

# IPRs and EU Competition Law

20.4.2010, Kilpailuoikeudellinen yhdistys

Tuomas Mylly,

ma. eurooppaoikeuden professori

Turun yliopisto, oikeustieteellinen  
tiedekunta

Email: [tuomyl@utu.fi](mailto:tuomyl@utu.fi)

# IPRs and Competition Law – classics...

- Do IPRs form competition law monopolies?
- Are the objectives of competition law and IPRs antithetical... or do they complement each others?
- How well the IPRs cater for competitive interests?
  - Patent law?
  - Copyright law?
  - Trademark law?
  - Design law?
- Does competition law understand the "new economy" or the information society?

# Characteristics of the “new economy”

- R&D and IP protection essential – from product competition to technology competition, from price competition to quality competition.
- Network effects, tipping.
- High fixed/sunk costs, low marginal costs.
- Technical complexity, complementarity, standardization.

# Challenges for competition law

- Economics of competition law largely based on price theory – pricing power.
- Exclusion and exclusionary power not definable through price theory. Definition of relevant markets?
- Economics of competition law largely based on a static model, with given resources and technologies.
- Dynamism: Schumpeterian competition
- Approach to uncertainty in economic modelling?

# Concrete challenges

- Predatory pricing – the “competitive price”?
- Tying and bundling?
- Licensing and mandating access to IPRs, platforms and information
- “Co-opetition”: standardization, R&D and other cooperation with (potential) rivals
- Cross-licensing and patent pools
- Mergers –towards concentrated markets...

# Development of the IP-comp. law interaction in EU Law

- EU harmonisation of IP began late → free movement of goods and competition law became the primary instruments through which the domestically defined intellectual property rights were *de facto* made compatible with the integration objectives.
- Interplay between the Commission and the EUC
- *Maher* has described it as a series of U-turns and evolving formalism

# The Old Basic Doctrines

- *Inherency doctrine, existence/exercise –dichotomy, essential function & specific subject-matter* of an IPR (e.g. *Windsurfing*)
- These had the function of protecting the *nationally defined* rights from too extensive encroachments of the EC Treaty free movement and competition provisions alike.
- Art. 36 ja 345 FEU (ex. 30 and 295 EC).
- The falling of the restrictive measure taken by a dominant firm within the core content of the right, referred to as the specific subject-matter as defined by the Court, functioned as a general justification for the measure from the otherwise broad prohibition regarding abuses of dominant positions.
- IPRs as justifiable, nationally defined trade barriers.

# Defects of the Old Doctrines

- Abstract analysis neglects considerations related to market power and competitive effects.
- Determining the exact scope of the IP becomes of crucial importance
- *Volvo*: the right of the proprietor of a protected design to prohibit others “*from manufacturing and selling or importing products incorporating the design constitutes the very subject-matter of his exclusive right*”.
  - It followed from this that a refusal to license, even in return for a reasonable royalty, cannot *in itself* constitute an abuse.
  - The argumentation is understandable: the design right in spares inevitably results in the right to block aftermarket competition

# Towards essential facilities

- It became later obvious in *Magill* that the doctrines based on IP protection alone are not sufficient
  - The weighing of the interests in protecting IP and competition may in some cases imply that there are reasons to limit even the core rights of the IP.
- *Magill* marked the beginning of an effects-based argumentation model.
- As the specific subject-matter no more provided a limitation on the application of the prohibition of abusing a dominant position, the Court had to limit the extent of the prohibition itself on the basis of competitive effects.

# Comparing the doctrines

- The blind spots of the essential facilities doctrine have been dynamic effects and thus also the features particular to IP cases, as well as the evaluation of demand-side effects.
- The central focus has been on the supply-side and indispensability of the resource in terms of substitution.
- Even though the doctrines of essential function and specific subject-matter may seem formalistic, but yet indeterminate in practice, they brought the societal justification of each IP into play with the basic EU freedoms and competition law.
  - The old doctrines thus connected the definition of the limits of IP rights to their justification as part of the judicial decision-making process.

# Essential Facilities and IPRS

- The impossibility of competing by substitution is already part of the indispensability test as defined in existing essential facilities case law!
  - Cf. the "new model" proposed by *Drexl & Conde Gallego*
- *New product -criterion* as introduced in the *Magill*-case
  - Non-duplication (cf. *Heinemann*)
  - Limitation of technical development (*Microsoft*)
  - *Increased likelihood* of independent products being produced and services offered in the presence of licensing

# Current position

- The CFI accepted the Commission's premise in MS that the pre-existing case law had not established *numerus clausus* conditions for compulsory licensing
  - Also other considerations could lead to a refusal to license constituting an abuse of a dominant position.
- The *innovation incentives test* as modified by the CFI in the *Microsoft*-decision is problematic...
- Cf. with the Commission's Enforcement Priorities
  - Based on a balancing approach (efficiency defence)!

# Direction Forward?

- Effects of a refusal to license – infrastructure theory
  - How and to what extent infrastructure resources generate value for society?
  - Focus on demand-side, outputs capable of being produced, instead of indispensability of input.
  - Distinctions could and should be made among resources or inputs that are in themselves indispensable in the sense that there are no existing or potential substitutes for them
  - Specific reasons for an open access regime for inputs enabling the production of public and non-market goods

# Direction forward? (2)

- Away from formalistic 3-prong "tests"?
  - Effects-based yes, but what kind of effects count?
- Does competition law form a "blunt instrument"?
  - Cumbersome yes, but reactive & still flexible, sets background principles for the exercise of private informational power
  - Its role in regulating standardization & collecting societies
  - Commitment decisions – could be utilized more frequently
  - The source of the problem is often a combination of single-sided (proprietary) IP law & characteristics of new markets
- Could competition law teach IP law something?
  - Volvo, Magill, IMS-Health, Microsoft, AstraZeneca