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Regulation Of Intellectual Property Rights By Competition Law

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Abstract
The effect on trade is properly an issue of competition law once an intellectual property right is utilized through a license or equivalent consensual agreement or arrangement. This holds true within the European Union regardless of whether the challenge is to an agreement, concerted practice (art. 101), or obtaining and using market power (art.102). The issue as a whole is also recognized globally and nationally.
In light of the foregoing, it is instructive to analyse the role of competition law in regulating IP rights.

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I. Introduction

Intellectual Property Rights (IPR) holders are granted the exclusive right to economically deal with the Intellectual Property (IP) subject matter (the goods) to the exclusion of all others. Negative IPRs enable the holder to prohibit others from using, selling, distributing, assigning, licensing, reproducing, exporting, or importing the goods without the holder's prior authorization[1]. Free trade and the free flow of goods and services can be harmed if the owner of an IPR is able to prevent others from dealing with its subject matter, giving the owner of the IPR an unfair advantage in the market[2]. Due to the tendency of IPR to stifle the free flow of goods and services and disadvantage competitors, competition law was introduced to regulate the exercise of IPR[3]. This paper analyses how intellectual property rights have been regulated by competition law. The purpose of this paper is to discuss the various ways in which intellectual property rights can be exploited, as well as how competition law regulates intellectual property rights and the impact of competition law on intellectual property rights.

II. Impact Of Competition Law On The Exploitation Of Intellectual Property Rights

IPRs gain from the free circulation of goods and services because of competition law. Additionally, it discourages unethical trade practices such as exclusive agreements between traders to the detriment of others. Additional to this, it prevents IPR holders from abusing their position of power by manipulating the pricing or availability of a product, or even by regulating the supply and availability of that commodity.

III. Regulation Of Intellectual Property Rights By Competition Law

Overview of Competition Law as it relates to IPR Regulation

Typically, competition law contains provisions addressing three types of activities that can have an anti-competitive effect[4]:

(1) Corresponding Business Practices or Agreements Between Two or More Undertakings

Vertical and horizontal agreements with the intent of blocking, restricting, or distorting competition are specifically prohibited by Article 101 of the Treaty on the Functioning of Europe (TFEU) and Section 2 of the Competition Act, 1998, respectively[5].

[1] 1 Sections 2(1), 226,227, UK Copyright, Design and Patents Act (CDPA), 1988. Section 9, The UK Trademark Act, 1994. See further Article 5, Council Directive of 1988.
[2] Tanya Aplin and Jennifer Davis, Intellectual Property Law, (third edn, OUP 2017) 44
[3] David I. Bainbridge, Intellectual Property, (ninth edn, Pearson Education Limited 2012) 948.
[4] Parveen Tamadon-Nejad, 'Intellectual Property Rights and Competition', University of Salford International Intellectual Property Rights Lecture Slides (Unit 3).
[5] Parveen Tamadon-Nejad, 'Intellectual Property Rights and Competition', University of Salford International Intellectual Property Rights Lecture Slides (Unit 3).

The evaluation of this under Article 101 consists of two steps:
(i) Determining whether the agreement is anti-competitive in terms of its object or effects, whether actual or probable;
(ii) Where the agreement is found to be anti-competitive under Article 101, it is necessary to ascertain the pro-competitive benefits while also determining whether the pro-competitive effects outweigh the anti-competitive effects[6]. The initial prohibition is subject to exceptions under Article 101(3) TFEU and Section 9 of the Competition Act, 1998.

Four conditions necessitating the use of exceptions include the following[7]:
(a) it must improve goods production or distribution or promote technical or economic progress;
(b) it must benefit consumers equally.
(c) restrictions must be necessary to achieve these goals; and
(d) it cannot give the parties the option of eliminating competition in a significant portion of the products in question.

(2) Unilateral Conduct

This is an act taken unilaterally by a single undertaking that is either presumed or proven to be anti-competitive under Article 102 of the TFEU and Section 18 of the Competition Act, 1998. These provisions prohibit oligopolistic firms with significant market power from abusing their position to stifle competition[8]. Nonetheless, it is critical to strike a balance between preventing anticompetitive behaviour and promoting sufficient incentives for innovation and investment.

(3) Acquisitions and Mergers

If permitted, an assessment of possible anti-competitive effects on the market because of mergers or acquisitions is conducted[9]. The following subsections discuss competition law regulation of IPRs up to and including the European Union's Treaty on the Functioning of the European Union.

Competition Law Regulation of Intellectual Property Rights By virtue of the European Union's Treaty on the Functioning of the European Union

One of the objectives of competition law is to prevent IPRs from being exercised in ways that are anti-competitive or obstruct the free movement of goods. Competition law promotes healthy trade competition between merchants and enables consumers to purchase high-quality goods at the best possible price[10]. Competition law regulates the exercise of IPRs to prevent abuse of dominant position through refusing or restricting the availability of goods, setting their prices, or forming groups or merging solely for the purpose of controlling the availability of goods[11]. Competition law regulates IPRs in the following specific areas:

Elimination of Restrictions on the Free Movement of Goods

Competition law ensures that the exercise of intellectual property rights is not unlimited and thus becomes exhaustible once the proprietor has voluntarily sold the goods in the EU market. As a result, such a proprietor may not restrict the free movement or redistribution of goods within the EU market in the future[12].

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[6] Parveen Tamadon-Nejad, 'Intellectual Property Rights and Competition', University of Salford International Intellectual Property Rights Lecture Slides (Unit 3).
[7] Paragraph 34, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08). Article 101,
TFEU was formally Article 81, Treaty Establishing European Community.
[8] Parveen Tamadon-Nejad, 'Intellectual Property Rights and Competition', University of Salford International Intellectual Property Rights Lecture Slides (Unit 3).
[9] Parveen Tamadon-Nejad, 'Intellectual Property Rights and Competition', University of Salford International Intellectual Property Rights Lecture Slides (Unit 3).
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[11] Raju, K. D, 'Interface between Competition Law and Intellectual Property Rights: A Comparative Study
of the US, EU and India' (2014) 2(3) IPR <https://www.omicsonline.org/open-access/interface-between competition-law-and-intellectual-property-rights-a-comparative-study-of-the-us-eu-and-india ipr.1000115.php?aid=26445> accessed 5 November 2021
[12] Article 7 of Directive 2008/95/EC of 22 October 2008.

Pursuant to Articles 34 and 35 of the TFEU, holders of IPRs are prohibited from entering into "agreements or transactions capable of impeding the free movement of goods quantitatively or measures capable of having the same effect on the importation and exportation of goods." Whatever the restriction, it is deemed to be detrimental to the free movement of goods and services.

In **Klagaren v. Mickelsson & Roos**[13], an agreement allowing for partial use of a product equates to quantitative restriction or measures of equivalent effect. Although article 36 of the TFEU states that free movement of goods may be permitted in the public interest, public morality, or public good[14]. This means that the holder of the IPRs may enter into a restrictive agreement obstructing the free flow of goods for the public good and promoting public morality[15]. According to the preceding analysis, competition law regulates IPRs under Articles 34 and 35 by ensuring that the IPR holder does not exercise his right to sell, distribute, assign, license, import, or export in a manner that restricts the free movement of goods within the EU market.

Non-Restrictive or Discriminatory Agreements

To the exclusion of others, the holder of IPRs has the right to exploit his goods through selling, assigning, distributing, licensing, importing, and exporting. In regulating these intellectual property rights, competition law provides in Article 101 of the TFEU that any agreement or act entered into by the IPR holder that is capable of preventing, restricting, or distorting competition, or that could result in price fixing, production limiting, or control, is prohibited. Additionally, marketing or investment agreements entered into by the holder of the IPRs that divide the market or sources of supply, or that create equivalent conditions that are unfavourable to others, are prohibited[16]. As a result, Article 101 prohibits holders of IPRs from exercising them in a way that restricts or discriminates against others in the common market. In **T-Mobile NV v. Raad Van Besuur**[17], the European Court of Justice (ECJ) held that a group of competitors had entered into an agreement to share trade secrets in order to gain a competitive edge over other competitors. The agreement was restrictive, discriminatory, and intended to disadvantage others. Competition law ensures that the holder of IPRs does not restrict the availability of the product by requiring third-party approval for any agreement to sell, assign, assign, or distribute. In **Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmarkete**[18], it was determined that an agreement requiring third-party approval for the sale of a German record was restrictive and violated Article 101(1). (e). Additionally, competition law prohibits the proprietor of IPRs from adopting and applying different terms and conditions to different persons or classes of persons when selling, assigning, licensing, distributing, importing, or exporting the IPR subject matter. This competition law principle implies that "A" and "B" must be treated differently when it comes to the same goods. The proprietor of IPRs is required to maintain a level playing field by ensuring that all parties are treated equally. In **Windsurfing International Inc. v. EC Commission**[19], the ECJ held that it is discriminatory and a violation of Article 101, TFEU, when a patent agreement deals with or subjects individuals to different terms and conditions regarding the purchase and sale of IPR products in the EU market. Additionally, competition law prohibits a situation in which the holder of IPR, in exercising the IP-related rights, prevents others from making full use of the IPR goods, either by requiring them to deal exclusively with a named dealer or individual or by prohibiting them from lawfully competing with a third party[20]. In **Football Association Premier League v QC Leisure**[21], the ECJ held that a collective society's agreement with a licensee to broadcast Premier League matches to a specific location is restrictive and violates article 101 (1) of the TFEU. It is worth noting that competition law will not always intervene to prevent an IPR holder from exercising statutory rights, even when they appear to be restrictive and discriminatory. Restrictive agreements that are necessary for the public good and to protect public morality and the life of IPRs are permitted under competition law, as established

[13] Klagaren v. Mickelsson & Roos [2009] ECR I-4273
[14] Merck & Co. v Stephar BV [1981] ECR 2063.
[15] Rotich Caroline Jerobon, 'The Interface Between Competition Law and Intellectual Property in Kenya'
(University of Nairobi, 2016)
<http://erepository.uonbi.ac.ke/bitstream/handle/11295/99140/Jerobon%20_The%20Interface%20Between%20Competition%20Law%20And%20Intellectual%20Property%20Law%20In%20Kenya.pdf?sequence=
1&isAllowed=y> accessed 5 November 2021.
[16] Article 101 (1) (a-e), TFEU 2007
[17] T-Mobile NV v. Raad Van Besuur [2009] ECR I-4529.
[18] Deutsche Grammophon Gesellschaft v. Metro-SB-Grossmarkete [1971] ECR 487.
[19] Windsurfing International Inc. v. EC Commission [1986] ECR 611
[20] Velcro SA v Aplix SA [1989] 4 CMLR 157
[21] Football Association Premier League v QC Leisure, Unreported case decided 4th October 2011

by article 36 TFEU[22]. In **Warner Brothers v. Christiansen**[23], it was held that article 36 of the TFEU could be invoked to protect the copyright in a film by preventing others from infringing the film's existing IPR. In another case, **Ministere Public v Jean-Louis Tournier**[24], it was determined that a group of collective societies for copyright holders that entered into agreements preserving their members' IPR did not violate Article 101 (1), as long as the agreement did not restrict competition or result in price fixing.

Thus, competition law regulates the exercise of IPRs, not their existence, under article 101 of the TFEU. This ensures that IPRs are not used to impose market restrictions or discrimination.

Abuse of Dominant Position is Prohibited

Competition law regulates the exercise of IPRs by ensuring that the proprietor does not monopolize the market at the expense of other competitors. The proprietor of intellectual property rights is dominant because he or she has the exclusive right to prohibit others from selling, assigning, licensing, distributing, importing, or exporting the goods. He has the option of making the industrial property available to third parties. Competition law seeks to regulate these exclusive rights and the exercise of a dominant position; as a result, Article 102 of the TFEU prohibits the exercise of IPRs in a manner that results in an abuse of dominant position. Article 102 defines abuse of dominant position as any arrangement that disadvantages other parties competitively through price discrimination, imposing different trading conditions on the same category of customers, limiting production, requiring third-party approval for an agreement, or any other activity that disadvantages other parties competitively[25]. The ECJ has ruled against any IPR proprietor abusing their dominant position in several cases, in accordance with Article 102, TFEU. In **Hoffmann-La Roche AG v Commission to the European Communities**[26], the court defined a dominant position as "any act or arrangement that has an adverse effect on the market structure and is detrimental to fair competition." The ECJ held in **Volvo AB v. Erik Veng (U.K.) Limited**[27], that the refusal of some dealers to license auto spare parts while supplying the same goods to others constituted an abuse of dominant position. A patentee cannot preclude or prevent others from innovating or improving on the patentee's invention, nor can the patentee require a licensee to disclose all innovative technical information they discover to the patentee. In **Independent Television Publications Limited v. European Communities Commission**[28], television stations in Ireland and the United Kingdom developed broadcasting program guides. When the group of television stations applied for a license to obtain the program guides, the group of stations refused to license the program's copyright to Magill, an Irish publisher. Magill was inspired by this development to conduct research on the program guides, update them, and create a more comprehensive and updated version. Magill was sued by television stations and won an injunction prohibiting him from releasing a detailed television program guide. After several appeals, the case reached the ECJ, which found that the TV stations abused their dominant position by refusing to license the copyrights in TV program guides to Magill while licensing them to other publishers, and that any IPR proprietor prohibiting any invention or improvement on any IPR subject matter would be an additional abuse of dominant position. It is critical to remember that competition law does not preclude a business owner from setting the terms on which he markets his product, and that a refusal to license a right cannot be considered an infringement of dominant position unless there is no alternative or replacement for the product, or the refusal is motivated by the owner's desire to prevent the emergence of new products, or the owner has no legitimate reason to refuse to license his product[29]. A proprietor of intellectual property may not create a competitive disadvantage by making his products available to a merchant but not to the merchant's competitors. Sun Microsystems sued in **Microsoft v. Commission**[30], claiming that Microsoft failed to provide it with the information necessary to connect to the Microsoft operating system, while others received the same information. Microsoft's dominant position was determined to have been abused. By ensuring interoperability, facilitating the creation and integration of markets, reducing market uncertainty, and lowering costs and prices for downstream products, standards are critical not only for innovation and growth, but also for any operator wishing to enter a market, Alexane Vialle stated succinctly in her article on the importance

[22] AG v. Heinz Sullhofer [1988] ECR 5249, 5285
[23] Warner Brothers v. Christiansen [1988] ECR 2605
[24] Ministere Public v Jean-Louis Tournier [1989] ECR 251
[25] Article 102 (a-e) TFEU.
[26] Hoffmann-La Roche AG v Commission to the European Communities [1979] ECR 461.
[27] Volvo AB v. Erik Veng (U.K.) Limited [1979] ECR 461.
[28] Independent Television Publications Limited v. European Communities Commission [1995] E M L R 337
[29] 9 Independent Television Publications Limited v. Commission of the European Communities [1995] E M L R 337.
[30] Microsoft v. Commission (2007)

of competition law's regulation of intellectual property rights[31]. This demonstrates that competition law ensures the free movement of goods, consumer satisfaction, and IPR innovation.

Competition Law Regulation of Intellectual Property Rights Outside the European Union's Treaty on the Functioning of the European Union (TFEU)

Apart from the TFEU, competition law regulates the exercise of IPRs through other statutes in order to prevent restrictive trade practices and abuse of dominant position while recognizing the IP proprietor's ownership right[32]. An owner's right to have his or her moral and economic interests safeguarded in connection with any scientific, literary, or artistic output owned by the proprietor is recognized in Article 15(1)(c) of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR). All agreements that may have an impact on intra-Community trade and have the intention or effect of avoiding, restricting, or distorting competition inside the common market are prohibited under Article 81(1) of the 1957 Treaty of Rome. Article 81(3), on the other hand, applies to agreements that aid in the growth or distribution of goods or advance technical or economic progress. Recognizing the importance of competition law, the World Intellectual Property Organization (WIPO) notes that it seeks to protect IPRs by allowing owners and right holders to enter into sale, assignment, licensing, or distribution agreements, provided that such agreements do not obstruct trade or technological advancement[33]. In **Alcatel Espace/ANT v Nachrichtenchnik**[34], the ECJ held that a patent agreement entered into by the plaintiff to cooperate in the promotion of a patent was not anti-competitive but intended to advance development, as parties were not prevented from undertaking similar activities outside the agreement.

IV. Conclusion

Competition law regulation of IPR is beneficial because it ensures free movement of goods, the abolition of restrictive agreements and practices, the abolition of abuse of dominant position, and consumer protection, while also recognizing the IPR proprietor's right to economically exploit the product to the exclusion of all others. Competition law protects IPR owners from using their rights to negotiate restrictive agreements, obstruct the free flow of commodities, or abuse their dominant position in anti-competitive ways. EU competition law, particularly the Treaty on the Functioning of the European Union (TFEU), forbids quantitative restrictive clauses in IPR-related contracts and measures with equivalent impact under Articles 34 and 35. On the other hand, Articles 101 and 102 ban restrictive agreements (including mergers and acquisitions) between undertakings or unilateral measures capable of limiting competition between undertakings, as well as the use of dominant positions to limit competition. Nonetheless, competition law controls intellectual property rights only in terms of their use at the national and international level, not their existence. Article 36 of the TFEU provides those prohibitive agreements and undertakings may be utilized to safeguard the proprietor's rights, public morality, public policy, and public safety. Competition law controls intellectual property rights to protect owners, consumers, and rivals and to promote innovation, product improvement, consumer satisfaction, and best practices, among other things.

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