

## ***NOTES AND COMMENTS***

### **THE ECONOMIC AND JURISPRUDENTIAL UNDERPINNINGS OF THE INTERFACE BETWEEN INTELLECTUAL PROPERTY AND ANTITRUST: DRIFTING CLOSER OR FURTHER APART?**

#### **Abstract**

Both intellectual property laws and antitrust laws regulate the use of exclusive rights provided to the inventor in their own ways. In doing so, the objectives that these two disciplines have in common are facilitation of innovation and enhancement of consumer utility. This paper will look into the manner in which these two branches of law interact with each other. Such an exercise is primarily based on jurisprudential underpinnings and takes help from the economic foundations on which the basic tenets of intellectual property and antitrust laws are built. The paper also attempts to examine whether the new alternatives, so-called 'fringe' economic theories, look upon such interface of antitrust and intellectual property more favourably as compared to their traditional counterparts. An informed opinion based on prevailing regulations is advanced regarding the ever-growing affinity between these two disciplines, especially insofar as technology and related innovative growth are concerned. In this context, reference is made to the related market, gaining dominance therein, using and abusing such dominance and available remedies for such misfeasance. The paper concludes by indicating that in their modern forms, antitrust and intellectual property laws often end up associating with each other closely in course of the efforts of the policymakers, legislators, regulators and the judiciary to foster economic development and market growth in ways more than one.

#### **I Introduction**

THE ESSENCE of intellectual property protection is to attain a delicate balance. On the one hand, exclusive rights are accorded to the innovator as a form of motivation which cannot be exercised in an absolute form by the innovator. On the other hand, exceptions are built into those rights to facilitate further development and improvement of such inventions by subsequent inventors. Certain restrictions are also applied to the usage of these exclusive rights by the innovator who enjoys such protection and the ambit of such restrictions is governed by intellectual property laws, as well as antitrust laws.

These two streams of law do share a common ground in their objectives to facilitate innovation and increase the utility of consumers. While intellectual

property laws incentivise creation by way of commercialisation and exploitation through enforceable property rights, antitrust rules seek to attain their goals by outlawing specific actions that can have an adverse impact on market competition. In course of this paper, the author has sought to explore the nature of the interface between these two disciplines, especially from a jurisprudential perspective and one embedded in their respective underlying economic foundations.

## **II The law & economics aspects of intellectual property and antitrust: Transcending orthodoxy**

Behavioural studies of market players, whether individuals or organisations, can be of considerable significance when one is seeking to engage in policy prescriptions influencing the market. Economics is a discipline intrinsic to such studies and is, therefore, often relied upon to ensure that the macro-level policies properly connect with micro-level effective implementation. Scholars and practitioners, who place such reliance on economics, generally tend to prefer the more established and accepted fundamental economic theories. This is chiefly owing to the latter's enhanced level of acceptance among the judiciary and policy makers. From the perspective of intellectual property, these include the instrumental or utilitarian approach as advocated by the Chicago school of thought,<sup>1</sup> the cost-benefit analysis of neo-classical economics<sup>2</sup> and the transactional cost analysis that stems from the *Coase Theorem*.<sup>3</sup> From the standpoint of antitrust laws, on the other hand, the basic underpinnings of economic theories lie in models involving industrial reorganisation, which in turn owe their origin to usage of neo-classical

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1 See generally, R.A. Posner & W.M. Landes, *The Economic Structure of Intellectual Property Law* (Harvard University Press, 2003).

2 Such analysis includes, *inter alia*, the restriction on resource availability, the characterization of economic agents as individuals concerned with self-interest and possessing high level of rationality, exogenous preferences, adequate information and similar motivations, economic welfare being the sole human good, human beings being solely concerned with rational maximization of welfare, the value of anything being entirely dependent on the agent's perception of it and optimal choice for economic agents being decided from a series of alternative options. For further details on neo-classical theory of economics see, E. Screpanti & S. Zamagni, *An Outline of the History of Economic Thought* 165-167 (Oxford University Press, 2005).

3 As per this theorem, reduction of transaction costs, along with grant of property rights, facilitates an agent to maximize allocative efficiency and to reach a pareto-optimal situation by allocating resources to those by whom they would be valued highest. For further details see generally, R.H. Coase, "The Problem of Social Cost" 3 *Journal of Law & Economics* 1 (1960).

economics to appreciate the imperfection of several forms of realities presented by the market.<sup>4</sup>

The neo-classical school of thought indicates failure of the market at two levels insofar as an intellectual good is concerned, as explained by scholars like Ordovery.<sup>5</sup> First, an inventor cannot exploit the entirety of the profits generated out of the invention in which he has invested. Therefore, a competitive market cannot incentivize such an inventor adequately to generate a quantity of invention that would be socially optimal. At the same time, in most cases of the forms of good thus created, consumption by one individual does not reduce the value of the good for another individual. Therefore, the market cannot provide the creator with the knowledge to allocate the creation to those for whom it would have the maximum utility.

In order to resolve these failures, the traditional intellectual property economics suggests converting intellectual creation into specific property rights that would not only allow the inventor to recoup his investment, but also engage in negotiation about allocating them in an efficient manner. The greater an appropriation is permitted by an intellectual property regime, the further the society can progress in the path of innovation; more easily such property rights can be allocated, more expedited will the innovation process be. This line of argument has caused, directly or otherwise, a strengthening of intellectual property protection, so as to enable the creator to control not only his invention, but also complementary inventions based on it, as well as other derivative forms, thereby expanding the net capturing even spill-over benefits of innovation.<sup>6</sup> However, many arguments exist against it, including empirical results<sup>7</sup> discounting such relationship between a strong intellectual property regime and incentivizing innovators, as well as theories that such

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<sup>4</sup> Such imperfection implies lack of perfect competition, evidenced by collusion among market players, immobility of resources, product differentiation, existence of entry and exit barriers, economies of scale and various externalities.

<sup>5</sup> J.A. Ordovery, "Economic Foundations and Considerations in protecting Industrial and Intellectual Property" 53 *Antitrust Law Journal* 503, 505 (1985).

<sup>6</sup> See generally, D.J. Teece, "Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy" 15 *Research Policy* 285 (1986).

<sup>7</sup> See generally, B.H. Hall & R.H. Ziedonis, "The Effects of Strengthening Patent Rights on Firms engaged in Cumulative Innovation: Insights from the Semiconductor Industry" 32 *Rand Journal of Economics* 101 (2001). Also see, M. Heller & R. Eisenberg, "Can Patents deter Innovation? The Anticommons in Biomedical Research" 280 *Science* 698 (1998).

regimes may actually lead to a gradual but damning disconnect between current and future innovation, thus causing more harm than good.

The next in line of consideration is the traditional approach of economics towards antitrust laws. The perfect competition model that such laws ideally strive for is characterized by maximized welfare from the perspective of the consumer as well as the producer, and efficiency, both allocative and productive, and arguably dynamic too. If market players by way of collusion shift from such a perfectly competitive scenario, hypothetical as it may be, they can generate a deadweight loss by decreasing total welfare and supply, and increasing price. At the same time, they are also likely to consume the excess welfare that gets transferred from the consumers to themselves in acting as rent-seekers trying to protect their enhanced market power.<sup>8</sup> Lack of competition is also likely to cause a decline in product and service quality and variety<sup>9</sup> and consequently, a stagnation of innovation. While this may be the reason why antitrust laws seek to prohibit any action harmful towards market competition, there are cogent arguments against it. One of them is that a perfectly competitive market, owing to its utopian nature, is elusive in reality. Even empirical studies have contradicted the aforementioned linkage between perfect competition and promotion of innovation.<sup>10</sup> In order to counter these arguments, the industrial organization model played a significant role in the context of antitrust laws, by studying and adapting themselves to imperfect real markets and coming up with ways in which the legal regime can be used to prevent market players from worsening the existing actual market performances by certain specified conduct.<sup>11</sup> There are many instances illustrating the manner in which the 'post-Chicagoan' models take into account the efficiencies and harms to market competition that can be caused under different circumstances by the non-pricing behaviour of market players such as exclusive dealing or refusal to deal.<sup>12</sup> However, the very success of such

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8 See generally, A.O. Krueger, "The Political Economy of the Rent-Seeking Society" 64 *American Economic Review* 291 (1974).

9 See generally, H. Leibenstein, "Allocative Efficiency v. 'X-Efficiency'" 56 *American Economic Review* 392-415 (1966).

10 See generally, P. Aghion, Nick Bloom *et al.*, "Competition and Innovation: An Inverted-U Relationship" 120 *Quarterly Journal of Economics* 701 (2005).

11 See P.J. McNulty, "Economic Theory and the Meaning of Competition" 82 *Quarterly Journal of Economics* 639, 645 (1968).

12 See Mariateresa Maggolino, "The Economics of Antitrust and Intellectual Property Rights" in Ariel Ezrachi & Steven Anderman (eds.), *Intellectual Property and Competition Law: New Frontiers* 73, 79-80 (Oxford University Press, 2011).

models in emulating and predicting complex realistic market scenarios may also occasionally render them too esoteric and less prone to being comfortably used by the judiciary and policy makers with immunity. Another criticism aimed at such models is their concentration on short-run pricing scenarios and effects on production and hence their failure to appreciate the nuances of innovation and entrepreneurial actions (which facilitate economic growth more than the mere removal of static inefficiencies under the perfect competition model can ever hope to achieve).<sup>13</sup>

The aforesaid inconsistencies between these two disciplines have caused some scholars to wander beyond the traditional beaten path and seek rationality off the so-called 'fringe' economic theories. Such theories, some of them using Schumpeterian notions, perceive antitrust as a process infused with developmental dynamism that hinges around market changes triggered by innovation. In this instance, it may be apt to mention the theory having Austrian origin.<sup>14</sup> This looks upon antitrust as a process of continuous disclosure, with the market players finding out information previously ignored and getting motivated to innovate. This process of innovation, in turn, provides the innovating players with a competitive advantage over their rivals who tend to flounder in the face of the uncertainty generated by aforesaid ignorance. The rivals can, however, in a competitive market, always choose to spend resources towards finding out further information and proceed along the road to innovation, thereby giving rise to an open-ended healthy competitive race among all the players. Another theory<sup>15</sup> (combining the evolutionary mode of economics and behavioural pattern of market players) perceives such players as users of routine behaviours, which at least partially stem from observing new developments and innovation. Only the players who can regularly develop new and profitable routines will survive the market selection procedure.

The antitrust laws can learn several things from a careful consideration of these alternative economic perspectives. For example, it is possible to perceive actions considered inefficient at present, such as monopolistic behaviour and entry barriers, to yield efficient market outcomes subsequently by

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13 See generally, C.I. Jones & J.C. Williams, "Measuring the Social Return to R&D" 113 *Quarterly Journal of Economics* 1119 (1998).

14 See generally, D. Kallay, *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach* (Edgar Elgar, 2004).

15 Maggiolino, *supra* note 12 at 84-85.

compromising allocative efficiency to trigger innovation.<sup>16</sup> Similarly, a dominant player's contribution to the market economy's growth by way of framing innovative organization models may also be recognized, as may the unnecessary nature of protecting players with low innovative yield.<sup>17</sup> Although it is difficult to reconcile these perspectives with the traditional industrial organization models that antitrust laws are founded on, as well as the doctrine of path-dependence,<sup>18</sup> yet they may lead to understanding the fact that antitrust jurisprudence should occasionally allow market concentration to exist for the good of a new market economy.

In this context it may be worthwhile to mention the evolutionary theory<sup>19</sup> that shifts the focus of innovation from mere information to less easily non-excludable and more rivalrous knowledge. Intellectual property regimes providing wide scope of protection may therefore make dissemination of such knowledge further difficult, thereby yielding static inefficiencies like steeper market price and strangling innovative development and hence dynamic efficiency. At the same time, a narrower allocation of property rights may also have a considerable impact on the innovative level in the industry and thus affect its future development. The traditional economic fundamentals of intellectual property may therefore, be called into question under this new alternative perspective.

It is thus clear from the aforesaid discussion that both the traditional versions of economic theories as well as their new radical counterparts do conceive a linkage between the two disciplines of intellectual property and antitrust. The choice of theories to rely upon will undoubtedly decide the policy outcome of the nature of these two regimes. To a certain extent, the newer 'fringe theories' may even render the treatment of such laws and the economic underpinnings thereof more amenable to treatment by legislators, judiciary and policy-makers, in as much as they take into account market behavioural patterns to a greater extent than their more sophisticated traditional

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16 *Id.* at 85.

17 *Ibid.*

18 This doctrine proposes that antitrust intervention in an infant market to stop dominance from coming into fruition may eventually lead to superior outcomes in terms of consumer welfare.

19 See generally, G. Dosi *et al.*, "Knowledge, Competition and Innovation: Is Strong IPR Protection really needed for More and Better Innovations?" 13 *Michigan Telecommunications and Technology Law Review* 471 (2007).

counterparts. Irrespective of the theoretical base, however, the need to acknowledge the existence of the common interface between these two disciplines remains indubitable.

### **III Intellectual property and antitrust: Growing closer to each other than ever**

The development of modern antitrust regulations, to a certain extent, owe their origin to the need for having a second level of regulatory restriction on the use, or rather, abuse of the exercise of intellectual property rights. These regulations seek to address the actions detrimental to market competition that may stem from such abuse and cannot be dealt with effectively under the in-built protections existing within the intellectual property regime. In that respect, antitrust is likely to perceive intellectual property rights and exercise thereof as indistinguishable from any other private rights associated with tangible property, which in turn are subjected to behavioural limitations imposed by public law standards on the market. However, one must not believe that the objective of these two branches of law run contrary to each other. A close look will reveal instead that, antitrust law allows intellectual property rights to be exercised in their normal manner, resorting to prevention of only abuse thereof coupled with extreme forms of commercial behaviour by one or more market players.

To a certain extent, there are valid reasons for this so-called 'affinity' between these disciplines. The exclusivity that is the product of intellectual property protection also motivates market players to develop new and substitute product and services markets, as do tools such as licensing designed to broaden the ambit of exploitation of technology that is the product of innovation. Intellectual property regimes also generally encourage further developments of innovation and derivative products and services. The experimental use provision of patent law and the fair use exceptions embedded in copyright law clearly illustrate this position. It is therefore at least theoretically possible for such innovators of derived products to engage in fair competition with the original innovator. Adding this to the tendency of antitrust law to intervene not in use, but anti-competitive abuse of intellectual property rights, one usually reaches at a rational conclusion that these two streams are meant to be complementary rather than contrarian.

Both in the United States of America (US) and in the European Union (EU), there have existed in the past certain presumptions about intellectual property rights necessarily leading to monopolistic power and eventual market

dominance.<sup>20</sup> Such presumptions often diverted the attention of legislators and judiciary from the beneficial effect of such rights on research and development and innovation being considered as sought-after investment destinations.<sup>21</sup> Modern developments in the field of antitrust in both these jurisdictions as well as their less-developed fellow countries have not only debunked such presumptions, but also led to an acceptance of the need for empirical ascertainment of real power in the relevant market that solely results from intellectual property rights.<sup>22</sup> For instance, European practice of block exemption rules and the safe harbour clauses, which collectively facilitate regulatory concentration on agreements involving actual competing players having secured intellectual property-based market dominance, as opposed to those between non-competing players.<sup>23</sup> Certain novel commercial strategy-based actions of intellectual property owners and the corresponding actions of the antitrust authorities have ensured, however, that the instances of apparent conflict between these two disciplines are still very much a reality.

New and more accurate methods of valuation of intellectual property-based assets, as well as the expansion in the range of usage for such assets have contributed to several such strategic corporate initiatives. The practice of Qualcomm<sup>24</sup> to invest only in intellectual property rights-based research and earn revenues out of licensing its technological know-how is but one of the many such examples.<sup>25</sup> This may deviate from the usual practice of R&D investment with manufacturing objectives and drive up quantum of royalty, but it is nonetheless a perfectly legal move that makes business sense. Acquisition of expanding patent portfolios with the intention of enhancement of bargaining power in the course of negotiations for cross-licensing or pre-emption of violation claims, or even for shoring up one's defences against

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20 See Steven Anderman, "The IP and Competition Interface: New Developments" in Ariel Ezrachi & Steven Anderman (eds.), *Intellectual Property and Competition Law: New Frontiers* 3 (Oxford University Press, 2011).

21 *Ibid.*

22 *Ibid.*

23 For further details, see art. 101 of Treaty on the Functioning of the European Union (TFEU) and the Technology Transfer Block Exemption Regulations (TTBER) and the Technology Transfer Guidelines in vogue in the European Union.

24 Qualcomm Incorporated is a world leader in 3G and next-generation mobile technologies.

25 See for instance, Antitrust investigations against Qualcomm's patent licensing practices recently conducted in China, in Qualcomm to pay record \$975m in China antitrust case, *available at*: <http://www.bbc.com/news/business-31335551> (last visited March 16, 2015).



competing players during as well as beyond the duration of patent protection, in several sectors such as pharmaceuticals, telecommunication *etc.* can be another example.<sup>26</sup>

It is true that such techniques can potentially lead to a hike in the expenditure incurred by competing firms, thus having adverse effect on market competition as a whole. Nonetheless, it will not be accurate to tar all similar actions by the intellectual property owners as *per se* harmful to market competition. For instance, the aforesaid acquisition of wide patent portfolio can cause patent thickets to come into existence, but merely the presence of such thickets may not be sufficient to draw the attention of antitrust regulators, unless they are also accompanied by abuse of dominance involving bundling or tying-in of products or compulsory package deals of licensing. Again, concentrating one's research on research and development and patenting out the resultant knowhow may initiate a royalty race, but unless it is associated with any kind of patent ambushing or FRAND<sup>27</sup> exploitative measures, it is unlikely that the same will draw the wrath of antitrust authorities. Therefore, every strategic move on the part of the market players owing intellectual property rights may not necessarily lead to an antitrust violation.<sup>28</sup>

At the same time, if a commercial strategy does fall foul of antitrust regulations, then the same will undoubtedly be hauled up for such deviation by the concerned authorities.<sup>29</sup> The widespread and cross-border impact of such strategies in the liberalised market economy has also necessitated mutual cooperation and coordination between antitrust authorities across the border, whenever there appears to be at least *prima facie* evidence of intellectual

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26 See generally, Carl Shapiro, "Navigating the Patent Thicket: Cross Licenses, Patent Power and Standard Setting" 1 *Innovation Policy and the Economy* 119 (2000).

27 Refers to a dispute concerning the adjudication of fair, reasonable and non-discriminatory, available at: <http://www.wipo.int/amc/en/center/specific-sectors/ict/frand/> (last visited on Jan 20, 2015).

28 Mention may be made in this instance of the decision in *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.* 382 US 172 (1965), wherein while seeking to penalize efforts to enforce known invalid patents, the judiciary made a distinction between attempts violative of antitrust and other attempts.

29 See *Microsoft Corp. v. Commission* [2007] ECR II-3601, wherein antitrust regulators complained against vertical integration strategies intended for dominating the aftermarkets in the IT sector; *Intel* case COMP/37.990 (May 13, 2009) wherein abuse of dominance for generating primary market exclusivity was penalized; *Astra Zeneca v. Commission* case T-321/05 (July 1, 2010) wherein abuse of patent process leading to infringement of art. 102 TFEU was challenged.

property rights being manipulated to act as an integral feature of market power or as an offensive tool intended to use leveraging of associated dominance to achieve exclusionary abuse in the marketplace.

The precise manner in which an intellectual property right-related commercial action will be perceived by the antitrust officials depend to a considerable extent of the precise antitrust violation that is being alleged. Therefore, in the very initial stages of determining whether such an action belongs to the realm of anticompetitive agreements or dominance, or whether the relevant market needs to be defined and if so, how, there is no specific concession granted to intellectual property as such. These stages mostly involve analysis of data and economic interpretation and to what extent the said right translates into market power, or at least generates an asset that is capable of creating dominance within the relevant market concerned. When it comes to actually assessing whether usage of such right leads to a genuine abuse, however, certain concessions have been granted to intellectual property, keeping in mind the necessity to facilitate innovation, such as the exceptional circumstances doctrine that can be used to defend a decision to refuse licensing out such a right, or the manner in which valuation of such rights include risk-based cost analysis.<sup>30</sup> The judicial reluctance to read too much into future contributions of a right to the benefit of a market may however, occasionally eat into the effectiveness of similar concessions, as may the judicial practice of the right-owner being required to objectively justify his actions rather than doing a cost-benefit analysis and establish the relative merits of such actions.<sup>31</sup>

#### **IV Technology and relevant market: A meeting ground for intellectual property and antitrust**

The difficulties in ascertaining the extent of the relevant market, especially the relevant product market, has always been rather prominent in the realms of antitrust laws and the same holds true in relation to the market within which the intellectual property right under discussion is alleged to generate dominance too. If the market is too narrowly defined to the ambits of only a single product market shorn of its derivatives, the right owner will usually be determined to exhibit dominance even if he actually does not possess thus in reality. Decisions such as *Hilti AG v. Commission*<sup>32</sup> and *AB Volvo v. Eric*

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30 Anderman, *supra* note 20 at 8-9.

31 For further details on similar judicial trends see *Microsoft* case, *supra* note 29.

32 [1991] ECR II-1439.

*Veng Ltd.*<sup>33</sup> have clarified the duties of the owner of an intellectual property right towards the secondary market that prevented the owner from leveraging his dominance in the primary market and engage in abusive actions in the secondary market.

Technologies play a significant role in the interface between antitrust and intellectual property, especially when it comes to the assessment of the relevant market. On certain occasions, rights associated with patents and industrial copyright have been classified as technologies instead of giving them the moniker of an end product for the purpose of the relevant market determination. Markets for technology are usually perceived as a trading place for licensing of the said technology and its close substitutes and this concept has been used in merger control under antitrust and technology transfers involving intellectual property licensing in both the US and the EU.<sup>34</sup>

The aforesaid classification assumes further significance in the context of a test for abuse of dominant position, where a technology that forms the subject-matter of licensing is perceived as an upstream product, and the product itself that stems from such technology and is also a part of the licensing deal, is looked upon as a downstream product. These two markets will therefore be regarded as the primary market (for upstream) and secondary market (for downstream) respectively. This may lead to the owner of the intellectual property right associated with such technology as having a dominant position in the primary market and the technology itself may even be regarded as an essential facility for the purposes of the secondary market.<sup>35</sup> This methodology is not bereft of logic either— there are times at which essential upstream facilities are subjected to the same scrutiny and if the technology carries with it a similar essentiality, then it does indeed carry potential market power. In case the intellectual property right associated with the technology deserves any exceptional treatment, the same can always be applied to it post-analysis of this kind.

Another methodology applied by antitrust analysts for identifying relevant primary product markets by way of demand-substitutability may also create a restricted product market insofar as intellectual property rights are

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33 [1988] ECR 6211.

34 See generally, M. Glader, *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law* (Edward Elgar, 2006).

35 Anderman, *supra* note 20 at 10-11; see also the *Microsoft* case, *supra* note 29.

concerned.<sup>36</sup> Even the right holder of the technology can find himself to be entirely judged within the confines of a single product market in the context of antitrust, depending on the way the technology fixing procedure goes including selection of the standard.<sup>37</sup> Such a mode of dealing with technology markets is not against antitrust principles, it is simply a method for ascertainment of what exactly is the degree of dominance that a product based on intellectual property (in this case, technology rights) can exercise, by way of finding out the actual market power wielded by the same. However, such methodology is not restricted only to intellectual property-based products, but also beyond. Often the regulator, especially in the EU, considers mainly the real substitutes while trying to identify the relevant market, with additional attention being paid to potential substitutes only if the latter qualifies a test for real potentiality.<sup>38</sup> It is therefore a distinct possibility that a narrow product market, while being considered in the context of a right relating to technology-based intellectual property, will usually assign considerable market power to the holder of such right. Evidence of *bona fide* technological integration may however be used to overcome such narrow definitions of the relevant market, depending on whether the bundling is because of technological reasons, or the mere results of commercial and strategic decisions. As has been witnessed in the *Microsoft* case, however, it may prove to be considerably difficult for the owner of the intellectual property right to adduce sufficient evidence to pass judicial scrutiny.

### V Dominance, abuse and alternative remedies

In order to ascertain dominance, the market power of the holder of the intellectual property right needs to be calculated and in relation to such rights, that means figuring out the precise extent to which the rights may pose barriers to entry and exit to existing and potential competitors. Mere identification of market power may not be enough in this case; the power has to bear a direct correlation with the right and ought not to stem from any other factor. Empirical tests to ascertain market power and recognition of intellectual property rights not being automatic monopoly generators

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36 For further discussion on this method see *Astra Zeneca* case, *supra* note 29.

37 See the discussion on the host of *Rambus Inc.* Decisions in Daniel Culley Malik Dhanani *et al.*, "Learning from Rambus- How to tame those Troublesome Trolls" 57(1) *The Antitrust Bulletin* 117 (Spring, 2012).

38 See EC Notice on Defining the Relevant Market [1997] OJ C372/5, para 20; see also Anderman, *supra* note 20 at 12.

(especially when potential substitutes exist) help cementing the success of this route. Ownership of essential technology (even when essential only to the downstream market) may end up triggering the antitrust remedies in certain cases, because such ownership can potentially be abused to leverage the owner's monopolistic power in the upstream market to eliminate potential competition in the downstream market, which would be outside the legally permissible limit. Mere dominance (without accompanying abuse) is not usually *per se* unlawful under the antitrust jurisprudence across most of the world. Furthermore, while considering acquisition of dominance, there are several legitimate reasons why distinction should be drawn between unilateral, bilateral and multilateral acquisitions and on the beneficial impact of some of such acquisitions on efficient innovation by application of substitutive stimulus to market competition, antitrust and intellectual property tend to reach a general consensus.

While determining whether an action by a market player is equivalent to unjustified exploitation or merely commercial and competitive strategy, antitrust law has usually proven to be more receptive to usage of intellectual property rights to foster innovative growth and hence dynamic efficiency. That is the very reason why provisions such as exceptional circumstances, catering to the flexibility of regulatory supervision exist when it comes to antitrust jurisdictions. However, in case a *per se* prohibition exists under any jurisdiction, as opposed to a rule of reason, then it may prove to be less amenable to be appreciative of the actions of an intellectual property right owner. Furthermore, the recent judicial trend of limiting the defence of an alleged action having beneficial effects on market competition to the realm of mere objective justification is also detrimental to the scope of innovative development and dynamic efficiency arguments being used with acceptable chances of success.

Last but not the least, comes the turn of the remedies existing within the intellectual property regime that can act as a replacement of antitrust sanctions when it comes to fulfilment of the common objectives of facilitation of innovation and maximization of consumer welfare of these two branches of law. The presence of such remedies has raised the occasional question as to whether antitrust should only pay attention to matters wherein an intellectual property right has been exercised outside its legally permissible ambit. This may not be the correct path to trod, for there may exist scenarios wherein an action, although not prohibited by intellectual property standards, may very well run foul of antitrust prohibitions applicable in that situation. Even where both the options are available, actions have usually been preferred under the

garb of antitrust rather than intellectual property, and the judiciary has seldom shown any inclination either to prefer the intellectual property-based remedy over the antitrust remedy, the latter providing more immediate relief on most occasions, as well as the chance of a penal sanction that is seldom conceived of under the intellectual property laws.<sup>39</sup>

## VI Conclusion

To conclude, the purpose of this paper has not been to trace the jurisprudential and evolutionary contours of the two seemingly separate branches of law, *viz.*, intellectual property and antitrust. That would require more in-depth research and a considerably bigger scope than this paper could hope to attain. However, what the author has sought to do in course of this paper is to indicate that in their modern forms, these two branches often end up associating with each other closely in course of the efforts of the policymakers, legislators, regulators and the judiciary to foster economic development and market growth in ways more than one. Another attempt that has been made by the author is to seek to identify whether the traditional underpinnings of these disciplines embedded in economic rationale has been altered somewhat with the passage of time. What has been discovered is that despite certain possible deviations in terms of approach and partial replacement of traditional, orthodox economic perspectives with new, alternate models, market economics still dictate that antitrust and intellectual property work hand in hand so as to facilitate innovative growth. Different facets of antitrust analysis, ranging from anticompetitive agreements, to abuse of dominance and identification of relevant market and calculation of market power, do occasionally grant special treatment to the rights associated with intellectual property. However, even if one discounts such special treatment, simply the need to accurately ascertain the extent of impact a market player's actions can have on market competition would have been sufficient to merit a thorough understanding of the fundamentals of intellectual property, especially if one takes into consideration such property rights associated with technology and related primary and secondary markets.

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<sup>39</sup> Anderman, *supra* note 20 at 24-25.

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