Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)
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Where Competition and IP Meet!

Date: 1 March 2023
Venue: Matrix Chambers, Griffin Building, Gray's Inn, London WC1R 5LN
Speaker: Mr Justice Marcus Smith[1]

Christopher Stothers introduced Mr Justice Marcus Smith and noted how much both Competition law and Intellectual Property ("**IP**") law had developed in the last 20 years. He then invited Marcus Smith J to explore "**Where Competition and IP Meet!**"

Our speaker began by stating that it is right that Competition law and IP rights have an uneasy relationship. Competition law focuses on controlling monopolies, whereas IP rights create a monopoly.

Mr Justice Smith outlined the scope of the talk:

- Competition: Limited to Chapter 1 and Chapter 2 Competition Act 1998. The key trait of competition is that it constitutes a legal constraint over a right that otherwise lawfully exists.
    - For example, in Chapter 1 cases the abuse can be on the face of the documents, where a contract is anticompetitive.
    - Similarly, with Chapter 2 abuses, what is lawful for a non-dominant entity is unlawful for a dominant entity.
    - It is often said that this can be analogised to a speed limit – something that cannot be exceeded. However, there is a distinction. There is no *right* to drive above the speed limit. The right to contract exists for all.
- IP: Limited to patents. The key traits of patents are:
    - There is nothing inherently valuable about a patent and many are of marginal use.
    - There is no relationship between the cost of development and revenue. With tangible goods, the marginal costs of production are variable and fixed costs diminish with higher volumes of production. The development of something that results in a patent is unlikely to bare any relationship to the eventual price of it.
    - There are no cost restraints to licencing a patent. How widely a patent is licenced is not dependent on its cost, as these are only marginal when there is an additional person. There is, however, the dilution of the monopoly the more widely it is licenced.

Reframing the Issues

Firstly, we should not be distracted by a patent being a monopoly - as in many cases it will not be economically significant. An owner of the right does not become *ipso facto* dominant.

[1] All speakers were speaking in a purely personal capacity and whilst their views may be influenced by the cases they work on, no-one was representing the views of their clients or cases.

Secondly, it is important to define the market in relation to the economically useful invention, and factor in the wider context.

Thirdly, we need to take care with standard essential patents ("**SEPs"**). Many patents are essential, but what is important is not the patent itself but the standard.

Context Matters

IP rights are property rights. Legal ownership provides a bundle of rights, one of which is the right to exclude and exploit. Analytically the difference is tangibility, but this ought not the cause a material difference.

In some contexts the fact that there are rights associated with property betrays a political philosophy. If one were to image competition law in the Soviet Union, it would be concerned with a top down allocation of resources.

There are 4 tools that the law provides in order for markets to operate: (1) contract; (2) property; (3) persons and (4) insolvency. The first two are of obvious importance. These legal tools are necessary in western society, but there different tools needed in different economies. It would therefore be a mistake to assume that markets are uniform.

Markets

There are different features within a market that affect the manner in which they operate:

- Organisation: Some markets are extremely organised, for example, exchange markets. The terms of the contracts are regulated depending on the property sold. The only variables are the price and the quantity. There are then *ad hoc* markets, which are not organised and where contracts are individualised.

- Complexity: An example of a simple market is housing, where there are brokers exchanging real property. The insurance market can be considered more complex.[2]

Without understanding the complex ecosystem and services provided, one cannot understand the uneasy relationship between competition law and IP.

This complexity is further demonstrated in FRAND cases. The Supreme Court has been faced with reconciling the standard with control of the market.[3] In *Unwired Planet*, the court made clear that if parties cannot agree the FRAND terms, it is within the court's jurisdiction to determine those terms where there is an infringement of a SEP. This is a different tool to address market power outside a Chapter 1 or 2 prohibition. It is important that the richness of the market should be understood first and it is the standard setters that create the market power, not the patent itself.

An example of a case where, in all instances, the CMA, CAT and Court of Appeal found a Chapter 1 prohibition is in *Ping Europe Limited v Competition and Markets Authority.*[4] This case causes unease when explained to a lay person. Ping's unique selling point was a bespoke experience for customers, and it therefore discouraged internet sales. Had Ping been a unitary undertaking, it would have been

[2] See, for example, *BGL (Holdings) Limited & Others v Competition and Markets Authority* [2022] CAT 36.
[3] *Unwired Planet v Huawei and Conversant Wireless Licensing v Huawei & ZTE* [2020] UKSC 37 ("**Unwired Planet**").
[4] *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13

permitted to restrict online sales, but because it relied on distribution through contracts it breached Chapter 1. Where competition is about the control of market power, we ought to be able to say that a particular market structure, such as a vertically integrated undertaking rather than a unitary undertaking, would not change the outcome. This case is uneasy not because of the way the law was applied, but rather the law itself not understanding the market.

Conclusion

There is an apparent uneasy relationship between competition and IP rights. However, we should not be distracted by the monopoly nature of IP rights. All property rights are exclusionary, and there is no market without property. The exploitation of exclusionary rights should be seen in their true context taking into account the complexity of the market. It should not be forgotten that in the absence of competition law, those exclusionary rights are lawfully exercised.