Intellectual Property Law Practitioners Association (IPLPA)
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Intellectual property law and competition law

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INTRODUCTION

- Is there inevitably a conflict between intellectual property law and competition law?
- Cf the European Commission's *Technology Transfer Guidelines*, 2004, paras 7-8: note the stress placed on the importance of encouraging innovation etc.
- Note the European Commission's decision in the case of *Microsoft* (24 March 2004), and the Commission's concern to protect, for example, Sun Microsystem's incentive to innovate as well as Microsoft's

COMPETITION LAW AND PROPERTY OWNERSHIP UNDER THE EC TREATY

- Article 81 EC prohibits anti-competitive agreements (cf section 3 Indian Competition Act 2002)
- Article 82 EC prohibits the abuse of a dominant position (cf section 4 Indian Act)
- What is the significance of a firm's intellectual property rights when considering whether it has entered into an agreement that restricts competition or whether it has abused a dominant position?
- Article 295 EC: 'nothing in this Treaty shall affect the system of property ownership'
- Does this mean that all matters relating to intellectual property are outside the scope of EC competition law? No: see eg *Consten and Grundig v Commission* (below)
- See also Article 8(2) TRIPS:-

> 'Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology'.

EARLY CASE-LAW ON INTELLECTUAL RIGHTS AND COMPETITION LAW UNDER EC LAW

- *Consten and Grundig v Commission*: the ECJ drew a distinction between the *existence* of intellectual property rights, which could not be challenged, and their improper *exercise* (cf section 3(5) Indian Act)
- *Parke Davies v Probel*: the ECJ held that the existence of intellectual property rights did not in itself mean that a firm was dominant, although it was relevant to any assessment of dominance; the ECJ also held that a dominant firm with intellectual property rights might be guilty of abusing its dominant position, for example by charging excessive prices

- Cf also *Frankfurt Flughaven*: the European Commission held that a refusal to grant access to *land* (in this case Frankfurt Airport) could be an abuse of a dominant position. The same distinction, between existence and exercise, is made in this decision

ARTICLE 82 AND REFUSALS TO SUPPLY – GENERAL

- *Commercial Solvents v Commission*: the ECJ held that it could be an abuse of a dominant position for a dominant firm to refuse to supply an input to an existing downstream customer
- So, could this doctrine apply to a refusal to supply a licence of an intellectual property right?

ARTICLE 82 AND LICENCES OF INTELLECTUAL PROPERTY

- *Volvo v Erik Veng* and *Renault*: the ECJ held, on the facts of those cases, that there was no duty to provide licences to produce spare parts for motor cars, but that it could be an abuse to charge excessive prices for the spare parts or to refuse to supply them at all
- *Magill v Commission*: the ECJ agreed that it was an abuse of a dominant position for TV stations to refuse to supply a licence of copyright to produce *a new product* (a composite listing of all television programmes)(at the time TV stations each published a listings magazine for their own programmes, but there was no composite listings magazine)
- Note the *Magill* requirements – indispensability, new product, consumer demand, lack of objective justification
- Note the ECJ's *IMS Health* judgment – paragraph 38: the ECJ held that it was *sufficient*, for a finding of an abuse, that the *Magill* criteria were satisfied – the ECJ did not say that it was *necessary* to satisfy *Magill*, thus implying that liability for abuse could arise in other circumstances
- Query: to what extent was the *Magill* case influenced by the 'low level' of the intellectual property concerned (copyright in a listing of TV programmes): would the ECJ have applied the same reasoning, eg, to patented technology? This has never happened

THE COMMISSION'S DECISION IN MICROSOFT

- See paragraphs 546-559 of the Commission's decision in *Microsoft*: it was an abuse to refuse to supply interoperability information concerning Microsoft's operating software to other software producers if this could exclude them from the market for server software
- Note in particular paragraph 555 of the decision – the Commission says that there is no exhaustive list of the 'exceptional circumstances' in which there could be an abusive refusal to licence
- The decision is on appeal before the CFI: the oral hearing was held in Luxembourg a couple of weeks ago
- See also the Commission's *Discussion Paper on Exclusionary Abuses* (December 2005) on abusive refusals to licence

ARTICLE 82 AND THE ABUSE OF REGULATORY PROCESSES

- See the Commission's decision *AstraZeneca* on abuse of regulatory processes leading to the issuance of supplementary protection certificates: a fine of EURO 60 million was imposed

ARTICLE 81 AND INTELLECTUAL PROPERTY RIGHTS

- Is it possible for an agreement to licence intellectual property rights to infringe Article 81?
- Note the early case-law on Article 81(1) and the possibility that licences of intellectual property rights might lead to territorial exclusivity:-

    - *Consten and Grundig v Commission*
    - *Nungesser v Commission*
    - *Coditel v Ciné vog Films*
    - *Erauw-Jacquery v La Hesbignonne*

    - Note throughout these cases the influence of the 'single market imperative', that is to say the creation of an internal market throughout the EU with no territorial frontiers; but note also that it does sometimes give way to other considerations in special cases: *Coditel*, *Erauw Jacquery*

- The technology transfer reform: the Commission has adopted a block exemption which provides a 'safe haven' for certain technology transfer agreements: see

    - Regulation 772/2004 on technology transfer agreements ('TTBER')
    - The Commission's *TTBR Guidelines*

INTELLECTUAL PROPERTY RIGHTS IN EU MERGER CONTROL

- Intellectual property remedies: see the Commission's *Remedies Notice*, paragraphs 28-29
- *SEB/Moulinex* –licence of trade names

- Note the significance of *technology* in some markets, for example:-

  - *DSM/Roche Vitamins* – transfer and licence of technology
  - *AstraZeneca/Novartis* – licensing of various ip rights
  - *Areva/Urenco* – Commission satisfied in the end that there was no technology market issue in relation to enriched uranium

- *GE/Instrumentarium* – remedy ensuring interoperability of medical equipment
- *Newscorp/Telepiù* – control over licensing of audio-visual content