Treatment of Intellectual Property Rights in the Smaller Developing Countries: Tips for Second Generation Competition Legislation

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Proposal for Introduction of “Know-How” in Second Generation Developing Country Competition Legislation

- Most developing countries have gone through a teething phase:
  - Understand the rules of competition

- Understand game theory: **taking small, open, economies as they are and developing appropriate enforcement and policy strategies** to build stronger/more competitive market dynamics in **countries of 13 million or less...even in countries of just over ¼ million**

- Competition law applies/is relevant to all economies: present-day objective in the developing world is to **tailor the application of the law to the micro-economic setting** and the business/market reality of the developing country.

- IPRs give legal right to engage in conduct that would otherwise be anticompetitive/absent existence of IPR. **Inherent conflict with the economic/legal principles of competition law: exercise of know-how in developing world leads to the same conflict.** Alternatively: Established Multinationals Can Use Economic Strength to Coerce Owner of Know-How to enter anticompetitive licensing agreements.
In the Developing World, Competition Law’s Ultimate Objective is to Elevate Consumer Welfare which Reduces the Cost of Living and Elevates Standard of Living

- Possible If: Markets Are Contestable
- Possible if there is Choice in Product (Good or Service)
- Possible if there is Access to Product Input
- Possible if there is Access to Ultimate Product

The recognition of IPR and IPR Laws extends to the developing world

- Grant of Exclusivity/Licensing terms can extend to use, input, output, next generation technology. Grant of IPR leads to Generation of Profits, Recoupment of R&D Costs
- …BUT the presence of IPR Laws is not necessarily what is fostering innovation in developing countries

IPR and Developing World:

- Grant of IPR can mean suppression of rivalry, increased prices, depressed output, no/low choice and quality and decreased access—not recognising “know-how” and regulating it means “de facto” IPR is unregulated in developing countries.
The Value of Developing Country “Know-How”

- Competition authorities can choose to recognise that there is significant use of secret yet identifiable farming, plant-breeding, agricultural, medical knowledge and processes being put to use....Secret methods when practised in a district or region may be also be the subject of contractual conditions and restrictions among businesses:
  - Plant-Breeding: Ethno-Botany and the creation of unique and identifiable local fruits, plants in Belize and Guatemala
  - Agri-Farming: Local innovative methods to protect farm animals from diseases like in Uruguay
  - Herbal Medicine/Naturopathic Remedies: The development of naturopathic herbal remedies for skin diseases in St. Lucia
  - Fisheries: Development of Agri-fishing tools and methods for catching flying fish in Trinidad and Barbados
Existing Legislation on “Know-How” IPRs in the Developing World?

**Intellectual Property Legislation:**

- “In Kenya, … the patent office, which is among the most active of patent offices on the African continent, has issued a total of 589 patents since the office opened in 1991. Compare that with the 5,500 patents issued by the US patent office in a single week in July this year… Of the 50 or so patents granted in Kenya each year, between zero and five (on average) are granted to local Kenyan organisations or individuals. […] Despite the benefits of WTO membership and of safeguarding one’s intellectual property, the fact is that on balance, the western patent model is not yet helpful to most Kenyan – or African – entrepreneurs” Isaac Rutenberg, Centre for Intellectual Property and Information Technology Law, October 2013

- Typically, Trade Mark Act, Example Cap 26:04, section 6 of Zimbabwe states, for example: “No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark...”

- International sphere/agreements do not pre-empt national legislatures from exercising right to develop policies/laws/ regulatory interventions to ensure that exercise of an IPR does not lead to closed or uncontestable markets. Presently unregistered designs are protected under Tort Law and Contract Law.

- TRIPS Article 40: Member States can pass laws that prevent the exercise of IPRs in a manner that constitutes a restraint of trade or adverse effect on competition. Therefore countries should develop appropriate competition law framework.

- Competition Regulation of IPR, Example Guyana, sections 24(2)(b) and 24(3): It shall not be an abuse of dominance to enforce an IPR unless the exercise of the right “unreasonably lessens” competition or “impedes” the transfer/dissemination of technology. IPR described as “copyright, patent, registered design or trade mark”.

- No protection of unregistered know-how IPRs identified in competition law in developing world legislation presently.
How “Know-How” Would be Applied in the Law

- **Definition:** Include a definition of know-how in the legislation and use the term anywhere in the legislation where IPRs are regulated.

- **Example of Definition for Competition Legislation:** “know-how” means information that is kept confidential in order to preserve competitive gains and shall include unregistered designs, business processes, trade and business secrets, and other practical and non-patented information, identifiable business processes, or other secret, significant, useful and practical methods;”
How Know-How Would be Applied in the Law

- **Application:** Register them at the IPR Authority
  - Since the term may be introduced under the new/amended competition law and not under IPR law, must have coordination framework/MOU between Patent Office and Competition Authority on the application of the competition law to “know-how”
  - Can create subsidiary regulation further defining procedures, e.g. registration

- **Give them the same protection as IPRs**
  - Example, the individual farmer or plant-bred or medical practitioner, for example, may be the inventor or owner of the technical “know-how” but operates at the mercy of certain big corporations that impose on them long-term contracts and other oppressive and highly restrictive intra-technology restriction or pay for delay tactics

- **Apply the rules on competition to them:** Know-how would be assessed in the same manner as other IPRs. The competition authority would therefore examine arrangements which restrict the sale, transfer or licensing of know-how in a manner that restricts competition in a market.
  - Example Of Legislative Provision: It shall not be an abuse of dominance to enforce an IPR or “Know-How” unless the exercise of the right “unreasonably lessens” competition or “impedes” the transfer/dissemination of technology.
Tips for Second Generation Competition Act Treatment of IPRs

- Define IPRs also as “Know-How” in the Legislation
- Develop Priority Policies for Dealing with IPR/Competition Law Conflict Typically Seen in the Particular Developing Country
- Make Arrangements for Concurrent Jurisdiction and Coordination (IP Office/Registration of Know-How, Competition Authority, Consumer Protection Authority, Standards Bureau, Customs, Food, Drug and Agricultural Bodies)
- Use Guidelines to Explain Competition Authority’s Stance on IPRs
Questions/Comments
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