



The Interface between IP Law and Competition Law

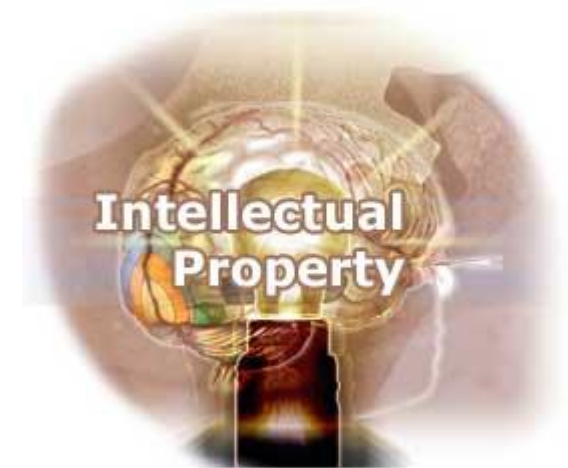
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Today's Presentation

- Introduction
- Overview of IP Laws in Mauritius
- Benefits of competition regime
- Overview of the Competition Act 2007
- Competition Act v/s the IP Laws
- How CCM treats IP Rights?
- New Developments in IP law
- Conclusion



Introduction

- Interaction of IPR with competition law:
complex and contentious issue



Conflict?
or
Complementary?



Conflict



- rights to control access and charge monopoly rent to others on the use of their rights
- regulate downstream activities in their distribution
- Competition law, on the other hand is directed at curtailing such market power which may prove harmful to economic welfare

Complementary?



“ competition laws protect robust competition in the market place while intellectual property laws protect the liability to earn a return on the investments necessary to innovate. Both spur competition among rivals to be the first to enter the marketplace with a desirable technology, product or service.”

FTC/DOJ

Overview of IP laws in Mauritius



- (1) The Patent, Industrial Designs and Trademark Act 2002 (PIDTA) [came into force in Jan 2003]
- (2) The Protection against Unfair Practice Act 2002 (PAUP) [came into force in Jan 2003]
- (3) The Layout Designs (Topographies) of Integrated Circuit Act 2002 (Layout Designs Act)- Not proclaimed
- (4) The Geographical Indications Act 2002 (GI Act)- NP
- (5) Copyright Act 1997

Types of Intellectual Property protected in Mauritius



- Copyright
- Patents
- Industrial designs
- Marks
- Layout-designs of integrated circuits
- Geographical indications

The Copyright Act



- ‘copyright’ : ‘an economic right subsisting in a work’
 - It is transferable as moveable property and grants an exclusive right to the copyright owner in relation to well-defined activities
- Protects ‘work’ (artistic, literary or scientific work, or a derivative work).
- Protection of an author’s work is not subject to a formality but instead the law creates a statutory presumption, that is applied during copyright proceedings

The PIDTA



- Industrial Design
 - Any composition of lines or colours or any three-dimensional form, or any material, whether or not associated with lines or coloursprovided that such composition, form or material –
 - (a) gives a special appearance to a product of industry or handicraft
 - (b) can serve as a pattern for a product of industry or handicraft
 - (c) appeals to and judged by the eye

The PIDTA /



- Patent:
 - The title granted to protect an invention (invention is defined as an idea of an inventor which provides solution to a specific problem in the field of technology)

- Marks
 - trade marks,
 - trade names,
 - service marks
 - Collective marks

PAUD



- Creates the offence of ‘unfair practice’
 - define as an act committed during the course of an industrial or commercial practice and is contrary to ‘honest commercial practice’
- Its scope covers ‘any industrial property enactments’ (though this phrase was not defined)

Competition Law

Competition law and Economic benefits



- **Static Efficiency:**

- Lower prices
- Better quality
- More choice

- **Dynamic Efficiency:**

- Efficient allocation of resources
- Management, processing and technological improvements
- Product innovation

The Competition Act 2007



- Sets up the Competition Commission
- Powers to investigate restrictive business practices:
 - Collusive agreements (cartels)
 - Monopoly Abuses
 - Mergers resulting in substantial lessening of competition

Collusive Agreements



- price fixing
- Market sharing or sharing source of supply
- Restricting supply or acquisition
- Vertical agreement involving resale price maintenance
- Bid rigging:
 - Agreement not to submit bid or tender in response to an invitation for bids or tenders
 - Agreement upon the price, terms and conditions of a bid or tender to be submitted in response to a call or request

What is an Agreement?



- Any form of agreement between enterprises:
 - Whether legally enforceable or not
 - Which is implemented or intended to be implemented (in Mauritius or part of Mauritius)
 - Includes an oral agreement
 - A decision by an association or enterprises and
 - Any concerted practice :
 - means a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them

Effect of a collusive Agreement



- Null and void
- Carries a penalty of up to 10% of turnover of the enterprise in Mauritius during the period of the breach up to a maximum of 5 years:
 - Note: penalty applies only when there is intentional or negligent breach

Monopoly Situation

- Exists in relation to supply of goods or services where:
 - 30 % or more are supplied or acquired on the market by **one** enterprise
 - 70% or more are supplied or acquired on the market by **three** or **fewer** enterprises
- Object or effect of preventing, restricting or distorting competition
- In any other way constitutes exploitation of the monopoly situation

Abuse of Monopoly



- Dominant position or being a monopoly is not prohibited
- Abusing the dominant position of market power is prohibited

Mergers



- The bringing together under common ownership and control of 2 or more enterprises of which one at least carries its activities in Mauritius, or through a company incorporated in Mauritius resulting in substantial lessening of competition

COMPETITION ACT V/S THE IP LAWS

HOW DOES THE COMPETITION
COMMISSION TREAT INTELLECT
PROPERTY RIGHTS?



Agreements or Practices excluded from the Act



“Any agreement in so far as it contains provisions relating to the use, license or assignment of rights under or existing by virtue of laws relating to copyright, industrial design, patents, trade marks or service marks.”

CCM Guidelines 7 – General Provisions



- Defines how CCM will treat IP related Issues!
- All IP related issues are not per se excluded because of the exemption in the Act
- Not all agreements that involves IPRs are exempt.

Application of the Cartel provision



- Horizontal agreements on sharing IPRs, for a legitimate purpose such as cooperation in the marketing and development of new products, might also create a channel of communication through which prices more generally are fixed, which would be a breach of Section 41 of the Act.
- Following investigation, the CCM might (in addition to other penalties and remedies) require agreements to be renegotiated in a manner that preserves the IPR-related element of the original agreement, but removes such effects.

Application of the Merger Provision



- IPR rights will be treated as any physical assets that might be involved in cases CCM is considering.
- The purchase by one enterprise of intellectual property rights from another will be treated as a merger.
- Remedies may require IPRs, or at least access to intellectual property, to be divested as part of the package, for example, to make the divested entity viable.
- The CCM would not in normal circumstances force an owner of an IPR to give access to rivals.

Application of the Merger Provision/



- There may be a concern if IPRs held by the same entity extend across several products if those IPRs could reasonably be expected to be held by different enterprises (for example because the original holders of those rights are separate enterprises). The holder of an exclusive import right for two competing branding products may have *more* market power than the original owners of those brands.
- The CCM would regard the acquisition of exclusive rights to IPRs on products that can be expected to compete against one another as a horizontal merger and would assess whether any such acquisition is likely to result in a substantial lessening of competition.
- Similarly, the acquisition of rights that could reasonably be expected to be held by different owners to complementary products (such as different stages of production), may create concerns of a vertical nature, investigated as a vertical merger.

Application of the Monopoly Provision



- An IPR such as a patent, copyright or trademark is essentially a legally-protected monopoly.
- A legal monopoly provided by IPR on a specific product does imply that the owner has a monopoly position within the meaning of the Competition Act. A monopoly position can be held only in relation to a market.
- In most cases, multiple brands compete in a wider product market and the legal 'monopoly' over the brand does not imply that the holder is in a monopoly situation in that wider market.
- Thus, to assess whether the owner of an IPR is in a monopoly situation, the CCM would follow the same procedures as it would in an assessment of any other business.

Application of the Monopoly Provision



- Exploitation of IPRs by the holder to maximize the value of that intellectual property, will not be regarded as a restrictive practice.
- For ex: an inventor with a patent is free to price it at whatever level he chooses, to assign exclusive rights, to prevent resale at prices below a specified price and so on.

Application of the Monopoly Provision



HOWEVER

- In particular, holders of IPR may not be permitted to ‘leverage’ the legitimate monopoly power they enjoy from their IPR to restrict, distort or prevent competition in other markets.
 - Ex An importer might be considered to be abusing a monopoly situation if he threatens not to supply that product to force his customers to take other products from his line, or to agree to exclude the products of his competitors.
- ‘Bundling’ of IPR protected products with other products, whether formally through a restrictive agreement or for example through a retailer exclusively selling some brand and also thereby capturing customers for his non-branded products, could be an abuse of monopoly .

Application of the Monopoly Provision



- As a general principle, the CCM will not treat exclusive import rights any differently from the way it will treat 'original' holders of IPR.
- If it receives a complaint about behaviour by the holder of an exclusive import right, therefore, the CCM will consider whether it would be concerned were the same complaint being made about a product of Mauritian origin. If not, the CCM will not be concerned.

New Development in IP Laws



- The Mauritian government is presently reviewing the IP legislation in Mauritius
- It is proposing to allow parallel import by moving from a regime of national exhaustion to that of an international exhaustion
- The Competition Commission has fully supported this move, as this meets the objective and mandate of the Competition Commission

Conclusion



- Interface between competition law and IP law can be complex and contentious
- In spite of the exclusion, the Competition Commission may depending on the circumstances of the case investigate behaviours which may still infringe the provisions of the Act.



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