# INTELLECTUAL PROPERTY RIGHTS AND ANTI-COMPETITIVE LICENSING AGREEMENT

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## INTRODUCTION

Competition and innovation are two central processes in market economies, for they are the means through which efficiency and growth are generated and enhanced in an economy. With the ongoing acceleration of global technological integration and the continued prosperity of international free trade, there are two game rules that today have become compulsory courses for every player in this innovation driven world economy, i.e., intellectual property rights (IPRs) and competition policy. The former which deals with innovation, are legal rights granted to creators and owners of works that are results of human intellectual creativity. They give their owners the right to exclude others from access to or the use of protected subject matter for a limited period of time. This also gives them the subsequent right to license others to exploit the innovation when they themselves are unable to engage in large-scale commercial exploitation or for other reasons. On the other hand Competition law is the branch of law that deals with how businesses compete in the market-place. In other words, Competition policy involves putting in place a set of policies that promotes competition in local and national markets, as well as legislation (competition law), judicial decisions and regulations specifically aimed at preventing anti-competitive business practices and unnecessary government interventions, avoiding concentration and abuse of market power. Therefore, Intellectual property is related to properly assigning and defending property rights while Competition Law is concerned with the use of such property rights. More precisely, Competition Law is concerned only with the use and abuse of property rights that are sources of monopoly power.

This article discusses some of the issues related to the application of competition policy in the area of Intellectual Property Rights (IPRs) licensing. An attempt is also made to study as to how these two policies interact with each other and what is the relation between the two and how they both can affect each other with special reference to Licensing of Intellectual Property.

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## ANTI-COMPETITIVE LICENSING AGREEMENTS AND COMPETITION POLICY

Licensing agreements are a common creature in the area of intellectual property law. These agreements link up the creators of intellectual property with entities that possess the resources and know-how to commercialize that property and to extract from it whatever profits result. The licensee generally pays the licensor inventor a fee and often royalties from the profits as compensation for the right to market the protected property. These agreements often draw meticulous antitrust inspection because they transfer the legal monopoly over the intellectual property from the hands of the creator to the hands of the commercial licensee. The law has struggled over whether this expansion of monopoly power is consistent with the policies supporting intellectual property protection, or whether it runs afoul of the antitrust or competition laws' desire to maintain an open and competitive marketplace. The courts also have not provided consistent, thematic answers to these questions.[97]

There are IPR related anti-competitive practices within the IPR Licensing agreements which can be in the form of some restrictive clauses in the Licensing agreements which raise serious anti-competitive concerns. But before we check out these agreements, it should be borne in mind again that any of these licensing agreements in itself is not necessary a violation of competition policy. Usually its effects would be tested by competition authorities under "the rule of reason" concept developed by United States. If the clauses in the licensing agreement is neutral or supportive of competitive policy rather than being anti-competitive market, then it will be upheld on balance, *i.e.*, competition policy has a so-called "safety zone".[98] The US Antitrust Guidelines for Licensing of Intellectual Property, announced the creation of an antitrust "safety zone" for intellectual property licensing arrangements. The safety zone applies where: (1) the restraint is not facially anti-competitive — of a type that ordinarily warrants condemnation under the per se rule; and (2) the licensor and its licensees collectively account for no more than 20 percent of each relevant market affected by the restraint.[99] However there are certain practices which are per se violations, such as naked price-fixing (or minimum re-sale price fixing), output restraints (production and sale

97 Thomas L. Hayslett III, '1995 Antitrust Guidelines for the Licensing of Intellectual Property: Harmonizing the Commercial Use of legal Monopolies with the prohibitions of Antitrust Law', Journal of Intellectual Property Law, 3 (1996) 375.

98 Robert Mc Tamaney, 'Anti Trust and Intellectual Property Rights: The Devils in Details' New York Law Journal, 219(21) (1998).

99 Article 4.3 of the U.S Anti-Trust Guidelines for the Licensing of Intellectual Property, 1995, http://www.usdoj.gov/atr/public/guidelines/0558.htm (Last visited on 05/04/09)

Limitations), and market division among horizontal competitors, as well as certain group boycotts and resale price maintenance, Tie-in sales, Package Licensing, Grant Backs, Pooling and Cross-Licensing, Refusal to license.

## THE CONCEPT OF VERTICAL RESTRAINTS AND HORIZONTAL RESTRAINTS IN ANTI-COMPETITIVE LICENSING AGREEMENTS

As with the other property transfer anti-trust or anticompetitive analysis of intellectual property licensing arrangement also examines whether the relationship among the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspect of both.[100] The Anti-competitive restraints in the licensing agreement can be classified according to their types.[101] A restraint that affects competitors in the market are classified as Horizontal and restraints that affects users or supplier are classified as vertical restraints. The competition policy applicable to a particular licensing agreement will often hinge on whether the restrictive clause is used in vertical agreements or horizontal agreements. Vertical agreements are that, where the licensor and licensee are in a vertical arrangement, *i.e.*, both parties are not competitors on the same level. Actually, the term "vertical restraints" refers to a whole class of transactions between companies in a vertical relationship in the chain of distribution, including dealers, franchisors, distributors, resellers, etc.[102] For example a Company whose primary business is product manufacturing acquires a license from a company whose primary business is research and development. Vertical restraints are generally considered to be pro-competitive whereas horizontal restraints are generally considered as anti-competitive such as anti-trust cartelization, facilitating collusion or anti-competitively excluding entry in a market. But in cases of vertical restraints also harm to competition may still occur where a restraint forecloses access to, or increases competitors' costs of obtaining, important inputs, or facilitates coordination among competitors to raise prices or restrict output in a relevant market.[103]

100 Jay Dratler Jr., *Licensing of Intellectual Property* 1st edn (Law Journal Press) 2006, 6-50.6.

101 In looking at an action that may potentially harm competition, one of the key aspect is whether the action affects intrabrand competition, such as competing retailers that sell the goods of the same manufacturer, or interbrand competition, such as competing manufacturers of similar goods. Agreements that affect intrabrand competition are commonly referred to as "vertical restraints," while agreements that affect interbrand competition are often called "horizontal restraints."

102 Mark A.Lemely, 'A new balance between IP and Anti-Trust', http://ssrn.com/abstract=980045 (Last visited on 04/04/2009).

103 Carlos M.Correa, 'Intellectual Property Law and Competition Law – Exploring some issues of relevance to Developing countries', http://www.iprsonline.org/resources/docs/corea_Oct07.pdf (Last visited on 08/04/2009).

Horizontal restraints are that, where the licensor and Licensee are both competitors at the same level. Horizontal restraints are more troubling because they may allow the participants to create a cartel, which can then behave anti-competitively, much as a monopolist would. For example, two major horizontal competitors jointly assign a wholly owned separate corporation their patented technologies which are not blocking and with which inter-changeable consumer products can be manufactured by the two firms respectively in the absence of the joint assignment. The separate corporation then licenses the right to use the patented technologies to other consumer product manufacturers and establishes the license royalties. In this situation, there is a horizontal restraint that may merit *per se* treatment by competition authorities since it would cause a horizontal price fixing[104]. Thus, a threshold question in applying antitrust analysis to contractual restraints in licensing is whether they are vertical or horizontal.

## RESTRAINTS IN LICENSING AGREEMENTS WHICH ARE DEEMED TO BE ANTI-COMPETITIVE

In the year 1970, a common restrictive policy was originated from the knowledge that the Antitrust Division of the US Justice Department under the influence of the "patent misuse" doctrine developed by the US Supreme Court,[105] had developed a set of administrative guidelines to antitrust enforcement in the form of Nine No Nos for patent licensing. These so-called Nine Nos. were not subject to a rule of reason but generally viewed as *per se* unlawful, i.e. there was no need to apply the rule of reason test in these cases. These were:

1. Tying of unpatented supplies
2. Mandatory grant-backs
3. Post-sale restrictions on resale by purchasers of patented product
4. Tie-outs
5. Giving the licensee veto power over the licensor's grant of further licenses
6. Mandatory package licensing
7. Compulsory payment of royalties in amounts not reasonably related to the sale of the patented product

104 Jerry F Xia, "Intellectual Property rights and Competition Policy: Double Edged Swords", http://www.angelfire.com/folk/jerry/mydocu/IPRComp.htm (Last visited on 04/04/2009)

105 Under the impetus of Mr. Justice Douglas. See e.g. *Morton Slat Co.* v. *G.S. Suppiger Co.* 314 US 488 (1941); *United States* v. *US Cypsum Co.* 333 US 364 (1947).

8. Restrictions on sale of unpatented product made by a patented process, and
9. Specifying prices licensees could charge upon resale of licensed products.[106]

Although the influence of the Nine No Nos has reached all over the world, they are not identically incorporated into other countries' competition regime but instead are more or less transferred into similar rules or even complemented and enriched with further developments. Now let us discuss the Vertical No-price restraints and Horizontal or Non-territorial restraints in Intellectual property licensing agreements which the researcher has tried to summarize from the current practices in most countries which are *per se* anti-competitive and considered unlawful under broad competition policy including the laws of anti-monopoly, anti-restrictive-competition and anti-unfair-competition.

### (a) Restrictions on the field or location of use :

In markets protected by IP, sellers often segment their buyers based on line of business, location, field of technology, or whether the use is not for profit. They implement this segmentation through contract terms that specify allowable uses. The usual goal of this marketing strategy is price discrimination. Price discrimination occurs when a seller charges different prices to different classes of customers even though the marginal cost of serving the different classes is the same. For example, DuPont imposed a field of use restriction and charged different prices for a patented synthetic fibre depending on the end use intended by the customers. Price discrimination allows the seller to increase profit by tailoring prices to different customer classes that have different preferences. This is considered to be Anti-competitive and draw the attention of Competition Authorities.

### (b) Product Tying or Tie-in Sales (Tying of unpatented supplies)

Sellers are motivated to control frequency of use because it aids price discrimination. Buyers who use a product more frequently are likely to have a higher valuation and be willing to pay more. More commonly, sellers control frequency of use indirectly through the sale of some complementary product that is used with the IP protected product. Sellers require buyers to purchase the complementary product (1) through a tying contract, (2) because of product design, or (3) by threat of an infringement suit against

106 Richard J. Gilbert and Alan J. Weinschel, 'Competition Policy for Intellectual Property: Balancing Competition and Reward' http://elsa.berkeley.edu/users/gilbert/wp/Antitrust_and_IP.pdf (Last visited on 01/04/2009)

a competing supplier. Antitrust or competition law treats tying contracts as *per se* illegal, but actually imposes a relatively mild check. A tying contract is unlawful if: there are truly separate tied and tying products; the seller has market power in the tying product market; and there are anticompetitive effects in the tied product market.

In *East Man Kodak Co. V Image Technical Services, Inc*,[107] "tying arrangement" was defined "an agreement by party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. In the United States, tying in patent licensing was one of the nine no-nos. and the Supreme Court has consistently referred to tying in other contexts as illegal per se.[108] But in the same decision the court has recognised that to be guilty of *per se* offence, person accused of illegal tie must have power to force purchase of unwanted products, which is usually called "market power". Therefore, in order to tying be illegal *per se* it must be shown that there is a market power in the tying product or service. Further a 1988 amendment to United States patent Statute required market power to be demonstrated by analysis akin to the rule of reason – and not merely presumed from the existence of the patent protection – in order to support a patent misuse defence based on tying. Accordingly, despite continued judicial references to tying as illegal *per se,* tying in fact is subject to analysis using a modified rule of reason. Therefore the current rule of reason requires that the tie is highly likely to foreclose competition on the merits and reduce consumer choice. Summarily in US antitrust authorities, *i.e.*, the Department of Justice (DOJ) and Federal Trade Commission (FTC) would consider a tying agreement *per se* unlawful and would challenge it if: 1) the seller has market power in the tying product; 2) the arrangement has an adverse effect on competition in the relevant market for the tied product; and 3) efficiency justifications for the arrangement do not outweigh the anti-competitive effects."

In the EU, a tie-in can be categorized into Article 82 (d) of the EC Treaty as "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts". In this context, it is abusive because it excludes competitors as well as limits the freedom of choice of customers. Moreover, it is also viewed as a restriction of competition under Article 81(1)(c) and is applicable to the terms of IPR licenses. In addition, the EC Technology Transfer Regulation also limits the licensor's right to place a tying requirement upon the licensee.[109]

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107 504 U.S 451, 112, S.Ct. 2072, 2079, 119, L.Ed.2d 265 (1992)

108 *Jefferson Parish Hospital District No.2 v Hyde,* 466 U.S 2, 9,104, S.Ct. 1551, 80L.Ed.2d2 (1984)

109 Supra n.104

The classic illustration of contractual tying is the printer market. Printer companies tie the sale of ink cartridges to printers because cartridge sales are a good measure of frequency of use. Printer companies have discouraged third party cartridge suppliers by making it difficult to design a compatible cartridge and by enforcing patent and copyright rights. Buyers responded by simply refilling empty cartridges with ink. Hewlett Packard countered by designing cartridges to be non-refillable.[110]A company named Repeat-O-Type Stencil purchased HP ink cartridges, modified them so that they could be refilled, and sold them to the public. HP sued Repeat-O-Type for patent infringement. The Federal Circuit ruled against HP and held the modification was not infringing.

Therefore, tying, clearly results in welfare-reducing effects when it is employed as a tool to foreclose other markets. This can be achieved if the licensor holds considerable market power in the tying product and has the ability to extend its market power in the tied product, due to favourable market conditions (high entry barriers, etc).

### (c) Mandatory or Coercive Package Licensing

Tying one license to another is known variously as "mandatory package licensing", "block-booking", or "blanket-Licensing". Whatever term is used, the gist of practice is requiring a licensee to accept an unwanted license in order to obtain a desired one. Mandatory package licensing occurs when the licensor requires the licensee to take a license under an entire "package" of intellectual property – including unwanted items – in order to receive a license for desired items. Often but not always, mandatory package licensing involves charging royalties on products not protected by the licensed intellectual property, such as "total sales royalty". Like tying in general, mandatory package licensing generally raises no antitrust or misuse concerns if coercion is lacking, i.e. if the package is not forced upon the licensee but voluntarily accepted. Therefore, this doctrine focuses on elements of coercion and not other elements of tying. In *Well Surveys, Inc V Perfo-Log, Inc*[111] held that "The relative importance of patents in package licensing has no significance if the licensee is given the choice to take a patent alone or in combination on reasonable terms. Thus package licensing raises anti-trust or misuse question only when it is coerced. Therefore, in the United States, package licensing of patents does not offend the antitrust laws or give rise to patent misuse if the licensor has not "forced" the package upon the licensee.

In the EC, the question of package licences is treated under Article 3(9) of patent licensing

110 *Hewlett-Packard* v. *Repeat-O-Type Stencil*, 123 F.3d 1445, 1449 (Fed. Cir.1997).

111 396 F.2d 15, 18 (10th Circuit)

block exemption and Article 3(3) of the know-how exemption. "Inducing" a licensee to accept an additional licence which he "does not want" and which is not "necessary for a technically satisfactory exploitation of the licensed invention" removes the entire agreement from the protection of the block exemption. Package licensing can also be imposed under the know-how regulation if necessary to ensure quality standards followed by the licensor or other licensees.[112] Article 40.2 of the TRIPS Agreement also exemplified Coercive or mandatory package licensing, as an anti-competitive IPR licensing practice.

### (d) Impediments to a buyer's decision to exit its relationship with a seller.

Exit restraints arise when contracting parties commit to a long-term relationship and commit not to deal with others. Such commitments can be an efficient way to encourage parties to invest in a relationship, but they occasionally pose a danger to competition. That danger is elevated when one of the parties owns patents or copyrights that might lead to market power. Patent law regulates certain restraints that impede a licensee's ability to exit his relationship with a patent owner through the misuse and pre-emption doctrines. Copyright law has enacted compulsory licenses to moderate the danger that exclusive licenses can be used to create market power in downstream markets. For example in United States Patent law condemns as misuse contract terms that extend the patent beyond its expiration date. This policy originates in *Brulotte v. Thys Co.*[113], a case in which the patentee sold a hop picking machine to farmers under a contract which required royalty payments after the patents covering the machine had expired.

### (e) No-Challenges Clauses

No-challenge clauses are those conditions set in an IPR licensing agreement to prevent the licensee from challenging the validity of the IPR to be licensed. Surprisingly, this practice was universally accepted as a lawful one in western countries before the 70's. But in *Lear v. Adkins*[114] in 1969, the US Supreme Court changed the history by clearly establishing the ability of a licensee to challenge a patent. It held that a licensee was not estopped by virtue of its license to bring a challenge. In the EU, Commission has consistently found no-challenge clauses to be restrictive of competition within Article

112 OECD 1989, on 'Competition Policy and Intellectual Property Rights', http://www.oecd.org/dataoecd/8/44/2376247.pdf (Last visited on 04/04/2009)

113 379 U.S. 29 (1964).

114 Lear v. Adkins, 395 US 653 (1969).

85(1) beginning with decisions in the early 1970s and continuing through the current block exemptions. In the *Vaessen/Moris*[115] sausage casing decision, for example, the Commission found that the no-challenge clause restrained competition by preventing the licensee from acting to remove "an obstacle to his freedom of action[116]. Now it is one of the three examples of anti-competitive licensing practices listed in the TRIPS Agreement.[117]

## (f) Licensing Arrangement involving Exclusivity

A licensing arrangement may involve exclusivity in two distinct respects. First, the licensor may grant one or more *exclusive licenses*, which restrict the right of the licensor to license others and possibly also to use the technology itself. Generally, an exclusive license may raise antitrust concerns only if the licensees themselves, or the licensor and its licensees, are in a horizontal relationship. Examples of arrangements involving exclusive licensing that may give rise to antitrust concerns include cross-licensing by parties collectively possessing market power, grant backs, and acquisitions of intellectual property rights.[118]

A non-exclusive license of intellectual property that does not contain any restraints on the competitive conduct of the licensor or the licensee generally does not present antitrust concerns even if the parties to the license are in a horizontal relationship, because the nonexclusive license normally does not diminish competition that would occur in its absence.

A second form of exclusivity is 'exclusive dealing'. Exclusive dealing arrangements prevent licensees from manufacturing products which employ technologies supplied by competitors of the licensor. Such arrangements exist when a licensor conditions the license of intellectual property on the licensee's agreement not to create, use, distribute, etc., competing products.[119] This parallels exclusive dealing arrangements in distribution agreements whereby retailers are not allowed to carry competing brands. The rationale for entering into exclusive dealing restrictions in intellectual property licensing is similar to that applying to product markets: to avoid free riding opportunities between

115 Vaessen/Moris (1979) 1 CMLR 511 paras. 34 -5.

116 Supra n. 112

117 See the TRIPS Agreement, supra notes 3, 254, Art. 40(2). Available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (Last visited on 05/04/2009)

118 'U.S Anti Trust Guidelines for Licensing of Intellectual Property Rights', http://www.usdoj.gov/atr/public/guidelines/0558.htm (Last visited on 05/04/2009)

119 Supra n.103,p.41

competing licensors and to promote the development of relationship-specific technologies by both licensors and licensees. Licensors transferring know-how to licensees also manufacturing goods under license of other firms, may risk leakage of information and misappropriation of their patented knowledge. The development of exclusive relationships with licensees can be a way to overcome this potential free-riding situation. Also, exclusive dealing may increase the return on specific investment because the likelihood of licensees interrupting a consolidated relationship with the licensor is reduced. Exclusive dealing arrangements may, however, also result in market-foreclosing effects to the detriment of rival licensors and restrict competition in the market, particularly when the firms entering into such arrangements already hold a large share of the relevant product market. The foreclosing effect depends to a large degree on the availability of alternative manufacturing capacity for existing or new licensors.[120]

In determining whether an exclusive dealing arrangement is likely to reduce competition in a relevant market, the U.S Agencies (DOJ and FTC) take into account the extent to which the arrangement 1) promotes the exploitation and development of the licensor's technology and 2) anti-competitively forecloses the exploitation and development of, or otherwise constrains competition among, competing technologies." "The likelihood that exclusive dealing may have anti-competitive effects is related, *inter alia*, to the degree of foreclosure in the relevant market, the duration of the exclusive dealing arrangement, and other characteristics of the input and output markets, such as concentration, difficulty of entry, and the responsiveness of supply and demand to changes in price in the relevant markets."[121]

## (g) Exclusive grant-backs

According to the US Antitrust Guidelines for IP Licensing, an exclusive grantbacks is an arrangement under which a licensee agrees to exclusively extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology.[122] This type of restriction refers to the situation whereby licensors request to receive all the rights on new technologies developed by licensees through improvements on the licensed technology. While it may facilitate the transfer of

120 Massimiliano Gangi, 'Competition Policy and the exercise of Intellectual Property rights' http://www.archivioceradi.luiss.it/documenti/archivioceradi/osservatori/intellettuale/Gangi1.pdf (Last visited 04/04/2009)

121 See US Anti Trust Guidelines for Licensing of Intellectual Property, 1995, Art. 4.1.1 and Art. 4.1.2. http://www.usdoj.gov/atr/public/guidelines/0558.htm ( Last visited on 05/04/2009)

122 *Ibid*

technologies to licensees, it may also affect negatively licensees' incentive to engage in R & D. Nonexclusive grant-back clauses, whereby licensees are allowed to deal with other buyers of their incremental inventions, are less likely to reduce competition while maintaining adequate incentives to license new technologies.[123] In *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*,[124] it was held that the grantback provision in technology license is not per se unlawful, and will depend upon its effect in light of the overall structure of the licensing arrangement and conditions in the relevant markets. Thus a grantback clause imposing an obligation to assign improvements back to the licensor is a prohibited clause, *i.e.*, a *per se* violation.

One of important factor in determining as to whether grant backs provisions are anti-competitive or not will be to consider whether the licensor has market power in a relevant technology or innovation market. If it is determined that a particular grantback provision is likely to reduce significantly licensees' incentives to invest in improving the licensed technology, the competition authorities will consider the extent to which the grantback provision has offsetting pro-competitive effects, such as (1) promoting dissemination of licensees' improvements to the licensed technology, (2) increasing the licensors' incentives to disseminate the licensed technology, or (3) otherwise increasing competition and output in a relevant technology or innovation market. In addition, the Authorities will consider the extent to which grantback provisions in the relevant markets generally increase licensors' incentives to innovate in the first place.

## (i) Cross-Licensing and Patent Pooling

Cross-Licensing occurs when two firms reciprocally allow each other to use technology protected by patent. In other words Cross-licensing of intellectual property rights occurs when one firm grants a license to another firm to exploit its rights in exchange for a license to use intellectual property of the other firm. In principle, it is possible that such an agreement might be used to restrict competition in market place. This may happen, for instance when the technologies at stake are substitutable, and the cross-licensing agreements contain per unit royalties that reduce the incentive to market aggressively.

A patent pool, on the other hand, is an agreement between several holders of patents, which are complementary and necessary for the development of derivative products or processes, to license all the intellectual property rights in the pool at a single price, i.e.

123 Supra n.120

124 329 U.S. 637, 645–48 (1947)

as a bundle.[125] Patent pooling can also be often pro-competitive as it decreases transaction costs, as one firm would be spared multiple time-consuming bilateral negotiations and could instead deal with only one party, namely, the patent pool. These arrangements may provide pro-competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. By promoting the dissemination of technology, cross-licensing and pooling arrangements are often pro-competitive.

Pooling or cross-licensing of patents can also be used by the grantors or licensors to obtain many of the anti-competitive objectives touched upon in earlier contexts, e.g., a pool could be used in an effort to fix prices, limit output or assign territories or field-of-uses. For example 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. The creation of the pool might diminish competition between the pool members to develop substitute technologies. For example, a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development because members of the pool have to share their successful research and development and each of the members can free ride on the accomplishments of other pool members.[126] Further stipulations in the agreement between the pool members and the licensing terms *vis-à-vis* third parties might be anticompetitive.[127] *In United States v. New Wrinkle, Inc.,*[128] it was held that 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.

## CONCLUSION

Therefore, from the above study we can come to conclusion that there are certain type of restraints which are anti-competitive *per se* such as cartelization, price fixing, foreclosure

125 Mattias Ganslandt, 'Intellectual Property rights and competition Policy', Working Paper No. 726, 2008, Research Institute of Industrial Economics", Available at http://www.ifn.se/Wfiles/wp/wp726.pdf (Last visited on 01/04/2009)

126 U.S Antitrust Guidelines for Licensing of Intellectual Property Rights, 1995, http://www.usdoj.gov/atr/public/guidelines/0558.htm (Last visited on 05/04/2009)

127 Mark-Oliver Mackenrodt, "The Political Economy of Intellectual Property Rights and Competition Policy - Report on a Max Planck Conference on Intellectual Property and Competition Law", International Review of Intellectual Property and Competition Law, 36(1) (2005), 113-126.

128 342 U.S. 371 (1952)

of innovation, co-ordinated output restrictions, exclusive licensing etc. and on other hand there are certain agreement which though not *per se* anti-competitive such as patent pooling and cross licensing refusal to deal, but are subject to 'rule of reason' standard, such as demand or use of the product, market allocation etc. These are dependent upon the case to case basis. The competition law prevents such behaviour which goes beyond what patent, trademarks and copyright generally allow. It can also be concluded that generally that licensing agreement between non-competitors is generally pro-competitive because they combine intellectual property rights with other complementary factors of production such as manufacturing and production facilities and workforces". However agreements between competitors are more likely to create competition problems. Therefore, above are some of the cases in which clauses in the licensing agreements will be anti-competitive. The position in India is that Competition Act, 2002 as amended by Competition (Amendment) Act, 2007 deals with the applicability of Sec.3, prohibition relating to anti-competitive agreements to IPR's. Sec. 3(5) of the act says that reasonable conditions as may be necessary for protecting IPR's during their exercise would not constitute anti-competitive agreements. The expression 'reasonable restriction' has not been defined in the Act. Hence, it is implied that unreasonable conditions in an IPR Licensing agreement likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not reasonable with reference to the bundle of rights that go with IPR's.