BALANCING INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW

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ABSTRACT

IPR and Competition Law are the two areas of law that operate in the market dealing with the commercial aspect with their own approach. However they don't tend to operate in isolation with each other despite functioning on different legal theories from each other. The linkage between these two different legal theories is the common objective of promoting innovation and public welfare. But due to their different approaches any interaction between the two causes friction and leads to conflicts with each other. This article highlights briefly the different legal theories of IPR and Competition Law. IP laws confer a bundle of exclusive rights to the innovator in order to remunerate the innovator, encourage others for indulging innovation, and make innovative information & technological advances. On the other hand monopolies, mergers & acquisitions, and commercial relationships are subject to regulation by competition authorities with the goal of preserving healthy market competition. The article then discusses the instances of interface between competition law and intellectual property rights leading to anti-competitive practices in the market. Then it majorly focuses on the conflicts between the two as in the competition law issues arising out of the policy of IPR such as cartelization, exclusionary effects arising out of tie-in & tie-out agreements, creation of access barriers patent thickets, hindering the development of technology, minimizing competition due to patent pooling, increased costs for consumer, abuse of dominance arising out of licensing agreements, increased production costs due to royalty payment for useless patents etc. Due to these conflicts, the issue arises with respect to application of these two areas of law over the sectors where the overlap with each other. Intellectual property owners' actions that were normally permitted by intellectual property rights legislation have been forbidden by competition authorities and courts around the globe because they violated the conditions of competition law. It is to be understood that to achieve the common objective of increased technological advances along with ensuring a competitive market focused on consumer welfare. The balance has to be striked between their scope of application on the overlapping areas of market

since no good to economy can be achieved if these two, though different legal theories, operate in divorce with each other.

Keywords: Intellectual Property Rights, Competition Law, Anti-competitive, Cartelization, Patent Pooling, Monopoly, Licensing Agreement

Introduction

Recent developments in technology present opportunities as well as obstacles in a variety of fields. As scientific advancement is a crucial factor in the promotion of economic growth, these new improvements such as those in information and communications technologies, biotechnology, and the creation of new materials, could offer a significant boost to reviving economic growth throughout the world.[1] Incentives to develop novel technologies may be influenced by competition policy in three ways. First, through merger control, many nations' competition policies prevent the development of disproportionate concentration of market power and market dominance. This is significant because it is thought that when an industry is not monopolized, there are stronger incentives for growth and innovations. The application of competition regulations to joint ventures engaged in research and development is a second significant component of the connection between competition policy and innovation.[2]

Intellectual property rights (IPRs) and competition policy has traditionally developed as two distinct systems of law. Each has unique legislative objectives, as well as distinctive approaches to accomplish those objectives. The two legal systems share many objectives since they both seek to foster innovation and monetary expansion. However, there are also possible conflicts because of the strategies each system employs to further those objectives.[3] Modern developments in technology may be significantly impacted by how competition policy is implemented in the licensing of patents and other intellectual property. First, the commercial viability of an innovation may be directly impacted by competition policy. Investments in R&D will typically surge as the potential rewards from technological innovation rise. Those earnings are obtained in part by licensing technology to other users, which are often shielded from appropriation by IPR.[4]

[1]ORGANIZATION FOR ECONOMIC COOPERATION, https://www.oecd.org/regreform/sectors/2376247.pdf (last visited Jul. 13, 2023).
[2] *Id* at 6.
[3]STEVEN D ANDERMAN, INTELLECTUAL PROPERTY RIGHTS AND COMPETITON POLICY 15 (Cambridge University Press 2009).
[4] *Supra* note 2.

Given the significance of innovation to economic growth, every effort should be taken to ensure that the implementation of competition legislation does not impede the development and dissemination of technologies. However, patent and know-how licensing agreements can result in major cartel issues, such as price fixing, output constraints, and geographic market territory and customer divisions, therefore competition regulators cannot simply adopt a lenient approach. Finding the right mix that allays these worries should be the goal of respective authorities.

Intellectual Property Rights

Patents, copyrights, registered trademarks, know - how, registered and unregistered designs, confidential business knowledge, trade secret along with other useful, non-patented information or business procedures are all examples of intellectual property rights.[5] IPR's primary objective is to promote innovation by offering adequate incentives.[6] By granting the creator an exclusive legal right to the commercialization of his or her innovation for a specified length of time, the objective of adequate incentives is accomplished. The resulting income and profits serve to both compensate the innovator for his time, effort, investment and to inspire others to pursue innovation in the future.[7] A licensing agreement structure is one effective technique to derive value from an IPR. The licensee is given the authority, for example, to create, promote, or utilize a specific product. [8] As a result, numerous actors as licensees are able to pay the IPR owners, the licensor, through license fees. Widespread copying may be feared if inventors were not given property rights to their creations, which would reduce their earnings and the desire to create.[9] Therefore, the most significant feature of the property rights conferred to the innovator is the capacity to prevent imitation. The ability to grant others a license to use the innovation is another aspect of intellectual property rights. When the owner of the property right is not in a position to conduct extensive commercial

[5] *Examining the interface between the policies of competition policy and intellectual*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (Jul. 12, 2023, 5:43 PM), https://unctad.org/system/files/official-document/ciclpd36_en.pdf#:~:text=The%20present%20note%20examines%20the%20interface%20between%20the,which%20competition%20authorities%20m.

[6] *Id* at 2.

[7] KORAH & VALENTINE, AN INTRODUCTORY GUIDE TO EC COMPETITON LAW AND PRACTICE 335-336 (9th ed. 2007).

[8] *Id.*

[9] M.I. Kamien and N.L. Schwartz, *Market Structure and Innovation*, 13 JOURNAL OF ECONOMIC LITERATURE 1, 14 (1975).

exploitation, licensing can be the only source of income for the innovator.[10]

Competition Law

By removing barriers to markets' effective operation, competition policy tries to advance consumer welfare. This is achieved by preventing cartels that aim to restrict competition, limit output, or fix prices, by preventing companies from acquiring market power unfairly, such as through anticompetitive mergers with rival companies, by raising the entry barriers for new businesses, and by preventing companies that already have market power from exploiting their dominant positions. Although agreements for the licensing of intellectual property are typically pro-competitive, they can become anti-competitive if they serve as a deception for a cartel arrangement, limit competition between innovations that are economically equivalent, or exclude emerging technologies from the market.[11] This prevents the dominating power derived from IPRs from becoming too complex, leveraged, or expanded to the disadvantage of competition. Additionally, while competition law aims to safeguard competition and the competitive system, which in consequently motivates innovators to be the first to market with a new good or service at a price and caliber that consumers desire, it also emphasizes the significance of encouraging innovation in terms of competitive inputs and thereby works to enhance consumer welfare.[12]

Interplay between IPR and Competition Law

Any aspect of IP, including patents, trademarks, and/or copyright, may give rise to concerns of competition law. The exclusive right to manufacture a patented good or exercise ownership rights over a protected technique or technical know-how for a specific amount of time (such as 20 years for a patented product in India) is granted to a business by virtue of recognition of or award of intellectual property rights to that business. As a result, the company gains some measure of market protection from competition, if not a monopoly. In this backdrop, the use of intellectual property rights and the protection they provide under intellectual property laws may make it simpler for the owner of such rights to engage in behavior that would be considered anti-competitive and have the effect of stifling competition, raising prices, and

[10] *Supra* note 1, at 9
[11] *Supra* note 1, at 10.
[12] Ashwin, *The Interplay between intellectual property law and competition law – Similarities and Differences,* ENHELION (Jul. 10, 2023, 5:15 PM), https://enhelion.com/blogs/2022/08/22/the-interplay-between-intellectual-property-law-and-competition-law-similarities-and-differences/#_ftn1.

lowering output and quality.[13] The majority of the time, IP right holders with significant market power (if not domination) must exercise extra caution when it comes to the potential effects of their actions on competition law. As is well recognized, the mere fact that an enterprise has a dominant position does not in and of itself violate the competition laws. However, a company in a dominating position has a specific obligation to refrain from actions that can restrict competition.[14] Companies with intellectual property (IP) rights are seen as dominant, and the Competition Authorities are now more frequently paying close attention to their operations. When achieving economic efficiency and protecting both competitors and customers, the basic goal of competition legislation is to sustain effective competition.[15] According to the core theory, innovation levels rise as a result of competition.[16] The antithesis of perfect competition is monopoly, which is a marketplace where there exists only one seller. The rationale is that legal monopolies, like intellectual property, restrict other businesses from entering the market and thus impedes competition. Since only one competitor is permitted to participate, the price is set as high as possible. Therefore, a monopoly could prevent competition from arising within a particular market.[17]

If the way intellectual property rights are used has an impact on innovation and competition and have unfavorable effects on consumers, there may be cause for concern. Antitrust law and intellectual property law, when properly understood, both aim to foster innovation and improve consumer welfare through various instruments and legal strategies. However, the conflicts between the two legal ideas sometimes cover up this reality. Through the dissemination of technology, the goal is to benefit customers in the long run, not only the individual creator. Even though they use different methods to achieve the goal, the goals of competition law and intellectual property both center on enhancing innovation and promoting consumer welfare. Nowadays, the focus of the interaction between the two legal systems is on mutual accommodation rather than any potential conflict. By attempting to maintain equilibrium between the initial innovators and creators and the subsequent ones, IP helps to increase competition's efficiency and maintains access to the market.[18] When IP becomes accessible to consumers and competitors, at that stage it enables and promotes development that will

[13] *Supra* note 5, at 2.
[14] T-201/04 *Microsoft v Commission* (2007) ECLI:EU:T:2007:289.
[15] JONES. ET.EL, EC COMPETITION LAW 3,7 (3rd ed. 2008).
[16] *Supra* note 3, at 17.
[17] *Supra* note 15, at 8.
[18] S.D. ANDERMAN ET.EL, TECHNOLOGY TRANSFER AND THE NEW EU COMPETITION RUES: INTELLECTUAL PROPERTY LICENSING AFTER MODERNIZATION 34 (Oxford University Press 2006).

ultimately benefit consumers in the market. [19] By granting writers and inventors the exclusive right to their unique writings and breakthroughs for a finite period of time, patent and copyright law aims to advance science and useful arts.[20] In line with this finding, courts have found that while if the goals of the IPRs and antitrust laws may appear to be entirely in conflict at first look, they are actually complementary because both the areas of law seek to promote invention, commerce, and competition. [21] When IP legislation is properly applied, it protects the incentives for innovation, which is the advancement of science and technology. Consumers profit from innovation because it leads to the creation of new, better products and services, which also helps the economy expand. For instance, the development of cellular technology and the Internet has sparked an upsurge in a variety of consumer goods and services.[22] Similar to this, effective antitrust law encourages innovation, economic growth, and efficiency by removing obstacles to strong competition. Allocative, productive, and inventive efficiency are the three parts of economic efficiency. Allocative efficiency presupposes that producers would make goods that customers want because of the price. Due to competition from other producers, productive efficiency assumes that producers would work to make goods at the lowest cost while maintaining quality. Last but certainly not least, innovative efficiency assumes that manufacturers would compete with both the finest existing technologies and new innovations.[23] Antitrust law also makes sure that consumers are provided with a wide choice of goods and services at reasonable prices by encouraging a competitive spirit among market participants which is against monopolization and other forms of anti-competitive practices.[24]

There are many levels of exclusivity that could arise from the use of intellectual property rights. A monopoly may result if the patent holder (patentee) decides to produce and market a patented product exclusively. For instance, upon the granting of a license, a patentee or licensor can decide not offer for sale the patented product in the licensee's country, may put export restrictions to other countries, may include a clause limiting the production of an invention to a certain number of units, may stipulate a minimum selling price (MSP), or may demand that the licensee agree to purchase additional technology or goods from the patentee that are without there any connection to the licensed patent. By engaging in procedures intended to prolong the

[19] *Id.*
[20] Timothy J. Muris, Competition and Intellectual Property Policy: The Way Ahead, FEDERAL TRADE COMMISSION (Jul. 7, 2023, 3:32 PM).
[21] Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir.1990).
[22] *Supra* note 5, at 3.
[23] STEVAN, *supra* note 3.
[24] TIMOTHY, *supra* note 20.

initial period of protection provided by a patent, holders of intellectual property rights may misuse their rights. Concerns about the intellectual property itself may arise in circumstances when just the existence of intellectual property rights constitutes a formidable barrier or obstacle to entry. Such actions may reduce market competition and discourage participation by entrants who may be inventive but are too small to compete with powerful multinational patent holders.[25] Another possibility is that a patent holder might, for lack of production capacity due to dearth of resources, offer a license to another company or dealer (the licensee) with terms and conditions that might limit competition. Additionally, a single strong company may hold bargaining power as the licensee, whereas the patent holder might be a sole inventor, as in the case of Google or Microsoft enforcing stringent terms on a single software developer or technology application inventor who is in a weaker bargaining position. There is a chance that such exclusive agreements will result in market foreclosure and competition-related issues. By engaging in procedures intended to prolong the initial period of protection provided by a patent, holders of intellectual property rights may misuse their rights. Such actions raises concerns as intellectual property in such scenario may reduce market competition and discourage participation by entrants who may be inventive but are too weak to compete with powerful and big patent holders.[26]

Conflicts between IPR and Competition Law

The idea that the development of an IPR imparts an economic supremacy along with its package of exclusive legal rights is seen to be the root of at least some of the unease surrounding competition policy with regard to IPRs. The assertion is undoubtedly relevant; for instance, many IPRs are both incredibly important and problematic as briefly highlighted in the above discussion. New patented products with expected sales in the hundreds of millions of dollars are frequently mentioned. Similar to how ordinary life demonstrates the economic strength of copyrighted products, consider the fortunes created by some software developers or the box office success of specific films.[27] Following are some of the major worrisome aspects of IPRs from the lens of competition law:

I. Intra-Technology Constraints

A patentee or licensee may apply an intra-technology restriction in a license agreement to

[25] *Supra* note 5, at 3.
[26] *Id.*
[27] *Supra* note 1, at 14.

reduce competition or free riding. By placing such limits, patent owners hope to recoup significant R&D expenses, which may restrain companies with weak negotiating positions. The expense of getting a license is not worth the cost unless the licensee is assured protection from technology competition, that is, from competition by other licensees, therefore typically, licensees agree to intra-technology limits. A licensee's ability to conduct business may be restricted by various intra-technology constraints, which may also limit their customer base to a specific geographic area or set of suppliers.[28] Restrictions can be imposed through contract clauses such as a non-compete clause prohibiting the licensee from handling or competing with the patentee's products, a clause requiring the licensee to execute a long-term contract so that other agreements with competing technology licensors become financially unviable, etc. A clause imposing a minimum retail price, a clause putting maximum-quantities that restricts the amount that can be produced by a licensee to the level of projected demand in a certain area, region, or territory, a provision establishing terms and conditions that could have an immediate impact on the price at which the good or service is sold, a restriction or prohibition on the licensee's ability to sell in or into the licensed territory, or both, exclusive tie-in and buying clauses that mandate the licensee purchase all technology or goods from the patent holder exclusively, including unpatented items as part of a tie-in or other required packaged licensing, etc.[29]

II. Cartelization

When assessing intellectual property licensing agreements, the biggest issue for competition regulators is if the agreement is being used as an instrument for a cartel agreement to regulate prices, control output, or split markets. Thus licensing agreement can be vehicle to create the greatest competition danger. It can happen each time there is an agreement between competitors, either actual or potential, in a specific market. Notably, the market to be cartelized need not be the market covered by the licensing agreement, and those rivals can be either the licensors or the licensees.[30] By evaluating the potential efficacy of the technology being licensed, one can determine whether a licensing agreement serves as an excuse for a cartel arrangement.[31] According to this perspective, a horizontal agreement is especially dubious

[28] *Supra* note 5, at 4
[29] *Supra* note 5, at 5.
[30] R. B. Andewelt, *Analysis of Patent Pools under the Antitrust Laws*, 53 ANTITRUST L. JOURNAL 618, 625 (1984).
[31] 2 PAUL DEMARET, PATENTS, TERRITORIAL RESTRICTIONS AND EEC LAW: A LEGAL AND ECONOMIC ANALYSIS, 46 (Wenheim 1978).

when a weak patent is involved or the licensee does not place a high priority on the invention. The drawback of this strategy is that it is frequently challenging to evaluate the strength and efficacy of the patent or its commercial value.[32] The amount of the relevant market that is subject to the restrictions is an important factor to take into account when determining the risk of cartelization from a licensing arrangement among actual or potential rivals. Clearly, a licensing limitation between businesses with significant market share carries a higher danger of effective cartelization than a deal between disparate smaller companies.[33]

In addition, licensing agreements may be used to aid the execution of other separate cartel understandings, outside from the situations when the cartel agreement is included in the licensing agreement as described in the examples above. For instance, a product is made identical rather than differentiating through the facilitation of cartelization.[34]. Due to the homogeneity of the products produced using the licenced patent via licensing agreements that specify the design or technology to be used in producing a product, such agreement may actually lead to facilitate a separate cartel agreement between the licensor and licensee to fix its price. Particularly under patent pooling agreements, this issue might occur.[35] If patents pertinent to a standard in a specific industry are owned by multiple entities, a patent pool can fulfil the demand for standardization. A patent pool allows the participating patentees to benefit from the pooled patents, grants non-pool members a standard license for the pooled patents, and divides the licensing payments among the pool members in accordance with the agreement thus adding to recovering their respective R&D costs. When there are restrictions on prices, regions, customers, disciplines of use, or "output," a patent pooling or cross-licensing agreement between rival licensors might minimize competition in downstream markets for products employing or using the technology as an input or in the market for such technologies itself.[36]

Even vertical distribution agreements can also used to carry out cartel agreements among the licensees. By forcing their licensors to implement resale price maintenance, for instance, they could be able to fix pricing at the licensee (horizontal) level. However, for such limitations to be effective in preventing competition, they would need to be applicable to a sizable part of

[32] *Supra* note 1, at 22.
[33] *Id.*
[34] *Supra* note 30.
[35] *Supra* note 30, at 617.
[36] *Supra* note 30, at 621-629.

licensee firms; otherwise, the licensees involved in cartelization would be exposed to competition from unrestrained and enterprises which are not involved in it.[37]

III. Refusal to grant License

The refusal to license intellectual property rights could be considered abuse if the exercise of such rights comprises abusive behavior, akin to a refusal to deal in a competition practice, notwithstanding the fact that there is no legal requirement for holders of intellectual property rights to license their patents. For instance, a unilateral refusal to license is regarded as abusive in the enforcement of competition law in the European Union when access is essential, the refusal to license prevents the introduction of a new good for which there may be potential demand by the consumer, and also eliminates all competition in secondary marketplaces.[38] In *Microsoft*[39] the company was dominant and had the copyright to a computer program in a 2004 case, it was found by the EC (European Commission). Following an investigation, the European Commission fined Microsoft €497 million[40] for exploiting its dominant position in workgroup server services and personal computer (PC) operating systems by withholding information on interoperability that would have allowed its rivals to create competing workgroup server programs that were appropriate with the Windows platform and could compete with Microsoft's own products. The Court used a broad definition of consumer injury and emphasized that consumer choice would be impacted if competing products could not compete on an even playing field in the market.[41]

IV. Standard Essential Patents (SEPs)

Standards may improve public health and safety, innovation, efficacy and customer choice. Additionally, they enable interoperability among products in market, which increases the value of goods for consumers. Standard-setting entities and businesses can work together to create industry standards. If norms are agreed upon that include intellectual property rights, such a patent, there may be worries about competition.[42] Companies typically want their technologies to be recognized as standard-essential, as this is likely to enhance demand for the technologies

[37] F. H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L. JOURNAL 133, 141-42 (1984).
[38] KORAH V., INTELLECTUAL PROPERTY RIGHTS AND THE EUROPEAN COMMISSION COMPETITION RULE 454 (Hart Publishing 2006.)
[39] *Supra* note 14.
[40] *Supra* note 14.
[41] *Supra* note 14, at Para 71.
[42] EUROPEAN COMMSSION, https://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf (last visited Jul. 12, 2023).

in question. Because the concerned technologies profit from being recognized as standard-essential, there is a competitive danger that standard-essential technologies could get licensed for costs that do not represent market value, which is usually lower.[43] In order to gain an advantage over companies planning to implement the standard, standard-essential patent (SEPs) owners may wish to set higher royalties or impose more favorable licensing conditions (for the patent owner) than would have been the case had the patent not been included in an adopted standard. This practice is known as hold-up in the competitive context. Patent delays could jeopardize the spread of beneficial standards, disrupt the standard-setting process for that specific industry, and shift incentives for innovation, and increase consumer prices and output restrictions. Therefore, if a patent owner with a SEP declines to license their patent on reasonable, non-discriminatory, and fair (FRAND) conditions, this may hinder rivals from joining the market, which will result in less innovation and competition.[44]

Payments in the form of royalties for standard-essential patents that are invalid or not in use could unnecessarily drive up production costs for the entity making the payment for employing that SEP, which could then raise consumer prices. For instance, in one instance, Motorola[45] obtained and upheld an injunction, which obliged Apple to waive its legal right to contest the legality of or cause any infringement of Motorola's SEPs. The European Commission determined that Motorola's efforts to obtain and enforce injunctions against Apple, a willing licensee, based on one of its SEPs (standard-essential patents), breached EU competition laws. A similar finding was made in a case involving Samsung[46]. In the two cases, the Commission came to the conclusion that it was anti-competitive to attempt to bar competitors from the market by obtaining injunctions based on standard-essential patents when the licensee was willing to accept a license on fair, reasonable, and non-discriminatory terms if standard-essential patent holders had made a commitment to licensing their standard-essential patents on FRAND terms and did so to other entities in the market. In certain circumstances, requesting injunctions may stifle licensing discussions and result in unjust licensing terms, which would have a negative impact on consumer choice and costs.

V. Exclusionary Effects of Tie-in and Tie- out agreements

[43] *Supra* note 29.
[44] ASHWIN, *supra* note 12.
[45] EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_490 (last visited Jul. 12, 2023).
[46] *Id.*

The exclusion of other businesses through an anti-competitive license agreement is something that competition regulators are rightfully concerned about.

Tie-in agreement- Issue is that the vertical restriction will not significantly increase entry barriers by requiring admission at more than one level. In contrast, with tie-ins, the worry is that the licensee will establish a dominant position in the market for the tied commodity, forcing any possible competitors to simultaneously enter both the markets. The tied products' market's hurdles to entry and growth determine whether acquiring a sizable market share in the tied good's market results in increasing market power for the entity imposing the vertical constraint or not.[47]

Tie-out agreement- Similar exclusionary issues may arise if licensees are bound by a "tie-out" agreement or exclusivity clause, which forbids them from using any other technology from potential licensees. There would be legitimate worry that the licensor had restricted or eliminated prospective competition at the licensor level if such an arrangement involved so many licensees that admission at the licensor level necessitated simultaneous entry at the licensee level as well and such an entry was challenging. Less success would be had in rising prices in that market if the licensors only have a small percentage of the licensee market and do not cover substantial part of the market. The issue is similar to the one about a licensor obtaining market dominance for a tied good that was previously expressed; the potential anticompetitive effect relies on the barriers to entry in the second market.[48]

Exclusive grant back agreement- Practices that obstruct the development of rival new technologies fall under the category of exclusionary effects. This can be accomplished by granting licenses with exclusive grant-back clauses that work to remove the licensees' incentives to create competing technologies[49] It gives the licensee a non-exclusive right to utilize any patented modifications while on the other hand giving an exclusive right to the licensor to use or even sub-license any patented improvements. This issue may result from either a single licensor's conduct or the rules of a patent pool agreement.[50]

Exclusive grant-back conditions and coercive package licensing are two instances of practices having potential anticompetitive effects in the relevant market that are mentioned in Article 40

[47] T.G. Krattenmaker and S.L. Salop, *Anti-competitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE LAW JOURNAL 234, 236-38 (1986).
[48] *Id* at Para 25-26.
[49] *Supra* note 29.
[50] *Supra* note 1, at 24.

of the Trade-Related Aspects of Intellectual Property Rights agreement of the World Trade Organization. Exclusive grant-back agreements could be anti-competitive since they give the original patent owner market leverage that they could misuse by accumulating technological improvements and advancements made to a particular technology by licensees.[51]

VI. Pay for Delay Settlements

Innovation and easy access to medications both may be hampered by anticompetitive practices in the pharmaceutical industry. Patenting methods that prevent the creation of rival medications by lowering the incentives for other emerging businesses to continue their own R&D efforts have been observed by the European Commission's Report on Pharmaceutical Sector Inquiry in 2009 and the related enforcement report of 2017.[52] Patenting tactics may hinder generic competition in terms of access by delaying competition in exchange of payment. A complaint was made against a contract between Solvay Pharmaceuticals and two generic medication producers by the Federal Trade Commission in 2009. According to the Commission, Solvay bribed the firms to stop them from obtaining patents for their rival generic medications and to delay entry for nine years in the concerned market, until 2015. In 2013, the Supreme Court ruled that pay-for-delay arrangements between the manufacturers of branded and generic medications are subject to anti-trust review. The Court has made it plain that pay-for-delay contracts between brand-name and generic pharmaceutical corporations are susceptible to antitrust examination, and it has rejected attempts by these companies to essentially exempt these contracts from the antitrust rules.[53]

VII. Patent Thickets

A specific technique may be covered by a sizable number of patents in some industries. It may result in a "patent thicket" that makes it challenging for rivals to enter the market since they might need to secure licenses from numerous patent owners to adopt standardization. It may result in less innovation and market competition as well as higher prices for customers.[54]

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[51] *Supra* note 29.
[52]EUROPEAN COMMSSION, https://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf (last visited Jul. 12, 2023).
[53]*Watson Pharmaceuticals, Inc., et.el (FTC v. Actavis)*, FEDERAL TRADE COMMISSION (Jul. 7, 2023, 1:23 PM).
[54] ASHWIN, *supra* note 12.

VIII. Non-Price Predation

A company can utilize copyrights, patents, and trade secrets as tools of non-price predation if it files legal action in bad faith to keep competitors out. This is distinct from going to court to get invalid patents enforced.[55]. Although arbitrary enforcement isn't technically a licensing practice, it definitely has anticompetitive implications. Companies creating new technologies can lack the resources to engage in protracted legal disputes with incumbent companies and hence be completely barred from competing. At the very least, a firm's entry could be postponed and its costs could increase significantly relative to those of its established competitor. However, it is important to distinguish between abusive litigation and legitimate intellectual property rights enforcement. [56].Access to courts or other law enforcement agencies is required for any functional IPR regime since the intrinsic worth of intellectual property rights rests on the IP rights holder's capacity to prevent others from copying his/her idea. A good faith litigator will inevitably lose in court, but that is different from when the process is a ruse designed only to burden the opponent. Only the most heinous type of non-price predation is abusive litigation. Any behavior intended to eliminate competitors or increase their expenses on a basis apart from efficiency might be considered non-price predation.[57]

IX. Merger and Acquisition

A broad topic of competition law enforcement that touches on many aspects of commercial operations is mergers and acquisitions. Similar technological advancements have led to mergers and acquisitions have an aspect of intellectual property. The choice to merge with or purchase the interests of another firm is frequently influenced by intellectual property concerns, particularly in the technology related sector. The selling (acquired) company's licenses, trademarks, copyrights, patents and other intellectual property rights connected to the transaction must therefore be investigated by an acquiring party.[58]

Conclusion

Intellectual property rights (IPR) and competition law have a complicated and frequently tense connection. IPR laws give the holder of the intellectual property a bundle of exclusive rights.

[55] R.J. Hoerner, *Bad Faith Enforcement of Patents - Antitrust Considerations*, 55 ANTITRUST L. JOURNAL 415, 421 (1986).
[56] *Supra* note 1, at 24.
[57] JOSEPH DREXL, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 312 (Edward Elgar 2008).
[58] *Id.*

IP and antitrust-related disputes can be incredibly complicated, both legally and factually. Anti-competitive behavior is prohibited under competition rules, which also provide a fair opportunity for all market participants.[59] When the exercise of IPR by a dominant market player has anti-competitive impacts on the market, it may result in a conflict between IPR and competition law. It is now widely acknowledged that a successful competitive economy depends on a legal system that effectively defines and safeguards property rights. In this system of property rights as a whole, IP law is crucial. A patent holder can try to prevent the unauthorized use of his intellectual property rights, just like other owners of property rights can.[60] In situations when IPR has an anti-competitive impact, competition law aims to restrict application of IPR. Compulsory licensing regulations, for instance, permit rivals to make use of patented technology in specific circumstances, such as when addressing public health issues. In order to boost innovation and competitiveness in the market, IPR holders and rivals may sometimes be encouraged to work together. For instance, patent pools enable several patent owners to license their patents to one another, which can result in the development of new goods and services. Cross-licensing agreements can similarly enable rivals to share their intellectual property, fostering more innovation and market competition. By using a rule of reason analysis, which involves a determination of the IPR's pro- and anti-competitive impacts, the approach should aim to strike a balance between the interests of IPR holders and those of a competitive market.[61] Competition legislation and IPR are employed as separate tools on the business field. However as in every relationship, both the tools are formed to achieve a balance between the early founders and the later ones. Therefore it is necessary to include both carrots and sticks when establishing an IPR distribution agreement which will work in tandem with the competition law policy of promoting innovation and ensuring consumer welfare.[62]

[59] ASHWIN, *supra* note 12.
[60] TIMOTHY, *supra* note 20.
[61] ASHWIN, *supra* note 12.
[62] UNIVERSITY OF GOTHENBURG, https://gupea.ub.gu.se/bitstream/handle/2077/18251/gupea_2077_18251_1.pdf?sequence=1 (last visited Jul. 10, 2023).