WG4 Conference Call 1/7/09 – Notes

The three chapters are set up & ready to discuss and move forward

I. Standard-setting chapter:
Does anyone have any substantial issues of the redline issue of the chapter?

Diane: in the discussion of unocal case: reference in passing to FTC's claims under section 2 (p ?) – there was no claim under section two. Needs to be corrected.

Also, the following issues were brought up:

1. the front end: could add info about areas where these orgs can get into trouble.
2. principle 3-2, paragraph 3: language suggests that all actions taken under these organizations is efficiency-enhancing & this is misleading
3. principle 3-4 (2)(a) wasn't clear about California
4. concerns about principle 3-2: the principal is not as narrowly tailored as it might be, does not explain which IP it is specific to
5. section on rule of reason is unclear – not sure what the principal is intended to get at – Steve will need to address these sections
6. principal 3-1: tie between disclosure policy & obligation to license: believes this is incorrect. We should be able to nail down an agreement on this issue in our next meeting.

→ Resolved that Tom, Cheryl & Steve will put together proposals on specific revisions for these sections

II. Settlement Chapter
At our March meeting: we reached the conclusion that it's unlikely that patent bar & antitrust enforcement bar are unlikely to reach consensus on principles, but should still provide guidelines for courts making decisions on these issues.

1. What should our goal be with this section?
Suggestions:

-We should still come up with a way to identify key issues, subtleties, different camps in the settlements case law:

- how much can we agree upon? How can we capture the best thinking in some structural kind of way?
- David's draft captures nice plaintiff-oriented kind of way, David & Kevin's draft is nice defendant oriented: can we restructure those together to provide an overview?

-Cheryl: we need to identify reverse payments
- to the extent that enforcement of a patent is consistent w/ antitrust laws, going outside the scope of the patent is an antitrust problem
- we should identify issues like scope of patents that the courts have identified: we can describe whatever conflict is contained in the law, to resolve these issues we'll have to decide what will happen

2. Hatch-Waxman & uncertain future:

-- if the settlements chapter is now exclusively a hatch-waxman chapter: are we looking at a target that's going to move before we can impact it?

Greg Glover:

1. we need to recognize that the fact patterns we're describing may not be repeated because of changes in laws and regulations. The most egregious cases probably won't re-occur.
2. since we are now focused on pharmaceuticals, we need to make sure to get the industry dynamics correct. Some of the things described here (like 4 issues described about getting to settlements) aren't well-characterized (overly pro-generic)

-- is there really a long-term gain given that hatch-waxman might be changed in the next 2-4 years?

-not convinced that is true & believes patent reform will not affect these issues very much. Authorized generics are the newest problem and the dynamics have changed since 2003: 180 day exclusivity is gone now – multiple first filers, only one 30-day stay.

Greg Glover: reverse payments no longer a problem

3. we should still do the chapter: there's value in explaining to the courts the issues with the court even if we can't come to a consensus answer to the questions raised

Will Schieber: doubts it will ever reach agreement; we have been working on it for two years and have npt reached agreement on anything
Cheryl: maybe we are reaching too far? Maybe we can agree on smaller principles that might aid the court – ex: point out that patent validity cannot be assumed

4. Everyone is troubled by inability to reach consensus on the settlements chapter.

Kevin: this draft indicates that we have not agreed on the intent of this chapter/decided what it is it needs to do.
Perhaps we can illustrate where the conflict is and outline it for the courts.

In March 07, didn't we decided to provide points that would help courts parse the interests of the parties? We are having trouble reaching consensus on even that level.

The two sides believe that these cases stand for different things, so any interpretation of the law is going through those filters:

- A lot of scholarly articles have been written on these points

- to try and summarize the case law and what kind of standard it points to is extraordinarily difficult. Only in tamoxifen has this really been tried to set a standard – other analyses have been very vague. The question of what they said has become part of the polarized discussion. Ultimately we'll have to get an answer from the supreme court to establish this.

Therefore. it looks like even reaching a consensus on what the case law says will be difficult.

→ Resolved that Kevin will draft a paragraph or two for the introduction on how people have a difficult time reaching a consensus on this issue following the points laid out in his memo, which reveals the underlying complexity very well – these paragraphs will outline the conflicts in opinion on settlements to complement to section on the tension btw patent and antitrust law. This will warn courts not to take an overly simplistic view.

Inequitable & Fraudulent Patent Conduct Chapter:

John: Cheryl & I got frustrated on this chapter: we disagreed with the approach taken by the draft, which allowed a lot of competitive pooling of patents we felt could thwart competition, made everything rule of reason; said patent pools should permit non-essential non-related patents to pool.

-question: is patent pooling a topic to include in this exercise? This may be similar to settlemnts in that we wont reach consensus in the principles area

If we approach it as setting up the status of the law and what the approach and pitfalls are

Can you set forth the principles and go from there? Then we can see whether we are all on the same page.

→ Resolved: Cheryl & John Will put together an outline of positions without doing commentary and we'll go from there.

→ Resolved: at our next meeting, tentatively scheduled for Weds Jan 28 at noon, we will finish the discussion on the standards setting chapter & nail down other issues on which we can agree.