Treatment of Intellectual Property Rights in the Smaller Developing Countries: Tips for Second Generation Competition Legislation

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Proposal for Introduction of "Know-How" in Second Generation Developing Country Competition Legislation

- Most developing countries have gone through a teething phase:
  - Understand the rules of competition
  - Understand game theory: **taking small, open, economies as they are and developing appropriate enforcement and policy strategies** to build stronger/more competitive market dynamics in **countries of 13 million or less…even in countries of just over ¼ million**
  - Competition law applies/is relevant to all economies: present-day objective in the developing world is to **tailor the application of the law to the micro-economic setting** and the business/market reality of the developing country .
  - IPRs give legal right to engage in conduct that would otherwise be anticompetitive/absent existence of IPR. **Inherent conflict with the economic/legal principles of competition law: exercise of know-how in developing world leads to the same conflict.** Alternatively: Established Multinationals Can Use Economic Strength to Coerce Owner of Know-How to enter anticompetitive licensing agreements.

Intellectual Property Rights and the Developing Country

- In the Developing World, Competition Law's Ultimate Objective is to Elevate Consumer Welfare which Reduces the Cost of Living and Elevates Standard of Living
  - Possible If: Markets Are Contestable
  - Possible if there is Choice in Product (Good or Service)
  - Possible if there is Access to Product Input
  - Possible if there is Access to Ultimate Product

- The recognition of IPR and IPR Laws extends to the developing world
  - Grant of Exclusivity/Licensing terms can extend to use, input, output, next generation technology. Grant of IPR leads to Generation of Profits, Recoupment of R&D Costs
  - **…BUT the presence of IPR Laws is not necessarily what is fostering innovation in developing countries**

- IPR and Developing World:
  - **IPR = "Know-How" in the Developing World**/Unregistered/Unrecognised designs, methods, practical, non-patented business processes.
  - Grant of IPR can mean suppression of rivalry, increased prices, depressed output, no/low choice and quality and decreased **access—not recognising "know-how" and regulating it means "de facto" IPR is unregulated in developing countries.**

The Value of Developing Country "Know-How"

- Competition authorities can choose to recognise that there is significant use of **secret yet identifiable farming, plant-breeding, agricultural, medical knowledge and processes** being put to use….Secret methods when practised in a district or region **may be also be the subject of contractual conditions and restrictions among businesses:**
  - Plant-Breeding: Ethno-Botany and the creation of unique and identifiable local fruits, plants in Belize and Guatemala
  - Agri-Farming: Local innovative methods to protect farm animals from diseases like in Uruguay
  - Herbal Medicine/Naturopathic Remedies: The development of naturopathic herbal remedies for skin diseases in St. Lucia
  - Fisheries: Development of Agri-fishing tools and methods for catching flying fish in Trinidad and Barbados

Existing Legislation on "Know-How" IPRs in the Developing World ?

- Intellectual Property Legislation:
  - *"In Kenya, … the patent office, which is among the most active of patent offices on the African continent, has issued a total of 589 patents since the office opened in 1991. Compare that with the 5,500 patents issued by the US patent office in a single week in July this year… [**O]f the 50 or so patents granted in Kenya each year, between zero and five (on average) are granted to local Kenyan organisations or individuals.** […]. Despite the benefits of WTO membership and of safeguarding one's intellectual property, the fact is that on balance, the western patent model is not yet helpful to most Kenyan – or African – entrepreneurs"* **Isaac Rutenberg, Centre for Intellectual Property and Information Technology Law, October 2013**

- Typically, **Trade Mark Act, Example Cap 26:04, section 6 of Zimbabwe** states, for example: *"No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark…"*
  - International sphere/agreements do not pre-empt national legislatures from exercising right to develop policies/laws/ regulatory interventions to ensure that exercise of an IPR does not lead to closed or uncontestable markets. Presently unregistered designs are protected under Tort Law and Contract Law.
  - **TRIPS Article 40: Member States can pass laws that prevent the exercise of IPRs in a manner that constitutes a restraint of trade or adverse effect on competition. Therefore countries should develop appropriate competition law framework.**

- Competition Regulation of IPR, **Example Guyana, sections 24(2)(b) and 24(3):** It shall not be an abuse of dominance to enforce an IPR unless the exercise of the right "unreasonably lessens" competition or "impedes" the transfer/dissemination of technology. IPR described as "copyright, patent, registered design or trade mark".
- No protection of unregistered know-how IPRs identified in competition law in developing world legislation presently.

How "Know-How" Would be Applied in the Law

- Definition: Include a definition of know-how in the legislation and use the term anywhere in the legislation where IPRs are regulated.

- **Example of Definition for Competition Legislation:** *"**know-how**" means information that is kept confidential in order to preserve competitive gains and shall include unregistered designs, business processes, trade and business secrets, and other practical and non-patented information, identifiable business processes, or other secret, significant, useful and practical methods;"*

How Know-How Would be Applied in the Law

- Application: Register them at the IPR Authority
  - Since the term may be introduced under the new/amended competition law and not under IPR law, must have coordination framework/MOU between Patent Office and Competition Authority on the application of the competition law to "know-how"
  - Can create subsidiary regulation further defining procedures, e.g. registration

- Give them the same protection as IPRs
  - Example, the individual farmer or plant-breeder or medical practitioner, for example, may be the inventor or **owner of the technical "know-how" but operates at the mercy of certain big corporations** that impose on them long-term contracts and other oppressive and highly restrictive intra-technology restriction or pay for delay tactics

- Apply the rules on competition to them: Know-how would be assessed in the same manner as other IPRs. The competition authority would therefore **examine arrangements which restrict the sale, transfer or licensing of know-how in a manner that restricts competition in a market.**
  - **Example Of Legislative Provision:** It shall not be an abuse of dominance to enforce an IPR **or "Know-How"** unless the exercise of the right "unreasonably lessens" competition or "impedes" the transfer/dissemination of technology.

Tips for Second Generation Competition Act Treatment of IPRs

- Define IPRs also as "Know-How" in the Legislation
- Develop Priority Policies for Dealing with IPR/Competition Law Conflict Typically Seen in the Particular Developing Country
- Make Arrangements for Concurrent Jurisdiction and Coordination (IP Office/Registration of Know-How, Competition Authority, Consumer Protection Authority, Standards Bureau, Customs, Food, Drug and Agricultural Bodies
- Use Guidelines to Explain Competition Authority's Stance on IPRs

Questions/Comments

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