II. The Department of Justice and Federal Trade Commission's 1995 IP Guidelines and their Funding Principles

Antitrust Policy has continued to implement new economic insights when it comes to addressing the intersection of antitrust and patents that gained precedence in the 1980s. In 1995, the Antitrust Division of the Department of Justice and the Federal Trade Commission jointly issued the Antitrust Guidelines for the Licensing of Intellectual Property (hereinafter IP Guidelines)[203]. Similarly to the 1988 Department of Justice's Antitrust Enforcement Guidelines for International Operations, the 1995 IP Guidelines identify and discuss potential efficiencies associated with many licensing practices and emphasize the need for licensing practices to be analysed under the "rule of reason".[204] They outline the approach of the federal antitrust agencies in this area, and apply the same antitrust principles to patent and copyright licenses as are used to analyse conduct relating to any other type of personal property. It should be noted that the guidelines are only indicators of the position of the federal enforcement agencies and consequently not binding but only persuasive on the courts. There are other sources of antitrust challenges in the United States, such as private parties and state attorneys general, who may not agree with the approach of the guidelines.[205] Nonetheless, they provide a good basis for analysis and counselling.[206]

The IP Guidelines embody three general principles:

1. The first[207] is that "for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property". However, responding to some concerns expressed about this statement, the same guidelines undermine this characterization, adding that: "intellectual prop-

203 US Department of Justice and Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property", April 1995, available at: www.usdoj.gov/atr/public/guidelines/ipguide.htm

204 The 1995 IP Guidelines superceded the 1988 International Guidelines. The 1988 International Guidelines specified that "because they hold significant pro-competitive potential, unless the underlying transfer of technology is a sham, the Department analyzes restrictions in intellectual property licensing arrangements under a rule of reason", Sec. 3.62. The 1995 Guidelines provide for a slightly greater possibility of per se treatment, see IP Guidelines, Sec. 3.4, but still make clear that the Agencies use the rule of reason "in the vast majority of cases." IP Guidelines, Sec. 3.4; See more generally Sect. 4 "General principles concerning the Agencies' evaluation of the rule of reason".

205 In particular, while the guidelines are generally consistent with the case precedents, there are some areas in which the guidelines take a different view of licenses than the judicial precedents might justify.

206 Cohn *et al.*, "Antitrust Pitfalls in Licensing: a Practical Guide", Practicing Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook, June, 2004, p. 246 *et seq.*

207 US Department of Justice and Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property (IP Guidelines)", Sect. 2.0, "General Principles", April 1995, available at: www.usdoj.gov/atr/public/guidelines/ipguide.htm

erty has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles".[208]

2. Secondly, "the Agencies do not presume that intellectual property creates market power in the antitrust context".[209] This important remark undermines the automatic conflict between patents and antitrust traditionally perceived by courts by assuming that patents always create monopoly power in the hands of the patent holder. As noted above, patents may enable the holder to exercise market power, but the Antitrust Agencies do not any longer assume that this must be necessarily the case.
3. Thirdly, "the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive". [210] Thereby the IP Guidelines explicitly highlight the potential efficiencies that firms and undertakings can gain through different forms of intellectual property licensing, including patent pools, which can "benefit consumers through the reduction of costs and the introduction of new products".[211] Further, the IP Guidelines state that "by potentially increasing the expected returns from intellectual property, licensing also can increase the incentive for its creation and thus promote greater investment in research and development".[212] Along the same lines**,** the IP Guidelines note that various forms of exclusivity can provide a licensee with the incentive to invest in commercialising and distributing products, embodying the intellectual property right at issue, by "protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor".[213]

208 *Id.,* Sect. 2.1, "Standard antitrust analysis applies to intellectual property". The IP Guidelines further note that the power to exclude others from the use of intellectual property may vary substantially, and that "the greater or lesser legal power of an owner to exclude others is also taken into account by standard antitrust analysis".

209 *Id.,* Sect. 2.0, "General Principles".

210 *Id.,* Sect. 2.1, "Standard antitrust analysis applies to intellectual property".

211 *Id.,* Sect. 2.3, "Pro-competitive effects of Licensing".

212 *Id.*

213 *Id.,* Sect. 2.3, "Pro-competitive effects of Licensing".

III. Driving Criteria for Patent Pools in the IP Guidelines and Business Review Letters: Sanctioning an Overall More Favourable Approach

When examining patent pools,[214] the IP Guidelines state that such cooperative licensing agreements "may provide pro-competitive benefits" when they:

1. Integrate complementary technologies;
2. Reduce transaction costs;
3. Clear blocking positions;
4. Avoid costly litigation;[215]
5. Promote the dissemination of technology.

Conversely, the IP Guidelines call to mind that pooling agreements "can have anti-competitive effects in certain circumstances" if:

1. The excluded firms cannot effectively compete in the relevant market for the good, incorporating the licensed technologies;
2. The pool participants collectively possess market power in the relevant market;
3. The limitations on participation are not reasonably related to the efficient development and exploitation of the pooled technologies.

For example, quoting the Guidelines,[216] "collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants […]. When cross-licensing or pooling arrangements are mechanisms to accomplish naked price fixing or market division, they are subject to challenge under the per se rule.[217] […] Settlements involving the cross-licensing of intellectual property rights can be an efficient means to avoid litigation and, in general, courts favour such settlements. When such cross-licensing involves horizontal competitors, however, the Agencies will consider whether the effect of the settlement is to diminish competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the cross-license. In the absence of offsetting efficiencies, such settlements may be challenged as unlawful restraints of trade.[218] […] Pooling arrangements generally need not be open to all who would like to join. However, exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may,

214 *Id.,* Sect. 5.5, "Cross-licensing and Pooling arrangements".

215 For an interesting overview on patent litigation in Europe, see in particular: Schneider M., "Die Patentsgerichtbarkeit in Europa: Status Quo und Reform", Schriftenreihe zum gewerblichen Rechtsschutz, 2005, vol. 136; Straus J., "Patent Litigation in Europe - A Glimmer of Hope? Present Status and Future Perspectives", Washington University Journal of Law and Policy, 2000, p. 403 *et seq.*

216 IP Guidelines, *supra,* fn. 207, Sect. 5.5, "Cross-licensing and Pooling arrangements".

217 See United States v. New Wrinkle, Inc., 342 US 371 (1952) (price fixing).

218 Cf. United States v. Singer Manufacturing Co., 374 US 174 (1963) (cross-license agreement was part of broader combination to exclude competitors).