



Competition Policy, Patent System Design, and the Promotion of Innovation

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What Future for the European Patent System

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Themes

- Institutions Shape Policy Outcomes
- Competition Policy (CP) and Intellectual Property (IP) Policy
 - Interrelated Systems
- Aims
 - Better system design
 - Better APIs to link CP and IP systems



Resources

- Kovacic & Reindl, An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy, 28 *Fordham Int'l L.J.* 1062 (2005)
- Kovacic, Competition Policy and Intellectual Property: Redefining the Role of Competition Agencies, in *Antitrust, Patents, and Copyright: EU and US Perspectives* 1 (F. Leveque & H. Shelanski eds. 2005)



Overview

- Two Communities and Cultures
- Interdependencies
- Policy Suggestions
- Caveat: Personal Views



The CP/IP Policy Archipelago

- Competition Agencies
 - Over 100 jurisdictions
 - Sometimes with multiple entities
- Rights-Granting Bodies
- Collateral Regulators
 - E.g. Food and Drug Administration



Characteristics of the CP/IP Policy Archipelago

- Distinctive Professional Backgrounds
- Different Professional Societies
- Insular Compartments within Multinational Bodies: e.g. OECD
- Limited Interaction Across Disciplines
 - Inside each jurisdiction
 - Across each jurisdiction
 - But more infra-disciplinary cooperation



CP/IP Interdependencies in Theory

- Common Influence on Innovation
- Old View: Fundamental Incompatibility
- New Perspective: Complements



CP/IP Interdependency Theory: Two Cautions

- Importance of Quality of Rights-Granting Process
 - Harms from permissive standards and processes
- Importance of Quality of CP Policy
 - Harms from overreaching and misdiagnosis



DOJ/FTC Report (April 2007)

- “Over the past several decades, antitrust enforcers and the courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation.”



CP/IP Interdependencies in Practice: Judicial Equilibration

- Judicial Equilibration Defined
- Perceptions of Flaws in Rights-Granting Process Elicit Equilibrating CP Response
- Perceptions of Faulty CP Rules Elicit CP Tribunal Equilibrating Responses



Judicial Equilibration Examples

- Competition Courts Push Back
 - Tying and the “patent monopoly”
 - Access Issues: *IMS* and *Magill*
- IP Tribunals Push Back
 - *CSU v. Xerox* (Federal Circuit 2001)



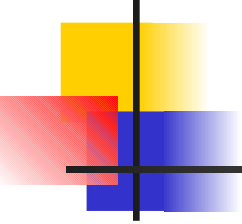
Policy Aim: First Best Solutions

- Infirmities of Judicial Equilibration
- First Best Outcomes
 - Cure weaknesses in rights granting process
 - Cure flawed CP policies and doctrines



Policy Suggestions

- Institutional Predicates
- Applications



CP Institutional Predicates: Building Knowledge

- Personnel (IP) and Organization (Deeper Sectoral Knowledge)
- Self-Assessment: Ex Post Evaluations and Learning from IP Bodies
- CP Research and Development
 - Hearings/workshops/seminars
 - Studies: Generic entry/Patent System



Illustration: DOJ/FTC IP Proceedings

- Public Consultations in 2002
- FTC, To Promote Innovation (2003)
- DOJ/FTC, Antitrust Enforcement and Intellectual Property Rights (2007)



Institutional Predicates: Greater Cooperation (Better APIs)

- Within Disciplines
 - Three Step Process
 - Experimentation
 - Identification of better practices
 - Voluntary opting-in
- Across Disciplines and Jurisdictions at Three Levels
 - Agency leaders, agency staffs, NGOs



Cooperation Means

- Networks within Disciplines
 - Domestic competition networks
 - Bilateral international discussions
 - Multilateral: OECD, ICN, law societies
- Networks across Disciplines
 - Domestic: CP agencies and USPTO
 - Multinational: OECD (CP/IP)
 - E.g. EUPACO and EU Ischia (2004)



Applications: Improvements in Rights Granting Process

- Legislation
- Litigation: e.g. *KSR* and *EBay*
- Some Focal Points
 - Criteria
 - Post-grant review
 - Funding and operations
 - Concept: Presumption of validity depends on quality of rights granting decisions



Applications: Improvements in CP Analysis

- Doctrine
 - *Independent Ink* (US Supreme Court 2006)
- Guidance
 - DOJ/FTC IP Guidelines (1995)
 - DOJ/FTC Antitrust/IP Report (2007)



Concluding Thoughts

- Institutional Design Shapes Outcomes and Demands Greater Attention
- Need to Link CP/IP Archipelago
- More Universal Concern: e.g. Health
- Non-Litigation Activities/Network Building Will Command More Attention