The Convergence between Intellectual Property and Competition Law under Ecuadorian Legislation

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Abstract: The following article develops the existing convergence between intellectual property and competition law in Ecuador. It analyzes the areas in which a superposition of both areas of law may arise, the potentially harmful effects of this concurrence, and, finally, the balance that must be reached for the harmonious coexistence of the two regimes.

Key words: Intellectual Property, Competition Law, Ecuador, antitrust, merger control

Despite the fact that competition law and intellectual property apparently have opposing interests, they are two closely related subjects. Intellectual property as an institution is founded upon retributing creation by the human intellect through various forms of protection of intellectual and industrial property. This retribution constitutes an incentive to promote creativity in all areas of intellect, particularly in innovation and development industries, where these creations can lead to inventions, the disclosure of which would benefit society as a whole. Intellectual creations can range from a photograph, to a design, to an invention, or a trademark, among many others. These creations, due to the contribution they can make to society and the value that they represent to their creator, receive protection from the institution of intellectual property.

As a starting point, we mention Ricardo Antequera's definition of "intellectual property": "intellectual property" is a "legal space" which covers a variety of legal systems, which seek to protect different types of intangible goods: industrial, commercial, technical, artistic, scientific, and literary. The particularity of this broad normative field is the grant of exclusive rights to distinctive, original, or novel intangible goods, as applicable." [2]

In some cases, these exclusive territories can constitute an asset with an importance to society that conflicts with competition law, primarily in the area of patents, where we could find new patent-protected technology that is essential to create new subsequent technology. Due to the very nature of intellectual property, market demand should naturally lead its owner to exploit this intangible right to the fullest extent possible and maximize its revenues as return and compensation from its investment to obtain this invention. If, on the contrary, reasons of another kind exist to deny access to these, measures provided by competition law would come into play.

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[2] Ricardo ANTEQUERA PARILLI. *Manual para la enseñanza del Derecho de Autor y los Derechos Conexos.* Volume I. Santo Domingo: Escuela Nacional de la Judicatura de la República Dominicana, 2001, p. 3. **Unofficial Translation. Official text in Spanish**: *"espacio jurídico" dentro del cual caben diferentes sistemas normativos que tienen por objeto la protección de bienes inmateriales de diferentes órdenes: industriales, comerciales, técnicos, artísticos, científicos y literarios. Ese amplio campo normativo tiene como particularidad el otorgamiento de derechos exclusivos y excluyentes sobre bienes inmateriales que reúnan como característica, bien sea la originalidad, la distintividad o la novedad, según los casos*"[2].

The fine line that must prevail in these cases is very delicate; as competition law should only conflict with intellectual property in exceptional cases where insufficient use of an invention has been proven; due to abuse of these rights as a restrictive measure on free competition; or attributable to presumptions that justify imposing a compulsory license. Therefore, its field of "'action' [must be established] as a limit to the specific behavior of owners of intellectual property rights who create conflicts with the ultimate objectives of competition law, understood in its broadest sense." [3] Excess or unjustified interference of competition law with intellectual property could have adverse effects on the industry of innovation and development, if the market perceives these as unmeasured interferences of competition law into the borders of intellectual property.[4] These harmful effects could lead to: (i) courts' excessive condemnation of violations to competition or anticompetitive "misuse" when such practices were not anticompetitive at all,[5] or (ii) discouragement of innovation benefitting the consumer in the short and long term. Case *SCM Corp. v. Xerox Corp.* is an example, in which the ruling determined that, "*[t]he conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws proscribe unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art."*[6]

In Ecuador, intellectual property covers both copyright and related rights, and industrial property, which protects other rights such as inventions, trademarks and plant varietals.[7] Ecuador's domestic intellectual property legislation is governed by the recently enacted Organic Code on the Social Economy of Knowledge, Creativity, and Innovation[8] ("Code of

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[3] Carlos Andrés URIBE and Fernando CARBAJO CASCÓN. *Regulación "ex ante" y control "ex post": La difícil relación entre Propiedad Intelectual y Derecho de la competencia.* https://app.vlex.com/#WW/search/content_type:4/Regulaci%C3%B3n+%E2%80%9Cex+ante%E2%80%9D+y+control+%E2%80%9Cex+post%E2%80%9D%3A+La+dif%C3%ADcil+relaci%C3%B3n+entre+Propiedad+Intelectual+y+Derecho+de+la+competencia./WW/vid/575905762/graphical_version **Unofficial translation, official text in Spanish**: *"intervención [debe establecerse] como límite frente a específicos comportamientos desarrollados por titulares de Derechos de Propiedad intelectual que generan conflictos con los objetivos últimos del Derecho de la competencia entendido* lato sensu*"*

[4] "The interdependence between intellectual property and competition works in two ways: economically and technologically. Competition requires the existence of a modern, effective, and adequate intellectual property protection system. Effective operation of this system also depends on efficient observance of competition policies that ensure both an adequate climate for commercial competition in general as well as control of the abuses of intellectual property rights." Pedro ROFFE. *El Acuerdo TRIPs y sus efectos: el caso de los países en desarrollo*, in Propiedad intelectual en el GA1T. Buenos Aires, Ciudad Argentina, 1997, p. 354. **Unofficial translation, original text in Spanish**: "*La interdependencia entre propiedad intelectual y competencia obra económica y tecnológicamente en dos sentidos. La competencia requiere de la existencia de un sistema moderno, eficaz y adecuado de protección de la propiedad intelectual. El funcionamiento efectivo de tal sistema depende asimismo de una eficiente observancia de políticas sobre competencia que aseguren tanto un clima adecuado de competencia comercial en general como un control de los abusos de los derechos de propiedad intelectual".*

[5] Herbert J. HOVENKAMP. *The Intellectual Property-Antitrust Interface.* University of Iowa Legal Studies Research Paper. 2008, p. 1980.

[6] *Id*., p. 1979, footnote 1.

[7] Paris Convention for the Protection of Industrial Property (1883).

[8] Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación. Official Register Supplement No. 899 dated as of 9 December 2016

Knowledge"), which repealed the Intellectual Property Law that had been in force in Ecuador since 1998. Ecuador is also signatory to a number of international treaties and agreements: Andean Community of Nations' Decision 486 on industrial property and Decision 351 on copyright and related rights. Generally, domestic legislation complies with international treaties and agreements with respect to minimum standards of protection and fundamental principles of universal application on the subject. Without prejudice to the foregoing, the creations of intellect in a globalized economy require constant normative evolution which considers humanity's intellectual development and the mechanisms – particularly technological- by which it is currently disseminated and could potentially violate these same rights.

In turn, competition law, as to its relationship with intellectual property, must seek to provide support and balance, because *"they share the common objective of promoting innovation and improving consumer wellbeing due to inclusion of technical progress as an essential process of competition."* [9] In this sense, competition law only intervenes in such cases where intellectual property is used against its own spirit and nature, as a means to limit competition.[10] Considering the constant technological changes and the importance that these new technologies gain in our lives, protection of intellectual property is in constant conflict with competition law when intellectual property effectively limits competition. In this case, a balance must be sought between the system of retribution to the owner for its creation, society's interest in accessing innovative discoveries, and technological development without directly violating competition.

The four areas of the local competition regime find borders with intellectual property. In the field of abuse of dominant position, a process of this type could lead to a judicial order to divest intellectual property assets or imposition of compulsory licenses on patents. In the area of cartels or restrictive agreements, these may adopt the form of patent settlements that would soon expire. In this area, well-known cases analyzed pursuant to the European Commission's pharmaceutical sector inquiry in 2008 led to research and recent first instance decisions issued by the European Commission. A series of pharmaceutical patent-holding companies had reached agreements with generic pharmaceutical manufacturing companies, potential competitors according to the Commission,[11] with the actual or potential effect of delaying entry of generic competitors into the market at the time the patent's protection expired. Agreements may also take the form of cross-licensing agreements within complex patent portfolio schemes among competitor companies, which could be deemed to restrict competition if they seek, or have the actual or potential effect of limiting competitors' access to these technologies. In a recent case in Chile, after a competition investigation, a court

[9] Hebert TASSANO VELAOCHAGA. "La convergencia entre el derecho de la competencia y los derechos de propiedad intelectual". Revista de la Facultad de Derecho PUCP. (2015), p. 239. Unofficial translation, original text in Spanish: "*comparten el objetivo común de promover las innovaciones y mejorar el bienestar de los consumidores debido a la inclusión del progreso técnico como un proceso esencial de la competencia*"

[10] "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare." U.S. Department of Justice and Federal Trade Commission. *Antitrust Guidelines For the Licensing of Intellectual Property,* April 6, 1995, § 1.0. In Xavier GÓMEZ VELASCO. "Los derechos de propiedad intelectual como restricción a la competencia económica". UASB- Ecuador (2003), p. 94.

[11] EUROPEAN COMMISSION. *Antitrust: Commission enforcement action in pharmaceutical sector following sector inquiry.* http://europa.eu/rapid/press-release_MEMO-12-593_en.htm

ordered the sale of a series of trademarks belonging to a beer company, as it believed that a series of trademarks had been acquired to restrict a competitor's access to the market. In merger control, intellectual property gains essential importance in cases in which concentration among two economic agents, where these would reinforce their market presence due to the intangible aspects of the transaction's, such as, for example, through the acquisition of new inaccessible technologies for third parties, that would in turn strengthen the new merged operator. In Ecuador, a recent well-known global beer market transaction was conditioned upon the sale of trademarks and licensing agreements with third parties.

On these apparently opposite subjects, there is a fundamental cooperation arising between a country's authorities, on one hand, the Superintendence of Market Power Control, especially its Merger Control Intendency, and the Ecuadorian Intellectual Property Institute, when evaluating competition cases, such as the abusive use of judicial or administrative actions, or economic concentration involving a significant component of intangibles. Cooperation between these two institutions is necessary to corroborate information provided by parties in their merger control filings, with the information contained in the registries of the Intellectual Property Institute.

"*This is not about proposing competition law as the tool par excellence for solving conflicts between access and rights to property. On the contrary, only a few scenarios are considered in which the right to competition can intervene without seriously altering intellectual property rights. As an extension, we make a call so that legislation enshrines broad, pro-competitive rules promoting greater access to protected intangible goods in its intellectual property legislation*."[12] It is essential for the competition authority's practice to find this desirable balance enabling full coexistence of both regimes with mutual respect for each other's limits.

Despite some degree of scarcity, there is precedent in Ecuador that has already raised this discussion, particularly within a case of purported abusive exercises of rights under a patent, in which the authority that applied the community competition law in Ecuador between 2009 and 2011 assessed those two systems and determined that a party had abused a patent right in seeking to restrict competitors' access to the market. It is essential for the competition authority's officers, when facing an investigation involving IP components, to use all the tools at hand to form a technical criterion, potentially even requesting cooperation from the IP Authority to form the broadest possible understanding of the case at hand.

[12] Carlos Andrés URIBE and Fernando CARBAJO CASCÓN, *supra* note 3. cit. p. 307