



# Briefing

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Brief based on the paper “Stealth Licensing” - or antitrust law and trade regulation squeezing patent rights, by Nicolas Petit

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## **What is Stealth Licensing?**

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 at risk. Patent owners are under increasing pressure to give away their property rights on their most successful inventions. The threat comes from subtle interventions by policy makers, judicial organs and regulatory agencies, despite the fact that stimulating investment in research & developments remains critical for economic growth. While falling short of outright expropriation, ‘stealth licensing’ eases the thresholds to take such drastic measures. Typical approaches include re-defining what the patent system is intended to achieve, watering down exceptions to patent rights beyond what was originally envisioned in the TRIPS<sup>1</sup> and/or adding new avenues to dilute patent rights. Instead of increasing access to technology, such ‘stealth licensing’ actually impairs the ability of innovators and investors to create new solutions and disseminate them and adversely impacts the social welfare functions of the patent system.

## **Manifestations of Stealth Licensing**

Attempts to make formal compulsory licensing more “flexible” originally emerged in the international trade arena. TRIPS 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” (exception 1) and “anticompetitive practices” (exception 2).<sup>2</sup> The late 1990s saw compulsory licenses issued for some pharmaceutical products. Demands for further relaxation of the TRIPS derogations have since escalated and that have the effect of diluting patent rights at different levels of economic regulation.<sup>3</sup> In international trade,

stealth licensing emerges through a top down approach, calling for a “flexible” interpretation of TRIPS exceptions in response to global macro-economic imbalances. This may lead to relaxing the strict application of exception 1 in both international and eventually national laws. A more bottom up approach is also developing, whereby antitrust intervention in the market leads to “undercover” expansion of exception 2.

### **Unfounded calls for enhanced flexibilities in green technology**

Equating patents as a barrier to trade or using moral justifications for extending patent flexibilities are common in the debate surrounding green technologies. However, both lines of argument are flawed and lack empirical evidence. Most underlying technologies were invented long ago and were either never or are no longer protected by patents.<sup>4</sup> In other words, much of the related innovation today builds on these foundations and is incremental.<sup>5</sup> And as a result a large number of substitutes are available.<sup>6</sup>

Evidence also suggests that patents do not inhibit competition for green technologies.<sup>7</sup> On the contrary, there are indications that patents play a positive role in facilitating their transfer<sup>8</sup>, by creating a legal framework for commercial relationships. Today solar, biofuel, and wind technologies, among others, are currently deployed in developing countries.

While patents are not a proven barrier to the dissemination of green technology, the literature suggests that other, non-patent related, elements are possible impediments. A few examples include insufficient technical knowledge to produce innovative technologies locally, insufficient market size to justify local production units, unfavourable market conditions and investment climate and ineffective government and institutions.<sup>9</sup>

### **Undercover licensing in antitrust law**

The phenomenon is also evident in antitrust law, where stealth licensing is getting traction on a global scale and relates to incremental changes in legal tests, standards, interpretations and doctrines that bring patent owners one step closer to antitrust licensing orders. “Hard”

compulsory licensing remains exceptional given the difficulty of establishing the essential facilities doctrines. Yet increasingly antitrust enforcers' statements - and now decisions - impose on patent holders the prospect of being under an antitrust duty to license their technology. The symptoms are abundant and include: terminological confusion between a patent and monopoly rights, downplaying the significance and validity of certain IPRs, relying on undefined concerns such as 'strategic use' or 'anticompetitive practices' pitting the patent system against competition law and focusing enforcement priorities on high-profile, patent-intensive sectors such as smartphones, pharmaceuticals.

Competition agencies, judges and scholars exhibit an inveterate tendency to equate a patent with a market monopoly. And by virtue of the intellectual property rights, patent holders would be allegedly dominant and enjoy significant market power.<sup>10</sup> Pegging patent ownership to monopolies eases the application of the competition rules on "abuse of dominance." While in most competition regimes "dominance" alone is not a cause of remedial intervention, for some authorities it drastically reduces the burden of proof making it easier to circumvent the related patent rights.

Similarly, the application of the essential facilities doctrine linked solely to patents can effectively require firms to engage licensing as a remedy. Other forms of undercover licensing include working requirements that diminish patent rights when inventions are not practiced promptly, policies that question the enforcement of patents before a court and policies that prevent dominant patent holders from freely revoking licenses. Slightly different approaches can be seen by competition authorities encouraging the license interoperability information upon successful development of a platform or challenging the validity of patents, and use findings of invalidity as a basis for antitrust liability.

## The impact of stealth licensing

Despite the above, the actual award of compulsory licenses by domestic authorities pursuant to the flexibilities or by antitrust agencies on the basis of abuse of dominance rules should remain the exception rather than the rule. But even rare events can have a significant impact on incentives to create and disseminate. In fact, researchers are already finding existing compulsory licenses are having “an indirect, preventative effect.”<sup>11</sup> And while formal compulsory licences are comparatively rare, the increase in soft law (i.e. IPR guidelines, speeches etc.) from regulators increases the commercial uncertainty around the legitimate enjoyment of patent rights.

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. This directly affects technology development and technology transfer between science and business, which is one of the backbones for innovation and sustainable economic success, especially in Europe. Moreover, compulsory licensing for a particular technology has a detrimental effect on technology transfer towards developing countries, as it decreases the incentive for other multinational companies to engage in joint ventures with local firms in that state.<sup>12</sup>

<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994 (“TRIPS”), Article 31.

<sup>2</sup> TRIPS Article 31 b) and k), respectively

<sup>3</sup> e.g. Ahead of the 2009 Copenhagen Summit on Climate Change, the developing countries parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) put forward proposals to weaken (or even eliminate) IPRs in green technologies. China and India proposed to mandate compulsory licensing of patented technologies or to introduce explicit derogations for green technologies in the text of the TRIPS agreement. (Maskus K., “Differentiated Intellectual Property Regimes for Environmental and Climate Technologies,” OECD Environment Working Papers 17, OECD Publishing, 2010)

<sup>4</sup> E.L. Lane, “Clean Tech Intellectual Property: Eco-marks, Green Patents, and Green Innovation”, Oxford University Press, 2011, pg. 9-10; Copenhagen Economics, 2009, Are IPR a Barrier to Transfer of Climate Change Technology?, Report to Directorate General of Trade, European Commission, January 19

<sup>5</sup> Barton, J. H., Intellectual Property and Access to Clean Energy Technologies in Developing Countries, ICTSD Trade and Sustainable Energy Series Issue Paper No. 2, Geneva, 2007, pg. 5

<sup>6</sup> Fair R., “Does Climate Change justify Compulsory Licensing of Green Technology?”, International Law and Management Review, Vol.6, Winter 2009

<sup>7</sup> Barton 2007

<sup>8</sup> Perez Pugatch, M., “When Policy meets Evidence: What's next in the discussion of intellectual property,

technology transfer and the environment", Global Challenges Brief, WIPO, 2011

<sup>9</sup> UNEP, EPO and ICTSD study, Patents and Clean Energy: Bridging the Gap between Evidence and Policy, 30 September 2010, available at

[http://documents.epo.org/projects/babylon/eponet.nsf/0/cc5da4b168363477c12577ad00547289/\\$FILE/patents\\_clean\\_energy\\_study\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/cc5da4b168363477c12577ad00547289/$FILE/patents_clean_energy_study_en.pdf)

<sup>10</sup> See S. Bostyn and N. Petit, "Patent=Monopoly: A Legal Fiction", SSRN: <http://ssrn.com/abstract=2373471>

<sup>11</sup> Van Zimmeren, E. and Van Overwalle, G., "A Paper Tiger? Compulsory License Regimes for Public Health in Europe", International Review of Intellectual Property and Competition Law (IIC), 2011

<sup>12</sup> Fair, 2009

"Stealth Licensing"- or antitrust law and trade regulations squeezing patent rights, by Nicolas Petit is available at

<http://www.4ipcouncil.com/research/stealth-licensing> or

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