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The Taiwanese 'Philips' CD-R cases: Abuses of a monopolistic position, cartel and compulsory patent licensing

Kung-chung LIU
Singapore Management University, kcliu@smu.edu.sg

Chapter 6

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Kung-Chung Liu

1. INTRODUCTION

A Compact Disc (CD) is an optical disc used to store digital data, originally developed for storing digital audio. The CD, available on the market since October 1982, was jointly developed by Philips (Dutch) and Sony (Japanese). The technology was later adapted and expanded following the standards set by Philips and Sony in a series of Red Book, Yellow Book and Orange Book to include data storage CD-ROM (Read Only Memory), write-once audio and data storage CD-R (Recordable), rewritable media CD-RW, Video Compact Discs (VCD), Super Video Compact Discs (SVCD), PhotoCD, PictureCD, CD-i, and Enhanced CD. The dye materials developed by Taiyo Yuden (Japanese) made it possible for CD-R discs to be compatible with Audio CD and CD-ROM discs.[1] Philips, Sony and Taiyo Yuden have pooled their patents together and started to jointly license the pooled patents through a Joint Licensing Agreement (JLA), in 1992 with one royalty formula: 3% of the net sales price and not lower than ¥ 10.

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1 <http://en.wikipedia.org/wiki/CD-R> (last visited 15 Sep. 2009).

Christopher Heath and Anselm Kamperman Sanders (eds), Landmark Intellectual Property Cases and Their Legacy, pp. 1–22

Philips was designated as the sole contact for licensing the pooled patents. Taiwanese manufacturers secured licenses from Philips sometime in 1996 and managed to occupy 80% of CD-R's world market in 2003.

The market price of a CD-R disc at the time the said licensing agreements were entered into was approximately ¥ 300, and any difference between 3% of the net sales price and ¥ 10 would have been negligible. As the market price of CD-Rs in the meanwhile dropped drastically, [2] the minimum royalty of ¥ 10 presented unbearable burdens. Philips et al. refused to accommodate repeated requests from Taiwanese licensees to lower the minimum royalty of ¥ 10 to reflect the falling prices of CD-Rs. A dilemma similar to that of 'The Merchant of Venice' emerged; whether it would be better to cut a pound of flesh and die to honour the contract, or to find a way to render the contract unenforceable, or to annul it. Taiwanese CD-R manufacturers disagreed amongst themselves and legal cases ensued.

The Taiwanese Fair Trade Commission (TFTC) found abuse in those cases of a joint monopolistic position and cartels among Philips et al. While the Taipei Administrative High Court upheld the first finding and overruled the second, it took into consideration the fact that the TFTC imposed NT$ 8 million, NT$ 4 million, and NT$ 2 million fines on Philips, Sony and Taiyo Yuden, respectively, in one administrative decision (not three administrative decisions) and found itself unable to render an 'affirmed-in-part, vacated-in-part' decision and instead compelled to rescind the TFTC's decision completely. Both the TFTC and the complainant appealed the case to the Supreme Administrative Court which rejected the appeal on 4 April 2007.[3] The TFTC filed a retrial petition to the Supreme Administrative Court. The retrial petition was rejected by the Supreme Administrative Court on 18 June 2009.[4]

The Taiwanese Intellectual Property Office (TIPO), however, did see fit to grant a compulsory patent license against Philips, before later annulling same – both decisions were made upon application. Despite the fact that on 31 May 2007 TIPO annulled the compulsory license with immediate effect, the Taipei Administrative High Court rescinded TIPO's decision to grant such a compulsory license.

The ramifications of these cases have been great. The Court of Appeals for the Federal Circuit (CAFC) of the US, as well as the European Commission of the European Union (EU) were called upon. Philips, Sony and Taiyo Yuden were forced to change their licensing patterns and license their patents

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[2] The retail price of a CD-R disc was around US$ 50 to US$ 60 when it was first put on market in the early 1990s. When production started to gain momentum, the retail prices decreased to a level of around US$ 10 to US$ 15. By 1997, the trade price for a CD-R disc dropped significantly to around USD 2.55. By 2000, the worldwide prices for a CD-R disc fell further to US$ 0.44 and continued to fall to US$ 0.2 in 2006. See European Commission, TBR Investigation Report, Report to the Trade Barriers Regulation Committee, 30 Jan. 2008 (hereinafter TBR Report), which is available at: <http://ec.europa.eu/trade/issues/respectrules/tbr/cases>, para. 34 (last visited on 15 Sep. 2009).

[3] The Supreme Administrative Court, 4 Apr. 2007, Panzi 553 (2007).

[4] The Supreme Administrative Court, 18 Jun. 2009, Panzi 661 (2009).

separately, the CD-R industry in Taiwan suffered on account of an ailing market, and the applicant for compulsory license, that is Gigastorage, moved out of Taiwan and relocated its production lines to countries in which Philips et al. do not have patents. The TFTC substantially revised some of its Guidelines on Technology Licensing Agreements, and TIPO proposed new provisions for compulsory patent licensing to be included in the Patent Act. In the following, this paper will address the issues at the core of these cases, namely the abuse of a joint monopolistic position, cartel, compulsory patent licensing, and then look into the aftermath of these cases, concluding with some prospects for the future.

2. ABUSE OF A JOINT MONOPOLISTIC POSITION

In 2000, Princo et al., Taiwanese CD-R manufacturers, accused Philips et al. of abusing their monopoly power in the CD-R market through patent pooling and the JLA to demand excessive royalties, of engaging in cartels by bundling patents and by licensing in packages, of tying in patents that have already expired and of obscuring information about the patents to be licensed. On 20 January 2001 the TFTC found that Philips et al. had a joint monopoly power in the CD-R patent-licensing technology market: they own all the important patents for the manufacture of CD-Rs, any production and sales of CD-Rs in the world must acquire license from them; they were therefore found to have an overwhelmingly superior position to exclude competition and enjoy a worldwide monopolistic status (Philips I).

2.1. IMPROPERLY MAINTAINING PRICES

Philips I looked into the drastic price drop (US$ 7 for one CD-R in 1996, and less than US$ 0.5 in 2000) and the sixty-fold growth in volume worldwide (from 182 million in 1997 to 3.6 billion CD-Rs in 2000). It was concluded that, by Philips et al.'s refusal to negotiate with its licensees regarding the matching of its royalty scheme to the market situation, the conglomerate could expect to see royalties in 2000 twenty to twenty-six times more than the expected amount. Hence Philips et al. were found guilty of abusing their joint monopoly market power through charging royalties far in excess of those expected by the licensors and were therefore in violation of section 10(2) and (4) of the Fair Trade Act.[5] Philips et al. appealed the Philips I decision to the Executive Yuan (the Cabinet), which was not convinced by the TFTC's determination of the relevant product market and vacated the Philips I decision, remanding it back to the TFTC. The TFTC reached a decision on 25 April 2002 (Philips II) with the same

[5] Section 10 of the Fair Trade Act provides: No monopolistic enterprises shall: (1) directly or indirectly prevent any other enterprises from competing by unfair means; (2) improperly set, maintain or change the price for goods or the remuneration for services; (3) make a trading counterpart give preferential treatment without justification; or (4) otherwise abuse its market power.

conclusions. Philips II was appealed to and upheld by the Executive Yuan. Philips et al. appealed the case to the Taipei Administrative High Court. On 11 August 2005 the Taipei Administrative High Court concurred with the TFTC on its finding of an abuse of joint monopolistic market power.[6] The TFTC came to the same determination on 29 October 2009 in Philips III.[7]

2.2. OTHER EXPLOITATIVE ABUSES

Philips et al. were also found by the TFTC in Philips I, II and III to be elusive about important trading information such as the contents, scope, terms and number of patents they individually owned. Moreover, the TFTC found that the defendants' demand that licensees withdraw their invalidity applications against defendants' patents as a precondition for concluding the licensing contracts was an improper exercise of patent rights. All of this amounted to a so-called exploitative abuse of monopoly power and therefore violated section 10(4) of the Fair Trade Act. On 11 August 2005 the Taipei Administrative High Court also concurred with the TFTC on its finding.

3. DID THE DEFENDANTS FORM A CARTEL?

3.1. CONFIRMED BY THE TFTC

Philips I and II found that Philips et al. were in violation of section 14 of the Fair Trade Act by engaging in two cartel activities.[8] First, Sony and Taiyo Yuden promised Philips that 'all the licensing requests on their patents at issue would be forwarded to Philips, and no other licensing agreements would be made, except for other cross-licensing agreements of a broad coverage'. Second, Philips, in its

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[6] Taipei Administrative High Court, 11 Aug. 2005, Sutze No. 908 (2003).

[7] TFTC, Gongchuzi 098156 (2009).

[8] Article 14 of the Fair Trade Act provides: No enterprise shall have any concerted action; unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and in the public interest, and the application with the central competent authority for such concerted action has been approved.

response to the complainants, stated that 'Philips, Sony and Taiyo Yuden have all agreed that there is only one way of calculating royalty.' Such cartel activities were sufficient to affect the market function of producing and trading products or providing services, because Philips et al. owned all the patents necessary for the production of CD-R disks and thus together possessed a worldwide monopoly status; the collective licensing left no room for individual licensing. The TFTC ordered that Philips et al. license their patents separately.

3.2. DENIED BY THE TAIPEI ADMINISTRATIVE HIGH COURT AND THE SUPREME ADMINISTRATIVE COURT

The qualification of a horizontal competition relationship is the prerequisite for the application of cartel prohibition of the Fair Trade Act. According to Philips I, defendants were horizontal competitors in the CD-R patent-licensing market despite the assertion made by Philips et al. that the patents they owned were collectively necessary and not interchangeable for the production of a certain product, and that the patents complemented each other. What was decisive was that Philips et al. admitted that they still offered individual licenses competitively, and in addition, each defendant had its own R&D and did compete against the others at the beginning stage of R&D for CD-R. Philips II emphasized that each defendant was potentially capable of developing other substitutable technology which could compete with other defendants; and that the patents owned by defendants were in fact interchangeable to some extent.

However, the Taipei Administrative High Court was of a totally different opinion, because it was guided by the following facts: (1) The TFTC had determined the 'CD-R technology market' as the relevant market; (2) What the TFTC defined as CD-R was a product produced in accordance with the standards specified in the Orange Book set up by Philips and Sony; (3) Local CD-R manufacturers must use all the patents owned by Philips et al. in order to make CD-Rs; (4) Using patents of any one of the three companies would not be sufficient to manufacture CD-Rs; (5) Therefore, patents owned by Philips et al. were complementary in nature and every pooled patent was indispensable, which made the patented technology no longer substitutable, and no competition relationship was possible between Philips et al.

The Taipei Administrative High Court's finding of 'no substitutability for the patented technology and no competition relationship between Philips et al.' was not questioned, but rather recognized by the Supreme Administrative Court as 'ascertaining the facts according to the law'.

4. THE COMPULSORY PATENT LICENSING

In recent years, compulsory patent licensing has been in the focal point of the international IP arena. While compulsory patent licenses for life-saving medicines against, for example, HIV and other epidemics have found worldwide sympathy and led to many international initiatives, compulsory patent licenses aimed at preserving competition by, for example, curbing the network effects and mitigating the pinch caused by the need to comply with de jure or de facto industry standards, have been confronted with a cold shoulder from more-developed countries and even harsh criticism and threats to take WTO counter-measures. Compulsory patent licenses in Taiwan coincide with the global trend just described.

4.1. TIPO'S DECISION TO GRANT A COMPULSORY PATENT LICENSE AGAINST PHILIPS

In July 2002, GigaStorage, a Taiwanese CD-R manufacturer and licensee of CD-R patents held by Philips, pursuant to relevant provisions of the Patent Act,[9] filed with TIPO an application for compulsory licensing of five Taiwanese patents owned by Philips, after having tried to no avail to negotiate with Philips to reduce the royalty to reflect the falling prices of CD-Rs. It was the first application since the enactment of the Patent Act in 1949. TIPO came to a decision two years later (in 2004) and permitted the applicant to use the five patents, primarily to satisfy the needs of domestic market until the dates when they would expire (ranging from 26 January 2007 to 19 December 2009).[10] TIPO, wisely, did not touch upon the sensitive issue of appropriate compensation, since the object of the application for compulsory license was limited to the granting of such and did not involve the calculation of compensation. However, no agreement on the calculation of compensation has ever been reached between the two parties. The administrative grievance process brought by Philips was rejected by the Ministry of Economic Affairs (MOEA) in June 2006. Philips filed an appeal with the Taipei Administrative High Court in August 2006.

4.2. TIPO'S DECISION TO ANNUL THE COMPULSORY PATENT LICENSE

GigaStorage and Philips filed applications with TIPO to annul the compulsory patent license on 23 April 2006 and 5 May 2006, respectively. Among other reasons, GigaStorage's main consideration was that it would cease to manufacture CD-Rs in Taiwan on 31 May 2007 and that the compulsory license would no longer be needed. Philips's application was based on the grounds that the licensee had exceeded the limitation of 'primarily for domestic market' by exporting more than

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[9] Section 76(1) and (2) of the Taiwanese Patent Act provide: (1) In order to cope with the national emergencies, or to make non-profit-seeking use of a patent for enhancement of public welfare, or in the case of an applicant's failure to reach a licensing agreement with the patentee concerned under reasonable commercial terms and conditions within a considerable period of time, the Patent Authority may, upon an application, grant a right of compulsory licensing to the applicant to put the patented invention into practice; provided that such practicing shall be restricted mainly to the purpose of satisfying the requirements of the domestic market. However, if the application for compulsory licensing of a patent right covers semiconductor technology, such application may be allowed only if the proposed practicing is purposed for a non-profit-seeking use contemplated to enhance the public welfare. (2) In the absence of the conditions set forth in the preceding Paragraph, the Patent Authority still may, upon an application, grant to the applicant a compulsory license to practice the patented invention in the event that the patentee has imposed restrictions on competition or has committed unfair competition, as confirmed by a judgment given by a court or a disposition made by the Fair Trade Commission of the Executive Yuan.

[10] For more details of the case see Kung-Chung Liu, 'Interface between IP and Competition Law in Taiwan', The Journal of World Intellectual Property 8 (November 2005): 738–741.

50% of its produce manufactured under the compulsory license. Philips went on to demand that the license be retroactively annulled, in the hope of eradicating the precedential effect of TIPO's decision. On 31 May 2007 TIPO decided to annul the compulsory license with immediate effect instead of a retroactive revocation as requested by Philips. Its reasoning was twofold; GigaStorage no longer needed to use the patents and no other public interest was at stake, and the evidence provided by Philips could not directly prove that GigaStorage had exported more than 50% of its production made under the compulsory license.[11]

4.3. THE TAIPEI ADMINISTRATIVE HIGH COURT RESCINDED TIPO'S DECISION TO GRANT A COMPULSORY PATENT LICENSE

Regardless of the fact that TIPO annulled the compulsory license with immediate effect on 31 May 2007, and that the compulsory license was granted only to GigaStorage, the Taipei Administrative High Court rescinded the decisions of TIPO on 13 March 2008, on the grounds that when determining 'the reasonable commercial terms', TIPO failed to take into consideration factors other than the way royalty is calculated, such as the profit concerns of the licensor and licensee, the shared risks, the reputation of the technical brand, market demand, the scope and duration of the license, the licensed technology, competition within the industry, market conditions for licensing and other terms of licensing.[12] On 10 April 2008 TIPO decided not to appeal the decision, which made the case final, given the fact that GigaStorage and Philips had entered into a settlement agreement on 29 October 2007.[13]

5. THE RAMIFICATIONS ABROAD

5.1. IN THE US: RAISING THE PATENT MISUSE ISSUE UNDER THE PATENT ACT

In 2002 Philips US (Complainant) resorted to the ITC and filed with it an application to apply section 337 of the US Customs Act in order to stop the importation of CD-R disks made by GigaStorage and Princo, who had not settled with it (Respondents) on the charge of infringing its US patents. The Respondents raised the defence that the patents at issue were unenforceable because the Complainant had engaged in patent misuse involving the creation of an unlawful patent pool and the use of its power to control the US CD-R and CD-RW disk markets. So, what

[11] TIPO, 31 May 2007, Zhifazi No. 09618600360.
[12] Taipei Administrative High Court, 13 Mar. 2008, Suzi No. 2783 (2006).
[13] For more details see Kung-Chung Liu, 'Rationalising the Regime of Compulsory Patent Licensing by the Essential Facilities Doctrine', International Review of Industrial Property and Competition Law (IIC) 39 (2008): 762.

was under dispute was in effect the applicability of 35 USC 271(d)(5), which was introduced into the US Patent Act in 1988 by the Patent Misuse Reform Act. 35 USC 271(d)(5)(d) reads as follows:

‘No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (5) conditioned 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 in the relevant market for the patent or patented product on which the license or sale is conditioned.’

On 24 October 2003 the Administrative Law Judge (ALJ) of the IFC, Sidney Harris, reached the final Initial Determination (ID) of patent misuse not only by the per se test, but also by the rule of reason test, which rendered the patents unenforceable. On review, the Commission affirmed the ALJ’s conclusion that the asserted patents were unenforceable for patent misuse per se, but on different grounds: Philips’s practice of mandatory package licensing constituted a tying agreement between license for essential patents and license for non-essential patents. Philips appealed the Commission’s decision to the CAFC. On 21 September 2005 the CAFC reversed the Commission’s decision of no violation of section 337 of the US Customs Act and remanded the case for further proceedings.[14] The Supreme Court denied the petition brought by GigaStorage for a writ of certiorari on 19 June 2006. On 5 February 2007 the ITC reversed the ALJ’s findings of patent misuse, found a violation of section 337 and imposed a general exclusion order prohibiting the entry of CD-R made by GigaStorage and Princo.[15] GigaStorage and Philips entered into a settlement agreement on 29 October 2007 to resolve their US litigation, settling all of GigaStorage’s debts towards Philips for CD-R production up to and including 23 September 2007.[16] The settlement between GigaStorage and Philips did not persuade Princo to make peace with Philips. Instead, it appealed the ITC’s decision on 5 February 2007 to the CAFC, which rendered a decision on 20 April 2009 (for more details see supra section 5.1.5.).

5.1.1. Philips Has Market Power in the Relevant Market

According to the CAFC, although section 271(d)(5) does not define the scope of the defence of patent misuse, but merely provides a safe harbour against the charge of patent misuse for certain kinds of conduct by patentees, the statute makes clear that the defence of patent misuse differs from traditional antitrust law principles in an important respect, as applied to tying arrangements involving patent rights. In the case of an antitrust claim based on a tying arrangement involving patent

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[14] US Philips v. Int’l Trade Commission, 424 F.3d 1179 (Fed. Cir. 2005).

[15] USITC, 337-TA-474. Notice 1170697224 (5 Feb. 2007), available at <www.usitc.gov> (last visited on 19 Jun. 2009).

[16] TBR Report, Executive Summary, para. 6.

rights, ownership of a patent on the tying good is presumed to give the patentee monopoly power. Section 271(d)(5) makes clear, however, that such a presumption does not apply in the case of patent misuse. To establish the defence of patent misuse, the accused infringer must show that the patentee has power in the market for the tying product.[17]

The CAFC sustained the ruling made by the ALJ and the ITC that,[18] although Philips has no market power in the worldwide product market for CD-R/RW (combined with its licensor-partners, it has only 8.8% and 13% of CD-Rs worldwide output and sales, and 2% and 10% of CD-RWs worldwide output and sales in 2002), Philips and its licensor-partners do have the market power of an absolute monopoly in the licensing market. This is because there is no manufacturing without license from Philips (and its licensor-partners), and Philips had been able to maintain the royalty rates (now representing 50%–70% of today's average net selling price, and X times [the actual times was a commercial secret and therefore not disclosed] of those of individual rates worked out between Philips and its Taiwanese licensees after the FTC's decision that demanded separate licensing) above competitive levels for a significant period of time.

5.1.2. Package License of 'Essential' and 'Non-essential' Patents

Initially, Philips offered four different pools of patents for licensing: (1) a joint CD-R patent pool including patents owned by Philips and two other companies (Sony and Taiyo Yuden); (2) a joint CD-RW patent pool including patents owned by Philips and two other companies (Sony and Ricoh); (3) a CD-R patent pool including only patents owned by Philips; and (4) a CD-RW patent pool including only patents owned by Philips. After 2001, Philips offered additional package options by grouping its patents into two categories, 'essential' and 'non-essential', for producing compact discs compliant with the technical standards set forth in the Orange Book. The 'essential' and 'non-essential' patents are licensed in package, however licensees do not have to pay any additional royalty fee for 'non-essential' patents.[19]

5.1.3. No Patent Misuse under Per Se Analysis

In light of the efficiencies of package patent licensing, that is the pro-competitive effect of reducing the degree of uncertainty associated with investment decisions, and the important differences between product-to-patent tying arrangements and arrangements involving group licensing of patents, the CAFC rejected the presumption that Philips's conduct showed a 'lack of any redeeming virtue' and could be 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for

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[17] US Philips v. Int'l Trade Commission, 424 F.3d 1186 (Fed. Cir. 2005).
[18] Ibid., para. 17.
[19] Ibid., para. 3.

their use'. To apply the rule of per se illegality to Philips's package licensing agreements would be legally flawed.[20]

5.1.4. No Patent Misuse under Rule of Reason Analysis

The CAFC concluded that Philips's inclusion of the four allegedly non-essential patents in the package licenses did not constitute patent misuse under the rule of reason either, because the record did not disclose that 'any commercially viable alternative actually existed' to those patents and therefore no 'anticompetitive effects on competitors offering alternatives to' those patents can be resulted therefrom.[21]

5.1.5. Even if Philips and Sony Agree to Suppress Sony's Technology, Such an Agreement would not Constitute Patent Misuse

On Princo's appeal, a divided panel of the CAFC ruled on 20 April 2009 against the ITC and Philips. Although the panel rejected several of Princo's arguments, it vacated the ITC's remedial orders and remanded the case for further proceedings on one issue: (1) whether Lagadec (patent owed by Sony with a digital modulation method) was a potentially workable alternative to the Orange Bol technology (the Raaymarkers patents owned by Philips with an analog solution) and (2) whether Princo has established that Sony and Philips agreed that Lagadec would not be licensed in a manner allowing its development as competitive technology.[22] Philips, Princo and the ITC all field petitions for rehearing en banc. The CAFC granted the petitions field by Philips and the ITC, but denied the petition filed by Princo. However, the CAFC addresses only one issue raised by Philips, namely regardless of whether Philips and Sony agreed to suppress the technology embodied in Sony's Lagedec patent, such an agreement would not constitute patent misuse and would not be a defense to Philips's claim of infringement against Princo. The CAFC concludes that the conduct alleged in this case is not the type of conduct that could give rise to the defense of patent misuse and therefore affirms the ITC's orders granting relief against Princo.[23]

5.2. IN THE EU

On the other side of the Atlantic, Philips filed a complaint with the European Commission on 15 January 2007, alleging that Taiwan maintained trade barriers by granting compulsory licenses to certain patents held by Philips for CD-R, and that such measures were inconsistent with Articles 28 and 31 of the TRIPs Agreement. The Commission concurred with Philips by finding that the application by TIPO of several incorrect interpretations of the TRIPs Agreement, in combination with the

[20] Ibid., para. 41.
[21] Ibid., para. 58
[22] Princo Corporation et al v. Int'l trade Commission, 563 F. 3d 1318-19.
[23] Princo Corporation et al v. Int'l trade Commission, 2007-1386 decided: August 30, 2010, at 13.

standard licensing practices of major licensors of intellectual property (such as Philips) interfered gravely with the free operation of the market; that TIPO had been using compulsory licenses as an industrial policy instrument, and not as a limited exception to the use of patent rights. The Commission reported to the Trade Barriers Regulation Committee (TBR) on 11 January 2008, recommending that the

Commission initiate WTO action against Taiwan if concrete steps were not taken by Taiwan to amend its Patent Act and to ensure that the precedential effects of the measures were eliminated, including ensuring that the compulsory licenses were revoked in their entirety within two months from the transmission of this report to the TIPO. Its reasons were the following:

(1) Violation of Article 28 of the TRIPs Agreement[24] Section 76 of the Taiwanese Patent Act, which permits the granting of a compulsory license in situations in which there is no longer a refusal to grant a license, on reasonable commercial terms and conditions, and within a reasonable period of time, strips the substance from the exclusive rights granted by a patent and protected by Article 28 of the TRIPs Agreement, and that inconsistency is not justified by reference to Article 31 of TRIPs Agreement.[25]

(2) Violation of Article 31(b) of the TRIPs Agreement[26] Even if the TRIPs Agreement were to permit a compulsory license because of failure to reach voluntary license on reasonable commercial terms and conditions within a reasonable period of time, the decisions of TIPO are based on an unwarranted interpretation of the notion of ‘reasonable commercial terms and conditions’. TIPO’s interpretation ignores the fact that the first step of any analysis of this term should be done in reference to the market and not to the situations of individual operators. The royalties charged for CD-Rs in the market (either in

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[24] Article 28 (Rights Conferred) of the TRIPs Agreement: (1) A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process. (2) Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

[25] TBR Report, Executive Summary, para. 10; IV. Legal Analysis, para. 107.

[26] Article 31(b), (c), (f) of the TRIPs Agreement: Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive; (d) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.

Taiwan or elsewhere), the value of the patents to Philips and what would be a reasonable return from Philips' point of view, were factors that TIPO failed to take into consideration. For this reason, the decisions of TIPO also violate Article 31(b) of the TRIPs Agreement.

(3) Violation of Article 31(c) of the TRIPs Agreement Article 31(c) essentially establishes a proportionality requirement which requires two elements. First, the identification of a purpose for the grant of a compulsory license and, second, a limit on the scope and duration of the compulsory license to that required to satisfy the purpose of the grant of the compulsory license. The contested decisions do not clearly state a purpose for the grant of the compulsory licenses. As such, it is impossible to conclude that the scope and duration of such use is limited to the purpose of that grant. In any event, there is no limitation on the scope and duration of the compulsory licenses beyond that which is already inherent in the compulsory licenses. Even if the purpose of the compulsory licenses was to bring about reasonable commercial terms, there is no indication which links the scope or duration of the compulsory licenses with the advent of such reasonable commercial terms. For these reasons, the contested decisions do not respect Article 31(c) of the TRIPs Agreement.[27]

(4) Violation of Article 31(f) of the TRIPs Agreement The aforementioned violations of the TRIPs Agreement have been compounded by the failure of TIPO to monitor effectively the manner in which the compulsory licenses have been used. The Commission is of the opinion that a WTO Member granting a compulsory license is obliged to make sure that it can ensure compliance with Article 31(f) by monitoring the use made of a compulsory license. TIPO has failed to meet its obligations in that respect. As a result, there is a violation of Article 31(f) of the TRIPs Agreement.[28]

6. THE AFTERMATH

6.1. AILING CD-R MARKET IN TAIWAN

The price sank even further in 2008, to US$ 0.07.[29] After the JLA was ruled an illegal cartel by the TFTC on 20 January 2001, Philips offered the Philips-only license agreement, setting the royalty rate at US$ 0.06 per disc as a standard rate and US$ 0.045 as a reward rate for those who are in full compliance with the licensing agreement. The reward rate was lowered to US$ 0.035 from the third

[27] TBR Report, IV. Legal Analysis, paras 148, 151, 154.
[28] Ibid., para. 171.
[29] Economic Daily News, 23 Jun. 2008 (published in Mandarin): <www.udn.com> (last visited on 15 Sep. 2009).

quarter of 2004 to the second quarter of 2005. In the beginning of 2006, Philips started to offer the so-called Veeza programme with an even lower reward rate.[30]

An increasingly ailing CD-R market in Taiwan was clearly recognizable alongside the development of the legal cases. Taiwan has held the largest worldwide market share for CD-Rs since around 1998, which peaked in 2003 reaching 80%. However, Taiwan's total output has decreased sharply since then, 36% in 2004, 33% in 2005, and 28% in 2006.[31] Presumably, the difficulties of getting the royalty reduced in proportion to the free fall of CD-R prices on the one hand,[32]and the 'unfair competition' from CD-Rs made in other countries where Philips do not have patents and cannot charge royalties for patents on the other, have contributed to this.[33] In addition, GigaStorage was dealt a severe financial blow by paying Philips a huge settlement fee around USD 31 million, over one-third of its capital.[34]

6.2. NEW CHARGES AGAINST PHILIPS:VIOLATING SECTION 24 OF THE FAIR TRADE ACT?

Philips required the licensees to provide a detailed 'list of manufacturing equipments, suppliers, dates of installing and testing' and 'sales report in writing' (breaking down in countries, product specifications, buyers and trademarks used) thirty days after the end of each quarter. The licensees filed complaints with the TFTC. On 26 April 2006 the TFTC found in its behaviour a violation of the general clause against unfair competition, namely Article 24 of the Fair Trade Act and imposed a fine of NT$ 6 million on Philips.[35]

The TFTC reasoned as follows: demanding a detailed 'list of manufacturing equipments, suppliers, dates of installing and testing' to be provided by licensees

30 TBR Report, para. 16.

31 TBR Report, II. Factual Background, para. 27.

32 Another Taiwan-based CD-R manufacturer, Prodisc, ranking as the fourth largest of its kind in the world, was also forced to discontinue the production of CD-Rs in Taiwan in August 2007, allegedly due to Philips 'unwillingness to reduce the royalty to accommodate falling prices'. United Daily and Economic Daily News, B2, 7 May 2008 (both published in Mandarin): <www. udn.com> (last visited on 15 Sep. 2009).

33 Having no other choice, GigaStorage ceased manufacturing CD-Rs in Taiwan and relocated its production to patent-free countries.

34 Although the actual sum of the settlement fee is kept confidential, its rough figure can be calculated from the loss GigaStorage had to disclose according to Taiwanese Stock Exchange Act. GigaStorage reported a NT$ 3.42 loss per share for the third quarter of 2007, in which the settlement was reached. NT$ 3.42 (loss per share) times the registered capital of NT$ 3 billions equals NT$ 940 million, which can be converted to US$ 31 million at the 30 to 1 exchange rate.

35 Section 24 of the Fair Trade Act stipulates: In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order. For more discussion see Kung-Chung Liu, 'The Unfair Competition Law in Taiwan', International Review of Industrial Property and Copyright Law (IIC) 30 (1999): 377–402.

cannot be justified by the alleged need to enforce payment of royalty, due to the fact that there are regular legal processes available and the 'relativity of obligation (obligation can be enforced only against the obligor)'; given the fact that such lists constituted important commercial information concerning the operation costs and that Philips was competing with its licensees in the CD-R market via brand-licensing, such a demand was a misuse of the relatively superior market position that Philips possessed and might lead to unfair competition.[36] Philips appealed the case to the Executive Yuan which echoed the decision of the TFTC. However, on 20 October 2008, the Taipei Administrative High Court saw the usefulness of this information and therefore annulled the decisions by the TFTC and the Executive Yuan.[37] On 9 September 2010 the Supreme Administrative Court rejected the appeal filed by the TFTC.[38]

6.3. THE TFTC SUBSTANTIALLY REVISED ITS GUIDELINES ON TECHNOLOGY LICENSING ARRANGEMENTS IN 2009

The TFTC promulgated the Guidelines on Technology Licensing Agreements (Guidelines) on 20 January 2001. The Guidelines were revised in 2005 and 2007 exclusively for formatting reasons. In February 2009, part of the Guidelines were substantially amended and followed the European Commission in deleting the so-called grey clauses.[39] The Guidelines cover patents and know-how licenses

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[36] TFTC, 26 Apr. 2006, Gonghuzi 095045 (2006).

[37] Taipei Administrative High Court, 20 Oct. 2008, Suzi No. 3612 (2007).

[38] The Supreme Administrative Court Decision Caizi 2028 (2010).

[39] Point 7 of the 2001 Guidelines illustrated following grey clauses whose legality may be questioned:

(1) Technology licensing arrangement content that is likely to restrain competition or impede fair competition in relevant markets may violate s. 19(6) of the Act. Examples include:
(i) Restrictions involving distinctions between regions in which the licensing is applicable within the territory of Taiwan during the valid term of a patent; likewise, regional restrictions on the use of know-how before the know-how is publicly disclosed or loses its status as a trade secret through no circumstance imputable to the licensor. (ii) Restrictions on the scope of sales or the trading counterparts of the licensee, where the restrictions are unrelated to the areas of application [of the licensed technology]. Restrictions on the areas or scope of applications in which the licensee may practice the licensed technology. (iii) Ceilings restricting the quantity of goods that may be manufactured or sold by the licensee, or the number of times the know-how or patented technology may be used. (iv) Requirements that the licensee must sell goods through the licensor or a person designated by the licensor. (v) Requirements that the licensee pay licensing fees based on the quantity of a particular type of good manufactured or sold irrespective of whether the licensee used the licensed technology. (2) Section 19(1) or (6) of the Act may be violated by requirements that the licensee purchase raw materials or component parts from the licensor or a person designated by the licensor, where such requirements are unrelated to reasonable and necessary efforts to assure effective utilization of the licensed technology, to maintain the reputation of a trademark associated with the licensed technology or to maintain the secrecy of the know-how involved, and where such requirements are likely to restrain competition or impede fair competition in relevant markets. (3) Section 19(2) of the Act may be violated by licensing arrangements that, without justification, give discriminatory treatment to licensees with regard to the terms of the arrangement or licensing fees,

(Point 2(2) of the Guidelines). Following the US path, the Guidelines do not presume that the licensor possesses market power simply because he owns a patent or know-how (Point 3 of the Guidelines).

6.3.1. Analytical Steps

Point 4 of the Guidelines delineates the analytical steps that the TFTC will follow:

(a) The Patent Act does not exclude the application of the Fair Trade Act

In reviewing technology licensing arrangement cases, the Commission will first examine the licensing arrangements with respect to Article 45 of the Fair Trade Act.[40] An arrangement, which appears to be proper conduct in connection with the exercise of rights under the Patent Act or other relevant laws, but actually oversteps the scope of proper exercise of rights under such laws and contravenes their legislative purpose of protecting invention and innovation, shall be reviewed under the Fair Trade Act and its Rules.

(b) Impact on relevant markets

When reviewing technology licensing agreements, the TFTC will not be bound by the forms or language used. Instead, the TFTC will concentrate on the possible or actual restraint of competition or unfair competition in the following relevant markets:

(i) 'Goods markets' to which the goods manufactured or provided through use of the licensed technology belong.
(ii) 'Technology markets' defined by technology that is substitutable with the licensed technology.
(iii) 'Innovation markets' in which research and development of relevant goods may take place.

(c) Factors to be considered

In reviewing technology licensing arrangements, in addition to the reasonableness of the provisions of such arrangements, the Commission shall consider the following factors:

(i) The market power of the licensor with regard to the licensed technology.
(ii) The market position of the parties to the arrangement at a relevant market and the status of that market.
(iii) The increase of influence by the licensing arrangement on opportunities for utilization of the technology or exclusion of competition.
(iv) The degree of difficulty of access to the relevant market.
(v) The length of the term of limitations under the licensing arrangement.

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where such discriminatory treatment would be likely to restrain competition or impede fair competition in relevant markets.

[40] Section 45 of the Fair Trade Act reads: No provision of this Law shall apply to any proper conduct in connection with the exercise of rights pursuant to the provisions of the Copyright Act, Trade Mark Act, or Patent Act.

(vi) International or industry precedents applicable to the relevant market for the licensed technology.

6.3.2. White Clauses

The Guidelines contain illustrative White Clauses and Black Clauses. While White Clauses remained unchanged, Black Clauses became more far-reaching, and the original illegal per se stance was relaxed. Unless improper matters were determined after applying Points 3 and 4, Point 5 of the Guidelines prescribes that the following technology licensing arrangements do not intrinsically violate the Fair Trade Act for restraining competition or unfair competition:

(1) Limitations clauses that restrict the scope of use by the licensee to manufacture, use, or sale.

(2) Restrictions on the period of a licensing arrangement that falls within the term of validity of the patent itself. Restrictions on the period of a licensing arrangement prior to the loss of the status as a trade secret and public disclosure of know-how through circumstances not imputable to the licensor.

(3) Stipulations that, for ease of calculation, fees for licensed technology that is part of a manufacturing process or that subsists in component parts are to be calculated on the basis of the quantity of finished goods manufactured or sold that employ the licensed technology, or the quantity of raw materials or component parts used that employ the licensed technology, or the number of times such materials or parts are used in the manufacturing process.

(4) Stipulations that the licensee shall continue to pay fees after expiration of the patent term for use already made of the licensed technology, where the fees for use of a licensed patent are paid in installments or on a postpaid [running royalty] basis. Stipulations that, in the event of public disclosure of the know-how and loss of its status as a trade secret through no circumstance imputable to the licensor, the licensee must continue to pay agreed fees by a certain period and method through the free will of the parties to the arrangement until the expiration or termination of the arrangement.

(5) Stipulations that the licensee shall grant non-exclusive license to the licensor with respect to any improvements in or new applications of the licensed technology.

(6) Stipulations that the licensee shall, to the best of its ability, manufacture and sell goods using the licensed technology.

(7) Stipulations that, during the licensing period or after the expiration of the term of the licensing arrangement, impose on the licensee the obligation to maintain the secrecy of any know-how that retains the status of a trade secret.

(8) Clauses that, in order to guarantee the licensor a minimum amount of revenue from licensing fees, require the licensee to produce a minimum volume of goods employing the licensed technology, to employ the licensed technology a minimum number of times in the manufacturing process, or to sell a minimum quantity of goods manufactured with the licensed technology.

(9) Requirements that the licensee shall maintain a certain level of quality with respect to the goods, raw materials, or component parts of the goods that employ the licensed technology insofar as is necessary to ensure effective utilization of the licensed technology and maintain a certain level of quality in the licensed goods.

(10) Stipulations that the licensee may not transfer or sublicense the licensed technology, except where otherwise agreed by the parties to the licensing arrangement.

(11) Stipulations that the licensee may not continue to use the licensed technology after the expiration of the term of the licensing arrangement insofar as the licensed patent remains valid or the licensed know-how remains a trade secret.

6.3.3. Black Clauses

Point 6 of the Guidelines lists arrangements that are illegal either per se or according to a rule of reason analysis:

(i) Arrangements between parties to a licensing arrangement who are in a competitive relationship, in which through contract, agreement, or other form of mutual understanding they jointly determine the price of the goods employing the licensed technology, or restrict quantities of goods, trading partners, trading regions, or areas of research and development, thus mutually restricting each other's business activities in a manner sufficient to influence the functions of the relevant market According to Point 7, such arrangements per se are in violation of section 14 of the Fair Trade Act.

(ii) Licensing arrangements that involve any of the following contents and are likely to restrain competition or to impede fair competition in relevant markets, are prohibited:

(1) Restrictions on the licensee during and after the expiration of the licensing agreement with respect to research and development, manufacture, use, sale or adoption of competing technology.

(2) Restrictions on the licensee with respect to the scope of use of the licensed technology, or trading counterparts, in order to achieve the segregation of customers or other purposes irrelevant to the scope of the licensing agreement.

(3) Mandatory requirements that the licensee purchase, accept, or use patents or know-how not needed by the licensee.

(4) Mandatory requirements that the licensee license back exclusively to the licensor any improvements to the licensed patent or know-how.

(5) Restrictions on the licensee's free use of the technology in question or requirement of payment of fees after the expiration of patents or the public disclosure of the know-how through circumstance not imputable to the licensee.

(6) Restrictions on the licensee's prices to third parties for licensed products it manufactured or produced.

(7) Restrictions on the licensee's ability to challenge the validity of the licensed technology.

(8) Refusal by the licensor to provide the licensee with information about the content, scope, or term of the licensed patents.

(9) Segregation of licensed areas within the national boundaries during the term of patents; regional limitations on the licensed know-how within the national boundaries prior to the loss of secrecy by public disclosure of the know-how through circumstance not imputable to the licensor.

(10) Caps on the amount of products that the licensee may

manufacture or sell; caps on the number that the licensee may practice the patents or know-how.

(11) Restrictions that the licensee must sell through the licensor or parties designated by the licensor.

(12) Requirements that the licensee must pay royalty pursuant to the amount of certain products manufactured or sold, regardless of the fact whether the licensee has actually practiced the licensed technology.

According to Point 7, violation of the above provisions would probably contravene section 19(6) of the Fair Trade Act:[41]

(iii) The licensor may not command the licensee to purchase materials and parts from the licensor or persons designated by the licensor, which exceeds the reasonable boundary of fulfilling specific function of the licensed technology, preserving the reputation of the licensed products, or of maintaining the secrecy of the know-how, and which is likely to

[41] Section 19 of the Fair Trade Act reads: No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: (1) causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise; (2) treating another enterprise discriminatively without justification; (3) causing the trading counterpart(s) of its competitors to do business with itself by coercion, inducement with interest, or other improper means; (4) causing another enterprise to refrain from competing in price, or to take part in a merger or a concerted action by coercion, inducement with interest, or other improper means; (5) acquiring the secret of production and sales, information concerning trading counterparts or other technology related secret of any other enterprise by coercion, inducement with interest, or other improper means; or (6) limiting its trading counterparts' business activity improperly by means of the requirements of business engagement.

restrain competition or to impede fair competition in relevant markets. According to Point 7, a violation would probably contravene section 19(1) or (6) of the Fair Trade Act.

(iv) The licensing agreement may not discriminate without due cause against the licensee in trading terms and royalty fee which is likely to restrain competition or to impede fair competition in relevant market. According to Point 7, a violation would probably violate section 19(2) of the Fair Trade Act. According to Point 7, when a party to a licensing arrangement, which violates Point 6, is a monopolistic enterprise, there would be a probable contravention of section 10 of the Fair Trade Act.

6.3.4. Evaluation of the Guidelines[42]

The 2009 Guidelines retain an itemized style and give no detailed reasoning or examples, which in reality can easily lead to formalistic application instead of the rule of reason approach. To the disappointment of local industries that are highly dependent on patent pools and standards, the Guidelines fail to crystallize from the Philips cases guiding principles with regard to those issues. Furthermore, it is unclear why the Guidelines have not incorporated the legally binding judgment made by the TFTC and Taipei Administrative High Court, namely the maintenance of a fixed royalty regardless of sharp price fall by a monopoly constitutes abuse of a monopolistic position. Is it because the Supreme Administrative Court did not express its opinion on this issue? Or has the TFTC some reservation to generalize such ruling into a principle? It begs for some explanations.

6.4. THE IP COURT AWARDED PHILIPS FULL ROYALTY DESPITE OF VIOLATION OF ARTICLE 10 OF THE FAIR TRADE ACT

According to Philips, Princo had signed a licensing agreement with it on 23 June 1997, but only paid royalty for one quarter and subsequently ceased to pay from the 4th quarter of 1997. Philips was forced to terminate the licensing agreement on 21 March 2000. Philips filed suit for royalty payment in around 2000. The Shinju District Court soon suspended the trial due to the then pending antitrust cases brought by Princo. It resumed the trail when the Supreme Administrative Court

[42] For an evaluation of the 2001 Guidelines see Kung-Chung Liu, supra n. 13, 757.

rejected the appeal filed by the TFTC on 4 April 2007. The Shinju District Court came to a decision on 15 August 2008 which awarded Philips the full royalty of JPY 2,353,850,000, calculated by JPY 10 times the amount of CD-Rs produced by Prico. The reasoning behind the decision was very straightforward; the licensing agreement was valid despite the fact that it had been found by the Taipei Administrative High Court and confirmed by the Supreme Administrative Court to contravene section 10(2) of the Fair Trade Act. What is really surprising is that the newly-established (1 July 2008) Intellectual Property Court, acting as a court of second instance in a civil case, concurred and did not question the reasonableness of the royalty.[43]

6.5. THE DRAFT COMPULSORY PATENTLICENSING PROVISIONS

TIPO proposes to revise compulsory patent licensing provisions as part of its ambitious effort to overhaul the Patent Act. The gist of this endeavour is to limit TIPO's power to grant compulsory licenses upon application and to empower TIPO to grant compulsory licenses in cases of restraint of competition and unfair competition which have been adjudicated by court or disposed by the TFTC, without having to wait for the decision to become final.

The Patent Act Revision Draft prepared by TIPO has been approved by the Executive Yuan on 3 December 2009 and awaits the enactment by the Legislative Yuan . The draft provides in section 89:

(i) In case of national emergencies other circumstances of extreme urgency, TIPO 'must' grant a compulsory license and notify the patentee as soon as possible when it is commanded by the 'Emergency Decree' issued by the President, or requested by other competent authorities which may need to practice the patent at issue.
(ii) Upon application, TIPO may grant a compulsory license in one of the following cases and only to the extent that it is necessary:
(1) Not-for-profit practice that would enhance public interest.
(2) The practice of an invention patent or a utility model, which possesses important technical improvement(s) with considerable economic significance, would inevitably infringe upon other prior inventions or utility models.
(3) The holder of a plant variety right, which possesses important technical improvement(s) with considerable economic significance, must practice biotech patents of others.
(4) The patentee has imposed restrictions on competition or has committed unfair competition which has been adjudicated by court or disposed by the Fair Trade Commission.

[43] The Intellectual Property Court, Civil Patent Shangzi No. 14 (2008), 23 April 2009..

(iii) The grant of a compulsory license with regard to semiconductor patents is limited to paragraph 2(1) and (4).

(iv) The grant of a compulsory license pursuant to paragraph 2(1)–(3) is only permissible after the applicant has failed to secure a licensing agreement under reasonable commercial terms and conditions within a considerable period of time.

(v) Patentee, whose patent has been compulsorily licensed pursuant to paragraph 2(2)–(3), may file an application with TIPO, with reasonable terms and conditions, for the granting of compulsory license with regard to the new invention patent, utility model and plant variety.

7. FUTURE PROSPECTS

The Philips CD-R cases are bound to be landmark cases in many ways for Taiwan, and hopefully also for countries which try to move upward in the value chain of international separation of labour. The antitrust law, when properly applied, could help balance the interests of IP right holders and commercial IP users who make decisive contributions in the dissemination and proliferation of new products embodying the IP at issue (such as CD-R). However, different jurisdictions may apply antitrust laws to, for example, package licensing of patents, differently. Continuous study of the merits and shortcomings of package licensing of patents is indispensable in the endeavour to understand and mend differences.

In the future, both the TFCT and the Administrative Courts will be better advised to exert more scrutiny on:

1. The other form of improperly maintaining prices by monopolistic undertaking, namely price squeeze. In theory, vertically integrated enterprises in a market of product standardization (not differentiation) are tempted to exercise price squeeze strategy by maintaining the royalty rate for the upstream technology licensing market at high level and thereby squeeze the profits out of technology licensees in the downstream product market, in order that they cannot compete with the licensor, thereby excluding competition in the downstream product market.
2. Patent pools. Patent pools are a two-edged knife. On the one hand, patent pools can reduce transaction costs by avoiding frictions between contesting patentees and speed up the proliferation of new products. On the other, patent pools can raise barriers to the entrance to downstream markets through restriction of use and can be used as a disguise for cartel by horizontally competitive enterprises. Generally speaking, patent pools consisted of complementary patents raise no concerns of restricting competition. By contrast, patent pools consisted of blocking patents are subject to hostile scrutiny from courts. It would be a matter of first priority

to tell a patent pool consisted of complementary patents from that consisted of blocking patents. Otherwise, patent pools can easily elude antitrust screening by asserting their complementary nature and non-competitive relationship between the pool members.