Is the balance between competition law and intellectual property changing?

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I proposed the organisers to discuss whether the balance between competition law and intellectual property is changing.

In case you were wondering, my impression is that, indeed, it is changing.

In 1995, roughly 20 years ago, the ECJ confirmed that a refusal to license an intellectual property right can amount to an abuse of a dominant position. In order to establish an abuse, however, it is necessary to show that a set of very strict conditions are met.

As is well-known, the Magill case had a profound impact on EU competition law and policy. The idea that EU competition law can be used to impose a compulsory licensing obligation on a firm was considered to be nothing less than revolutionary at the time.

Equally interesting, if not more, than the outcome of Magill is, in my view, how stakeholders perceived the case at the time. I was fortunate enough to receive lectures from Giuliano Amato during my time at the European University Institute.

He was very clear in stating that officials and practitioners alike understood to be an extreme case, arising in an extreme set of circumstances, that would be very unlikely to be repeated again.

The perception at the time, in other words, was that the outcome was explained by the fact that the intellectual property was not really worthy of protection. The outcome would have been different if the intellectual property rights in question had been deemed worthy of protection.

20 years later it is clear that this prediction proved to be wrong. In a sense, it proved to be more than wrong. Not only has Magill been repeated, but it has become easier than in the past to interfere with intellectual property systems.

Several factors explain this evolution of the law.

First of all, the set of strict conditions defined in Magill have been progressively relaxed over time. Under the Magill conditions, a refusal to license an intellectual property right is only abusive where it prevents the emergence of a new product for which there is potential consumer demand. After Microsoft, one could argue that it is sufficient to show that the refusal would limit follow-on innovation. In other words, it is sufficient to claim that the refusal might limit the development of new products in the future.
Secondly, the set of circumstances defined by the ECJ in *Magill* is not the only one that triggers the application of Article 102 TFEU. In *IMS Health*, the Court was clear in stating that the Magill conditions are sufficient to establish an abuse – as opposed to necessary. A separate set of exceptional circumstances was identified in *Huawei*. The exploitation of intellectual property in the context of standard-setting justified intervention, according to the Court, even when some of the factors that are peculiar to *Magill* are not present.

Finally, it would seem that competition authorities across Europe give priority to cases in which intellectual property rights are of relevance. As a result, the boundaries of EU competition law are tested more frequently. The application of Article 102 TFEU to the exploitation of standard-essential patents has already been mentioned. Pay-for-delay agreements, which will be discussed at length by Professor Hemphill later, is another example.

My presentation has focused until now on how interference with intellectual property rights is easier, in the sense that the circumstances in which such interference may take place are broader and have become less strict over time.

These are significant developments that have an impact on the balance between competition law and intellectual property. But I am tempted to argue that they are not the most relevant or the most decisive ones.

What really reflects the ongoing shift, in my view, is not so much that it is easier to interfere with intellectual property but how the substance of the conditions has been defined by competition authorities and by the courts over the past two decades.

The important factor, from my perspective, is not so much the substantive standards in *Microsoft* (as compared to *Magill*), but the ideas underpinning the conditions identified in the former.

I will try to make my point clear and less abstract: in a case like *Magill*, the nature and operation of intellectual property systems was not disputed. More importantly, the conditions set by the Court reflected the traditional understanding of EU competition law. *Microsoft*, on the other hand, reflects a competing view about the most appropriate way to increase the rate of innovation in the relevant market.

The analysis in *Magill* was indeed quintessentially static in nature. In this sense, it does not dispute the essence and the premises on which intellectual property regimes are based.

In *Magill*, the Court expressed a concern with practices that result in the exclusion of a source of competitive pressure that can be readily identified at the time when intervention is considered. The requirement that the refusal prevents the emergence of a new product for which there is potential consumer demand is there to ensure that
the source of competitive pressure brings substantial added value to consumers (i.e. that it is not simply a copycat of the product offered by the holder of the intellectual property right).

The analysis in *Microsoft* is significantly different. It is quintessentially dynamic in nature. *Microsoft* was no longer about the elimination of a powerful source of competitive pressure going beyond the mere duplication of existing products.

The belief at the heart of the *Microsoft* case is that a compulsory licensing obligation can be the best means to increase the rate of innovation on the relevant markets affected by the practice. In this sense, it reflects the belief that undermining intangible property may, at least in certain circumstances, be the best way to promote innovation. There was no specific new product, but simply an expectation that intervention would benefit consumers in the long run.

It is not very difficult to see that this premise is fundamentally at odds with the logic of intellectual property. The main novelty of *Microsoft*, which is not always given the relevance that it deserves, in my view, is that it encapsulates the view that competition authorities can and should depart from the logic of intellectual property, and this on a targeted basis.

Some people may react to the above by arguing that *Microsoft* was an isolated case and that, in any event, was decided a decade ago.

My impression is that it started a trend that is alive and well.

Allow me to illustrate this impression by reference to an ongoing case.

Many in the audience will have heard of the proceedings conducted against Sky UK, a pay television operator, and the Hollywood major studios. The case is about the licensing of copyright.

In this case the Commission argues, inter alia, that the licensing agreements concluded between the studios and the television operator are in breach of Article 101 TFEU insofar as they require Sky to block access to its online services. The Commission appears to claim that the agreements limit Sky’s ability to respond to unsolicited orders from users based in other Member States.

The blocking of access to websites based on the location of the user is known as geo-blocking.

What is interesting about this case is that the agreements do not restrict competition that would have existed in their absence. Even if the geo-blocking clauses in the agreements did not exist, Sky UK would not be able to offer its online services outside the UK and Ireland, which are the two Member States covered by the licensing agreements.
If Sky UK offered online content outside the territories where it holds a licence, it would be infringing copyright. Accordingly, the scope of the licensing agreements does not grant protection going beyond the intellectual property regime. It overlaps exactly with it.

If the agreement does not go beyond the scope of the underlying intellectual property regime, the question is of course whether, and why, it would be contrary to EU competition rules.

Under the traditional understanding of EU competition law, this agreement does not appear to be contrary to Article 101(1) TFEU. This is at least the principle that, I would argue, stems clearly from the Coditel saga.

But I would not like to go into the details of the Coditel cases.

Instead, I would like to discuss with you the consequences of ruling that an agreement that remains within the scope of the underlying intellectual property is contrary to Article 101 TFEU.

When one argues that an agreement that prevents a licensee from doing what it would otherwise not have been able to do is contrary to Article 101 TFEU, one is implicitly arguing that the underlying intellectual property is also contrary to Article 101 TFEU.

This is the question that I find particularly intriguing about this ongoing case. If the Commission argues that the geo-blocking provisions do not fulfil the conditions set out in Article 101(3) TFEU, it is, in a way, arguing that copyright protection, in its current form, goes beyond what is necessary to give authors the incentives to invest in creative activities.

It is certainly controversial to state that copyright protection can be deemed to go beyond what is necessary under Article 101 TFEU. This is the reason why I believe this pending case raises fascinating issues.

The implications of this position are equally fascinating.

It means that the desirable scope for protection under EU competition law and intellectual property is not necessarily the same. I do not believe this position is necessarily problematic, or incorrect.

For instance, this very question was at the heart of the Actavis case decided by the US Supreme Court. The majority opinion, as I understand the case, took the view that the scope of US antitrust need not be identical to the scope of intellectual property. According to the majority, what is unproblematic from the perspective of intellectual property may justify action from an antitrust perspective.
The fact that this approach is not necessarily problematic or incorrect does not mean, going back to my argument above, that it does not raise fundamental questions.

I would like to devote the remainder of my presentation to these. Raising these questions is even more relevant before a gathering of judges. As you will see, you are more than familiar with them. They are routinely raised by a judge when controlling administrative action.

One fundamental question raised by this trend is whether a competition authority like the Commission has the means to engage in the sort of analysis that is implicit in the cases discussed above.

If a competition authority argues that the existing level of copyright protection is not necessary to preserve authors’ incentives to engage in creative activities, or if it argues that a compulsory licensing obligation will lead to an increase in the rate of innovation, it is necessary to ask whether it has a sufficient basis to believe that this will be (or is likely to be) the case.

The principles behind the setting up of a system of intellectual property protection are well-known. The assumption is that, in the absence of protection, firms would not have sufficient incentives to invest in the creation of intangible property. Put differently, the idea behind protection is that it is necessary to ensure that investments can be appropriated by the inventors and creators.

Against this background, the question would be whether the competition authority has a competing theory leading it to believe that this will be the case. Is there solid theoretical and empirical evidence giving the competition authority reasons to believe that intervention will lead to a net improvement in innovation?

When I think about this question I am immediately reminded of landmark cases in EU competition law like Airtours and Wood Pulp. In the two, the EU courts essentially asked whether the position of the Commission was appropriately substantiated in light of mainstream economics.

My guess is that a similar question will have to be addressed in relation to cases involving the exploitation of intellectual property rights.

Let me move on to my second question now.

Cases like Microsoft, or the ongoing pay TV case raise the question of whether a competition authority would be in a position to prove its position to the requisite legal standard.

I mentioned above that the Commission argued in Microsoft that the refusal by the firm to share its intangible property would reduce the rate of innovation on the relevant market.
I have always found this position intriguing for reasons that are not often emphasised, but that come naturally to judges engaged in the judicial review of administrative action.

The impression I have always had is that, if the Commission position in Microsoft is problematic, this is so because it sets a condition that could always be fulfilled.

It is certainly plausible that a refusal to license an intellectual property right hinders follow-on innovation. The problem is not that it is plausible, but that it would always be plausible.

The impression I have is that one could argue, always and everywhere, that harm to follow-on innovation could be the outcome of the exploitation of intellectual property rights.

From the perspective of a judge controlling administrative action, to be sure, the question is whether a legal condition that would be fulfilled always and everywhere and that cannot be disproved as such, is acceptable.

A second related question is whether a standard of plausibility is sufficient to justify intervention. On this point, I believe we could have an interesting discussion about the requisite standard of proof in EU and national competition law.

But I also believe that I have spoken long enough already, and that I would very much benefit from your thoughts and questions.

Again, thank you very much for the invitation.