World Competition Day, 2016

Interface between Competition and Intellectual Property Rights

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Preface

International Days are observed to draw the attention of society at large on issues that are extremely important for human development in the present and particularly for the future.

Competition Policy falls into this category and this is why a global movement led by CUTS International has been celebrating and calling for the adoption of a World Competition Day (WCD) on 5th December, the date of the adoption of the first-ever Set on Competition Policy by the United Nations General Assembly 35 years ago. Since 2010, over 24 countries have supported the call and celebrated this Day. One of the biggest achievements of our advocacy efforts has been the declaration of the National Competition Day made by the Philippines Office for Competition, Department of Justice. It is essential for countries to take such steps in their advocacy efforts as consumers need to realise the potential benefits of an effectively implemented competition regime, and also know about their role in making competition regimes work worldwide.

Considering the exponential technological advancements across the global market and its implications on the consumer, the theme for this year's WCD is "Linkages between Competition and Intellectual Property". It is a recognized fact that innovation and competition are two of the most important pillars which support and foster the growth of an economy. The peculiarity of the interface between competition and IPRs which have similar objectives but different tools of enforcement make their interaction intriguing and puzzling. Thus, keeping in mind the overarching issues which lie at the linkage between competition and IP, we thought that the complex theme could be justified and explained through the voices of prominent global experts. Owing to this thought process, the World Competition Day E-Compendium was born and we are proud to release the first edition of this annual publication. The 2016 E-Compendium consists of select articles on the theme and is an attempt to guide the discourse on related issues which lie at the interface between competition and intellectual property rights.

Finally, I would like to thank all the authors for their valuable contributions and for being part of our endeavour to spread the word on competition and its benefits. It is my sincere hope that the readers enjoy this edition and also celebrate with us the essence of competition and acknowledge the immense benefits which it offers.

Pradeep S Mehta
Secretary General
CUTS International

Relationship between Competition and Intellectual Property

Allan Fels AO[1]

A much neglected aspect of international property laws is the draconian restrictions on international trade in copyrighted products. They illustrate a general point: intellectual property law has been dominated by the interests of countries which export intellectual property at the expense of countries which are major importers of intellectual property.

Taking books as an example, in nearly all countries it is not possible for a bookseller to import books from the cheapest available source in the world. Instead they must purchase from whoever holds the local copyright in that country - typically the multinational publisher.

This enables publishers to set different prices in different countries depending on supply and demand conditions. Australia is an example.

In the nineteenth century Australian booksellers could import books from anywhere. As a result they got the best prices and best value for money. However, British colonial publishers pushed through a law that effectively required booksellers to buy directly from UK publishers and no one else e.g. American publishers of the same book. In other words, an import monopoly was established. It enabled foreign publishers to set high prices in Australia without being undercut by identical versions that UK publishers sold far more cheaply in other countries.

This system had nothing to do with protecting Australian culture. It was for the protection of profits of foreign publishers. To this day foreign publishers and writers like Stephen King are the main beneficiaries of this archaic import monopoly law.

Only one third of books are Australian yet all the publishers, foreign and local, hide behind Australian authors who are sent out to defend the system.

Since 1989 there have been numerous studies by our top economic agencies.

[1] Professor Alan Fels AO is currently a Professorial Fellow at the University of Melbourne, Australia. Prof Fels previously held the inaugural Chair of the Australian Competition and Consumer Commission from 1995 to 2003 and also chaired the Trade Practices Commission and the Prices Surveillance Authority.

All have concluded on average that our book prices are higher than overseas nearly all of the time.

Regarding “like” editions of books, that is, identical books, Australia’s prices are on average 35 percent more expensive than “like” editions in the USA even after taking into account tax.

The cause of these dramatic price differences is the import monopoly. If imports were allowed such a huge gap could not persist. If it was removed, there clearly would be a price fall as there was after the 1998 reforms removing the same restrictions on CD’s when prices fell about 8 percent.

The retail market is sufficiently competitive to pass most or all of the price fall on.

There is overcharging of the disadvantaged as well as the advantaged, young and old, students and others who enjoy reading and the many struggling families in our society can’t get access to books because they can’t afford them.

What of the cultural issues? The system imposes a major tax on culture and education. If I want to read Shakespeare, Plato or A K Sen of Harvard on justice or a top English, American or Indian writer, or a children’s book or a textbook, why do I have to pay 10, 20 or 30 percent extra? This contradicts policies regarding disadvantage, the education revolution and economic reform.

This is worse than a tax because the benefit does not go to Australians. It principally goes overseas. According to the Productivity Commission, of every $250 overcharge, $150 goes overseas.

Another weakness of the present system is that it does not discriminate between works of high and low cultural value.

Publishers, foreign and local are hiding behind authors who are greatly exaggerating the effects of the change.

What of the impact on authors? There will be some impact on some authors but the effects will be quite small, the same as happened with CD’s where there has been little adverse effect on the local industries. The fact is that there is and will continue to be a very strong and growing demand for Australian authored books and as a result publishers will publish them and make money as will Australian writers.

Does the rise of e-books change anything? The Productivity Commission analysis shows the purchase of books in their traditional hardcopy format remains very high and so do the price differences. Technology has done little to undermine the anticompetitive arrangements.

Is the message different for developing countries? Should they all abolish statutory import restrictions? This is a more serious policy question. The current price discrimination system allows publishers to charge very high prices in better off countries such as Australia and much lower prices in poor countries where the demand is more sensitive to price. Would prices rise in poor countries?

I believe this is a legitimate subject for debate. My own view is that statutory import restrictions in principle are undesirable. I also believe that the market left on its own would handle the situation adequately especially by producing different quality, lower cost publications to suit those local markets thus differentiating them from high quality high price products in better off countries.

More generally there seems to be little justification for parallel import restrictions on intellectual property in any field of the economy in any country. This is no relevant market failure in this field: this law is simply designed to protect some producer interests.

Treading on a Tricky Turf: IP vs Competition Law

Shamnad Basheer[1]

On this World Competition Day, I want to pose a fundamental question on the interface between Intellectual Property (IP) and competition law: To what extent should competition or antitrust law be permitted to intrude into the hallowed halls of IP?

Resolution of this issue requires that we address another more fundamental issue: Does IP necessarily conflict with competition law?

No, say a number of erudite scholars! For, in the ultimate analysis, both regimes are about enhancing competition, and therefore, there is no real conflict. To me, this appears a bit of a stretch, even for a country like India that boasts serious Yogic contortions of yore.

We need to call a spade a spade! After all, IP is largely about dangling the incentive of a monopoly carrot in front of a putative creator. As to whether or not the incentive really works is another issue and will require traversing the difficult domains of economics, science, psychology etc.

For the moment however, suffice it to state that most IP owners will want to milk the IP cow for all that it is worth (albeit within the contours of the law)! And to me, that is at serious odds with the avowed aim of most competition regimes, namely to foster more free competition in the market. Though, with the increasing tendency to make legal regimes answer to any and every possible value that society holds itself beholden to, some have argued that competition law is also about promoting overall societal well-being, including good health, education, environment, clean energy and presumably even spiritual salvation (notwithstanding the commercial cartels constructed by many a new age guru).

Anyway, the short point is this: there is an inherent conflict between the avowed aims of these two regimes and sooner we admit it, the better. So, how do we resolve it? Who trumps whom? IP purists argue that IP regimes are good enough to internally sort out the negative fall outs of excessive monopoly power typically engendered by

[1] Shamnad Basheer is the Honorary Research Professor of IP Law at Nirma University and Founder of SpicyIP and IDIA.

avaricious IP owners. An egregious example of an IP abuse is excessive pricing or a refusal to supply in quantities sufficient enough to satiate the market. Or even to license the patent to a follow-on innovator who wishes to unleash improvements to the patented technology. It is thus that the Indian patent regime (as with a number of other regimes) stipulates that in such situations of IP abuse, the IP owner could be hit with a compulsory license.

The Indian provision (section 84) was triggered in a controversial compulsory licensing dispute pitting Bayer, a German multinational pharmaceutical company against Natco, an Indian generic company. Natco had petitioned the patent office arguing that Bayer's price for its patented anti-cancer drug, Nexavar was exorbitant and unaffordable to a large segment of the patient population (Rs 2.8 lakhs) and that it was willing to supply the drug at less than 1/30th of the patented price i.e. at Rs 8800. The patent office found in favour of Natco, holding in pertinent part that Bayer's price was exceedingly excessive.

However, the patent office did not tell us as to what metric it used to arrive at this conclusion that the drug was not affordable. It cleverly relied on Bayer's own admission that the drug reached only 2% of the patient population; and took this to mean that the drug was unaffordable to the other 98% of patients. This of course begs the question of whether the others wanted the drug at all in the first place! After all, India is home to a large number of patients that never so much as see the insides of a decent hospital and/or others who put their faith in faith healers and traditional medications.

But even assuming that this clever short hand heuristic may have worked in this one instance, future cases will demand the formulation of a rigorous frame for determining "excessive pricing", prior to holding that a patented invention is unaffordable. This will require an understanding of the health care market, purchasing power, the operation of insurance schemes etc.

Are patent offices competent enough to make this complex evaluation? Not quite! At least not at this stage. And at least not in countries such as India whose patent offices struggle for resources amidst a piling pendency of patent applications to be prosecuted.

Which then leads us to: is this complex evaluation better performed by a competition agency? To the extent that this agency is meant to have some proficiency in economics and empiricism, one might be tempted to trump it up as the appropriate situs for rigorously evaluating the deleterious effect of a patent monopoly (or a near monopoly, as economists continually remind us that an exclusive patent right does not necessary convert to a "monopoly").

But then again, there is many a slip between the cup of theory and the lip of practice. The jurisprudential worth of many a decision from the Competition Commission of India (CCI), particularly those that traverse the tricky interface between IP and completion leaves much to be desired. I speak in particular of the *Shamsher Kataria* case involving automobile spare parts, where the CCI confidently pronounced that there can be no copyright protection for industrial drawings that underlie spare parts; this when our courts have struggled with this issue for years on end, rendering one split verdict after another.

Effectively, we're stuck between devil and the deep sea! And the competition cure may well be worse than the patent plague that it was meant to heal; engendering an iatrogensis of sorts!

So quo vadis? Perhaps we could begin by infusing our IP offices with some in-house competence in economics; one might even think of recruiting experts on a case by case basis. After all, an ex post evaluation of a purported patent abuse has less to do with measuring the technical merit of an invention (which presumably requires competence in science/technology) and more to do with economics and the like.

In short, we cannot afford to have ex post evaluations of patent abuse determined by the same set of patent technocrats. Particularly when the old formalist IP property paradigm and notions of absolute exclusivity is slowly paving the way for a newer and more progressive liability regime, where IP owners are denied automatic injunctive relief against infringers and forced to contend with a mere right to share in the monetary spoils (what we respectfully refer to as "royalties").

Needless to say, a determination of what constitutes a "reasonable" royalty to be paid to the IP owner requires a serious engagement with economic frames. But then again, given the inherent arbitrariness of valuing an intangible such as IP, do we really need to spend time and resources in getting this right? Can't we have broad rules of thumb? As a valuation expert once quipped: give me the price you want and I'll work out the methodology!

And this is where the cookie crumbles. For in the end, patents are tricky tools of the trade; boasting uncertainty of an unusually high degree. They are largely luck based (lottery like) and can be invalidated at any time owing to the discovery of a primal piece of prior art on a remote island (as was the case with the classic Windsurfer patent comprising a creative combination of a surf and a sail). Worse still, the precise parameters of a patent (measured through a tortuous reading of diabolically drafted patent "claims") are largely indeterminate and patent value will continue to remain contested.

The best we can do is to pretend that there is some methodological rigour in our analytical framework, when in fact one conclusion may well be as good as the other. Or to put it more bluntly, the legal realists may well have won the day!

Standard-Essential Patents and Market Power

Anne Layne-Farrar and Koren W. Wong-Ervin[1]

While most agencies that have addressed the issue recognize that intellectual property rights (IPRs), including standard-essential patents (SEPs), do not necessarily confer market power,[2] there remains much confusion over how to determine the proper relevant market and the issue of whether a particular SEP owner has market power. For example, some agency officials have contended that, while not always the case, SEPs will "generally" or "typically" confer market power absent the existence of substitutes such as competing standards. As an initial matter, empirical research suggests that standardization does not automatically confer market power, but rather frequently "crowns winners," i.e., more important technologies are natural candidates for inclusion in standards. This is particularly important in jurisdictions such as the United States, in which antitrust laws do not punish extraction of monopoly profits, but reach only exclusionary or predatory conduct. Also flowing from this finding is that the issue of whether a particular SEP holder has market power requires a case-by-case fact-specific inquiry into whether a single SEP (or portfolio of SEPs) constitutes a well-defined relevant market, whether there are potential substitutes, and the degree to which any market power is mitigated by complementarities among technologies used for the same product.

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1 Dr. Anne Layne-Farrar is a Vice President in the Antitrust & Competition Economics Practice of Charles River Associates (CRA) and an Adjunct Professor at Northwestern University School of Law. Koren W. Wong-Ervin is the Director of the Global Antitrust Institute (GAI), an Adjunct Professor at George Mason University School of Law (GMU), and former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission. The views expressed here are the authors own.

2 *See, e.g.*, KOREA FAIR TRADE COMM'N, REVIEW GUIDELINES ON UNFAIR EXERCISE OF INTELLECTUAL PROPERTY RIGHTS pt. (II)(2)(B) (2014), http://www.ftc.go.kr/eng/bbs.do?command=getList&type_cd=62&pageId=0401; Press Release, KFTC Rationalizes Its Regulations on SEPs to Promote Technology Innovation (Mar. 30, 2016), http://www.ftc.go.kr/eng/bbs.do (amending 2014 KFTC IP Guidelines); STATE ADMIN. FOR INDUS. & COMMERCE, RULES OF THE ADMIN. FOR INDUS. AND COMMERCE ON THE PROHIBITION OF INTELLECTUAL PROPERTY RIGHTS FOR THE PURPOSES OF ELIMINATING OR RESTRICTING COMPETITION art. 6 (2015), http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201504/t20150413_155103.html; STATE ADMIN. FOR INDUS. & COMMERCE, ANTI-MONOPOLY ENFORCEMENT GUIDELINES ON ABUSE OF INTELLECTUAL PROPERTY RIGHTS (DRAFT) art. 4 (2016), http://www.saic.gov.cn/zwgk/zyfb/qt/fld/201602/t20160204_166506.html; NAT'L DEV. & REFORM COMM'N, ANTI-MONOPOLY GUIDELINE ON INTELLECTUAL PROPERTY ABUSE (DRAFT) pt. (I)(i)(2) (2015), http://www.sdpc.gov.cn/gzdt/201512/t20151231_770313.html; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (DRAFT) § 2.2 (2016); Edith Ramirez, Chairwoman, FED. TRADE COMM'N, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective 4 (Sept. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf ("[T]he same key enforcement principles [found in the 1995 IP Guidelines] also guide our analysis when standard essential patents are involved.").

Whether Standardization Confers Market Power

As the U.S. antitrust agencies recognized in their 2007 Intellectual Property Rights Report, it is important to distinguish between two sources of potential market power: "the market power that comes from the technology on its own and the market power that comes just from the standard, the act of setting a standard that elevates a technology above the competitors."[3] Empirical research underscores that in certain circumstances incorporation in a standard will make a patent a "winner" in the market, but more commonly valuable technologies are natural candidates for inclusion in standards. In other words, standard development organizations (SDOs) frequently "crown winners," not create them.[4] For example, one study analyzing a database of patents declared essential to a range of standards including telecommunications technology (e.g., W-CDMA) and imaging standards (e.g., MPEG2 and MPEG4) found that the most prevalent effect of a patent's inclusion in a standard is no or a negligible impact on the value or importance of that patent, measured by forward citations. This result suggests that inclusion in a standard in itself does not necessarily or even ordinarily create market power.[5]

Determination of Market Power

The issue of whether a particular SEP holder has market power requires a case-specific inquiry. First, SEPs are self-declared to SDOs yet no SDO evaluates essentiality, which itself may change over time as the standard continues through development and as new generations are issued.[6] Until an independent legal and technical review[7] establishes that a particular patent declared "essential" is in fact essential for compliance with the standard, there should be no presumption that an SEP confers market power. Second, even restricting the analysis to truly essential patents, one cannot perfunctorily conclude that an individual SEP or a portfolio of SEPs constitutes a well-defined relevant market or that the owner possesses market power.[8] Genuinely essential patents are perfect complements, which creates a connection among patents and patent holders such that SEPs cannot be licensed in

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3 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 39 (2007) (quoting Lauren J. Stiroh, Vice President, Nat'l Econ. Research Assoc., Remarks at Hearing: Licensing Terms in Standards Activities 321–22 (Apt. 18, 2002)).

4 *See, e.g.*, Anne Layne-Farrar & A. Jorge Padilla, *Assessing the Link Between Standards and Patents*, INT'L J. IT STANDARDS & STANDARDIZATION RES., July–Dec. 2011, at 19, 25.

5 *Id.* at 40-43.

6 Anne Layne-Farrar and Michael Salinger, *The Policy Implications of Licensing Standard Essential FRAND-Committed Patents in Bundles* at 7 (July 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846147&download=yes.

7 Typically only conducted during litigation or if the patent is submitted for inclusion in a patent pool.

8 Layne-Farrar & Salinger, *supra* note 6, at 7.

isolation. In particular, FRAND royalty rates are tied to the value the patented technologies contribute to the standard, which inherently accounts for all valuable contributions to the standard. In addition, because licensees know they must license other SEPs to be compliant with a given standard, licensees tend to push back in negotiations if they think an SEP holder is attempting to ask for more than its share. Thus, in contrast to a monopolist, which can set prices without considering the reaction of other firms, an SEP holder cannot act unilaterally and must take into account the value of other SEPs when setting its royalty rates.[9]

Conclusion

Agencies and courts should avoid presuming that a particular SEP holder has market power and instead should analyze the issue on a case-by-case basis taking into consideration issues such as whether a single SEP or portfolio of SEPs constitutes a well-defined relevant market, whether self-declared SEPs are truly essential to the standard at issue, whether there are potential substitutes within a given standard or across standards, and the degree to which any market power is mitigated by complementarities. Careful analysis of this sort can avoid erroneous conclusions about the existence of market power and thus help to protect both competition and innovation.

[9] *Id.*

Intellectual Property Rights and Competition Policy: A Few Suggestions for Developing Countries

Keith E. Maskus[1]

Intellectual property rights (IPRs) and competition policy are, in principle, complementary. They share the goal of promoting market competition, which supports economic growth. IPRs are supposed to encourage dynamic innovation by offering inventors and creators temporary exclusive rights to produce, license, and distribute their new products and technologies. Competition policy aims to limit the unwarranted exercise of market power by preventing firms from engaging in anti-competitive behavior. Thus, IPRs address the innovation problems firms face if they cannot protect their information advantages while competition regulation addresses the market-access difficulties consumers and rival firms experience when there are strong monopolies.

Despite sharing this pro-competition objective, tensions inevitably exist between these regulatory systems. The essential reason is that IPRs at times may support excessive market power and facilitate anti-competitive licensing restrictions, reducing access and competition. Indeed, patents and copyrights may be strong enough to deter innovative investments by rival firms, diminishing dynamic competition. In such cases competition policies become an antidote to IPRs.

Both systems face complex and difficult challenges in balancing among such tradeoffs. Attempting to marry them in an "optimal" structure through defined rules is impossible. Further, even if one could define such a balance it would differ among countries, depending on their levels of development, comparative advantages in production and trade, and many other factors. For example, most emerging and developing countries remain net importers of new ideas and products. Correspondingly, their IPRs systems have been rather basic, favoring access over exclusion while not building an extensive legal machinery. Further, international inventions traditionally have not been patented in developing countries. Thus, few of

[1] Keith E. Maskus is an Arts and Sciences Professor of Distinction and Professor of Economics, University of Colorado Boulder

them have a history of using competition regulations to restrain the abuse or misuse of intellectual property.

However, the TRIPS Agreement at the World Trade Organization and other factors have obliged developing countries in recent years to upgrade their standards for protecting patents, trademarks, and copyrights. The primary initial beneficiaries will be companies headquartered in the technologically advanced nations. Empirical evidence shows that such companies expand their exports of high-technology goods and foreign direct investment (FDI) in emerging countries with stronger patent laws. Those companies tend to be large and have considerable efficiency advantages, raising the risk of greater market power emerging from the assertion of stronger IPRs.

This potential threat is one major factor behind the growing trend among emerging and developing nations to enact new competition laws. There are now well over 80 countries engaging in competition enforcement, with many having adopted them recently. Despite this, actual use of competition actions remains rare. Countries are still grappling with how to organize their authorities and establish appropriate norms for enforcement, so the nexus between IPRs and competition policy remains nearly a blank slate.

The following observations may be helpful for developing countries striving to deploy systems to deal with potential anticompetitive use of IPRs.[2] It is important to note first that even within the IPRs regime there are procedures that can preserve access and competition. Among these are patents with narrow scope, high eligibility standards, opportunities for opposition, and research exceptions. Copyright laws may embody wide latitude for fair use or other limitations and exceptions. Countries may permit parallel imports to diminish pricing power. In extraordinary circumstances, authorities may issue compulsory patent licenses to ensure availability of essential goods. Each of these is a form of competition preservation, though their effectiveness depends on specific cases.

Regarding competition policy per se, some basic principles may help guide thinking for developing countries. A first priority should be to establish an office of competition advocacy, which can raise awareness of the benefits of competition. This office could also define practices that are particularly damaging to development prospects, building up expertise over time in recognizing them. Next, enforcing competition law is technically demanding and subject to numerous economic uncertainties. Few poor countries can afford the resources needed to study goods and technology markets for adverse competition impacts. Thus, building capacity through education and studying IPRs-related competition actions abroad is sensible.

[2] A far more comprehensive discussion is in Keith E. Maskus, *Private Rights and Public Problems: Intellectual Property in the 21st Century*, Washington DC: Peterson Institute for International Economics, 2012.

Another way of managing the resource constraint may be to establish regional competition authorities empowered to act across borders as companies increasingly assert their rights in multiple jurisdictions.

With this incremental approach, competition authorities could gradually build the expertise needed to sustain a competition regime that properly balances innovation incentives and access needs. The alternatives are to do nothing or to try to build a full-scale competition regime. The former is too risky and only major emerging countries have scope for the latter. Thus, experimentation and learning about the interplay between IPRs and competition in specific market circumstances are the keys for addressing these issues as economies become more sophisticated. That, after all, is how the major developed economies evolved their own systems, a process that will always continue.

Intellectual Property Licensing and Competition law: Case of Japan in Global Context

Toshiaki Takigawa[1]

This short essay gives a broad overview of relationship between intellectual property (IP) and the competition law, through highlighting situation in Japan in the context of global trend.

Exercise of IP is not exempted from the competition law

Exercise of IP rights is not exempt from the Japanese competition law (the Antimonopoly Act: AMA), as is the case for the US, the EU and China. The AMA, at Article 21, misleadingly stipulates: "The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act". Nevertheless, the Japanese competition agency (the Fair Trade Commission: JFTC) has issued its IP Guidelines ("Guidelines for the Use of Intellectual Property under the Antimonopoly Law" <http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf>), in which the JFTC proclaimed that the AMA is applicable to IP-related conduct as far as "[exercise of IP rights] is found to deviate from or run counter to the intent and objectives of the intellectual property systems", adding that the Japanese fundamental law on IP (Intellectual Property Basic Act) includes in IP rights' objectives "to promote fair and free competition".

The JFTC has enforced the AML on exercise of IP, mostly regarding licensing of IP rights. Therefore, for simplicity sake, I here limit my explanation to "IP licensing and competition law", although other areas of IP related conduct is also covered by the AMA.

Regulation against Horizontal Restraints

Competition restraints, besides mergers, consist of collaboration among competitors (horizontal restraints) and unilateral exclusion of competitors (exclusionary conduct).

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As for horizontal restraints, the JFTC, under the AML, has enforced the AMA on IP licensing, when licensing gives rise to cooperation among competitors. For IP licensing, horizontal restraints are mostly brought about through cross-licensing (including patent-pool) between competitors: owners of substitutable patents (and other IPs).

As for patent-pools, the JFTC invariably tolerates those pools constituting solely of "indispensable (and complementary)" patents, because such patents are not competing, rendering the pools not constituting horizontal restraint. By contrast, a pool consisting of substitutable patens constitutes horizontal restraint. Still, the JFTC does not treat a patent pool constituting horizontal restraint as per-se illegal, but balances each restraint's harm to competition with merits to consumer welfare (JFTC Patent-pool Guidelines III-2(1) b). Such standing is in line with that of the US and the EU competition agencies.

Regulation against Exclusionary Conduct, including Standard-Essential-Patent holdup

Patent law grants patentees legal power to exclude other enterprises from using the patentees' patents. Nonetheless, such exclusionary power does not shield the patentees from charge of infringing competition law, as explained above. Still, the JFTC has taken into consideration legal exclusionary power of patentees in judging exclusionary conduct by patentees.

One of the most important categories of IP-related exclusionary conduct is refusal-to-license by patentees. Yet, the JFTC has never condemned licensing-refusal exercised by single patentees. By contrast, the JFTC has condemned licensing-refusal exercised jointly by competing patentees (Pachinko Patent-pool Decision, 1997).

Nevertheless, given that patentees' legal exclusionary power does not shield patentees from the AML application, the JFTC very plausibly would take up, in near future, a case condemning unilateral refusal to license. Relating to this point, the JFTC, in its recently published "Guidelines on Exclusionary-Monopolization" (2009), guaranteed that enterprises, in case of unilateral conduct, are basically free to choose with whom to have dealings. Consequently, the JFTC would limit condemnation of refusal-to-license to cases where targeted patents constitute "essential-facilities", with safeguards similar to those adopted by the European Commission.

Within the context of IP-related exclusionary conduct, holdup conduct (typically, injunction suits against licensees) by owners of standard-essential-patents (those patents rendered essential through their incorporation into technology standards) has come to draw attention of major competition agencies—those in the US, the EU and China. The JFTC is no exception in this global trend. Although the JFTC has yet to condemn holdup by a standard-essential-patent (SEP) owner, the JFTC proclaimed, in its recent revision of the IP Guidelines (January 2016), that a SEP owner would be condemned as infringing the AML, when a SEP owner brings injunction suit (or refuses to license) against a licensees who have shown willingness to go into negotiation on FRND (Fair, Reasonable and Nondiscriminatory)-conditioned royalty, with several safeguards. This viewpoint basically follows the EU jurisprudence: European-Court-of-Justice's Huawei v ZTE decision (2015).

Regulation on Vertical Restraints

Vertical restraints comprise agreements between non-competitors, typically between manufactures and distributors. For IP licensing, vertical restraints materialize when a licensor (an IP owner) inflicts upon its licensees conditions on usage of the IP. Large majority of IP licenses (excepting above-mentioned cross-licenses/ patent-pools) constitute vertical restraints, because IP rights legitimately exclude licensees from competing with the licensor: the IP owner and its licensees are not competitors.

To be sure, after the licensing, licensees come to compete with the licensor (the IP owner); nevertheless the licensor, using licensing clauses, usually prohibit the licensees from competing with the IP owner. These licensing clauses comprise territorial as well as field-of-use restraints. The US IP Licensing Guidelines famously proclaim that such territorial or field-of-use restraints are basically legitimate, since "[t]he arrangement is merely a subdivision of the licensor's intellectual property among different fields of use and territories." (US IP Licensing Guidelines, Proposed Revision, August 2016, at Example 1). By contrast, the European Commission has adopted a position markedly different from that of the US authorities: the Commission treats territorial or field-of-use restraints as competitors' collaboration, thus treating many of vertical territorial and field-of-use restriction as illegal—See the Commission's Technology Transfer Agreements Guidelines (2014), at para 27.

On this issue, the JFTC IP Guidelines follow the US position, rather than the EU one, consequently proclaiming vertical territorial-restraints legal. Nevertheless, price restraints in licensing conditions, even in case of vertical restraints, are proclaimed illegal by the JFTC IP Guidelines.

Those vertical restraints, which are neither per-se-illegal or always legal, are condemned by the JFTC when the restraints give rise to "risk to unfairly harm competition", based on the unfair-trade-practices provision in the AMA (Article 2 (9)). This standard based on "risk" is inherently ambiguous for identifying illegal conduct, thus giving the JFTC much latitude in reaching illegality decisions. Still, the unfair-trading-practices clause, as well as the JFTC IP Guidelines, state that restraints maybe exonerated when legitimate reasons exists for the restraints. Thus, IP owners may defend their vertical restraints (excepting price restraints which are virtually per-se-illegal) as legitimate at JFTC hearing or courts.

Regulation against Exploitative Conduct

Not a few licensees have complained about clauses in licensing-contracts, as unfairly disadvantaging the licensees. Competition agencies would take up such complaints in case the licensing gives rise to either competitors' collaboration or exclusionary conduct. Consequently, the US antitrust agencies do not take up cases in which licensors are merely "exploited", rather than "excluded". This is because the US antitrust jurisprudence has denied regulating "exploitative conduct", as compared with exclusionary conduct.

By contrast, competition laws in the EU, Japan and China all contain provision against exploitative conduct. As for the EU, its competition law (Article 102 TFEU) prohibits "abuse of dominant position". This phrase has been interpreted to cover "exploitative abuse", as well as "exclusionary abuse". Nevertheless, in recent years, the European Commission has refrained from enforcing exploitative-abuse regulation, for fear that this regulation, inherently ambiguous, entails overregulation of legitimate competitive conduct. Use of exploitative-abuse prohibition against IP licensing clauses (typically on royalty) is particularly problematic because patentees (to a lesser degrees, other IP owners as well) are granted legal right to exploit its legal privilege.

As for Japan, the Japanese competition law (AML) contain article prohibiting exploitative-abuse (AMA Article 2 (9) (v), prohibiting "abuse of superior bargaining position). The JFTC has enforced this article against trading-terms deemed unfairly disadvantageous to trading counterparts, at inferior bargaining position.

Nevertheless, the JFTC has, so far, never utilized the "abuse of superior bargaining position' provision against IP licensing. This may reflect JFTC's reluctance to intervene into IP rights through exploitative-abuse regulation.

Among major competition-law jurisdictions, China seems to be the only jurisdiction that has enforced exploitative-abuse regulation against IP licensing clauses: National Development and Reform Commission (NDRC) has condemned Qualcomm as engaging in illegal exploitative abuse (unfairly high price) against Chinese licensees: NDRC's Qualcomm decision (2015). NDRC as well as SAIC (State Administration for Industry & Commerce) subsequently published drafts for China's IP Guidelines, which contain a section prohibiting unfairly high licensing fees (February 2016; December 2015).

*Eleanor M. Fox**

Monopolization, Abuse of Dominance, and Refusal to License Intellectual Property to Competitors— Do Antitrust Duties Help or Hurt Competition and Innovation? How Do We Know?

A. Introduction

This essay concerns intellectual property and unilateral refusals to license competitors. Further narrowing the field, it concerns refusals to license under circumstances in which a grant of license is likely to have some pro-competitive, pro-consumer effects. The conundrum is that an antitrust duty to license may also have negative effects; in particular, chilling innovation by the dominant firm on the theory that the antitrust duty (pejoratively called "forced sharing") will decrease the dominant firm's incentives to invest in innovation. In addition to a possible net loss in competition and innovation, an antitrust duty might be shunned on two other grounds: 1) the antitrust rule may be perceived as an undue limitation on freedom to engage in market competition as one chooses, including the freedom of contract, and 2) it may be perceived as an undue limitation on property rights.[1]

We should note at the outset that an antitrust duty to license IP to one's competitors is extremely limited and is the exception rather than the rule. This is commonly the law.[2] For a duty to arise, it must at least be the case that the owner of the intellectual property has monopoly or dominant power in a market, that the "monopolization" of the intellectual property stymies competition in the market, that market forces are not likely to induce licensing because the gains from foreclosing [declining to create] competition exceed the gains available from licensing, and that, absent a duty to license, effective competition cannot break out.

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[1] All four negative potentialities of antitrust duties to deal, even without involvement of intellectual property, are highlighted in the US Supreme Court case, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko,* 540 US 398 (2004).

[2] See Joined Cases C-241 and 242/91 *Radio Telefis Eirann v. Commission (Magill)* [1995] ECR 743; Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* [2004] ECR I-0000; *Independent Service Organizations Antitrust Litigation (CSU v. Xerox)*, 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied*, 531 US 1143 (2001); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999).

This essay asks: Limited to this context, do antitrust duties to license help or hurt competition and innovation, and how do we know?

The essay does not explore what is an undue limitation on freedom to exercise contract or property rights. It is well established that these rights are subject to reasonable regulation, and it is assumed that antitrust rules that will probably enhance competition, efficiency, innovation and consumer welfare constitute reasonable regulation.[3]

First, the essay summarizes the legal background. Second, it maps three cases—*Magill*, *IMS* and *Microsoft* (Europe; interoperability aspects), in terms of helping or hurting competition and innovation. Finally, it draws some conclusions and poses questions for research.

B. Background Law

1. European Union law

Several landmark cases have defined the landscape. In Europe, the most recent leading Court of Justice authority is *IMS*, and the other most important current authority is *Microsoft*. In the United States, particular guidance is given by Federal Circuit court cases, several *Microsoft* opinions, and the important Supreme Court refusal-to-deal case (not involving intellectual property), *Trinko*. I revisit some facts of and judicial observations in these cases.

In *IMS*, NDC wished to use IMS's copyrighted geographic format for collecting data on sales of individual pharmaceutical products, and it planned to sell the data it collected to the pharmaceutical companies in competition with IMS. Replying to a question by a German court, the Court of Justice declared that the exercise of an exclusive right is not normally an abuse of dominance but may constitute an abuse of dominance in exceptional circumstances. First, to constitute a violation, access to the product, service or intellectual property must be indispensable to enable the undertaking to carry on business in a market. To find indispensability: it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create,

[3] Within the problem area of this essay, courts' reliance on contract and property freedoms seems to reveal political/philosophical leanings that align with a conclusion that a duty to deal would harm competition and innovation, rather than to reveal whether competition and innovation are in fact harmed in a particular case.

possibly in cooperation with other operators, the alternative products or services.[4]

> "[A] dependency by users . . . , particularly at a technical level," must be taken into account in determining indispensability.[5]
>
> If access is indispensable, three additional factors "are sufficient" to trigger a violation based on refusal to license; "namely, [1] that that refusal is preventing the emergence of a new product for which there is a potential consumers demand, [2] that it is unjustified and [3, that it is] such as to exclude any competition on a secondary market."[6] The secondary product or service need not be marketed separately from the product/service to which access is sought. "[I]t is sufficient that a potential market or even hypothetical market can be identified."[7]

In the shadow of *IMS*, the European Commission decided *Microsoft*.[8] The European *Microsoft* case is much more complex than *IMS*. The European Commission determined that Microsoft illegally leveraged its dominant position in the PC operating system market into the workgroup server software market[9] by refusing to give workgroup server software rivals full interface information so that they could interoperate seamlessly with Microsoft's Windows and Microsoft's workgroup servers. The interface information included intellectual property. The Commission noted that Microsoft had supplied full interface information to workgroup server software providers before it commercialized its own workgroup server software, but thereafter it "disrupt[ed its] previous levels of interoperability," giving only some of the interface information to the users who were now also rivals. The Commission found also that Microsoft designed its system so that rivals' product could not call up all of the functions on Microsoft's operating system, and so that Microsoft's own server software could access Microsoft OS functions more quickly than could rivals'.

In various passages, the Commission made findings of how Microsoft's only-partial disclosures of interfaces harmed competition and innovation. For example:

> 589 Microsoft's refusal puts Microsoft's competitors at a strong competitive disadvantage in the work group server operating system market, to an extent where there is a risk of elimination of competition.

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[4] *IMS*, para. 28.

[5] *Idem*, para. 29.

[6] *Idem*, para. 38.

[7] *Idem*, para. 43–44. The Court continued:

"Transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1860 brick structure [the geographic format for the data] constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products." Para. 46.

[8] Case Comp/C-3/37.792, Commission decision of 24.03.2004.

[9] Workgroup servers connect all desktop computers within an enterprise so that fellow workers can share applications, data, files, etc.

694 Due to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems. This impairs the ability of such customers to benefit from innovative work group server operating system features brought to the market by Microsoft' competitors. In addition, this limits the prospect for such competitors to successfully market their innovation and thereby discourages them from developing new products.

695 If Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture.

782 Microsoft's refusal to supply has the consequence of stifling innovation in the impacted market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution. . . .

783 The major objective justification put forward by Microsoft relates to Microsoft's intellectual property over Windows. However, a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified. . . .

1064 The interoperability information at stake is indispensable for competitors to be able to viably compete in the work group server operating system market.

The Commission's decision requires Microsoft to disclose the full interface information. Microsoft applied for a stay of relief before President Bo Vesterdorf of the Court of First Instance. The order of Judge Vesterdorf, while denying Microsoft's application, recognized that Microsoft had made a number of important points for the Court to consider when it opines on the merits, including whether the purported value of the information allegedly covered by intellectual property rights (which was much more substantial than the IP rights implicated in *IMS* and its predecessor *Magill)*,[10] should have been sufficient to constitute an objective justification for non-disclosure.[11]

The "exceptional circumstances" required by EU law to support a duty to license, and the circumstances constituting an objective justification, thus remain to be clarified.

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[10] In *Magill, supra* n. 2, there was no consolidated TV guide in Ireland. Each of the three TV broadcasters in Ireland refused to license their TV schedules (which were protected by Irish copyright law) to Magill, who wished to produce a TV guide. There was consumer demand for a guide. The Court of Justice required the licensing.

[11] Para. 222. The Commission has agreed, pending appeal, not to require Microsoft to reveal its trade secrets embodied in the interface.

2. US law

The American landscape may be defined by two sets of cases. First, in the intellectual property cases, the Federal Circuit Court of Appeals[12] has declared that an intellectual property holder has a nearly absolute right not to license;[13] freedom to refuse to license is the essence of an intellectual property right. Other circuits speak in a somewhat softer tone but still presume no duty to license, declaring that IP rights holders' desire to profit from their IP rights is presumptively a justification for refusing to license.[14]

Secondly, the issue is informed by non-IP refusal to deal cases, and particularly by the Supreme Court's recent case, *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko* (*Trinko*).[15] This is so because refusal to license is a subset of refusals to deal, and, *a fortiori*, if there is no duty to deal without the involvement of intellectual property, there would be no duty to share intellectual property, since exclusivity is an intrinsic characteristic of intellectual property ownership.

The *Trinko* Court's declarations—which may be characterized as strong presumptions against antitrust duties to deal—are germane to this inquiry. Therefore we set forth certain facts and dicta.

In *Trinko* the US Supreme Court held that Verizon, owner of the local loop for a large swath of Northeastern United States, had no antitrust duty to provide its local telephone competitors with full access to the local loop; this, against a backdrop of a regulatory statute that imposed just such a duty. The regulatory statute, however, expressly did not preempt application of the antitrust laws, so the Court was drawn into a full discussion of what antitrust law requires even in the absence of a regulatory duty. The Court began by pronouncing a strong principle that firms, even monopoly firms, have no antitrust duty to deal, except in narrowly drawn situations that did not fit the case. The Court linked this strong principle to the importance of not undermining incentives for investment and innovation. The Court declared that unilateral acts of private firms, in contrast to competitors' collaborations, are presumptively pro-competitive; maximizing firms' freedom to act and freedom to use their property as they choose is pro-competitive because it induces private firms to invest and innovate. Courts, on the other hand, are limited in knowledge and capacity; when they interfere and prohibit single firm conduct they are likely to err and damage the marketplace. Highlighting the dangers of court-ordered duties to deal, the Court said:

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[12] This court is designated to hear appeals in intellectual property cases.

[13] *Intergraph, supra* note 2; *CSU/Xerox, supra* note 2.

[14] *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 US 1094 (1998) (holding that pretextual invocation of IP rights rebuts the presumption of validity).

[15] *Supra* n. 1.

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive . . . to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners. . . . Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.[16]

In a final passage, the Court referred to antitrust law as not "ambitious" in the way that regulatory law can be and the US 1996 Telecommunications Act is. Antitrust law is not intended to eliminate monopolies but merely to prevent unlawful acts. It does not require "a monopolist [to] alter its way of doing business whenever some other approach might yield greater competition."[17] US antitrust law is not an affirmative command to compel firms to use their assets to increase competition.

Despite this strong language in *Trinko,* the Court did not presume to overrule antitrust law running in the other direction. When reflecting on the "narrow" exceptions to the right-not-to-deal principle, the Court invoked the *Aspen Skiing* case[18]—the principal authority relied on by plaintiffs to support the monopolist's duty. The Court distinguished Aspen Skiing's conduct from Verizon's conduct on grounds, among others, that the Aspen Skiing Company had engaged in a past course of dealing with its competitor Highlands in offering a four-mountain ticket for skiers at Aspen, Colorado, and that the four-mountain ticket was presumably profitable or Aspen Skiing would not have embraced it. Terminating this arrangement therefore (said the Court) gave rise to an inference that Aspen Skiing was sacrificing the profits that flowed from a pro-competitive relationship and it must have done so (the Court inferred) for an anticompetitive end.[19] (We refer to this point below when we note that Microsoft engaged in a practice of providing full interface information when it was not a provider of workgroup server software, and subsequently terminated this arrangement.)

The US *Microsoft* cases, while not refusal-to-license cases, significantly reflect on the antitrust/IP interface. I draw here from three opinions of the Court of Appeals for the District of Columbia. In the first US *Microsoft* opinion that I cite,[20] the DC Circuit Court of Appeals expressed the importance of giving firms, even dominant firms, wide range to make product changes ("innovation") without interference from antitrust law, despite exclusionary aspects. "[T]he limited competence of courts to evaluate high-

[16] 540 US at 407.

[17] *Id.* at 415-16.

[18] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985).

[19] *Trinko, supra* n. 1; Fox E. (2005): "Is There Life in *Aspen* After *Trinko*?—The Silent Revolution of Section 2 of the Sherman Act", 73 *ABA Antitrust Law Journal* 153.

[20] *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (contempt case alleging Microsoft violated a 1995 consent decree).

tech product designs and the high cost of error should make them wary of second-guessing the claimed benefits of a particular design decision."[21] The following DC Circuit *Microsoft* opinion[22] elaborated on the same theme, holding that Microsoft's deliberate reconfiguration of Java language to frustrate Java's cross-platform potential (a potential that threatened to destroy the monopoly power of Microsoft's operating system) did not constitute a Sherman Act violation because the Microsoft-tailored Java had the positive quality of running more swiftly.[23] Therefore it was innovation, not predation. The third and last DC Circuit *Microsoft* opinion[24] addressed the objections of Massachusetts to the settlement agreement proposed by Microsoft and the US Government in the big monopoly case by the Federal Government, 19 states, and the District of Columbia. Massachusetts argued that the remedies in the proposed decree were so weak that the decree was not in the public interest. Among other things, Massachusetts argued that Microsoft should be required to remove certain software code and to make more extensive disclosures of applications programming interfaces (APIs). The court rejected Massachusetts' appeal, stating not only that courts should not involve themselves in redesigning products but that broader disclosure requirements would be perverse; they would enable rivals to clone Microsoft software products.

> The effect upon Microsoft's incentive to innovate would be substantial; not even the broad remedial discretion enjoyed by the district court extends to the adoption of provisions so likely to harm consumers.[25]

The cases reviewed above are a small but important sampling. They raise a set of questions: Despite the apparent confidence of certain jurists, how do we know whether Microsoft's obligation to disclose complete interface information will help or hurt innovation and consumers? How do we know whether a duty of Microsoft to disclose more APIs, or to carry cross-platform Java, would help or hurt? Can we be confident that duties in *Magill* and *IMS* will not hurt innovation? What criteria can we identify that support or undercut conclusions that duties to license help or hurt competition and innovation? What are the appropriate default presumptions? Might jurisdictions agree to default presumptions? At what point does the law draw the line as if to say: We don't care if consumers would be better off if producers had a duty to deal; it is not the role of antitrust to engineer the marketplace?[26]

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[21] *Idem* at 950, n. 13.

[22] 253 F.3d 34 (D.C. Cir.), cert. denied, 534 US 952 (2001) (affirming in part and reversing in part the decision of the district court on the merits).

[23] *Idem* at 74–75.

[24] *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

[25] *Idem* at 1219.

[26] Compare Mavroidis P. and Neven D. (2005): "*Bronner* Kebab: Beyond Refusal to Deal and Duty to Cooperate", in Ehlermann C.-D. and Atanasiu I., eds., *European Competition Law 2003: What Is an Abuse of A Dominant Position?*, Hart Publishing Oxford, London, at pp. 355–369,

III. Mapping cases

I map several cases below. I do so to tease out certain potentially critical questions. My answers, which are necessarily arbitrary, are not important. I want to suggest that the questions are or might be important; they are part of the mosaic of the set of cases addressed; they should be unbundled and their materiality considered.

On a scale of 1 to 10, with 10 being "very important":

a. *How important to competition and innovation is access by outsiders to the dominant firm's IP?*

Magill	4	The loss to consumers from no duty to deal is: inconvenience of not having access to consolidated TV schedules until 24 hours in advance on weekdays, 48 hours on weekends.
IMS	3	The loss from no duty is: Pharmaceutical companies lose an alternative provider; the alternative provider offered a new, flexible web-based system; but the beneficiaries could have contracted to make the format non-exclusive to IMS.
Microsoft	10	(Interoperability issue) The loss from no duty is: Competing sources of innovation are seriously handicapped.

b. *How important to dominant firms' incentives to innovate is freedom to choose not to license?*

Magill	0	The schedules were a by-product of the broadcasting firms' business.
IMS	close to 0	
Microsoft	4 to 5	Microsoft argues: 10. Commission suggests: not insignificant.

c. *Will a duty-to-license regime probably produce a net gain in innovation?*

Magill	modest
IMS	modest
Microsoft	very significant (Microsoft disputes this judgment)

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demonstrating that an antitrust duty of Mediaprint to make its newspaper distribution system available to Oscar Bronner would have increased efficiency. The Court of Justice determined that Mediaprint was not required to give Bronner access to its distribution system, in what is generally accepted as an appropriate disposition. Case C-7/97 *Oscar Bronner v. Mediaprint* [1998] ECR I-7791.

4. *Will a duty-to-license regime probably produce a net gain in consumer welfare (price/choice)?*

Magill	yes
IMS	yes, but modest
Microsoft	yes; but innovation gains are much more significant than static price savings
Compare	
Aspen	yes, skiers get to ski 4 mountains
Bronner[27]	yes, newspaper readers get much better access

e. *How much creativity went/will go into the product to which access is sought?*

Magill	0
IMS	close to 0
Microsoft	disputed. Microsoft argues: 10. Commission argues—this is "mere" interface information.

f. *Is the essence of the case mere failure to license IP ("I want your IP because I want to exploit it commercially too") or is the essence of the case an independently-stated exclusionary practice with IP incidentally involved in the cross-fire?*

Magill	providing a new product is the essence
IMS	question whether providing a new product is the essence
Microsoft	IP is not of the essence; just caught in the cross-fire
Compare	
Eastman Kodak	independent service operators just wanted to offer repair services; IP in repair parts was just caught in the cross-fire
South African AIDS drug case[28]	quintessentially, getting the IP is the essence

g. *How did the court/commission determine whether imposing the duty produced net loss or gain in innovation, consumer welfare?*

Magill	net gain was obvious
IMS	assumes net gain if court/commission finds "new product"

[27] See *supra* n. 26. Note that small newspapers' barrier to an effective distribution system is not insurmountable, whereas total exclusivity of IP needed for interoperability in a network industry is likely to constitute an insuperable barrier.

[28] Fox E. and Janow M. (2005): "Antitrust and Intellectual Property: Duties to License, Parallel Imports, and the Question of Differential Treatment for Developing Countries", *NYU/Columbia Workshop Report*, Post-Fordham International Competition Policy Conference (Oct. 9, 2004).

Microsoft	European Commission examined past innovation under earlier conditions of supplying full interface information; surveys, consumer statements; Commission inferred harm to innovation from blockage; inferred harm to Microsoft's innovation from a duty to deal; concluded that withholding interface information causes net harm. [But what part of this conclusion was based on the evidence; what part on default presumptions?]
Microsoft	(D.C. Circuit) strong presumption of net harm from antitrust duty to deal [Based on what?]
Compare *Trinko*	Court assumes as a general proposition that an antitrust duty would chill investment and innovation.[29]

D. Conclusion

This paper has staked out limited ground: The market is monopolized; the dominant firm's complete exclusivity of IP rights frustrates competition and consumer welfare and undermines outsiders' incentives to innovate; but imposing a duty to license is likely to have counter effects of undermining the dominant firm's incentives to innovate (except in cases of by-product IP as in *Magill*). The principal question the author wishes to pose is: How can we tell (or predict with some confidence) whether a refusal to license has a significant net negative effect on innovation, and whether an antitrust duty will have a significant net positive effect?

Second, in view of the absence of empirical information, presumptions have obviously been important to the jurists confronted with these questions. What, in fact has been the role of default presumptions? The default presumptions employed in the cases are virtually never articulated, and they seem to be quite different in Europe and the United States. As a starting measure to tackle the problem addressed in this paper, we could at least seek transparency as to what presumptions courts or agencies use. Second, we could seek to identify where there is room for convergence. For example, might nations agree to the proposition that, in network industries such as computing and telecommunications, interoperability generally serves the interests of innovation, competition and consumers? I suspect that jurisdic-

[29] Note that the Court could have inferred consumer harm, including innovation harm, from the adjudicated fact that Verizon degraded its local service competitors' access to the local loop; but it did not.

tions will agree to disagree, for the proposition implies interventionism that some jurisdictions (e.g. the United States) are unlikely to accept; but this itself will be revealing. Are there other relevant propositions on which convergence might usefully be sought or identified?

Third, a few legal conclusions can be drawn or observed. First, unilateral antitrust duties to deal are exceptional. Second, "raw" duties to license are particularly disfavored. This means that, if GenericCo simply wants GlaxoSmithKline's IP underlying its AIDS drugs because it can make and sell them more cheaply, GlaxoSmithKline can just say "No." In most nations in the developed world,[30] antitrust law imposes no duty in such a case. But normally the facts lack this Doric simplicity.

In the event of more complex facts, four sets of factors may tip the balance. 1) characterization, 2) intent of the dominant firm in refusing access, and centrality of the IP, 3) functional integration of the rights holder and its accompanying opportunity to use leverage to disadvantage rivals, and 4) creativity value of the IP.

First, semantics and characterization, however subjective, may be critical to the legal treatment. Is the problem one of exclusionary strategies, or is the conduct a mere decision to keep one's intellectual property for one's self? I.e., did the IP owner actively harm competition, or did it merely refuse to do good?[31] Consider, for example, the problem in *Trinko*. Did Verizon, owner of the local loop, just say "No," or did Verizon, newly faced with competition in the local market and knowing that a local service provider's full access to the local loop was necessary for its best performance, purposely degrade the service available to its new rivals so its own customers would not defect? Plaintiffs alleged the latter (and most of their allegations had already been proved before the Federal Communications Commission). The Supreme Court interpreted the allegations to be the former and it dismissed the case on the face of the complaint.[32] This example shows that characterization may be used instrumentally. The inquiry, however, can be deontological and not instrumental.

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[30] Other considerations may be taken into account in developing countries. Consider the situation in South Africa, Workshop Report, *supra* n. 28. Even in the US, a duty may be created by statute in exceptional cases, as it was in the context of the anthrax scare and the need for the drug Cipro. *Idem.*

[31] Compare, in torts, the good Samaritan doctrine, and the difference between non-feasance and mis-feasance. The United States places more weight on the distinction between positive and negative duties (do no wrong versus do good) than do many European nations. This difference appears in constitutions as well as statutory law.

[32] See *Trinko*, *supra* n. 1. Compare *Gordon v. Microsoft Corp.*, 2004–1 CCH Trade Cas. ¶ 74,273 (Minn. D. Ct. 2003) (under Minnesota law, re Microsoft's refusal to disclose APIs to applications programmers: "Plaintiffs contend that the manipulation of technical information about APIs was an integral part of a general scheme that Microsoft employed to gain control of the applications market." Therefore, said the court, Microsoft's motion to exclude evidence could not be granted "even if [it] is correct that nondisclosure of APIs could not on its own support an antitrust violation.") *Idem,* at p. 98, 238.

Second, intent of the dominant firm in refusing access and centrality of the IP to the product/standard/portal rivals seek. This inquiry relates to the first. Did the dominant firm say No because it wished to protect its IP rights, or did it assert IP rights as a pretext to restrain competition? Where the IP holder has engaged in a prior course of dealing which it abruptly terminates (implying no objection in principle to diffusing the IP), jurists are more likely to find an antitrust duty. This was the case in US *Kodak/ITS*,[33] in which Kodak facilitated market entry of independent repairers of its machines, but cut off the supply of its repair parts to the independent service operators (ISOs) after the ISOs had shown their mettle and the service and repair market had become lucrative. As it turned out, some repair parts were patented—a point Kodak apparently observed only after it lost its case in the Supreme Court and lost on remand before a jury.[34] This situation may also describe *Microsoft,* which was providing complete interface information to workgroup server software providers before it developed its own suitable workgroup server software, and it changed its pattern of trade and invoked IP rights only after the users became rivals.[35]

Third, functional integration and the opportunity to leverage and squeeze rivals. An antitrust duty is more likely to be found where the rights holder is functionally integrated; in one function it provides a critical input that is or that incorporates IP while in the other market it competes with its buyers. In such a case, the IP holder is not just failing to give aid to its competitors (as the Court characterized the matter in *Trinko*) but is actively handicapping or excluding its rivals, as in *Kodak/ITS.* This scenario, too, fits the European Commission's case in *Microsoft.* It is another iteration of the distinction between a simple refusal to deal and exclusionary strategies.

Fourth, creativity involved in the production of the intellectual property. In *Magill,* no creativity went into the intellectual property and in *IMS* very little did. In most jurisdictions the "intellectual property" in *Magill* and *IMS* would not have been so designated. It has been suggested that insubstantiality of the intellectual property and the lack of inventiveness behind it was a critical factor in the Court of Justice's embrace of a duty to license in *Magill* and *IMS.*[36] Even if it was, the *Magill* and *IMS* judgments leave open the possibility that, where denial of access seriously frustrates innovation, a duty to license might be called for even in the case of substantial IP.

A final point hidden in the cases is where the antitrust law stops even though an affirmative antitrust duty would produce pro-competitive or

[33] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451 (1992).

[34] But see *Intergraph, supra* n. 2, contra.

[35] *Microsoft, supra* n. 8, at para. 1064.

[36] This seems not to have been the case in *Magill,* wherein the Court of First Instance put this factor into the balance but the Court of Justice upheld the duty on other grounds.

innovation gains. I refer to the point in *Trinko*: antitrust law does not compel firms to do all that is pro-competitive.[37]

In summary: How do we know when significant net innovation benefits are likely to result from duties to deal? What evidence is necessary, and what is sufficient, to support such a conclusion? What default presumptions are justified, empirically and theoretically? Typically, these questions have been swept under the rug, and presumptions are buried in factual conclusions. This paper is a call for sunlight.

[37] See also *United States v. Marine Bancorporation, Inc.*, 418 US 602 (1974); and see note 26 supra.

Linkages between Competition and Intellectual Property Rights

Augustine Peter and Neha Singh[1]

There was a time when serious doubts regarding the compatibility of Competition Law and Intellectual Property Law were raised emphasising perceived inherent conflicts between the two. However, with the jurisdictions maturing, it is now universally recognised that both are aimed at enhancing economic efficiency and consumer welfare. With the establishment of separate regulators, the issue of jurisdiction came to the fore, the inevitable result of which was legal frameworks being re-worked to resolve potential conflicts and to introduce suitable mutual consultative processes. The Competition Act, 2002 is no exception to this.

IPRs under Competition Act, 2002

Article 40 of the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), permitting member states to apply their national laws to prevent abuse of Intellectual Property Rights (IPR) by its holders, particularly anti-competitive licensing, has been adequately manifested in the Indian competition law reinforcing the importance of IPRs and providing them with a special treatment while assessing anticompetitive conducts. Unlike the Monopolies and Restrictive Trade Practices (MRTP) Act, the Competition Act acknowledges major IPRs as exception under section 3(5) insofar as they place 'reasonable' restrictions on the use of IPR. Though the holders of these special rights are exempt from section 3 (anti-competitive agreements), they are subject to the rigours of section 4 (abuse of dominance). Also, no special treatment is accorded to IPRs under section 5 and 6 (combinations). Needless to say that unreasonable conditions that attach to an IPR will attract section 3. However, what amounts to 'reasonable' has not been defined in the Act and needs to be decided on a case to case basis. This is in sharp contrast to section 15 of the MRTP Act, which allowed the benefits for both restrictive and monopolistic trade practices. Interestingly, despite the MRTP Act having reference to patents[2], no case alleging monopolistic or restrictive practices arising on the strength of a patent was decided by it, though decisions such as *Vallal Peruman* v *Godfrey Philips (India) Ltd* [3]

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[1] The authors are Member, Competition Commission of India and Research Associate, Competition Commission of India. Views are personal

[2] Section 15, MRTP Act

[3] (1995) CTJ 21 (MRTPC)

and *Manju Bhardwaj* v *Zee Telefilms*[4] with focus on Unfair Trade Practices, more in the nature of consumer complaints, came up before it.

While the Competition Commission on India (the Commission) does not hesitate to take corrective action when a market distortion takes place, as was done in the case of *Verifone*[5], a leading supplier of Point of Sale terminals to the card payment industry which was bought to books for abusing its dominant position by imposing unfair/discriminatory conditions and prices in the downstream market for VAS, the Commission is mindful that such matters require a cautious and balanced approach to ensure that incentive for innovation is not undermined in these dynamic knowledge sectors. A step towards this rational approach has been incorporated under section 19(4) which lists a host of factors for determining dominance rather than the same being presumed on a mere holding of an IPR. Similarly potential competition issues are likely in the case of combinations, especially in the pharma sector where pipeline products are in potential competition.

The Patents Act 1970, permits issue of compulsory licences in certain cases[6]. The Competition Act authorises the Commission, where after inquiry, it finds a contravention of section 3 or 4 to pass, *inter alia*, "such other order or issue such directions as it may deem fit"[7]. The Commission has, so far, not been faced with a situation warranting the issue of compulsory licensing drawing on the above provision. While the competition authorities in foreign jurisdictions[8] have not hesitated to grant compulsory licensing in cases concerning an abusive refusal to supply, anti-competitive practices resulting from the exclusivity etc. under their competition regimes despite specific provisions present in their IP laws, no beginning has been made in India. Though the concept of licensing under competition law has the potential to enhance competition, the Commission realises that most licensing arrangements need to be evaluated under a *rule of reason* framework rather than accepting a strait jacket formula.

Issue of jurisdiction

Even though there has been no occasion for confrontation between the two regulators, the question of jurisdiction of the Commission to look into IPR issues was settled by the Delhi High Court[9] in its recent judgement being the outcome of a writ petition filed by *Ericsson* challenging the order of the Commission directing the Director-General to investigate complaints filed by *Micromax* and *Intex* regarding abuse of dominant position by Ericsson on account of demand for unfair royalty. It

4 (1996) CTJ 230 (MRTPC)
5 Case No 56/2012 and case No 13/2013
6 Section 84, Patents Act, 1970
7 Section 27 (g), Competition Act, 2002
8 Ciba-Geigy and Sandoz merger
9 W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014

was noted by the Commission that practices adopted by Ericsson were contrary to Fair, Reasonable and Non Discriminatory (FRAND) terms. While holding that there is no irreconcilable conflict between the Competition Act and the Patents Act, it was held that the Commission had the jurisdiction to entertain complaints for abuse of dominance in respect of patent rights, besides recognizing the potential of Standard Essential Patents (SEPs) to create dominant position for their owners.

Working in tandem

The implementation of Competition and IP laws in tandem would better serve the objectives of innovation leading to rapid economic growth. However, since each regulator has its own domain of assigned responsibilities the concern is to ease the stress between the two. While the IP authorities are vexed with the ground realities of IP issues and possess the desired technical skill, competition may not be high on their agenda as they may neither possess the appropriate expertise for a competition assessment nor the yardstick to gauge damage to competition. In a step towards harmonious construction of the two, the process of consultation assumes importance and the Commission is fortunate to have section 21 and 21A where a Statutory Authority may make a reference to the Commission for its opinion if a competition issue is raised in proceedings before it and *vice versa*. Accord between the two is indispensable as, after all, the dynamic goals of both are economic efficiency and consumer welfare.

The Patent-Competition Interface from a Developing Country Perspective

Thomas K. Cheng[1]

The basic premise of this essay is that there are limits to convergence and a one-size-fits-all approach to competition law is misguided. Such an approach risks ignoring local circumstances that need to be taken into account in the enforcement of competition law. One area in which such local adjustments are necessary is the patent-competition interface, which requires a balance between preservation of innovation incentives generated by the patent system and protection of consumer welfare. One group of countries for which such adjustments are especially necessary is developing countries. This essay argues that competition law enforcement against patent exploitation practices in developing countries needs to take into account local circumstances with respect to innovation. Otherwise, developing country consumers would incur consumer welfare loss in vain without generating concomitant gains in innovation.

The patent-competition interface is one of the most controversial and complex areas of competition law. The complexity mainly stems from the fact that it requires competition law to balance its primary goal of protecting consumer welfare with the patent policy objective of generating innovation incentives. The fear in taking an overly aggressive approach to the interface is that significant curtailment of patent exploitation practices will reduce innovation incentives and retard technological progress. The consensus in the advanced jurisdictions such as the U.S. and the EU is that a cautious approach to the interface is called for to ensure that innovation is not discouraged.

There are, however, reasons to believe that such a deferential approach to innovation incentives is questionable, if not outright mistaken, for developing countries. The simple reason is that many developing countries do not possess the capacity to innovate across the board or at least in certain industries. If there are no local innovators to take advantage of the innovation incentives generated by the patent system and preserved by deferential patent-competition rules, the consumer welfare

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loss that is incurred to generate these incentives will be borne in vain. Permissive patent-competition rules effectively amounts to having local consumers, many of whom are poor and downtrodden in developing countries, subsidize foreign innovators. Depending on the technology at issue, the foreign innovator at issue could very well be a multi-national corporation (MNC). Given the widespread poverty in many least-developed countries, there are good reasons to question whether competition law should be enforced in such a way to facilitate subsidization of MNCs by developing country consumers.

One may argue that such a subsidy is defensible because foreign innovators may take into account the innovation incentives generated by the local patent system in making innovation investment decisions. The return which the foreign innovator expects to generate from the local jurisdiction may form part of the calculus when the innovator makes investment decisions in R&D. It is conceivable that deprivation of the returns from a significant number of developing countries will cause the foreign innovator to abandon the R&D project altogether. In other words, the local patent system generates innovation incentive externalities to foreign innovators.

There are two responses to this argument. First, it is not at all clear that multi-national innovators take into account the innovation incentives generated by the patent system in every single jurisdiction in which their products are sold. The fact that innovators usually only patent their inventions in select countries would suggest otherwise. While some developing countries with large domestic markets, such as the BRICS countries, will most probably feature in the innovation calculus of multi-national innovators, the same cannot be said for developing countries with much smaller domestic economies such as many of the Sub-Saharan countries. If foreign innovators do not take into consideration these smaller developing countries in their investment decisions, the welfare loss borne by the local consumers will be truly incurred in vain. Second, a more fundamental response is that given the impoverished state of developing country consumers, their welfare should form the paramount consideration in competition law enforcement in these countries. If an innovation would be abandoned because some small amount of extra returns from developing countries were eliminated, the innovation is unlikely to be particularly groundbreaking or valuable. The loss of such an innovation should not cause grave concern.

If a developing country does possess innovation capacity in a particular industry, then the consumer welfare loss incurred to preserve innovation incentives under permissive patent-competition law rules will not be in vain. There are local innovators to take advantage of the incentives. Given that developing countries are unlikely to have uniform innovation capacity across industries (some may have none at all in any industry), a sensible approach to the patent-competition interface from a developing country perspective will require an industry-specific approach.

Regulating the digital economy

Payal Malik[1]

A theory of economic growth focused on innovation has come to the fore. Empirical studies from across the world also support a positive linkage between technological innovation and economic growth of nations. This theory, dating back to Joseph Schumpeter (1942), postulates that economic growth comes from within the economic system and is not merely an adaptation to external factors. Such a growth is not only based on capital accumulation, but also on the innovative capacity spurred by appropriable knowledge and technological externalities. Discontinuous bursts of innovative investment by the entrepreneurs constitute the autonomous cause of economic growth.

In this dynamic context, above-normal profits reward innovation, thus leading to surplus values that cannot be present otherwise. This emphasis on the dynamic aspects of change, the recognition of the central role of the entrepreneur, is in direct conflict to the price theory's focus on static consumer surplus and competition regulation's traditional preoccupation with consumer choice. There are counters to this argument as well—both theoretical and empirical. These models assert the traditional view, that the incentive to invent is less under monopolistic than under competitive conditions. The costs of innovation are high, a competitor has the economic benefit of receiving the technology from a prior invention without incurring the costs, while a monopolist has a "strong disincentive for further innovation." However, the empirical results are country- and product-specific and for certain products, the Schumpeterian paradigm may hold. For instance, in hi-tech sectors (such as hardware, software, pharmaceuticals, biotechnology), firms compete mainly by innovating or the innovation intensity of capital is greater in these industries.

One such burst of innovative investment in recent years has been seen in the meteoric rise and continuing success of internet-based markets and e-commerce platforms. The leaders in this innovative race have acquired substantial market power and this market leadership position of a few firms in this space has spurred a debate among academics and policy-makers alike: Do internet markets foster competition or do they facilitate market monopolisation or, at least, concentration?

[1] Payal Malik is an Associate Professor of Economics at University of Delhi. *This article was published in the Financial Express on 4th December 2015. It has been included in this publication with the permission of the author.*

There is enough theoretical and empirical evidence that competition in hi-tech markets is dynamic in the Schumpeterian sense: It takes place as competition for the market in a so-called "winner-takes-all race". Thus, competition tends to come from subsequent rivals.

The "winner takes all" phenomena occurs as many Internet markets operate as multi-sided platforms, where a platform operator brings two different groups of customers together, for example buyers and sellers or "users" and advertisers. The platform aims to become the most efficient way these two distinct groups can transact – essentially performing the role of an intermediary. A market is typically called a two-sided or even multi-sided if indirect network effects are of major importance. Indirect network effects only arise indirectly if the number of users on one side of the market attracts more users on the other market side. The idea of indirect network effects is very simple: A higher number of sellers and an increased variety of goods offered, in turn, make the trading platform more attractive for more potential buyers. These positive effects imply that the more the number of participants on one side of the market, higher are the benefits to participants on the other market side. However, due to this platform markets may be more concentrated than other industries, as most consumers would flock to the larger players leaving small players competitively unviable. Thus, the conduct of firms operating in multi-sided markets will often be competitively ambiguous, because the same features that yield market power might help achieve optimal scale/demand side efficiencies. Moreover, competition between several platforms may not be necessarily beneficial to the consumer when compared to monopolistic market structures. So these markets, lead to totally opposite result with innovation and concentration being positively related and in direct conflict with the "traditionalist" view.

It is this conflict that makes the choice of regulatory incentives for regulating the digital economy extremely difficult. What market conditions are best for fostering innovation is one of the most heated discussions in economic circles in recent years. This conflict is also apparent in the jurisprudence coming from the United States. In the face of conflicting theories and empirical evidence, judgments seem to be driven by the ideological underpinnings of the government of the day—Republicans relying on the self-correcting nature of markets and Democrats being more interventionist.

Shall the choice of competition rules in India be also guided by some ideological underpinnings or there are some bright line rules that can guide regulatory philosophy? The normative basis of regulating the digital economy will finally depend on what ideology the Indian regulatory governance subscribes to. If it considers concentrated markets, by their very nature, to be undesirable, then an interventionist approach would be adopted and competition rules would impose visions of an ideal market upon economic agents. But if the regulators ascribe to a dynamic view of competition, concentrated markets will have to be traded off for consumer benefit. One guiding principle that can perhaps be adopted is that only when there are clearly identified concerns to the consumer can an intervention be deemed to be an appropriate regulatory response—and even then only to a degree proportionate to the concern. Regulatory response should exclusively target objectionable activities that hurt consumers (and not protecting some competitors), leaving other pro-competitive conduct that benefits consumers unregulated. This may translate into: Watch, look for evidence of consumer harm, be ready for action. But do nothing till then. After all, regulators are the watchers upon the wall, the guardians of the realm of economic freedom; they may take no part in the battles of markets.

Big Data and Antitrust: A European Competition Law Introduction

Pedro Callol[1]

1. Introduction: data and its key competitive role

In the era of the information society, data has become a key factor of production, an input without which it appears impossible to compete. Raw data is in most instances freely available and in massive amounts in the Internet through various channels or methods (Internet searches, social networks); or data is available through direct purchase either from data aggregators or intermediaries or from selected operators, either in consideration for money or in consideration for some type of service (*e.g.,* information provided by customers via e-commerce sites or other Internet tools). In this context, data is like a raw material which becomes valuable when appropriately selected and processed.

Therefore, regardless of whether the information is more or less readily available, the key seems to lie in the ability to be able to collect and process enormous amounts of information in a manner that is commercially meaningful. The assignation of commercial value to enormous amounts of data seems to be associated to the notion of "big data", which is a much-used term in recent times.
Once data has been accessed, companies maximize the use of that data in a variety of manners, for instance:

- Search engines use data of searches carried out by their users to improve the quality of future search results.
- Search engines and social networks use big data on searches to identify marketing trends and tailor individual-specific information. Geo-location technologies (enabling digital marketing linked to exact location, for instance) can be combined with marketing information of the individual user to deliver dynamic content, on-the-spot and targeted advertising or marketing, for instance, in many likely ways that maximize the possibilities of commercial success. Likewise, e-commerce businesses use their data on actual purchases to make product recommendations and targeted promotions to individual customers.

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- Data can be processed to segment consumer surveys and cluster types of clients. In the case of consumer companies handling mass communication strategies, data clusters can be used to tailor targeted communications according to consumer groups' profiles.

  Big data marketing therefore aims at segmenting data with the aim of creating targeted and relevant communications from companies to customers. Whereas the traditional approach to marketing looked at a few key market segments, digital based big-data marketing looks at unlimited segments seeking individualization

  From a competitive standpoint, data has become a key driver of competition across virtually all markets. Data is "non-rivalrous",[2] implying that, in principle, it can be used by as many actors as required, as access by one does not prevent access by many (potentially infinite) more. From a competition law enforcement standpoint, it seems therefore that access to data should generally not be a problem, unless firms somehow succeed in making it artificially difficult for a given company to be able to access data.

2. Business strategies related to data and competition law

2.1 *Areas of competitive concern surrounding data.*

The Joint Report on Competition Law and Data, cited, refers to three possible areas where data plays a role in competitive analysis. First, data as a source of market power; second, data as a factor reinforcing market transparency; and third, data as basis for firm conduct potentially raising competition concerns.[3]

(a) Regarding data as a source of market power, although in principle data may be widely available, even at a price, in some sectors and circumstances the leading companies may have such a large base of data that the question arises whether any third party has the capacity to match the same volume and variety of data. In an extreme hypothetical scenario, the possession of a supposedly enormous and unmatchable amount of data may amount to a barrier to entry.

The Joint Report also reminds that economic sectors such as social networking and search engines are highly concentrated. Network effects would lead to tipping towards a single, most successful, operator

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[2] Term used by the 2016 Joint French and German Competition Authority Report on Competition Law and Data, page 36.

[3] Joint Report, cited, at page 11.

(snowball effects).[4] Clearly, the type of concern displayed here should not in principle raise any antitrust concerns, as success which is the result of competition on the merits, is fine under the antitrust laws. However, this kind of barrier to entry may be a key factor in prospective analysis (merger control) as well as in the analysis of past conduct, particularly potentially abusive unilateral conduct.

(b) Regarding market transparency and the general trend identified that the increasing use of digital data is often associated with greater market transparency.[5]

(c) Indeed, in markets where commercial or marketing data is valuable, the incentives for companies already enjoying a good position in the acquisition of data are high to appropriate additional data. In that struggle, the potential for anticompetitive conduct is evident.

2.2 *Agreements and concerted practices aimed at restricting third party access to data.*

Non-unilateral (*i.e.*, agreements or concerted practices) strategies seeking to appropriate commercial data may take place if, for instance, a marketing information company enters into exclusivity agreements, or arrangements with similar effects to exclusivity, with the generators of marketing information (retail outlets, consumers, etc.). This appropriation strategy would seek to prevent entry by alternative marketing information companies.

The competition law on vertical restraints has made it clear that agreements by means of which a company seeks to monopolize the sales of another company, carries with it a risk of exclusion of companies competing to purchase the same good or service, as well as a softening of competition and increased risk of collusion in cases of cumulative contracts. This will be the case particularly where market shares are high and particularly in excess of 30%, barriers to entry are high and there is potential for third party anticompetitive foreclosure.[6]

2.3 *Unilateral conduct aimed at restricting third party access to commercial data.*

In addition to the infringement of 101 TFEU, a company may potentially breach Article 102 TFEU, which prohibits the abuse of a dominant position.

4 Joint Report, cited, at page 13.

5 Joint Report, cited, at page 14.

6 European Commission Guidelines on Vertical Restraints (OJ C130 of 19 May 2010), for instance at points 129, 194.

2.2.1 *Dominance.*

Dominance has been defined by the Courts[7] as a "*position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*." Large Internet companies controlling large clusters of big data could potentially be dominant depending, of course on the circumstances.[8]

2.2.2 *Existence of abuse.*

Dominance is not an offence by itself; however, the Court of Justice has found that a firm in a dominant position "*has a special responsibility not to allow its conduct to impair undistorted competition in the common market*". [9]

Conduct by a dominant company aimed at preventing competitors or new entrants from accessing relevant data may run counter to the European competition law rules.[10] Unilateral (abusive) conduct may take the form of exclusive dealing, refusal to supply, selective price cutting[11] and, in some circumstances, the insertion of "most favoured nation" clauses in agreements with clients or suppliers.[12]

3. Data and merger control.

3.1 *The (recurrent) issue of merger control thresholds.*

Due to the nature of data and data analytics, data mining and data processing companies' interaction with technology is intimate. In that

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7 For instance, see Judgment of the European Court of Justice of 13 February 1979, *Hoffmann-La Roche & Co AG v Commission*, Case 85/76.

8 For more detail on the notion of dominance under EU law we refer, for instance, to EC's Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

9 Judgment of the Court of First Instance of 1 April 1993, *BPB Industries plc v Commission*, Case T-65/89.

10 See Section III "*General approach to the exclusionary conduct*" of the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

11 Judgment of the European Court of Justice of 16 March 2000, *Compagnie maritime belge transports SA v Commission*, Case C-395/96P; Judgment of the Court of First Instance of 7 October 1999, *Irish Sugar v Commission*, Case T-228/97.

12 Decision of the Higher Regional Court of Düsseldorf of 9 January 2015 confirming the Decision of the Bundeskartellamt to prohibit the use of MFN clauses by HRS, a hotel reservations portal, which in practice prevented HRS hotel partners from making better offers anywhere else, including direct sales. Similarly in the UK, for instance, see https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.

regard, it is probably fair to refer to some recent developments in the area of merger control which may possibly apply to future mergers and acquisitions in industries where big data and data processing play a key role.

The issue of merger control thresholds is likely to be revised in view of the mergers and acquisitions frenzy in the technology sector. Turnover thresholds are an indicator of size; but size only has any significance if considered in relative terms. In the antitrust world, such significance is normally put in contrast with the remaining competition in a given market. That is the reason why turnover thresholds as such sometimes do not signify much: banking, insurance or private equity related mergers and acquisitions may involve huge turnover figures and yet have no implication whatsoever from an antitrust standpoint. Conversely, acquisitions of technology firms with only minimal turnover, may have antitrust implications when the technology or intellectual property involved, for instance, are scarce or amount to large market shares in the relevant markets.

Some degree of concern has been sparked by the *Facebook/Whatsapp* acquisition, which could well have escaped scrutiny by the European Commission, had it not been because the notifying party used the reasoned submission system under Article 4.5 of EC Regulation 139/2004, on the control of concentrations between undertakings [13] (**ECMR**), and the countries originally competent to review the merger (Spain, Cyprus and the UK) all agreed to enable the Commission to review it under the ECMR. It is symptomatic in this regard that the two most significant countries with original jurisdiction to review the merger were countries with market share based merger thresholds: the UK has a share of supply test and Spain and Portugal a market share threshold. Cyprus has, as we understand, very low thresholds. As we have advocated in the past, market share thresholds are a much better proxy of market power than turnover thresholds. The pros and cons of market share and similar thresholds have been discussed elsewhere and we refer to such discussion for more detail.[14] It suffices to say here, that thresholds based solely on turnover may be ill-equipped to deal with technology mergers, also those where big data is of significance since, as we have seen, often these businesses are not exclusively based on turnover generation: the currency of these markets may sometimes not be money, but data. Furthermore, some of these acquisitions may only have a

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[13] OJ L 24, 29 January 2004, p. 1.

[14] P. CALLOL, *A practical Guide on How to Deal with Market Share Thresholds: Risks and Solutions in Multijurisdictional Transactions*, [2012] ECLR, Issue 11. That paper attempted to examine with objectivity the advantages and disadvantages of market share thresholds and the tools available to maximize legal certainty and minimize prior analysis costs.

prospective value, with many millions being paid for businesses, which are sometimes little more than a gamble on the success of a new or disruptive business model.

Already in March 2016, Competition Commissioner Ms. Vestager mentioned the issue of merger control thresholds and review of relevant technology acquisitions with a large big data component that may well go unnoticed.[15] The solution may lie in leaving the ECMR thresholds unaltered, while relying on the streamlined referral system envisaged in the ECMR which, as Ms. Vestager recognizes, has enabled Commission review of the *Facebook/Whatsapp* merger (although arguably due to the mercy of the affected stakeholders). However, the European Commission seems to be wondering now if the ECMR thresholds are broad enough to catch significant transactions in eh digital sectors and other industries that involve large data sets. The same sources state that the EU's competition directorate plans to start a 12-week public consultation to collect views and opinions on whether the purely turnover based thresholds set out in the ECMR should be amended.[16]

3.2 *Data in recent merger control matters.*

The issue of data and big data is in the spotlight for currently ongoing mergers such as the *Microsoft/Linkedin* or *Verizon/Yahoo*. Some European merger control precedents have already at least identified some issues surrounding competition appraisal of big data (see section 2, above). The Joint Data Report contains a good study of merger control precedents where data has played a role. Bearing in mind the features of marketing data, which in its traditional view does not seem to be related to a multi-sided market, as there is only one set of clients deriving a non-strictly monetary benefit from the company collecting and processing data, we would underline the following:

(a) Dynamic competition in the electronic data related markets might normally make up for any apparent loss of competition and/or apparent barriers to entry. However, depending on research and development, marketing and other expenses, the barrier to entry caused by existing big data clusters may be considerable, although this is to be established on a case-by-case basis.

[15] https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en

[16] Source: Mlex, 8 August 2016. See http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_003_evaluation.pdf

(b) Mergers of companies with access to client data amounting to large shares of market could in theory create a considerable barrier to entry in the market. However, the merger decisions that have identified this type of potential conern, have also dismissed it, given that such a potential advantage could be matched by competitors or that the data are available in the Internet for anyone wishing to exploit them. This was assessed in the *Facebook/Whatsupp* and the *Google/DoubleClick* merger Decisions of the European Commission.

Competition and Intellectual Property Rules 36 Years After Adoption of the UN Set of Principles and Rules on Competition

Philippe Brusick[1]

Introduction

Thirty-six years ago, on the 5th of December 1980, the UN Set of Principles and Rules for the Control of Restrctive Business Practices (as anti-competitive practices were called at the time), was adopted by the General Assembly of the United Nations[2]. The UN Set, later nick-named the Set of Principles and Rules on Competition, is still today the only fully multilaterally agreed code of conduct on competition in existence in the world. While considerable progress in determining best practices have been developed in UNCTAD, OECD, WTO and the International Competition Network (ICN), the date of adoption of the UN Set of Principles and Rules on Competition was chosen for the World Competition Day.

Today, some 130 countries in the world have adopted or are in the process of adopting competition or antitrust laws[3], and these include not only developed OECD member countries, but a rapidly growing number of economies in transition, developing and least developed countries. In addition, the level of fines imposed on companies for breach of competition rules prohibiting cartels and abuse of dominance reach considerable amounts, sometimes in the order of billions of US dollars.

At the same time, competitors, such as for example Apple and Samsung, are involved in long-term patent disputes, now set for a decision of the US Supreme Court in

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2 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adversely affecting International Trade, particularly the Trade and Development of Developing Countries, adopted by United Nations General Assembly Resolution 35/63 of 5 December 1980.

3 CUTS, Competition Regimes in the World, 2006 listed some 117 countries at that time.

2017. In December last year, Samsung paid as much as US$528 million for infringing a number of iPhone patents, in a case that began in 2011.[4]

Recently, the proposed US$85 bn acquisition of Time-Warner by ATT brought to the headlines the telecommunications cable operator's mega-puchase of a media (CNN) and movie and video (HBO) producer, which is the owner of major video and cinema masterpeece copyrights. It is still to be seen whether this merger will be authorised by competition authorities.

In an increasingly competitive world as can be seen today, with mega-giants struggling for market power, the issue of the interplay of competition rules with intellectual property rights comes more than ever to the forefront. How do competition rules, which, under the UN Set are meant to Control the concentration of capital and/or economic power in order to « attain greater efficiency » and « encourage innovation », coexist with intellectual property rights, namely - patents, industrial designs, trademarks, service marks, layout designs of integrated circuits, commercial names and designations, and geographical indications- offering monopoly rights to their owners ?

Can we concur with the view expressed by Margrethe Vestager, the EU Competition Commissioner in one of her recent statements[5], that « Competition policy and intellectual property policy must work hand in glove in order to promote economic growth while ensuring consumers gain access to a wide range of innovative and creative goods and services at reasonable prices» ?

The objectives of competition law and policy in the UN Set

As stated in Section A, the main objectives of the UN Set are the following:
The first objective is « *To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries* ».

In other words, as trade barriers are gradually reduced and eliminated as a result of trade liberalization efforts at the WTO and under regional free trade agreements, anti-competitive practices such as cartels and abuse of dominant position of market power by dominant firms should not substitute governmental barriers with enterprise barriers. The importance of this goal is demonstrated, in particular by the ever-growing number of regional FTAs, including the TTP and TTIP, and the EU itself, plus

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4 Silicon Valley Business Journal, October 10, 2016.

5 Statement by Margrethe Vestager, EU Competition Commissioner before the 19th IBA Competition Conference, Florence 11 September 2015

FTAs in all parts of the world, such as COMESA, ECOWAS, APEC, ASEAN, CARICOM, to name just a few, which all have in common the adoption of regional competition rules.

The second objective, « *To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through: (a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation* » relates to the main goals of UNCTAD, which concern efficiency of trade and development. The encouragement of innovation is mentioned, as one of the main goals of development policy. IPRs are also meant above all to encourage innovation and creativity.

The third objective is « *To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;* ». In other words, the adoption of principles and rules on competition, coïncide with the interests of consumers, as they benefit from lower prices, higher quality and increased choice, resulting from the elimination of cartels and abuses of dominant power.

Another important objective of the Set is to provide a multilaterally agreed basis of principles and rules for adoption and strengthening of competition laws and policies at the national and regional levels. The aim is to encourage all countries individually, as well as regional groupings of states, to adopt competition laws and policies at the regional level.

Thirty-six years after adoption of the principles and rules embodied in the UN Set, competition law and policy has become one of the main instruments regarding entreprise behaviour, unanimously considered to be a powerful engine of growth and development.

IPRs in the UN Set

Intellectual property rules are seldom mentioned in the UN Set. They are considered to be part of a different set of laws, which rarely contradict each-other. Some national laws, however, do specify that IPRs are not covered by the competition law. Provisions of the UN Set relating directly or indirectly with IPRs are found among the Objectives of the Set, in its Scope of application as noted above on the encouragement of innovation, and in a specific sub-section of the Prohibition of abuse of dominant position of market power (Article D4 (e)).

As can be seen from its Scope of application, under article C5, the UN Set covers « *all transactions in goods and services* ». This would imply that intellectual property, considered as a service whenever patents are granted or licensed, or whenever trademarks, copyrights and other IPRs are protected, are included.

In addition, it should be mentioned that among the practices prohibited under the UN Set, Article D4 prohibits practices « *in abuse or acquisition and abuse of a dominant position, including through (inter-alia) :*

« *(e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;* »

Such practices include the use of trademarks to impose differential prices according to what each market will bear, taking into account its general level of income or otherwise, by decision of the management of the firm. Such practices are considered to be part of the normal freedoms of an enterprise to dispose of its markets as it wishes, except, as in the case of Article D4 of the UN Set, for dominant enterprises in so doing are abusing their dominant position.

Intellectual propety rights as an engine for innovation

As defined by the World Intellectual Property Organization (WIPO)[6], Intellectual property (IP) is information or knowledge. Intellectual property rights (IPRs) are rights, provided in law, that exclude non-owners for a specified duration and over a specified breadth from commercially exploiting the IP without the owner's permission. IPRs are divided into industrial property and copyright. Industrial property includes patents (which protect inventions), industrial designs (which protect the appearance of industrial products), "*trademarks, service marks, layout designs of integrated circuits, commercial names and designations, [and] geographical indications*".

Patents are the most widespread means of protecting invention. Patent protection usually has a 20 year duration. A trademark is a sign, or a combination of signs, which distinguishes the goods or services of one enterprise from those of another. Trademarks usually have a 10 year duration, which can be renewed indefinitely by paying a royalty. Copyright law is used to protect the form of expression of ideas, not

[6] Understanding Copyright and Related Rights. WIPO publication No. 909(E)

the ideas themselves, in artistic or literary work. Computer programmes fall into this category. The protection duration is usually 50 years after the death of the author.

Two fundamental difficulties, highlighted by Nobel prize winning economist Kenneth Arrow, are behind the need for IPRs. First, inventive activity and especially investment devoted to R&D is a risky exercise. Irrespective of the amounts invested in a problem-solving exercise, it is always uncertain whether a solution will be found. Second, when he is successful in his efforts, the inventor may easily fall prey of « free riders », who will copy his invention. Hence, this creates a fundamental case of unfair competition, since the inventor invested time and money in his efforts, while the « free rider » can compete as soon as he is informed of the invention without having spent any money for R&D. Faced with these two fundamental difficulties, Arrow concluded that left alone, markets would underinvest in inventive activity relative to what would be socially desirable.[7]

Intellectual property rights limit the extent to which competitors can free ride on inventions and other intellectual assets. They also favour the so-called cumulative process, whereby researchers build on existing knowledge to develop new technologies or products. IP rights, especially patents, play an important role in the process of cumulative innovation. As patent applicants must disclose the problem-solving information underlying an invention, this promotes timely disclosure of new technological knowledge and allows follow-on inventors to build on that knowledge.

As seen above, IP rights are important in creating value, because without such rights, any invention or creation could be pirated by a simple click of a mouse. The registration of a patent, or of a trademark, gives its owner the right to use it as his property, to rent it or to sell it, as he wishes. In the case of the patent owner, he can use his patent or license its application in exchange for a royalty ; in the case of a trademark, he can use it for his own benefit, or rent it to others, through a franchise agreement. Thanks to the protection afforded by the IPR, he is able to conserve the value of his property for as long as the IPR remains valid. If such IP protection did not exist, he would not be able to capture the value of his IP, and his efforts to innovate would be lost.

The development dimension in IPRs and competition

As seen above, it is clear that IPRs are a considerable incentive for innovation : without IPRs innovation would be very limited. In the health sector, it is easy to understand the links with consumer protection : lack of IPRs would result in much slower R&D and medical progress. So it is essential to offer incentives to the pharmaceutical sector to « create value » for their investments in R&D, because it will

[7] See WIPO : World Intellectual Property Report 2015.

accelerate innovation. However, on the other hand, it may be vital for the « consumer » to be able to afford the medicine resulting from this innovation.

If prices of the resulting medication are excessive, the person will not be able to afford it, and will be left to die, unless the State or other bodies give support. This case has had important repercussions in developing countries, where large portions of the population could not afford HIV and other life-saving medicines. It was agreed under a 2001 Declaration on the TRIPS agreement and public health[8], that the TRIPS agreement should not prevent members from taking measures to protect public health and that in this connexion, members of WTO had the right to grant compulsory licences and to determine the grounds upon which such licences should be granted. WTO members also had the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

In addition, Paragraph 6 of the same Declaration stated that : « *We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement.* » For this reason, the WTO General Council, in its Decision of 30 August 2003, concerning the implementation of Paragraph 6, specified that :

« 3. Where a compulsory licence is granted by an exporting Member under the system set out in this Decision, adequate remuneration pursuant to Article 31(h) of the TRIPS Agreement shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory licence is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall be waived in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.

4. In order to ensure that the products imported under the system set out in this Decision are used for the public health purposes underlying their importation, eligible importing Members shall take reasonable measures within their means, proportionate to their administrative capacities and to the risk of trade diversion to prevent re-exportation of the products that have actually been imported into their territories under the system. In the event that an eligible importing Member that is a developing country Member or a least-developed country Member experiences difficulty in implementing this provision, developed country Members shall provide, on request and on mutually

[8] Doha WTO Ministerial, 2001 on TRIPS

agreed terms and conditions, technical and financial cooperation in order to facilitate its implementation. »

In the field of competition law and policy, the UN Set also deals with the development dimension, in affording developing and especially least developed countries with so-called « preferential or differential treatment ». These can be found in Section C of the Set, which provides that :

« *7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:*

1. *(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and*
2. *(b) Encouraging their economic development through regional or global arrangements among developing countries.* »

Conclusion

From the foregoing, it is evident that IPRs are essential for encouraging innovation, as a source of economic progress and growth, and should work hand in hand with competition law and policy to encourage innovation, economic growth and accelerate development.

In the last 36 years or so, since the UN Set was adopted, the globalized world has immensely enhanced competition forces, as mega-multinational corporations strive to achieve world dominance through every means at their disposal. Rapidy emerging new technologies are revolutionizing the world economy at a pace never seen before. It is essential under such conditions that governments are able to follow and to remedy any attempt to monopolize through cartel agreements or mergers &acquisitions, or through abuse dominant positions of market power.

In modern world, the pace of innovation and creativity is faster every day and accelerates in a geometrical progression. One could argue today that the duration of monopoly rights afforded under existing IPRs should possibly be shortened, to reflect this rapid pace of innovation. Too long IP protection might encourage owners to postpone innovation since their profits are guaranteed for older, perimated know-how. Some pharmaceutical companies have used some gimmicks, including undeserved patent claims to prolong the duration of existing patents. Such practices may be especially damaging for poor and developing countries, who are likely to find themselves at the receiving end of outdated technologies.

New Challenges for Competition Enforcement

Geeta Gouri[1]

Technology has changed the way we live and rapidly. Technology has also changed market structures. High technology industries based on knowledge and new ideas are characterized by the presence of a few firms. Monopolistic competition is more often the rule than pure competition. The scope afforded by a monopolist to retain a portion of the profits by raising pricings provides the incentive to invest in R&D and innovations. Consumers benefit from innovations. So does the economy. At the same time without competitive constraints monopolists can indulge in behavior of market power while slackening efforts to innovate and improve quality of products. These changes in the market structure suggest a rethink on competition enforcement with implications on interpretation of the Competition Act.

On World Competition Day I think the most significant development of high technology industries is the return to center stage of the consumer whose place had been usurped by competitors. The idea of competition is that competitors should compete to the benefit of consumers. Competition enforcement should be to protect competition and not protect the consumer.

Emphasis on protecting competitors has its roots in the static framework of pure competition where increasing the number of firms in a market ensures that consumers benefit from lower prices. The framework is without consideration of the dynamic gains of innovation and benefits to consumers. Accordingly, new economic tools are required for competition enforcement.

Firstly the need to accept that competitive price in terms of marginal cost may not be the appropriate indicator of competition. Instead non-price competitive constraints come to the forefront. Cycles of innovation and quality gains predominance. Equally significant in the downsizing of price in the concept of predatory pricing difficult to establish as prices can be lower than marginal cost maybe zero where network economies are involved.

Secondly the way a market is defined has to be in tandem with technological progress. The recent revolution of telecommunication is the emergence of large

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substitutes open and available to consumers and surprisingly similar in "*characteristics, substitutability and their prices*". In each substitutable segment there would be one or two firms. The dominant firms keep changing. Competition is then a "*Clash of the Titans*". Intervention by the Commission the consumer would get hit in the cross fire.

Thirdly, the legal framework which proceeds with first defining the relevant market and then in assessing market share and the alleged abuse ultimately examining benefits to consumers may be inappropriate. The revised Guidelines of the Horizontal Merger Guidelines of the US Department of Justice and the Federal Trade Commission have emphasized that the steps (in mergers) should be interrelated and not sequential. Moreover, under the Competition Act Section 4 on 'abuse of dominance' proceeds on the basis of factors of dominance outlined in Section 19(4). Efficiency gains associated with monopolistic competition and presence of a dominant firm do not find a place in either of the sections.

The arguments outlined above for a fresh and innovative perspective of dominance in high technology industries is not to ignore Commissions' concern with market deterrence capability of a dominant incumbent. The presumption is that a dominant firm has the capability of investing in R&D and in employing the best minds globally widens the gap between the incumbent and the entrant. The argument fails to recognize that the present technological revolution has been driven by two forces. They are: a) spurt of disruptive ideas and concepts as can be observed in the frequency of apps and consumer reach on the internet; and b) technological development in the instruments of access itself. In fact, in India the internet access has skipped the PC replace by the new smart phones. A large portion of the innovative ideas have emanated from India. Protecting the competitors is myopic and extremely short term measure where the consumer is the loser. Protection to infant industry while politically endearing does not promote dynamic markets which is the objective of competition policy. This is not to deny the market power of dominant technology firms. It is rather to suggest that competition authorities should rarely intervene in these markets. I think the best adage for competition is '**Ask the Consumer**' a simple rule hardly appreciated.

Should Intellectual Property be exempt from the application of Competition Law?

Thula Kaira[1]

A number of competition legislations expressly limit the application of competition law and policy in matters of intellectual property. Why is this so? Is this really relevant? In the southern and eastern part of Africa, such exemptions are provided for in legislations in Botswana, Malawi, Swaziland, and Zambia. These have a provision that more or less reads like this: Nothing in this Act those elements of any agreement which relate exclusively to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trademark…

Intellectual property is a branch of the law that is aimed at protecting inventors and innovators by granting them intellectual property rights (IPRs), i.e., monopoly rights, for a specified period of time (within the framework of national laws and international laws and agreements (including WIPO, WTO, regional and bilateral investment or trade agreements). By their very nature, inventions and innovations are aimed at having industrial application, that is, they are implemented in the market place.

International moral consensus on IPRs and competition law

There appears to be no international custom or authority to support the exemption of IPRs from application of competition law and policy. Notably, the UN Set of Principles and Rules on Competition (2010), which is a leading moral authority for UN Member States in relation to competition policy, provides under paragraph B(ii)(5) that "the principles and rules for enterprises, including transnational corporations apply to all transactions in goods and services". The UN Set, does not indicate any exemption to goods and services benefitting from an IP protection. Another moral source is the UNCTAD Model Law on Competition (2000 as amended), which under its Article II(a) in terms of scope of application states that (competition law): *Applies to all enterprises…, in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property.*

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The UN Set provides further, under its Article B(ii)(7), that "the provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behavior". All enterprises (including those conferred with IPRs) must 'refrain' from engaging in activities listed under paragraph D(3) of the UN Set, which includes but not limited to agreements fixing prices, including as to exports and imports; collusive tendering; market or customer allocation arrangements; concerted refusal of supplies to potential importers; and; collective denial of access to an arrangement, or association, which is crucial to competition.

Exemptions under the UN Set

A notable express exemption of engagement in restrictive business practices listed under the UN Set [paragraph D(3)] is presumed for enterprises dealing with each other in the context of an economic entity wherein they are under common control/ownership. There is also another notable exemption, this time relating to IPRs, under paragraph D(4)(e) in relation to restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e., belong to the same owner or are used by enterprises between which there is economic, or organisational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices.

What is the recommended best approach?

The UN Set and UNCTAD Model Law on Competition provide reasonable best approaches for domestic laws to adopt. Some countries have done so. For instance, in the Kenya Competition Act of 2011, it provides under section 28(1) that: *the Authority may, upon application, and on such conditions as the Authority may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights*. The South African Competition Act of 1998, under section 10(4), provides that the Competition Commission may exempt an agreement, or practice, or category of either agreement, or practices, that relates to the exercise of a right acquired or protected in terms of key IP-related domestic laws[2]. Similarly, section 3(1)(a) of the Competition Act, 1996 of Zimbabwe acknowledges the acquisition of exclusive IPRs but does not exempt the application of competition law to the extent that such a right is used for the purpose of enhancing or maintaining prices or any other consideration in a manner contemplated in the definition of "restrictive practice". Again, Article 4(2) of the COMESA Competition Regulations does not

[2] Similar to section 30(1) of the Competition Act, 2003 of Namibia.

exempt IPRs where the use of such property is in such a manner as to cause the anti-competitive effects prohibited herein. This is important to ensure that the actual industrial application and marketing of an IPRs, which ultimately ends in use or consumption, does not have detrimental effects to competition or consumers.

The application of IPRs is subject, inevitably, to various laws that are already in place affecting the products and services that arise from commercial activities. These laws include public safety, standards and consumer protection, hire purchase, etc. It is therefore not possible that IPRs can in any way proffer a license to the holder to engage in anti-competitive practices and or violate sacred consumer protection rights. Where there is such an exemption in application of IPRs, are they academic? Yes. Are they necessary? No. The express exemption of application of competition legislation to IPRs is an oxymoron that in real effect does not confer such an exemption.

Intellectual Property Rights and Anti-Competitive Practices

S Chakravarthy[1]

Introduction

Twenty first century will be the century of knowledge, indeed the century of mind. Innovation is the key for the production as well as processing of knowledge. A nation's ability to convert knowledge into wealth and social good through the process of innovation will determine its future. In this context, issues of generation, valuation, **protection and exploitation of intellectual property (IP)** are going to become critically important all around the world. Exponential growth of scientific knowledge, increasing demands for new forms of **intellectual property protection** as well as access to IP related information and increasing dominance of the new knowledge economy over the old 'brick & mortar' economy, will pose a challenge in setting the new 21st century IP agenda.

An ideal regime of **Intellectual Property Rights (IPRs)** strikes a balance between private incentives for innovators and the public interest of maximizing access to the fruits of innovation. This balance is reflected in **Article** 27 of the 1948 Universal Declaration of Human Rights, which recognizes both that "Everyone has the right to the **protection** of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author" (emphasis added) and that "Everyone has the right …… to share in scientific advancement and its benefits". The burning question seems to be balancing the interest of the inventor and that of the society in an optimum way.

In this Article, it is proposed to address the **interface between Intellectual Property Rights and Competition Law/Policy,** to narrate tersely the Indian competition law in so far as it relates to IPRs and also to list those practices, which would be compatible with competition law and those which would not be.

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Intellectual Property and Competition Policy/Law

All forms of Intellectual Property have the potential to raise competition law problems. Presently, competition laws are generally viewed in the context of economic theories about the way in which various forms of business practices, broadly levelled "anti-competitive" interfere with and distort the free market.

As normally understood, Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not automatically include the right to exert restrictive or monopoly power in a market or society. The Intellectual Property, often, may not be able to generate market power. In a few really successful cases, the potential pejorative character of power may be unjustifiably great because of the public policies like the encouragement of inventions, but on the other hand if investment of resources to produce ideas or conveying information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay anything for what they take. This may result in lack of incentives to invest in ideas or information and the consumer may be correspondingly the poorer. **What is called for is a balance between unjustified monopolies and protection of the property holders' investment.**

The relationship between competition law control and Intellectual Property Rights is inherently contradictory as there is a potential conflict between the two, in that **the existence and the exercise** of Intellectual property Rights may often produce anti-competitive effects through the monopoly power granted to the holder of the rights. Merkin suggests that the conflict is not as severe, as it first appears, as the powerful public policy justification for maintaining the rights can be harmonised with protecting competition and consumer interest in the market (Merkin, 1985). Such harmonisation has been attempted by the European Court of Justice (ECJ) developing a workable formula for disposing of the conflict [European Court of Justice (1974)].**ECJ made a distinction between the existence of Intellectual Property Rights and their exercise.** Within this dichotomy, all aspects of a right which relate to its existence will be undisturbed by the Treaty of Rome, but those aspects which relate to its exercise may be capable of regulation if they are anti-competitive (Frazer, 1988).

In India, the conflict between IPRs and competition law is captured in a case that came up before the Indian Monopolies and Restrictive Trade Practices Commission (Box below).

Conflict Between IPR and Competition Law Indian Case Law – Godfrey Phillips
The conflict between IPRs and the competition law came up before the Monopolies and Restrictive Trade Practices Commission (MRTPC) in India in Vallal Peruman and another Vs. Godfrey Phillips (India) limited (MRTP Commission, 1994). The Commission observed as follows: "Applying the above principles to the controversy at hand, it seems ....., that a certificate of registration held by an individual or an undertaking invests in him/it, an undoubted right to use trade mark/name etc. so long as the certificate of registration is in operation and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted. If however, while presenting the goods and merchandise for sale in the market or for promotion thereof, the holder of the certificate misuses the same by manipulation, distortion, contrivances and embellishments etc. so as to mislead or confuse the consumers, he would be exposing himself to an action -----of indulging in unfair trade practices. It will, thus, be seen that the provisions of the Monopolies and Restrictive Trade Practices Act would be attracted only when there is an abuse in exercise of the right protected ...." This principle was reiterated in Manju Bhardwaj's Case by the same Commission (MRTP Commission, 1996).

There is no doubt of the presence of the dichotomy between Intellectual Property Rights and competition law. The former endangers competition while the latter engenders competition. This conflict or dichotomy is not incapable of resolution. A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of public interest or consumer interest, it ought to be assailed under the competition law.

New Indian Competition Law, Competition Act, 2002 and IPRs

The new Indian competition law, namely, the Competition Act, 2002[2] (Act, for brief) has come on the statute book. Government made an express provision in the Act that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti-competitive practices. In other words, unreasonable conditions in an IPR agreement that will not form a part of the bundle of rights that normally form a part of IPRs would come under the mischief of the Act.

2 Amended in Sept 2007 by Indian Parliament.

The rationale for this exception is that the bundle of rights that are subsumed in intellectual property rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. No doubt, this bundle of rights essays an anti-competition character, even bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, new technology and enhancement in the quality of products and services. However, it may be noted, that the Act does not permit any **unreasonable condition** forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights.

Conditions Compatible with Competition Law

The bundle of rights that usually accompany the IP rights (which can be regarded as reasonable) needs to be listed by way of illustration. The following would constitute the so called "reasonable conditions" of an IP right in the context of the licensor (patentee, for example) and the licensee entering into a licensing agreement of the IP right.

1. An obligation on the licensor not to license other undertakings to exploit the licensed technology in the licensed territory.
2. An obligation on the licensor not to exploit the licensed technology in the licensed territory himself.
3. An obligation on the licensee not to manufacture or sell the licensed product in territories which are licensed to other licensees.
4. An obligation on the licensee to use only the licensor's trade mark to distinguish the licensed product during the term of the agreement.
5. An obligation on the licensee not to divulge to others, the know-how communicated by the licensor.
6. An obligation on the licensee not to grant sub-licences or assign the licence.
7. An obligation on the licensee not to exploit the licensed know-how or patents after the termination of the agreement as long as the know-how is secret or the patents are in force.
8. An obligation on the licensee to observe minimum quality specifications including technical specifications for the licensed product.
9. An obligation on the licensee to inform the licensor of infringement of IP rights.
10. An obligation on the licensee to restrict his exploitation of the licensed technology to one or more technical fields of application covered by the technology.

11. An obligation on the licensee to mark the licensed product with an indication of the licensor's name or the licensed patent.
12. An obligation on the licensee not to use the licensor's technology to construct facilities for third parties.
13. An obligation on the licensee to use his best endeavours to manufacture and market a licensed product.

Note: The above list is not exhaustive but just illustrative. Usual conditions relating to royalty, duration of licence etc form part or the license and are regarded as reasonable.

Conditions not Compatible with Competition Law

It may be noted that any <u>unreasonable condition</u> forming a part of protection or exploitation of intellectual property rights is not likely to be compatible with competition law. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with intellectual property rights.

A few such practices are described below.

1. Patent pooling is a restrictive practice, which will not constitute being a part of the bundle of rights forming part of an IPR. This happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may earn supra-competitive profits and keep new entrants out of the market. In particular, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.

2. Tie-in arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete or to handle goods, which compete with the patentee's.

3. An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.

4. There could be a clause, which restricts competition in R & D or prohibits a licensee to use rival technology.

5. A licensee may be subjected to a condition not to challenge the validity of IPR in question.

6. A licensee may require to grant back to the licensor any know-how or IPR acquired and not to grant licenses to anyone else. This is not likely to pass the competition test, as it is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.

7. A licensor may fix the prices at which the licensee should sell.

8. The licensee may be restricted territorially or according to categories of customers.

9. A licensee may be coerced by the licensor to take several licences in intellectual property even though the former may not need all of them. This is known as package licensing which is regarded as anti-competitive.

10. A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent is an anti- competitive practice.

11. Restricting the right of the licensee to sell product of the licensed know-how to persons other than those designated by the licensor is violative of competition. Such a condition is often imposed in the licensing of dual use technologies.

12. Imposing a trade mark use requirement on the licensee is prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark.

13. Indemnification of the licensor to meet expenses and action in infringement proceedings.

14. Undue restriction on licensee's business could be anti-competitive. For instance, the field of use of a drug could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both.

15. Limiting the maximum amount of use, the licensee may make of the patented invention may affect competition.

16. A condition imposed on the licensee to employ or use staff designated by the licensor is anti-competition.

The above list is not exhaustive. It is desirable that a particular license restriction is not considered in isolation by the Competition Authority but is considered in totality against the backdrop of the motivation of the patent holder.

Finale

Intellectual Property Rights and Competition law are not anti-thetical to each other. While IPRs require to be protected in the interests of creativity and innovation, such protection needs to be reasonable allowing only such conditions that constitute the bundle of rights that usually accompany IPRs and as are compatible with competition principles. Those conditions outside the bundle of rights as are incompatible with competition principles need to be assailed in the larger interests of consumers and the public.

REFERENCES AND READINGS

European Court of Justice (1974): Centrafarm Vs. Sterling ECR 1147, 1974.

Frazer, Tim (1988): 'Monopoly, Competition and the Law: The Regulation of Business Activity in Britain, Europe and America' - St. Martin's Press, Inc., New York, 1988, 222.

Merkin (1985): 'The Interface between Anti-Trust and Intellectual Property' - 6 European Competition Law Review, 1985, p.377.

MRTP Commission (1994): Vallal Peruman and Dileep Singh Bhuria Vs. Godfrey Phillips (India) Ltd. – IA 91/92 in UTPE 180/92 -MRTP Commission, New Delhi, 24 May 1994.

MRTP Commission (1996): Manju Bhardwaj Vs. Zee Telefilms Ltd. and others, UTPE 148/95, MRTP Commission, New Delhi dated 2 Jan. 1996.

Linkage between competition law and intellectual property

Dhanendra Kumar[1]

Competition is the *sine-qua-non* for sustained economic and accelerated growth and innovation necessary to provide it dynamism. Competition Law and IP Law, at first glance seem to be in conflict with each other, yet it is soon obvious that both are integral in nature and have a common goal of encouraging innovation, dynamic efficiency and consumer benefit.

Competition law recognizes that monopoly is not necessarily bad, so long as it is not abusive. It is considered against Competition principles if the proprietor of an IP abuses dominant position to tamper the competitive market. Although fuller jurisprudence in India on this is still under evolution, onsets of a few cases in recent times, like against Microsoft (I) and Ericsson filed by Micromax, are expected to help in the process.

United States approach

The DOJ and other US authorities have been engaged with antitrust and IPR issues over time and have viewed that existence of IPR does not essentially amount to an abuse of dominance when IPRs and more precisely the SEPs are given to the licensees under FRAND terms. This was seen in the decision of Virnetx Inc. v. Cisco System (No.13-1489, Fed. Cir. 2014), where the US Court of Appeals for the Federal Circuit held that the royalty base must be closely tied to the claimed invention rather than the entire value of the product, which signifies that the licensor of SEP is required to give its invention on FRAND terms in order to avoid royalty stacking and patent hold-up.

In the promotion of the same, a framework was built which brought an antitrust "security zone". The rules identified with the security zones fundamentally force no restrictions to the proprietor only when the limitations put up do not result in predatory/increase in pricing, tying-in arrangements, reduction of output, conditional refusals to license, and foreclosure of innovation.

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US authorities consider that the objective of both IPR and Competition law is to advance innovation with the facilitation of Competition in the market for greater choice and welfare.

European Union approach

EC has embraced a more conservative and market-driven approach by giving numerous exemptions. The primary block exemption that drives the IPR regime in EU is on the "technology transfers", issued in the year 2004, which regulates the exemption of licenses, know-how and copyright assignments from the point of view of Competition law.

A Standard Setting Organization namely, European Telecommunications Standards Institute (ETSI), officially recognised by the European Union as a European Standards Organization seeks to promote that the essential IPRs are available under FRAND terms and conditions. At the same time, recognise that IPR holders get adequately rewarded. As per clause 6 of ETSI IPR policy, an IPR owner is required to give irrevocable written undertaking that it is prepared to grant irrevocable licenses on FRAND terms to be applied fairly and uniformly to similarly placed players.

This approach was seen in the EU Court of Justice Judgment in Huawei v ZTE (Case C-170/13) dated 16 July 2015**,** the Court has ruled that the holder of a SEP that has committed to license its SEP on FRAND terms may be found in breach of the competition rules (Article 102 TFEU) by seeking an injunction against a potential licensee in certain circumstances. In doing so, the CJEU's judgment sets out a number of steps that should be followed in SEP patent licensing negotiations. The CJEU has made it very clear that, in situations where the user of a SEP is notionally prepared to pay a royalty, a number of specific steps must be complied with in order to seek an injunction restraining the use of the relevant SEP.

Indian Approach

Indian Competition Law draws a balance between Competition Law and IPR. Section 3(5) of the Indian Competition Act exempts sensible use of inventions under IPRs from the domain of Competition law. Section 4(2) says that activities by undertakings that might be regarded as abusive are similarly applicable to IPR holders too. It implies from both the provisions that an IPR holder can't put any irrational conditions while licensing his IP rights.

In the 2008 case of Entertainment Network (I) Ltd. v. Super Cassette Industries Ltd, the Supreme Court examined the interface between Competition law and impact of IPR on competition in the market. The Court held that although the proprietor of a copyright exercises a total monopoly over it, yet the same is restricted as in any transaction with unreasonably tainting or limiting competition would amount to refusal. IPR proprietors can seek rewards for their labour through royalty by issuing licenses but the same is not absolute.

The Indian Competition authorities have developed a balanced approach as seen in the cases of iball Vs. Ericsson (Case No. 04 of 2015), Micromax Informatics Limited V. Ericsson (Case No. 50 of 2013) and Intex Technologies (I) Limited V. Ericsson (Case No. 76 of 2013), wherein the Commission was of the prima facie view that the conduct of Ericsson amounts to abuse of dominance and required Ericsson to conclude licenses with patent seekers on FRAND terms. The Commission also observed that "*While companies must be mandated to pass their technology on the basis of FRAND commitments, it is also pertinent to note that rights of the patent holder are also to be safeguarded*". This approach of Indian authorities lays the development of the concepts of FRAND licensing terms for SEPs. However, Indian jurisprudence on this is still at a relatively nascent stage, though it helps in laying the foundation of creating a balance between IPR and Competition law in India.

Competition Law and IPR cannot be mutually exclusive and opposed to each other, specially in India which is on a fast trajectory of technology led economic growth. This has been evident from a series of policy pronouncements of Government. The evolution of competition law jurisprudence is witnessing it.

Challenges of Optimal Innovation & India in the New World Order

Sarita Kapur & Amit Kapur[1]

We live in interesting times. A technologically connected multi-polar world (arguably an outcome of the communication and transportation revolutions) is witnessing a rise in nation-focussed protectionism manifested in tariff and other barriers since the 2008 financial meltdown. The BREXIT and the US elections are a testimony to the growing influence of such an outlook in the world order. Interestingly, the countries raising these barriers for entry in their markets continue to push for a preferential treatment and access to markets/resources *et al* in other countries through bilateral and regional treaties.

In this context, a modern welfare state[2] facing demand for inclusive capitalism[3], is challenged in designing and implementing a regime which encourages investments and innovation while safeguarding welfare of its citizens and preventing unjust squatting on markets. Intellectual Property Rights ("IPRs") are of significant importance since they secure to the creator (a) control over use of the underlying intellectual property ("asset"); (b) enjoyment of income produced by that asset; and, (c) ability to alienate all or any such rights over that asset, fully or partly / temporarily. The owner of an IPR has the right to enforce, protect and defend the same through process of law. Inherently, IPR is linked to the economics of innovation – premised to encourage investments in R&D and innovation by rewarding the effort by grant of the IPRs. On the other hand, competition law and policy focuses on promoting competition, and hence choice, in the relevant market by, amongst others, creating a level playing field for people to compete.

There is an apparent overlap with potential of conflict. Any progressive IPR regime is premised on a balance between the long term social objectives of enabling future

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2 Through instrumentalities including courts, regulators, law and policy makers, and enforcers.

3 Bill Gates is credited to have shown the light on this at Davos (2014) espousing "twin mission of making profits and improving lives of those who don't fully benefit from market forces".

innovations, while allowing people, in the short term, to avail of and exploit their innovations commercially.

Excessive protection invariably blunts the innovative impulse by apathy which inheres monopolists where consumers become hostage. An attractive aspect of the patent protection is that the innovator must compulsorily disclose all concerned information for the purpose of grant of the patent, thereby enabling academicians and industrialists to conduct further research enriching the knowledge base amongst all stakeholders within the industry.

With over two decades since WTO (1994) and TRIPS Agreement (1995), the implementation in recent years shows a strong propensity to use IPRs to corner markets while creating entry-barriers for competitors[4]. While grant of longer tenure or deeper intellectual IPRs may be found desirable to induce high upfront investments in R&D, denial of access to the outputs of such research even in commodities like lifesaving drugs and essential facilities[5]. Competition and welfare impulses may warrant a more stringent requirements of compulsory licensing[6] or access on non-discriminatory terms[7].

One of the battlefronts has been freedom to contract which includes the right to refuse to deal when confronted by the essential facility doctrine[8]. In certain circumstances (like access to highways, rail bridges, electricity transmission network or telecom network) this freedom is subjected to reasonable restrictions to ensure against a natural monopoly facility (bottleneck) being abused to assert monopolistic market power. This reasoning underlies the common carrier principle and the rule of non-discriminatory access imposed in such cases particularly to attain welfare and optimal utilization of scarce resources.

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[4] Some noteworthy examples being Ericsson sued by Micromax and Intex in India for anti-competitive behaviour (judgement of Delhi High Court dated 30.03.2016 reported as 2016 CompLR 497); litigation overseas amongst smart-phone manufacturers like Apple, Microsoft and Samsung; big pharma's repeat endeavour to perpetuate monopoly through incremental changes ever-greening patents (see (2013) 6 SCC 1).

[5] Owner(s) of an "essential" or "bottleneck" facility must provide access to that facility, at a reasonable price. For example, a railroad or an electricity/signal transmission grid; interoperability of technologies (like set-top boxes of broadcasters). There is an important distinction among public, private but regulated, and private unregulated facilities because mandatory access can diminish private incentives to invest and to innovate. [*OECD Paper 'The Essential Facilities Concept 1996'*]

[6] SC judgement in Novartis AG v. Union of India (2013) 6 SCC 1

[7] US SC in Otter Tail Power Co. v. United States – 410 U.S. 366 (1973)

[8] Refer to OECD Roundtable on *"The Essential Facilities Concept"* (1996) and the fourfold tests:
(1) Control of essential facility by a monopolist.
(2) Competitor's inability to duplicate it.
(3) Denial of use of facility to such Competitor.
(4) Feasibility of providing the facility to the Competitor.

An even more stark challenge is faced by authorities in balancing between "innovation" and "patentability" of molecules and pharma products. In 2013, the Supreme Court of India had the occasion to evaluate this dialectic while deciding upon a claim by Novartis for patentability of the beta crystaline form of Imatinib Mesylate, a cure for myeloid leukemia. In rejecting the claim, the Supreme Court expounded on the standard of "patentable innovation with enhanced therapeutic efficacy". It was held that trifling changes cannot be permitted to enjoy monopoly rights by evergreening patents. The court was conscious that India has emerged as the saviour of public health in poor economies with its strong generics industry.

Evidently, we have not seen the last of such challenges. As India takes its place on the high table in the emerging multilateral, protectionist world-order, we need to keep a sharp focus on our national interest while balancing it with our international commitments. Courts and authorities must take guidance from the Indian Constitution, which gives a balanced framework, in particular its directive principles of state policy[9], fundamental duties[10], fundamental right[11] and constitutional rights to property[12] for evolving our unique offering to attract innovations and investments without sacrificing our welfare goals. Innovation with competition resulting in better products and services available at efficient prices is the ideal for which instrumentalities of state need to strike the fine balance between the two apparently conflicting impulses.

[9] To guide allocative efficiencies and use of scarce resources to maximize welfare *Article 39* inter-alia, mandates that "the State shall, in particular, direct its policy towards securing - …
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; …"

[10] *Article 51* makes it a duty of every citizen to "(h) develop the scientific temper," et.al. and (j) "strive towards excellence in all spheres of individual and collective activity."

[11] *Article 19(1)(g) and (6)* protects the rights of all citizens "to practice any profession, or to carry on any occupation, trade or business" subject to the State "making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the said right …"

[12] Every person has a right to property (including IPRs) under *Article 300A* to not be deprived of property except by authority of law. Supreme Court has read this to mean this can only be done pursuant to a just and fair legislation enacted for public purpose and for due compensation.

Competition and Intellectual Property in Pakistan

Rabia Manzoor, Vaqar Ahmed and Ghulam Samad[1]

The multilateral agreements under UN on competition policies that provides a set of equitable rules for the control of anti-competitive practices, recognize the development dimension of competition law and policy, while also providing a framework for international operation and exchange of best practices (UNCTAD 2015). The overall focus of the efforts at UN level is to limit any adverse impact that restrictive business practices (RBPs) may have on the economic development process of developing countries and potential gains from international trade.

The history of competition law in Pakistan dates back to the 1970s when Pakistan promulgated the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970. The Monopoly Control Authority was established to enforce this law. However, considering the changed economic conditions and various limitations of this legislation, the Government overhauled the competition regime in 2007 by enacting a new legislation - Competition Ordinance 2007. This was a competition law on modern lines and essentially based on the principles given in the Treaty of Rome. The Ordinance also established the Competition Commission of Pakistan (CCP) to implement the new law. The Ordinance was enacted as an Act of Parliament in October 2010.

The Competition Act 2010 guides corporate behaviour, empowers the consumer, and mandates a professional, autonomous institution to enforce the law (CCP 2016). Being a part of the broader competition policy framework, the Act endeavours to engender free competition in all spheres of commercial and economic activity with the aim to provide all entities an equal opportunity to participate in the economy. The law prohibits actions that tend to lessen competition such as abuse of market dominance, agreements that restrict dominance, and deceptive marketing practices. The law sets out procedures relating to review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency, and other essential aspects of law enforcement.

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Despite these efforts, Pakistan faces numerous challenges to build an across the board 'competitive culture' (see Ahmed et al. 2015, Khan and Ahmed 2014, and Suleri et al. 2014). The CCP encounters opposition by vested interests in almost all sectors of the economy (World Bank 2016, Ahmed and Batool 2014, SDPI 2016). Being well aware of this challenge, CCP is vigorously pursuing an advocacy agenda to inform, educate and persuade its stakeholders on the need and implementation of competition law.

While competition law is an important tool for promoting consumer well-being, this law is helped by strengthening of intellectual property (IP) framework and law in the country. Pakistan had promulgated the IP law in early-2000. IPO-Pakistan was established in 2005 in order to manage the dispersed components with in the IP framework. The Federal Investigation Agency (FIA) was authorized to raid the counterfeiting producing industries; measures were taken to establish IP judiciary system. During the past decade, we have seen increased number of patents registration which has given a boost to the innovation culture (Samad and Manzoor 2015, Janjua and Samad 2007, Khalid et al 2010).

The business community in Pakistan also appreciates the IPO-Pakistan's efforts as respect of IP laws is an important requirement for accessing Generalized System of Preferences (GSP) and related market access incentives provided by United States and European Union.

While both CCP and IPO-Pakistan will need to acquire greater autonomy and independence in running their affairs, the political leadership in Pakistan needs to be cognizant of the commitments made under Trade Related Intellectual Property Rights (TRIPs) agreement. As Pakistan endeavors to become part of the regional and global supply chains, foreign investors and importers will attach immense importance to the compliance aspect under TRIPs and related multilateral commitments. Ultimately a coordinated and proactive implementation of competition and IP laws delivers lower prices, greater choice and more responsive markets.

References:

- Ahmed V and Batool S 2015, India-Pakistan Trade: Perspectives from the Automobile Sector in Pakistan' working paper-293, published by Indian Council for Research on International Economic Relations http://icrier.org/pdf/Working_Paper_293.pdf

- Competition Commission of Pakistan 2016, http://www.cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=103&lang=enIPO-Pakistan website: http://ipo.gov.pk/Common/NewsDetails.aspx?NewsID=275

- Janjua, P Z and Samad G (2007). Intellectual Property Rights and Economic Growth: The Case of Middle Income Developing Countries. The Pakistan Development Review 46:4, pp 711-722

- Khalid A. R, Ahmed V, Samad G, Abid M, Khan A and Mohsin A 2010, 'The Economic Contribution of Copyright-Based Industries in Pakistan' by National Institute of Cultural Studies. http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_pk.pdf

- Khan, S. A and Ahmed V 2014, 'Peaceful Economies: Assessing the Role of the Private Sector in Conflict Prevention in Pakistan' published by International Journal of Security and Development, E-ISSN: 2165-2627 http://www.stabilityjournal.org/articles/10.5334/sta.dv/

- Samad G and Manzoor R 2015, 'Green Growth: Important Determinants' published by Singapore Economic Review, Vol 6, No. 2 http://www.worldscientific.com/doi/abs/10.1142/S0217590815500149?journalCode=ser

- SDPI 2016, *Social Enterprise Landscape in Pakistan,* by Sustainable Development Policy Institute and British Council http://www.slideshare.net/vahmed/social-enterprises-and-sustainable-development

- Suleri Q. A, Ahmed V, Zeshan M and Batool S 2014 'Managing Intra Country Growth Dipartites in South Asia' conference paper published by Institute of Policy Studies of Sri Lanka http://www.sdpi.org/publications/externalpublications/Towards-a-Stronger-Dynamic-and-Inclusive-South-Asia.PDF#page=88

- UNCTAD 2015, United Nation Conference for the Review of the set of multilateral agreed equitable principles and rules for the control of restrictive business practices, organized by United Nation Conference for Trade and

Development in Geneva.
http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=609

- Vaqar A, Suleri A. Q and Javed A 2015, 'Strengthening South Asia Value Chain: Prospects and Challenges' published by South Asia Economic Journal, *September 2015 vol. 16 no. 2 suppl 55S-74S*
http://sae.sagepub.com/content/16/2_suppl/55S.short

- World Bank
http://siteresources.worldbank.org/INTMENA/Resources/Challenges_in_implementing_Modern_competition_law_-_updated.pdf

Parallel Import and Exhaustion Law in Mauritius: Call for reform

Mosadeq Sahebdin[1]

There are three different types of Exhaustion law recognized by international law. They are national, regional and international exhaustion.

1. The doctrine of ***international exhaustion*** accepts the world as one market and thus the sale of products sold in any market of any country implies that the holder's rights are exhausted.

2. The doctrine of ***regional exhaustion*** states that when products of a brand are sold first in one country by or with the consent of the trademark owner, it cannot prohibit the sale of these products in their own country or any country that is part of the region. The European Union, for example, adopted regional exhaustion.

3. The doctrine of ***national exhaustion***, concurred in Mauritius, stipulates that once a product is sold on domestic market for the first time by the holder of the property right or with his consent, he ceases to have control of the subsequent sale of the product in this market.

If a country recognizes international exhaustion, import of any product sold elsewhere with the permission of the industrial property right owner, it cannot be challenged by its owner anymore. The concept of international exhaustion recognizes the world as one market. At present, the national exhaustion system of Mauritius doesn't allow anyone to import any good bearing the mark or copyright of the owner without the consent or authorization of its owner.

In a recent case of spare parts import by a local company Zario Ltd for Nissan, the judge pointed out that the economic aspect should not be considered during the judgment as many traders import genuine goods into Mauritius as they are cheaper in abroad than in Mauritius. However, it violates the patent law of Mauritius. Even though the court acknowledges that the rule is anticompetitive and protectionist; however, in a previous judgment it endorsed the position of the European Commission and declared that the Court's task is to implement the regulation and not to consider whether the Regulation is good or bad from an economic point of

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view. It is in this context that a number of importers are mobilizing in order to recognize their right to parallel imports.

The Finance Minister of Mauritius in his Budget speech of 2016-2017 has called for the modernization of current Industrial Property Framework aiming to consolidate the institutional arrangement to administer Industrial Property. A consolidated Bill will be introduced before late December-early January, 2017. In this context, Consumer Advocacy Platform (CAP) is strongly advocating the rights to parallel import under the new legislation on industrial property. However, even before the start of consultation process, a strong lobby of business community against international exhaustion has emerged. Being an organisation working on consumer welfare and protection issues, CAP has already begun a series of consultation meetings to advocate the adoption of international exhaustion by the legislature. This is because the adoption of international exhaustion law will enable the country to undertake parallel import which could enable competition in the market and lower prices leading to consumer welfare. Moreover, in the long run implementation of international exhaustion could lead to better access to technology and it is important to acknowledge its potential in fostering innovations and economic efficiencies in the broader industrial climate.

Competition law to promote access to medicines: a human rights perspective

Nuna Van Belle[1]

Access to high-quality and affordable medicines remains out of reach for millions of people around the world. While the reasons for impeded access in low- and middle-income countries are multifold, a key barrier to access is high prices for medicines as patients are expected to pay out-of-pocket. The current legal framework has not managed to strike the right balance between economic, social and political interests and universal human rights such as right to life, health and development.

The international trade architecture[2] has been under severe criticism for not permitting low- and middle-income countries to benefit from medical innovation and economic growth. Instead, it has created a twin challenge for innovation and access: high levels of intellectual property protection have had an upward effect on drug prices on the one hand and have failed to provide incentives for research and development in diseases specific to developing countries on the other. The existing legal safeguards known as TRIPS flexibilities have not been able to address legal uncertainty and ensure access to medicines for people living in these countries. Developed countries seeking economic benefits from increased trade continue to impose stricter intellectual property rights obligations through bilateral and regional trade and investment treaties and exert political and economic pressure to restrain low- and middle-income countries from making use of TRIPS flexibilities. Private for-profit actors have not refrained either from threats, tactics and strategies that have had detrimental effects. As a result, access to medicines as a core element of the right to health[3] continues to be denied. The rise of increasingly protectionist views on trade policy and overlooking of human rights obligations in the United States and Europe, as well as the growing power of private for-profit actors globally, are likely to affect patients in low- and middle-income countries even more in the future.

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[2] Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") (1994); WTO, Ministerial Declaration of 20 November 2001 on the TRIPS Agreement and Public Health (2001).

[3] Universal Declaration of Human Rights (1948); International Covenant on Economic, Social, and Cultural Rights (1966); Committee on Economic, Social, and Cultural Rights, General Comment No.14 (2000).

The legal architecture needs robust strengthening both at an international and national level to guarantee effective accountability of states and private for-profit actors.

International human rights norms and standards are a strong basis for an integrated approach. States should be held accountable for their human rights obligations alongside their international trade obligations. States are obliged to respect, protect and fulfil the right to health. The right to health principles should govern trade and investment negotiations as well as domestic legislation that implements the TRIPS Agreement, and provide safeguards for protection against measures which could jeopardize access to medicines. Human rights due diligence should also be implemented across policies and business practices of pharmaceutical companies.[4] The limitations are nevertheless in the enforcement. While mechanisms such as universal periodic review provide an important opportunity to ensure state accountability at the global level, so far issues related to international trade or access to medicines have not been given adequate attention or have not been comprehensively discussed through such mechanisms. In the context of private for-profit actors there are often no such guarantees at all.

The international community[5] has increasingly called upon low- and middle-income countries to adopt and use competition law to promote access to affordable medicines. While the use of competition law is not without risks in adequate budget, expertise and an enabling legal and political environment, it has been recognized for its strength as a corrective tool for barriers to innovation and access. It brings down prices and ensures quick introduction of new medicines. As such, it is an important policy tool for balancing proprietary interests with economic and social interests to advance public welfare. Countries have been encouraged to design and implement a competition law regime according to their own needs, explicitly incorporating developmental and equity objectives.[6]

This opens up the debate on the correlation and relationship between human rights and competition law. Does the promotion of competition support human rights and vice versa? What are the opportunities for an integrated human rights approach in

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[4] United Nations, Guiding Principles on Business and Human Rights (2011).

[5] United Nations Secretary-General's High-Level Panel on Access to Medicines, Final Report (2016); UNCTAD, "The role of competition in the pharmaceutical sector and its bene ts for consumers" (2015), United Nations Office of the High Commissioner on Human Rights, "Access to Medicines in the context of the Right to Health" (2015); United Nations Development Programme, "Using competition law to promote access to health technologies" (2014); WHO, WIPO, WTO, "Promoting Access to Medical Technologies and Innovation: intersections between public health, intellectual property and trade" (2012).

[6] Republic of South Africa, Competition Act (1998); Fox, Eleanor. "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia" 41 *Harvard International Law Journal* 579 (2000).

competition laws? What are the limits and contradictions in this interaction? And why has the potentially strong and reciprocal relationship between human rights and competition law not had a greater impact until now?

We urgently need to start exploring these questions in depth, as they enable the discovery of the right way to economic development.

Interface of Competition and Standard Essential Patents: Selecting the appropriate base for Fair, Reasonable and Non-Discriminatory (FRAND) royalties

Parveer Singh Ghuman[1]

The manner in which we communicate and interact with people around us has drastically changed with the advent of mobile phones. Standards are a quintessential part of industries such as telecommunications and are set by Standard Setting Organizations (SSOs) in order to ensure that there is interoperability among products and minimum quality and safety requirements are met. It is generally seen that the most efficient technological solutions to industrial problems are patent protected. Thus, SSOs have to adopt patented technologies in setting up standards which consequently become essential to the standard and are aptly known as a Standard Essential Patents (SEPs). Before adopting such a patent, the SSOs require the SEP holder to agree to a Fair, Reasonable, and Non-Discriminatory (FRAND) licensing commitment in order to avoid anti-competitive behaviour such as refusal to license by the SEP owner. Such a commitment entails that the SEP holder will license the SEP to all potential licensees on FRAND terms in consideration of a reasonable royalty.

Conflicting interpretations of FRAND

The IPR policies of SSOs do not contain a definition of FRAND. The licensees and SEP holders negotiate amongst themselves and often have varied methodologies of calculation of FRAND royalties. On one hand, the Net Selling Price (NSP) of the end product i.e. the mobile phone is selected as the appropriate royalty base and on the other, the royalty is set keeping the 'smallest saleable patent practicing unit' (SSPPU) i.e. the chipset as the base. The argument against the NSP approach generally forwarded by the licensees is that the SEP holder charges different royalty rates for the same technology and discriminates amongst licensees depending upon the prices of manufactured handsets. It is also contended that such a rate is anti-

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competitive as it is unrelated to the patented product and is in derogation of the FRAND commitment. Conversely, the SSPPU approach is often criticized as being inappropriate. The contention is that the actual value of the patent cannot be restricted to the unit and the value provided to the handset by the patented technology adds important functionalities which go beyond the physical aspects of a unit.

Choosing the appropriate base

The varying methodologies of determination of FRAND royalties has transpired into several legal disputes across the globe in the form of anti-competitive claims made by the licensees and infringement claims forwarded by the SEP holders. Discussing the two royalty bases in an infringement suit, the Federal Circuit in the US held in the case of Laser Dynamics, Inc. v. Quanta Computer, Inc. that where the patent in question adds to only one of the constituents of a product which is multi-component in nature, such a plaintiff (alleging infringement) cannot ask for a royalty rate to be set according to the NSP of the product. However, when the value of the product is so dependent on the patented technology that it contributes to several constituents of the product, then the NSP approach could be an appropriate one.[2] Thus, the general rule required reliance on SSPPU and the NSP rule was held to be a narrow exception. However, the opposite view was taken in the case of CSIRO v. Cisco where the court held that, "Basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper, and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product, it provides no indication of its actual value."[3] In addition to the US, the NSP approach was also followed by the Chinese Competition Law Authority (The National Development and Reform Commission) in the Qualcomm case.

India is also currently witnessing several disputes at the interface of SEPs and competition law. The Competition Commission of India (CCI) while forming its prima facie opinion in anti-competitive allegations filed against Ericsson has favoured the SSPPU approach . On the contrary, the Delhi High Court has favoured the NSP as the royalty base while addressing an infringement suit filed by Ericsson against Intex. Thus, it is relevant to understand the implications of both these approaches in order to build a strong and robust judicial response in India. Automatically applying the SSPPU approach in calculating royalties in FRAND encumbered patents can lead to discouragement of innovations as it may underestimate the value of the technology and also devalue the importance of its inventive step. Also, if the value of the chipset is regarded as the base for FRAND royalty, differently placed mobile handset manufactures would have to pay the same amount as royalty irrespective of their

[2] Laserdynamics Inc. v. Quanta Computer, Inc., 694 F.3d 51, 67 (2012)

[3] CSIRO v. Cisco. 2014 WL 3805817, E.D. Tex. (2014) at 11

economical footing. Competition will be adversely effected as a low cost mobile handset manufacturer may not find it profitable to manufacture cell phones due to the costs which he would have to incur in the form of royalties alone. Also, it seems that the easier and widely accepted approach is to rely on NSP as economists argue that due to the enormous number of patents in technical products such as mobile phones, it is nearly impossible to ascertain individual royalties based on SSPPU. Even if it is somehow ascertained, it might amount to a rate which is higher than the one based on the NSP of the product. On the other hand, calculating royalties based on the end product value is also troublesome in case of products which rely on several components apart from the patented one. The peril lies in the fact that relying on the NSP approach, the SEP holder might erroneously be compensated for technology which was actually not infringed by the licensee.

Conclusion

There are pros and cons for both the approaches and blind reliance on either ought to be avoided. Each case should be seen in the light of its unique facts and circumstances and only then a reasoned decision should be reached at. While deciding royalty rates, other important factors such as prior licensing agreements, the possibilities of distinguishing between non-patentable elements from the patentable ones and the possible result of a hypothetical negotiation which would have been carried out prior to infringement, should not be ignored.

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