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Topic 5: The patent system and its relationship with other public policies. Policies to promote competition

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The Patent System and its relationship with other Public Policies: policies to promote competition

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The rationale behind IP

- In the absence of IP rights, while the original innovator is likely to have invested heavily in R&D, competitors benefit from the results of and get a free ride on the creativity of the innovator at a significant lower cost.
- Whenever a successful new product or process that attracts customers enters the market competitors will sooner or later attempt to make similar or identical products or processes.

The need for protection

- **Patents: tools for promoting innovation**
  - ✓ Need of **r**ecouping the costs and the earnings from the R&D activities and investment.
  - ✓ Limitations of trade/industrial secrets and the limited or specific scope of public funding, subventions and incentives.
  - ✓ No reliable instruments seem to warrant innovators to amortize costs and investments and obtain a differential rent other than exclusive rights with respect to the results of the R&D.

A balanced approach

- Concern on a **market failure** (free riding) **shall not contribute to create another failure** (restrictions on follow-on innovation or freedom of research.
- Balance between **over-protection and under-protection** of IPRs holders.
- **Over-protection** may discourage follow-on innovation and thus harm competition and, in turn, consumer welfare.
- **Under-protection** may discourage R&D and risk investment in innovation.
- **Not only economics drives IPRs**: Social needs, human rights (right to health, moral rights of authors) and promotion of culture shall also be taken into account.

Pro-competitive antibodies within the patent system

- Exclusive rights are limited in time
- Patent applications and granted patents be published
- Exhaustion of rights
- Exemption to exclusive rights: experimental use and “Bolar”
- Compulsory Licenses (refusal to deal and anti-competitive conducts)
- Prohibition of clauses having negative effects on competition (non-challenge of patents; grant-back and cross licenses for dependent patents)

Internal Balancing in the Patent field

- **Pro-competitive antibodies of the patent systems:** exhaustion and free movement of goods; compulsory licenses, experimental use and bolar exceptions, claim analysis and narrower application of the doctrine of equivalents.
- **Fair use doctrine** for copyright and **patent and copyright misuse doctrines** in the US are internally the basis to prevent exclusionary uses of IPRs that are considered outside the scope of protection.
- **Reverse engineer the interfaces of computer programs** in Europe (Harmonized by Directive 2009/24).
- **Pro-competitive antibodies** within patent law (ex-ante) may be easier to apply as external control of IPRs by competition laws (ex-post).

Factors affecting competition

- **Over-protection of IPRs** or too broad or **bad quality patents** (information patents, broad and uncertain claims, broad or narrow application of the doctrine of equivalents to decide what happens with the applications or modifications or variants not expressly mentioned in the claims?).
- **IPRS application in a uniform "one size fits all" manner** (e.g., excessive copyright exclusive rights duration or uniform terms for patent regardless the business sector)
- **Abusive use of IPRs:** refusal to deals with respect to IP indispensable for the creation of new products, tying clauses

Patents vs. free competition?

- **Possible tension between exclusive rights and competition is acknowledged in TRIPs.**
- Flexibility exist for countries to set forth the internal balance within IP laws as well as the interaction between IP and competition law.
- **Preamble**: IPRs shall themselves not become barriers for legitimate trade.
- **Article 7 (object)**: protection of IP should contribute to innovation and transfer and technology to the mutual benefit of producers and users (balance of rights)
- **Article 8.2:** power of States to take measures to prevent IPRs abuses by right holders (or the practices which unreasonably restrain trade or adversely affects international transfer of technology.
- **Article 31 (k) (compulsory licenses):** no need to prior negotiations with IPRs holders and that the license be granted to mainly supply the domestic market to remedy an anticompetitive practice.
- **Article 40 (2):** Members acknowledged that some licensing practices pertaining to IPRs which restrain competition may have adverse effects on trade and transfer of technology
- **Article 40 (2):** nothing prevents States from specifying in their legislation which practices may constitute an abuse of IPRs having an adverse effect on competiton in the relevant market.

IPRs and Competition Laws: tension or complementary tools?

- Case law and commentary in developed countries tend to consider that **IPRs and Competition rules to be complementary rather** than conflicting regimes.
- From an **economic perspective** both regimes are aimed at **stimulating innovation** (dynamic efficiency) and **competition in price** (static efficiency).

Approaches & Tools

- **IP and Competition Laws normally use different tools to achieve their goals**:

- IPRs: **ex-ante (in advances) certainty** as to what subject-matter be protected and the scope of rights (interplay between exclusive rights and exceptions and limitations).
- Competition Law: **case-by-case analysis** of market conduct very often **ex-post** (based on analysis of economics and abusive conducts).
  - It offers less ex-ante certainty than IPRs
- Intermediate approach: Block Technology Transfer Exemption in Europe (Reg. 772/2004 on technology transfer agreements) to balance protection of IP and the protection of competition (safe harbor for certain agreements that do not exceed certain market share thresholds and do not include certain hardcore restrictions listed in the Regulation).

The goals of competition policies

- Protection or defense of competition **shall not hinder the title to and the exercise of exclusive patent rights** and admits “monopolistic imperfections” as legal exceptions to a free competition regime.
- A good understanding of such “**paradox”** would be to restrict temporary competition (to deter free riding) to incentive competition (restrictive effects are thus tolerated).
- **External limitations** (ex-post facto intervention of competition law in IPRs) to the exercise of exclusive rights (“*ius excudendi*”) arise when the connatural monopolistic effect of IPRs exceeds the necessary measure to satisfy the essential function of exclusive rights which are the stimuli for innovation/reward)

Approaches & Tools

- Pro-Competitive Antibodies within the Patent System: set forth limits to the tension between exclusive rights and the competition regime.
- Competition Law maintains the business exercise of IPRs within limits that are compatible with the general interest of preserving the competitive structure of the market itself (Ghidini).

Guidance for an interpretative framework

- **Numerus clausus (exhaustive list) of exclusive rights** which may confer power to restrict competition
- Interpreters (e.g. judges / enforcement authorities) should **avoid allocating new or "unexpected" functions of exclusive protection to other branches of law** (unfair competition, investment protection untied to innovation).
- **Pro-competitive interpretation**: that favors the free initiative of third parties should be preferred when different views are possible to preserve the competitive framework in the market without discarding the essence of IPRs (e.g. to foster innovation).

Guidance for an interpretative framework

- Coherent and systematic interpretation of patents with other constitutional principles:
  - Freedom to compete and research
  - Promotion of culture (& diffusion of information), science, technologies and freedom of industry and commerce (this could be hampered by too broad or bad quality patents)
  - Third parties involved by an over-protective interpretation of IPRs will be induced not to invest in improvements.
  - Consumers freedom of choice and welfare.

Unilateral abusive conducts by IP holders in a dominant position

- The law on unilateral conduct is one of the pillars of competition policy.
- A firm in dominant market position can abuse that position by:
  - removing key remaining competitive constrains;
  - by restricting competition on a secondary market
- The starting point is that all firms are encouraged **to compete on the merits**

Unilateral abusive conducts by IP holders in a dominant position

- There is no general requirement to IPRs holders to deal with competitors or to license IP in the US and Europe.
- To chose with whom to deal forms part of the realm of exclusive rights of patents.
- A dominant position is not unlawful **per se** but a an abuse certainly is.
- Different approaches followed in developed countries; under-utilization or development of competition law in Latin America and the Caribbean.

IP uses and external scrutiny by competition law

- **Volvo v. Veng case (European Court of Justice, 1988)**: A bare refusal to grant a license of exclusive design rights in spare body parts enabling Volvo to control the aftermarket for such parts fell within the “subject matter” (or existance) of such design rights.
- For the ECJ abusive would be **the refusal to supply spare parts to independent repairers**, **the fixing of unfair or excessive prices**, or the decision to **no longer produce such spare parts** where many cars of that model are still circulating

IP uses and external scrutiny by competition law

- **Renault Case (ECJ)**: no abuse of dominant position may be inferred from the fact that the Design right-holder initiates infringement procedures (based on registered industrial designs).
- **Monsanto Case in Argentina (2008)**: it is not abusive to invoke patents in foreign countries to block importations of soy-based product originated in Argentina to different countries where the soy seed RR (Round up Ready resistant to gliphosate) was patented (in Argentina RR seeds where not patented).

IP uses and external scrutiny by competition law

- **Magil case (ECJ, 1995)**: collective refusal of three Irish TV broadcasters to license their respective copyrighted TV programs listings intended to produce a new, comprehensive TV Guide was held abusive.
- The Court emphasized the fact that such conduct impeded the creation of a new product not produced by the broadcasters for which there was consumer demand (thus harming consumers).

IP uses and external scrutiny by competition law

- **IMS case (ECJ, 2004)**: refusal of IMS to license a “copyrighted brick structure” (consisting in a map dividing Germany in 1860 areas) used for the collection of pharmaceutical sales data and that had become a “*de facto*” industry standard could be unlawful since **it prevented the emergence of a new product.**

IP uses and external scrutiny by competition law

- **Microsoft case (ECJ, 2007)**: ceasing to provide the essential interoperability information –for which Microsoft claimed IPRs- and refusing to license such information was held an abuse of dominant position.
- **Microsoft dominated the 90% of the PC computer market** and by not granting technical information competition **in adjacent markets** would thus eliminated (e.g., small workgroup operating systems for which before Microsot's exclusionary conduct significant level of competition existed).
- The Court highlighted the refusal to license could be held unlawful because **it limited technical development to the prejudice of consumers**.

Unilateral Abuses of IP

- AstraZeneca judgment of the ECJ (2010) found:
  - AZ has abused its dominant position **by withdrawing the market authorization for its LOSEC drug** thereby forcing generic drug makers to re-submit generic versions for such drug for a lengthy market process and thus artificially postponing their entry (although such behavior was not illegal per se under regulations). This holding may be transposed to "patent ambush" cases were disclosure of IPRs over emerging standards is not mandatory within the standard setting organization (Vinje van Rooijen, 2012).

IP uses and external scrutiny by competition law

- In the United States courts seem to be more reluctant to scrutinize use of IPRs by means of antitrust law.

  - **ISO Antitrust Litigation** (use of IPRs is legal per se) (2000, Federal Circuit)

  - **Data General** (First Circuit, 1994), use IPRs are presumed to be legal but such proposition may be rebated.

  - **Kodak case** (1997, Ninth Circuit): refusal to supply spare part for maintenances markets could be abusive (some parts were not protected by IP in the case)

Trends / Facts

- Patents Pools (e.g. for access to patented medicines)
- FRANDS Licenses (standards or essential IPRs)
- “Patent ambush” sanctioned.
- Patent trolls: NPE (non-practicing entities)