PART THREE:
THE IMPACT OF COMPETITION RULES ON INTELLECTUAL PROPERTY

Chapter 7: The Abuse of Intellectual Property Rights

Background

7-1 It has not always been self-evident that the rules on competition can or should impinge on the exercise of intellectual property rights.[1] As recently as the 1970s, it was argued in cases involving intellectual property rights in the European Community that, since (other things being equal) those rights were inviolable[2], the laws on competition could not touch them. In the original draft of the Community Patent Convention, there was even an Article specifically excluding the application of the competition provisions of the EC Treaty to Community patents; and there was at about the same time a move in the World Intellectual Property Organisation to seek international agreement on the principle that intellectual property rights should be exempt from competition and anti-trust laws. Neither the article of the Convention nor the move in the World Intellectual Property Organisation survived. Indeed, the rules on competition in the European Community widened in scope and severity, whether intellectual property rights were involved or not.

7-2 In at least four areas, abuses of intellectual property rights, in the context of competition cases, were identified:

- in the licensing of intellectual property rights in such a way as to restrict competition;,
- in the use of intellectual property rights to reinforce the abuse of a dominant position on the market,
- as an element in the formation of a cartel and
- as ancillary restrictions in cases involving concentrations of market power.

Licensing of Intellectual Property Rights

7-3 In principle, the licensing of intellectual property rights, far from restricting competition, extends the opportunities for traders to stimulate the market, by facilitating the wider dissemination of products and services protected by those rights. In practice, however, what may give a licensing agreement its restrictive character is one or more clauses of the agreement creating more or less essential restrictions if the agreement is to have any value. The licensee's exclusivity is an obvious case in point. Closely related to, and often overlapping, the question of exclusivity is the territorial scope of the agreement. From the point of view of those upholding the main objectives of the European Community, and in particular the removal of barriers to trade between Member States, territorial restrictions can be doubly objectionable: both as a potential restriction on competition and as a reinforcement of national barriers to inter-state trade.

7-4 Where licensing agreements contain provisions going beyond the essential requirements of the licensing of intellectual property, exposure to objections from the competition authorities is likely to be even greater. An obvious case in point here is any attempt by the licensor to fix the prices charged by the licensee. An otherwise unimpeachable agreement may be vitiated by the inclusion of a clause directly or indirectly having the effect of fixing prices. An equally obvious, though in practice less sweepingly objectionable, type of clause in a licensing agreement is the non-competition clause, designed to restrain the licensee from taking advantage of his position after the licence has expired. Despite its name, a non-competition clause may be quite acceptable, provided it is within the well-established rules: if it is not, it may vitiate the entire agreement.

7-5 Problems in the licensing of intellectual property rights arise mainly in connection with patents and know-how, as well as with the trade mark rights and copyrights subsidiary to the patent and know-how rights in the same agreement. Trade mark licensing itself has given rise to relatively few problems in recent years, largely because the rules are well settled and fairly easily applied. Copyright licensing, though potentially problematic, has not yet resulted in any major decisions by the Courts or Commission.

Intellectual Property Rights and the Abuse of a Dominant Position

7-6 By their very nature, intellectual property rights create a form of monopoly or, expressed in another way, a degree of economic exclusivity. However, neither monopoly as such nor the possession of exclusive rights constitutes an infringement of the rules on competition.[3] Instead, the rules prohibit the abuse of a dominant position. This term has been extensively discussed in the case law, as the result of which it can be said, first, that the existence of a monopoly right does not necessarily mean that the owner or licensee of that right has a dominant position on the market; and, second, that the exercise of that right does not necessarily mean that the dominant position, if it exists, is being abused. Much depends on the facts of the case. To show that there is an infringement of the rules, the accuser, who may be a competing trader or the Commission, has to prove the existence both of a dominant position and of a recognised form of abuse.

7-7 Nevertheless, there are cases in which intellectual property rights have served either to reinforce the existence of a dominant position on the market or to be the instrument of some form of abuse. These cases involve both patents and copyright, with trade marks playing a clearly subsidiary role.

Horizontal restrictions

7-8 Although there is little material in the European Community case law to justify this proposition, there can be no doubt that intellectual property rights may be used as a horizontal restriction[4] and thus contribute to the formation, existence or activities of a classic cartel. The creation of a patent pool may, intentionally or otherwise, serve this purpose. It may involve unilateral licensing or, more probably, cross-licensing; and the

fact that it is specifically excluded from the Commission's policy of automatically exempting patent licensing agreements by category from the general prohibition of restrictive agreements, suggests that the Commission allows for the possible risks presented by the creation of patent pools.

7-9 In theory, trade marks and copyright could, *mutatis mutandis*, also be used to bolster horizontal agreements restricting competition. So far, however, this has not led to any major case law.

Intellectual Property Rights as ancillary restrictions in concentration cases

7-10 When corporations are involved in acquisitions or mergers, or in the creation of joint ventures, there is an increasing tendency for the instruments of transfer to include specific provisions for the use, disposal or licensing of the respective corporations' intellectual property rights. As a rule, these provisions technically restrict competition; sometimes the restriction of competition is substantial and unacceptable. The broad test of whether the restrictions are acceptable or not is whether they are ancillary to the main transaction: that is, whether they are a necessary and reasonable part of it. If they are, they are referred to as "ancillary restraints (or restrictions)" and, subject to the Commission's guidelines, are accepted as such. If they are not ancillary to the main transaction, they are liable to infringe the rules on competition.

[1] This Chapter is only an outline of matters dealt with in more detail, and with appropriate references to the legislation and case law, in the companion volume on Competition Law in the European Union.
[2] See, for example, Article 295, EC Treaty, - with the usual caution about the scope of that Article.
[3] "Monopoly" in this context may be taken to include "oligopoly".
[4] That is, an agreement between traders at the same economic level, as distinct from a vertical agreement between traders at different levels of a manufacturing and supply chain.