

**Recent Developments in Taiwan, Republic of China**  
– CLEARANCE GRANTED TO COMBINATION REGARDING  
ESTABLISHMENT OF A LICENSING COMPANY FOR A PATENT POOL

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At its March 31, 2010 commissioners' meeting, the Fair Trade Commission ("FTC") conditionally permitted a proposed combination for the joint operation of One-Blue, LLC ("One-Blue") by Hitachi, Panasonic, Philips, Samsung, Sony and Cyberlink. One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disk (BD) patents for the manufacturing of backward-compatible BD products. Upon the consummation of the combination, the participating parties will respectively acquire a 1/6 shareholding and then jointly operate One-Blue.

The relevant market of One-Blue is defined as "the domestic product market, technology market, and innovation market which are related to BD." The basis for such broad definition is that the participating parties not only hold technologies for the manufacturing of BD products but are also engaged in the manufacturing of BD products.

As to the competition analysis, the FTC held that the proposed combination would not give rise to competition restraints due to the following arrangements in the applicable pool agreements:

- (1) Only essential patents will be included in the patent pool and the essentiality of the patents will be determined by independent patent experts, according to the pool agreements. Through such mechanism of periodic review by independent experts, the essentiality of patents in the pool can be secured and any substitutable patents will be excluded.
- (2) The patent pool will be open to all patent holders and thus is not a closed pool. Meanwhile, all licensors of the patent pool are required to conduct individual licensing activities for any licensee requesting individual licenses on a RAND (reasonable and non-discriminatory) basis. Therefore, licensors and licensees are free to coordinate their technology to promote a competitive technology.
- (3) Licensors are prohibited from disclosing their confidential information so as to ensure that the confidential information will not be exchanged between licensors resulting in a conspiracy among pool members. Additionally, the pool agreements stipulate that licensors cannot have access to licensees' information provided for the application of per-batch license before each shipment of product.
- (5) The scope for the grant back provision is limited to essential patents and the royalties

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paid under the applicable pool agreement will qualify for the royalty rate for the grant back of essential patents. Licensors of such grant back licensing are free to individually license their patents, and thus the incentives for further R&D by such licensors will not be affected. Such arrangement promotes future innovation. Also, no provision under the pool agreements prohibits the licensors from using competing technologies or developing competition standard or products.

The FTC further explained that as for BD technology, Taiwanese enterprises are in a position to adopt technologies which have been developed by others. If this combination is prohibited, Taiwanese BD products manufacturers will have to negotiate for licenses with patent holders individually and the transaction cost of individual negotiation and the accumulated royalties are expected to be higher than being granted licenses through One-Blue. Therefore, licensing the essential BD patents through a patent pool is expected to make it easier for Taiwanese manufacturers to obtain the licenses for essential patents, lower the transaction cost and avoid the risk of infringement and litigation, which will promote competition among Taiwanese manufacturers, with the consumers being the ultimate beneficiary.

On the other hand, since participating parties are also engaged in the manufacturing and sales of BD products, the patent pool will increase the opportunity for third parties to use the licensors' essential patents, which may stimulate competition in the downstream market. The licensors will not acquire sensitive information such as cost data, and will refrain from exchanging sensitive information between themselves, and thus upstream and downstream vertical competition will not be negatively affected.

To sum up, the combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licenses and thus the overall economic benefit of the combination indeed outweighs the disadvantages from competition restraints. However, in order to prevent the participating parties from stifling competition through the patent pool, the FTC attaches six necessary conditions to eliminate any disadvantages from possible competition restraints, and to ensure the overall economic benefit as follows:

1. The participating parties should not engage in any concerted action by entering into any agreement restricting the quantities or prices of BD products or by exchanging important transaction information.
2. The participating parties and One-Blue should not restrict licensees' scope of technology use, trading counterparts and product prices.
3. The participating parties and One-Blue should not forbid licensees from challenging the essentiality and validity of the licensed patents.
4. The participating parties and One-Blue should not forbid licensees from researching and developing, manufacturing, using and selling competing products and/or adopting competing technologies during the license term or after expiration of the license.
5. The participating parties and One-Blue should not refuse to provide licensees with the content, scope and term of the licensed patents.

6. The participating parties are required to provide executed copies of the pool agreements for the FTC's review.

This case is noteworthy because this is the first time the FTC reviewed a case concerning a patent pool. Therefore, the FTC's views of market definition, recognition of patent essentiality review mechanism, and standards for competition assessment of a patent pool are expected to serve as guidelines for future patent pool filing.