



Patent Ambushes in Standards Setting Organizations – Implications for Antitrust Policy and the Design of IP Rules

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Abstract

In the year 2002, the US Federal Trade Commission charged the memory chip technology company Rambus with violating antitrust provisions. Rambus had withheld information about its patent applications from a standard-setting group called JEDEC - a move that allowed the company to claim royalties from chip producers as soon as the standard had been set.

In the aftermath of the Rambus case, discussion on both sides of the Atlantic intensified on economically appropriate ways to tackle such hold-up problems in standard-setting organizations. While the United States seem to build more on the application of standard antitrust laws, the European Union seem to favor the appropriate design of IP rules to mitigate the problem of patent ambushes. In any case, policy actions are needed as the late disclosure of patent rights in standard-setting organization may not only undermine efforts to establish common standards in the first place but also may deter innovation (since companies face the risk of ex post appropriation in relation to submerged patents) as well as harm competition (since elevated royalty rates will be passed on to the manufacturer in the form of higher prices).

Against this background, the paper aims at characterizing the problem of patent ambushes and deriving policy proposals on how this problem should be tackled. To reach this aim, the paper is structured into four sections. The first two sections provide a brief overview of the basic rationale for a patent system and the incentives of IPR holders to make innovations available to other users. The third section introduces into the topic of submerged patents and especially assesses how this can give rise to patent ambushes. The fourth section first discusses the applicability of EU competition laws to tackle the problem of patent ambushes. The important finding that these laws do not appear to provide an effective safeguard against patent ambushes subsequently leads to an assessment of the question how the risk can be mitigated via the adoption of appropriate IP rules by standard-setting organizations. A checklist is developed which allows an assessment of IP rules with respect to their capability of mitigating the risk of patent ambushes.

Keywords IPR, SSO, SSO IP rules, patent ambush, antitrust policy

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