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



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# Key Questions

- **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?**

# Reasons to Protect IP

- Innovation and creation have to be financed; like everything else. 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 copying, a work without creator's consent.
- Further, protection of intellectual property is justified as the value placed on intangibles 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.

## Are IPRs and Competition Policy Objectives Conflicting?

IPRs creates **monopolistic power** in the market. IPRs, by granting **legal exclusivity** (in the sense of granting the right to exclude others, rather than a positive right to use the protected matter), confer to their holders the ability to **exercise market powers**, when similar technologies and products representing viable constraints are not present. Such exercise of market power can lead to **allocative inefficiencies** and **consumer exploitation**

*IPRs create monopolies, while a competition law battles monopolies*

*“The conflict between the antitrust and IPR laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws prescribe unreasonably restraints of competition, the IPR laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his protected art”.*

(SCM Corp. v. Xerox Corp. , 645 F. 2d 1159.1203 (2d Cir. 1981)

# Interface of IPRs with Competition Policy

## Interact:

Rather than conflicting, 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.

*“...the aim and objectives of patent and antitrust law may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition”.*

(Atari Games Corp. v. Nintendo of America, 897 F.2d 1572, 1576 (Fed. Cir.1990))

## Affects:

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.

## What Types of IP Arrangements May Cause Competition Problems?

*IP license arrangements usually enhance competition because they make it easier to transfer technology efficiently. Although, a variety of IP arrangements may reduce or eliminate it. Three type of IP arrangements are especially significant in this context:*

- 1. Refusal to License or Refusal to deal or Refusal to provide proprietary software interface code.**
- 2. Patent Pool and**
- 3. Grant Back Obligations**

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

*While IP law deliberately ..... unique analytical challenges to policy makers.*

In the recent decade, competition authorities and courts have prohibited conduct by intellectual property owners which was otherwise lawful under the intellectual property rights legislations.

### Court Cases (Refusal to Deal):

- **Case 1:** The general right of a firm freely to determine with whom it will and will not deal was first established by the Supreme Court (US) nearly nine decades ago. In its 1919 Colgate decision, the Supreme Court observed that

*“[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”*

**Case 2:** In 1992, the Supreme Court addressed another refusal to continue dealing with a rival in *Eastman Kodak Co. v. Image Technical Services, Inc.* [T]he court held that

*“a monopolist's 'desire to exclude others' from using its patented work is a presumptively valid business justification for any refusal to license. The court found that the [independent service operators] had rebutted the presumption, concluding that the jury would have found Kodak's presumptively valid business justification rebutted on the grounds of pretext.”*

**Case 3:** The Paris Convention of 1883 provides that each contracting State may take legislative measures for the grant of compulsory licenses. Article 5A.(2) of the Paris Convention reads:

*“Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”*

**Case 4:** However, there have been some decisions over the years-sometimes termed “essential facility cases”-imposing duty to deal or decreeing compulsory licenses.

Consider the case of ***Microsoft Corporation vs. United States***. The European Commission decided in March 2004 that this was an abuse of a dominant position under Article 82.

***Problem:*** Microsoft refused to supply interoperability information to Sun Microsystems, so as to allow Sun to offer its own work group server operating system product, in competition with Microsoft’s own work group server product.

### **Commission’s Position**

***Microsoft was ordered to disclose information so as to allow its competitors to compete on an equal footing with Microsoft even if this required Microsoft to license its IP to its competitors (including 3 patents).***

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

**Command and Control Approach:** The competition authorities in many countries including USA, EU and Japan have created a detailed framework of regulations for certain terms of bilateral IPR licensing agreements, whether by means of official guidelines and regulations.

### EC- Article (81 and 82)

### International Arrangements (TRIPS Agreement)

Article 7 of the TRIPs Agreement stipulates that:

*“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to balance of rights and obligations”.*

Further Article 8.2 of TRIPs Agreement stipulates that:

*“Appropriate measures, provided that they are consistent with the provisions of the agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer to technology”.*

# Policy Consideration

- Whether competition agencies should be involved in the intellectual property granting process? (Perhaps-No)
- 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.
- 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.
- It is also important to identify whether agreements are between the competitors or between the non-competitors. Agreements between competitors are more likely to cause competitive problems and should therefore be subjected to greater scrutiny.

# Policy Consideration

- 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.
- 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.

**Comments and Suggestions:**

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