

The convergence between competition law and intellectual property in Peru

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INSTITUTO NACIONAL
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COMPETENCIA Y DE LA
PROTECCIÓN DE LA
PROPIEDAD INTELECTUAL



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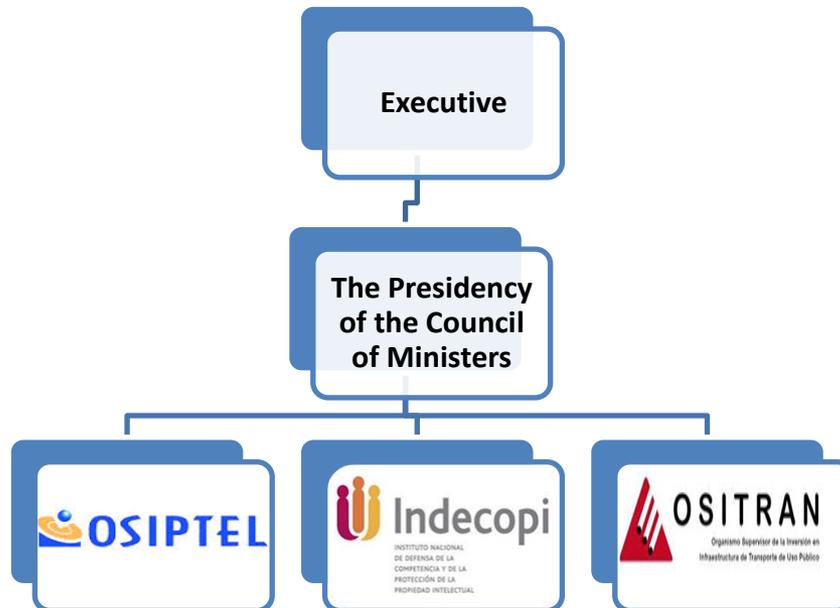
Indecopi

Perú

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Indecopi

The National Institute for the Defense of Competition and Protection of Intellectual Property Rights (INDECOPI) is a specialized public agency with legal capacity in domestic public law. Consequently, it has functional, technical, economic, budgetary and administrative autonomy and it belongs to the Presidency of the Council of Ministers.



Indecopi

INDECOPI has, among other functions, the important function to be the National Competition Agency and at the same time, the Intellectual Property Authority

National
Competition
Agency



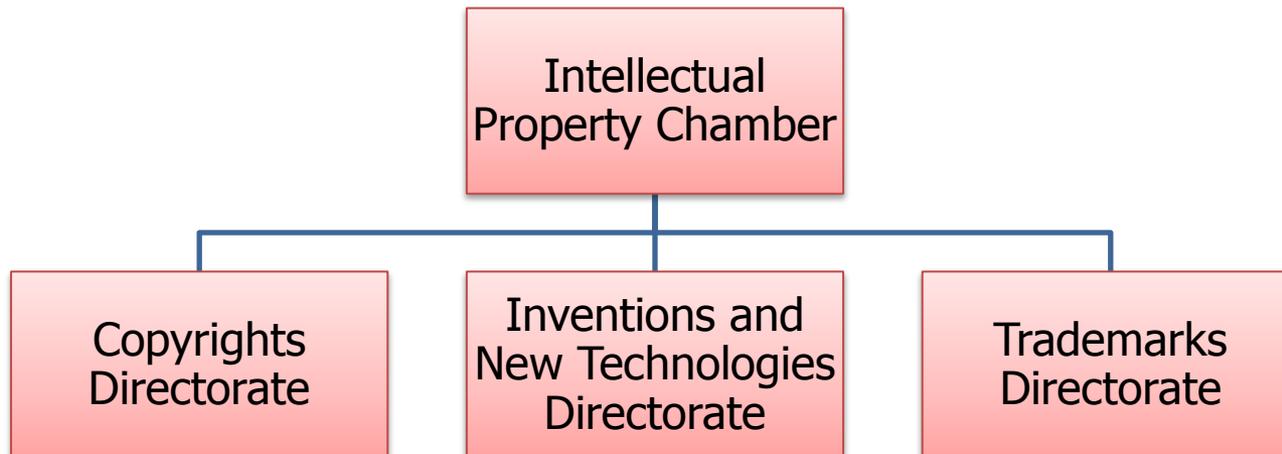
INDECOPI

Instituto Nacional de
Defensa de la Competencia
y de la Protección Intelectual

Intellectual
Property
Authority



Structure of Intellectual Property



Structure of Competition

Specialized Chamber in
Defense of Competition



Defense of Free
Competition Commission



Is there convergence between intellectual property and competition law?

- We believe **YES** there is a convergence between Competition Law and Intellectual Property.
- This interface has attracted more attention in recent years because intellectual property rights have acquired importance in the knowledge economy and the legal protection of competition as a mechanism for allocating and innovation in markets.
- In the case of developing countries like Peru, are more evident problems in the interplay of both areas. Whereas the need for development and promotion of innovation may be associated with the idea that technology -subject to the protection of Intellectual Property – pass as soon as possible to the public domain.



Is there convergence between intellectual property and competition law?

- ❑ In response, the natural incentive for holders of Intellectual Property Rights could be delaying the transfer to the public domain by using anticompetitive practices.



Is there convergence between intellectual property and competition law?

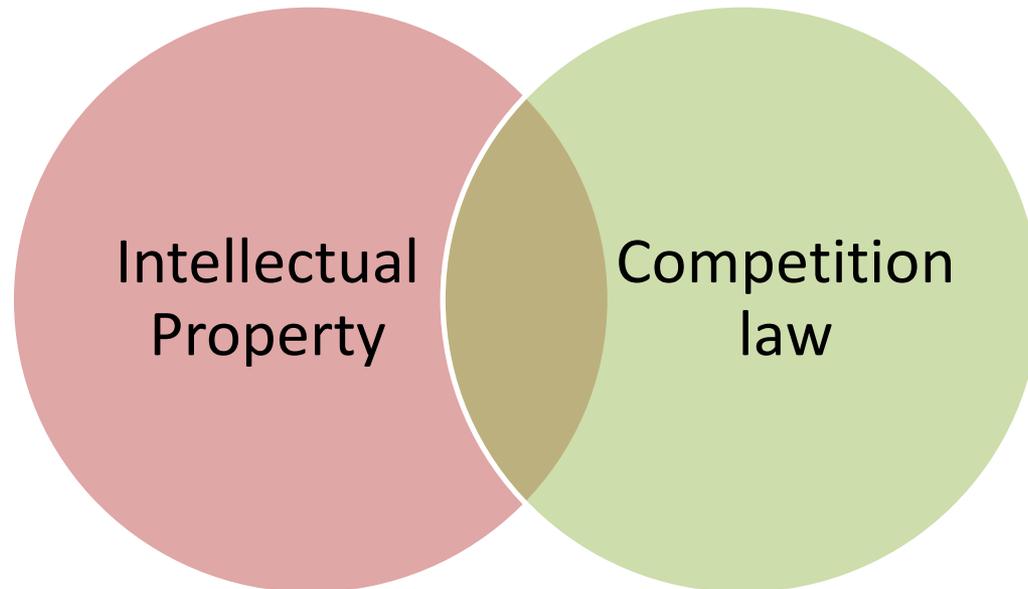
Opinion of INDECOPI

- Competition law and intellectual property share the common goal of promoting innovation and enhance consumer welfare due to the inclusion of technical progress as an essential process of competition
- This has led us to a new vision of the relationship between the two disciplines, noting that although there may be some apparent conflict in the short term, in the long term objectives are in harmony.



Is there convergence between intellectual property and competition law?

Therefore it is necessary to study the mechanism of interaction between these two areas and how to resolve potential conflicts between them if their appear



Which are the areas of convergence between competition law and intellectual property?

First Possibility

Competition cases involving intellectual property rights: are those in which a company has dominant position because it is the holder of an intellectual property right (for example a patent) and refuses to grant a license to its competitors, making use of its right but probably affecting the interest of others because its behavior distorts competition.



Which are the areas of convergence between competition law and intellectual property?

Despite, the Peruvian Competition Law establishes the power of INDECOPI to sanction this type of anticompetitive practice, unfortunately to date there has not been one case with these features, which has limited study this topic with depth from the practical point of view.

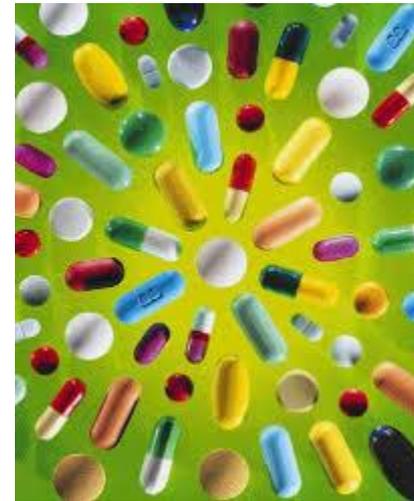
However, it is important to note that there have been some cases that involved issues regarding intellectual property rights, such as the case *Telecable Vs Telefónica* and the case *Ambev Vs. Backus* and others.



Which are the areas of convergence between competition law and intellectual property?

Second Possibility

Compulsory Licensing: is the area in which the link between patents and competition is more evident. It is the ability to use and exploit a patented product without authorization of the patent holder, in particular cases, properly defined by law.



Which are the areas of convergence between competition law and intellectual property?

Grant a compulsory license to the finding of an abusive refusal to license, is not intended to reduce the protection afforded to patent holder. The authority shall intervene only when demonstrating that the refusal to license harms consumer welfare in the short and long term. In that sense, **this is an exceptional measure and therefore must be properly substantiated.**



Compulsory licenses

Compulsory Licenses

- Peru is member of the CAN that is a community of countries (Bolivia, Colombia, Ecuador and Peru) united voluntarily to achieve development. Therefore, we applies Decision 486 of the CAN which provides the cases where a Compulsory License could be granted, mainly:
 - i. Lack of use of the patent
 - ii. Public necessity, urgency or national emergency.
 - iii. Abuse of dominant position
- The Inventions and New Technologies Directorate of INDECOPI (DIN) is the office in charge of granting Compulsory Licenses.
- If DIN will grant a mandatory license, it must determine the amount and conditions of economics compensations that will be received by the patent holder.



Compulsory Licenses

- Decision 486 specifically states in which cases its member countries can grant compulsory licenses and also states what are the conditions.
- However, Decision 486 does not develop the concepts of public necessity, urgency or national emergency that we consider fundamental to define when to grant Compulsory Licenses and thereby strengthen its exceptional character.
- Additionally, it is necessary that authorities will be provided with a proper procedure that provides clarity and predictability to economic agents involved.



Compulsory Licenses

Whereas it is an exceptional measure, the following topics should be evaluated:

- ❖ Incentives to innovate may decrease
- ❖ Negative impairs short-and long-term consumer welfare
- ❖ The alleged abuse of dominant position has been performed through a right of ownership or making use of the freedom of contract



1. Compulsory Licenses: Lack of use of the patent

Due to lack of use for more than three years of granted a patent or four years since its application was submitted.

The Compulsory License will be granted only if the applicant has previously attempted to obtain a contractual license from the patent holder.



2. Compulsory Licenses: public necessity, urgency or national emergency

Compulsory licenses can be requested when the Peruvian Government needs to use a patented invention to address a situation of public interest, emergency or national security.

In these cases, in addition to the amount and terms of financial compensation, DIN must establish the scope of the license (duration and object).

This type of mandatory licenses will be valid only for the duration of the situation that originated the request of the government and it does not eliminate the exploitation right of the patent holder.



3. Compulsory Licenses: abuse of dominant position

DIN can grant a mandatory license in presence of an anticompetitive conducts, particularly, in case of abuse of dominant position, as determined by the antitrust authority, the Defense of Free Competition Commission of INDECOPI.

Thirds parties that are granted the compulsory license are required to pay to the owner a compensation, the amount of the compensation must take into account the need to correct the anti-competitive practice.

This type of licenses can be granted by DIN with or without a request from a third party.



Proposal of INDECOPI

A) Developing Public Policy for the interaction between competition law and intellectual property

INDECOPI has the advantage to be the competition agency and the national authority of intellectual property. That allows to see with more clearly the points of convergence between both areas.



Proposal of INDECOPI

Our position is that both areas share common goals because on one hand, the patent system is very important for the country's development as it fosters the development of technology and encourages competitors to invest in research and in the other there is a duty of the competition agency to monitor the holders of these rights does not undertake anticompetitive practices in the market.

In this regard, an important point that must be internalized, is that although there may be convergence points, both areas have the same challenge that **is the increased innovation, competition and consumer welfare.**



Proposal of INDECOPI

In this scenario the exchange of knowledge and experiences will serve as important inputs for the development of public policies that establish the roadmap to be followed by the authorities and harmonize the relationship between intellectual property rights and competition.



Proposal of INDECOPI

B) Develop guidelines to define the concept of public necessity, urgency or national emergency and a procedure for granting a Compulsory License.

For a developing country like Peru is very important to develop guidelines defining the scope of the concepts of public necessity, urgency or national emergency. And the procedure to be followed by the authority to grant a Compulsory License.

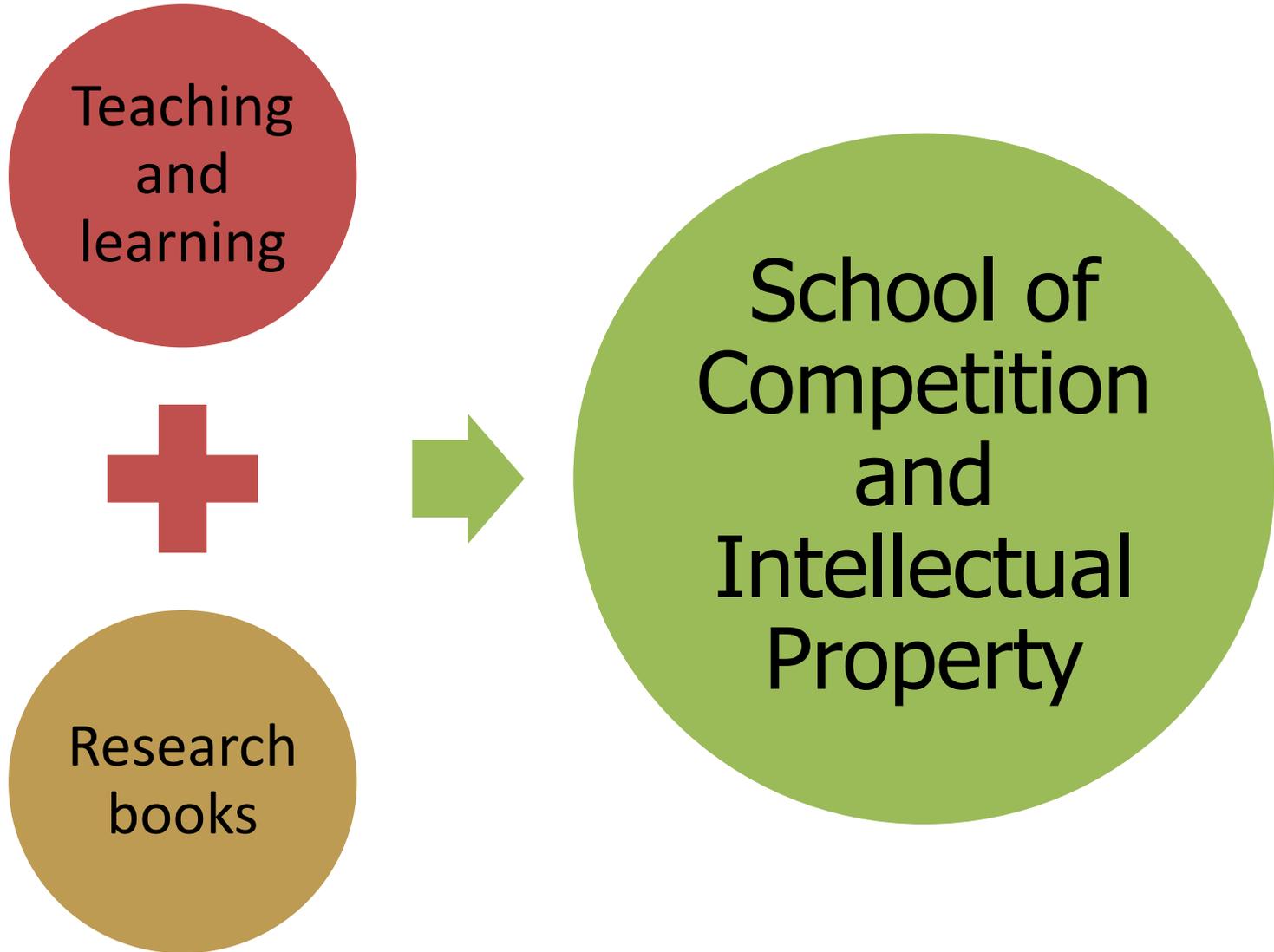


Proposal of INDECOPI

We don't know any previous international experience defining the concepts of public necessity, urgency or national emergency or about the procedure to follow, although there are specific cases in other countries of South America where Compulsory Licenses have been granted.



Important tool: School of Indecopi



Conclusions



- In Peru INDECOPI is in charge of the Defense of Free Competition and also Intellectual Property Protection, noting that there is a convergence where intellectual property rights might collide with competition.
- Therefore, we believe that while there is an interface between the Defense of Free Competition and Intellectual Property Protection, this does not mean that there is a collision between the two areas. On the contrary, should be regarded as exceptional situations, as the exclusive rights encourage innovation and the generation of technology to benefit society.
- In that sense, is important to note that the patent system also encourages the development of incremental technology from technical information protected, what motivates competitors to improve or exceed technology, researching about the technical stuff and patented thereby generating an incentive for competition.



Conclusions

- In this scenario it is important that these events serve as a platform to exchange knowledge and experiences in order to develop public policies to harmonize the relationship between Intellectual Property Rights and the Protection of Free Competition.
- Also, for a developing country like Peru is of great importance to establish guidelines and procedures for the granting of Compulsory Licenses for public necessity, urgency or national emergency, taking into account that their grant is an exceptional flexibility.
- To achieve these purposes, INDECOPI has a very important tool: the School of Competition and Intellectual Property, where we create spaces for reflection and discussion across scholars events and publications.



Conclusions

- Therefore, our proposal is to work in developing guidelines and / or clear procedural for defining specifically in which case we have a public necessity, urgency or national emergency and in what way can exercise these flexibilities in practice, taking into account that there is not history of guidelines that define theses topics.



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