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The Interaction Between Intellectual Property and Competition Law in Singapore

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Background

- Singapore started its IP regime in the 1980s due to:
  - pressure from major trading partners to provide stronger protection for IP originating from those countries
  - because it was determined to move up the value chain as a matter of economic strategy.
- Singapore introduced a general competition law regime following the recommendations of the Economic Review Committee in 2003 and in keeping with its obligations under the US-Singapore Free Trade Agreement
  - substantive provisions of the *Competition Act* came into force in stages from 2006
  - administered by the Competition Commission of Singapore (CCS)

Background

- The Competition Act is largely based on UK/EU legislation, and seeks to promote the efficient functioning of the markets in Singapore and to enhance the competitiveness of the economy through prohibiting anti-competitive activities that unduly prevent, restrict or distort competition.
- Within a relatively short amount of time, Singapore has installed the institutional framework and expertise mirroring the best practices from the world's leading competition authorities.
- One example of this is the CCS IP Guidelines, which incorporates a blend of EU and US jurisprudence, firmly grounded in contemporary economic analysis applicable to Singapore economic circumstances

Licensing

- Section 34 of the Competition Act prohibits agreements or concerted practices between undertakings and to decisions by associations of undertakings with the object or effect of appreciably 'preventing, restricting or distorting' competition within Singapore.
- Entities engaging in commercial or economic activities which knowingly cooperate or concur in any form to substitute competitive risks with the benefits of collusion are thus prohibited.
- Anti-competitive agreements attract financial penalties and can be declared void.
- At the Interface, the main focus of section 34 is on anti-competitive clauses in licensing agreements – but note that vertical agreements are exempted (not those that have a horizontal impact ie has the same effect as a horizontal agreement).

CCS Approach

- The CCS IP Guidelines provide guidance on how the CCS approaches IP rights. The Guidelines set out a three - step process to assessing licensing agreements
- First, agreements between competitors are more likely to be anti - competitive. The CCS is mainly concerned with restraints between competitors that fix prices, divide markets, limit outputs or reduce incentives to carry out independent R&D. The CCS IP Guidelines focuses on anti-competitive effects toward technological innovation, and expressly exclude trademarks. Agreements between non-competitors are regarded to have an adverse impact on competition where one or more of the undertakings enjoy 'high market power' and the agreement 'forecloses access to, or increases competitors' cost to obtaining inputs' so preventing the licensing of competing technologies.
- Second, agreements imposing actual or potential restraints on competition .
- Third, agreements without offsetting net economic benefits are more likely to be anti-competitive. The Guidelines also state how the CCS will approach the common varieties of licensing clauses, including restrictions on independent R&D, grantbacks, territorial and field-of-use restrictions, geographical exclusivity and technology pools

CCS Approach

- Agreements that improve production and distribution, facilitate technology transfers and encourage innovation in related markets may be allowed, despite being prima facie anti-competitive
- An important issue is whether the agreements are between firms within a single economic entity (and so the agreement is excluded from the Competition Act) or not
- Vertical agreements where the IP licensing restraints are merely ancillary to the agreement, such as franchise agreements, are also exempted from review.
- Licenses or assignments of IP, while not exempted, are recognised as being pro-competitive. However, the CCS will examine bundling or tying agreements. In any case, vertical agreements may still be subject to the prohibition against the abuse of dominance where one or more licensing parties are dominant or the agreement shields an agreement between competitors

CCS Approach

Abuse of Dominance:

- Firms with substantial market power must avoid conduct distorting market competition, either through unilateral or collective exercise of their market power.
- Market power is assessed:
  - in the market for the technology,
  - the market for products and services embodying the technology, as well as
  - markets for research and development
- Market power arising from the IPR itself is not objectionable.
- The CCS IP Guidelines allow for 'persistently high' market shares resulting from the owner's use of IPR to deter entry in the short term, as long as competitors may 'in the long term be able to enter the market with its own innovation'

CCS Approach

- Being dominant or maintaining dominance through successful innovation or economies of scale or scope are acceptable.
- It is only where the IP owner attempts to leverage its IP to extend its market power to the detriment of market competition resulting in a loss of total welfare that the CCS will intervene. This includes predatory behaviour, (perhaps) refusals to license essential IPRs, and tying arrangements

CCS Approach

- There is no express prohibition against excessive pricing of IPRs (exploitative conduct) in Singapore.
- As Richard Whish notes:

> This is a sensible position for the CCS to have taken, since it is certainly not the function of a competition authority to establish itself as a price regulator: in competitive markets, it is the market itself that should determine what the price should be.... It may be that the courts in Singapore would interpret the deliberate deviation from the wording of Article [102 TFEU] and the Chapter II prohibition in the UK as indicating that exploitatively high prices—simply overcharging customers—are excluded from the Act; however, where an excessive price is simply a different way of achieving the effect of a refusal to supply, it may be more difficult for the CCS to ignore a claim that the price in question is abusive.

Parallel Imports

- Consistent with Singapore's liberal trade policy, its IP laws generally encourage parallel imports of genuine goods without the consent of the IP owner.
- These policies prevent owners from segmenting domestic and overseas markets and promote price competition both through the provision of direct substitutes as well as through the threat of entry by competitors, since '[t]he threat of import competition can constrain a dominant firm, even if there are currently no imports. In fact the dominant firm may be pricing at a level to deter imports
- So once a trade-mark owner has placed its goods on the market anywhere in the world, or allows their goods to be so sold, his or her rights are exhausted and can be imported for resale in Singapore in competition with more expensive versions of the same products
- Copyright and patent laws have similar provisions. In the case of copyright law, copyright owners are also prohibited from using copyright in accessories to prevent imports of products which would otherwise be permitted.
- Competitors of pharmaceutical patent owners can manufacture generic versions of the patent drug for regulatory approval to shorten the lag between the patent's expiry and the available of generic substitutes

Patent Act

- The Patent Act allows the High Court to grant compulsory licenses where it is necessary to remedy an anti-competitive practice.
- This happens where there is a market for the invention in Singapore, but it is either not being supplied or not being supplied on reasonable terms and the patentee has no valid reason for failing to supply the market.
- It is not clear whether anti-competitive acts that result in failure to supply overseas markets would invoke compulsory licensing powers, the view on this seems that it will be unlikely.
- Another area of ambiguity is whether compulsory licensing under the Patent Act will be invoked upon a finding of anti-competitive abuse under competition law