III. Driving Criteria for Patent Pools in the IP Guidelines and Business Review Letters: Sanctioning an Overall More Favourable Approach

When examining patent pools,[214] the IP Guidelines state that such cooperative licensing agreements "may provide pro-competitive benefits" when they:

1. Integrate complementary technologies;
2. Reduce transaction costs;
3. Clear blocking positions;
4. Avoid costly litigation;[215]
5. Promote the dissemination of technology.

Conversely, the IP Guidelines call to mind that pooling agreements "can have anti-competitive effects in certain circumstances" if:

1. The excluded firms cannot effectively compete in the relevant market for the good, incorporating the licensed technologies;
2. The pool participants collectively possess market power in the relevant market;
3. The limitations on participation are not reasonably related to the efficient development and exploitation of the pooled technologies.

For example, quoting the Guidelines,[216] "collective price or output restraints in pooling arrangements, such as the 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 […]. 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.[217] […] Settlements involving the cross-licensing of intellectual property rights can be an efficient means to avoid litigation and, in general, courts favour such settlements. When such cross-licensing involves horizontal competitors, however, the Agencies will consider whether the effect of the settlement is to diminish competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the cross-license. In the absence of offsetting efficiencies, such settlements may be challenged as unlawful restraints of trade.[218] […] Pooling arrangements generally need not be open to all who would like to join. However, exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may,

214 *Id.,* Sect. 5.5, "Cross-licensing and Pooling arrangements".

215 For an interesting overview on patent litigation in Europe, see in particular: Schneider M., "Die Patentsgerichtbarkeit in Europa: Status Quo und Reform", Schriftenreihe zum gewerblichen Rechtsschutz, 2005, vol. 136; Straus J., "Patent Litigation in Europe - A Glimmer of Hope? Present Status and Future Perspectives", Washington University Journal of Law and Policy, 2000, p. 403 *et seq.*

216 IP Guidelines, *supra,* fn. 207, Sect. 5.5, "Cross-licensing and Pooling arrangements".

217 See United States v. New Wrinkle, Inc., 342 US 371 (1952) (price fixing).

218 Cf. United States v. Singer Manufacturing Co., 374 US 174 (1963) (cross-license agreement was part of broader combination to exclude competitors).

under some circumstances, harm competition.[219] […] In general, exclusion from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. If these circumstances exist, the Agencies will evaluate whether the arrangement's limitations on participation are reasonably related to the efficient development and exploitation of the pooled technologies and will assess the net effect of those limitations in the relevant market.[220] […] Another possible anticompetitive effect of pooling arrangements may occur if the arrangement deters or discourages participants from engaging in research and development, thus retarding innovation. 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.[221] […] However, such an arrangement can have pro-competitive benefits, for example, by exploiting economies of scale and integrating complementary capabilities of the pool members, including the clearing of blocking positions, and is likely to cause competitive problems only when the arrangement includes a large fraction of the potential research and development in an innovation market".[222]

Additionally, the IP Guidelines discuss the more general criteria underlying a pooling agreement that must be taken into consideration and specifically:

1. The patents in the pool must be valid and not expired;[223]
2. No aggregation of competitive technologies and setting a single price for them;
3. An independent expert should be used to determine whether a patent is essential to complement technologies in the pool;
4. The pool agreement must not disadvantage competitors in downstream product markets;
5. The pool participants must not collude on prices outside the scope of the pool, for example on downstream products.

219 Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 US 284 (1985) (exclusion of a competitor from a purchasing cooperative not per se unlawful absent a showing of market power).

220 See section 4.2, "General principles concerning the Agencies' evaluation of licensing arrangements under the rule of reason – Efficiencies and justifications".

221 See generally United States v. Mfrs. Aircraft Ass'n, Inc., 1976-1 Trade Cas. (CCH) 60,810 (S.D.N.Y. 1975); United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal 1969), appeal dismissed sub nom. City of New York v. United States, 397 US 248 (1970), modified sub nom. United States v. Motor Vehicle Mfrs. Ass'n, 1982–83 Trade Cas. (CCH) 65,088 (C.D. Cal. 1982).

222 See Sect. 3.2.3, "Antitrust Concerns and Modes of Analysis – Research and Developments: Innovation Markets".

223 See Sect. 6, "Enforcement of invalid intellectual property rights".

On the basis of what has been reported above, we can certainly conclude that on the whole the 1995 IP Guidelines, as well as the 1988 International Guidelines, signal a new perspective toward patent licensing that is far more positive than earlier antitrust approaches. Thus, with particular reference to patent pools, the US Department of Justice and the Federal Trade Commission have finally recognized that those agreements can have significant pro-competitive effects and may improve a business' ability to "survive" this era of rapid technological innovation characterized by an increasingly global economy. Accordingly the IP Guidelines recognize that "licensing, cross-licensing, or otherwise transferring intellectual property […] can facilitate integration of the licensed property with complementary factors of production" and that such integration can "benefit consumers through the reduction of costs and the introduction of new products".[224] Still the Guidelines also caution, however, that "while intellectual property licensing arrangements are typically welfare-enhancing and pro-competitive, antitrust concerns may nonetheless arise" particularly "when a licensing arrangement harms competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the license".[225]

In the same vein, the Antitrust Division of the Department of Justice has issued, from 1997 until 2002, a total of four Business Review Letters analysing in greater depth the antitrust issues raised by the specific patent pools under examination and discussing the features that reduce the risks of competitive drawbacks of such agreement.[226] Each letter explicitly recognizes that patent pools can enhance competition in the relevant market by promoting the dissemination of new technologies.[227] In each case, based on the descriptions of the patent pools provided by the parties, the Antitrust Division declined to initiate enforcement action.[228]

224 *Id.*

225 IP Guidelines, *supra,* fn. 207, Sect. 3.1, "Antitrust concerns and modes of Analysis – Nature of the concerns".

226 See Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Department of Justice, Letter to Garrard R. Beeney, Esq., June 26, 1997, available at: http://www.usdoj.gov/atr/public/busreview/1170.htm (hereinafter MPEG Pool Letter); Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Garrard R. Beeney, Esq., Dec. 16, 1998, available at: http://www.usdoj.gov/atr/public/busreview/2121.htm (hereinafter Phillips DVD Pool Letter); Letter from Joel I. Klein, Assistant Attorney General, Department of Justice, to Carey R. Ramos, Esq., counsel to Hitachi, Ltd., June 10, 1999, available at: http://www.usdoj.gov/atr/public/busreview/2485.htm (hereinafter Hitachi DVD Pool Letter); Letter from Charles A. James, Assistant Attorney General, Antitrust Division, Department of Justice, to Ky P. Ewing, Esq., Nov. 12, 2002, available at: http://www.usdoj.gov/atr/public/busreview/200455.htm

227 See MPEG Pool Letter, *supra*, fn. 226, p. 5; Phillips DVD Pool Letter, *supra*, fn. 226, p. 5; Hitachi DVD Pool Letter, *supra*, fn. 226, p. 5.

228 See MPEG Pool Letter , *supra*, fn. 226, p. 9-10; Phillips DVD Pool Letter, *supra*, fn. 226, p. 9; Hitachi DVD Pool Letter, *supra*, fn. 226, p. 10.

IV. Department of Justice and Federal Trade Commission's Joint Hearings on Competition and IP Law Policy and the Ensuing Innovation Reports: Paving the Way for a Sustainable Balance

In accordance with the new economic approach[229] and in order to examine the current balance between antitrust and patent law, as well as common intellectual property licensing practices, including patent pools, and the implications of those activities to the benefit of innovation and consumer welfare, the Federal Trade Commission and the Department of Justice held joint hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy", which took place in 2002 and involved more than 300 panellists: participation included business representatives from firms and the independent inventor community; major patent and antitrust organizations; leading antitrust and patent practitioners; and leading scholars in economics, antitrust and patent law. In addition, the Federal Trade Commission received about 100 written submissions. Business representatives were mostly from high-tech industries in the sectors of pharmaceuticals, biotechnology, computer hardware and software and the Internet Community.

On February 6, 2002 the Opening Day Comments[230] for the Public Hearings outlined the reasoning supporting the Business Review Letters, which were addressing the targeted patent pools' proposals to jointly license the protected technologies to other companies. Specifically, the addressees were an MPEG patent pool, based on an industry standard for video compression technology, and two DVD patent pools. In all cases under examination, as anticipated above, the Division concluded that the proposed arrangements did not appear to pose antitrust concerns. In particular, and with reference to the Business Review process, it was stated that "the Division's decisions rested on a number of factors, including the fact that the pools only license those patents essential for a manufacturer to comply with an established standard. The pools were designed to capture the efficiencies that may come from licensing complementary technologies. Concomitantly, they were designed to limit the anticompetitive effect that can arise from pooling technologies, such as the elimination of competition or the increase in prices that could arise if substitute technologies (that is, technologies that could compete against each other) were placed in a pool".

Anticipating this resolution, just one year before those Public Hearings, in January 2001, the US Patent and Trademark Office issued a White Paper on Patent Pool-

229 For a wider, comprehensive debate on the issue, see i.a.: Drexl J., "Is There a 'More Economic Approach' to Intellectual Property and Competition Law?", In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 27 *et seq*.

230 James C., Opening Day Comments for F.T.C/D.O.J. Public Hearings, Feb. 2002, available at: http://www.ftc.gov/opp/intellect/james.htm