



When does the Patent violate the Antitrust Law?

Abstract

In the pharmaceutical industry the negative externalities of the intellectual property play a sensitive role. The competition is often seen as an antidote. This position represents a new dimension of the confrontation between the patent and competition provinces, a paradox which has perplexed the scholars and the courts of both the opposite shores of the Atlantic.

In the U. S. this issue has been discussed particularly with respect to the ties imposed by the patent owner to his licensees. In Europe the problem has been linked with the effect of separation of the markets implied by the exercise of intellectual property rights. In the block exemption regulations the interconnection between intellectual property rights and competition plays also a role.

But, probably, the contrast is not between the monopoly created by the patent and the competition created by the antitrust rules, as the competition rules does not create the competition, which is a state of nature, while the patent is a legal creation; it is between a creation of a particular long term competition tool created by the patent law and the regulation of the free market created by the competition laws; in other words, between the fact that a legal monopoly creates competition and the fact that competition left alone may create a monopoly.

What really the patent gives is not the right to exclude, but the right to include and to govern the access to the knowledge protected by the patent and to the products or services encompassed within the scope of the patent. This could (even if not necessarily) lead to a position of market power.

The doctrine of essential facilities has been elaborated in order to resolve the problems of dominant position given by the property of goods having a high cost of reproduction or that are in fact not reproducible. Recent courts decisions have tried to extend the doctrine to the field of intellectual property.

A last frontierland where the competition and intellectual property meet is the regulatory discipline, particularly important in a highly regulated sector as the pharmaceutical industry is.

In conclusion, the paradox is likely to remain an intractable problem. Probably the competition rules are not the appropriate tool in order to balance the downsides of the patent system. Competition rules are intended for different purposes, mainly to regulate the downsides of competition in itself. Instruments of regulation (partially in contrast with the philosophy of the antitrust laws) such as price/profits controls, extension of compulsory licenses, international regulations for access of the poor countries are more adequate instruments and the recent agreement reached within the World Trade Organisation (WTO) after the Doha declaration is a first and good example.





1. - Old John, the poor man protagonist of Dickens' «*A poor man's tale of a patent*», at the end of the report of his misadventures, hopeless interrogates: «it is reasonable to make a man feel as if, in inventing an ingenious improvement meant to do good, he had done something wrong?».

Today the patents are on trial, particularly in the pharmaceutical field. And, in fact, according to the conventional wisdom, reserving to someone an exclusive economic domain on information, essential or helpful in order to prevent or cure the human diseases, appears to be unjust. Health is something that everyone feels as a natural right, to be protected as a non-commercial good, and the information in itself is something incorporeal, a public good, naturally intended for the free circulation and use.

Those are the reasons why in Italy, in 1855, after a passionate and fervent discussion in the Piemontese parliament, the proposal of Carlo Farini, a philanthropic physician and scientist, investigator of tropical diseases, prevailed over the position of Antonio Scialoja, an illustrious scholar of economics, and the Piemontese patent law, which would become the Italian patent law, prohibited the patentability of pharmaceutical inventions, a rule which remained in force until 1978.

Even if the opposers to the patents generally do not share completely the philosophy of the free market, they often sustain the concept of competition as an effective antidote for the elimination or the attenuation of what, be it right or wrong, are seen as the negative externalities and undesired interlaced effects of the patents, high prices and difficult access.

This position undoubtedly represents a new dimension of the confrontation between the patent and competition provinces and the problem of the definition of the boundaries between them.

2. - Before examining the European situation, it may be of interest to have a quick glance on how the problem has been dealt with on the opposite shore of the Atlantic, as the influence of the American legal experience in this field is undeniable.

In the U.S. the relationship between antitrust laws and intellectual property laws has been a “paradox”, an “intractable problem”, perplexing the scholars and courts ever



since the U.S. Congress, in 1890, by the Sherman Act, took the road of the competition as a national policy, while the patent protection of inventions was well established in the law since 1790, and based in an express provision of the Constitution of 1787 (article 1.VIII.8).

The origin of the formal doctrine of patent misuse -identified as the border over which the patent rights are superseded by the antitrust rules- dates back in 1942, in the case *Morton Salt Co. v G.S. Suppiger Co.*, decided by the U.S. Supreme Court (314 u.s. 488 (1942)). The patentee of an invention related to a salt dispensing machine used in the canning industry sued for infringement a manufacturer of an allegedly infringing equipment. The patentee, who leased its machines under licenses requiring the licensees to obtain their salt from the patentee, was denied relief for infringement on the ground that it was misusing its patent in his leases. The Court found that a patentee, otherwise entitled to be granted his request of relief, should be denied when his use of the patent was in a way to control the sale of an unpatented product. The commentators note that, unlike other precedents, in this case the tie (in which the abuse consisted) was not related immediately to the facts relevant for the decision; the remedy would be withheld so long as the patentee was tying sales to its patent in completely independent transactions.

The position of the Court, which, in the first decade of 20th century, had been very lenient towards tying agreements imposed by the patent owners and had embraced the “rule of reason” in deciding cases under the Sherman Act, giving origin to the congressional reaction of the Clayton Act (1914), had then developed in a completely opposed way, and two years later, in 1944, collapsed the patent law issues into an antitrust context, affirming, in *Mercoid Corp. v Minneapolis-Honeywell Regulator Co.* (320 U.S. 680 (1944)), that «the legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law [...]. The effort here made to control competition in this unpatented device plainly violates the antitrust laws».

This gave rise to further adjustments of the statutory law and to subsequent Court's responses. The present status of this swinging of the pendulum, at least at a statutory law level, is the section 271 of chapter 28 of title 35 of U.S. Code, as amended in 1988, which explicitly authorises patent owners to refuse to license or to



use their patents as well as to condition the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned. The elaboration of courts and scholars on this theme is a continuing work. Very recently (October 2003) the Federal Trade Commission (FTC) has dedicated over three hundred pages of a Report to “the proper balance of competition and patent law and policy”.

3. - The European perspective is similar in a way and different in another.

It is similar insofar the antitrust provisions of the Treaty (which reflect an “acquis” of the previous experience of those systems, as the U.S. system, that had already developed an antitrust law) supervene to a well established system of national patent laws; it is different because the primary purpose of the Treaty is to ensure the creation of an internal market and to prevent hurdles to the expression of the «four liberties». Even if there are directives and regulations intended to establish a common set of rules in the domain of intellectual property rights, and, according to the EC Regulation 1/2003 of 16th December 2002, effective from 1st May 2004, articles 81 and 82, as well as the related regulations, will become a real European competition common law, we should not forget that there are always two levels: the European legislation and the internal legislation of Member States, which maintain, within the limits of the subsidiarity principle, the full power to dictate laws on the matters such as intellectual property rights and internal competition.

The patent is therefore primarily seen in its territorial force and limitation, as a tool able to separate markets, more than in view of its effect of empowering the patentee to determine the conditions of the use of the information protected by the patent exclusivity.

Articles 81 and 82 of the Treaty do not mention intellectual property rights. They are mentioned in article 30, which stipulates that the provisions of Articles 28 and 29 [prohibiting the quantitative restrictions to imports and exports between Member States] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of the protection of industrial and commercial



property. Such prohibitions or restrictions shall not, however -article 30 also provides- constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

This is the perspective of the case-law elaborated by the European Court of Justice (ECJ) with respect to the exhaustion of intellectual property rights and the limits that the intellectual property rights owners have in opposing to parallel trade¹.

However, in my personal view, we may not consider this kind of issues as connected with the problem of the contrast between patent law and competition law or the abuse of the rights conferred by the patent.

I submit that the doctrine of the exhaustion of the patent rights and the related issues surrounding the phenomenon of the parallel trade are aspects which just belong to the discussion of the limits of the patent protection, which, being a “privilege” granted by the law, as a general principle requires a narrow interpretation.

The interface between the patent laws and competition rules must not be confused with the problem of the definition of the scope of the patent rights, which is purely a problem of the interpretation of the statutory patent law.

4. - Another area of the European legislation where the interconnection between intellectual property and competition may be of relevance is the system of the block exemption regulations.

The block exemption regulations constitute an exception, based on the third paragraph, to the general rule provided for in the first paragraph of art. 81. Some forms of exercise of the intellectual property rights show up in the block exemption regulations as an exception to the exception.

For instance, art. 2 par. 3 of EC Regulation 2790/1999 of 22nd December 1999 on vertical restraints stipulates that the exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of *intellectual property rights*, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services,



those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under the Regulation.

Regulation EC 240/1996 of 31st January 1996 on technology transfer agreements permits to agree on an obligation on the licensee to observe minimum quality specifications, including technical specifications, for the licensed product or to procure goods or services from the licensor or from an undertaking designated by the licensor, *in so far as these quality specifications, products or services are necessary* for: (a) a technically proper exploitation of the licensed technology; or (b) ensuring that the product of the licensee conforms to the minimum quality specifications that are applicable to the licensor and other licensees; and to allow the licensor to carry out related checks.

The Regulation EC 2659/2000 of 29th November 2000 on R&D agreements excludes from the exemption the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the common market, *and in particular to exercise intellectual property rights* or take measures so as to prevent users or resellers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the Community by another party or with its consent.

A more stringent provision is contained in the Regulation EC 1400/2002 of 31st July 2002 concerning vertical agreements in the motor vehicle sector. Art. 4 par. 2 provides that the exemption shall not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures. Such access must include in particular the unrestricted use of the electronic control and diagnostic systems of a motor vehicle, the programming of these systems in accordance with the supplier's standard procedures, the repair and training instructions and the information required for the use of diagnostic and servicing tools and equipment. Access must be given to independent operators in a non-discriminatory, prompt and proportionate way, and the information must be provided in a usable form. *If the relevant item is covered by an intellectual property right or constitutes knowhow, access shall not be withheld in*



any abusive manner.

But, again, we are not in an area where the problem of the abuse is addressed. The provisions of the block exemption regulations look at the patent and related rights as a possible subject matter of the agreements contemplated by the regulations. We are not properly dealing with a problem of an abuse of patent rights undermining the competition. We are here in the area of the description of the agreements that the regulations would exempt from the prohibition established by art. 81 of the Treaty but are not exempted when the patent holder exercises or does not limit the exercise of his patent rights.

5. - Before proceeding ahead with our analysis I propose to spend a minute on some general concept.

The approach of confronting the patent law with the competition law and resolving the issue saying, as FTC does, that «both patents and competition make significant contributions to innovation, consumer welfare, and [...] nation prosperity» may be unsatisfactory.

Patent law and competition law do not work at the same level.

Patents do not exist in nature. They are a legal creation. The first letter patent for an invention was issued by Henry VI in 1449, and the first general patent law was enacted in Venice, 1474, when the “Signoria” decided that the inventors should be granted a privilege, valid only in the territory subject to the sovereignty of the Venetian Republic and for a period of ten years, consisting in the prohibition to everybody to manufacture the artifact described in the invention or a similar artifact without the consent of the inventor.

Competition is a natural state of nature. There is no need of a set of rules in order to create competition. The purpose of the law here is to establish the rules of the game and to prevent that the game comes to an end, maintaining a situation where new players can always enter and compete. Rules do not create the game; they just try to keep the game going on.

Patent implies the disclosure of information, while one of the natural tools of competition game is the secrecy, and the potential perpetuity of the valuable



information property; sharing information is seen with some suspicion by the competition rules.

It is true that the intellectual property rules switch the competition from the pure trade arena to the innovation and technological progress turf. But it is not less true that the rules which protect the competition prohibiting restrictive agreements and the exploitation of a dominant position, in fact limit the natural expression of the competition game until its ultimate end, the final victory of one player (it is sufficient to look at the Parker Brother's game, where there are not antitrust rules, to realise this). If the final purpose of the legal creation of the patent is, through a temporary monopoly (a "static loss"), the dissemination of information and the competition ("a dynamic gain"), the purpose of the competition in itself is the monopoly and the rules are, in fact, a limitation to some natural expressions of the competition.

Therefore, if there is a contrast, it is not between the monopoly created by the patent and the competition "created" by the antitrust rules; it is between a creation of a particular long term competition tool created by the patent law and the regulation of the free market created by the competition laws; in other words, between the fact that a legal monopoly creates competition and the fact that competition left alone may create a monopoly.

On a different perspective it has been said that the essence of the patent is the right to exclude as long as it is in force and the right of exclusion is seen in opposition to the competition.

But the patentee does not draw its profit from the exclusion; exclusion in itself would be stupid and the enforcement of exclusion is generally costly and risky, as it puts the validity of the patent under challenge. What really the patent gives is the right and power to include and to govern the access to the knowledge protected by the patent and to the products or services encompassed within the scope of the patent. This could (even if not necessarily) lead to a position of market power, which, according to the good definition contained in the U.S. FTC Guidelines consists in the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time. The situation of market power is not a necessary implication of the patent and it may also be caused by a number of factors which have nothing to do with the patent, and, on the contrary, are the result of the competition game.



6. - Coming closer to the conclusions, the problem is not of a conflict between laws, nor it is about an abuse consisting in an exercise of rights conferred by law. The problem is about the exercise of the market power, irrespective of the source of it, including but not limited to the intellectual property rights².

The concept of the abuse of rights, in the civil law as well as in the common law is very controversial, since, as a general rule, «if it was a lawful act, however ill the motive might be, he had the right to do it»³. It is *de facto* situation that may be a source of a nuisance or an abuse and, in the case of patents, this *de facto* situation may consist in the market power that is not a legal product, so to say, of the patent. Therefore, the limitations that may be imposed to the exercise of the market power are not properly a limitation to the exercise of the patent rights.

The market power having its source in the right to exclude/include presents two aspects: one is related to the goods or services considered in their physical nature; the second is related to the access to the information protected by the exclusivity rights as a tool in order to do business in a certain market.

The second one, which involves the relationships between market players is more precisely related to the competition, while the first one may also involve more directly the relationships between the holder of the market power and the consumers or those who are not allowed to be consumers due to economic constraints, even if they need the goods or services.

7. - The need of resolving the problems of access in situations of control over a “good of life” that appears to be inequitable, even if lawful, has given origin to a discussion in the courts and among the scholars which has led to the elaboration of the “essential facility” doctrine.

According to a good definition, a factor of production is considered an essential facility when duplication of the input or a close substitute is uneconomical so that the owner or producer of the input is able to extend its power over the input market (the upstream market) to another market, namely the output market (the downstream market). In addition, essential facilities must have some significance for the economy as a whole. Possible examples of essential facilities include ports, railroad lines or



stations, power transmission and local telecommunications networks. The outputs will be respectively docking services, railway services, electricity retail services, and telecommunication services. Market power is typically exercised by controlling the output market, for instance by structuring access prices to this effect.

In the U.S. the Supreme Court first articulated this doctrine in *United States v. Terminal Railroad Ass'n* (224 U.S. 383 (1912)). A group of railroads controlling all railway bridges and switching yards into and out of St. Louis prevented competing railroad services from offering transportation to and through that destination. This, the court held, constituted both an illegal restraint of trade and an attempt to monopolize. The essential facility doctrine was born in the area of the facilities in the very sense of the word, i.e. physical facilities, but, over time, it has been extended to situations where the “facility” is represented by information and the control over it does not derive from the physical structure of the facility, but from the legal system of patents or copyright.

In fact, since *Terminal Railroad*, the Supreme Court has reached similar decisions in a series of cases and several recent cases from United States appellate courts provide significant support for the proposition that intellectual property protections do not shield a monopolist from antitrust liability for refusal to deal in an essential facility. The fact that the patent is a legal creation causes an important difference between physical essential facilities and intellectual property. The cost of duplication or the construction of a close substitute of a physical essential facility is determined by physical costs, and over time by technological progress, neither of which are within the control of policy makers. In case of patents the extent of monopoly power or equivalently the cost of producing a close substitute, can be changed by changing the rules of the patent protection. Changing breadth of protection, creating more severe patenting procedures, tightening standards of obviousness etc.⁴ can reduce the cost of close substitutes which may be sufficient to prevent foreclosure. This is a possible remedy for anti-competitive use of the market power given by patents which is not available for general essential facilities. Moreover, use of information is physically non-exclusive. Unlike ports or telecommunications networks, both of which are subject to congestion, it is possible for any number of people or firms to use intellectual property at the same time. Therefore another system (which overcome



the need to refer to the essential facility doctrine) is to create by statute a number of compulsory license obligations.

8. - In Europe, the ECJ has applied the doctrine of essential facility in a number of cases, according to the principle that two distinct markets should be involved and the product or service supplied in one (usually an upstream) market is a necessary input for the production of goods or services in the second (usually downstream) market. The case-law where the Community judicature has considered refusals to supply by a dominant undertaking in such circumstances are, in particular, *Commercial Solvents v Commission* (Joined Cases 6/73 and 7/73 - separate markets for a raw material and derivatives of the raw material); *CBEM v CLT and IPB* (Case 311/84 - separate markets for television broadcasting and telemarketing); *GB-Inno-BM* (Case C-18/88 - separate markets for the establishment and operation of the public telecommunications network, and for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network); *Tiercé Ladbroke v Commission* (Case T-504/93 - separate markets for broadcasting coverage of horse races and the operation of betting shops); *Bronner v Mediaprint* (Case C-7/97 - separate markets for the distribution of newspapers and the publication and sale of newspapers)⁵.

The leading case in the application of the doctrine in the intellectual property area is *P RTE and ITP v Commission*, better known as “Magill”. The Court held that the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct. Such will be the case when broadcasting companies rely on copyright conferred by national legislation to prevent another undertaking from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of those companies, where, in the first place, that conduct prevents the appearance of a new product, a comprehensive weekly guide to television programmes, which the companies concerned do not offer and for which there is a potential consumer demand, conduct which constitutes an abuse under heading (b) of the second paragraph of Article 86 [now 82] of the Treaty; where, second, there is no justification for that refusal either in the activity of television broadcasting or in that of publishing



television magazines; and where, third, the companies concerned, by their conduct, reserve to themselves the secondary market of weekly television guides by excluding all competition from the market through denial of access to the basic information which is the raw material indispensable for the compilation of such a guide.

A case presently under scrutiny for the merit is IMS case⁶. In this case the Commission held as an abuse the refusal of IMS Health to license to a competitor his copyrighted system of market research in the pharmaceutical sector based on a brick-structure of territorial sales-data. Apparently unlike Magill, instead of seeking to exclude the emergence of a new service on a separate market, the refusal to grant a copyright licence appears, at first sight, to be designed to prevent the competitor from furnishing regional sales-data services based on freely available data, provided on the same market and to the same potential clients and differing only as to detail from the services offered by the IMS. The prevention of the emergence of a new product or service for which there is potential consumer demand is not an indispensable part of the notion of exceptional circumstances developed in Magill: this appears an extensive interpretation of that notion. This extensive interpretation is based on the following proviso: - the refusal of access to the facility is likely to eliminate all competition in the relevant market; - such refusal is not capable of being objectively justified, and the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility.

In the merit proceeding, Advocate general has concluded (2nd October 2003) that the refusal is to be considered abusive if (a) there is no objective justification for that refusal; (b) the use of the incorporeal good is indispensable in order to operate on a derivative market, with the consequence that, through that refusal, the holder of the right would eliminate any competition in that market; provided however that the firm which requests the access is not just seeking to duplicate the goods/services already offered on the derivative market by the copyright holder, but wishes to produce goods/services having different characteristics, which, even if in competition with the copyrighted ones, meet particular needs of the consumers which are not satisfied by the existing goods/services.

Moreover, the level of participation of the pharmaceutical firms to the development of the copyrighted structure and the effort that said firms should exert in order to buy



studies performed on a basis of a structure alternative to the copyrighted one are factors that should be taken into consideration in order to decide if the copyrighted structure is indispensable for the commercialisation of the studies on the territorial sales of drugs.

9. - A last frontierland where intellectual property and competition meet is that of the commixtion of patents with the regulatory discipline.

In the U.S. FTC prosecuted a number of suspected practices and agreements and there are many class consumer-based lawsuits where the plaintiffs charge the research based pharmaceutical companies to use illegal tactics, including settlements with generic competitors, to prevent competing companies from bringing to the market lower priced generic versions of patented products. Those tactics often consist in “inventing around” its own patent (merely duplicating the prior art, according to the plaintiffs) in the attempt to perpetuate the patent protection.

Class action is not an instrument provided by the European laws.

But, recently, the European Commission has sent a Statement of Objections (SO) to the Anglo-Swedish group AstraZeneca outlining its preliminary findings that it may have misused the patent system and other regulatory procedures for the marketing of pharmaceutical products. The Commission believes that this was abusively done with the purpose of blocking or delaying market entry for generic products. The sending of an SO marks the opening of a formal antitrust investigation.

In a press release the Commission says to have taken considerable care to examine the file in detail. This is not about the use or enforcement of patent rights which are necessary and even indispensable to foster a competitive European research-based pharmaceutical industry. It is about suspected misuses of governmental systems and procedures which have the effect of blocking or delaying entry to the market of cheaper medicines which involves savings for both health systems and patients.

Two practices are under scrutiny, under art. 82 of the EC Treaty and art. 54 of the EEA Treaty.

The first suspected abuse involves alleged misrepresentations by AstraZeneca before a certain number of national patent offices with a view to obtaining so-called supplementary protection certificates (SPCs) for the medicinal product Losec.





Towards the end of the 1990s, Losec had become the world's best-selling prescription medicine ever. Losec revolutionised the treatment of stomach ulcers and other acid-related diseases.

According to Commission, AstraZeneca has allegedly concealed from the patent offices the date at which it received its first marketing authorisation for Losec, thereby enabling AstraZeneca to obtain extra protection for Losec in certain countries. In the Commission's view, the company could not have obtained the extra protection in the absence of its misrepresentations.

The second practice under scrutiny relates to the alleged misuse of rules and procedures applied by the national medicines agencies which issue market authorisations for medicinal products. Specifically, the practice relates to AstraZeneca's switch of its Losec capsules (the original formulation) for a tablet formulation of Losec combined with requests by AstraZeneca to certain national medicines agencies to de-register the market authorisations for the capsules. De-registration is relevant for generic producers because generic products, can, in principle, only obtain a marketing authorisation and parallel importers can in principle only obtain import licenses if there is an existing reference authorisation⁷.

The Commission believes that both practices were intended to block or delay access to the market for generic versions of Losec and that the second practice was also intended to prevent parallel imports of Losec capsules. The Commission emphasises that the present case under Article 82 of the EU Treaty and Article 54 of the EEA Agreement does not concern the alleged misuse of intellectual property rights, but the alleged misuse of governmental procedures.

AstraZeneca denies the charges.

10. – In conclusion, the paradox is likely to remain an intractable problem. Perhaps, at least on the side of policy, a recent proposal of some scholars deserves to be followed. Probably the competition rules are not the appropriate tool in order to balance the downsides of the patent system. Competition rules are intended for different purposes, mainly to regulate the downsides of competition in itself. Instruments of concerted regulation (partially in contrast with the basic philosophy of the antitrust laws) such as price/profits self-controls, negotiation and surveillance,



systems of incentives for voluntary licenses, international regulations for access of the poor countries are more adequate instruments and the recent agreement reached within the World Trade Organisation (WTO) after the Doha declaration is, its insufficiencies notwithstanding, a first and good example.

Carlo Piria
Avvocati Associati
V. Brera, 5
20121 Milano
Italy



+39 02 85909260
carlo.piria@franzosi.com

NOTES

¹ See, inter alia, Judgements in cases C-19/84 of 9th July 1985 Pharmion Hoechst; C-434/85 of 3rd March 1988 Allen Hansbury Generics; C-191/1990 of 27th October 1992 Generics & Harris Smith Kline and French; C-267 and C-268/95 of 5th December 1996 Merck Primecrown; C-316/95 of 9th July 1997 Generics Smith Kline and French.

² FTC Guidelines observe that market power can be exercised in other economic dimensions, such as quality, service, and the development of new or improved goods and processes. It is assumed in this definition that all competitive dimensions are held constant except the ones in which market power is being exercised; that a seller is able to charge higher prices for a higher-quality product does not alone indicate market power. The definition in the text is stated in terms of a seller with market power. A buyer could also exercise market power (e.g., by maintaining the price below the competitive level, thereby depressing output).

³ Lord Halsbury in *Bradford v Pickles* [1895 A.C. 587], which corresponds to the Roman Law principle «qui suo jure utitur neminem laedit» (those who exercise their rights do not harm anyone).

⁴ This is the sense of recommendations of FTC included in the Report cited at the end of paragraph 2 of this Paper.

⁵ See also the Commission decisions in Case IV/34.689 *Sea Containers v Stena Sealink* (OJ 1994 L 15, p. 8 - markets for port services and passenger ferry services) and in Case IV/34.801 *FAG Flughafen Frankfurt/Main AG* (OJ 1998 L 72, p. 30 - separate markets for airport facilities for the landing/take-off of aircraft and the provision of ramp-handling services)

⁶ At this time the Tribunal of first instance has decided only on an interim basis (T-184/01 R, 26th October 2001 and C-481/01 P(R), 11th April, 2002), suspending the execution of the Commission decision 3rd July, 2001 in Case COMP D3/38.044 NDC Health/IMS Health.





⁷ But see ECJ 10th september 2002, Case C-172/00, Ferring, and ECJ 16th October 2003, Case C-223/01, AstraZeneca.

Bibliographical note

- For the consumer based class actions in the U.S. see the website www.prescriptionaccesslitigation.org
- Commission on intellectual property rights, Final report (Integrating intellectual property rights and development policy) and UK Government response, in www.iprcommission.org
- Gambaro, Abuso del Diritto, in Encicl. Giur. Treccani
- M. Lamandini, Abuso dei diritti di proprietà industriale e intellettuale e diritto antitrust
- D. Sarti, Proprietà intellettuale, interessi protetti e diritto antitrust, in Riv. Dir. Ind., 2002, I, 543
- M. Tavassi, Diritti della proprietà industriale e antitrust nell'esperienza comunitaria e italiana, in Riv. Dir. Ind., 1997, I, 147
- M. Gangi, Competition policy and the exercise of intellectual property rights in www.archivioceradi.luiss.it
- D.J. Gifford, The antitrust/intellectual property interface: an emerging solution to an intractable problem, in Hofstra law review, vol. 31, 363
- R. Pitofsky, D. Patterson, J. Hooks, The essential facilities doctrine under U.S. antitrust law, in Antitrust law journal, vol. 70, 444
- W. J. Baer, D. Balto, Antitrust enforcement and high technology markets, in Michigan telecommunications law review, 1999, 73
- M. Carrier, Unraveling the patent-antitrust paradox, in University of Pennsylvania law review, vol. 150, 761





-
- Federal Trade Commission, To promote innovation. The proper balance of competition and patent law and policy, a Report, October 2003, in www.ftc.gov
 - J. Fromm, R. Skitol, Harmonisation of the IP misuse doctrine and antitrust law. A call for help from the agencies and Congress
 - R. Pardolesi, M. Graneri, Proprietà intellettuale e concorrenza: convergenza finalistica e liaisons dangereuses, in Foro ital., 2003, V, 193
 - R. Pardolesi, M. Graneri, Alcune considerazioni sui rapporti tra proprietà intellettuale e concorrenza nel settore farmaceutico, in Diritto industriale, 2002, 379
 - M. Graneri, Evoluzione del diritto statunitense sulla tutela brevettuale e profili di contrasto con le normative concorrenziali, in Giur. commerc., 2003, I, 29