

Patent Pools, Standards Setting
and Related Negotiations
专利池，标准设定，及相应许可谈判

IP China 2006, Beijing

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Patent Pools, Standards Setting and Antitrust Law

专利池，标准设定，和反垄断法的关系

- Patent pools and standards setting are related to antitrust law and patent misuse principles 专利池和标准设定与反垄断法及专利滥用的相关法律密切相关
- Antitrust Law prohibits certain acts that restrict competition 反垄断法禁止某些影响市场竞争的行为
 - Monopoly gained through legitimate exercise of IP rights is legal 通过合法使用知识产权获得的市场垄断并非违法
 - Seller/licensor may charge whatever price the market may bear 卖方/许可人可以索要任何市场可承受的价格

Patent Misuse

专利滥用

- ❑ Post-expiration royalties 专利过期后仍收取使用费
- ❑ Tying--Conditions sale/license of patented product to purchase of another product 捆绑--将销售/许可享受专利权的产品与购买其他产品相捆绑
- ❑ Using patent to illegally restrain competition, e.g. fraudulent procurement, baseless lawsuit to interfere with business of competitor 使用专利非法限制竞争，例如靠欺诈获得专利，用没有根据的诉讼来干扰对方
- ❑ Misuse of a patent to violate the antitrust laws makes the patent unenforceable 违反反垄断法的专利滥用会使专利失去实施的效力

Patent Pooling

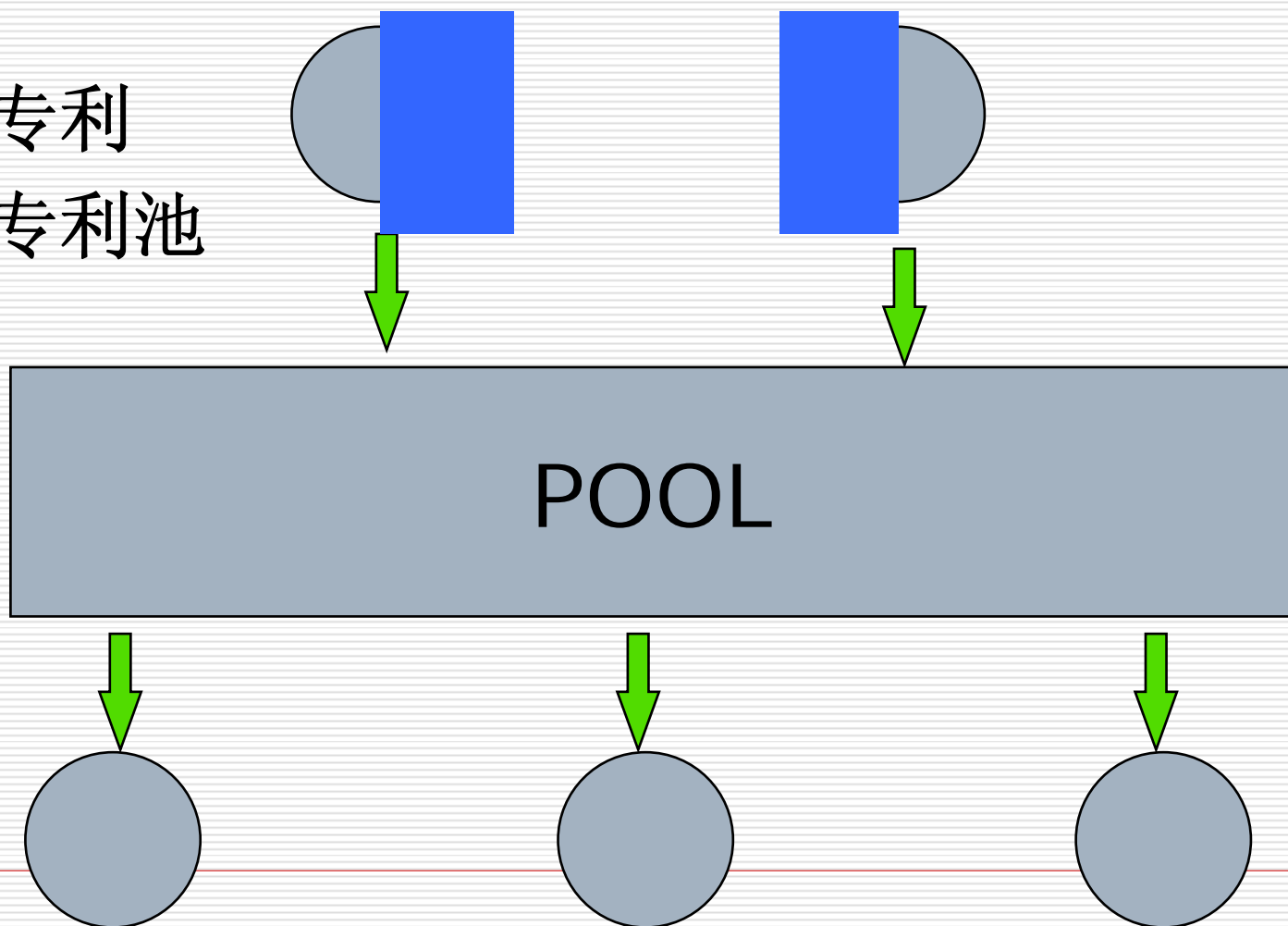
专利池

- Two or more owners license IP collectively to third parties 两个或两个以上的专利所有人联合向第三方许可知识产权
 - Generally lawful if IP is complementary or blocking 如果知识产权是互补或缺一不可的情况下，这种做法是法律许可的
 - Antitrust scrutiny where IP is competing or non-essential 双方知识产权有竞争（可以互相替代）或包括非核心专利的情况下会有违反反垄断法的嫌疑，会受到审查

Patent Pooling – One Version

形成专利池——一种形式

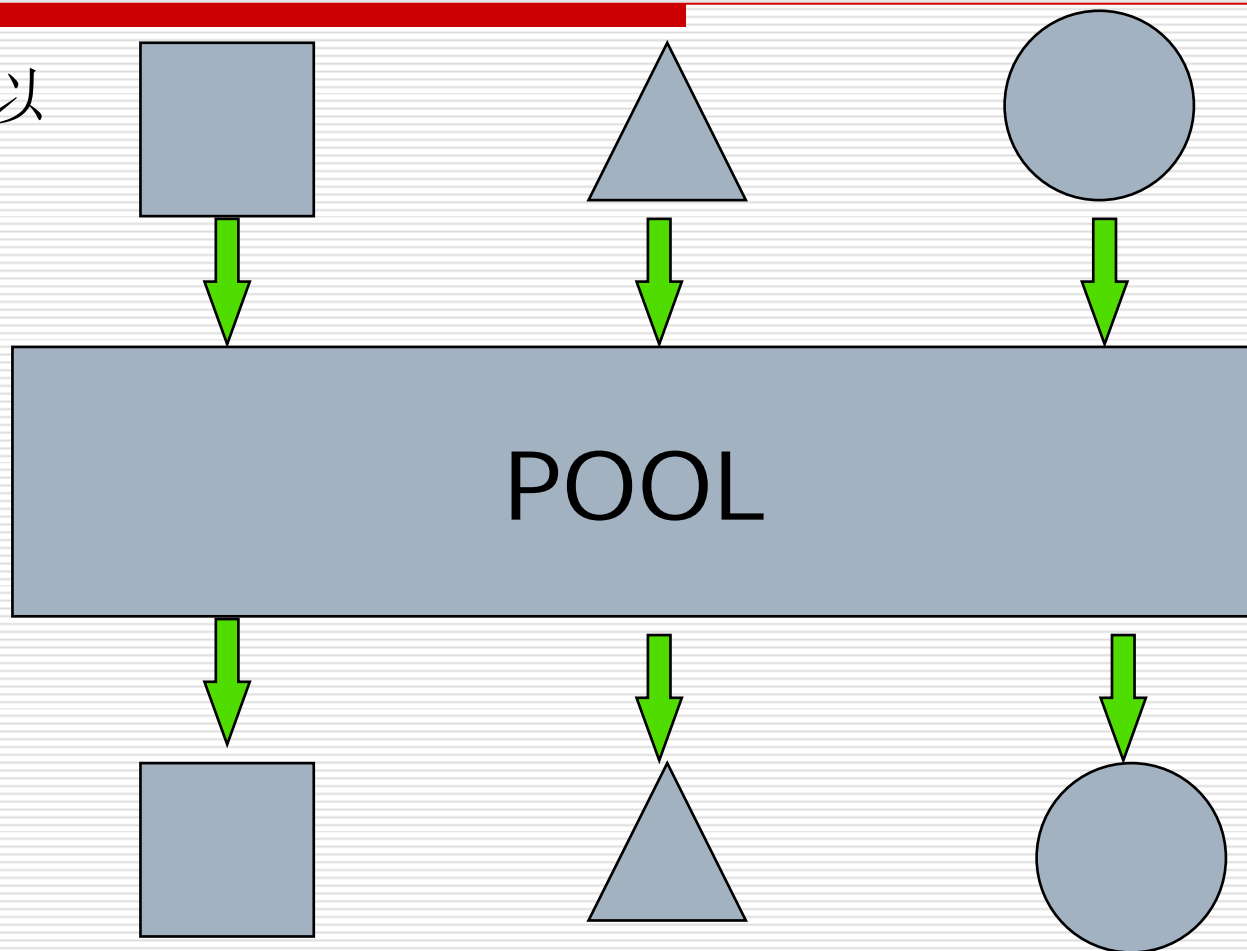
互补专利
合法专利池



Patent Pooling – Another Version

形成专利池——另一种形式

互相竞争或可以
替代的专利，
不合法专利池



Patent Pooling

形成专利池

- Pooling of blocking patents lawful 将具有阻碍性或互补的专利放在同一个专利池是合法的
- Benefits: 好处
 - Promote efficiency by allowing users to have one stop shopping 用户可以用一个许可得到所有必需的技术
 - prevent problems of blocking patents being enforced by different parties 可避免不同专利人分别向用户收费的情况，节省相应费用
 - Allows marketing of products that would otherwise not exist 为原来没有可能存在的产品开拓市场
- Antitrust concerns and risks: 可能触犯反垄断法的因素
 - Enables competitors to coordinate or set prices 使竞争者有机会协商或固定价格
 - May provide pool with market power 有可能使专利池独占市场
 - Pool can exclude rivals' access to technology 专利池有可能使竞争对手不能使用技术

MPEG-2 & DVD Patent Pool Example

MPEG-2 & DVD 专利池实例

- ❑ MPEG: 9 patent holders; 27 patents; MPEG拥有9位专利权人, 27项专利
 - ❑ Only patents “essential” to implementing the MPEG-2 standard 只有对于实施MPEG-2标准有决定意义的专利才放入专利池
 - ❑ Independent expert reviews patents for inclusion or retention in the portfolio 由独立的专家来决定是否将某专利包含或保留在专利池中
 - ❑ Non-discriminatory terms to any party requesting a license 对于需要许可的任何人都给与同样的许可条款
 - ❑ Any person may submit a patent 任何人都可以要求将其专利加入此专利池
 - ❑ Patents may be licensed independently from pool members 专利池成员可以单独许可其专利
 - ❑ Pool is legal 因为以上因素, 所以是合法的专利池 (但不是没一个专利池一定要满足以上每一个条件)
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3G Patent Pool Example

3G专利池实例

- Third Generation Mobile System technology 第三代移动通信系统技术
- Five competing standards; 100 essential patent holders 有5个相互竞争的标准，100个核心专利的拥有者
- First proposal involved single pool, involving patents for all five competing standards 第一个提议只有一个专利池，包含所有5个标准
- Maximum royalty rate was established for licensing the patents in the pool 规定了许可该专利池专利的最大许可费
- DOJ concerned that first proposal would restrain competition among five standards by preventing price competition among competing standards 美国司法部担心这第一个提议会由于免去了不同标准间的价格竞争，从而阻碍5个执行标准之间的竞争，因而提出反对意见

3G Patent Pool Example

3G专利池实例

- ❑ Revised proposal involved five separate patent platforms, with separate control over royalty rates 修改后的建议，包括5个独立的专利平台，形成各自独立控制的许可使用费。
- ❑ DOJ satisfied that only essential patents integrated and that benefit > harm 因为每个平台只包括了核心专利，且整合的益处大于坏处，DOJ批准了此提议
- ❑ Approved by DOJ and EC (European Commission) Nov. 2002; approved by JFTC (Japanese Fair Trade Commission) Dec. 2000 DOJ和 EC 2002年11月认可此项建议，JFTC 2000年12月表示认可

Philips Patent Pool Example

菲利普专利池实例

- CD-R and CD-RW pool involving Philips, Sony, Taiyo Yuden CD-R 和CD-RW专利池包括Philips, Sony和Taiyo Yuden公司
- CD-R patents licensed as package, with fixed royalty fees CD-R系列专利整体许可，专利费固定
- Philips brought trade complaint against companies selling “pirated” CD-Rs which did not purchase a license to the patent pool Philips公司向一些公司提起贸易投诉，起因是这些公司销售“盗版”的CD-R，没有向CD-R专利池支付许可费
- Respondents defended by claiming patent misuse 对方以滥用专利权回应

Philips Patent Pool Example

飞利浦专利池实例

- ITC finds *per se* patent misuse ITC决定有专利滥用
 - Requiring licensees to take licenses to non-essential as well as essential patents constitutes tying 要求被许可人对非核心专利和核心专利一起许可，构成“捆绑”
 - Tying is *per se* patent misuse “捆绑”本身就是一种专利滥用
 - Thus, patents non-enforceable, no trade violation 因此，专利不能实施，被告不存在贸易违法

Philips Patent Pool Example

飞利浦专利池实例

- On appeal, Federal Circuit reversed and found that a package license which includes non-essential patents is not Per Se misuse 联邦巡回法院在上诉时决定不是所有包含非核心专利的专利池都是专利滥用
 - Unlike tying, there is no requirement for Licensees to use non-essential technologies 与“捆绑”不同的是，被许可人不需要使用非核心技术
 - no evidence that any part of royalty was attributable to non-essential patents 被告没有证明所收许可费与非核心专利有关
 - No evidence of negative effect on commercially available alternative technology 没有证据对其他相应技术有负面影响（实际上在许可期间没有与之相竞争的技术存在）
 - Under the rule of reason, this package license which includes non-essential patents is not a violation 综合所有因素，此包括非核心专利的专利池不属于专利滥用

3C Patent Pool Example

3C专利池实例

- Chinese DVD-player manufacturers (Wuxi Multimedia and Orient Power) sued 3C DVD Patent Group (Sony, Philips, Pioneer, LG) in 6/2004 中国的DVD播放器的生产商（无锡多媒体和东方电力）于2004年6月起诉3C DVD专利池（ Sony, Philips, Pioneer, LG ）
 - Claim price fixing, tying, group boycott, conspiracy to monopolize 起诉包括限定价格、捆绑销售、联合抵制以及企图垄断
 - After several amended complaints, anti-trust claims dismissed 1/2006, now on appeal 经过几轮的修改，2005年1月反垄断起诉被撤销，现在上诉中
-

Standards Setting

标准设定

- Often arises in patent pool context 通常和专利池有关
- Standards require all companies use the relevant technologies, difficult to design around the essential patents covered by the standards 标准规定所有人都要用其指定的技术，通常很难绕过其核心专利
- Creates automatic market power for patent pool owners that control technology in the standard, allow them to collect royalties 使掌握标准专利的企业对市场有控制力

Standards Setting

标准设定

- Standards-setting bodies usually organized to - 设定标准的主体通常有如下构成
 - Maximize openness 最大程度的开放
 - Provide for consensus 成员有表达意见的机会，会采取大多数人的意见
 - Limit one firm's ability to control body 限制一个企业对于整体的控制力
- Manipulation of process can lead to antitrust liability 如果不遵守规章制度可能会导致反垄断法的惩处

Standards Setting

标准设定

- IP right policies for standard setting committees 设定标准的主体一般有相应知识产权政策
 - Must disclose existence of IP rights 成员必须披露其相应知识产权
 - give committee option to select alternative technology 使委员会有机会选择其他可替代技术
 - cannot mislead or withhold information about IP rights 不能误导或隐瞒其相关专利的信息
 - Must agree to license patents on standards with reasonable and nondiscriminatory (RAND) terms 专利人必须同意合理地无歧视地对覆盖标准的专利授予许可
 - Future trend --“Ex Ante” Negotiation for potential licensing fees upfront before a standard is set 今后可能的趋势：标准设定前就协商许可费

Standards Setting - Dell

标准设定-Dell公司实例

- Dell purposefully did not disclose information to standard setting committee Dell对标准设定机构隐瞒了实情
- 1996 FTC consent decree 1996年联邦贸易委员会通过一项决定
- Violation of duty to disclose patents 判定Dell违反了公开专利的义务
- But “[t]he order should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action.” 但是这一决定不能够上升为一个一般性准则，不是所有在标准制定过程中非故意的失责都有被诉讼的依据

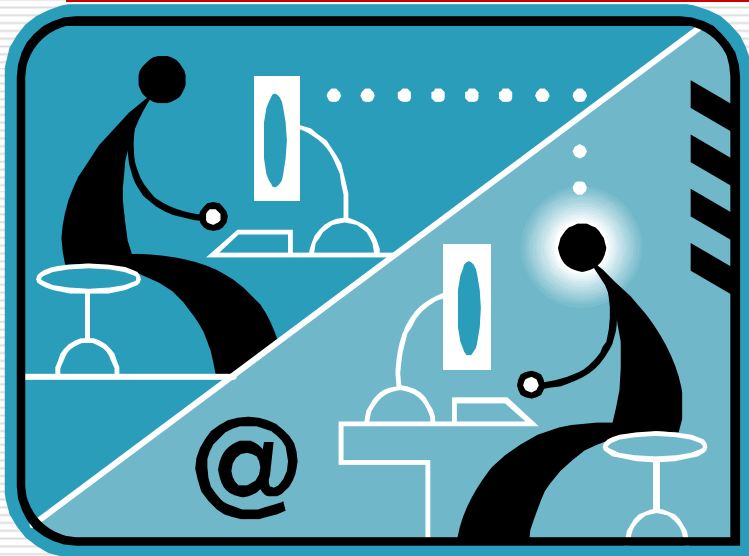
Standards Setting - Rambus

标准设定-Rambus公司

- JEDEC adopted technology patented by Rambus into SDRAM and DDR SRAM standards JEDEC将Rambus公司的专利技术采纳入了SDRAM和DDR SRAM 标准
- FTC claimed Rambus failed to disclose patents and applications for technology within standard, but later enforced those patents FTC认为Rambus公司没有公开他们的在标准范围内的专利和专利申请，但后来开始收取专利费
- Charged Rambus with antitrust violation 指控Rambus公司违反了反垄断法
- ALJ finds monopoly power but no liability: 行政法官发现其具有垄断的能力，但不需被惩处
 - Rambus did not violate JEDEC disclosure policy Rambus没有违反JEDEC公开政策
 - Neither JEDEC nor members misled by Rambus Rambus没有误导JEDEC或其成员
 - No anticompetitive effects 没有造成反竞争的结果
- ALJ decision was appealed to the full Federal Trade Commission, and FTC found violation. 联邦贸易委员会在上诉时决定Rambus 确实违法了。

Patent pool and standards related negotiations 相应许可谈判

- One common negotiation strategy in license negotiation is to attack patent pools and standards related patents based on antitrust violation and patent misuse 在做和专利池及标准相关的许可谈判时，一种常见的方法是判断对方是否触犯了反垄断法并造成了专利滥用
 - Patent pool 专利池 -- whether competing technologies or non-essential patents are included in pool, and whether patent mis-use 专利池是否包括相竞争或可替代的技术，或非核心专利，是否有专利滥用行为
 - Standards 标准 -- Whether patentee disclosed IP to standard setting committee; license must be on reasonable and non-discriminatory terms 专利人是否及时对标准设定主体披露其相应知识产权；专利人不能拒绝许可，必须同意以合理的许可费无歧视的授予许可
- Due to common issues faced by all licensees, collective negotiation strategy may be used 因为所有被许可人面对的是同样问题，集体谈判是可取的措施



THANK YOU!
谢谢

如有问题的话，请联系

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