

## INTELLECTUAL PROPERTY RIGHTS AND THEIR INTERFACE WITH COMPETITION POLICY: IN BALANCE OR IN CONFLICT?

While IP law deliberately subjects intellectual assets to the exclusive control of right owners, competition law seeks to avoid market barriers and benefit consumer by encouraging competition among a multiplicity of suppliers of goods, services and technologies, dealing with such a relationship poses unique analytical challenges to policy makers.

Are Intellectual Property Rights Justified?

How IPRs and Competition Policy Interact and Affect Each Other?

Are IPRs and Competition Policy Objectives Conflicting?

What Types of IP Arrangements May Cause Competition Problems?

How to Strike the Right Balance between IPRs and Competition Policy?

Intellectual property rights provides stimulation and reward of innovation, creativity and diffusion of knowledge on the basis that society gains economically from efficiencies, disclosures and activity encouraged by the limited exclusivity offered by intellectual property. There are several compelling reasons to protect the intellectual property. For instance, innovation and creation have to be financed; like everything else. Large amounts of time and money can not be spent on researching and developing new technologies and products without any guarantee that these will be rewarded, as there is always a risk that the product or new technology will not be successful. Intellectual property rights are a mechanism that allows innovators, creators and producers to finance their work through the market-place. It is also morally valid for persons to be prevented from dealing with, or coping, a work without creator's consent. Further, protection of intellectual property is justified as it is worth noting that intellectual capital has become critical to the industry and its growth in globalization era. The value placed on intangible assets, such as people, knowledge, relationships and intellectual property (patent, copyright, trademark etc.), is now a greater proportion of the total value of most businesses than is the value of tangible assets, such as machinery and equipment. But at the same time, these rights are creating monopolistic power in the market resulting consumer exploitation, and inefficient allocation of resources. The exercise of IPRs which give monopolistic power leading to allocative inefficiencies,

in the absence of competing technologies and products, may appear in con with what is generally perceived in most jurisdictions as the main objective competing policy is: the protection of competitive process to ensure an efficient allocation of resources, lower prices and higher choices for consumer welfare. Moreover, the harm caused by market power may extend beyond this, when protection granted to firms allow them to slow or distort innovation (Refusals to license, patent pooling and grant back obligations are the most common arrangements to distort innovation and harm competition). Under these circumstances, market powers limit the growth of productivity over time, reduce the scope for sustainable increases in living standards. For its part, competition regulation aims at curbing attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition laws and IPRs, particularly if competition laws emphasize static market access and IPRs emphasize incentive for dynamic competition. Broadly speaking, the main function of IP law is to properly allocate and defend property rights on assets that might have economic value. The main function of competition policy is to regulate the use of property rights when these rights are sources of market power. Structured properly, however, the two regulatory systems complement each other in striking an appropriate balance between the needs for innovation, technol

transfer and information dissemination. In fact many experts argued that from a policy point of view there is no inherent conflict between competition policy and protecting IPRs. There are areas where IPRs and competition law complement each other. First, at the highest level of analysis IPRs and competition policies share a concern to promote technical progress to the ultimate benefit of consumers and society. Firms are more likely to innovate if they are at least somewhat protected against free-riding and face strong competition. In fact, both IP policy and competition policy aim to encourage innovation, but both will discourage it if pursued too strongly or too weakly. Thus, these two areas are interdependent and affect each other in three important ways. First, they pursue the same aims—consumer welfare, together with the increase of useful investment. Second, enforcement of competition laws against the intellectual property owners can damage the incentives to innovate that the intellectual property systems are designed to foster. Third, despite the conflict, both competition law and IPR laws take into account allocative efficiency and dynamic efficiency consideration, albeit with different emphasis. Competition laws are primarily focused on allocative efficiency, i.e., ensuring that consumers obtain the goods they desire the most at the lowest possible prices that producers produce the goods that consumers desire in the most cost effective manner.

Both bodies of law balance allocative efficiency against dynamic efficiency, which forms a useful starting point for the resolution of the conflict between them. While competition authorities need to ensure the co-existence of competition policy and intellectual property laws, they need not overlook the fact that the objectives of the two policies, though complementary, can also be conflicting, in which case there could be harm to society in terms of reduced welfare. Although putting exemption clauses in competition laws to cater for IPRs is a noble idea, the exemption should ensure that it leaves room for competition authorities to carefully implement a rule of reason approach, on a case by case basis, to ensure that the innovation objective, which is the basis for IPRs, does not result in practices that are in violation to the competition laws. Case of Microsoft Corporation vs. United States and Volvo are excellent examples by the competition authorities of USA, the European Union (EU) to place limits on the anticompetitive commercial conduct of individual owner of IPRs where they protect a market standard or *de facto* monopoly.

Thus, in the case of unreasonable restrictive practices or abuse by the IPR holder, relief is available to the affected parties under the Competition Act. In fact, it is widely accepted that competition policy is a potent tool to neutralize the negative effects of anticompetitive activities. Therefore, in an environment where it is too easy to acquire a patent, competition authorities and courts have tendency to regain a balance by using competition law to limit the undesirable effects of over patenting. But, that leads to the question whether competition agencies should be involved in the intellectual property granting process itself. For several reasons, including a lack of relevant technical and legal expertise, as well as limited

resources, it would be imprudent for competitive authorities to assume responsibilities related to review intellectual property applications. Furthermore, requiring approval from the competition agency would impose significant delays on the patent process. That in turn may dilute the incentive to innovate and retard the benefit that would flow from the patent, such as disseminating technological information and facilitating pro-competitive licensing agreements. Nevertheless, competition agencies can undertake a variety of measures to promote greater awareness of competition issues so that intellectual property agencies can begin to take necessary steps to improve the intellectual property process themselves. Among the ideas that have been successfully implemented in some jurisdictions are opening interdisciplinary dialogue with intellectual property agencies to foster greater mutual understanding of each other's fields, commissioning expert reports that study a nation's IPRs system to determine whether and how it is causing any undue competition problems, and holding seminar or hearings in which academics, public and private sector practitioners, and industry participants come together to discuss the overlap between IPRs laws and competition policies. Whatever intellectual property related initiatives competition agencies may take, they should strive to limit the anticompetitive aspects of IPRs while respecting its necessary. Further, competition agencies should consider publishing a set of guidelines describing how they will analyze licensing agreements and other IP related conduct. It is advisable for competition authorities to incorporate in their guidelines a practice of distinguishing vertical relationship among licensing parties from horizontal ones. In other words, it is useful to identify whether agreements are between the competitors or between the non-competitors because that will inform the policy decision that needs to be made. Agreements between competitors are more likely to cause competitive problems and should therefore be subjected to greater scrutiny. Added to these, most developed countries have established rather sound national regimes governing the interface between the IPRs and competition policy. In most developing countries, however, such an interface has not gained enough attention and prescriptive frameworks governing it are still in infancy. Competition authorities of jurisdictions having already developed experience in this area will play, therefore, an extremely important role in providing the assistance to those countries with less or no experience in dealing with competition cases in the intellectual property areas. These countries should also fully use the flexibilities allowed by the TRIPs Agreement to determine the grounds for granting compulsory licenses to remedy anti-competitive practices relating to IPRs. Finally, possible friction between IPRs and competition laws can be reduced if competition agencies are constrained, either by statutes or administrative policy from seeking to fine tune IPR protection.

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