Patent Tying: Does Price Discrimination Promote Innovation? (Part 3)

by Howard Ullman on February 17, 2012

Returning to the subject of patent tying, price discrimination, and the promotion of innovation, Christopher Leslie's recent article comes to the following conclusions:

1. Tying law should apply equally to patent tie-ins as to other tie-ins.

2. Tying law generally should be "fixed" by requiring proof of anticompetitive effects. In other words, *per se* treatment should be jettisoned. (In reality, although many courts still speak of *"per se"* illegal tying offenses, they often analyze competitive effects. But there is language in some relatively recent cases suggesting that the offense of *per se* illegal tying may still exist.)

3. So long as the elements of a tying claim (including anticompetitive effects) are proven, then the fact that the patentee was using the tie-in as a metering device should be irrelevant.

I personally suggest that point no. 2 above makes eminent sense. Point no. 3 at least has the advantage of simplicity of administration. But I find, perhaps surprisingly, that point no. 1 is the most interesting one. For one thing, it may be overbroad. Patent law, after all, distinguishes between staple products (those that have uses unrelated to the patented product) and non-staple products (which are specially designed for use with the patented product). Sale of a non-staple product can, at least under certain circumstances, amount to contributory patent infringement. So if non-staple products are in some sense within the scope of the patent grant, why shouldn't a patentee be able to engage in metered tying without worrying about tying law?

Additionally, the existence of a patent is probably some evidence of at least some sort of innovation in the patented product. In the ordinary tying case involving unpatented products, there may be no such presumption. And although some patentees can directly meter usage instead of using a tie in, as Leslie suggests, in some cases that may not be possible. For example, suppose a company has a patent on a razor design, which utilizes unpatented blades. Each consumer may buy only one razor, which lasts many years (or decades). As a practical matter, it may not be possible to meter the razor usage — but it is relatively easy to meter the blade usage.

So perhaps the rule should be: as to staple products, or as to tied products where metering of the tying, patented product is a practical alternative, the tying rules should be the same.

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