INTELLECTUAL PROPERTY POOLS AND THE DISAPPEARING ESSENTIALITY REQUIREMENT

Intersection between Antitrust and Intellectual Property

Robert A. Saunders, ESQ.
Saunders Law, PLLC
saunderslaw.co

In a recent Federal Circuit case, the court called into question the long standing notion that only "essential" IP rights will be allowed entry into an Intellectual Property Pool. While the exact impact of the Federal Circuit's holding on the "essentiality" requirement remains unknown, the court has illustrated the problems that enforcement agencies and pool participants have had in defining, and placing boundaries on, the essentiality requirement.

I. Introduction

Within the United States, the Intellectual Property (IP) rights necessary to develop and commercialize a product, especially in the technology sectors, often are held by multiple, individual holders. While the statutory grant of exclusivity, created through the Patent Act and the Copyright Act, that these IP holders possess entitle them to exercise their legal monopoly against the world, often, in order for an IP holder to effectively develop, produce, and market a technology, that holder will need to either cross-license their rights with another IP holder or enter into an IP "pool" due to fact that they do not possess all of the "essential" IP rights necessary to commercialize that technology.[1] Also, given the uncertainty of an IP right's scope or whether that right can weather a third party challenge,[2] the IP holder may want to cross-license or pool their rights as a means of removing "blocking" rights[3] and minimizing costly challenges to be defended against.[4]

---

[1] *See* Shapiro, Carl, Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting.
[2] The "property" right of an IP holder remains uncertain even after the PTO has issued the patent, or the Copyright Office has allowed the copyright to be registered, due to the fact that a successful third party challenge to the IP's validity could destroy the right.
[3] Newberg, Joshua A., Antitrust, Patent Pools, and the Management of Uncertainty. available at http://www.ftc.gov/opp/intellect/020417joshuanewberg.pdf:

> Two patents are said to block each other when one patentee has a broad patent on an invention and another has a narrower patent on some improved feature of that invention. The broad patent is said to "dominate" the narrower one. In such a situation, the holder of the narrower ("subservient")

Over-all, IP pools are regarded as an "efficiency-enhancing" integration between not only the individual holders of the IP rights attempting to commercialize their IP but also between those entities, outside of the pool, seeking to license a larger number of IP rights in a given area of technology and those holding the IP rights.

Given the efficiency-enhancing nature of IP pools, why has the Department of Justice Antitrust Division and the Federal Trade Commission taken such an active role in overseeing the formation, through the issuance of business review letters and guidelines, of IP pools? The simple answer is, of course, to limit the possibility for a pool to support/shelter anticompetitive behavior. In terms of antitrust, the four greatest areas of concern for enforcement agencies, like the DOJ, are that a given IP pool will: 1) facilitate collusion; 2) foreclose competition; 3) exclude or stifle new innovation; or 3) extend an IP holder's market power through tying a "non-essential" IP right to the licensing of an "essential" IP right that the holder also owns. In reviewing an IP pool for anticompetitive behavior, according to Deputy Assistant General for the Antitrust Division of the U.S. Department of Justice, an enforcement agency's "[a]ntitrust analysis [should] . . . emphasize[ ] liability tests and remedies that are objective, as opposed to subjective, and *ex ante* [(before the event)] in focus, versus *ex post* [(after the event)]."[5] With the DOJ emphasizing a review of a pool for anticompetitive effects at the time of formation, rather

---

> patent cannot practice her invention without a license from the holder of the dominant patent. At the same time, the holder of the dominant patent cannot practice the particular improved feature claimed in the narrower patent without a license.

[4] Id. at 6.

> A patent is, after all, no more than a right to exclude based on a recitation of claims allowed by the Patent and Trademark Office; the right to bring an infringement lawsuit. Although it is only infringement litigation that offers a formal test of a patent's exclusionary power, untested perceptions of a patent's breadth or of a patent's "strength" or "weakness" may literally move markets.

[5] Masoudo, Gerald F., *Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct* (2007) at 2. Available at http://www.justice.gov/atr/public/speeches/227137.htm

than an analysis with the benefit of hindsight, it become obvious why the DOJ would attempt to take an active role in overseeing a pool's formation.

a. ***Intellectual Property Pools and Cross Licenses***

An intellectual property pool, in its simplest form, is an agreement between two or more IP owners to license one or more of their IP rights to each other (cross licensing), or to third party licensees (pooling). In constructing an IP pool, the owners of the IP may collectively choose, for a myriad of reasons, to assign their IP rights to a separate administrative entity (the pool), which then licenses the pooled IP rights to third parties in exchange for royalty payments. Usually, the IP rights that are assigned to the pool are complimentary IP rights that cover a specific technology and are essential to the commercialization of that technology.

Although IP pooling agreements usually require greater antitrust scrutiny than cross licensing agreements due to the collective pricing of pooled IP rights and the increased possibility for collusion, for the purposes of this paper, I am going to discuss them as a single entity in regards to their interplay with antitrust laws. Crucial in this discussion is the *Antitrust Guidelines for Intellectual Property Licensing* (the "Guidelines").

b. The 1995 DOJ/FTC Antitrust Guidelines for Intellectual Property Licensing

While the Department of Justice (DOJ) Antitrust Division is only an enforcement administration charged with enforcing the antitrust laws of the U.S. and has no power to make antitrust law, the regulatory guidance that the division provides should not be disregarded because it reflects the division current prosecutorial intentions in regard to prosecutable conduct. The DOJ Antitrust Division shares jurisdiction over civil antitrust cases with the Federal Trade Commission (FTC) and often works jointly with the FTC to provide regulatory guidance to businesses. In 1995, the DOJ and the FTC jointly issued federal antitrust guidelines for intellectual property licensing arrangements.[6]

At the outset of the Guidelines discussion of Cross-Licenses and Pooling arrangements, the DOJ sets forth the presumption that pooling arrangements are precompetitive in nature. According to the Guidelines, the precompetitive nature of pooling arrangements is demonstrated by the fact that such arrangements often, "integrat[e] complementary technologies, reduc[e] transaction costs, clear[] blocking positions, and avoid[] costly infringement litigation."[7]

According to Gerald Masoudo, the Deputy Assistant General for the DOJ Antitrust Division, in looking at the anticompetitive effects of an IP pool, the Guidelines explain how the DOJ and the FTC will initially examine a pool, via a structural approach, for a potential antitrust violation:

> the agencies will begin by examining market structure in much the same way that they do in the merger context, will examine the extent to which a grantor-licensee relationship is horizontal as well as vertical, and will apply an "antitrust safety zone" where a licensing restraint is not facially anticompetitive and the grantor and licensee collectively account for no more than twenty percent of the affected relevant market.[8]

If a pool falls within the structural threshold, that threshold is treated by the DOJ as a safe harbor where a business has the ability to make reasonable business decisions without

---

[6] U.S. Dep't of Justice and Fed. Trade Comm'n, *Antitrust Guidelines for the licensing of Intellectual Property* (1995), available at http://www.justice.gov/atr/public/guidelines/0558.htm
[7] Id. at §§ 5.5: Cross licensing and Pooling Arrangements
[8] Masoudo, at 3-4, citing *Antitrust Guidelines*, §§ 4.1, 3.3, & 4.3.

facing the serious threat of a DOJ antitrust suit for those decisions. However, a pool that falls outside of the structural threshold will be closely examined by the DOJ for anticompetitive effects.[9]

Therefore, if a pool falls outside of the structural threshold safe harbor, the guidelines set out four circumstances in which cross-licensing and pooling arrangements can run afoul of antitrust law and warrant a closer examination (using a rule-of-reason approach)—an examination that may possibly result in an antitrust suit: (1) pooling arrangements that contain collective price or output restraints that do not contribute to an economic "efficiency-enhancing integration" among participants; (2) settlements between horizontal competitors that involve the cross licensing of IP rights that result in diminished competition among potential competitors in a relevant market; (3) excluding participants from pooling arrangements when the pooling participants, collectively, posses market power in the relevant market, resulting in the excluded entity's inability to effectively compete in that market; (4) pooling arrangements that deter or discourage participants from engaging in research and development.[10] When any of these activities cease to "contribute to an efficiency-enhancing integration of economic activity among participants" that conduct may be deemed an unlawful restraints of trade.[11] According to the Guidelines, the only conduct that will be considered per se illegal by the DOJ is when pooling agreements are "mechanisms to accomplish naked price fixing or market division."

Another potential area where a pool can run afoul of antitrust laws, but is not mentioned in the Guidelines, is the acquired market power after a standard has been

[9] Id. at 3.
[10] *Antitrust Guidelines,* at § 5.5
[11] *Antitrust Guidelines,* at § 5.5

adopted and a single pool exclusively contains all of the essential IP rights for that standard. The standard not only gives market power collectively to the IP rights in the pool but also can give substantial market power to individual IP rights.[12]

c. DOJ Business Review Letters

In keeping with the DOJ's policy for imposing liability based on objective, "ex ante" analysis, the DOJ allows potential IP pools to disclose the nature and scope of the proposed pool to the DOJ, and the DOJ will issue, based upon the received information, a "business review letter" that details the Department's intent, if the proposed pool goes forward "as is," to bring an antitrust suit against the pool. While the DOJ has issued more current Business Review Letters on IP pools, those letters specifically look at the anticompetitive effects of establishing a particular Standard Setting body.[13] For the purposes of this paper, the discussion of DOJ Business Review Letters will be confined to the 1997 MPEG-2 Review Letter, the 1998 "Phillips, Sony, and Pioneer" DVD Review Letter, and the 1999 "Hitachi, Matsushita, and Mitsubishi" DVD Review Letter. Taken together, these three Business Review letters identify key pool features that operate as safeguards against anticompetitive effects: "clarifying which patents are in the pool; limiting pools to complementary patents and avoiding substitutes; requiring licenses into and out of the pool to be nonexclusive, and licenses out to be nondiscriminatory; limits on the scope of grantback demands; and strict, written limits on the collection of and

---

[12] *See* In re Rambus, 2006 WL 2330117, 2006-2 Trade Cases P 75,364 (Aug. 2, 2006).
[13] See the DOJ's IEEE Business Review Letter (2007). Available at http://www.usdoj.gov/atr/public/busreview/222978.pdf; and the DOJ's VITA Business Review Letter (2006). Available at http://www.usdoj.gov/atr/public/busreview/219380.pdf

access to competitively sensitive proprietary information of pool members and licensees, to prevent downstream coordination."[14]

In 1997, the DOJ Antitrust Division responded favorably to a purposed IP pool for the MPEG-2 standard for video and audio compression. In issuing the "no action" letter, the DOJ went through a series of factors that lead to the conclusion that the pool, in its proposed form, would not be subject to an antitrust enforcement action. The DOJ's analysis consisted of a review of these 4 factors: (1) the patents licensed by the pool are all essential to comply with the MPEG-2 standard and are thus complementary, not competitive; (2) the license offered by the pool is the same for any and all licensees including "maverick competitors and upstart industries"; (3) the structure of the pool prohibits exchange of competitively sensitive information among participants; and (4) the license agreement does not restrain development of rival products or technology.

Through looking at the four factors, one can gain a clear roadmap of how to make a standards-based pool precompetitive, thereby avoiding an antitrust suit. However, the simplicity in which the factors are described can, as latter business review letters demonstrate, cause a pool to easily be lead astray.

d. The "Essentiality" Requirement for Entry into an IP Pool.

Throughout all of the DOJ's business review letters on IP pools, the DOJ's concern over a pool's requirement that only "essential" IP rights are allowed entry is highlighted. In order to minimize the possibility that "non-essential" IP rights are included into the pool, the DOJ goes through great effort to restructure the pool's

[14] Masoudi, at 11.

definition of “essential.” However, within the letters, the DOJ failed to institute a uniform definition of “essential” when restructuring and/or approving the pools definitions of “essential,” thereby creating an aura of ambiguity around the term.

The DOJ’s essentiality requirement for IP pools stems from the notion that if a pool is limited to IP rights that are essential for compliance with the standard specifications, then the pool will only integrate complementary IP rights. In the broadest sense, the DOJ has defined essential as an IP right that has no substitutes; or in other words, “one needs licenses to each of them in order to comply with the standard.”[15] If the essentiality requirement were removed, then two IP holders of “substitute” IP rights—rights that would place the two in direct competition with each other—could jointly enter a pool, thereby creating a scenario where the pool could serve as a price-fixing mechanism (a *per se* antitrust violation).[16]

In the DOJ’s MPEG-2 business review letter**,** the DOJ accepted the pool’s definition of “essentiality” as, “any Patent claiming an apparatus and/or method necessary for compliance with the MPEG-2 standard . . . under the laws of the country which issues or published the Patent.”[17] Here, for a patent to be considered “essential,” the patent must be either a method or utility patent that is necessary for compliance within the given standard and, although poorly stated, the patent must be valid under the patent laws of the country that issued the patent.

In contrast with the DOJ’s approval of the MPEG-2’s definition of essential, the DOJ’s review of DVD-3C’s definition resulted in the DOJ reshaping the definition as criteria for the “no action” letter to remain effective. The DVD-3C pool defined essential

[15] DVD-6C letter, at 11.
[16] Id. at 12.
[17] MPEG LA review letter, at 3.

as “necessary (as a practical matter) for compliance with the DVD [-Video or DVD-ROM] Standard Specifications.”[18] Since the language that DVD-3C’s pool used closely mirrored that of MPEG-2’s pool, the DOJ’s recasting of the definition can be seen as redefining “essential.” In recasting DVD-3C’s definition, the DOJ specifically stated: “[w]e understand this definition, [necessary (as a practical matter)] to encompass patents which are technically essential - i.e. inevitably infringed by compliance with the specifications - and those for which existing alternatives are economically unfeasible.”[19] Here, the DOJ can be seen expansively defining essentiality as those patents without an economically viable alternative that infringe upon the technology covered by the patents in the pool.

In the next business review letter, the DOJ again conditions its “no action” upon the allowance of only essential patents utilizing its re-characterization of the pool’s definition of essential. In the DVD-6C letter, the pool purposed the following definition: “A Licensor's patent is ‘essential’, and thus subject to the commitments in the MOU, if it is ‘necessarily infringed,’ or ‘there is no realistic alternative’ to it, in implementing the DVD Standard Specifications.”[20] As seen in the DVD-3C letter, here, the DOJ took issue with a definition that closely paralleled the definition that they had just certified. In the DOJ’s DVD-3C definition of essential, the DOJ limited essential patents to those without any economically viable alternative. However, when the DVD-6C pool swapped out “economically feasible” for “realistic,” the DOJ critiqued that definition as being too subjective, and again advocated for “economically feasible” test for essentiality:

[18] DVD-3C, at 3.
[19] Id. at FN 8.
[20] DVD-6C letter at 3.

> To be sure, the definition of "essential" contained in the MOU and the Authorization Agreement introduces some uncertainty. By asking the expert to identify not only those patents that are literally essential to compliance with the DVD-ROM and DVD-Video Standards, but also those for which there is no "realistic" alternative, the definition introduces a degree of subjectivity into the selection process. Based on your representations, however, it appears that the expert will interpret realistic" to mean "economically feasible. So long as the patent expert applies this criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine only complementary patent rights."[21]

In this definition, the DOJ removes the language requiring a patent to be "technically essential" and instead, adopts the language, "literally essential." Given the fact that in three review business review letters, the DOJ has take the time to reshape the pool's definition of "essential" in each one, but has not, itself, adhered to a single definition, it is of no wonder that that litigation concerning the inclusion of "non-essential" patents in a pool would soon after appear.

e. The doctrine of Patent Misuse and its relation to Antitrust.

While patent misuse is an equitable defense against a patent infringement suit, patent misuse law and antitrust law are closely related. Typically, a claim of patent misuse is alleged by an infringer for the patent holder's attainment of a patent through an act of fraud on the Patent Office or the patent holder's extension of the patent beyond the scope of the patent grant, thereby creating an anticompetitive effect. The connection between antitrust law and patent misuse law has long been recognized. According to the Federal Circuit, referencing the U.S. Supreme Court in Independant Ink, Inc. v. Illinois Tool Works, Inc.:

[21] Id. at 12.

> "[w]hile the doctrine of patent misuse closely tracks antitrust law principles in many respects, Congress has declared certain practices not to be patent misuse even though those practices might otherwise be subject to scrutiny under antitrust law principles. In 35 U.S.C. § 271(d), Congress designated several specific practices as not constituting patent misuse. The designated practices include condition[ing] the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power for the patent or patented product on which the license or sale is conditioned. . . . [However,] [i]n the case of an antitrust claim based on a tying arrangement involving patent rights, . . . ownership of a patent on the tying good is presumed to give the patentee monopoly power."[22]

Therefore, according to the Federal Circuit, and as you will see in Phillips, the true divide between an antitrust claim for an unlawful tying arrangement and a patent misuse claim for tying is the added presumption of market power in the antitrust claim.

f. U.S. Phillips Corp. v. International Trade Commission

In 2005, the U.S. Court of Appeals for the Federal Circuit, in U.S. Philips Corp. v. International Trade Commission, relying on antitrust principles, held that Phillips' package license for recordable compact discs did not constitute patent misuse under either a *per se* standard or a *rule of reason* standard.[23] While Phillips is technically not an antitrust suit due to the fact that the case deals primarily with patent misuse[24] instead of the Sherman Act,[25] Phillips is crucial to an understanding of the current state of antitrust laws in regards to their application to IP pools, particularly the inclusion of non-essential

[22] U.S. Phillips Corp. v. Int'l Trade Comm'n, 424 F 3.d 1179, 1185-1186 (Fed. Cir. 2005).
[23] *See* U.S. Phillips Corp. v. Int'l Trade Comm'n, 424 F 3.d 1179 (Fed. Cir. 2005).
[24] 35 U.S.C. § 271(d)
[25] 15 U.S.C. § 1–7

patents into an IP pool, and the manner in which patent misuse closely tracks the principles of antitrust law.[26]

i. The Facts Involved in U.S. Phillips Corp.

In the 1990s, Phillips was involved in the licensing of patents for the manufacturing of Recordable Compact Discs (CD-R) and Rewritable Compact Discs (CD-RW).[27] Initially, Phillips offered the licenses through four, separate and distinct, pools.[28] However, in 2001, Phillips began offering licenses through two different, categorical packages, which Phillips designated as "essential" and "non-essential" for producing "orange book"[29] compliant CDs.[30] Within the different pools that Phillips offered, Phillips required that each licensee was required to pay the same royalty rate per a manufactured disc, regardless of the amount of patents utilized to create the discs.[31] Further, Phillips refused to license any individual patent in any of the pools to licensees.[32]

In the course of issuing licenses for the manufacturing of "orange book" compliant CDs, Phillips entered into licensing agreements with Princo, GigaStorage, and Linberg.[33] However, soon after Phillips entered into the licensing agreements with these entities, all three of them stopped paying the required licensing fees. As a result, Phillips

[26] U.S. Phillips Corp., at 1185-18886. According to the Federal Circuit: "While the doctrine of patent misuse closely tracks antitrust law principles in many respects, Congress has declared certain practices not to be patent misuse even though those practices might otherwise be subject to scrutiny under antitrust law principles."
[27] Id. at 1182.
[28] Id.
[29] Orange Book refers to the technical requirements for compliance with the CD-R and the CD-RW Standard.
[30] Id. at 1182-1183.
[31] Id. at 1182.
[32] Id.
[33] Id. at 1183.

filed a complaint with the International Trade Commission claiming that Princo, GigaStorage, and Linberg were in violation of the Tariff Act through their importation of CD-Rs and CD-RWs into the U.S. that infringed on Phillips patents.[34]

In response to the ITC suit, the respondents raised patent misuse as an affirmative defense, claiming that Phillips required them, as a condition of licensing the "orange book" compliant patents necessary for the manufacture CD-Rs and CD-RWs, to license additional patents that were not necessary to manufacture compliant CDs.[35] Specifically, the respondents claimed that in Phillip's "essential pool," Phillips included non-essential patents for the manufacturing of compliant CDs because "there were commercially viable alternative methods of manufacturing CD-Rs and CD-RWs that did not require the use of the technology covered by those patents."[36]

Initially ruling on the matter, an administrative law judge found that while Princo, GigaStorage, and Linberg had all infringed upon Phillips' patents, the infringed patents were "unenforceable by reason of patent misuse."[37] In coming to the conclusion that the patents were unenforceable as a result of patent misuse, the administrative law judge found that the "package licensing arrangements constituted tying arrangements that were illegal under analogous antitrust law principles."[38] In light of the administrative law judge's finding, Phillips petitioned the Commission for review of the decision. After review, the Commission affirmed the administrative law judge's ruling stating that, "Philips's package licensing practice 'constitutes patent misuse per se as a tying

[34] Id.
[35] Id.
[36] Id.
[37] Id. at 1184
[38] Id.

arrangement between (1) licenses to patents that are essential to manufacture CD-Rs or CD-RWs according to Orange Book standards and (2) licenses to other patents that are not essential to that activity.'"[39]

ii. Federal Circuit of Appeal's Analysis

On appeal, the Federal Circuit reversed the Commission's decision. In its analysis, the Federal Circuit explicitly rejected the concept put forward by the Commission that a pooling arrangement containing both essential and non-essential patents constitutes a tying arrangement with an anticompetitive effect. First, if no commercially feasibly alternatives exist to the non-essential patent that are included in the pool, then the inclusion of that non-essential patent cannot have an anticompetitive effect in the market place—in other words, competition with an alternative product cannot be foreclosed upon when there is no alternative product.[40]

Second, even if a commercially feasible alternative exists to the non-essential patent, the Circuit puts forth an economic based rational for why pooling essential and non-essential patents together does not constitute unlawful tying. In a fixed licensing fee pool, the licensor is simply guaranteeing to the licensee that it will not sue them for engaging in any conduct covered by the entire group of patents in the pool.[41] In this regard, the patent-to-patent tying arrangement is very different from the patent-to-product tying arrangement. In the typical patent-to-product tying agreement, the patent holder

[39] Id.
[40] Id. at 1194.
[41] Id. at 1190.

conditions licensing the patent to the licensee upon the licensee's purchase of a product in a separate market, thereby stifling competition with that product in that separate market.[42] Furthering the economic rational, the Circuit stated:

> It is entirely rational for a patentee who has a patent that is essential to particular technology, as well as other patents that are not essential, to charge what the market will bear for the essential patent and to offer the others for free. Because a license to the essential patent is, by definition, a prerequisite to practice the technology in question, the patentee can charge whatever maximum amount a willing licensee is able to pay to practice the technology in question. If the patentee allocates royalty fees between its essential and nonessential patents, it runs the risk that licensees will take a license to the essential patent but not to the nonessential patents. The effect of that choice will be that the patentee will not be able to obtain the full royalty value of the essential patent. For the patentee in this situation to offer its nonessential patents as part of a package with the essential patent at no additional charge is no more anticompetitive than if it had surrendered the nonessential patents or had simply announced a policy that it would not enforce them against persons who licensed the essential patent. [43]

Therefore, without introducing evidence of the exact royalty each patent in the pool commands, a pool with essential and non-essential patents will be deemed as contributing the non-essential patent into the pool for no additional value.

Lastly, in holding that the inclusion of non-essential patents in the CD pool did not constitute patent misuse, the Circuit Court detailed the general precompetitive benefits of pools. Mainly, in ensuring that a "single licensing fee will cover all the patents needed to practice a particular technology and protecting against the unpleasant surprise for a licensee who learns, after making a substantial investment, that he needed a license

[42] Id. at 1189-1190. citing International Salt Co. v. United States, 332 U.S. 392 (1947)
[43] Id. at 1191-1192.

to more patents than he originally obtained, a pool will offer the precompetitive effect of reducing the uncertainty in entering an area of a technology market.[44]

g. *Essentiality after Phillips*

While the Federal Circuit's decision can be limited to hold that the Commission incorrectly determined that the "essential" pool contained non-essential patents due to the fact that patents are only considered non-essential if they are commercially viable alternatives, the more expansive interpretation of Phillips is that the Federal Circuit held that the inclusion of, in specific circumstances, non-essential patents in a pool will not bring about a presumption of anticompetitive tying. In regard to the current state of the law, it is still unclear if Phillips created a precedent for allowing non-essential IP rights into a pool; and if it did create a precedent, how will the Federal Circuit's decision undermine the DOJ's guidelines that expressly disallow nonessential IP rights entry into a pool?

Assuming that the Federal Circuit's holding is limited to finding that the Commission incorrectly identified non-essential patents, the confusion present in this case can be directly linked to the DOJ's ever evolving definition of essential. Even the Federal Circuit's definition, which seems to borrow heavily from the DVD-3C business review letter, provides incomplete guidance for the patent holder seeking to form a pool; however, the Federal Circuit's decision does seem to provide better guidance for those respondents' seeking to avoid liability for infringement by instituting a patent misuse claim.

[44] Id. at 1193