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The Pendulum Does What Pendulums Do: The Evolving Relationship Between IP and Competition Law

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While the symposium on *Application of Competition Policy to Technology and IP Licensing hosted by the* Center for Transnational Law and Business at the USC Gould School of Law on 10 November 2017 was, for many reasons, worthy of a suite of scholarly articles (I particularly look forward to Professor Jonathan Barnett's upcoming article in the Berkeley Technology Law Journal), I'll try to do it justice in my inaugural blog post.

Featuring presenters including senior regulators from Australia, China, Japan, the UK and US, industry representatives from Microsoft, Qualcomm and Ericsson, and academics from India, Taiwan and the US, the highlight was the keynote address by Makan Delrahim, the US Assistant Attorney-General for the Antitrust Division of the USDOJ, who announced a reasoned, pro-IP and innovation policy towards the intersection of IP and competition law.

In discussing the competition law and policy implications of standard-essential patents (SEP) and fair, reasonable, and non-discriminatory (FRAND) licensing, the conference featured presentations offering empirical and anecdotal evidence, or lack thereof, of the evils of monopolistic "patent hold-up", potential for monopsonistic practices by standard setting organisations (SSOs), and the possibility of cartel-like behaviour by technology implementers to reach more favourable licensing terms than would be achievable in an unfettered market. It was AAG Delrahim though, who gave teeth to the discussion, announcing what at least one commentator has called a "major pro-IP and pro-innovator shift in DOJ policy." In short, one of his significant proclamations was that regulators (the implication being both in the US and worldwide) have "strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate award for developing breakthrough technologies."

The first impression I had upon hearing his presentation was not how major a shift it was, but rather how familiar it sounded. It was only later that I realised that the AAG, our host, Center Director Brian Peck, and I had all held positions in the Office of IP and Innovation (as it is now known) at USTR. What we were hearing was not a dramatic policy shift, but rather a return to long-standing US policy in IP and competition law. Core concepts, such as the fact that an essential element of a property right is the right to exclude, that the proper exercise of patent rights cannot violate competition law, and "that a unilateral refusal to license a valid patent should be *per se* legal," all once taken as given, have now been labelled as a new direction.

What might be called the latest anti-IP shift in IP and competition policy may have only happened in the last ten years, but it continues to have dramatic impact globally. Qualcomm alone has faced fines of $975million in China (2015), $854million in South Korea (2016) and $774million in Taiwan (2017) for what were deemed anticompetitive licensing practices for its portfolio of SEPs. Without commenting on the appropriateness of any of these decisions themselves, the evidence and arguments presented at the USC symposium, accentuated by the announcement of a US return to pro-IP policies concerning IP and competition law, beg the question of whether the basis for the law and policy underlying those decisions by national competition authorities is justifiable.

Finally, we get to the nexus with globalisation. While the matters above demonstrate how enforcement of competition law today often has extraterritorial consequences and impact, the improper enforcement of competition law can also conflict with rights and obligations under international trade law. The line will likely remain blurred, but there are two sets of rights and obligations implied. First, IP rights and obligations set out explicitly in international instruments (implemented under national law) such as the TRIPS Agreement may be in direct conflict with decisions such as these. Regulatory decisions that find exercise and enforcement of IP rights, including seeking injunctive relief, violative of competition law consequently deny that IP protection provided for under a series of international agreements. A patent holder could be enjoined from a unilateral decision not to grant a licence, and without the right to obtain an injunction themselves, a patent holder's only remedy for infringement becomes the payment of a reasonable royalty. In either case, exclusivity in the right is removed.

Second is the protection for foreign direct investment built into many trade agreements, including via the mechanism of investor-state dispute settlement. This could be implicated if the domestic mechanism for regulating anticompetitive behaviour is exercised in a way that may improperly expropriate the value of an investment in innovation by undermining the related intellectual property rights.

Viewed from a more subjective standpoint, what technology implementers might argue as a valid regulation of anticompetitive licensing practices by innovative patent holders, the innovator might see as a veiled barrier to trade, using competition law remedies to empower monopsonistic behaviour in a country that is home to large technology implementers.

While AAG Delrahim put the IP and competition community on notice that the US will be pursuing a more pro-IP policy and enforcement direction, and urged other competition regulators to do the same, the international trade community should take notice as well, and competition regulators should be equally concerned. Are current laws and polices grounded in evidence-based and economically sound principles – strong enough to justify the largest fines levied in your regulator's history, and capable of justifying a potential breach of concurrent international obligations? Are these the least trade-restrictive measures to address any perceived competitive imbalance, or are contractual obligations and market forces sufficient to level the field? When does regulatory action become a regulatory taking for which compensation should be made?

Watch this space.

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