Vexatious Litigation

Denis Borges Barbosa
Federal University of Rio de Janeiro
denisbarbosa@unikey.com.br

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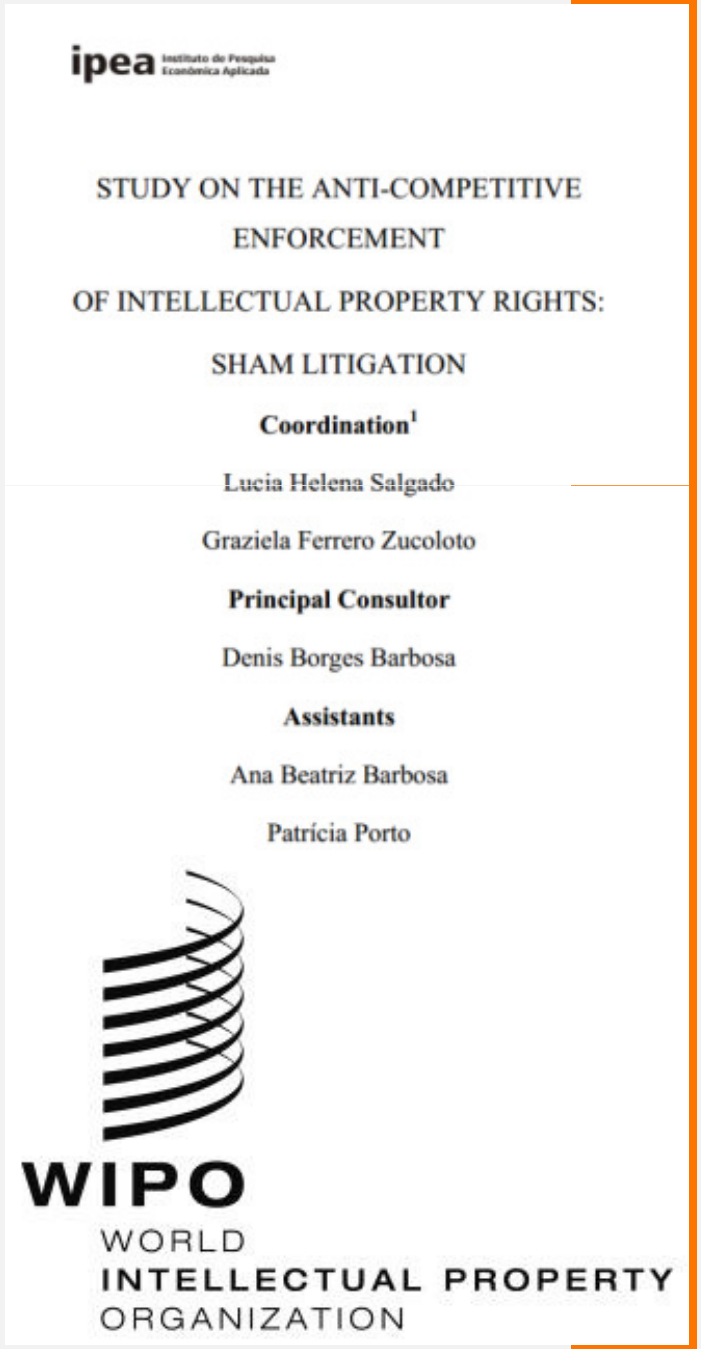

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THE BASICS

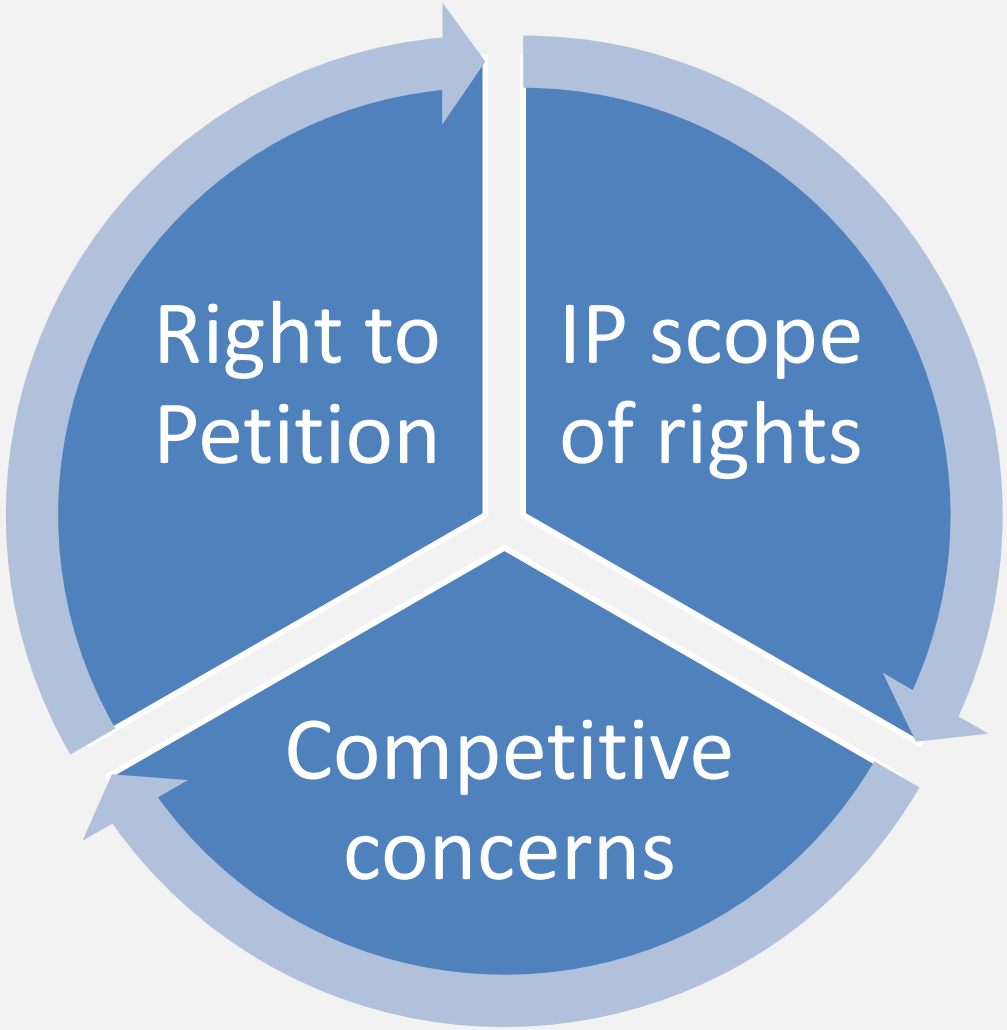
Vexing through IP

- **What is it**
- the "use [of] the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon
- Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380

For instance:

1. **Use of the judicial system for anticompetitive purposes**
2. **Obtain IPR under false pretenses**

Vexing through IP



Vexing through IP

ITT Promedia “wholly exceptional circumstances”

US Response to WIPO study:
“This standard is difficult to meet, and very few cases have met the stringent test for this exception.”

The importance of the constitutional enablement overweights most vexation

Vexing through IP

As IP enforces interests through exclusive rights in competitive environments, there must be an proper extension where the use of such exclusive rights are protected against antitrust concerns.

- The intersection between competition law and IP occurs in two ways:
  - either the exclusive rights upon creations are the effective cause of the damage to competition,
  - or are mere accessories, even though relevant, of one effective or potentially damageable practice. (…)
- Regarding cases in which the IP law is the cause of a tort or potential tort to competition, the authors indicate the presence of an accepted rule according which the *regular* use of an exclusive right *does not* presume an illegal restriction to competition, but also does exclude possibility of anti-competition effects
- Barbosa 2005

Antitrust as a “second tier” remedy in face of the inherent IP filters

Vexing through IP

FEDERAL TRADE COMMISSION v. ACTAVIS, INC., SCOTUS June 17, 2013

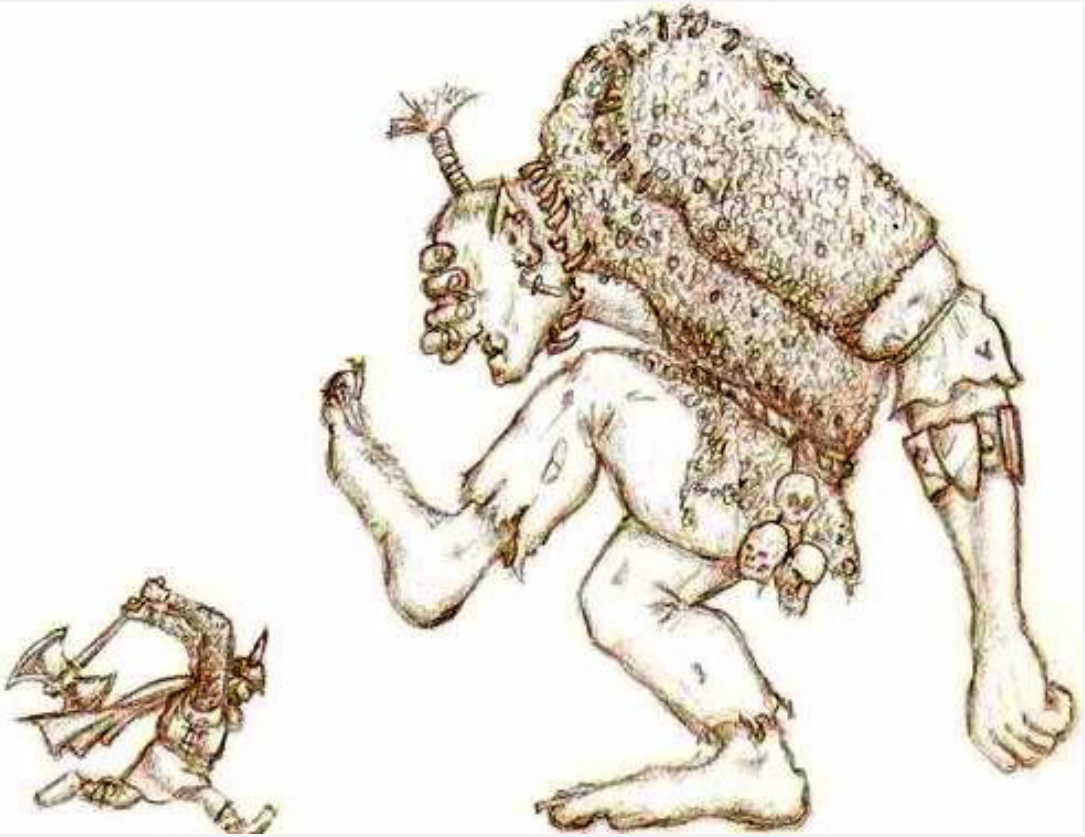
Although the anticompetitive effects of the reverse settlement agreement might fall within the scope of the exclusionary potential of Solvay's patent, this does not immunize the agreement from antitrust attack.

(As LUNDBECK learned form European Commission on June 19, 2013)

Antitrust as a "second tier" remedy in face of the inherent IP filters

Vexing through IP

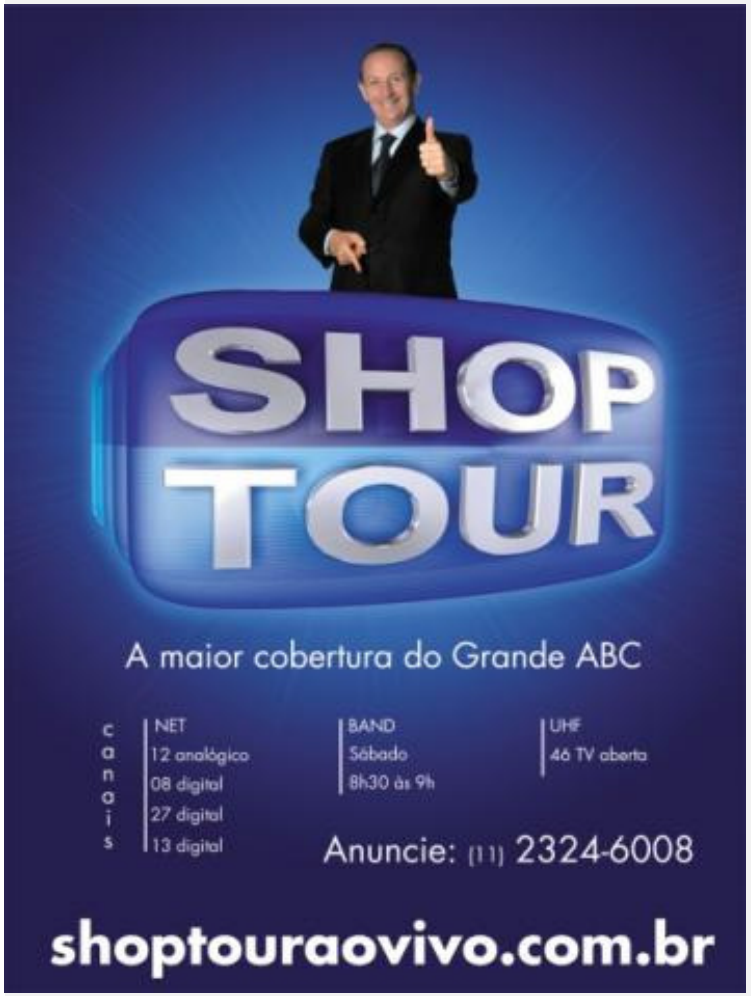
Sham/Vexatious litigation stays being a real problem in face of the Patent Assertion Entities ("PAEs") issue and FRAND/RAND situations?



But in the EU environment, Scarlett (2011) and Google Motorola (2013) ITT Promedia standards were referred to and enforced

BRAZIL AND THE REST OF WORLD

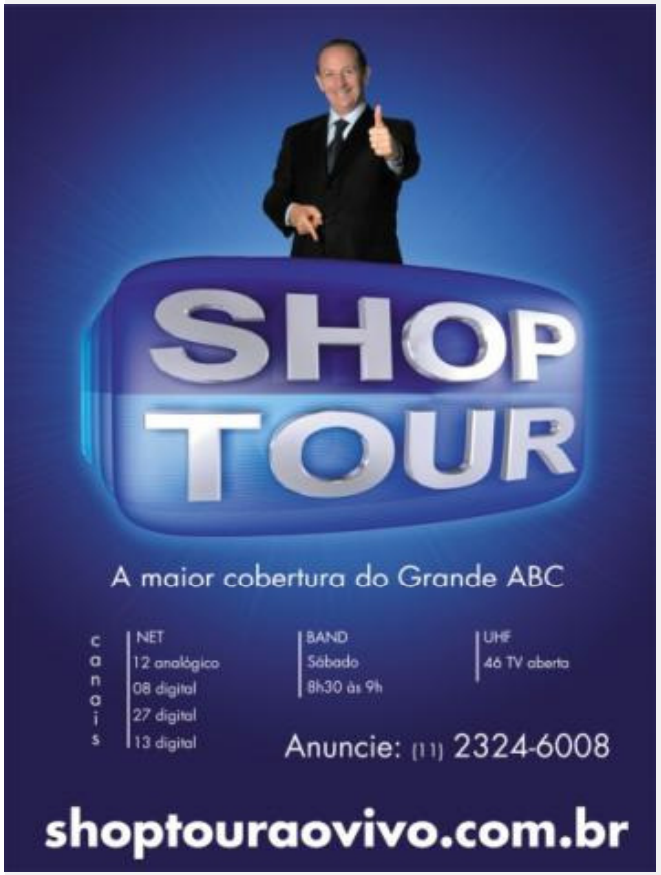
An Brazilian Example



- The first conviction in a purely anticompetitive litigation (or sham litigation) case in intellectual property arena dealt with the anticompetitive abuse of copyrights in sales TV channels, the Shop Tour case (CADE PA 08012.004283/2000-40)(December, 2010)

One of the rare cases where vexatious litigation was actually found

An Brazilian Example



- "The Brazilian decision on the Shop Tour case (PA 08012.004283/2000-40) taken on 15/12/2010 is the first conviction in Brazil for sham litigation and seems to be the only recent conviction worldwide. It sheds some light on the topic.
- The case dealt with sham litigation concerning bringing lawsuits against competitors in the sales TV channels segment for alleged violations of copyrights on the scripts of those sales opportunity shows.
- The decision reviewed the history of all lawsuits involved – as the respondent claimed it had won several of them. The decision pointed out that all those victories in first instance were reversed at upper courts when appealed.
- This was enough to dismiss the defense argument and characterize that the respondent could not reasonably expect to win those suits and therefore they were a sham aimed at excluding competitors by claiming false abuses of IP".
- Salgado/Morais

Once blood was tasted, Brazilian antitrust craves on sham

- Finally, there had been five investigations open for years on anticompetitive litigation in the pharmaceutical industry. On December 5th 2011, three of them have been concluded and sent to CADE for judgment, with a recommendation for conviction

Salgado, Lucia Helena and Morais, Rafael Pinho de, The new Brazilian Antitrust Law: beyond the basics, found at http://www.cresse.info/uploadfiles/2012_PAR2_1_PAP.pdf

The WIPO Study

Where else the issue is being dealt with (beyond US and EU)

- Mexico
- Spain
- South Korea
- Argentina
- Australia
- New Zealand
- France
- South Africa
- Canada
- Chile
- Peru
- Brazil

The WIPO Study

What the scope of the study

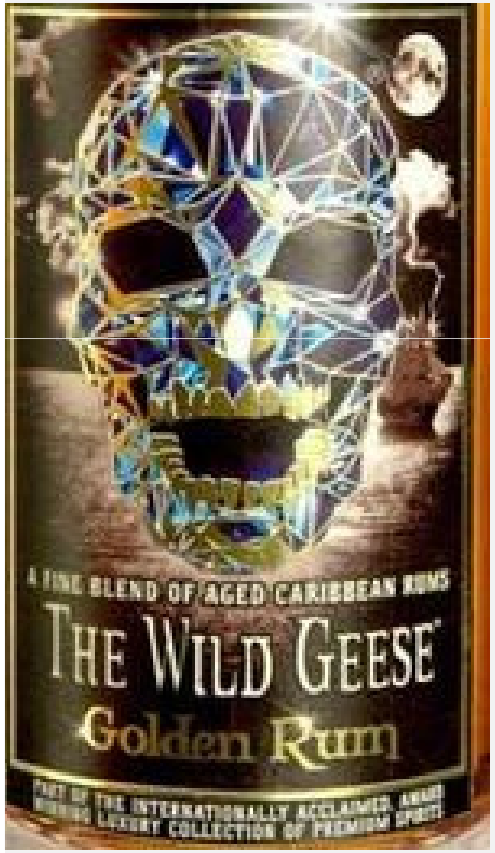
- "The administrative or judicial procedures concerning any of the rights covered by Article 1.1 of TRIPs, brought to the attention of Intellectual Property authorities or antitrust agencies, where at least one of the following aspects is conspicuously present:
- (a) **procedures where the final favorable prospects for plaintiff (or requiring party) is evidently improbable, but the initiation or continuation of the procedure by itself is liable to have anticompetitive effects** OR
- (b) **procedures multiplied on the same or closely related causes of action where such reiteration of actions or requests** (even though each one action or request by itself would be procedurally reasonable) also is liable to have anticompetitive effects OR
- (c) other actions, initiatives of requests where the benefit to plaintiff or requesting party could result from the initiation or continuation of the procedure itself rather than the final result of the exercise, and such initiation or continuance by itself is liable to have anticompetitive effects; OR
- (d) any actions, initiatives of requests, which under domestic law is classifiable as abuse of right or abuse of process, and such abuse is liable to have anticompetitive effects. "

A EUROPEAN PERSPECTIVE

The use of the governmental process as an anticompetitive weapon

- 55 The Commission states that, in order to be able to determine the cases in which such legal proceedings are an abuse, it laid down two cumulative criteria in the contested decision: it is necessary that the action
  - cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and
  - it is conceived in the framework of a plan whose goal is to eliminate competition (hereinafter `the two cumulative criteria').
- 56 According to the Commission, under the first of the two criteria the action must, on an objective view, be manifestly unfounded. The second criterion requires that the aim of the action must be to eliminate competition. Both criteria must be fulfilled in order to establish an abuse. The fact that unmeritorious litigation is instituted does not in itself constitute an infringement of Article 86 of the Treaty unless it has an anti-competitive object. Equally, litigation which may reasonably be regarded as an attempt to assert rights vis-à-vis competitors is not abusive, irrespective of the fact that it may be part of a plan to eliminate competition.
  - Case T-111/96, **ITT Promedia** NV v Commission of the European Communities. Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 July 1998. European Court reports 1998, Page II-02937, visited 12/12/2010, found at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996A0111

The use of the governmental process as an anticompetitive weapon



Case T-119/09, **Protégé International Ltd**, v. **Commission européenne,** 13 September 2012.
"the action must be objectively unreasonable or manifestly unfounded"

- 72 (…) legal proceedings can be characterised as an abuse, within the meaning of Article 86 of the Treaty, only if they cannot reasonably be considered to be an attempt to assert the rights of the undertaking concerned and can therefore **only serve to harass the opposing party**. (…)
- 73 Furthermore, when applying that criterion, it is not a question of determining whether the rights which the undertaking concerned was asserting when it brought its action actually existed or whether that action was well founded, but rather of determining whether such an action was intended to assert what that undertaking could, at that moment, reasonably consider to be its rights. According to the second part of that criterion, as worded, it is satisfied solely when the action did not have that aim, that being the sole case in which it may be assumed that such action could only serve to harass the opposing party.
  - Case T-111/96, **ITT Promedia** NV v Commission of the European Communities. Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 July 1998. European Court reports 1998, Page II-02937, visited 12/12/2010, found at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996A0111

The use of the governmental process as an anticompetitive weapon

- General Court in *ITT Promedia* and *Protége International.* The General Court found in those two cases
- **(i) that access to courts is a fundamental right and**
- **(ii) that only in wholly exceptional circumstances may the fact that legal proceedings are brought constitute an abuse of dominance.**
- The Court then went on to indicate—confirming the Commission's approach in that case (the ITT case)—two cumulative criteria on the basis of which one may identify an abuse in bringing legal action before the courts.

ITT promedia

- The *first* criterion is that the legal action cannot reasonably be considered to be an attempt to assert the rights of the undertaking and can therefore only serve to harass the opposing party and
- the *second* criterion that the legal action was taken in the framework of a plan whose goal was to eliminate competition.
- The Court then explicitly stated that those two criteria must be interpreted and applied restrictively since they are an exception to the general and fundamental rule of right of access to courts.
- **Vesterdorf**

The use of the governmental process as an anticompetitive weapon

- Therefore, the first prong of the test displays an *objective* standard: plaintiff's legal position at the inception of the action should be evaluated as whether it *reasonably* could consider claim in action as to be its rights.
- There should be no inquiry as to the *subjective* conditions of the plaintiff, as is just necessary to determine whether *a* person at that moment, canvassing the corresponding factual and legal material, would *reasonably* conclude that the rights claimed were actually his.
- Salgado/Barbosa/Zucoloto

The use of the governmental process as an anticompetitive weapon

- The second prong, however, by requiring the demonstration of “a framework of a plan”, that is to say, a deliberate and purposeful set of actions, the goal of which is eliminate competition, enters necessarily in a subjective level.

Salgado/Barbosa/Zucoloto

The use of the governmental process as an anticompetitive weapon

- The Pfizer Case
- “After completion of the Sector Inquiry, national competition authorities within the EU have been increasingly monitoring the pharmaceutical sector. On 11 January 2012, the Italian Competition Authority (ICA) fined Pfizer more than €10m for an alleged infringement of Article 102 TFEU. (…)
- The ICA argued that the plan was essentially based on artificially extending the duration of Pfizer's patent protection beyond the expiring date of the basic patent due in 2009 through the filing of an application for a divisional patent and requesting an SPC in Italy. This created a state of legal uncertainty as to the possibility of legally marketing new generic products that delayed market entry by generics companies in the glaucoma eye treatment market. Pfizer's actions led to uncertainty as to whether the generics companies could legally market their own versions of the drug, as well as rendering commercialisation of the generic versions more expensive.
- On 3 September 2012, however, the Lazio administrative court reversed the decision by the ICA. According to the Italian court, the ICA **failed to prove “a clear exclusionary intent** in light of a quid pluris further to the mere summation of behaviors regarded as legitimate by the administrative and judicial system”
- Vezzoso

A US PERSPECTIVE

The use of the governmental process as an anticompetitive weapon

- Noerr-Pennington rule: In essence, the right of petition is exempted from antitrust concerns, *unless* utilized in a sham manner.

The use of the governmental process as an anticompetitive weapon

- As examples of such misuse of a Governmental process, the U.S. case law offers:
  - a frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay· California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
  - A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 , n. 4 (1988),
  - But there would be no sham in a case where the petitioner “genuinely seeks to achieve his governmental result, but does so through improper means” . Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 , n. 4 (1988), at 508, n. 10 (quoting Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n. 5 (CA9 1987)). [499 U.S. 365, 381]

The use of the governmental process as an anticompetitive weapon

- Current legal analysis discerns three conflicting interests whenever the right to petition is deemed to carry an anticompetitive burden:
- These tenets are:
- (1) The right of citizens to petition the government for redress of grievances,
- (2) The ability of the government to protect the integrity of its processes which provide the structural framework permitting a democratic form of governance, and
- (3) The need for competition in the marketplace in order to drive a capitalistic economy
- J.B. Perrine, Defining the “Sham Litigation” Exception to the Noerr-Pennington Antitrust Immunity Doctrine: An Analysis of the Professional Real Estate Investors v. Columbia Pictures Industries Decision, 46 ALA. L. REV. 815 (1995).

The use of the governmental process as an anticompetitive weapon

- Eventually the case law elaborated a set of tests for determining which were those unfounded and meritless petitions. Following such tests, the Noerr exemption from antitrust screening would be denied wherever a petition was held to lack two cumulative requirements:
- in those cases where no reasonable litigant could realistically expect success on the merits; and
- Whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships.
  - An important case was California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). “California Motor played a significant role in the development of both the Noerr doctrine and the sham exception. It more firmly established the constitutional basis for the doctrine, extended the doctrine to the judicial context, and actually applied the sham litigation exception for the first time”. 46 Ala. L. Rev. 815, 824
  - “Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental [508 U.S. 49, 50] action" is "not at all affected by any anticompetitive purpose [the actor] may have had." Id., at 140. Thus, neither Noerr immunity nor its sham exception turns on subjective intent alone. See, e.g., Allied Tube Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503 . Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition, a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, Noerr, supra, at 144, through the "use [of] the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon," Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 . This two-tiered process requires a plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Pp. 55-61.” PREI, INC. v. COLUMBIA PICTURES, 508 U.S. 49 (1993) 508 U.S. 49, visited 2/8/2010, found at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/508/49.html.

The use of the governmental process as an anticompetitive weapon

- The first requirement (as shown in the European case) is to be employed as an *objective* standard. There would not be any insight into the subjective motives of the petitioner, but an application of the centuries-old standard of the *bonus paterfamilias*: Here, the version of such abstract standard would be "the reasonable litigant". Would a reasonable litigant initiate and pursue such action in court to seek redress for its own grievances?
- Again, the second test presupposes an inquiry on the intent of the petitioner by filing and pursuing the legally baseless suit.
- Salgado/Barbosa/Zucoloto

VERY SIMILAR TESTS

Very similar tests

- Under Noerr-Pennington and ITT Promedia the proposed tests are very similar.
- Under Noerr-Pennington the first question to be answered is whether, objectively speaking, the firm initiating the legal action reasonably could believe it had rights to protect, which is more or less the same as the test proposed by the Commission in ITT Promedia.
- Here, only objective factors are taken into consideration, and it is what the firm initiating the proceeding reasonably could believe at the time the lawsuit was initiated that is relevant, later events having no bearing on that finding.
- Second, both tests propose that if one can find that there was no merit to the case the court will have to decide whether the lawsuit was conceived in a plan whose goal was to eliminate competition, the last inquiry being an inquiry into the subjective intent of the dominant undertaking.
  - RICKARDSSON

"a deliberate practice leading to the grant of an exclusive right (e.g. a patent) to which the undertaking is not entitled (e.g. it is known to the undertaking that its patent application does not meet the patentability criteria, but nonetheless this undertaking pursues the application counting on an erroneous assessment of the patent office – the "Type II error" scenario);" (Filip Borkowski)

THE SECOND STREAM OF CASES: ANTICOMPETITIVE EXERCISE OF IP RIGHTS ILLICITLY ACQUIRED

Anticompetitive exercise of IP rights illicitly acquired

- A different breed of legal reasoning occurred in the US legal system in connection in connection with a series of cases where an IP Right, obtained by fraud or otherwise by illegal means, is *exercised* on a competitive environment (the “Walker Process” doctrine) .
- Walker Process Equipment, Inc. v. Food Machinery and Chem. Corp, 382 U.S. 172 (1965).
- Salgado/Barbosa/Zucoloto

Anticompetitive exercise of IP rights illicitly acquired

- This rationale identifies an anticompetitive behavior not in the use of *procedure* to attain the plaintiff's results, but in the enforcement of a *tainted* substantive right, including through a right of petition.
- Here, the constraints of a Constitutional right of petition is not so apparent, but even so, to defeat the presumption of validity of the IP Right, a steep set of requirements is imposed on the party alleging such misconduct .
- Salgado/Barbosa/Zucoloto

Anticompetitive exercise of IP rights illicitly acquired

The “second tier” analysis

- The US doctrine treats this approach as a clear “second tier” resource of dealing with illicitly acquired IP Rights, as the internal measures of the IP system are the primary responsible for quashing this illegal behavior
- This problem was also felt on a different perspective within the EU system, as indicated in a 2011 case (the AstraZeneca 2011 case). It could be argued that this standpoint derives from the peculiar construction of abuse of rights in the EU Competition system.
- There is a very outstanding split of approach in the treatment of anticompetitive acts between the US and EU
- Salgado/Barbosa/Zucoloto

Anticompetitive exercise of IP rights illicitly acquired

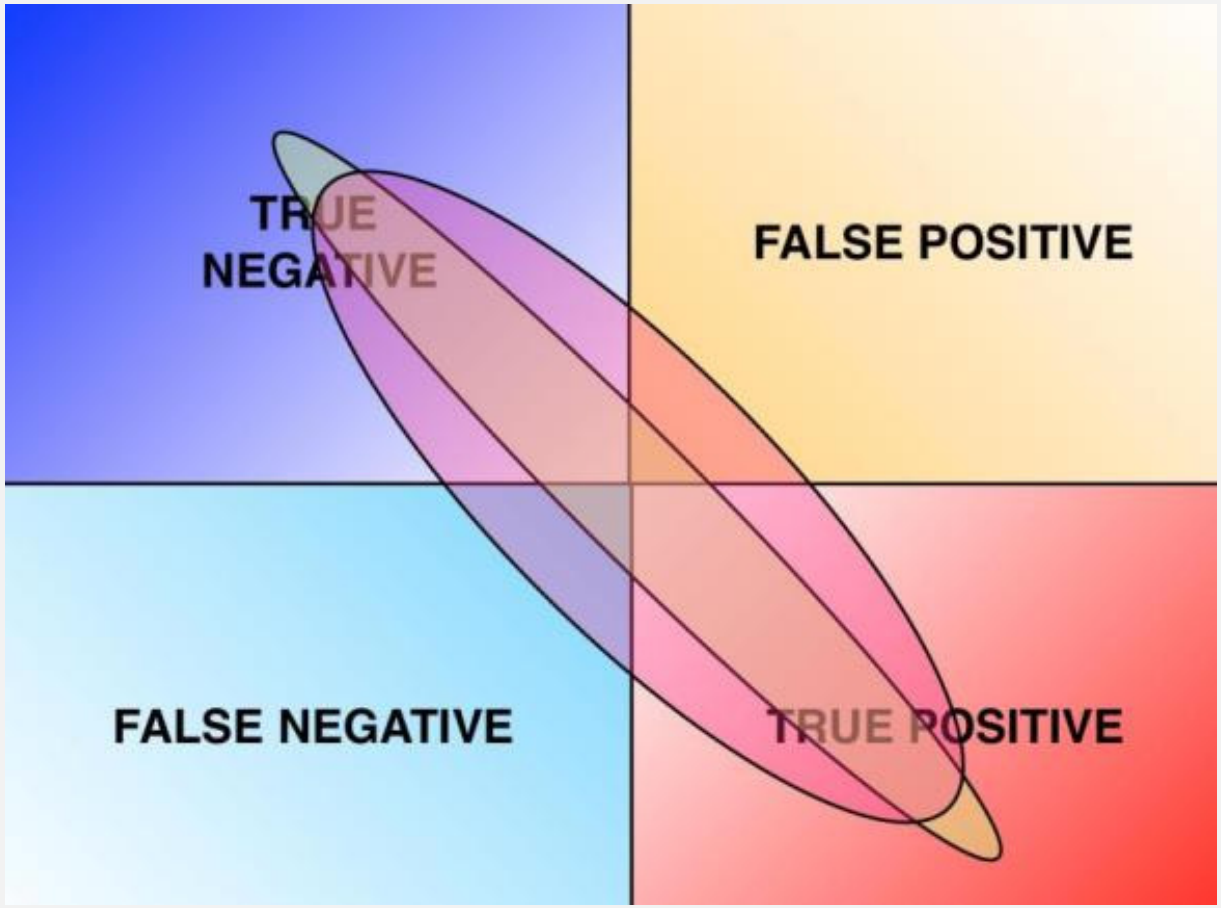
- In AstraZeneca [T-321/05], the Court held:
  - *"In the present case, the Court observes that the submission to the public authorities of* ***misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which the undertaking is not entitled****… constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition. Such conduct is not in keeping with the special responsibility of an undertaking in a dominant position not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market…"* [Par. 355]

Anticompetitive exercise of IP rights illicitly acquired

- Essentially, the distinct approach derives from the EU Judicial case law according to which a dominant player is prevented to act in a manner that would be irrelevant from non-dominant player; therefore, no subjective intent would be requisite, as there is no need to demonstrate an effective exercise of the illicitly acquired IP Right on an actual anticompetitive context.
- Salgado/Barbosa/Zucoloto

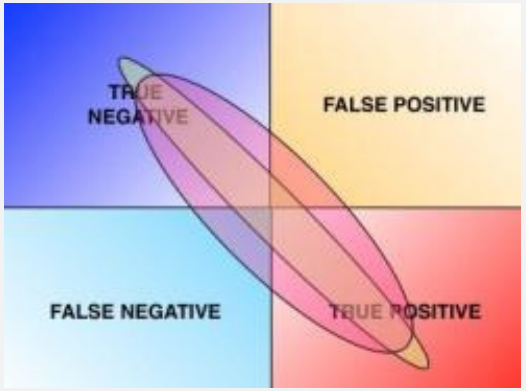
Anticompetitive exercise of IP rights illicitly acquired

- In the Brazilian Tacographs case:
- “once a firm has attained dominance in the relevant market, his *elephantine* behavior would render its exercise of the right to redress in face of competitors particularly sensible”..
- CADE Process 08012.004484/2005-51, decided 18/8/2011.



THE PROBLEM OF FALSE NEGATIVES

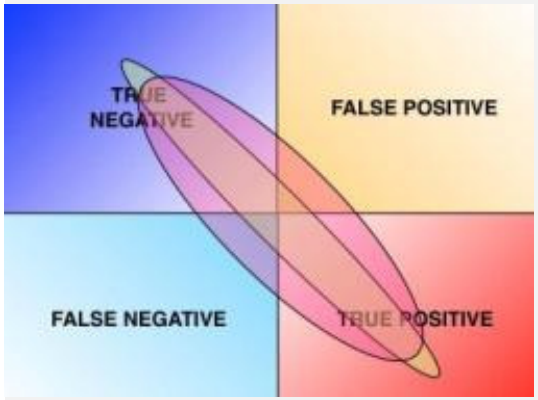
False negatives



- “However, in this some courts may consider baseless an action that other courts will consider meritorious. This risk is particularly present in situations in which the concept of what constitutes a baseless claim may be influenced by the court's conception of the adequate balance to achieve between allocative and dynamic efficiency.
- The establishment of a bright-line rule may lead to an important risk of false negatives”.
- Lianos /Deyfruss

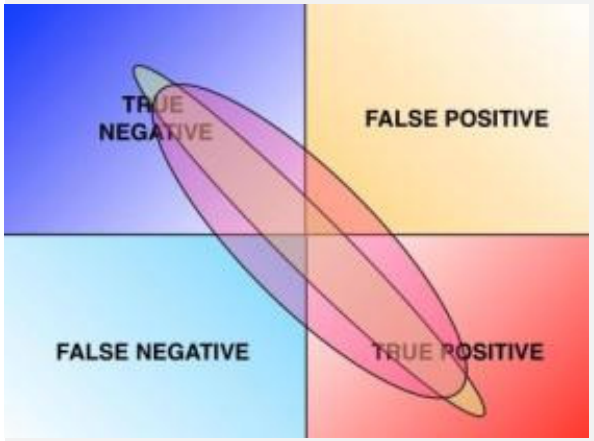
False negatives

And a most recent proposal



- “Predatory litigation is more problable as:
- a) the litigator is a dominant firm or a collusion of firms;
- b) the other part is a recent competitor that has just entered the market – or a potential competitor;
- c) the legal action effect is to prevent or delay the entry or expansion or the plaintiff, or force its exit”.
- Salgado/Morais

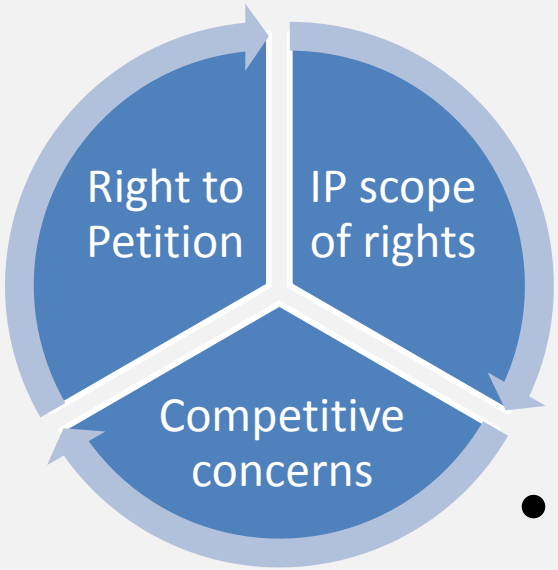
False negatives



- “The proposed test consists, in practice, in verifying:
- - If the incumbent firm has decided to incur in litigation costs;
- - If the level of market price remained pretty constant for a fair period of time;
- - If there are economies of scale or equivalent cost advantages (such as learning by doing) present in the case;
- - If the investigation can verify “raising rival cost” pieces of evidences in testimonies.
- **All these conditions should be present** in order fora case to be accepted as a sham litigation case”.
- Salgado/Morais

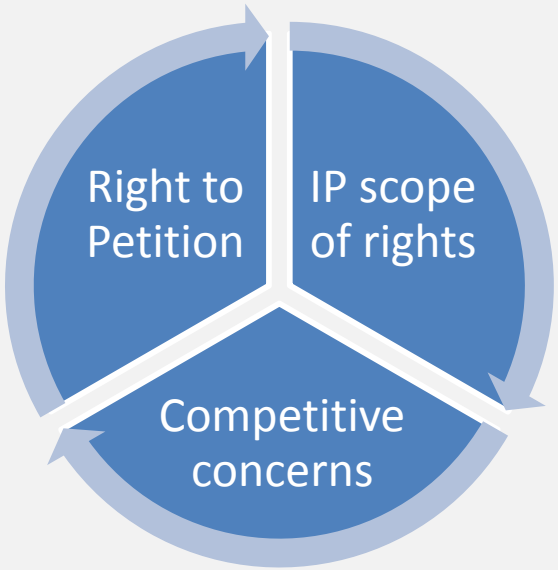
CONCLUSION

Conclusion



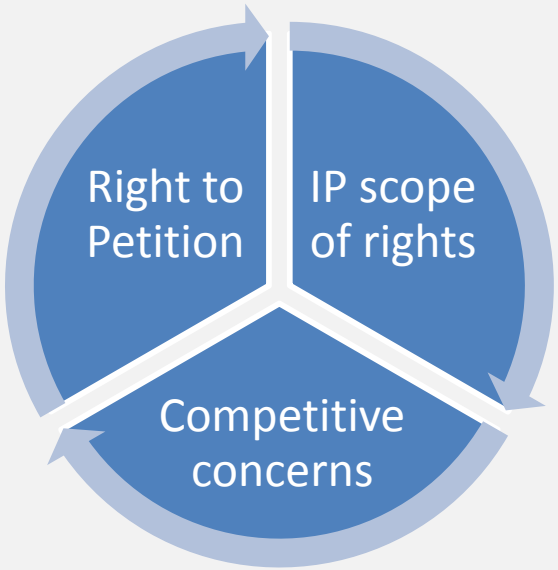
- The abuse of the Constitutional Right to petition to affirm Intellectual Property rights on an anticompetitive manner is a very sensitive issue.
- In a number of jurisdictions, some significant body of law is developed to regulate such dysfunctional use of legal means, essentially through judicial elaboration.

Conclusion



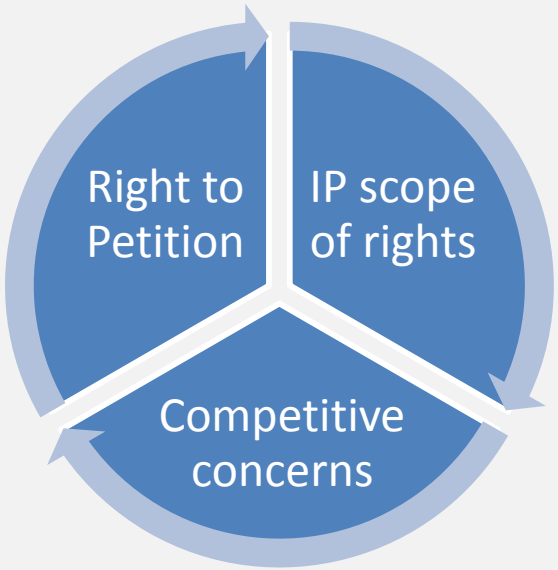
- The PREI/POSCO/ITT Promedia set of tests seems to be the most common standard to which the evaluation of such cases is subjected.
- Even in jurisdictions where no specific mention of such precedents are frequent, some complex filtering is carried out, considering both the dysfunctional use of the right of petition summed to a evident harm to the competition environment.
- Thus, the two-pronged approach seems to be prevalent.

Conclusion



- In most jurisdictions, the application of a sham/vexatious litigation argument is contingent to a series of *specially damaging* levels of behavior.
- Demonstration of *intent*, and in many cases a malicious or reckless intent, is very much frequent, even in those systems where a purely objective standard is prevalent.
- It could be argued that the double vectors of Constitutional empowerment *and* the peculiar status of IP rights as an exclusive power (thus legally accepted “monopolies”) to enhance dynamic competition, forces out such much steeper criterion on the courts and regulators.

Conclusion



- On the other hand, the need to deny the use of IP rights for anticompetitive purposes, especially through the *abusive* employment of the much cherished right to petition, seems to be so spread in the present International environment that the issue is, beyond any doubt, an essential factor in Intellectual Property theory and practice.