Research paper summary and key messages

Report title: 'Stealth Licensing' - Or Antitrust Law and Trade Regulation Squeezing Patent Rights
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Overview

The paper examines the emerging "stealth licensing" paradigm where intervention of policy makers, judicial organs and administrative agencies results in "soft" compulsory licensing, that lies outside the TRIPS agreement exceptions. Precisely because these measures are not set out in binding "hard law" instruments, they create significant legal uncertainty that risks impairing the ability of innovators and investors to create and disseminate new solutions, impacting on the social welfare function of the patent system. The underlying purpose of the patent system, to incentivise innovation by ensuring that inventors have the ability to seek fair return on R&D investment is – therefore – at risk.

The first symptom of stealth licensing is the tendency of competition agencies, judges and scholars to equate a patent 'monopoly' with an antitrust 'monopoly'. Following this 'logic', by virtue of their Intellectual Property Rights (IPRs), patent holders would be allegedly dominant, and enjoy market power. With the patent=monopoly proxy, agencies and courts thus lift 50% of the burden of proof of an infringement, having solely to prove "abuse" to apply Article 102 TFEU. However, a patent only grants a 'monopoly' over a technology that may never gain market success. Also, most antitrust agencies see IPRs as an asset like any other ignoring the specificities of intangible assets and the legal system created to protect them. And if treated like tangible assets, IPRs may be subject to heavy-handed intervention. Yet by doing so regulatory authorities are effectively penalising the most successful technologies.

The author concludes, however, that the effective award of compulsory licenses by regulatory authorities on the basis of abuse of dominance rules, should remain the exception rather than the rule, since it threats firms' return on investment prospects, creating uncertainty and reducing their willingness to take risks for R&D.

Key messages

Message

Attempts to make formal compulsory licensing more flexible originally emerged in the international trade arena where pressure is not exerted on patent owners directly, but through calls for a relaxation of the regulatory framework. Demands for further relaxations of the TRIPS derogation, however, have been constantly escalating with the effect of diluting patent rights at different levels of economic regulation. "Hard" compulsory licensing on the basis of competition rules remains epiphenomenal, yet there are indications of an insidious "stealth" licensing paradigm in antitrust law.

Proof points

- TRIPS agreement contains two key exceptions that are the subject of direct compulsory licensing, related to «national emergency or other circumstances of extreme urgency or in cases of public non-commercial use» and «anticompetitive practices».
- In international trade, stealth licensing emerged through a top-down approach, calling for a more "flexible" interpretation of TRIPS exceptions in response to global macro-economic imbalances.
- In about 50 years of EU competition enforcement, there have only been 4 (now 5) cases of compulsory licensing of IPRs in the EU legal system.
- Whilst antitrust-based compulsory licensing is theoretically available in most jurisdictions, it is "seldom applicable in practice" (Source: 2011 WIPO, CDIP/4/4 Rev./STUDY/INF/5, p.24)
- Several indications however suggest the rise of a more insidious "stealth" licensing paradigm in antitrust law and the undermining of IP rights generally.

Message

The award of compulsory licenses by antitrust authorities on the basis of abuse of dominance rules so should remain the exception rather than the rule and be restricted in their scope or they negatively impact incentives to create and disseminate technologies

Proof points

- Researchers find that existing compulsory licensing provisions, even though rarely enforced, have "an indirect, preventive effect". Stealth licensing threats to the patent system will affect firms' return on investment prospects, creating uncertainty in their business strategies and therefore reducing their willingness to take the risk for R&D investment.
- Even rare events can have a significant impact on incentives to create and disseminate. It is believed that the mere prospect of sporadic trade or antitrust licenses risks affecting patentees' incentives to create and disseminate.
- Technology development and transfer between science and business is affected not only in western countries - where it has a negative outcome on innovation and economic sustainability - but also in developing

countries, where it decreases the incentive for multinational companies to engage in joint ventures with local firms.

Message

Equating patents as a barrier to trade or using moral justification for extending patent flexibilities are common errors in the debate surrounding green technologies.

Proof points

- There is no empirical proof that patents are a barrier to the dissemination of green technology.
- Most underlying technologies were invented long ago and were either never or are no longer protected by patents. As a result, a large number of substitutes are available.
- Evidence suggests that patents do not inhibit competition for green technologies. On the contrary there are indications that patents play a positive role in facilitating their transfer by creating a legal framework for commercial relationships. Today solar, biofuel and wind technologies, among others, are deployed in developing countries and studies empirically confirm that technology transfer in green technology regularly happens between developed and developing countries.

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