

Anti-trust; not anti-IP

The Competition Act, 1998 ('the Act') is concerned with the promotion and maintenance of competition in South Africa. Implicit in the Act is a dislike of mechanisms designed to exclude competition. On the other hand, IP rights - patents, trademarks, copyright and so on –grant the owner thereof the right to exclude others from using the IP concerned. There is therefore an inherent and apparent tension between IP and competition.

Previously, the Maintenance and Promotion of Competition Act, which governed antitrust in South Africa, excluded IP rights from its application. The current Act, however, does not include such an exemption. The exercise of IP rights, insofar as it may contravene those sections of the Act that prohibit restrictive practices and abuses of dominance are no longer automatically immune from critical scrutiny. Therefore, for example, one might argue that, if a patent-holder licences several geographically-distinct competitors, that practice violates the prohibition on market division contained in the Act.

The natural inclination is to see the existence of IP rights as granting a monopoly to the owner, and complainants will be quick to make out a case that the use of IP rights to exclude competitors constitutes an abuse. However, as early case law in the European antitrust context highlighted, the normal use of patent protection by itself cannot constitute an abuse; abuse necessarily involves an element of impropriety in the way in which the patent right is exercised. Such impropriety cannot automatically be said to occur simply by virtue of the fact that a party is exercising the rights and protection granted it by operation of IP laws. Similarly, the approach has been taken in other jurisdictions that a simple refusal by an IP right holder to grant licences to third parties would not constitute an abuse. This is in line with the trite attitude of competition law to dominant firms: the mere fact of dominance is not what is prohibited; what is, is the abuse of that dominant position in a manner that contravenes the legislation. In the same manner, the mere fact that a firm is the holder of an IP right that gives it a 'monopoly' does not warrant the conclusion that an abuse is being perpetrated.

On the other hand, a practice like tying (or even implicit tying), where the holder of an IP right insists, for example, that two related products can only be purchased together, is likely to be considered an abusive exercise of IP rights in contravention of the provisions of the Act. The holder of an IP right would be considered to abuse that right if its actions prevented the production and marketing of a new product for which

there is a potential consumer demand: excluding competition from the market simply to secure a monopoly clearly goes beyond the essential function of, say, copyright.

A firm may apply to the Competition Commission to exempt from the application of Chapter 2 of the Act (the chapter dealing with prohibited practices) an 'agreement or practice, or category of agreements or practices' that relates to the exercise of intellectual property rights. Of course, the need to apply for an exemption only arises when the holder of the IP right considers that its agreements and or practices 'related' to the exercise of those IP rights might fall foul of the Act.

Commentators have accepted that owners of IP rights are living in the hope that the anti-competitive impact of their IP rights do not attract the attention of the competition authorities. They base this conclusion on the fact that only one exemption application under section 10(4) was granted by the Commission within 7 years of inception of the Act, whilst in the same period 100 000 patents were filed, as well as a host of trademarks and designs and innumerable unregistered copyright and trade secrets. The explanation offered is that IP rights holders would be loathe to make application under section 10(4) of the Act, since this would require them to explain in which manner the exercise of the IP right would contravene the Act, and that they would then run the risk that the application is not granted, leaving them open to prosecution under the Act. However, this analysis is overly simplistic. First, it assumes that the mere fact that a party holds an IP right constitutes a contravention of the Act. This simply is not so. Secondly, it should be noted that there is no requirement in the Act that the holder of an IP right, in an application for exemption under section 10(4), must include an 'acknowledgement of guilt', as it were. It is true that the applicant will have to identify the agreements and/or practices which it would seek exemption in respect of: the Commission cannot be required to grant a blanket exemption in respect of agreements and practices which have not been identified. But this stops well short of a requirement that a detailed analysis of the manner in which the IP right holder perceives its agreements and/or practices to contravene the Act to be submitted to the competition authorities. Furthermore, the fact that an exemption is not granted does not mean that prosecution will follow. There is, of course, a difference between finding that an exemption ought not to be granted in respect of a practice and/or agreement and finding that that agreement contravenes aspects of the Act.

The fact that section 10(4) refers specifically to practices and agreements has given rise also to commentary that the exemption clause may not be applicable to abuses of dominance, since abuses of a dominant position are not described in the Act using

that terminology. This is in contrast to sections 4 (restrictive horizontal agreements) and sections 5 (restrictive vertical agreements) of the Act. This view is ostensibly not supported by the language of section 10(4), which allows for exemption of agreements or practices from the application of the whole of chapter 2 of the Act. The abuse of dominance provisions form part of chapter 2. Also, one might take the provisions of section 8 (abuse of dominance prohibited) to see simply how a section 10(4) exemption application may be applicable: section 8(a) proscribed charging an excessive price to the detriment of consumers. Surely, the charging of an excessive price must be seen as a practice. And if that practice 'relates' to the exercise of intellectual property rights, exemption may be applied for. The same argument can apply to, say, (the practice of) engaging in exclusionary acts such as requiring a supplier or customer not to deal with a competitor (section 8(d)(i)), tying (section 8(d)(iii)) or selling goods or services below marginal or average variable cost (section 8(d)(iv)). The fact that the statutory language does not define these practices as such makes no difference.

Rather, exemption may not be granted to holders of IP rights who are also perpetrators of abuses of dominance on an entirely different basis: that the abuse does not 'relate' to the legitimate exercise of the IP right, as is required by the language of the Act, but constitutes simply an abuse of a dominant position, which dominance is derived from the IP right. One may illustrate it with reference to the complaint some years ago against Microsoft's licencing practices, which effectively foreclosed competitors in the market for operating software in personal computers, *inter alia* through requiring payment for royalty on every computer produced by a manufacturer or in a particular model series, regardless of whether it had pre-installed Microsoft software, ostensibly derived from Microsoft's intellectual property. However, a proper consideration of the facts reveals that the practice complained of had nothing to do with the proper exercise of Microsoft's intellectual property rights and in fact did not relate to those IP rights: the restrictions that Microsoft sought to place on its customers were necessary for the protection of the IP right concerned. In other words, the agreements with the manufacturers of personal computers to the effect that these royalties would be payable constituted a contractual arrangement between them which did not, to use the language of our statute, 'relate' to the legitimate exercise of the intellectual property right.

If one appreciates the distinction between practices and agreements which relate to the legitimate exercise of intellectual property rights and those which simply derive from a desire to exclude competition, the ostensible tension between IP rights and

competition law diminishes. No longer does the holder of an IP right have to fear infringement upon that right by virtue of the operation of the competition legislation. And the need for exemption applications diminishes with this. This conclusion is also borne out by the Competition Tribunal's stated approach to problems of IP: in 2000, the conflict between antitrust and intellectual property was highlighted in an interim relief application brought before the Competition Tribunal by DW Integrators CC against SAS Institute (Pty) Ltd. That case concerned a request for a direction obliging the respondent to issue a licence in its intellectual property to the applicant. The respondent was a large software firm owning valuable intellectual property and the applicant was a firm providing consulting services to licencees of the respondent's software programmes. The applicant claimed that it was unable to provide its services effectively without itself possessing a licence in the respondent's software, and that, by refusing to issue a licence to it, the respondent was preventing it from participating in the market. It therefore maintained that the respondent was in violation of section 8(c) of the Act, which makes it an offence for a dominant firm to engage in an exclusionary act if the anti-competitive effects of that act outweigh any associated efficiency gains. Maintaining that the software in question was an essential facility, the applicant argued that the respondent had violated section 8(b) of the Act, which prohibits a dominant firm from denying a competitor access to an essential facility. In that application, which was denied by the Tribunal, it noted that 'caution is particularly well-advised when dealing with the interface between anti-trust and intellectual property' and considered appropriate the remarks in a US decision (*Atari Games Corporation v Nintendo of America Inc*) which warned of the 'danger of disturbing the complementary balance struck' between IP and antitrust.

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