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New Horizons for Competition Law in Asia

Competition Policy and IPRs: How Copyright, Patent and Trade Mark Laws Facilitate Competition in the Marketplace

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Burton Ong (王泽恩)
Associate Professor, National University of Singapore

The impact of Competition Law on IPRs and IP Ownership

- Behavioural Restrictions on IP owner – conduct which infringes statutory prohibitions
  - IP licensing arrangements (Horizontal and Vertical agreements), including Patent Pools.
  - Refusals to licence: compulsory licensing?
  - Bundling/Tying
  - IP protection and standard-setting?
- Common themes:
  - Disguised avenues for collusion
  - Monopolisation/Abuse of dominance ➔ Barriers to market entry/contestability; "exclusionary conduct"/market foreclosure

Role of the competition regulator?

- To investigate complaints made against IP owner (usually made by his competitors) and determine the legality of his conduct.
  - **When** should the competition regulator curtail an IP owner's exclusive rights?
  - How should it distinguish between the mere exercise of those rights from exclusionary abuses?
  - Should distinctions be made between i)refusals to grant access to IP-protected subject matter (information/facts – *Magill*) and ii) refusals to licence IP (interface technology/industry standards) (*IMS*, *Microsoft*)?

Factors to consider before regulatory intervention?

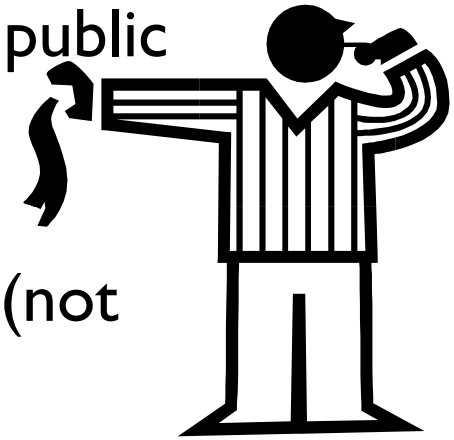
- Competition-related effects of non-intervention vs. intervention:
  - Market foreclosure effects? Leveraging? Dynamic efficiency / incentives to innovate?
- Other considerations?
  - Would regulatory intervention upset/disregard the statutory balance enacted in each IP regime?
  - *Are there alternative approaches to the competition problems arising from the IP owner's conduct – are they addressed, or can they be tackled, from within the IP regime itself?*

Policy goals and objectives of IP

- "Primary" policy goals and objectives:
  - To encourage innovation / production of intellectual creations
  - To reward deserving candidates for their valuable contributions
- "Secondary" policy consideration:
  - To **facilitate competition** between IP owners and rival third parties: creating "space" for competition to take place between the IP owner and third parties

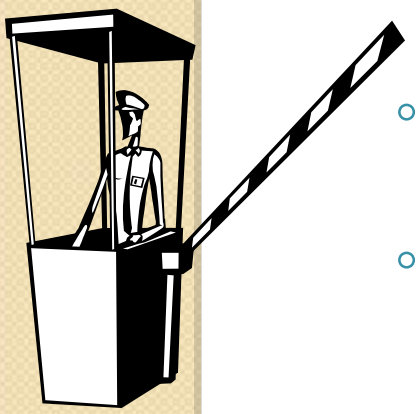
Facilitating competition

- Ensuring that rival third parties have opportunities to develop and market substitutes to IP-protected products:
  - *Copyright*: Ideas can be freely copied;
  - *Patents*: Basic scientific principles / factual discoveries can be utilised; (stringent legal standards to preserve what is in the public domain)
  - *Trade marks*: Descriptive / generic / functional marks may be freely used (not eligible for registration)



Facilitating competition

- Limiting the scope of the exclusive property rights enjoyed the IP owner (including special defences)
  - Parallel importation provisions – allowing genuine products put on the market outside the jurisdiction to enter the jurisdiction
  - *Copyright*: Fair dealing defence (for commercial research in developing subsitute products);
  - *Patents*: "Bolar" defence for generic pharmaceutical manufacturers;
  - *Trade marks*: Comparative advertising defences



Promoting competition *at the expense of* IP protection

- IP owners may be compelled, under the internal features of an IP regime, to grant access to third party licensees
  - *Copyright*: Copyright tribunal to determine "reasonable royalty rates" payable;
  - *Patents*: Compulsory licences, Prohibitions against tie-in/tie-up clauses (see Art 40 TRIPS)

When should a competition regulator intervene?

- Competition regulators sensitive to the existence of these pro-competition features might make more nuanced assessments about when to intervene.
  - Are there anti-competitive consequences arising from the conduct of the IP owner?
  - *Is it necessary for competition laws to be applied to the case? Or are there sufficient safeguards within the IP regime that facilitate competition?*

But is the competition regulator competent to address this question?)

Concluding Thoughts

- Barriers to market entry created by IP ownership are not absolute – subject to internal safeguards found within each IP regime which are able to facilitate competition most of the time.
- Competition law prohibitions should be applied only when these control mechanisms are *inadequate* to deal with the anti-competitive consequences of the IP owner's conduct. E.g.
  - When IP-protected subject matter becomes an industry standard, or is required to produce compatible interfacing products;
  - When IP owner's conduct allows him to leverage the market power he enjoys in the market for the IP-protected subject matter

Thank You

Burton Ong

lawongb@nus.edu.sg