



CONVERGENCE OR CONFLICT? ANTITRUST AND INTELLECTUAL PROPERTY LAW DYNAMICS

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Abstract: This research paper delves into the intricate relationship between antitrust law and intellectual property (IP) law, highlighting their deep interdependence. The analysis underscores the pivotal role of innovation in fostering new products and expanding markets, emphasizing the need for competition policy to promote innovation. The paper contends that competition interference in the realm of IP is crucial, as it directly impacts innovation and the dissemination of new technologies, essential for economic progress. Striking a delicate balance is important, requiring antitrust policy to navigate the potential benefits of IP rights for innovation while mitigating the risks of anticompetitive practices. Despite attempts by courts to reconcile these spheres, the challenge persists due to the inherent tension in the relationship between IP rights, innovation, and competition. Achieving equilibrium remains an ongoing and nuanced task, critical for sustaining commerce and employment.

"Free and open markets are the foundation of a vibrant economy. The competition among the businesses in an open market provides consumers with the multitude of benefits such as higher standard of products and services, better prices, larger pool of choices and greater innovation. The Federal Trade Commission (FTC) drives with the aim to enforce antitrust laws and thereby implementing rules of the competitive marketplace. The FTC enforces antitrust laws by challenging business practices that could hurt consumers by resulting in higher prices, lower quality, or fewer goods or services." (FTC, 2013)¹

I. INTRODUCTION

The inherent nature of Intellectual Property (IP) rights viz. patents, trademarks or copyright is to provide exclusivity to the right holder, that is, protection from anyone who tries to infringe upon their rights. When this exclusivity is looked at from the perspective of antitrust laws, one might say that it stands in contradiction with the antitrust laws.² One might also argue that the IP rights can be abused by the right holders to the detriment of consumers due to the inherent monopolization effect of these rights.³ Therefore, for the regulation of the players in the market, antitrust law is applicable to the area of IP and may be invoked by the consumers, or any interested or affected third party to ensure that the IP right holders are not abusing (misusing) their rights

¹ *Guide to Antitrust Laws*. (2013, June 11). Federal Trade Commission. <https://www.ftc.gov/advice-guidance/competition-guidance/guide-an-titrust-laws>

² Stakheyeva, H. (2018, July 24). *Intellectual Property and Competition Law: Understanding the Interplay*. Intellectual Property and Competition Law: Understanding the Interplay | SpringerLink. https://doi.org/10.1007/978-981-13-1232-8_1.

³ *Id.*

and their dominant or monopolistic position.⁴ At the same time, IP rights holders may rely on antitrust law to protect themselves from unfair competition and encourage more competition and innovation in the market.

At the most basic levels, antitrust law deals with the protection of competition and IP law deals with the promotion of innovation.⁵ Sometimes the courts and the agencies alike argued that there is an inherent tension between the two areas of law.

This possible conflict of antitrust law and the IP rights has been discussed by different courts in the country over a period of time. One such view has been illustrated in the case of *SCM Corp. v. Xerox Corp* (1981)⁶, the Second Circuit summarized the problem as follows:

“(...) the conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws proscribe unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art. When the patented product, as is often the case, represents merely one of many products that effectively compete in a given product market, few antitrust problems arise. When, however, the patented product is so successful that it evolves into its own economic market, as was the case here, or succeeds in engulfing a large section of a preexisting product market, the patent and antitrust laws necessarily clash. In such cases, the primary purpose of the antitrust laws to preserve competition can be frustrated, albeit temporarily, by a holder’s exercise of the patent’s inherent exclusionary power during its term”.

Other courts have reached somewhat similar conclusions and have also tried to sort out whether there really is a conflict between the antitrust laws and the IP laws. In *Atari Games Corp. v. Nintendo of America, Inc.* (1992)⁷, the court of appeals analyzed a patent-antitrust conflict as follows:

“When the patented product is merely one of many products that actively compete on the market, few problems arise between the property rights of a patent owner and the antitrust laws.... However, when the patented product is so successful that it creates its own economic market or consumes a large section of an existing market, the aims and objective of patent and antitrust law may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.”

Fundamentally, there is a tension inherent in the relationship between IP rights and antitrust law in that the former grants the right to exclude competitors from practicing an invention and the latter prohibits a competitor from engaging in unjustified exclusionary conduct used to gain or maintain a monopoly.⁸ The two bodies of law, however, are increasingly viewed as serving the same complementary goals of incentivizing innovation, promoting vigorous competition, and promoting consumer welfare, which flows from the creation of new technology.⁹

In *FTC v Qualcomm Inc*¹⁰ (2020), the court discussed that antitrust law, like patent law, is aimed at encouraging innovation, industry and competition. It was further said that:

“(...) despite the opportunities for conflict a central goal of both patent and antitrust law is the promotion of the public benefit through a competitive economy. It is the promotion of

4 *Id.*

5 [§ 15:1, Introduction, Corp. Counsel’s Antitrust Deskbook § 15:1](#).

6 *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 209 U.S.P.Q. 889.

7 *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 14 U.S.P.Q.2d 1034.

8 Susannah P. Torpey and Aldo A. Badini, *The Intellectual Property and Antitrust Review - The Law Reviews*, 15 July 2022, <https://thelawreviews.co.uk/title/the-intellectual-property-and-antitrust-review/usa>. Accessed 14 Apr. 2023.

9 *Id.*

10 *FTC v Qualcomm Inc.*, 969 F3d 974, 982 [9th Cir 2020].

interbrand competition, after all, that is the primary purpose of the antitrust laws. Indeed, the Federal Circuit, which frequently examines cases at the intersection of patent and antitrust law, has commented that the patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.”¹¹

It is usually assumed that a patent granted to a person or an entity also passes along the monopoly power to the patent holder, but in a more nuanced economic analysis it is observed that exclusive rights may be narrow or inconsequential when multiple products can compete effectively regardless of the rights at issue.¹² Therefore, it is important to understand where the statutory exclusion rights end and where anti-competitive exclusive behavior begins, which is subject to antitrust review. With the increasing importance of IP rights including patents in this tech spurred economy, the prevalence of antitrust-IP intersection cases continue to grow as well. This is only offset by the current trend in courts increasingly to hold breaches of FRAND commitments to be governed by contract law, rather than antitrust.¹³

Abuse of IP rights may cause anticompetitive effects on the market, and thereby shifting IP matters into an antitrust dimension. The crucial aspect is to provide sufficient protection to the IP right holders in a manner to strike balance and without eliminating the competition in the market.¹⁴ As it was explained before, IP rights (IPRs) and competition policy were once regarded as being in conflict. IPRs create monopoly, which was once viewed as contradictory to competition. By contrast, competition policy favors free market entry and asset movement, which IPRs limit in order to create incentives.¹⁵

The competition rules do not interfere with the granting of the IP right and its existence, but merely with the exercise of the right¹⁶ and only when this is used as an ‘instrument of abuse’.¹⁷ In other words, IP rights grant an exclusive right and thereby create legal barriers to entry, whereas the competition rules aim to keep an effective competitive process by ensuring that dominant companies and monopolies do not misuse their power to restrict competition.¹⁸

Some of the examples of antitrust and patent law issues include patent pools, monopolization, reverse payment settlements, patent assertion entities, SEPs and FRAND. The following sections addresses these issues.

II. PATENT POOLS

A patent pool is “an agreement between two or more patent owners to license one or more of their patents to one another or to third parties.”¹⁹ Alternatively, a pool is “the aggregation of intellectual property rights which are the subject of cross-licensing, whether they are transferred directly by patentee to licensee or through some medium.”²⁰

¹¹ *Id.*

¹² Elza Dauletshina, *Antitrust and IP overlap: patent pooling in the United States and the Russian Federation*, Journal of Intellectual Property Law & Practice, <https://www.kluweriplaw.com.gwlaw.idm.oclc.org/document/kli-kpl-jiplp-2015-11-014?q=antitrust+and+ip+law>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Stakheyeva, H. (2018, July 24). *Intellectual Property and Competition Law: Understanding the Interplay*. Intellectual Property and Competition Law: Understanding the Interplay | SpringerLink. https://doi.org/10.1007/978-981-13-1232-8_1.

¹⁶ Cases 56 and 58/64 *Etablissements Consten SA and Gründig Verkaufs-GmbH v Commission* ECLI:EU:C:1966:41, [1966] ECR 299, at 342-343 and case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.*, ECLI:EU:C:1971:59, [1971] ECR 487.

¹⁷ *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, [1979] ECR 461.

¹⁸ Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and US* Hart Publishing, 2012, <https://www.bloomsburycollections.com/book/intellectual-property-antitrust-and-cumulative-innovation-in-the-eu-and-the-us/ch7-cumulative-innovation-under-us-ip-and-antitrust-laws>.

¹⁹ David Serafino, *Survey of Patent Pools Demonstrates Variety of Purposes and Management Structures* at 2, KEI Research Note 2007:6 (June 2007), <https://www.keionline.org/book/survey-of-patent-pools-demonstrates-variety-of-purposes-and-management-structures>.

²⁰ Joel I. Klein, *An Address to the American Intellectual Property Law Association, On the Subject of Cross-Licensing and Antitrust Law* (May 1997), <https://www.justice.gov/atr/speech/cross-licensing-and-antitrust-law>.

A number of scholars have commented on both the pro-competitive and anti-competitive potential of patent pools.²¹ Cross-licensing is also an important aspect of patent pools. A cross-licensing agreement is one that gives two parties the right to use each other's patents. In a pooling arrangement, cross-licensing typically follows an assignment or exclusive license of the IP rights to a separately managed entity, which thereafter controls the licensing of the patent portfolio to those who contributed the IP rights and, in many cases, to third parties.²²

The terms of such agreements may be decided by the parties mutually and may vary. The members in the pooling arrangement may have the right to use the intellectual property(ies) royalty free or at the decided price.²³ Further, the parties in the pool may split the proceeds according to different formulae. The parties in the pool may also have different voting structures and veto rights.²⁴ The agreements may also discuss about the pending patent applications, and/or cross licensing agreements may be grouped together to form a licensing pool for the purpose of sharing complementary technologies held by several parties.²⁵

Patent pools 'may have a more competitive benefits by integrating complementary technologies, reducing transaction costs, eliminating blocking positions, and avoiding costly infringement litigation'.²⁶ However, the patent pools may also be a medium to abuse, as a means to fix prices, regulate output or eliminate the competing players from the market for the goods involving pooled technologies.²⁷ Particularly, pools containing fungible patents 'could actually set prices on fungible technologies, thereby eliminating opportunities for competition and increasing costs to licensees and ultimately consumers'.²⁸ Also, with the approach of licensing exclusively through a patent pool, there could be a reduction in competition with the other technologies in the pool.

The patent pools may be beneficial to the IP owners and the consumers as well.²⁹ Such pools can facilitate integration of complementary technologies. Further, the transaction cost could be reduced, it could also help in mitigating the blocking patent positions and also avoiding patent infringement litigations.³⁰ Otherwise there could be a situation when the IP right holders have patents in vertical segment which could cause blocking of patents. In such a situation, the IP right holders shall be encouraged to get into a pooling arrangement and thereby combining their IP rights.³¹ In the absence of such pooling arrangements, there could be adverse impact on the market and society and the technology could not be leveraged.

21 Richard J. Gilbert, *Antitrust for Patent Pools: A Century of Policy Evolution*, 2004 Stan. Tech. L. Rev. 3 (Noting three types of hazards to competition posed by patent pools: (i) patents in a pool, and the holders of those patents, could be foreclosed from competing with each other, (ii) vertical restrictions in the license terms can stifle competition among licensees, and (iii) the pools can stifle competition by providing a medium for cooperative patent defense, and cartel-like agreements not to license the patents. However, the article also notes that joint patent defense can be profit-maximizing and royalty-free cross-licensing can increase access to efficient technologies.); Roger B. Andrewelt, *Analysis of Patent Pools Under the Antitrust Laws*, 53 Antitrust L. J. 611 (1984) (Discussing pro-competitive (immunity from lawsuits, resolution of legal conflicts, access to more efficient technologies, ease of licensing) and anti-competitive (facilitation of collusion, disincentive to invest in R&D, tying, naked restraints, overly restrictive licensing terms) effects); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in *Innovation Policy And The Economy* 119 (Adam B. Jaffe, et al. eds., 2001); Josh Lerner & Jean Tirole, *Efficient Patent Pools*, 94 Am. Econ. Rev. 691, 691 (2004) available at <http://www.people.hbs.edu/jlerner/AER-PP-March4-04.pdf> (discussing the spectrum, from perfectly complementary patents, which produce mostly pro-competitive effects when pooled, and perfectly substitute patents, which produce mostly anti-competitive effects when pooled, as well as the reality of patent pools, in which almost nothing is "perfect"); Philip B. Nelson, *Patent Pools: An Economic Assessment of Current Law and Policy*, 38 Rutgers L.J. 539 (2007) (noting pro-competitive effects (increased access to technology, lower marginal royalty costs, elimination of hold-ups) and anticompetitive potentials (facilitation of collusion and/or tying, foreclosure of competition by alternatives) of patent pools).

22 Caro de Sousa and Pedro, *The Interface of Competition and Intellectual Property Law – Taking Stock and Identifying New Challenges*. 6 Nov. 2018. Social Science Research Network, <https://doi.org/10.2139/ssrn.3279355>.

23 OECD (2004) Intellectual Property Rights DAF/COMP(2004)24, p. 31.

24 *Id.*

25 OECD (2013) Competition Policy and Knowledge-Based Capital, p. 25.

26 U.S. Department of Justice and the Federal Trade Commission, *Guidelines for Licensing of Intellectual Property*, 12 January 2017, https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

27 *Id.*

28 *Response to the Avanci LLC's Request for a Business Review Letter*, Department of Justice, Response to the Avanci LLC's Request for a Business Review Letter, Department of Justice. <https://www.justice.gov/atr/page/file/1298626/>.

29 *Supra* at 14.

30 Arti K. Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science* (1999), Northwestern University Law Review 94 77.

31 *Id.*

On the flip side, it is also important to note that the patent pools could pose a risk for healthy competition in various different ways. This risk is starker when the patented inventions can be used interchangeably or could be substitutes to each other in a horizontal relationship. As an OECD's report indicates: "Such risks include: reducing competition in horizontal technology markets, particularly when patents are substitutes and not blocking; reducing horizontal competition in downstream markets by facilitating collusion, particularly when pool participants are active in such markets; foreclosing competing technologies; and reducing the incentives to innovate."³² In such circumstances, the arrangement likely serves only to fix prices or divide markets.³³

Over the past few decades, patent pools have played a crucial role in shaping both the industry and the law in the United States. Carlson explains that "Patent pools originated for two reasons. First, they help avoid competing technology owners suing each other endlessly in order to exclude each other from the particular technology area. This was the reason behind one of the first patent pools, which was established in 1856 by various sewing machine manufacturers. Second, pooling has become an imperative because many technologies involve multiple patents with different owners and no one can adopt such a technology without an efficient means for obtaining all the necessary licenses under the various patents. One example of such a patent pool is DVD6C Licensing Group that covers a technology on DVD discs, players, drives, recorders, and decoders."³⁴ The pooling effectively gathered its nine members, i.e., the patent owners, to jointly license the technology to third-party manufacturers."³⁵

Impact of Patent Pools on a Third Party

The integration of related technologies, the diminution of transaction costs, the elimination of blocking positions, and the avoidance of cost-intensive lawsuits relating to infringement are just a few of the competitive advantages that third parties can get by using patent pools, as previously discussed. In particular, "patent pools allow interested third parties one-stop shopping, i.e., to gather all the necessary patents to practice a certain technology in one place, rather than obtaining licenses from each patent owner individually."³⁶ Such agreements are frequently seen by third parties as a barrier despite the well-known advantages of patent pools. This is particularly noticeable in the export manufacturing sector, where local players that do not participate in pooling agreements must first pay royalties to patent owners in order to gain access to the market.³⁷

Third-party manufacturers are constrained just with the option to take a license and pay royalties at the asking rates where a patent pool controls all important patents directed to a standard that has been internationally adopted. Manufacturers frequently view patent pools as commercial barriers since they may be the only source for the essential license rights and because the patent pool frequently is unable to negotiate lower royalties due to the FRAND need to treat all similarly situated licensees equally. This is especially true when a manufacturer has the lowest production costs but yet has to pay the same royalties as a competitor with higher costs who is located in a different country.³⁸

The patent pool is thus a "double-edged sword" for a third-party manufacturer. On one hand, this makes it convenient for the third party to obtain the technology without having to incur considerable

³² OECD (2004) Intellectual Property Rights DAF/COMP(2004)24, p. 32.

³³ *Id.*

³⁴ DVD6C Licensing Agency web site, *SAMSUNG Joins DVD6C In Licensing DVD Patents*, News, November 21, 2006, <http://www.dvd6cla.com/news/019.html>.

³⁵ Steven C. Carlson, Note, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. 359, 373 (1999), <https://openyls.law.yale.edu/handle/20.500.13051/7979>.

³⁶ Jeanne Clark, Joe Piccolo, Brian Stanton, and Karin Tyson, *Patent Pools: A Solution to the Problem of Access in Biotechnology Patents?*, United States Patent and Trademark Office (December 2000).

³⁷ *Id.*

³⁸ Nicholas Redfearn, *Patent Pools in China*, Intellectual Asset Management (September 2009).

negotiation expenses when dealing with individual patent owners. On the other hand, when the third party is pressed to use the patented technology because there are no other options, it might not have much negotiating power over the royalties.³⁹

III. MONOPOLIZATION

The premise of modern antitrust law is not to restrict the entities from flourishing and gaining monopoly power if the entities reach to such a position by skill and hard work.⁴⁰ Instead, antitrust law frown upon certain type of behavior that are ethically and legally in wrong in the eyes of the law, which may include monopolization or attempted monopolization.⁴¹ A company may be accused of monopolizing the market in breach of antitrust law if it holds a dominant market position based on its patented technology.

The idea of a monopoly in the context of antitrust refers to a company that has the ability to raise prices and limit output.⁴² A patent does not, however, ensure dominance in a well-defined market. There might be alternatives to the patented product in a certain market, or there might be enough cross-market flexibility (i.e., elasticity).⁴³

In the context of monopolization cases, it is important to bear in mind the Supreme Court's reasoning in *Trinko* (2003):

"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."⁴⁴

IV. REVERSE PAYMENT SETTLEMENTS

The Hatch-Waxman Act mandates that the generic drug manufacturer guarantee the Food and Drug Administration (FDA) that the generic will not infringe on the brand-name's patents in its Abbreviated New Drug Application (ANDA) and that the pioneer brand-name drug manufacturer list the "number and the expiration

39 Esther H. Lim; Mandy J. Song, Ph.D., *Dealing with U.S. Patent Pools as a Third Party*, February 2010, <https://www.finnegan.com/en/insights/articles/dealing-with-u-s-patent-pools-as-a-third-party.html>. Accessed 7 Apr. 2023.

40 *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). See 15 U.S.C. § 2 (2000); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L. J. 435, 438 (2006).

41 *Id.*

42 Stakheyeva, H. (2018, July 24). *Intellectual Property and Competition Law: Understanding the Interplay*. Intellectual Property and Competition Law: Understanding the Interplay | SpringerLink. https://doi.org/10.1007/978-981-13-1232-8_1.

43 To test for cross-market elasticity, the DOJ Guidelines provide for a simple test to determine the relevant product market in an antitrust action. "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, reprinted in 4 Trade. Reg. Rep. ¶ 13,104, at § 1.0 (1992). If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase ["SSNIP"], including the price of a product of one of the merging firms. *Id.* at § 1.11.

44 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2003).

date” of any pertinent patent in its New Drug Application (NDA). The generic producer can offer this assurance by asking permission to market starting when any still-in-force patents expire, confirming that the brand-name manufacturer has not listed any relevant patents, or stating that any relevant patents have expired.

The Hatch-Waxman Act mandates that the pioneer brand-name drug manufacturer list the “number and the expiration date” of any pertinent patent in its New Drug Application (NDA),⁴⁵ and it further requires that the generic drug manufacturer guarantee the Food and Drug Administration (FDA) that the generic will not infringe on the brand-name’s patents in its Abbreviated New Drug Application (ANDA).⁴⁶ The generic producer can offer this assurance by seeking authorization to market starting when any still-in-force patents expire, confirming that the brand-name manufacturer has not listed any relevant patents, or stating that any relevant patents have expired.⁴⁷

As an alternative, the generic drug manufacturer may also request certification under Paragraph IV⁴⁸ by contending that any specified or pertinent patent “is invalid or will not be infringed by the manufacture, use, or sale” of the drug stated in the ANDA.⁴⁹ Under the provisions of the statute⁵⁰, a Paragraph IV challenge would automatically amount to patent infringement and frequently “means provoking litigation.”⁵¹

Furthermore, by granting the first-to-file company the generic exclusivity of 180 days beginning with the first commercial marketing of its drug, the Act encourages generic manufacturers to follow the route of Paragraph IV.⁵² Due to the exclusivity period’s restrictions on the marketing of competing generic drugs, the generic drug manufacturer’s potential revenues primarily reflect during this time and can reach several hundred million dollars.⁵³ When a brand-name drug manufacturer responds to a generic’s Paragraph IV certification, the law also includes a provision to reward that company. This is done by allowing a 30-month automatic stay of the FDA’s approval of the ANDA in the event that the brand-name drug manufacturer files a lawsuit alleging patent infringement.⁵⁴ The manufacturer of brand-name drugs is likewise inclined to contest Paragraph IV certification since it has a patent and, more significantly, because its earnings are at stake.

The Hatch-Waxman Act inadvertently provided an incentive system for brand-name and generic drugs manufacturers to settle patent infringement issues through “reverse payments,” in which the brand-name manufacturer pays the generic manufacturer to postpone the launch of a generic drug.⁵⁵ Due to the significant difference between monopoly and competitive drug prices, both manufacturers are inclined to settle litigation through reverse payments in the current landscape.⁵⁶ The profits that a generic manufacturer could generate, are substantially lower than what the brand name manufacturers could lose due to the entry on the generic drug in the market. Therefore, the brand name manufacturers are persuaded to settle the legal dispute by providing a small percentage of the monopoly profits to the generic drug manufacturer and in this case, the generic manufacturers end up receiving more money than what they could have made by entering

45 21 U.S.C. § 355(b)(1) (2012) (discussing what needs to be included in an application for a new drug).

46 *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1676 (2012).

47 21 U.S.C. § 355(j)(2)(A)(vii) (2012).

48 Because it stems from the fourth paragraph of this statute’s section, this type of challenge is commonly known as the “Paragraph IV” route, which requires the generic drug manufacture to certify that any listed, relevant patent “is invalid or will not be infringed by the manufacture, use, or sale” of the generic drug.

49 21 U.S.C. § 355(j)(2)(A)(vii)(IV) (2012).

50 35 U.S.C. § 271(e)(2)(A) (2006 & Supp. V 2011).

51 *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399 (2012).

52 21 U.S.C. § 355(j)(5)(B)(iv) (2012).

53 C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1555–56 (2006) (summarizing the “stark” conflict between the means of antitrust law and those of patent law).

54 21 U.S.C. § 355(j)(5)(B)(iii) (2012).

55 FTC, *Pay For Delay: How Drug Company Pay-Offs Cost Consumers Billions*, January (2010), <http://www.ftc.gov/sites/default/files/documents/reports/pay-delayhow-drug-company-pay-offs-cost-consumers-billions-federal-trade-commissionstaff-study/100112payfordelayrpt.pdf>.

56 C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 635–36 (2009) (discussing the drug manufacturer’s incentive to settle), <https://ssrn.com/abstract=1356530>.

the market.⁵⁷ The federal agencies in charge of enforcing antitrust laws, the FTC and DOJ, have repeatedly held that reverse payments are illegal since the settlements prolongs the monopoly of the patent holder.⁵⁸ Additionally, the agencies contend that because brand-name drug manufacturers have a monopoly on pricing, the delay of generic drugs has a detrimental economic effect on consumers of pharmaceutical drugs.⁵⁹

The courts have generally determined that reverse payment settlements are legal and not in violation of antitrust laws as long as they don't prolong the brand-name monopoly beyond the patent term expiration.⁶⁰ However, the Third and Sixth Circuits have taken a very different stance and have determined that reverse payment settlements are presumed to be violative of antitrust laws.⁶¹

The Hatch-Waxman Act was enacted by Congress to support consumer access to affordable generic medications.⁶² Hatch-Waxman also aimed to reduce the prevalence of bad patents, which harm society as a whole, by encouraging generic manufacturers to challenge brand-name patents.⁶³

Reverse payment settlements potentially avoid both of these objectives by delaying the release of generic versions into the market and impeding the determination of the validity of the original patents in question. The reverse payment settlements could also be helpful in the aspect of stronger patents since the Paragraph 4 challenges are usually for secondary patents i.e. the patents which are not for the original chemical compound or the active ingredient of the drug, but for the other improvements of the drug such as dosage amount. Technically, the generic manufacturers have no incentive to challenge these presumptively stronger patents by impeding the reverse payment settlements. Due to the increased costs and increased likelihood that the FTC would contest any settlement, generic manufacturers might completely avoid Paragraph IV challenges.

V. PATENT ASSERTION ENTITIES

In the words of the US Court of Appeals for the Federal Circuit, a “patent assertion entities or patent troll is an individual or company who acquires by purchase or application to the Patent and Trademark Office a patent that he or she uses not to protect an invention but to obtain a license fee from, or legal judgment against, an alleged infringer”.⁶⁴ Such entities purchase patents with the intention of enforcing them against other companies for financial gain, rather than using the patents to create new products or processes. Patent trolls are also referred to as non-practicing entities (NPEs) and patent assertion entities. The use of patents by such entities can be seen as anti-competitive, and antitrust law may be used to address such conduct.

⁵⁷ *Id.*

⁵⁸ *Supra* note 28.

⁵⁹ *Supra* note 28.

⁶⁰ *FTC v. Watson Pharm., Inc.*, 677 F.3d 1298 (11th Cir. 2012), cert. granted, 133 S. Ct. 787 (2012) and rev'd and remanded sub nom. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (holding that absent sham litigation or fraud in obtaining patent, reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within scope of exclusionary potential of patent); *In re Ciprofloxacin Hydrochloride Antitrust Litigation.*, 544 F.3d 1323 (Fed. Cir. 2008), abrogated by *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (holding that brand-name manufacturer acted within its rights as patentee when it agreed to make payments to generic manufacturers in exchange for an agreement not to market generic version of drug until patent expired); *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2006), abrogated by *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (requiring patent holder to make reverse payments to generic drug manufacturer in a settlement agreement would not be unlawful under Sherman Act even if it required reverse payments in an amount more than either party anticipated generic manufacturer would earn by winning lawsuit); *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1296 (11th Cir. 2003) (finding that brand-name manufacturer's agreements with generics manufacturers to not market generic version until patents expired or were held invalid, in exchange for cash payments, was not a per se violation of Sherman Act prohibition on contracts in restraint of trade).

⁶¹ *In re K-Dur Antitrust Litigation.*, 686 F.3d 197, 218 (3d Cir. 2012) and *In re Cardizem CD Antitrust Litigation.*, 332 F.3d 896, 908 (6th Cir. 2003)

⁶² C. Scott Hemphill & Bhaven Sampat, *Drug Patents at the Supreme Court*, 339 SCIENCE 1386, 1386 (2013).

⁶³ Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101 (2006), <https://scholarship.law.umn.edu/mlr/618/>.

⁶⁴ *Intellectual Ventures I LLC v Capital One Fin. Corp.*, 280 F Supp 3d 691, 694 [D Md 2017].

PAEs fall under the category of NPEs. All patent intermediaries, including universities and research organizations, that don't conduct commercial activities are considered NPEs. The business model of a PAE sets it apart from other NPEs. Instead of aiding in the development or transfer of inventions, a PAE focuses on purchasing and enforcing patents against the companies that are purportedly already making use of the technology.⁶⁵

As the FTC has explained: "The business model of PAEs focuses on purchasing and asserting patents against manufacturers already using the technology, rather than developing and transferring technology."⁶⁶ PAEs often monetize their patents by licensing them to Operating Companies or by suing them for patent infringement. Antitrust concern related to the judicial enforcement of IP rights focuses on the impact of patent assertion entities (PAEs) on competition and innovation.⁶⁷

Studies conducted in the recent years have suggested that PAEs are responsible for a sizable portion of recent U.S. and EU patent litigation.⁶⁸ This has raised significant issues and challenges including the evasion of litigation constraints and licensing obligations, as well as increased costs and frequency of patent litigation.⁶⁹ The antitrust law should intervene and reassert the correct rules for effective competition in order to curb the patent trolls which are involved in numerous litigations that harm the markets for certain patented goods.⁷⁰ This issue of patent trolls is still a contentious subject, it is not surprising to see the leading competition agencies have begun investigating this issue.⁷¹

PAEs and Antitrust Interaction: The Potential Theories

There are at least two approaches for the interaction between PAEs and antitrust: the merger and acquisition theory, and the anticompetitive agreement theory.

The Clayton Act (the M&A approach)

Certain patent acquisitions by PAEs might be prevented by Section 7 of the *Clayton Antitrust Act*, which forbids mergers and acquisitions that could tend to significantly lessen competition. A restriction on PAEs making anticompetitive acquisitions would severely limit their capacity to build sizable portfolios because most PAEs prefer to acquire patents rather than creating innovative technology internally.

PAEs does not generate the revenue by simply owning the patents. Such entities often generate revenue by getting into licensing agreements of those patents or by securing court-ordered damages in successful patent infringement litigation. Moreover, PAE typically starts licensing negotiations by making a demand for payment to an alleged infringer or by initiating infringement proceedings against the alleged infringer.⁷² Due

65 Logan M. Breed, *Addressing the Patent Assertion Entity Problem*, [https://www.westlaw.com/9-583-1125?transitionType=Default&context-Data=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/9-583-1125?transitionType=Default&context-Data=(sc.Default)&VR=3.0&RS=cblt1.0)

66 Federal Trade Commission, *The Evolving IP Marketplace Aligning Patent Notice And Remedies With Competition* 8 (2011), <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>. The FTC described numerous other models, including PAEs that also function as Operating Companies.

67 Caro de Sousa and Pedro, *The Interface of Competition and Intellectual Property Law – Taking Stock and Identifying New Challenges*. 6 Nov. 2018. *Social Science Research Network*, <https://doi.org/10.2139/ssrn.3279355>.

68 RPX Corp., *2015 Report: NPE Litigation, Patent Marketplace, and NPE Cost* (2016); B.J. Love, C. Helmers, F. Gaessler, M. Ernicke, *Patent Assertion Entities in Europe*, D. Daniel Sokol *Patent Assertion Entities and Competition Policy* (2017).

69 Matthew Sipe, *Patent Privateers and Antitrust Fears*, 2016 *Michigan Telecommunications and Technology Law Review* 22 191, p. 195.

70 Michael A. Carrier, *Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take*, 2013 *CPI Antitrust Chron.* 1; Mark S. Popofsky & Michael D. Laufert, *Patent Assertion Entities and Antitrust: Operating Company Patent Transfers*, 2013 *Antitrust Source* 12 1; Collin A. Rose, *A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission*, (2014) *Colum. J.L. & Soc. Probs.* 48 95.

71 National Economic Council, *Patent Assertion And U.S. Innovation*, June 2013, https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf; Federal Trade Commission, *Patent Assertion Entity Activity: An FTC Study*, October 2016, https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

72 Federal Trade Commission, *Patent Assertion Entity Activity: AN FTC STUDY*, October 2016 https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf

to the fact that the cost of defending all of those patents in court would be greater than the license fee, PAEs with big patent portfolios have unwarranted influence on prospective licensees.

As Gotts and Sher explains, this applicability of Clayton act to PAEs can be understood as the following: *"Under Section 7 of the Clayton Act, the antitrust agencies ask whether a transaction is likely to result in a substantial lessening of competition; the same is true under analogous European Commission law. The important element in that inquiry is whether the acquisition gives the acquiring firm the ability and incentive to exercise market power (...) The transfer of [essential patents] to non-practicing entities, for example, could confer both the incentive and ability to the non-practicing entity to exercise market power."*⁷³

For the cases under this section, it is necessary to demonstrate a decrease in competition in a specific antitrust market that includes all of the sufficiently substitutable products. The relevant market in a PAE case would be the products that compete with its patented technologies. For example, if there are four distinct technologies that enable effective data transmission between wireless devices and a mobile phone company acquires all the four technologies, it would be possible to demonstrate a decrease in competition in the market for that technology because other mobile phone manufacturers would be constrained to get into a licensing arrangement with the PAE.

The Sherman Act (the anticompetitive agreement approach)

Some forms of PAE activity may be prohibited by *Sherman Antitrust Act*⁷⁴, which forbids specific anticompetitive agreements. For instance, Section 1 may be applicable when an operating firm distributes or licenses its patents to PAEs in order for the PAEs to enforce the patents against the operating company's rivals. According to some academics, this practice, known as "patent privateering," is becoming more and more common in the US. There are several ways that privateering might violate the antitrust laws. Most importantly, since the PAE doesn't produce any products that might infringe the target's patent portfolio, there is no threat of a countersuit, which means that unlike the operating company, the PAE has no incentive to moderate its behavior. There might be situations where this privateering might increase the competitor's cost exorbitantly by enabling the operating company to bypass its FRAND obligations. This could even implicate the prohibition on monopolization under Section 2 of the Sherman Act⁷⁵.

The issue that has been observed is that a PAE is more likely to file a claim of infringement than a corporation that conducts its own research and development. Since such corporations or companies are more likely to use numerous patents and are therefore prone to the risk of getting into infringement issues.⁷⁶

VI. SEPS AND FRAND

Standards are extremely crucial, particularly in the field of technology due to the reason that if standards are adopted in an industry or a product segment, it would directly ensure and promote interoperability.⁷⁷ In the past few decades one of the hot topics for debate between the SEP holders and the implementers

⁷³ Ilene Knable Gotts & Scott Sher, *The Particular Antitrust Concerns with Patent Acquisitions*, COMPETITION L. INT'L, Aug. 2012, at 30, 36.

⁷⁴ 15 U.S.C. § 1.

⁷⁵ 15 U.S.C. § 2.

⁷⁶ Joshua D. Wright, and Douglas H. Ginsburg, *Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease?*, 30 March 2015, Social Science Research Network, <https://papers.ssrn.com/abstract=2587191>.

⁷⁷ Dolmans, Daniel P. Culley, Jessica Hollis, Maurits. *U.S. & UK Consult on Standard Essential Patents, Injunctions, FRAND Licensing, and Antitrust*, 13 Dec. 2021, Cleary Antitrust Watch <https://www.clearyantitrustwatch.com/2021/12/u-s-uk-consult-on-standard-essential-patents-injunctions-frand-licensing-and-antitrust/>.

is that implementers claim they are being “held up” and overcharged, while the SEP owners claim they are not being paid enough for patented technology used for standards.⁷⁸

One instrument for resolving these issues is antitrust (competition) legislation. Prior to the standard’s adoption (“ex ante”), the patented technology would often compete with the alternatives and substitutes available in the market.⁷⁹ As a result, royalties are often limited to the extra value that the patent portfolio brings to the implementer’s product over and beyond the value added by the other available alternatives. The standard setting agreements often plays a key role in disruption of competition between the various technologies in the process of creating more opportunities.⁸⁰ The exclusion of alternatives occurs when specific solutions are chosen for a standard and the standard is successful. For example, recently the EU Commission proposed a harmonized charging port standard and adopting USB-C as Europe’s Official Universal Charging Standard. This is a direct threat to the lightning port offered by Apple in its smartphones and other handheld devices.⁸¹

Owners of the selected patents thus gain a twofold advantage: the standard potentially generates enormous new demand and may also provide them the ability to block competitors downstream or impose supracompetitive royalty charges.⁸² “By seeking an injunction, SEP owners can exclude rivals from downstream markets – threatening a potential total loss of revenues and market share downstream, even if the SEP is one amongst many complementary patents reading on one tiny component amongst many.”⁸³

Competition law provides standard-setting agreements to overcome this issue by allowing SEP owners to get into “an irrevocable commitment in writing to offer to license their essential IPR to all third parties on [FRAND] terms”.⁸⁴ Standard setting organizations adopt IPR policies which are reflective of this principle.⁸⁵ However, the situation becomes complicated if the SEP owners and the and potential licensees do not agree on what FRAND means. This is frequently the case, leading to prominent litigation over different jurisdictions at the same time, as the *TCL and Ericsson*⁸⁶ dispute.

It has also been seen that in order to obtain injunctions, contest validity and infringement, and/or determine royalties, the same parties get into litigation proceedings in various different jurisdictions like Germany, the UK, the US, and China.⁸⁷ A complaint to the US International Trade Commission as well as one or more antitrust complaints may be filed by them. The entire process could be expensive and financially burdensome on

⁷⁸ *Id.*

⁷⁹ Purcher, J. (n.d.). *The EU Commission’s decision to adopt USB-C as Europe’s Official Universal Charging Standard gives Apple 2-3 years lead time to make changes*. Patently Apple. <https://www.patentlyapple.com/2021/09/the-eu-commissions-decision-to-adopt-usb-c-as-europes-official-universal-charging-standard-gives-apple-2-3-years-lead-time.html>

⁸⁰ *Id.*

⁸¹ Purcher, J. (n.d.). *The EU Commission’s decision to adopt USB-C as Europe’s Official Universal Charging Standard gives Apple 2-3 years lead time to make changes*. Patently Apple. <https://www.patentlyapple.com/2021/09/the-eu-commissions-decision-to-adopt-usb-c-as-europes-official-universal-charging-standard-gives-apple-2-3-years-lead-time.html>

⁸² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (“Horizontal Guidelines”), OJ C 11, 14.1.2011, para. 3. See, also, U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), 38 (“A holder of IP incorporated into a standard can exploit its position if it is costly for users of the standard to switch to a different technology after the standard is set.”)

⁸³ M. Dolmans, Standards For Standards, Fordham International Law Journal 26 (2002) 163-208, 191-192, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1867&context=ilj>.

⁸⁴ Dolmans, Daniel P. Culley, Jessica Hollis, Maurits. “U.S. & UK Consult on Standard Essential Patents, Injunctions, FRAND Licensing, and Antitrust.” *Clery Antitrust Watch*, 13 Dec. 2021, <https://www.clearlyantitrustwatch.com/2021/12/u-s-uk-consult-on-standard-essential-patents-injunctions-frand-licensing-and-antitrust/>.

⁸⁵ *Id.*

⁸⁶ Cleary Gottlieb, *TCL v. Ericsson: Landmark Judgment on FRAND Licensing*, January 9, 2018, <https://www.clearlygottlieb.com/-/media/files/alert-memos-2018/20180109-tcl-v-ericsson-landmark-judgment-on-frand-licensing.pdf>

⁸⁷ Culley, Jessica Hollis, Maurits Dolmans, *U.S. & UK Consult on Standard Essential Patents, Injunctions, FRAND Licensing, and Antitrust*, December 2021, U.S. & UK Consult on Standard Essential Patents, Injunctions, FRAND Licensing, And Antitrust, Cleary Antitrust Watch, <https://www.clearlyantitrustwatch.com/2021/12/u-s-uk-consult-on-standard-essential-patents-injunctions-frand-licensing-and-antitrust/>.

companies.⁸⁸ While, it has been seen quite often that the ultimate outcome could be a settlement that does not accurately reflect the FRAND value of the technology and rather who used the best strategic maneuvers to exert the most pressure or exhaust the other party.⁸⁹

The US approach emphasizes on solutions. In 2019, the US agencies released their most recent Policy Statement on the matter, which supported the view that licensing conflicts should be settled in accordance with contract law and patent law rather than antitrust legislation and that injunctions could be the preferable route. Despite the unique circumstances surrounding SEPs, it called for the “rejection of a special set of legal rules that limit remedies for infringement of standards-essential patents subject to an F/RAND commitment.”⁹⁰

The decision of a Ninth Circuit panel on August 11, 2020, which reversed the decision of the District Court for the Northern District of California in the case of *FTC v. Qualcomm, Inc.*, also corresponded to this strategy. It was decided that: “Qualcomm’s conduct—(a) refusing to license its SEPs to rival chipset manufacturers; (b) refusing to supply chipsets to OEMs unless they first executed a license to its SEPs (“no license, no chips”); and (c) making exclusivity payments to Apple—was not anticompetitive. This was in spite of the District Court’s conclusions that Qualcomm had monopoly power in the markets for code division multiple access (CDMA) and premium long-term evolution (LTE) cellular modern chipsets.”⁹¹

Due to the fact that this judgement does not exactly follow previous precedents, the matter still does not seem to be resolved. Some of these issues have an effect on antitrust law in general and the history of complex litigation where the District Court adopted an unusual theory that was different from the FTC’s and the DOJ intervened to challenge the FTC. In an effort to strike a balance between the positions of SEP owners and implementers, the 2021 Draft Statement takes a new approach. While the 2019 Policy Statement placed a strong emphasis on injunctive relief to address SEP infringement that is covered by FRAND, the 2021 Draft Statement asserts that “monetary remedies will usually be adequate to fully compensate a SEP holder for infringement.”⁹²

The declaration made by the federal agencies recognizes the importance of FRAND commitments and describes how they are being fulfilled as: “where a patent holder has voluntarily agreed to make available a license for the patent on reasonable and non-discriminatory (RAND) terms or fair, reasonable, and nondiscriminatory (FRAND) terms while participating in standards-setting activities at a standards-developing organization (SDO).”⁹³

The statement’s emphasis on the fact that FRAND “is the product of a voluntary agreement among the participants, requiring them to make their patents available on FRAND terms” captures the essence of the concept.⁹⁴

In the ongoing battle over standard essential patents (SEPs), the Ninth Circuit’s recent ruling in *FTC v. Qualcomm*⁹⁵ was another significant victory for patent owners. The court concluded that the FTC had failed to prove that Qualcomm had violated antitrust laws by allegedly failing to license SEPs on conditions that were reasonable, fair, and non-discriminatory (FRAND).

88 *Id.*

89 *Id.*

90 *Id.*

91 Cleary Gottlieb, *Our Analysis of the Ninth Circuit Panel Decision Reversing FTC v. Qualcomm*, August 27, 2020, <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/20200827-our-analysis-of-the-ninth-circuit-panel-decision-reversing-ft.pdf>

92 *Id.*

93 United States Patent And Trademark Office, *Nat’l Inst. Standards Tech. & Dep’t Of Justice, Policy Statement On Remedies For Standards-Essential Patents Subject To Voluntary F/Rand Commitments*, 2019, <https://www.uspto.gov/sites/default/files/documents/SEP%20policy%20statement%20signed.pdf> [<https://perma.cc/RR85-YZKT>]. The terms “RAND” and “FRAND” today are usually used interchangeably.

94 Herbert Hovenkamp, *FRAND and Antitrust – Cornell Law Review*. <https://www.cornelllawreview.org/2020/09/15/frand-and-antitrust/>. Accessed 12 Apr. 2023.

95 *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

The court further pointed out that:

"[1]-the FTC failed to meet its burden under the rule of reason to show that the cellular modem chip maker engaged in anticompetitive practices in violation of §§ 1 and 2 of the Sherman Act by licensing its standard essential patents exclusively at the original equipment manufacturer level because it was under no antitrust duty to license rival chip suppliers; [2]-The chip maker's patent-licensing royalties and 'no license, no chips' policy did not impose an anticompetitive surcharge on rivals' modem chip sales because its business model was 'chip-supplier neutral' and did not undermine competition in the relevant antitrust markets; [3]-The chip maker's agreements with a technology company did not have effect of substantially foreclosing competition in the modem chip market, and because the agreements were terminated years ago, there was nothing to be enjoined".⁹⁶

A Texas court followed the similar reasoning in dismissing the antitrust claims of an auto supplier Continental against the patent pool Avanci and its telecom licensors.⁹⁷ The owners of the IP rights may try to prevent rival products from entering the market based on the SEP, violating antitrust law in the process. The SEP safeguards technology that is necessary for a standard⁹⁸ (i.e., without using such SEP-protected technologies, it is not possible to produce products that comply with standards). There is no other option; for example, "slide to unlock" technology is non-SEP because other technologies can be created to unlock a smartphone screen. SEPs would make it impossible to accomplish this.⁹⁹ The SEP applies to a wide range of industries, including telecommunications, audio/video, security and biometrics, logistics, transportation, aerospace, energy production, power electronics, industrial equipment, etc.¹⁰⁰

The SEPs give their owners tremendous market power, which they have the potential to misuse by adopting standards that keep out rivals or demand disproportionate royalties or cross-license payments from licensees that they otherwise wouldn't accept. The SEP safeguards the innovation that is essential and standard for the use of a particular technology. The SEP becomes an "essential facility" because operating in the downstream market requires access to the product in the upstream market.¹⁰¹ Concerns that "SEP owners may have been exploiting market power, and stifling innovation, through unreasonable or discriminatory licensing demands" have shifted the attention of competition regulators globally to this issue.¹⁰²

Standard Setting Organizations (SSOs) now require SEP owners to agree to license their SEPs on fair, reasonable, and non-discriminatory terms (FRAND), in an effort to strike a balance with the compulsory licensing that the SEP implies and address these competition-related issues. FRAND tries to make sure that the technology covered by a standard is accessible to the manufacturers of products that comply with the standard and compensates SEP holders financially through the licensing revenue.¹⁰³

⁹⁶ *Id.*

⁹⁷ *Cont'l Auto. Sys. v. Avanci*, Civil Action No. 3:19-cv-02933-M, 2020 U.S. Dist. LEXIS 173799 (N.D. Tex. Sept. 10, 2020).

⁹⁸ A standard sets out requirements for a specific item, material, system, service and ensures that products 'communicate'/match with each other (e.g. A4 size paper, mobile phone charger, 4G, 3G telecommunication standards). Standards are set by the standard setting organizations (SSO), e.g. ETSI, etc.

⁹⁹ Case AT.39939 *Samsung Electronics-Enforcement of UMTS SEPs* (2014) OJ C 350/8, para 7 states that: "Standards ensure compatibility and interoperability of telecom networks and mobile devices. Mobile devices typically implement a large number of telecommunication standards (such as the so-called third generation or '3G' (UMTS) standard). These standards make reference to thousands of technologies, many of which are protected by patents. Patents that are essential to a standard are those that cover technology to which a standard makes reference and that implementers of the standard cannot avoid using in standard-compliant products. These patents are known as SEPs. SEPs are different from patents that are not essential to a standard (non-SEPs)".

¹⁰⁰ Stakheyeva, H., *Intellectual Property and Competition Law: Understanding the Interplay*. Intellectual Property and Competition Law: Understanding the Interplay | SpringerLink. https://doi.org/10.1007/978-981-13-1232-8_1.

¹⁰¹ Essential facilities doctrine: To prevent the competitive featured of the downstream market from being threatened by the concentrated structure of the upstream market and to develop competition in this former market, the obligation for undertakings in a dominant position to compulsorily enter into agreement with their competitors can be established.

¹⁰² *Supra* at 87.

¹⁰³ *Samsung Electronics-Enforcement of UMTS SEPs* (2014) OJ C 350/8 states that:

On the contrary, contract and patent law gives implementers a different viewpoint and more leeway in negotiations and legal proceedings. The parties must examine relevant legal precedent interpreting the SSO regulations, as well as the damage calculation methods courts have backed or disapproved, before negotiating FRAND terms. The parties should also be careful to avoid acting in a way that could be interpreted as bad faith and keep a record of their willingness and diligence. The covenant of good faith will have an impact in the FRAND environment much like it does in conventional contract arrangement, and which would impact both the parties.¹⁰⁴

VII. CONCLUSION

As discussed in the above analysis, the competition law and the IP law are completely intertwined with each other. Innovation fuels the creation of new products and promotes market expansion. In light of this, competition policy should aim to encourage innovation. For economic progress and prosperity, competition interference in the IP field is a crucial issue since it directly affects innovation and the spread of new technologies.¹⁰⁵ In fact, the role of IP and related applications of competition policy are so linked and dependent on one another that neither can be understood or used in the best way without the other.

In particular, competition policy must strike a balance between the potential for innovation that IP rights might bring and the dangers that these rights could be abused to strengthen or acquire dominance through anticompetitive measures.¹⁰⁶ The challenge, however, is figuring out precisely what should be the realm of competition law's participation in situations involving IP rights. Determining the proper function of competition law in such marketplaces is made more difficult by the ambiguity surrounding the precise relationship between IP rights and innovation as well as competition and IP rights.¹⁰⁷

Courts have tried to strike a balance between the two spheres of competition law and the IP law. However, it is unlikely that the tension will ever be fully resolved and the courts will always have to carefully strike a balance by fine-tuning the issues to get it right. Balance is necessary to support commerce and jobs.

(9) ETSI is one of the three European Standardisation Organisations. ETSI is officially responsible for producing standards and specifications supporting EU and EFTA policies and enabling an internal market in telecommunications. (10) The rules of ETSI impose two main obligations on companies participating in the standard-setting process: (i) to inform ETSI of their essential intellectual property rights (IP) in a timely fashion before the adoption of the standard, and (ii) to give a commitment to make their IP available on FRAND terms and conditions.

¹⁰⁴ *Id.*

¹⁰⁵ Robert D. Anderson and William E. Kovacic, *The application of competition policy vis-à-vis intellectual property rights: The evolution of thought underlying policy change*, (2017) WTO Staff Working Paper, No. ERSD-2017-13, p. 23.

¹⁰⁶ Caro de Sousa, Pedro, *The Interface of Competition and Intellectual Property Law – Taking Stock and Identifying New Challenges*, November 6, 2018, <https://ssrn.com/abstract=3279355>.

¹⁰⁷ *Id.*



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