# L’articulation droit de la concurrence - droit de propriété intellectuelle

## Séminaire Nasse

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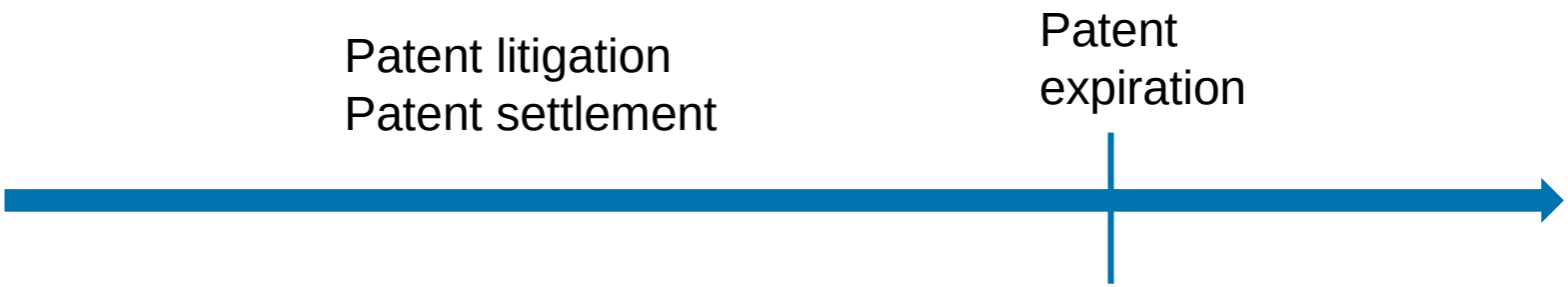
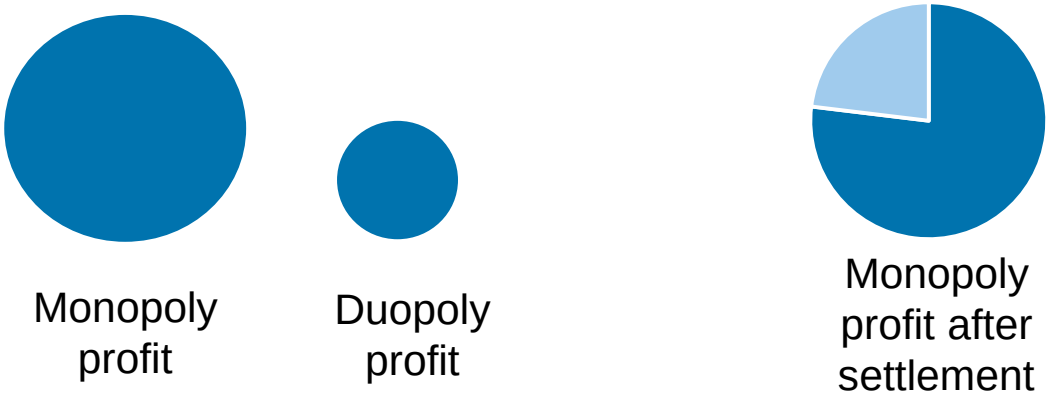



Patent owner has an incentive to protect his monopoly profit



# Probabilistic patents

Lemley, Shapiro

- Very few patents are litigated and even less go to trial
- Very few patents have a commercial significance

**Optimal policy** [optimal allocation of (scarce) resources]:

- Improving the system of granting patents or
- Controlling *ex post* some agreements with commercial interest

➢ **Probabilistic patents** (right to try to exclude and not right to exclude)

# Two concerns about patent settlements

1. Concerns about settlements that prevent weak patents from being "weeded out" by the courts
    - The extreme case of *sham patents*

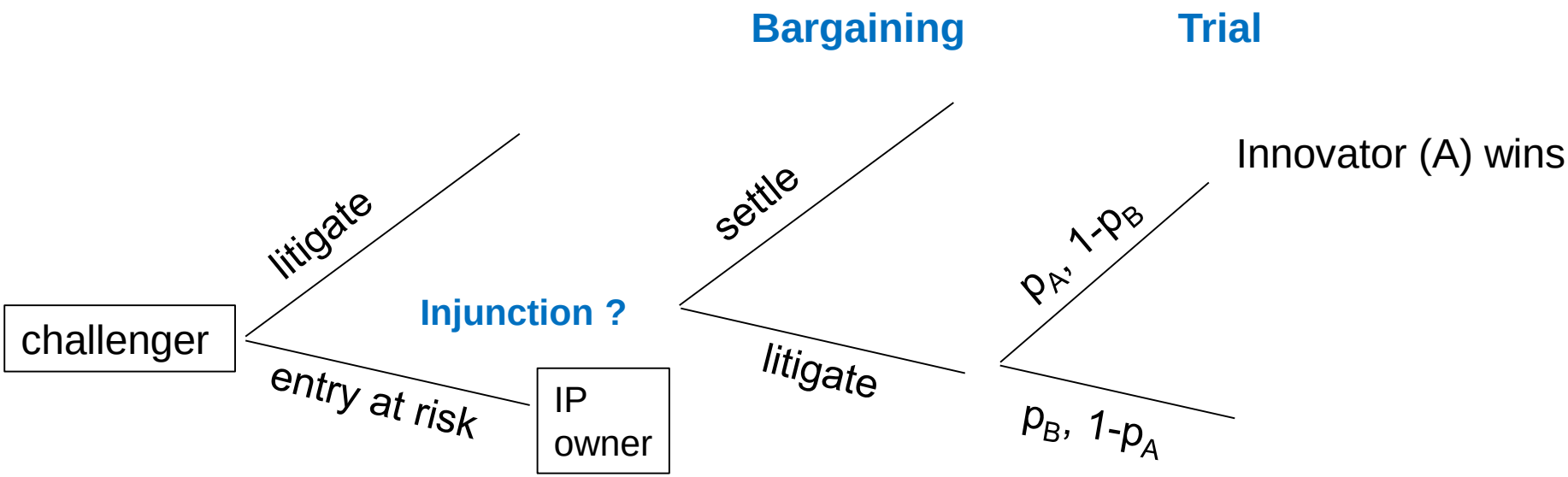
2. Concerns about settlements in which consumer welfare is less than the expected consumer welfare if the parties had litigated
    - Incentive to delay entry until patent expiration

# Preliminary remarks – the « IP bargain »

- **Patent** :
  - Reward for an innovation and R&D investment
    - rent given to the innovator (right to exclude, license, settle if more profitable)
  - Ex post dead weight loss for consumers

- **IP bargain**: trade-off between these two opposite effects (dynamic efficiencies)

# The game




$p_i$ : belief by i that he will win the litigation

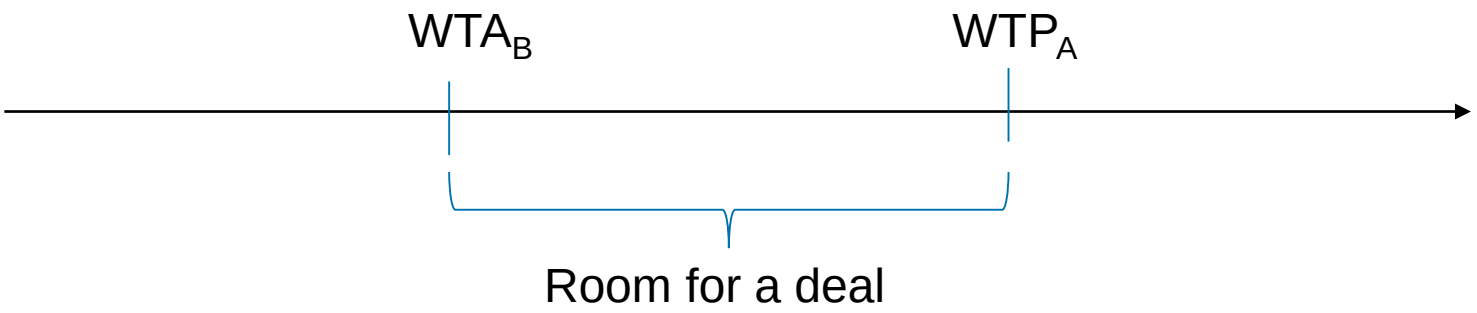
**Settlement**:

- Value transfer
- Other (compensation on other markets, early entry, …)

# Is there a room for a deal?

- Each party estimates his willingness to pay / willingness to accept

(e.g. innovator (A) pays, generic (B) receives)




**Willingness to pay** (to accept) depends on :

- belief on the probability of winning the trial
- litigation costs

# The asymmetric risk

Each party does not face the same risk in going to the trial

➢ ***Innovator***:

- Looses its profit on some markets
- Side effects on other markets if reference pricing
- Difficulty to be entirely compensated if wins the trial (limited responsibility, potentially huge damages – eg “at risk” entry )
- Enhanced if injunction is difficult to obtain
- Litigation costs

➢ ***Generic*:**

- Litigation costs

**Consequences:**

- A patent holder can have a rational incentive to pay significantly more than anticipated litigation expenses to settle patent litigation even when it believes there is a high probability that it will win at trial
- A settlement payment that significantly exceeds litigation expenses cannot be treated as evidence of a sham patent

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# Value transfer settlements

- **Value transfer** facilitates the settlement
  - Amount is certain (any other compensation would incur a risk)
  - No reason that the value transfer would be limited to the amount of the (saved) litigation costs

=> Value transfer settlements should not be seen as negative *per se*

# The articulation between antitrust and IPR

- Should private incentives to settle be aligned with some social welfare objectives?
  - No more than for a patent owner to set his price in order to maximize social welfare
- Should Antitrust compensate for some potential failures of the IPR system?
  - Why not addressing these potential failures with IP law/ rules?
  - Optimal allocation of resources between improvong granting system and selective ex post control (probabilistic patents)
- Limitating the ability of patent owners to settle decreases their potential profit and therefore their reward for R&D investments and innovation
  - Negative effect on innovation