Competition authorities seek to curb IP owners' rights

The European Commission and the US's Federal Trade Commission have both issued consultation documents outlining their views on intellectual property in several key areas. Rights owners have reacted with dismay

It is always a fine line for intellectual property owners when they come to negotiate their way through what the Americans label antitrust and most of the rest of the world calls competition policy. Because IP rights are, in effect, monopolies there is an ever-present danger that the way in which they are employed will fall foul of competition authorities. While a patent owner may feel it can use its right in any way it sees fit, the authorities believe their brief is to ensure the proper functioning of free and open markets. This means coming down hard on any activity that is deemed to distort those markets.

Recently, two of the world's most powerful competition authorities, the US's Federal Trade Commission (FTC) and the European Commission (EC), have been having a close look at intellectual property.

The FTC issued a report at the end of October 2003 detailing the reforms it felt were necessary to the patent system in the US. The report identified 10 areas where action should be taken. Whilst many of these – including a call for better funding for the US Patent and Trademark Office (USPTO); the publication of all patent applications 18 months after filing; and stronger tests for enhanced damages in cases of wilful infringement – have been broadly welcomed, others have proved to be less popular.

In particular, the FTC thinks that it should be harder to get US patents and easier to challenge those that are granted. The report makes clear that the USPTO has too few examiners who are therefore not able to give all patent applications the attention they require. As a result, there is a danger that patents which are too broad and damaging to competition are being granted. The FTC calls for standards of obviousness to be tightened so as to ensure a development is significant enough to be patented, and suggests that damage to competition should also be considered when an application is being examined. Even more controversially, post-grant the report recommends that it should be less difficult to invalidate a patent and suggests the current requirement that there be clear and convincing evidence be reduced to a standard based on the preponderance of evidence. It also calls for the introduction of an administrative procedure which would allow a patent to be disputed outside of the US's expensive court system.

While many IP owners would welcome the chance to determine the validity of patents without having to spend millions of dollars in litigation, the thought of them being struck down on a far lower burden of proof is a chilling one. With R&D programmes and major revenue streams at stake, any move to make patents easier to invalidate would be fiercely resisted. The IP lobby in the US is strong and enjoys considerable support in Congress. Legislatively, therefore, the more unpalatable parts of the FTC Report look set to die. However, the FTC also has wide powers of investigation and has made it clear that it will increasingly use these in cases relating to intellectual property. What it cannot get via Congress it may well try to get via the courts. FTC Chairman Timothy Muris told the annual meeting of the American Intellectual Property Law Association on 30th October that he was looking forward to working with IP owners to see the Report's recommendations implemented. Given the powers the FTC has at its disposal, rights owners would be wise not to overplay their hand.

Europe self destructs

On the other side of the Atlantic rights owners are in much more immediate danger. The EC looks set to introduce new rules regarding technology transfer as early as May next year. And, as things stand, they do not make for comfortable reading.

In Europe, all technology licensing agreements are considered potentially anti-competitive and therefore illegal unless they are covered by what is known as the block exemption. Since 1996, this has provided a safe harbour for deals involving patents and know-how where only two parties are involved and the agreement does not contain so-called black listed clauses relating to items such as pricing restrictions and certain kinds of non-compete restrictions. Under the new block exemption rules, the safe harbour will be extended to cover software copyright licensing. But, at the same time, it will introduce a provision that states only deals between competing companies whose combined market share is less than 20%, or non-competing companies whose share is less than 30%, during the lifetime of an agreement can qualify.

To make matters worse, the current possibility of getting a deal approved even if it falls outside the exemption is being removed, and the new rules are retrospective: licences covered by the old exemption will be invalid if for any two-year period up until May 2004 the new market share criteria were not fulfilled; whilst from October 2005 any existing exempted agreement will be subject to the new rules. If the rules are found to have been broken, an agreement will become null and void, fines may be levied and senior company officers could find themselves facing imprisonment. It is up to companies themselves to decide whether they meet the block exemption rules, the EC will be providing no more than detailed guidelines.

Bearing all this in mind, it is difficult to understand how anyone can take the EC seriously when it proclaims that Europe will be a world leader in technology by 2010. The new block exemption, as it currently stands, can only be a major hindrance to the achievement of this goal. Because it only affects deals done in Europe, one predictable consequence will be to see European companies increasingly license-out their technologies to non-European parties. As for licensing-in technologies from, say, US universities, you can forget it. Why take the risk of developing a successful product on the back of such a deal, exceeding the market share criteria and having your rights to the relevant technology taken away? It is hardly a scenario designed to stimulate European innovation, especially as it seems likely that the rules will be particularly onerous for small companies working in niche technological areas.

The outcry has been predictably intense. But it is all too easy to heap the blame on the Commission and accuse it of not really caring about IP rights. It is hard to believe that the EC as an institution has an active anti-rights agenda. More likely, it is not as informed as it should be about how IP and IP deal-making work. Here, industry groups only have themselves to blame. Until they organise effectively and begin to lobby as hard as their colleagues in the US there will be more damaging legislation and Europe will continue to fall further behind.