

Chapter 58

Comparative Analysis of Major Issues Involved in IPR and Competition Policy

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ABSTRACT

As IPR and competition laws share the same economic rationale, they both are crucial for the establishment of competitive and innovative market conditions. On the other hand, these two regimes are conflicting to each other, IP grants monopoly, whereas competition laws seek to undo monopolistic and restrictive trade practices. Therefore, focus has been shifted towards how these two separate regimes are complementary and conflicting to each other through their goals, how competition policy is effective on IPRs, and IPRs on competition policy. IPRs granted by patents, copyrights, and trademarks, etc. play an important role in fostering innovation and sustaining economic growth.

Edith Penrose in *The Economics of the International Patent System* in 1951:

Any country must lose if it grants monopoly privileges in the domestic market which neither improve nor cheapen the goods available, develop its own productive capacity nor obtain for its producers at least equivalent privileges in other markets. No amount of talk about the “economic unity of the world” can hide the fact that some countries with little export trade in industrial goods and few,

if any, inventions for sale have nothing to gain from granting patents on inventions worked and patented abroad except the avoidance of unpleasant foreign retaliation in other directions. In this category are agricultural countries and countries striving to industrialise but exporting primarily raw material whatever advantages may exist for these countries, they do not include advantages related to their own economic gain from granting or obtaining patents on invention.

DOI: 10.4018/978-1-4666-7230-7.ch058

COMPETITION AND PATENT

Both competition and patent policy can stimulate innovation. Innovation, in turn, benefits the public through the development of new and improved goods, services, and processes. An economy's capacity for invention and innovation helps to drive its economic growth and to increase its citizens' standard of living. Competition among firms can spur the invention of new or better products or more efficient processes. Firms may race to be the first to invent and patent an innovative technology. In some industries, firms often innovate to exploit first-mover advantages. Companies may invent lower-cost manufacturing processes, thereby increasing their profits and enhancing their ability to compete. Competition can prompt firms to identify consumers' unmet needs and develop new products or services to satisfy them. At the hearings underlying the FTC (Federal Trade Commission)'s Report 2002, many participants representing computer hardware companies observed that competition, rather than patent protection, drives innovation in their industries.

The search for this balance between patents and competition policy objectives is reflected both within the patent system as well as in respect of its relationship with competition law (Federal Trade Commission, 2002):

Within the patent system, the core principles of the system have been framed precisely with a view to ensure that the system simultaneously fosters innovation and remains consistent with fair market rules. Therefore, safeguards and boundaries have been built into the patent system to allow it to generate patents only for those inventions, which are most likely to serve the public interest, but should prevent patents for those inventions that would appear not to benefit society. In particular, such safeguards and boundaries include the fact that most patent systems protect only inventions, not discoveries, these limitation of patent rights

as to their contents and their duration, the availability of exceptions to the rights conferred, and the conditions of patentability, which prevent grant of patents for obvious and not novel creations.

On the other hand, competition law has its objective to prevent undesired market behavior and, in particular, abuses of a market position. In relation to patent rights, such behavior would cover activities going beyond the objectives and boundaries set by the patent system. Such situations may occur, for example, where an exclusive license totally excludes other competitors from market entry, through restrictive selling practices or where patent rights are used to create horizontal agreements for fixing price levels.

Against this backdrop, competition law can be important instrument to regulate potential abuses of patent rights and to complement patent inherent boundaries. This conflict between overlapping legal regimes suggests that some accommodation by both patent law and antitrust law to the unique circumstances of standard setting will be required if consistent legal rules administrative, legislative, or jurisprudential are to emerge. Modifying patent law and antitrust principles entails at least some principal tasks for instance to identify the inherent character of voluntary consensus standard-setting that makes it a unique activity under both the patent laws and the antitrust laws, to characterize the tenets of patent law to which the risk of an anticompetitive outcome is most attributable, to develop an economic analysis that places the consensus-building process utilized in standard-setting in a broader market context and to identify those elements of antitrust doctrine that most inhibit standard-setting participants from engaging in activities that deters or undermines anticompetitive outcomes. Patent licensing is subject to anticompetitive abuse. Control of anticompetitive patent licensing is a generally accepted practice among states.

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