Patent Ambushing Sullies Standard Setting

A Look at the Extent to Which the Rambus Case Is Relevant to Biotech

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The European Commission (EC), the EU's antitrust watchdog, recently indicted U.S. chip technology company, Rambus, for an alleged infringement of EC antitrust rules. The European Commission claims that Rambus set up a so-called patent ambush with a view to charging unreasonable royalties for some of its patents.

Rambus' Actions

A patent ambush exists when a company deceives a standard-setting organization (and its members) by concealing preexisting patents, which later will need to be licensed to apply the organization's prerequisites. This practice is considered abusive if the patent holder imposes exploitative licensing conditions.

The EC's charges against Rambus result from an investigation into the company's licensing of patented technology, which was believed to be fraudulently incorporated into industry standards. According to the EC, Rambus engaged in intentional deceptive conduct in the context of the standard-setting process for dynamic random access memory (DRAM) chips.

While the technology for DRAMs was being standardized, Rambus did not disclose the fact that it owns patents, which it later claimed cover the technology included in the standards. Producers of DRAM chips were consequently forced to acquire a license from Rambus—against payment of what the EC views as unreasonable royalties—or contest the patent claims in court.

This is the first case in which the EC has formally charged a company with abuse of patent rights by sending the company a Statement of Objections (SO) detailing the arguments raised against it. The SO does not prejudice the final outcome of the procedure, and Rambus is entitled to defend itself in written and oral proceedings. Yet, the EC may seek to impose sanctions and remedies if its preliminary views expressed in the SO are ultimately confirmed.

In the U.S., the FTC imposed remedies earlier this year after it found that Rambus' alleged patent ambush violated U.S. antitrust law restricting illegal monopolization.

The Rambus case may also be pertinent to the biotechnology industry. Intellectual property protection through patents is particularly sensitive in the biotech field where IP and the level of its protection can be determinative of a company's value. One could therefore argue that defining technical standards and specifications has been less important in the biotechnology industry in comparison with other sectors, because biotech companies were traditionally reluctant to promote interoperability of their technologies.

It is not inconceivable, however, that standard-setting initiatives, which go beyond recommending best practices, might become more popular in the biotech area as well, for example, in terms of reducing R&D costs. Companies and organizations involved in such standardization should bear in mind their collective efforts may be frustrated if a patent ambush forces them to license patented technology on exploitative terms.

Although antitrust laws in the EU offer some degree of relief, it is advisable to ensure that solid contractual provisions compel all those involved in standard setting, to reveal their intellectual property rights from the outset. Equally important, they should also commit to the licensing of any intellectual property rights embedded in the standard on fair, reasonable, and nondiscriminatory terms.

Violating EC Antitrust Rules

Standard-setting organizations are generally viewed as pro-competitive. They encourage and facilitate the adoption of industry standards that foster innovation and technological development. Industry standards allow manufacturers to produce compatible goods, which can reduce development and production costs and ultimately benefit consumers. Therefore EC antitrust law tends to favor standard-setting initiatives provided that they are based on nondiscriminatory, open, and transparent procedures.

Additionally, the benefits offered by the standardization must outweigh any restrictive effects on competition. If these conditions apply, standard-setting agreements may be allowed under Article 81 EC Treaty. In principle, this prohibits agreements and concerted practices that prevent, restrict, or distort competition.

Unless it involves more than one party holding or asserting patents, a patent ambush is difficult to challenge on the basis of Article 81 EC Treaty, since this would require that an agreement or concerted practice between at least two parties can be established. Most often, though, only one patent holder will organize the patent ambush. Its success thus depends on the ignorance of other parties before and during the standard-setting process.

The European Commission has therefore indicated that it would rather apply Article 82 EC Treaty to patent ambush cases that come to its attention. Article 82 EC Treaty prohibits the abuse by one or more undertakings of a dominant position. Three conditions must be met for this prohibition to apply: there must be at least one undertaking, the undertaking(s) must be dominant in the relevant market, and there must be an abuse of such dominance.

The last two conditions deserve further explanation, particularly in the context of a typical patent ambush situation.

Under EC antitrust law, a company is considered to hold a dominant position if it has sufficient economic strength to behave, to an appreciable extent, independently in relation to its competitors, customers, and ultimately, consumers. A firm is, therefore, dominant only if it holds substantial market power, as a result of which it is not subject to effective competitive constraints on the market.

The existence of a dominant position is difficult to assess with regard to technology markets. In the view of the EC, however, if there is an actual demand for certain technology on the part of firms seeking to carry out an activity for which the patented technology is indispensable, potential, or even hypothetical markets might be identifiable. Once a technology standard has become successful, the owner/licensor of the patent that is essential to apply the standard may be viewed as dominant as he/she holds a patent on the indispensable technology.

A dominant position, as such, does not violate EC antitrust law. The prohibition of Article 82 EC Treaty only comes into play if the dominant firm abuses its position to the detriment of competitors and consumers.

In the specific context of a patent ambush, claims of abusive behavior are likely to pertain to excessive royalties, unfair licensing conditions, discrimination, or refusal to license. Royalties may be considered excessive if they have no reasonable relation to the economic value of the licensing rights granted and if it isn't possible to impose them under normal competitive conditions.

Unfair licensing conditions typically involve the imposition of contract terms that are not reasonably required to protect the commercial interests of the dominant licensor, but which are particularly onerous for the licensee. Discrimination involves the application of dissimilar licensing conditions to similarly situated licensees, causing competitive disadvantages.

Refusing to license may amount to an abuse as well, if it denies a requesting party access to an essential input to exclude that party from participating in an economic activity. Depending on the type of abuse, it will be important to determine the most appropriate measure to remedy the abuse of dominance. In some cases, sanctions including fines imposed by the courts or competition authorities may also be necessary to cut short abuse behavior. GEN

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