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Competition vs. IP law tension refocused: Fair play on the IPR field

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Abstract

The thesis deals with a new phase in the ongoing discussion on the right balance between IP and competition law. This discussion has now moved to the New Economy era, which is characterized by a number of features—inter alia technological interdependence, network effects or high levels of industry dynamism—that complicate the analysis. Yet among these features, there is one of particular interest: **the recent rediscovery of IPRs as a strategic business tool**. Indeed, ICT companies are nowadays increasingly aware of the importance of their positioning in what we call the IPR field. The thesis reviews the evolution of the economic and competition law approach to IPRs up to the current state of the discussion in the context of the New Economy. This review reveals that, while many of the New Economy implications for the process of competition, in particular in relation to its approach to IPRs, have been correctly identified and addressed by competition authorities, a problem of fairness remains almost unaddressed. Namely, the rise of an IPR strategy has led to a process of patent accumulation that not only produces inefficiency, but is especially detrimental for small business. The last part of the thesis is then dedicated to the search of adequate solutions, which eventually may well lie in a more comprehensive level of interagency cooperation and, above all, in the recognition that a new type of competition obtains nowadays.

...E. The current economic framework: the ICT era

The ongoing debate about the balance between IP and competition law has moved to ICT era. This new economic era, even sometimes described as the Third Industrial 59 Cf. HILL/JONES (n. 39 above). As it can be seen, what is the useful point about licensing is that it is a way to share risks in the commercialization of an invention. Therefore, assignment agreements can also serve this function where some degree of control of the business— and therefore risk— transferred is withheld by the assignor.⁶⁰ **Revolution,61 is best portrayed in western developed economies 62 as the increased importance of knowledge, to the detriment of physical work.**

Production, embedded in processes since the Industrial Revolution, is now more and more automated and computerized. It is managed by information technologies, normally programmes designed to be implemented in machines. The variety of consumption goods has increased and entertainment goods, especially media, driven by communication technologies, are on the rise. In this context, what to a greater extent counts for economics agents is knowledge, in the form of information, innovation and design.

Within this framework, a number of features have been connected to the typical sectors of New Economy.⁶³ One of them is the presence of economies of scale. Other, more distinctive, are technological interdependence, network effects, market dynamism and a renewed interest in IPRs. Interdependence is a feature frequently present in the ICT

sector, where the increasing technological complexity of products and processes requires more and more specialization, but also a growing degree of coordination, cooperation and information exchange. Network effects, a particular manifestation of informational interdependence, easily arise in cases where community interaction is valued, such as in the communication industry: when users value a network by the number of other users that can interact within it, network effects are present. The result is that the attractiveness of a network heavily depends on the number of its users. This can pose a problem, because a network operator with more customers will per se be more attractive for consumers than an otherwise identical operator with fewer customers. Market dynamism relates to the move from classical competition in price and quality to competition in innovation: companies do not only primarily aim any longer at being the ones producing given items more efficiently, but at being the first ones to introduce new items or production processes into the market. Time-to-market is crucial.

Finally, a fifth element is the renewed strategic importance given to IPRs. In an economy based on knowledge, owing knowledge is the business key. And IPRs are

61 For example, the term is used as a title by J. GREENWOOD, *The Third Industrial Revolution: Technology, Productivity, and Income Inequality*, AEI Press (1997).

62 For alternative perspectives in developing economies, see e.g. Brazil's position in L.A. KOGAN, 'Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth,' 8 *International Journal of Economic Development* 1/2 (2006), 15-678, p. 19: "Brazil has assumed a leading role in helping to promote a new global paradigm that calls for the current high technology, knowledge and information-based digital era to become 'universally accessible,' 'open source,' and essentially 'free of charge' to developing countries— i.e., 'public international goods' " (for the sake of transparency, note that in general this author is highly sceptical of this position).

63 See M. MESSINA, 'Article 82 and the New Economy: need for Modernisation?,' 2 *Competition Law Review* 2 (2006), 73-98, pp. 74-75, and, more generally, OFFICE OF FAIR TRADING, *Innovation and Competition Policy*, part I, OFT 377 (2002), pp. 22-35. 61 33 conceived with that purpose: to give property rights over ideas. Thanks to their existence, companies can commercially exploit knowledge to a larger extent. However, recent times have witnessed an IP revolution: companies have become more aware of the strategic— both defensive and offensive— uses of IPRs 64 and embarked on their accumulation: an 'arms race has started.

(pp. 32-33)

...Bibliography

Legal and economic literature...

...L.A. Kogan, "Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth", 8 *International Journal of Economic Development* 1/2 (2006), 15-678.

(p. 108)