



## Competition Law and Intellectual Property Rights Conflicts

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### ABSTRACT

Developed countries apply some controls directly to protect national security, concerning persons` or certain countries` access to specified technologies. Similarly, they apply indirect supervision on the types, amount and channels of technology transfer to certain countries through currency exchange regulations, taxation and foreign investment. Developing countries also keep technology turn under their own control in order to ensure that technology transfer contracts and the economic objectives and policies of the government are consistent. In technology-transfer contracts (license contract), one type of various intellectual property rights is transferred. The exclusivity of intellectual property rights is one of the most striking examples of exclusivity which is granted to special people and for certain period; so that in the certain period, they themselves, or their own selected people or their representatives benefit from the issue of intellectual property. The reason why these exclusive rights are granted is that the issues of the rights are used by the common people without special protection (patents). The variety of intellectual products and their utilizations in diverse fields of industry, commerce, science, literature and art have made such issues important. Hence, demand for these products either from the government or private sectors always exists. The owners of intellectual property market their products due to such requests and also to observe their own investment, therefore, obtain incentives for more activities and innovation in today`s knowledge-based economy (in which just those societies are successful that own high creativity and technical ability for their consumers` welfare). Accordingly, either they themselves use them or totally transfer them to another person or sometimes (with preserving their property on such rights) they give others solely a license to use them. The recent form of using intellectual property rights (namely to conclude license contracts) allows license-givers (with preserving their property on technology) to develop their own technology and enter the global market.

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### Introduction

One of the most noticeable examples of exclusiveness is intellectual property rights which are awarded to certain people by governments for certain time during which only themselves, their own selected people or their own representatives take advantages from the intellectual property issue. The reason why the exclusive rights are awarded is that the issues of the rights are utilized by the public without any special protection (exclusive). The diversity of intellectual products and their utilizations in various areas including industry, commerce, science, literature and art have given an importance to these issues. Hence, the demand for these products, whether from governments or private sector, always exists. The owners of intellectual property due to the demands and in order to observe their own investment results, possessing an impetus for activity and innovation in today`s knowledge-oriented economics (in which just those societies are successful that own high creativity and technical ability for their consumers` welfare), market their products.

Economic studies show that the market system cannot optimally allocate resources alone in all terms and situations. The market works efficiently only when a favorable condition for its properly function is provided. There exist various anti-

competitive and aggressively behaviors which all of them are applied in order to eliminate consumers` welfare, not optimally allocate resources and remove competitors. Governments, viewing market shortcomings, take actions to eliminate these defects. They take, in fact, a supervisory role to provide conditions in order to optimally allocate resources and consumers` welfare.

Competition laws are an important tool for creating fairly competitive conditions and prohibiting any form of monopoly. The Competition laws of optimally allocate resources aim to distribute wealth in community through a better way and, above all, produce better productions. This is while the main purpose of legislating in the area of intellectual property rights is to encourage people to innovate in favor of the community`s benefits. Obviously, the competition laws aim to support and encourage competitions among rivals. The question is put forward, however, that whether the competition laws should merely try to maximize consumers` (customers`) welfare or pursues the general welfare of society (i.e. the welfare of producers and consumers in total). The competition law officials are striving to maximize consumers` welfare, while economists maintain to pursue the general welfare of society.

A central goal of competition laws is to oppose monopoly, while granting the exclusive right of commercial and economical exploitation to owners of intellectual property rights is the sole means to support mentioned people. That is why the issue of the impact of competition laws on license contracts has turned into a challenging one. In order to compensate for deficiencies caused by market defects, competition laws are becoming exclusive, so that approach it to a competitive state as much as possible. Because, the only way for consumers to achieve their needed products and services with the lowest and highest possibly quality is in a competitive state.

### 1. History of Conflict

Regarding the time priority of emergence of intellectual property laws towards competition laws in most countries worldwide, it can be concluded that by approving competition laws in any kind of legal system, a potential challenge and conflict would be made between the two legal sets.<sup>1</sup>

At the same time as planning legal bills in order to facilitate competitions, the issue of the challenge and conflict between intellectual property rights and competition rules were gradually focused by scientific, economic and legal communities of countries. To resolve the conflict, the clause No. 44 from rule of fulfilling general policies of the principle No. 44 adjudges:

"The rights and privileges caused by intellectual property should not violate the clauses 44 up to 48 of the law. In the case, competition council owns the right to make one or more following decision(s):

- A. Activity seizure or not implementing exclusive rights including restrictions on period of implementing exclusive rights;
- B. Prohibiting contract or settlement agreement related to exclusive rights to perform all or some parts of the conditions and commitment within it;
- C. Cancelling the contracts, agreements or unanimities related to exclusive rights, in absence of effective measures mentioned in items A and B.

In Europe Union, the conflict between the two right systems has been started from 1960 after Rome Treaty was concluded in 1957. This is essentially because of the predictive competition rules of the clauses 81 and 82 of this treaty. And the main procedure that has so far been applied by Europe Union to resolve the conflict between intellectual property rights and competition law is using subject exemption from the item 3 clause 81 of the European Convention.<sup>2</sup>

Since performing the above-mentioned general in the item 1 of the clause 81 regarding agreements, decisions and coordinated procedures can result in inappropriate economic effects, and even in some cases lead to waste consumers' interests, the regulators in the European Convention in the item 3 of the clause 81, thus, have predicted that the agreements, decisions and coordinated procedures (while possessing special conditions) can be exempted from the inclusion of overall sentence of the issue in the item 1 of the clause. The exemption in the item 3 of the clause 81 of the European Convention is

issued by relevant authorities in two forms including individual exemptions and general exemptions.

Declaration Issuance<sup>3</sup> concerning the invention license contracts in 1962 was the first action of European Commission taken in order to solve the conflicts between intellectual property rights and the competition rules.<sup>4</sup> Following two years of issuing the above declaration, European Commission issued the first total exemption regulations related to intellectual property rights under the title "Invention License Total Exemptions" in 1984 and the new regulations "Technology Transfer Agreements" in 2004 as well.<sup>5</sup>

### 2. Field of Conflict

Intellectual property rights are an exclusive island in a free ocean.<sup>6</sup> This indicates the conflict between the two legal systems. Intellectual property rights pursue exclusive exploitation, while the goal of competition rights is to assail exclusiveness. The field of conflict between the two systems points firstly to the legal exclusive essence of the intellectual rights and secondly disavows exclusiveness by competition rights, which will be investigated later.

The first characteristic of intellectual property rights is to be perilous.<sup>7</sup> In other words, investing in creative attempts, research and development for innovation has highly been perilous and the probability of its success is weaker than other investments and activities. And, in order to create motive for innovative activities, it requires the economical return obtained by this investment more than common investment. Providing unrestricted economical return, in other words, for investing in the field of creative innovations disturbs the healthy trend of competition in commercial markets.

Therefore, the economical return rate of innovative activities and creative attempts must be so much that it could recompense its risks, bring with it reasonable profits for investors and those engaged in the field, and meanwhile stop exclusion in commercial markets to be created.

The second characteristic of intellectual property rights is non-allocability<sup>8</sup>. It means if there is no certain legal arrangement, the creators of innovative works and inventions can in no way stop the economical interference and utilization of those people who have not had any profit in crating intellectual products<sup>9</sup>.

The concept of non-allocability has not been the same in all intellectual products and properties. It relates to the applied

<sup>1</sup> In the late 1980's, the countries with competition laws were 10, while the number reached more than 100 countries in 2004.

<sup>2</sup> Nawrouzi, Mashiyatullah, *Competition Laws and Intellectual Ownership Rights*, a PHD thesis for Private Rights, academic adviser: Dr. Mir Qasem Ja'far Zadeh, Shahid Beheshti University, Faculty of Law, 1386, pp. 45-47.

<sup>3</sup> The mentioned announcement has been published in European Official Journal, issue 139.24.121962 p.2922-2923.

<sup>4</sup> In the announcement, inserting some restrictive conditions including limiting exploiting invention to a form of production with itself or use, limiting the amount of production and the kind of license, and restricting using the issue process of license contract for a specific technical area in the invention license agreements have been authorized.

<sup>5</sup> (772/2002) European Commission was published in the Official Journal of European Union, issue OJ 123. 270, 4. 2004, p. 11-17.

<sup>6</sup> Jan Forrester, *Regulation Intellectual Ownership via Competition or Regulation Competition via Intellectual Ownership*, 2005, p 8.

<sup>7</sup> Nawrouzi, Mashiyatullah, *ibid* p. 6.

<sup>8</sup> Non-allocability

<sup>9</sup> Baryan Harris, *Intellectual Ownership Law in the European Union*, Franklin Pierce Law Center, 2002, p. 31.

technology for production and also the task done for producing or creating works<sup>10</sup>.

The reason why intellectual property is non-allocable stems from non-competitive characteristic of knowledge.<sup>11</sup> That is to say, the possession, application and utilization of knowledge can never be fundamentally allocated to a single person or a single company or economical unit. In other words, information and knowledge are public objects which everyone can, with no legal and legitimate obstacle, utilize it easily.<sup>12</sup>

We can interpret the third characteristic with the capability of common utilization.<sup>13</sup> It means utilization of intellectual properties does not cause its existing supply to decrease for subsequent utilizations. While financial properties possess such a characteristic. To put it another words, the utilization of an objective property (e.g. eating an apple) is a competitive process. In other words, it is possible just for one person to apply it, while utilizing intellectual properties and human genius (such as utilizing an industrial design) do not possess such a characteristic. Other intellectual properties are simultaneously used by several people.<sup>14</sup>

Another characteristic of intellectual property rights is accumulation. The feature means that the new inventions and innovations are created based on prior inventions and innovations.<sup>15</sup> Therefore, in a new invention or innovation, all of previously used inventions and innovations are shared. We can say that a new invention or innovation is given birth to through a collection of old and new attempts. Accordingly, the owner of a new invention or innovation has not immortal right to use his/her own invention or innovation. Because mentioned immortal right may turn into an obstacle against creating subsequent inventions and innovations.

Considering the above-mentioned features one can conclude as follows:

- The intellectual property rights are able to provide the owners of intellectual property rights with economical, exclusive utilization of these rights through awarding commercial utilization exclusive right to these owners for a limited period of time (while creating obstacles against others' free utilization ).
- The intellectual property rights, advocating the rights' owners, provide necessary conditions in order to reveal the resulting details regarding their creative efforts without being concerned about any threat to their legal economical profits. In such conditions, the owners of intellectual property rights can easily and immediately sell their own intellectual properties and obtain their economical profits.
- The intellectual property rights, advocating legal profits of the owners of the rights, present firmly legal frameworks in order to trading such properties, thereby support economical conversions utilization.
- By officializing the intellectual property rights and adopting suitable legal schemes for advocating them, owners of the intellectual property rights can participate in investments concerning aforementioned properties. They can share their

salaries in common investments with wealth owners as an economical property. This causes investment and participation to be facilitated. Besides, by awarding exclusive right of commercial utilization to owners of the intellectual property rights, we can justify supporting them based on the following reasons:<sup>16</sup>

First reason: since inventors, artists and innovators cannot, on their own and without support from law, search for the plagiaries of their works and stop them from seizing economical benefits of their works. Thus, the lack of necessary legal support for such people causes other people (with potentials for creating innovations and inventions) in society also avoid making any action in the case, which often requires much time and expense. Hence, governments, as society representatives, should make ideal ground in order to increase and enforce such inventions and innovations by awarding commercial, exclusive utilization right to owners of inventions and innovations and also creators of scientific, literary, and artistic works and so forth. The reason is called "Public Justification of Intellectual Property Rights".

On the other hand, the foresaid exclusive right should be limited for a certain time, so that, after the time passes, the necessary conditions for manifesting subsequent innovations and inventions would be provided.<sup>17</sup>

Second reason: Awarding exclusive right of commercial utilization from intellectual property rights to innovators or inventors, in order to provide appropriate economical reward, is the main foundation for the reward of respecting humans' attempts and activities.<sup>18</sup>

Consequently, without creating enough incentives for inventors and innovators, inventions and innovations necessary for the progress of human societies and their welfare would not emerge. Also, officializing exclusive right of commercial utilization for the creators of intellectual, artistic products and properties (especially for a certain, limited time) and legally supporting above-mentioned rights is the most invaluable and effective method through which society can provide incentives for invention, innovation and investment in regard to research and development.

The next topic is in order to determine the conflict grounds of exclusive disavowal in competition rights. Competition is a critical element in successful financial markets. The goal of all economically active units in market is to supply productive goods and services and also obtain economic profits.<sup>19</sup>

Competitive laws aim to create competitive markets. In this model of market, consumers' profits are maximized as much as possible.<sup>20</sup> In such a market, sellers are price takers of the market not price makers of it. Competitive markets<sup>21</sup> cause

<sup>16</sup>. Ibid.

<sup>17</sup>. Nawrouzi, Mashiyatullah, *ibid*, p. 11.

<sup>18</sup>. Ibid, p. 12.

<sup>19</sup>. Maher M. Dabbah, *EC and UK Competition Law Commentary and Materials*, Cambridge University Press, UK 2002, p.5

<sup>20</sup>. Alison Jones and Brenda Sufrin, *EC Completion Law*, Second Edition, Oxford University Press UK, 2004, p.7

<sup>21</sup>. Article 11, clause 1 in the law of Implementing General Policies of the principle 24 states: situation competition exists in the market in which some manufacturers, buyers and sellers who are independently manufacture, buy and sell goods or services; so that none of the manufacturers, buyers or sellers can

<sup>10</sup>. Carsten Fink and Keith E Maskus, *Intellectual ownership and Development* World bank, USA, 2005, p. 54.

<sup>11</sup>. Nawrouzi, Mashiyatullah, *ibid* p. 7.

<sup>12</sup>. Baryan Harris, *op.cit*, p.44.

<sup>13</sup>. Common Application

<sup>14</sup>. Nawrouzi, Mashiyatullah, *ibid*.

<sup>15</sup>. Nawrouzi, Mashiyatullah, *ibid* p. 9.

allocative efficiency and productive efficiency to be provided. The allocative efficiency is that existing resources in a society to be allocated to the best and most efficient consumption. Productive efficiency in productive section of market comes off when a manufacture be able to produce his/her productive products and services with a cost as low as possible. Monopoly is the opposite of competition. Monopoly<sup>22</sup> is a situation in which one or some economical unit(s) possesses/possess the power to determine the price or the amount product which should be supplied to the market, and entering new economical units to the market or leaving it, is carried out with some restrictions. We can say, accordingly, that competitive markets are characterized by preventing producers from imposing unjust prices on consumers. As a result, we can say that disavowing monopoly in the economical markets is one of the central goals and most important tools of competition laws for creating competitive markets.

### **3. The Interactive Effects between Intellectual Property Rights and Competition Rights**

Following specifying the conflict grounds between the two legal systems for determining interactions between them, we will investigate into their interactions. This will show that despite there are some essential conflicts between the two legal systems, the two can play their roles as two components which complement each other.

#### **3-1. Impact of Intellectual Property Rights on Competition Rights**

Despite there are laws relevant to intellectual property rights in Iran, the regulations concerning stopping monopoly and support for business competition have not been carried out in Iran so far, and it is not possible to examine the interactive effects of the two legal systems in exercise phase. The effects, however, can be examine and analyze in legislation phase in accordance with the regulations of the law of Implementing General Policies of the principle 24 of constitution. Yet, due to a peaceful coexistence between intellectual property legal systems and competition laws in the European Union (which dates back to approximately half century ago) we will examine the effects in this legal system.

According to the European competitive laws, property rights possess many features, as follows:

1. The owner of intellectual property rights does not have to, except in especial circumstances, utilize his/her own rights or utilization license alienors from it.
2. The owner of intellectual property rights has the right to assign the utilization license of hi/her own rights to every body he/she wishes.
3. Assigning intellectual property rights is awarded to inventors as a reward.
4. The owner of intellectual property rights can utilize the market in order to increase his/her own profits, invoking the exclusive right caused by the aforementioned rights.

The judicative procedure of the European Court of Justice differs on one hand between creating and granting intellectual property rights and on the other hand exercising them. Thoroughly granting intellectual property rights is subordinated to the national regulations of member countries, but exercising

the aforementioned rights is done in regulation framework and by European Union. The theory is known as Existence and Exercise Doctrine.

The Existence and Exercise Doctrine is solely a logical tool which has been created by the European Court to implement general policies. However, what we can deduce from the doctrine is that the existence and grant of intellectual property rights is completely subordinated to the intellectual property regulations of the European society member countries and European regulations relevant to intellectual property rights. And European competitive rights basically have no role in exercising or granting intellectual property rights.<sup>23</sup>

By separating the existence of intellectual property rights from their exercise in the European Union, any kind of the intervention of competitive rights in exercise and grant of intellectual property rights is prevented.<sup>24</sup>

Another type of effectiveness of intellectual property rights is to implement exemption system. In the European Union, regarding the methods of implementing exemption in the article 3, clause 81 of economical units, one can use the exemption in two methods:

The first method includes referring economical units to courts or the competitive officials in European Union member countries due to the agreements which apply for individual exemption under none of the total exemptions of the European Commission Regulation.

The second method includes legislating in the form of a regulation which exempt some of various agreements with competition limiting terms from the prohibition inclusion of clause (1) 81 of the Exemption Treaty. European Commission, as the supervisory and executive authority of competitive rules the European Union, has often embedded the intellectual property rights contracts under the inclusion of the General Exemptions Regulation.<sup>25</sup>

#### **3-2. Impact of Competitive Rights on Intellectual Property Rights**

European Court of Justice, in its various opinions issued about implement competitive rules in regard to intellectual property rights, has regarded a supervisory and regulative role for competitive regulations vis-à-vis intellectual property rights. Today, exercising intellectual property rights is subordinated to another set of supervisory and regulative developments codified in the form of competitive rules.<sup>26</sup>

Nowadays, most of countries' legal systems worldwide as well supervise and monitor the implement and exercise of intellectual property rights based on their own competition policies. Although, prior to competitive legislation in the countries, exercising the mentioned rights had also been supervised and controlled towards the rights relevant to intellectual property, however by approving competitive rules, another regulating mechanism is added to the collection as well. Competitive rules play two main roles in the fields of intellectual property rights:

The first role is to exercise supervision and control over the agreements related to intellectual property rights. The supervision and control aim to not allow the aforementioned agreements to have anticompetitive effects.

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determine the market price or has not limitations for firms to enter or leave the market.

<sup>22</sup> To see the definition of monopoly, refer to article 12, clause 1 in the law of Implementing General Policies of the principle 24.

<sup>23</sup> Alison Jones and Brenda Sufrin, op.cit, p.694

<sup>24</sup> Nawrouzi, Mashiyatullah, ibid, pp. 51-54.

<sup>25</sup> Nawrouzi, Mashiyatullah, ibid, pp. 54-59.

<sup>26</sup> D. Anderman Steven, op.cit, p6

The second role is to prevent economical powers dominating market from abusing intellectual property rights.<sup>27</sup>

It was previously thought that exclusivity of intellectual property rights can by itself lead to create exclusive power in the market. Therefore, the utilization licenses of intellectual property rights were issued collectively, so that all business competitors could use them. Today's resultant experience, however, indicates that although granting exclusive rights to owners of intellectual property rights for a certain period of time is at times inevitably necessary to enforce innovative stimulus in society, but this cannot totally preserve intellectual property rights from competitive regulations which are legislated to support effective competition in the market. Because some forms of exercising intellectual property rights can cause some risks for business competitions. For example, when the owners of intellectual property rights possesses the situation dominating the market, they can disturb in the existing competition through exercising commands such as supplemental sale or stopping third party from entering the market by creating economical barriers. On the other hand, despite the license contracts for utilizing intellectual property rights have many benefits such contracts also may be used as a tool for abusing intellectual property rights. As mentioned, on the basis of the article 81 of the European Treaty, all the common agreements and arrangements between economical unites which aim or affect creating prohibition, restriction or disturbance in the competition are banned. The contracts relevant to intellectual property rights (either utilization licenses or other contracts) may be subject to this article of the treaty due to competition limiting conditions in them.

The article 82 of the treaty, which arranges the unilateral behavior and actions of economical units, bans economical units from abusing dominant situation. This article can affect different methods for exercising intellectual property rights done by their owners. The European Union rights intend to make a logical balance between intellectual property rights and competitive rules according to the competitive rules included in articles 81 and 82.

### Conclusion

In the European Union, competition rules meet two goals: First, they guarantee a free and just competition in the European Economic Community, and specifically support the consumers against the firms which intend to raise prices and confine their choices by unjust actions. The second aim is to ensure that the European Economic Community acts as the European market of goods and services, in which, trade is done regardless of borders and without any obstacle. The Competition rules of the European Union, Facing the challenge caused by the effects of the competition rules on the license contracts whit the interpretation of the general rules, have been able to solve the problems concerning the competition rules. The European competition rights regulate the contracts on technology transmission. In the legal system, the competition rules have no role in the case of granting and gaining subjects of technology transmission contracts, but play a role as a regulating system of exercising the contracts under the title intellectual property rights. The competition rules in the field of contracts aim to stop concluding anti-competition contracts. The system, defining a safety zone for economically active people and predicting

collective exemptions, has provided these contracts with a safety margin. The viewpoint of the European Union regarding these contracts is not a merely legal one, but it is an economic and pragmatic viewpoint according to which the analysis of every event is carried out considering the realities of each case and market, that is the same doctrine of logical principle of the American juridical system. The essence of the relationship between the technology transmission contracts and the competition rules is not a stable and unchangeable subject. Because the subjects of these contracts are of miscellaneous types, and are continuously evolving as regards both variety and new functions.

On the basis of the American competition rights rules, the anti-competition actions fall into two categories:

1. The actions that are considered as absolutely anti-competitive and committing them will result in the fines included in the competition rules. These types of actions are absolutely called illegal actions.
2. A set of the actions are under the suspicion of breaking the competition rules. The set of actions does not merely result in committing the fines included in the competition rules, but their investigation should be done on the basis of a logical and rational principle which is based on economical analyses.

In the American juridical system, the rules of the intellectual property and competition rules together supervise the technology transmission contracts. The intellectual property rights and competition rules share their basic goals such as the consumer's benefits and innovations enforcement. The intellectual property rights are not (just due to their actions) confined by the competition rights. The intellectual property rights create exclusive rights which provide a motivation for innovations. These rights help the owners of the innovation make take advantages from their investment. Also these rights cause technology transmission to be more facilitated. Furthermore, knowledge is more quickly accessed by the public. Thereby others can utilize the supported innovation. Thus, more competitive space is made.

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