Practices Roundtable), available at http://www.oecd.org/dataoecd/26/33/45019987.pdf