

Interface between IP and competition in developed countries

Valentine Korah,
University College London

Anti-competitive aspects of Iprs

- Barriers to entry seldom high, because substitutes.
- US integrated when Sherman Act passed but EC concerned that iprs prevent market integration because limited to one MS.
- In Germany, Ordo Liberals concerned that iprs created political power. Patentee should act as if it had no patent.

Iprs pro competitive

- Induce or reward investment,
- Price of publication
- Enable negotiation of licences.
- Should compare situation *ex ante*, in absence of the agreement.
- Innovation may be more important than competition from similar supply.

Joseph Schumpeter, Capitalism, Socialism and Democracy, pp 83- 84, (1992)

- `Competition that counts [is] competition from the new commodity, the new competition the new sources of supply, the new type of organisation . . . competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives.'

Schumpeter

- He argued that ‘to survive in a capitalist competition, incumbents must withstand ‘a perennial gale of competition’ in the form of ‘the new consumer goods, the new methods of production or transportation, the new markets, the new forms of industrial organisation.’ [\[1\]](#)

Iprs may be too broad

- Particularly when technology new, patent examiners may not understand how wide exclusive right is.
- US Federal Circuit has granted wide patents, eg one click on Amazon.
- In EC, copyright extended by directive to life + 70 years to avoid German Constitutional crisis – better to have left longer protection just in Germany- Free movement has become theological.

Should antitrust limit broad patents?

- What is ‘palpably too broad’?
- If degree of protection be decided case by case, uncertainty may deter investment.
- Better if *ad hoc* limits imposed by competition authority including economists than by court or patent examiners.
- Terms of patent, copyright etc. determined generally at time of grant & do not depend on amount of protection required to induce particular investment.

Law reform by analogy

- Distrust law reform ‘by analogy’ – should think how much protection required for software,
- But easier for reformer to latch onto Berne Convention.
- Analogy save thought and dispute.

Should competition law trump over wide ipr?

- Doctrine of essential facilities invented in US, but applied to physical property not iprs. Now very narrow after *Trinko*.
- Congress had granted right, which courts should not reduce (US Guidelines on ip licensing, 1995).
- In EC, holders of IP may be required to license, *Magill, IMS & Microsoft*.

Magill

- When Magill published comprehensive programmes of 3 tv companies, it was successfully sued for copyright infringement.
- ECJ confirmed that each tv company dominant over information for its own programmes and abused contrary to art 82
- In absence of harmonisation, ip law is national,
- In exceptional circumstances, exercise of ipr may amount to abuse

Magill

- 1) no substitute for information.
- 2) specific, constant and regular potential demand
- 3) refusal to provide basic information prevented appearance of
 - a) new product ,
 - b) which appellants did not offer
 - c) for which potential demand

Magill (ECJ)

- 4) no justification
- 5) reserved to themselves the secondary market.
- By end of case, only lawyers gained from the result! *Magill* bankrupt and they got costs.

Oscar Bronner (ECJ)

- Not an IP case.
- AG Jacobs referred to protecting consumers, not particular competitors (para 58).
limited essential facilities because
 - Incentive to original investments (para. 57)
 - Incentives to derivative investment (para 57)
 - Problems of fixing compensation (para 69)

IMS (ECJ)

- Abuse if:
 - Product of firm requiring licence new
 - Refusal not justified and
 - Reserves actual, potential or hypothetical market downstream to holder
 - by eliminating all competition on that market.

Microsoft (Commission)

- Refusal by firm very dominant firm over operating systems to
- Supply interface information to providers of servers
- Amounts to abuse.
- M had supplied such information when its market share of server market was smaller.

Microsoft

- Second count condemned tying streaming media player to windows. Follows Commission practice.
- Commission feared exclusion from OS market if all neighbouring markets dominated.
- Interim order suspending duty to supply expected in 2004, final appeal in six years when market likely to have changed completely. Huge re-sources will be consumed by CFI, ECJ & parties.

Conclusion on law

- ECJ accepts a doctrine of essential facilities applied to IPRs in exceptional circumstances.
- Commission treats the circumstances special in *Magill* as only an example.

Questions outstanding

- Need product be new? – was not in earlier cases on refusal to supply, (*Commercial Solvents*)
- Need more than one undertaking be supplied? *Commercial Solvents* was supplying American Cyanamid.

Problem

- A holds patent on drug that cures aids,
- B obtains improvement patent with fewer side effects, but using invention would infringe A's patent.
- Who should be entitled to licence?
- Parties likely to cross licence, but terms depend on whether B entitled to licence.