Viewpoint

INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY

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Intellectual property rights create monopolies, while a competition law battles monopolies. How do the two policies interact? Is there a balance? There is, as explained in this paper.

Introduction

Intellectual Property Rights (IPR), very broadly, are legal rights granted to creators and owners of works that are results of human intellectual creativity. These can be in the industrial, scientific, literary and artistic domains. They give their owners the right to exclude others from access to or the use of protected subject matter for a limited period of time. This also gives them the subsequent right to license others to exploit the innovation when they themselves are unable to engage in large-scale commercial exploitation or for other reasons.

IPRs include:

(i) copyrights;
(ii) patents;
(iii) trademarks;
(iv) industrial designs; and
(v) trade secrets.

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), sets down minimum standards for many forms of intellectual property (IP) regulation.

Competition policy involves putting in place a set of policies that promotes competition in local and national markets, as well as legislation (competition law), judicial decisions and regulations specifically aimed at preventing anti-competitive business practices and unnecessary government interventions, avoiding concentration and abuse of market power.

Competition law prevents artificial entry barriers and aims to remove monopolisation of the production processes by encouraging entrance into industries by new players. The objectives of competition policy include the maximisation of consumer and producer welfare, as well as maximising efficiency in production. Well designed and effective competition laws promote the creation of an enabling business environment, which improves static and dynamic efficiencies and leads to efficient resource allocation and in which the abuse of market power is prevented mainly through competition.

Are IPRs and Competition policy objectives conflicting?

IPRs and competition are normally regarded as areas with conflicting objectives. The reason is that IPRs, by designating boundaries within which competitors may exercise legal exclusivity (monopolies) over their innovation, they appear to be against the principles of static market access and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions.

This legal monopoly may, depending on the unavailability of substitutes in the relevant market, lead to market power and even monopoly as defined under competition law.

However, ensuring the exclusion of rival firms from the exploitation of protected technologies and derived products and processes, do not necessarily bestow their holders with market power given that it is not dominance per se that is prohibited in terms of competition laws, but the abuse of such dominance.

There are rare cases where the protected technology can be totally divorced from the process that has been in existence, such that there often exist other technologies, which can be considered potential substitutes to confer effective constraints to the potential monopoly-type conduct of IPR holders.

Rather than conflicting, there are areas where IPRs and competition complement each other. By creating and protecting the right of innovators to exclude others from using their ideas or forms of expression, IPRs provide economic agents with the incentives for technological innovation and/or new forms of artistic expression. This will create more inputs for competition on the future market, as well as promote dynamic efficiency, which is characterised by increasing quality and diversity of

goods, which is also the objective of competition policy. Moreover, IPRs may create a race for innovation, as firms compete to exploit first-mover advantages so as to gain IPR protection. Therefore, both IPRs and competition policy are necessary to promote innovation and ensure a competitive exploitation thereof. It is necessary therefore to ensure their co-existence.

Implications for regulatory authorities

Firstly, regulatory authorities need to ensure that IPRs are not abused. In the TRIPs agreement, the general considerations in paragraph 1 of the Preamble, read with Article 8(2), allows Members to take appropriate measures consistent with the TRIPs to prevent the abuse of intellectual property rights by rights holders.

There are generally two approaches that have been adopted to prevent IPR abuse: compulsory licensing (an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state) and parallel imports (goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere).

Article 31 of TRIPs provides for the grant of compulsory licenses, under a variety of situations, such as:

- the interest of public health;
- national emergencies;
- nil or inadequate exploitation of the patent in the country;
- anti-competitive practices by the patentees or their assignees; and
- overall national interest.

Secondly, there are many implications regarding the interface between competition policy and IPR that needs to be taken heed of at all times. Competition authorities should determine each case involving IPRs on a carefully applied rule-of-reason approach. Although abuse of dominance laws can be applied to IPRs and appropriate remedies taken, such actions bear a high potential cost in terms of reducing incentives to innovate and should be used sparingly.

Tying and full-line forcing based on IPR is another area calling for sensitive, rule of reason application of competition laws as competition authorities should not just stop patent holders from linking the sale of patented products to the purchase of goods, which are not part of the patent, or whose patent protection had lapsed, as some of the invented technologies may not be compatible, or bring full benefits unless they are used with specific standards present in the tied product.

Competition agencies, concerned about encouraging greater horizontal competition, should also not be too quick to take action against grant-backs (an arrangement in which a licensee agrees to extend to the licensor the right to use certain of the licensee's IPR, most often in the form of improvements to the licensed technology).

Grant-backs can have pro-competitive effects, especially if they are non-exclusive, as the licensee and the licensor can share risk and the licensor may be rewarded for making possible further innovation based on or informed by the licensed technology. Normal competition law, applied under a rule of reason standard, should be carried out to distinguish between "pro" and "anti" competitive cases where the requisite market power is conferred through IPR.

Conclusion

In conclusion, while competition authorities need to ensure the co-existence of competition policy and intellectual property laws, they need not overlook the fact that the objectives of the two policies, though complementary, can also be conflicting, in which case there could be harm to society in terms of reduced welfare.

Although putting exemption clauses in competition laws to cater for IPRs is a noble idea, the exemption should ensure that it leaves room for competition authorities to carefully implement a rule of reason approach, on a case by case basis, to ensure that the innovation objective, which is the basis for IPRs, does not result in practices that are in violation to the competition laws.

It will also be equally important that in the drafting of the IPRs in countries with competition laws, some references also be made to corresponding competition provisions to ensure co-existence.