Chapter 2 Historical Outlook

A. Case Survey: The First Distinguished Patent Pools

Patent pools are a quite recent phenomenon, making their first appearance on the licensing scene only in the second half of the XIX century.[111] Here is a selection and a short description of the most significant examples of patent pools throughout the history.[112]

I. Sewing Machine

Actually, when retracing the story of patent pools throughout the last technological developments, it is widely agreed that one of the first recognized examples of a patent pool has been established in 1856 by sewing machine manufactures with the Sewing Machine Combination, consisting of sewing machine related patents aggregated together.

By the 1890s, pooling agreements had become a commonplace in the United States. The rising interest in technology pools stemmed in part from the widely felt desire to avoid the anti-competitive scrutiny pursuant to the Sherman Act of 1890, as patent pools were curiously considered as exempted from regulatory restrictions. This privileged perception was buttressed when in 1902 the US Supreme Court refused to invalidate and dissolve a patent pool, asserting "the general rule is absolute freedom in the use or sale of patent rights under the patent laws of the United States".[113]

II. Motion Picture

In December 1908, the Edison Film Manufacturing Company, the Biograph Company, and the other Motion Picture Patents members ended their competitive feuding in favour of a cooperative system under which the four firms assigned "all the patents in the early-day motion picture industry" to a newly created pool. The

111 Merges R., "Institutions For Intellectual Property Transactions: The Case of Patent Pools", in "Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society", August 1999, available at: http://www.law.berkeley.edu/institutes/bclt/pubs/merges/pools.pdf)

112 Consumer Project on Technology (CPTech) on Collective Management of IP Rights, "Patent Pool", available at: http://www.cptech.org/cm/patentpool.html

113 Bement E. & Sons v. National Harrow Company, 186 US 70, 1902, p. 91 *et seq.*

agreement also specified the royalties that were to be paid into the pool by licensees of the pool patents such as movie exhibitors.[114] Thus the motion picture inventors and industry leaders organized the first great film trust called the "Motion Picture Patents Company", designed in fact to bring stability to the chaotic early film years characterized by patent wars and litigation. By pooling their interests, the member companies legally monopolized the business and demanded licensing fees from all film producers, distributors, and exhibitors.

A January 1909 deadline was set for all companies to comply with the license. By February, unlicensed outlaws, who referred to themselves as "independents" protested the trust and carried on business without submitting to the Edison monopoly. In the summer of 1909 the independent movement was in full-swing, with producers and theatre owners using illegal equipment and imported film stock to create their own underground market. The Pool reacted by coercive tactics, such as the confiscation of unlicensed equipment, discontinuation product supply to theatres that showed unlicensed films, and so on.

However, as the independent outlaws flourished, the Motion Picture Patents Company was also hit with antitrust charges by the United States government. In October 1915, the courts determined that the Patents Company and its General Film division acted as a monopoly, falling under the prohibition of Sect. 1 of the Sherman Act[115] banning agreements, conspiracies or trusts "in restraint of trade".[116] Consequently, an order to dissolve the pool was later issued.[117] This change of approach patent pools was a sign that the earlier, "golden years" were over, putting an end to the past unspoken "immunity" of those kinds of agreements, while the tide began to shift.

In fact, private antitrust litigation regarding pooling agreements sharply increased after the US Supreme Court struck down the bathtub enamelling pool in 1912 in the *Standard Sanitary* decision.[118] In the latter case, a trade multi-party agreement under which manufacturers, who were previously independent competitors, limited output and sales of their products, i.a. by orchestrating their prices, was held illegal under the Sherman Act. Thereby, it was established that patent rights are also subjected to the general prohibitions of antitrust law. Here the licenses, although on their face lawful, was in fact considered a shield under which to implement an anti-competitive agreement.

114 Aberdeen J., "The Edison Movie Monopoly: The Motion Picture Patents Company v. the Independent Outlaws", available at: http://www.cobbles.com/simpp_archive/edison_trust.htm

115 US Department of Justice, Sherman Antitrust Act, 15 USC, Sect. 1-7, available at: http://www.usdoj.gov/atr/public/divisionmanual/chapter2.htm

116 For a critical analysis of the "conspiracy" theory developed under Sect. 1 Sherman Act, see: Strohm G., "Abgrenzung zu Conspiracy-Fällen" (Sec. 1 Sherman Act), in "Wettbewerbsbeschränkungen in Patentlizenzverträgen nach Amerikanischem und Deutschem Recht", Schriftenreihe zum Gewerblichen Rechtschutz, 1971, vol. 24, p. 252 *et seq.*

117 Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 513 (1917).

118 Standard Sanitary v. United States, 226 US 20 (1912), available at: http://supreme.justia.com/us/226/20/case.html

III. Folding Bed

In 1916, the owners of various patents related to folding beds and other similar devices entered into an agreement providing exclusive license to the Seng Company to manufacture and sell under the pool patents. Of the total royalties, 33 percent was allocated to the Pullman Couch Company. The license contract was signed by the Davoplane Bed Company (7 patents), the Pullman Couch Company (13 patents) and two inventors. The Seng Company paid a fixed percentage to the pool. Pool members split the royalty according to a pre-defined formula in the pooling agreement.[119]

IV. Airplane

In 1917, the US government needed to purchase more airplanes to use in World War I. Holders of the early patents for airplane production and various intermediate goods needed for it were charging exorbitant royalties for the use of their patents. Besides, production of aircraft in the United States had nearly come to a halt as airplane producers sued each other for patent violations. In March of that year there were two developments leading to the formation of the Manufacturers Airplane Association (MAA).[120]

An advisory panel, headed by then-Assistant Secretary of the Navy Franklin D. Roosevelt, recommended the formation of the patent pool. Consequently, congress passed the Naval Appropriation Act of the Fiscal Year 1918, which included $1,000,000 for the purchase of airplane patents. Every major producer of airplanes became a member of the Manufacturers Aircraft Association. Members would pay $200 in royalties to the MAA. Of the money paid in royalties about 10% were put into a fund to pay for administration of the patent pool.[121]

119 Serafino D., "Early Pools Associated with Monopolies and Cartels (1856-1919)" in "Survey of Patent Pools Demonstrates Variety of Purposes and Management Structures", Knowledge Ecology International Studies, June 2007, p. 9, at: http://www.keionline.org/content/view/69/

120 More on the Manufacturer's Aircraft Association available at: http://www.cptech.org/cm/maa.html

121 For a more comprehensive overview on the importance of patents in the global market for civil aircraft, from an historical and legal perspective, see: Begemann A., "Die Rolle von Patenten in der zivilen Luftfahrtindustrie aus historischer und rechtsvergleichender Sicht", Utz Herbert ed., Jan. 2008.