

IP, Competition Policy, and Enforcement Issues

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“Patent Thickets”

- Patent thickets may or may not map to “technology thickets”
 - Numerous patent grants may reflect numerous technological breakthroughs
 - Whether patent thickets are desirable or undesirable depends on whether or not they are undergirded by technology thickets

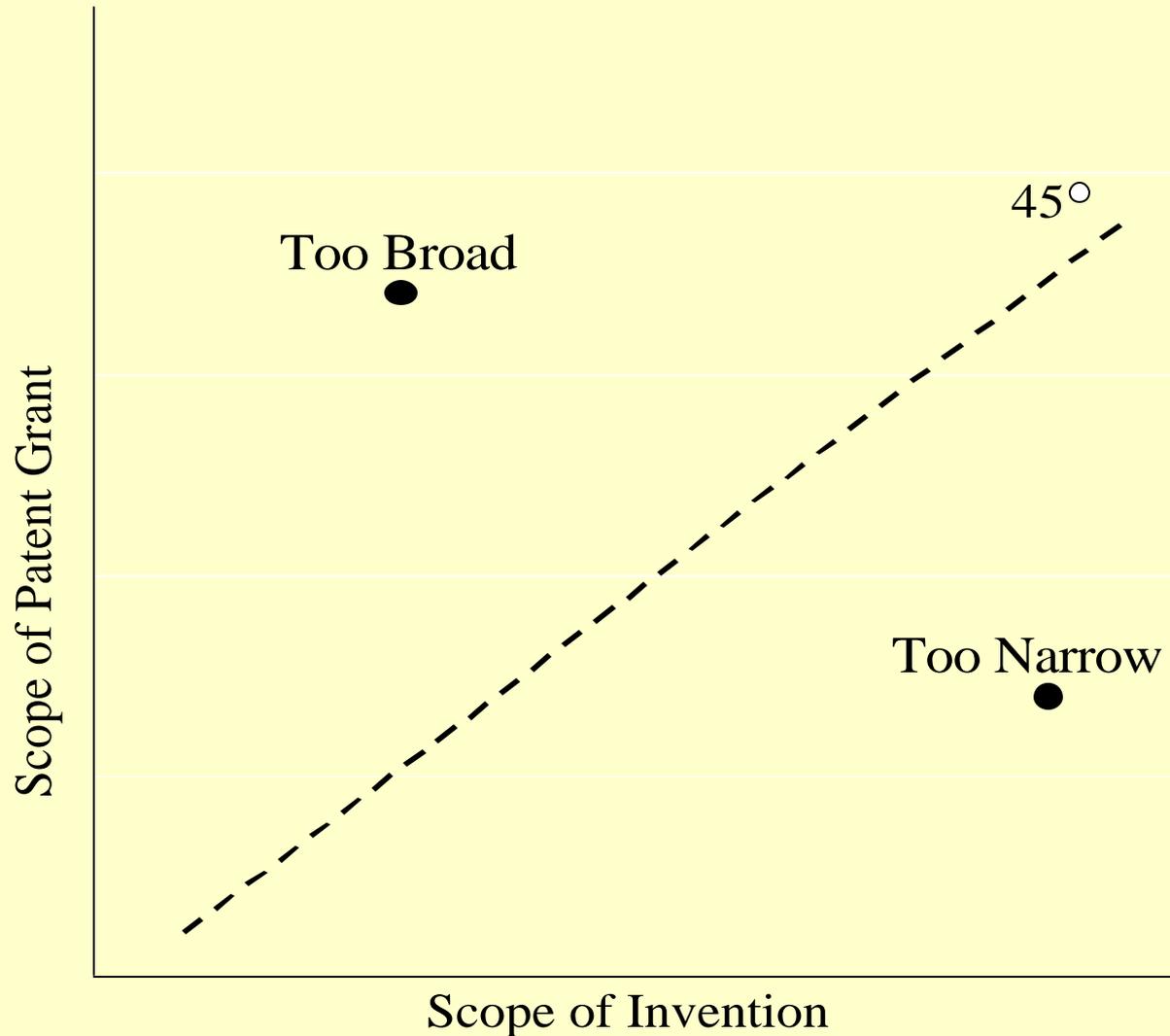
Complements *vs.* Substitutes

- Many “patent thickets” involve complex mixture of substitutes and complements
 - Especially in context of bulk licensing
- Cross-licensing of complementary patents is unambiguously good
- Cross-licensing of substitutes sometimes requires further analysis

“Royalty Stacking”

- “Input stacking” problem is ubiquitous and not unique to IP
 - manufacturing, real estate, oil pools, *etc.*
- Not generally seen as a competition issue
- Is IP different? discriminating factors may include:
 - Availability of alternative technologies
 - Concern that IP owner negotiate in a socially efficient fashion
- Evidently a transaction cost problem, not competition problem

Patent Breadth Issue



“Overly Broad” Patents?

- If there is a PTO problem, then:
 - Antitrust authorities have *policy* role to play encouraging reform
 - But not an antitrust *enforcement* issue
- Other mechanisms for combating overly-broad patents
 - Intervention during prosecution
 - *Ex parte* and *inter partes* reexamination
 - Litigation regarding validity
 - These problems do get sorted; issue is: cost?

Patent Litigation As An Antitrust Issue

- Cost of litigation
 - But see Lemley (“Rational Ignorance” paper)
 - Litigation costs are high, but infrequently incurred
 - The “threat” of litigation is needed to encourage negotiated agreements
- Settlements
 - Typically involve compromise on disputed issues
 - Concern: if authorities restrict settlements, transactions move out of the marketplace and into the courts

“Defensive Patenting” And Antitrust

- Concern about growth of what some see as “defensive patenting”
 - “Prisoner’s Dilemma” issue
- Issues:
 - No clear line identifying “defensive” patents
 - Clearly not technological
 - Motives for patenting? Subsequent use?
 - Source of “defensive” value is fact that others are using the invention
 - implies: represents some technological advance