Non Patent Exclusivities and their relevance to Drug Repurposing

Trevor Cook
trevor.cook@wilmerhale.com
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Non Patent Exclusiveties in Pharma

- Supplementary Protection Certificates
  - [Not really a non patent exclusivity!]

- Regulatory Data Protection (Data Exclusivity) in EU & US
  - Human Medicinal Products
  - Veterinary Medicinal Products

- Market Exclusivity in EU & US
  - Orphan Medicinal Products
Supplementary Protection Certificates and Patent Term Extension

- Not really a non patent exclusivity
  - As it requires a basic patent
  - And it corresponds to Patent Term Extension in the USA (and to Patent Term Extension on grounds of inadequate remuneration under pre 1977 Act UK law)

- Duration shorter of
  - Basic patent term plus 5 years or
  - 15 years from first EU/EEA Marketing Authorisation
  - plus 6 months paediatric extension

- Article 3 SPC Regulation limits its application to drug repurposing
  - A certificate shall be granted if,...
  - (c) the product has not already been the subject of a certificate;
  - (d) the authorisation referred to in point (b) is the first authorisation to place the product on the market as a medicinal product.
Supplementary Protection Certificates and Drug Repurposing

- Cases on new indications and new formulations of old actives
  - C–31/03 Pharmacia Italia
    - Earlier VMP MA in Italy precluded an SPC based on an HMP MA in Germany
  - C–431/04 Massachusetts Institute of Technology
    - Earlier MA precluded the grant of an SPC based on an HMP for a new indication the basic patent for which taught a new delivery means which made such new indication possible for the first time
  - C–130/11 Neurim Pharmaceuticals
    - Earlier VMP MA did not preclude SPC based on an HMP MA in respect of an indication the basic patent for which would not have “protected” the earlier VMP
  - C–433/17 Abraxis Bioscience LLC
    - Neurim could not be extended to cover new formulations
  - C–673/18 Santen SAS
    - Opinion of AG Pitruzzella 23 January 2020
True Non Patent Exclusivities - Data Exclusivity and Orphan Exclusivity Contrasted

- “Data exclusivity” - Regulatory Data Protection
  - Does not preclude second applicants securing authorizations for a product during the protected term on the basis of independently generated clinical trial data
    - Mandated by TRIPs and, with more specificity, by recent Trade Agreements
    - Has its origins in attempts to protect clinical data under trade secrets law
    - Such basis is challenged by trend to greater clinical data transparency although EU soft law seeks to decouple the two

- “Market exclusivity” - Orphan Medicinal Product Protection
  - Does preclude second applicants securing authorizations for a product (or in the EU a similar product) during the protected term on the basis of independently generated clinical trial data
    - Not challenged by greater clinical trial transparency
Data Exclusivity and Article 39(3) TRIPs

- Article 39(3) TRIPs
  - “Members, when requiring as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilise new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use.”
  - “In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”
- Mandated only for pharmaceuticals and agrochemicals
- Does not mandate protection for new indications etc
- In Europe such protection is also available for, inter alia
  - Chemicals
  - Biocidal Products
  - Health Claims for Food
Data Exclusivity in Europe for Human Medicinal Products

- “Generic” applications (“8+2+1” years) (since 2005)
  - Protects against “generic” of reference medicinal product where reference medicinal product had “New Active Substance” status
  - Cannot be filed less than 8 years after first MA for reference medicinal product and cannot be granted less than 10 (ie 8+2) years after first such MA
  - If a new indication providing “significant clinical benefit” is authorised during first 8 years then 10 years is extended to 11 (hence 8+2+1)
  - No other such protection for new indications of reference medicinal product within the same global MA, irrespective of how recent their authorisation
    - Leaving the possibility of protection for new indications within a different global MA where there is no link whatsoever between the holders of the two global MAs

...
Data Exclusivity in Europe for Human Medicinal Products

▪ “In addition ... for a new indication for a well-established substance, a non-cumulative period of one year of data exclusivity shall be granted, provided that significant pre-clinical or clinical studies were carried out in relation to the new indication”

▪ Change of Legal Status under Article 74A - 1 year

▪ Paediatric Use MAs where no other reward for paediatric studies - “8+2” years
Caselaw on Data Exclusivity for Human Medicinal Products in Europe

- Determinations of “New Active Substance” status
  - Case C-477/11 Sepracor
  - Tecfidera and Aubagio assessment reports
- Determinations of “Significant Clinical Benefit” for “+1”
  - Torisel and Zytiga positive assessment reports
  - Isentress, Prezista, and Yondelis negative assessment reports
- MA based on “well-established use” as a medicinal product attracts its own period of protection
  - Case C-104/13 Olainfarm
- No data protection for new indication where part of the same global MA as the reference product
  - Case T-472/12 & T-67/13 Novartis
- Combinations of actives have own period of protection irrespective of whether data exclusivity still attaches to components
  - Case T-547/12 Teva (withdrawn)
Case study comparing Data Exclusivity and Patents in Europe and the USA

- **Abiraterone (ZYTIGA)**
  - 1992 NCE invented by Jarman, Potter & Barrie at ICR, funded by CRUK, and NCE patent filed
  - 1996 Patent licensed out but licensee eventually withdrew
  - 2004 Judson et al at ICR publish reports of Phase I trials
  - 2004 Patent licensed out again
  - 2005-6 de Bono et al at ICR publish rationale for further studies, undertake Phase I/II clinical trials, and use patent filed
  - Phase II and Phase III clinical trials
  - 2011 US & EU MAs granted
  - 2016 EP use patent revoked by EPO Opposition Division (appeal subsequently withdrawn)
  - 2018 Expiry of US data exclusivity
  - 2019 CAFC upholds revocation of US use patent by PTAB
  - 2022 Expiry of (extended) EU data exclusivity
Data Exclusivity in Europe for Veterinary Medicinal Products

- Current (since 2005)
  - As for Human Medicinal Products except
    - 13 years for VMPs for fish or bees
    - Extra 1 year over 8+2 (up to 8+2+3 =13 years max) for each new food producing species to which VMP authorisation extended
    - 3 years for MRL data for an applicant that is otherwise relying on published literature route to secure an MA for a food producing species
Data Exclusivity in Europe for Veterinary Medicinal Products

- New (as from 2022, by Articles 39 and 40 of Regulation 2019/6)
  - 10 years - VMPs for cattle, sheep for meat production, pigs, chickens, dogs and cats
  - 14 years - VMPs for new antimicrobial products for such species
    - Plus, in above two cases, extra 1 year for each new such species to which VMP authorisation extended, up to 18 years maximum
  - 18 years - VMPs for bees
  - 14 years - VMPs for other species
    - Plus, in above cases, 4 extra years where VMP authorisation for more than one such species or extended to another such species

...
Data Exclusivity in Europe for Veterinary Medicinal Products

- New (as from 2022, by Articles 39 and 40 of Regulation 2019/6)

  - 5 years for MRL data for food producing species
  - 4 years for data supporting “a change to the pharmaceutical form, administration route or dosage, which is assessed by the Agency or the competent authorities ... to have demonstrated:
    - (a) a reduction in the antimicrobial or antiparasitic resistance;
    - or
    - (b) an improvement of the benefit-risk balance of the veterinary medicinal product,
Orphan Exclusivity in Europe for Human Medicinal Products

- **Market exclusivity**
  - As against same or similar medicinal product for same indication
  - 10 years
    - + 2 years where MAA includes studies conducted in accordance with PIP
  - Not avoided by independently generating data
  - Scope in some cases to reduce term to 6 years
  - Exception for inadequate supply
  - Exception for similar products which provide a technical advance

- **Caselaw**
  - Case T-80/16 & C-359/18P *Shire*
    - Orphan status is available for a new medicinal product containing the same active substance as an existing orphan medicinal product for the same indication
  - Case T-140/12 & C-138/15P *Teva*
    - Consequences of providing exclusivity as against similar products when there are two similar orphan medicinal products for the same indication each having different terms of protection
Orphan Exclusivity in Europe for Human Medicinal Products - Similarity

US Drug Exclusivities

- **Data Exclusivity for Small Molecule Drugs**
  - 5 years New Chemical Entity (NCE) exclusivity
    - Before generic can file
    - Extended to 7.5 years before generic authorisation can be granted where generic filing involves a Paragraph IV certification in relation to an Orange Book listed patent which is then the subject of patent litigation
  - 3 years New Clinical Investigation (NCI) exclusivity
    - Before generic authorisation can be granted

- **Data Exclusivity for Biological Drugs**
  - 12 years

- **Orphan Drug Exclusivity**
  - 7 years
    - As with EU provides market exclusivity as to same indication
    - But narrower than EU in not extending also to “similar” drugs

- **Exclusivities for Animal Drugs**
  - As for human drugs, except orphan drug exclusivity
  - But 7 years Minor Use and Minor Uses (MUMS) exclusivity
Conclusions (as to EU)

- **SPCs**
  - No protection for new indications, unless the CJEU in C–673/18 *Santen* does not follow AG opinion that C–130/11 *Neurim* was wrong
  - Keyed to basic patent

- **Regulatory Data Protection / Data Exclusivity**
  - No protection in EU for new indications of already authorised products unless significant new indication
    - when 10 year exclusivity extended to 11 years for all indications
  - But a valuable incentive to seek the first MA for a product with weak, old, or non-existent patent protection
  - And as the example of VMPs show, capable of considerable tailoring to reflect societal aims

- **Orphan Medicinal Product Marketing Exclusivity**
  - Absolute protection for new orphan indications against not only the same, but also similar, products, thereby avoiding incentivising simple me-too actives