Is there Something Different about the Exercise of Market Power when Firms Possess IPRs as the Basis of Their Business?

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ABSTRACT

Every organization in the current rival business world is trying to secure its market position and increase customers' base through different strategies. Intellectual property rights often allow organization in getting competitive advantages over the competitors. The paper will focus on the difference in exercising the market power while possessing IPRs.

INTRODUCTION AND BRIEF LITERATURE

All firms are highly intending in attracting more customers, maximizing their profit, expanding the market and as well as holding a superior power over the competitors. For doing such, firms are continuously focusing on developing new strategies through product differentiation, superior efficiency and quality innovation (Hill, Jones and Schilling 2015). Their aim is to exercise market power, the capabilities to influence prices and to exclude the competitors from the market (Baldwin 1987), so that they can operate differently from competitors that would enforce on facing otherwise similar cost and demand conditions (Anderman 2007).

While the competition/antitrust policy/law works as the measure in affecting either market structure or conduct; and ensures the availability of all information to both buyers and seller (Scherer and Ross 1990), the IPRs play the opposite role. Intellectual property is referred to the various legal regimes under which property rights are created through patents, copyright, trademarks, designs, and so on (Fitzgerald and Fitzgerald 2004). According to the WIPO, intellectual property laws aim at safeguarding creators and other producers of intellectual goods and service by granting them certain time-limited rights to control the use made of those products (WIPO 2004).

Within the conflicting situation, as stated, the research is attempting to focus on the difference in exercising market power while possessing the IPRs.

THE RESEARCH QUESTIONS

As we found a dilemma between IPRs and competition laws, it will be remarkable in focusing on the exercise of market power under these two laws. Very similarly with the

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research topic, the research will be conducted to answer the following research questions:

- What is the difference in exercising market power when firms possess the IPRs as the basis of their business?
- What is the market position of the firms, while possessing IPRs?

METHODOLOGY

To reach at the conclusion about the difference in exercising market power with the IPRs as basis of business, different scholarly articles and papers shall be critically analyzed. Furthermore, two related cases will be presented with in-depth analysis.

Analysis of Scholarly Articles/papers

Dumont and Holmes (2002) looked at the interface between competition law and IPRs law and drawn attention to a number of specific issues which have arisen in recent years and some of the conflicting costs and benefits of the IPRs for competition (mainly in the context of sequential innovation) and economic efficiency. They demonstrated that if competition policy and IPRs are complementary means of promoting innovation, technical progress and economic growth to the benefit of consumers, these common goals, however, are pursued by different instruments (Dumont and Peter Holmes 2002). Thus, the authors established that with the IPRs, firms operate differently and possess more power in the market over their competitors.

Anderman (2002) pointed the controversy over the appropriate relationship between EC competition law and IPRs and after an extensive research, finally agreed that there should be an internal balance within IPRs legislation, so that competition law can be thrust into the role of an external protector of the diffusion element of innovation because of its own logic of preserving competitors in the secondary "market" dependent on essential facilities by compulsory supply or license remedies, ensuring that the scope of the IPRs protection in licensing and research and development agreement is not too restrictive of competition by parties to such agreements and by controlling mergers both vertical and horizontal that would lead to foreclosure of competition in high-technology markets. Accordingly, the researcher tended in allowing firms in operating with the IPRs to gain more power in the market.

Encaoua and Hollander (2002) addressed that competition is for the market rather than in the market, dynamic aspects of competition matters more than allocative aspects, the IPRs reinforce network effects present in knowledge-based industries since the competition in these industries displays features that are radically different from those encountered in traditional sectors of the economy. They examined why these differences matter with respect to market delineation, assessment of intensity of competition, and predatory conduct and to what extent competition law limits the innovators' rights not to license their inventions to others, especially when they correspond to essential facilities. The researchers found that strong IPRs and network externalities reinforce each other by favoring market dominance by a single firm. Hence, the researchers have sought the difference in market power while the firms possess the IPRs as the basis of their business and the firms are in comparatively stronger position with such regulations.

Lea and Hall (2004) addressed the conflict between IPRs laws and competition laws while they were settling private rights that IPRs represent with the public benefit deriving from properly developed technical standards. They examined the issues that arise when the IP rights of a particular kind, the IPRs, operate in structurally complex markets where competitive conditions are shaped on the supply side by the compatibility of complementary components and on the demand side by network externalities and revealed that even from cursory examination of relatively simple markets where the IPRs underpin the production of simple consumer goods and individuals demand curves are independent, the IPRs are themselves a double-edged sword: they enhance dynamic efficiency through the incentives they create for innovation but potentially undermine static efficiency through the market power they place in the innovator's hands. Thus, within the conflict between two laws, firms are able in enhancing their market power through the IPRs as the basis of the business.

In his working paper, Lemley (2007) argued that IP and antitrust have cycled between over- and under-protection, and that the current (and mistakenly) conditioned to think of private property and private ordering as efficient in and of themselves, rather than as efficient only in the context of robust market competition. The author stated that the goal of the IP and antitrust laws should be to seek a robust balance between competition and monopoly in the service of dynamic efficiency and when the IP laws are strong, competition/antitrust laws should also be strong, and vice versa. The researcher pointed the gaps during periods of low protection can make the patent owners are free to expand their rights by contract without antitrust interference. Consequently, it clearly institutes the freedom of the IP right holders in exercising power in the market.

Jacobsen (2010) examined the failure to disclose the IP rights against the Sherman Act violation. Accordingly the author, antitrust laws impose a duty to disclose IP to a standard setting organization, even if the SSO does not have any policy requiring such a disclosure and conferring to section 2 of the Sherman Act, every person shall be punished who shall monopolize or attempt to monopolize, or combine or conspire with any other person(s), to monopolize any part of the trade or commerce among the several states, or with foreign nations … …. …, it is revealed that to exercise extra market power with the IP rights is restricted. Though the Supreme Court has said that a patent (an IP right) does not necessarily confer market power on its owner, but the implementation of a standard requires the use of a patented invention and the standard can confer additional economic value on a patent holder beyond the value of the patented invention itself. Thus, a firm gets the power to control prices or exclude competition in the relevant market. So, when a firm operates with the IPRs, it possesses extra power in the market.

Patel *at el* (2011) also harmonized that there is a considerable overlap in the goals of the Competition laws and IPRs laws because both are aimed at promoting innovation and economic growth, but IP laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators to bring into the public domain innovative information that might otherwise trade secrets. The researchers agreed that the IPRs should be created if goods and services are to be produced and used as efficiently as possible in such an economy and concluded that the IPRs provide short-term monopolies (Patent – 20 Years, Copyright – Life + 60 Years), which implies that it provides incentives for the innovator and also allows them to apply its industrial application. At this point the researchers take a strong position on behalf of the exercising different market power by the firms while possessing the IPRs.

Saggi (2012) stated that the extent to which the holders of the IPRs can freely exercise their market power in the global economy, depends upon (i) the amount of protection available to them against potential imitators and (ii) the degree to which they can price discriminate across national markets while addressing the linkages between policies that determine these two facets of the market power possessed by the IPRs holders. Accordingly the researcher, the IP rights holders obviously enjoy more market power under the umbrella of IPRs laws, and this market power is comparatively less under the competition law. Based on the research, it can be said that the more the protection of IP, the more the exercise of power in the market. From the research and model developed, author indicated that a firm can enjoy monopoly status by the virtue of IPR in one region (for example, in North) and has the incentive to price discriminate internationally because regional (Northern) consumers value its product more than other region(s) (for example, South). The scholar also found that the firm's market power is fully extended to another region (South) only if that region (South) protects its technology from being copied by local imitators and thus, while first region's (Northern) policy regarding the territorial exhaustion of IPR determines whether the firm can price discriminate internationally and therefore exercise its market power across regions, second region's (Southern) policy regarding the protection of the IPRs determines its monopoly power within the Southern market. Finally, the author concluded that due to policies adopted in two different regions, one to make capable in international pricing discrimination and another to protect the IP rights, gives the additional power to the firms to operate in the market.

Chu *at el* (2012) revealed that the variety inventor of an industry always obtain a share of the monopolistic profits generated by all subsequent innovations in the industry and such occurs when strengthening the patent protection, i.e. the IPRs stimulates inventions. This finding also strengthens that, while possessing the IPRs, firms operate and behave differently in the market against the competitors.

Layne-Farrar (2014) focused the debate over potential antitrust concerns for the use of protected intellectual property within standard setting often centers on the rules regulations in place at standard setting organizations (SSOs) that set "essential" for the practice of the standard on fair, reasonable and non-discriminatory (FRAND) terms and conditions. Agreeing with such standards, the researcher pointed at the *Microsoft* v. *Motorola* in 2012, where the Judge decided that since *Microsoft* paid royalties under the license agreement, there was no irreparable harm, and in that way, license payment constituted an appropriate remedy. This has proved that the capability of the licensors in exercising power in the market with the IP rights.

Singh (2015) spoke that the IPRs have the mechanism of favoring an efficient equilibrium, without significantly altering the nature of the market. He argued that this postulation is by definition erroneous: given that the IPRs make a non-rival good (e.g. knowledge, national park, movies, etc.) excludable, it constitutes inefficiency, since the price of the good will be above the marginal cost of producing the good. Sensibly the author added that the IPRs are instruments of market regulation and, therefore, influence the competitive configuration, altering it not just marginally, but drastically. Author indicated that according to the definition, the IPRs not only give the owner a certain amount of market power but also protect the IP owner from the competition and also grant the monopoly power in some cases; and therefore, granting an IPR to an entity is tantamount to conferring a monopoly. Accordingly the researcher, this is a key point of economic analysis since, in contrast to the dictum of IPRs, competition policy seeks to encourage competition, avoid market barriers and benefit consumers by ensuring that a multiplicity of goods/services and technologies may effectively compete each other. It clearly reveals that the umbrella of the IPRs obviously sanctions additional capabilities so that the firms can exercise power differently and strongly while using the IPRs in their business activities.

Analysis of Related Cases

United States* v. *Microsoft

Referring to the *United States* v. *Microsoft Corp.* case, it is found that Microsoft included Internet Explorer for internet browsing in their 'Windows' operating systems while the Internet Explorer is a stand-alone application. Evans *at el* (2005) found this inclusion as a tie-in which was illegal under Section 1 of the Sherman Act, though this tying claim was never proven and many commentators appear not to have noticed. The authors stated that the Courts did find that Microsoft engaged in anticompetitive actions, but, in the absence of any evidence that those actions actually reduced competition; the remedy imposed is well designed to prevent similar violations without imposing potentially expensive structural changes or substantially restricting Microsoft's ability to compete on the merits. Therefore, though illegal under the Sherman Act, but through tie-in Internet Explorer in their operating system, Microsoft operated strongly in the software market as against their competitors, having the protection from the IPRs. In this regard, authors stated that Microsoft took in the course of maintaining its leading market position were judged to have been anticompetitive and they asked the Courts to impose drastic structural and injunctive relief designed to induce more competition. It is found from the case that in the absence of evidence that the violations in question had actually reduced competition, the courts properly declined to take not particularly egregious antitrust violations as a license to punish the firm in ways that would make it a less effective competitor.

In that case, the authors found that Microsoft was blamed and trial was held on six broad topics: (1) market definition and market power; (2) tying of IE and Windows; (3) contracts that limited the distribution of Netscape; (4) predatory conduct against Netscape; (5) Microsoft discounts and other efforts to dissuade OEMs from installing Netscape and other middleware products; and (6) various Microsoft actions regarding IBM, Intel, Netscape, Sun, Real Networks, and Apple that were alleged to be part of a pattern of using monopoly power in the operating system to illegally maintain power there. The authors identified that the Trial Court agreed with the government on most of the charges against Microsoft; and found that Microsoft had a monopoly in personal computer operating systems, had illegally tied a browser to this operating system, had engaged in tying and exclusionary contracts for the purpose of excluding Netscape from the browser market, and had engaged in a variety of other actions to maintain its operating system monopoly and in an attempt to monopolize the browser market. But all these trails were failed when appealed. The authors stated that the D.C. Circuit reversed the finding that Microsoft had attempted to monopolize the browser market because the trial court had not found that browsers comprised a relevant market and also found that the plaintiffs had not presented adequate evidence on market definition or barriers to entry-either at trial or in oral argument on appeal-and it precluded the government from addressing this problem on remand. Moreover, the Appeals Court also vacated the finding of *per se* illegal tying, in part because it concluded that "the nature of the platform software market affirmatively suggests that *per se* rules might stunt valuable innovation.

But when the question arises regarding the winner of the case, there are different views. authors found that one could argue that the government won because Microsoft was found to have monopoly power in PC operating systems and to have violated the Sherman Act in trying to keep that monopoly and this finding has enabled various parties -from class actions representing consumers to companies such as AOL and Sun to obtain billions of dollars in settlements as well as other concessions from Microsoft. On the other hand, researchers also presented that it was a victory for Microsoft, because of its heavy investment in developing, improving, promoting, and distributing Internet Explorer, which was found lawful; and most importantly, the U.S. Courts did not condemn Microsoft's inclusion of new features in the operating system as a general matter, and the D.C. Circuit at least has specifically ruled that tying issues related to software platforms must be considered under the rule of reason rather than the *Jefferson Parish per se* test.

From the case, it is very clearly distinguished that when firms operate with the IPRs in proper way, and even go against the competition law, they still possess comparative more power in the market and can behave differently and strongly. Such situations enable them in getting more market share that increases their market power and competitiveness in the market.

Microsoft Corp.* v. *Commission of the European Communities

While considering the case, Moldén (2008) stated that Microsoft was charged, for refusing to supply interoperability information that is indispensable for competitors to be able to viably compete in the work group server operating system market and tying of Windows Media Player to the Windows operating system, by the European Communities as the violation of Article 82 of EC Treaty while Microsoft argued that the communication protocols to be supplied are protected by intellectual property rights, namely by patents and by copyright; and moreover, the communication protocols should be protected as valuable trade secrets. The author found that both the Court and the Commission reached the same result, namely that Microsoft has to supply the interoperability information in question but both the Court and the Commission left the issue open whether Microsoft's interoperability information was protected by intellectual property rights or not.

In the case, it must be noted very carefully that Microsoft's main argument was that the refusal to supply the interoperability information was objectively justified by the intellectual property rights that it holds over the 'technology' concerned; and Microsoft asserted that it had made significant investments in designing its communication protocols and that the commercial success its products have achieved represents the just reward. Finally, though Microsoft paid penalties as ordered by the Court, but it was established that the IPRs allowed them to operate with more power in the market as against the competitors.

FINDINGS

The detailed analysis of the research certainly has established that firms operate differently while they possess IPRs as the basis of their business. In the competition law, firms are bound with perfect competition policies and cannot enjoy the monopoly in the market, but with IPRs, their behavior become different. IPRs allow them more monopoly and freedom in the market which result in such difference.

Furthermore, while operating with the IPRs, firms are in stronger positions in the market over their competitors. Such strong positions allow them to expand their market through capturing more customers using their inventions. As stated earlier, invention, a competitive weapon, always brings extra benefits to the firms and when the inventions are protected through IPRs, in contrast to the competition law, firms are proven in the stronger position in the market and this causes the difference in their operations.

Analysis, presented on the two cases, also strengthens the findings of the research. In both cases, it was found that Microsoft enjoyed additional benefits under the IPRs and positioned strongly over their competitors, which was not possible under the competition law.

CONCLUSION

The research paper was aimed at the difference in exercising market power when the firms possess the IPRs as the basis of their businesses and the strength of market power with the IPRs. To get into the conclusion, different scholarly articles have been critically analyzed and two related cases also have been described. Then the findings are found in supporting to the research objectives.

Therefore, in conclusion, it is firmly established that while using the IPRs as the basis of the business, there is a certain difference in exercising market power and the firms holds a competitive stronger position in the market, which enables them in creating the maximum profit and huge potential for the growth.

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