Patent troll through the US and EU antitrust law: When co-operation is no longer an option
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Intellectual Property and antitrust law are seen by most authors to be in opposition to each other. The restrictions on competition created by the exclusivity that Intellectual Property law allows is regarded as an attempt to restrict the market.

However, the issue of the patent troll necessitates a different point of view, as it exists on the borderline of these two laws. Indeed, laws of intellectual property and antitrust must be thought of as complementary. Antitrust law is not designed to appreciate the degree of innovation that will justify the restraint of competition that constitutes a patent. Parallel to this, Intellectual Property law is not designed to maintain competition in the market. When they act in opposition to each other, it necessarily leads to a non-efficient result by the logic of dominant and dominated law.

This study examines the risk created by the patent troll, in European and American law. A company can be called a patent troll when (i) it makes use of a specific patent in order to hinder competition, or (ii) when it creates a portfolio with many patents that seek to protect the same innovation, reffered as patent ambush strategy. It must be underlined that such a portfolio can be pro-competitive for three reasons.

- If an entity detains many patents in a market, it will be easier for other companies to avoid any patent infringement. Dealing with one company decreases the probability of patent infringement.
- Secondly, a single company may be better in enforcing valid patent rights than many independent ones. This company can make sure that others have paid for using the patent, by buying them.
- Finally, in detaining many patents, the company will ask for less money in order to exploit a general licence, compared to the situation where a lot of different companies ask for a licence.

These positive elements of patent troll are accurate and need to be mentioned, even if negative ones are numerous. They called for caution and proportionate solutions.

Patent troll is one of the most serious problems in modern law. For the first time, in 2011, Apple and Google spent more money for patent lawsuit than on research and development. Apple has received more than 4,100 patents since 2000, and Google more than 2,700. Perhaps more impressively, IBM received more than 6,100 patents in 2011 alone. The "too-many patent problem" necessitates understanding how companies use patents, both as a way to protect innovation and to sue other companies. This problem calls for a better patent allocation system if the patents are to achieve its primary goal.

The best solution to securing fair competition on the market appears to be a co-operation between antitrust authorities and the authority granting patents. That will allow a fair protection by Intellectual Property and simultaneously will create a fair and freer market. This proposal calls to be developed through patent troll as the use of specific patents (Part I) and, also, patent ambushes (Part II).

First Part: Patent troll by using different patents

A company may use different kinds of patents as a sword instead of merely protecting their innovations (A). If several solutions can be envisaged to prevent such a problem in the future, only one appears to be satisfactory (B). A.

Presentation of the various types of patent engaged

Other than lawsuit for patent violation which doesn’t involve any patent troll strategy, there are three main kinds of patents—please note that there are regular patents but use in a certain way—that a company may use in order to sue other companies. The first one is called a "Frivolous Patent"; the second one is a "Dormant Patent" and the third is a "Second-Generation Patent".

It is a well-accepted principle that the patent is a key element to expand economic freedom by protecting innovation, as long as the patent is justified by a market reason. Indeed, a patent is a form of property that allows the patent holder to exclude others from its use and enable

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\[\text{*Dennis W. Carlton, "The Economics Of Patent Ambush". Frontiers of Antitrust Conference, 11 February 2011. These three reasons are presented in this article.}\]
\[\text{\textsuperscript{3}}\text{Randy Picker, "Apple v. Samsung: What Are Patents Good For", 25 August 2012, Chicago Law School Faculty Blog. Professor Picker explains here what should be the right inherent philosophy of patents.}\]
\[\text{\textsuperscript{4}}\text{For a better view of this classification, read Marie Malaurie-Vignal "Brevets dormants, brevets assumbls, pratiques de hold-up, que peut faire le droit? Retour sur une rencontre entre le droit de la propri t intellectuelle et le droit de la concurrence" [2012] Revue Dalloz 2325.}\]
the patent holder to avoid competition from someone else using the patent. The primary purpose of the patent is to be able to enforce it. By exploiting the concept of property, this mechanism allows a fair competition.

However, patents can also present a danger for the market. Therefore, it is imperative that only useful, new, and non-obvious ideas are patented. If not, the patenting of futile ideas would lead to oppressive transaction costs for every firm. In the case of the current US patent system, as well as the EU one, a firm who wants to innovate must negotiate with many others which have obtained patents, even on obvious ideas. Such a situation obviously deters innovation.

1. The “Frivolous Patent”

Mechanism. A frivolous patent is a patent protecting a limited innovation. In this situation, the company will ask for a patent that is just enough innovative to obtain it. With the very important number of patents allowed each year, companies do obtain such frivolous patents. Due to the fact that antitrust law cannot evaluate its validity, a frivolous patent is perfectly valid.

Sanction. Antitrust law nevertheless does prohibit the use of such a patent with art.102 of Treaty on the Functioning of the European Union (TFEU) and/or the §2 of the Sherman Act. The enforcing authority will use the notion of barriers to entry a market, and then, the constitution of a monopolisation that will restrain the competition. In such a trial, the patent will be declared valid but contrary to the Sherman Act or TFEU. The reason is that antitrust law operates an economic analysis and not a technical analysis as performed by Intellectual Property law when the patent was first delivered.

2. The “Dormant Patent”

Mechanism. In the case of a dormant patent, the company will not use it for its innovative value, but waits for another company to use the patent. Then, the first company will sue the second one.

Sanction. As for a frivolous patent, the Sherman Act or art.102 of TFEU cannot prohibit the validity of such a patent once. However, we have good reasons to believe that the same concept of setting up barriers to entry the market could be used to challenge it.

3. The “Second-Generation Patent”

Mechanism. In the situation, called evergreening, a company will look for extending the validity of a patent by using a second-generation patent that is linked in a general way to an innovation that is marginally important. This new patent will allow the company to use the first patent almost expired few more years. Then, in the absence of any licence agreement, any other companies will be prevented to do use the patent. This strategy is used by a lot of companies in the pharmaceutical industry in order to prevent generic producers to enter the market.

Sanction. Antitrust law, under the aforementioned art.102 of TFEU or §2 of the Sherman Act, is able to prohibit such a practice. For instance, in the case *AstraZeneca* the EU Court of First Instance has condemned a company for depositing a certificate in order to maintain more time the validity of her patent. Also, in the case *In re Longi*, judges talked about a judicially created doctrine that prevents the extension of the term of a patent by prohibiting the issuance of the claims in a second patent not distinct from the claims of the first one.

B. The elimination of those patents

There are only a few legal cases that deal with the subject. Anyhow, there is no doubt that the conditions amounting to an exploitation of a right may constitute an abuse and be sanctioned. As previously stated, the essential function of a patent is to encourage innovation. Therefore, it is extremely difficult to find the right to hold a patent abusive, even if the sole use is to restrain competition in the market. In general, patent abuse constitutes an antitrust violation only when it is reasonably calculated to create or maintain a monopoly. If a company is accused of creating a patent ambush, the plaintiff must prove that the defendant holds or attempts to create a monopoly in the market in which it has a patent.

In order to hinder patent troll, a necessary step to re-establishing free competition in the market, two main solutions may be considered. First, antitrust law can be used against drifts of Intellectual Property (1.). However, implying a need of proportionality between antitrust law and Intellectual Property Law, only a collaboration between the competent authorities appears to be satisfactory (2.). Indeed, using antitrust law in order to correct the defaults of Intellectual Property law creates a legal uncertainty, proving the need for different solution.

1. The use of antitrust law as a full remedy

Antitrust law may prohibit the use of these different patents, especially given the dispositions of the Sherman Act related to the monopolisation, or, with the art.102 TFEU related to the abuse of a dominant position. In sum, antitrust law is applied to Intellectual Property law in order to appreciate the use of a patent and, then, to restrict
the liberty linked to the property of a patent. This application of antitrust law to Intellectual Property Law raises two main questions:

1. **Technical aspect.**

   The first issue is a technical inquiry and concerns the limitation on the right linked to a patent. Because the goal of a patent is to encourage innovation and to prohibit uses of it by another party, the restriction did to the right to use entirely a patent can shock. In fact, a patent conferred the right to sue a third party who used it with no agreement. Then, to refuse in some cases that companies be able to sue a third party is likely to contradict the nature of the right.

2. **Legal uncertainty.**

   The use of antitrust law to restrain the right of a party to own a patent has led to legal uncertainty. Practitioners have said that a patent is only valuable after a first trial that contests the innovation. Similarly, it may be said that a patent is valuable after the first successful trial intended for using it with no authorisation. Indeed, if antitrust law may possibly prevent an action for violation of patent rights, then only a successful trial will be the proof that the patent is totally enforceable. On this point, some authors recently proposed to raise the stakes of patent litigation by providing “enhanced rewards to victorious patent holders and imposing enhanced penalties on owners of patents that are invalidated at trial.”[^4] It appears to be an efficient system to fight against frivolous patents. However, some questions remain on the legal uncertainty that it will create.

   In *Xerox Corporation*, the FTC[^5] chose to exploit antitrust law in order to break some Xerox’s patents. However, because antitrust law is not conceived to appreciate the degree of innovation that will justify the restraint of competition that constitutes a patent, and because Intellectual Property law is not conceived to ensure the competition, this first solution is not ideal.[^6] It inappropriately pits these two types of law against each other.

2. **A necessary collaboration between authorities**

   A co-operation between antitrust authorities and authorities who granted a patent appears to be a satisfactory solution in order to quell the development of patent troll. Indeed, this issue speaks to how the patent is used and by whom, rather than the properties of the patent per se. Because there are difficulties for the patent office to determine the relevant facts before the patent is issued, this a co-operation can act on two points.

   **The process to obtain a patent.** In the context of such co-operation, the possibility exists to raise the requirement of innovation for patents sought in new and/or attractive markets. In order to make this determination, an economic and antitrust analysis is necessary. This analysis will allow for the authorities to adjust the innovation requirement within a given market. Such a system will facilitate a change in obtaining a patent within any given market; the innovation requirement will necessarily be raised in very attractive ones. The analysis to grant the patent requires the examination of two elements. (i) The first determines the innovative character of the patent, and (ii) the second examines the patent in the context of the relevant market. Some economic discussion will need to be conducted on this subject to fix the current state of the law that provides the same requirement for all patents. The current state of the law is difficult to justify. To ask for the same requirements to obtain a patent in a new or attractive market that is required for a small market with high barriers to entry where a patent could revitalise the market can indeed be hard to understand.

   **Characteristic of the patent itself.** Such co-operation could be the occasion to change the characteristic of the patent itself. For the same reason, it may be shocking that patents are always granted in the same terms without considering the condition of the market in which they operate. For instance, the duration of a patent in markets which inherently encompass a fast pace of change need to differ. Deep economic and competitive studies would identify the different characteristics needed for each patent. Also, because consumption spreads faster today than 20 years ago,[^7] the system demands reform to reflect those changes. The goal of a patent is the encourage innovation; to award a patent for a shorter period in some situations (for example in the new technologies market where the competition is very intense) will preserve this objective. If the financial stakes are important, companies will continue to innovate. There is no good reason explaining why all patents have the same length, this must change.

   In sum, the major problem linked to patent troll is in the relationship between the authority who granted the patent ex ante, and antitrust authorities acting ex post. In order for the law to be effective, both authorities must

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[^5]: In the matter of Xerox Corporation, 86 F.T.C. 364 (1975).


intervene ex ante, without however depriving the ex post action of antitrust authorities. Thereby, legal certainty will increase, leading to a freer market. More accurately, co-ordination could be achieved either by integrating competition law economists and specialists into the relevant patent authorities, or by creating a new division of antitrust authorities dedicated to this matter. Either model would allow for a comprehensive ex ante analysis.

Yet, the European Commission expressly rejected the imposition of an economic analysis to the European Patent Office.19 The US Patent and Trademark Office similarly fail to realise either an economic or competitive analysis before granting a patent. This must change for all forgoing reasons.

Due to the lack of co-operation between antitrust authorities and patent authorities, patent trolls are generated each day. Companies may then create a patent ambush, a strategy that is regularly employed.

Second part: Patent troll by the patent ambush

A patent ambush is the use of patent(s) in order to prevent other companies from accessing a certain technology and subsequently a market, or, to lock out those companies in that technology.

It is not necessary that a company own many patents to take advantage of a patent ambush strategy. Nevertheless, the more patents owned, the easier it will be to employ such a strategy. Therefore, all patents presented in the first part can be used in the different patent ambushes. Those strategies can occur at different life cycle of a product, and within different forms (A.). If the applicable legislation, in Europe as America, can be use to fight partially against patent ambush (B.), here again, a collaboration between authorities appears to be necessary.

A. Presentation of patent ambushes mechanisms

1. A need to balance all elements

The existence of some positive characteristics. Patent-ambush is not a one-way issue; a balance of all the interests is necessary. Indeed, consumers want a lower price and (i) the patent ambush can be a way for company to reduce the price with negotiating with only one operator. (ii) Also, it may protect the companies’ interest in obtaining a fair remuneration for their inventions, as well as companies’ decision to invest in R & D.19 In sum, the patent ambush can allow companies to sell a patent in order to obtain a fair remuneration.

Due to these advantages, an accumulation of all patents in a market area is generally held not to violate antitrust law, and this, even if the company is making it much more difficult for other firms to compete. In Automatic Radio Mfg. Co. v Hazellett Research the court held that “the mere accumulation of patents, no matter how many, is not in and of itself illegal.”20 The only risk for a monopolist appears to be the patent accumulation simply for the purpose of denying others access to the market and did not make use of the patents itself. The basic rule remains that antitrust law doesn’t consider the fact to acquire a patent as an antitrust violation.21

The existence of many forms. Besides positive characteristics of patent ambush, it remains a complex question because of its different forms. Patent ambush may be used in two different situations. (i) The first one is during any instance of the product’s market life. (ii) The second one can be established during the specific period of the product’s normalisation: when a standard-setting organisation (SSO) establishes a standard for a product. Pro-competitive virtues of standardisation are universally recognised: improved products, enhanced quality and interoperability, as well as reduced output costs and sales costs. However, companies may use this standardisation period to set up different strategies of patent ambush.

2. Patent ambush through its different forms

Patent ambush can exists though many forms. Very often, these mechanisms are more complex than in their theoretical aspects.

a. Patent ambush of firms by raising the price of royalties This strategy occurs ex ante when one firm amasses a large portfolio of substitutable and complementary patents in order to gain expensive licensing royalties. Ex ante disclosure of licence term allows comparisons between all various technologies candidate for inclusion in the standard.22 Therefore, the standard-setting organisation will take more informed decisions about which alternatives to include in the standard. The main consequence of a policy requiring ex ante disclosure of patent licensing terms is that the holders of patents will develop a special licence to comply with that policy. The agency in charge of the normalisation will choose between all these special licences.

Mechanism. In this situation, a negotiation of a licensing agreement will allows companies to use the patent of another company. These firms will then use the patent under the licence, but will simultaneously make irreversible investments that will lock them into the patented technology. As a result, it will be very expensive.

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for them to switch technologies. Once consolidating the firm’s dependence, the patent holder will renge on the promised royalty.

In both the United States and European Union, SSOs may require a Fair, Reasonable and Non-Discriminatory (FRAND) commitments from companies which want to have their patents in the norm. The same obligation exists within the International Organization for Standardization (ISO). If the company decides nonetheless to grant licence of exploitation for a very expensive price, a condition has to be fulfilled in order to qualify an anti-competitive effect: returning to those past alternative technologies must be made unmanageable.

- In case of absence of normalisation.

This type of agreement can intervene in a market without any normalisation. The company who holds the patent will directly negotiate with companies which want to use it. However, a risk of cartelisation must be considered. In the case where firms collectively agree to a certain amount they will pay for a royalty, and then communicate this amount to the licensor, such a concerted action will affect the royalty and could in itself trigger an antitrust violation. Such agreements will be judged under a rule of reason, and judges will consider efficiency justifications.

- In case of normalisation.

This negotiation can also intervene on a normalised market. In this case, the company holding the patent will negotiate with the relevant authorising agency. Indeed, the company will make a licensing commitment declaration and promises to offer a licence on Fair, Reasonable and Non-Discriminatory terms. In this scenario, the company acts ex ante, before the utilisation of patent. Complainants in Qualcomm alleged they were the victims of such tactics. In this case, the court declined to impose sanctions against Qualcomm because of the absent evidence of Qualcomm bad faith, which is hard to prove. Also, in a more recent case, Apple argued that Samsung had not complied with its agreement to grant operating licences at a reasonable price after a normalisation of Samsung patents. The US District Court of N.D. California has considered that Apple failed to prove that another technology could be adopted in place of the patented Samsung technology.

b. In case of refusal to grant a licence of exploitation

This strategy also occurs ex ante. Here, a company will reveal the existence of a patent and refuse to grant a licence of exploitation. In US and EU law, the company cannot act in this way. The United States Court of Appeals for the Third Circuit confirmed this rule in the famous case Broadcom v Qualcomm.

A few cases illustrate this situation. In Image Technical Services v Eastman Kodak, judges decided that a mere refusal to license a patent violated §2 the Sherman Act. However, that decision may conflict with a provision of the Patent Act declaring that no patentee can be guilty of patent "misuse" because it sought to enforce those rights or refused to license. In the ISO Antitrust Litigation which involved facts similar to Kodak, the Federal Circuit held that under §2 of the Sherman Act, a patentee does not have a duty to license its product. Also, in Princo Corp. v International Trade Com'n, the Federal Circuit concluded that an agreement between two companies not to license a particular patent to third parties do not constitute patent "misuse" under §271d of the Patent Act. Finally, in the Magill case of April 6, 1995, the CJEU ruled that the refusal to grant a licence constitutes an abuse of dominant position condemned by art.102 TFEU. On this point, the European and American systems provide the same solution.

c. Patent ambush of firms by using the submarine patent

Patent ambush strategy can occur ex post, when a firm amasses a large portfolio of substitutable and complementary patents in order to "hide
In this situation, the firm will use a “submarine patent” and another one using an innovation implicating the patent may be informed by a patent holder of the infringement his patent from many years ago.

Such a strategy can intervene in case of a normalisation (i) to prevent the reviewing committee from determining if it could revise the standard to avoid the patent, and (ii) extract unreasonable terms later on from unsuspecting implementers.\textsuperscript{38} It can also intervene on a non-normalised market if some companies use the patent without any licensing agreement. In sum, the patent holder takes advantages of the potential user by inducing the user to make irreversible investments that lock the user into using the patented technology. Then, the patent holder will wait to make his royalty demands until after the user has made the irreversible investments.

Illustration. The only common case of this kind of patent ambush reviewed by both EU and US antitrust authorities is Rambus.\textsuperscript{37} The solution adopted by the Courts differs on the two continents. In this case, judges evaluated whether the Rambus Company disseminated its patents during normalisation, left the standards body to adopt a standard covering these patents, and then, pursued for infringement manufacturers who used standard products.

In order to qualify as anti-competitive behavior, two different points of view were adopted:

- **In the European Union,** the inquiry under art.102 of TFEU is objective, and the intent does not have to be proven. The EC took the view “that Rambus may have been abusing its dominant position by claiming royalties for the use of its patents from JEDC-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge”. The case resulted in commitments from the breaching firm.

- **In the United States,** the FTC concluded “that Rambus intentionally and willfully engaged in deceptive conduct,” despite the fact that under s.5 of the FTC Act intent does not need to be proven. FTC ruled that the actions of the SSOs, who lost the opportunity to impose some FRAND commitments, could not be considered as anticompetitive. However, the US Court of Appeals for the District of Columbia Circuit held that if the FTC had proven that absent Rambus deception the SSO would have standardised an alternative technology, there may have been a different result. Then, the FTC failed to demonstrate that Rambus Inc. engaged in conduct that was exclusionary “under settled principles of antitrust law”.

\textbf{d. Patent ambush of consumers by reverse patent settlement} The question of patent ambush also involves “reverse settlements” which occurs when a firm pays another one to stay out of its market, harming consumers by preventing them of the benefits of competition.\textsuperscript{40} More specifically, a firm will use a patent ambush to obtain a settlement. After creating a powerful bundle of patents, the company will leverage for profit the threat a lawsuit on the grounds of infringement. Also, a patents holder can use them to discourage other companies from entering the market. In sum, a firm already present in the market will pay another not to compete.\textsuperscript{41}

Illustration. In a recent case,\textsuperscript{42} the United States Court of Appeals for the Eleventh Circuit rejected the demand of the FTC against several pharmaceutical companies. In this case, Solvay had agreed to pay $10 million dollars to Watson and Par Pharmaceuticals. In exchange, Watson and Par agreed not to market generic drugs for six years. The agreement provides for $2 million dollars in incremental amount for every year of compliance.

The FTC argued that such an agreement constituted a cartel, depriving consumers of a new product and competition in the relevant market. The companies argued that the agreement was perfectly valid in conformance with antitrust law. They were relying on a case in the 11th Circuit which held that an agreement designed to delay the production of a generic drug cannot be condemned under the Sherman Act if the anti-competitive effects do not exceed those implied by the existence of a patent. In this case, the FTC failed to demonstrate that the agreement imposed an exclusion greater than that already imposed by the patent. The failure here was largely due to the FTC’s failure to demonstrate the anti-competitive effect of the agreement.

Other illustration. The New York Times recently\textsuperscript{43} published an article which described the true story of a company, that we will call A, which developed a system similar to Siri (the one inside every iPhone 4S and 5 which allow humans to talk to his phone). Another company, that we will call B, threatened to sue A for patent infringement. Apple decided to contract with B...

\textsuperscript{37} Other cases illustrate that main difference between the US and the EU appears to be that, in the US only, a competitive harm cannot emanate from avoidance of a RAND commitment through deception.
\textsuperscript{39} EU Rambus: European Commission, COMP/38,636, December 9, 2009.
\textsuperscript{40} US Rambus: Rambus Inc. v. FTC., 522 F.3d 456 (D.C. Cir. 2008).
\textsuperscript{41} A very complete article by C. Scott Hemphill was recently published on this question, “Collusive And Exclusive Settlements of Intellectual Property Litigation” Columbia Law and Economics Working Paper No. 364.
\textsuperscript{42} For a very precise explanation of this mechanism, see C. Scott Hemphill, “Collusive And Exclusive Settlements of Intellectual Property Litigation” Columbia Law and Economics Working Paper No. 364.
because of this possible patent infringement by A. After a few years and 3 million dollars spent in litigation, A won a verdict in its favor. Unfortunately, Apple’s contract B was already signed—and every iPhone now uses this technology. In this situation, the threat of a lawsuit for patent infringement disenabled a company to obtain a very important contract. Cases like this are the proof that a flaw patent system could destroy the innovation by discouraging companies to keep looking to innovate.

**B. The applicable legislation and the need for co-operation**

Despite the fact both EU and US actual legislations may be used to prosecute patent ambushes (1.), some practical difficulties explain why they are still growing (2.). Then, the same solution needs to be implemented, which is again a better co-operation between authorities.

**1. How to fight against patent ambush**

In the *European Union*, art.102 TFEU could be applied. This article states that:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".

The issue of patent ambush is covered by this paragraph of the article, saying that "such abuse may, in particular, consist in: (...) (b) limiting production, markets or technical development to the prejudice of consumers." A patent ambush may act as a barrier to the market, and an impediment to technical development. Also, in January 2011, the European Commission (EC) published its guidelines regarding the applicability of TFEU art.101 to horizontal co-operation agreements, which dedicates a whole chapter to standardisation agreements and flags the two-fold anti-competitive concerns.

In the *United States*, s.2 of the Sherman Act sanctions monopolisation and attempted monopolisation. The text prohibits:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

However, s.5 of the Federal Trade Commission Act, which functions as a complementary regulatory tool to the Sherman Act by banning unfair methods of competition and unfair or deceptive acts or practices, must also be considered. The Act states that:

> "Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

These two legal provisions are not mutually exclusive, and the FTCMA may reach practices that do not fall within the scope of the Sherman Act. The primary difference under the Acts is standing, as the FTC is the only authorised entity to bring suit under the FTCMA, while private parties can bring actions before courts under the Sherman Act. Lastly, §271 of the Patent Act prohibits the "Infringement of patent," but this is a penalty beyond antitrust law.

It is also important to note that EU and US antitrust law do not prohibit exactly the same practices. Apart from the differences regarding the specific terms of these two rules—the TFUE is applicable to any "abuse" by one or more "undertakings" which may affect "trade" when the Sherman Act is applicable to "every person" who shall try to "monopolize" any part of the "trade or commerce"—TFEU art.102 only apprehends undertakings that are already enjoying a dominant position and will not prohibit an undertaking’s conduct which grants it a dominant position. Therefore, liability under art.102 only arises if the patent owner imposes excessive licensing conditions or refuses to license its patent. US antitrust law will prohibit both practices. If historical reasons can explain this difference, the result in that the US system is, at least on this point, more efficient. The next difficulty to address is how to respect a free market and companies’ ability to act freely by preventing patent ambush strategies, but only then. Indeed, to constitute a dominant position based on merit, using innovative patent, need to be permitted and encouraged.

**2. Some practical difficulties calling for another solution**

*Few convictions.* Condemning a patent ambush is quite rare when compared to the thousands of standards that are being widely and successfully implemented. The reality is that many patent holders are playing by the rules. Indeed, they want to see the standard widely implemented and to enter into a licence agreement with as many

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implementers as possible as this increase their revenues. But also, the fact that few patent ambush cases are brought before competition authorities does not imply that this behavior is scarce. Indeed, it appears that some cases are settled through transactions or are litigated on the grounds of patent law or contract law first. The problem remains real.

Collaboration between authorities. Those different patent ambush strategies are often set up with some of patent evoked in the first part of our study. For that reason, and because the application legislation is obviously insufficient—patent ambushes are very common—a collaboration between antitrust authorities and the patent-granting authority appears to be the best solution to stop patent ambush from the beginning. Patenting should be subject to other expertises than Intellectual Property, as developed in this article. Without such a mechanism, only two situations seems to be realistic: (i) patent ambush will continue to grow, or (ii) if the patent-granting authority refuses to grant a patent without a complete analysis involving antitrust and economic analysis, the right to property itself, represented by patent, will be in true danger for no reason. And it will be the same for a free market, so far the more profitable economic philosophy for consumers.

Conclusion
The question of the patent troll is complex. This article revealed some differences between the US and EU law. However, there is a consensus that the actual method by which the patents are delivered could be problematic for the market, in that it could prevent innovation more than encourage it. Some may critique the utility of patent; this is not the purpose of the article, even if in the 1850s, 85 to 89 per cent of important US and UK innovations were not patented.\footnote{Petra Moser, “Innovation Without Patents—Evidence from World Fairs”, unpublished paper (July 16, 2010). \url{http://ssrn.com/abstract=930241} [Accessed April 3, 2013].} The actual absence of a better system to ensure a free market with companies competing fairly by using innovation is evidence that patents are in fact an attribute to the market economy. Nevertheless, if competition and patent authorities continue to act separately, the phenomenon of patent troll will continue to grow. Regulators need co-ordinated action in order to allow free competition. The question is not about more or less market regulation, but a different approach to the regulation with the aim of creating a better global market.