

Competition law and IP Rights: Not So Complementary - Time for Re-alignment of the Goals?

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Abstract

This paper argues through a US/EU comparative assessment of the IP law goals and competition law goals that whilst the overarching goals of competition law and IP rights to enhance overall economic welfare are still complementary, internal conflicts within the two legal spheres are jeopardising the achievement of these goals.

Within the IP laws the private/public reward/incentive to innovate equilibrium is now being tilted in favour of private interests due to recent developments in terms of rapid innovation in digital economy markets and technologies coupled with an expansion of IP rights and increase in patents grants and their width.

This has a knock-on effect on the application of the competition rules as a second-tier regulator of IP rights. However, the competition rules also face its own battle in keeping up with the fast-developing digital economy, the concerns regarding Big Data and online platforms raising questions about the sustainability of the 'consumer welfare' framework as an optimal standard to ensure effective competition in these markets.

Consequently, there is a danger that the competition rules and the IP rights will be out of quilter, risking stifling of innovation and harm to consumer welfare, unless adjustment is made within the two legal spheres.

Key Terms

Competition law, intellectual property rights, interface, goals, reward/incentive, consumer welfare, overall economic welfare, innovation, dynamic competition and digital economy markets.

1. Introduction

It has long been argued that competition law and intellectual property rights (hereinafter IP rights) are complementary.¹ Both are in principle working towards the same goals: namely promoting

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¹ 'at the highest level of analysis IPR and competition law are complementary because they both aim at promoting consumer welfare' Commission evaluation Report on the transfer of technology block exemption regulation N° 240/96 - Technology transfer agreements under article 81, COM/2001/0786 final, para 29. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52001DC0786> (accessed 30 May 2019). See

innovation and consumer welfare, despite the fact that one grants what the other strives to control or minimise.² The competition rules works on the economic notion that competitive markets produce better outcomes than monopolistic ones.³ Whereas IP rights whilst nevertheless creating a legal monopoly creates incentives to innovate both in relation to products and process which long term can increase dynamic efficiencies in the market.⁴ Bowman crystallised today's assumption when he stated '[in] terms of economic goals sought, the supposed opposition between these laws is lacking. Both antitrust law and patent law have a common central economic goal: to maximise wealth by producing what consumers want at the lowest cost.'⁵ This belief has been adopted into case law as illustrated in the US case *Illinois Tool Works*⁶, where the Supreme Court held that tying arrangements involving patented products should no longer be illegal *per se*, instead there would be a requirement to demonstrate that the IP right generated market power rather than a mere presumption of one.⁷ However, the reality is that the relationship between competition law and IP rights requires careful consideration of how to offset the rights of innovators, competitors, licensees and follow-on innovators and at the same time enhance overall economic welfare.⁸ In other words, there need to be a common understanding of what and when to prioritise certain categories and when to prioritise others to safeguard an overall goal of economic welfare.

This paper is significant to the current debate in regards to two issues 1) the effects of dynamic competition and innovation upon the interface between competition law and IP rights (sketched out in Section 2) and 2) what the goals of the competition rules really should be about, consumer welfare or overall economic welfare (discussed in Section 4). The paper reviews these two questions from a US/EU comparative approach and furthers the debate by asking if the goals of IP rights discussed in Section 3 and competition rules (in Section 4) are truly in alignment as has been claimed over the last couple of decades or whether, as this paper will argue, that the goals of the two legal spheres are drifting apart because the internal checks and balances are askew within both legal

also H. Hovenkamp, M.D. Janis and M.A. Lemley *'IP Antitrust, An Analysis of Antitrust Principles Applied to Intellectual Property Law'* Aspen Publisher 2007, Vol.1, 1-12-1-13. Competition Law and IP rights are set to stem from the same legislation, that of the English Statute of Monopolies 1623. The statute excluded all monopolies except for letters of patent, which were granted for a period of 14 years to inventors of new products. <http://www.legislation.gov.uk/aep/Ja1/21/3> (accessed 30 May 2019). For an opposing view see Olav Kolstad 'Competition Law and Intellectual Property Rights – outline of an economic-based approach' in Josef Drexl (ed) *'Research Handbook on Intellectual Property Rights and Competition Law'* Edward Elgar, 2008.

² Steve Anderman and Hedvig Schmidt *'EU Competition Law and Intellectual Property Rights, The Regulation of Innovation'* p. 11-12, 2nd ed. Oxford University Press, Oxford 2011.

³ See Richard Schmalensee 'The New Industrial Organization and the Economic Analysis of Modern Markets' in *Advances in Economic Theory* 253 (Werner Hildebrand ed. 1982). Paul McNulty 'Economic Theory and the Meaning of Competition' 82 *Quarterly Journal of Economics* 639 (1968), Robert Bork *'The Antitrust Paradox: A Policy at War With Itself'* p. 91, Basic Books 1978, reprinted in 1993 and Mariateresa Maggolino *'Intellectual Property and Antitrust, A Comparative Economic Analysis of US and EU Law'* p. 3-5, Edward Elgar 2011.

⁴ *Atari Games v Nintendo* 897 F.2.d 1572 (Fed. Cir. 1990), Maggolino, *Supra* fn 4, p. 12 and Richard J. Gilbert, 'Competition Policy for Intellectual Property' in Buccirosi, Paolo *'Handbook of Antitrust Economics'*, the MIT Press, 2008, p. 519.

⁵ W.S. Bowman *'Patent and Antitrust Law: A Legal and Economics Appraisal'*, p. 1, University of Chicago Press, 1973.

⁶ *Illinois Tool Works Inc v Independent Ink, Inc.* 547 US 28, 126 S.Ct. 1281 (2006).

⁷ *Ibid.* at 1291.

⁸ See Steve Anderman (ed) *'The Interface between Intellectual Property Rights and Competition Policy'* Cambridge University Press, 2007.

spheres due to recent developments of rapid innovation in digital markets and technologies coupled with an expansion of IP rights and increase in patents grants and their width.

Additional, as will also be reviewed in Section 4, the competition authorities seem to be sending conflicting messages as to which goals the competition rules are attempting to pursue and how far the rules can be stretched to work as second tier regulator for other areas of law.

If this is indeed happening, this would call for a re-balancing of the interface between the two laws and policies.

2. The Interface

IP rights have come a long way from 'just' being granted as a reward or incentive for an innovation. IP rights play a significant role in today's society by being a central part of many businesses and its resulting innovation is said to over the long run '[contribute] a great deal to economic growth, much more than the general movement of markets from lesser to greater price competition.'⁹ The upsurge and accelerated advance of new technologies and products places an intensified pressure on the IP rules to offer suitable protection resulting in the accretion or emulation of rights,¹⁰ which may not always be the most appropriate way forward. IP rights have traditionally been seen as an offspring of national law, however, over the last three decades international law (such as the TRIPS agreement)¹¹ has been highly engaged in shaping the modern developments of IP law, also on national level.¹² The TRIPS agreement was instigated to create greater protection for IP rights owners when trading internationally both in respect of the legal construction of IP rights and the enforcement of it as there was significant differences from country to country. It was pushed through by industry experts and interested parties with a private commercial interest at heart rather than a public-focused view of IP rights.¹³ IP rights, therefore sit in a multifaceted environment consisting of both national and international rules. Moreover, there has also been a significant expansion of IP rights not only in relation to territorial protection as a result of TRIPS agreement, functional coverage of rights has expanded and there has been an increase in the variety of new technologies that can achieve protection, such as biotechnology¹⁴, information technology and databases¹⁵ to accommodate innovation in these markets.¹⁶

⁹ Herbert J. Hovenkamp, "Consumer Welfare in Competition and Intellectual Property Law" (2013) 9 Competition Policy International, http://scholarship.law.upenn.edu/faculty_scholarship/1830 (accessed 30 May 2019), p. 54.

¹⁰ W.R. Cornish 'The International relations of intellectual property' [1993] 52 CLJ 46.

¹¹ The TRIPS Agreement (agreement on trade-related aspects of intellectual property rights) 1994 https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (accessed 30 May 2019).

¹² R.L. Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement' Emory International Law Review, (2003) 17, 819, p. 827.

¹³ See Christopher May *The Global Political Economy of Intellectual Property Rights, the New Enclosures*, 2nd edition, Routledge 2015.

¹⁴ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions *OJ L 213, 30.7.1998, p. 13–21*.

¹⁵ Directive 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, adopted 17 April 2019, *OJ L 130/92*.

¹⁶ Steve Anderman 'The Competition Law/IP 'Interface': An Introductory Note', p. 8-9 in Steve Anderman (ed) *The Interface between Intellectual Property Rights and Competition Policy* Cambridge University Press, 2007, p. 8-9.

Some have argued that these new technology and digital economy markets operate very differently to those of traditional markets as the emphasis is more on dynamic competition (that is competition *for* the market) rather than static competition (*within* the market) or ‘creative destruction’.¹⁷ This is fuelled by constant innovation, where the newest or most advanced product ‘wins’ the market until a new innovation race commences. The claim is therefore that monopolies in these markets are fragile and ever-shifting depending on which innovation wins the race. However, this is a one-dimensional picture of these markets, as other forces such as IP rights, direct and indirect network effects also influence the competitive structure in these markets and to some extent slow down the creative destruction leading to more static competition.¹⁸ With global giants such as Amazon, Apple, Facebook, Google and Microsoft, it is clear that digital economy markets are not as dynamic and these large corporations as fragile as claimed. Consequently competition and innovation do not flourish optimally.

This is where the competition rules come in working as a second tier regulator of the IP rights. The competition rules have the power to encroach upon other areas of laws as well such as trade, company law, and more recently data protection. This places the competition rules in a larger socio-economic and political framework and allowing it to be a tool for which to achieve more political orientated goals than those of economic efficiency and consumer welfare.¹⁹ Yet whilst the competition authorities acknowledge this, their enforcement priorities show a different story of pursuing a more simple line of consumer welfare.²⁰

The competition rules do not interfere with the granting of the IP right and its existence, merely the exercise of the right²¹ and only when this is used as an ‘instrument of abuse’.²² In other words, IP rights grant a legal monopoly and thereby create legal barriers to entry, whereas the competition rules aim to keep an effective competitive process by ensuring that dominant companies and monopolies do not misuse their power to restrict competition.²³

¹⁷ Jerry Ellig and Daniel Lin ‘Dynamic Competition Theories’ in Jerry Ellig (ed.) *Dynamic Competition and Public Policy, Technology, Innovation and Antitrust Issues*, Cambridge University Press, 2001, p.18-19.

¹⁸ Anderman 2007 *Supra* fn 16, p. 10-11.

¹⁹ Vestager, Margrethe, Speech by Competition Commissioner ‘The Values of Competition Policy’, CEPS, Brussels, 13 October 2015, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/values-competition-policy_en (accessed 30 May 2019) and See Juncker, Jean-Claude, President-elect of the European Commission ‘Mission Letter, Margrethe Vestager, Commissioner for Competition’ Brussels, 1 November 2014, https://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vestager_en.pdf (accessed 30 May 2019).

²⁰ See European Commission Report on Competition Policy (2015), Brussels, 15.6.2016

COM(2016) 393 final, p. 2 http://ec.europa.eu/competition/publications/annual_report/2015/part1_en.pdf (accessed 30 May 2019), Lina Khan ‘Amazon’s Antitrust Paradox’ *The Yale Law Journal* (2017), 126: 710-805, and Case COMP/M.7217—Facebook/WhatsApp [2014] OJ C7239 , para 164 (regarding Big Data).

²¹ Cases 56 and 58/64 *Etablissements Consten SA and Grundig Verkaufs-GmbH v Commission* ECLI:EU:C:1966:41, [1966] ECR 299, at 342-343 and case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.*, ECLI:EU:C:1971:59, [1971] ECR 487

²² Anderman and Schmidt, *Supra* fn 2, p. 6 and case C-85/76 *Hoffmann-La-Roche v Commission*, ECLI:EU:C:1979:36, [1979] ECR 461.

²³ Anderman 2007, *Supra* fn 16, p. 5-6 and Käseberg, Thorsten *Intellectual Property, Antitrust and Cumulative Innovation in the EU and US* Hart Publishing, 2012, p. 8-9. For further discussions of the interface between competition law and intellectual property rights see, Anderman and Ezrachi (ed) *Intellectual Property and Competition Law, New Frontiers* Oxford University Press, 2011, Michael A. Carrier *Innovation for the 21st*

It is through this understanding of common purpose that the two legal systems tolerate each other's means. As Hovenkamp has noted: 'If the IP system does what it should be doing... consumer loss is not an inherent part of the design. New innovation typically competes with existing technology, which largely stays in place. Consumers obtain the benefit of the new products or processes that IP rights make possible, and these should yield a surplus even at monopoly prices.'²⁴ Therefore there is in principle no need for the competition rules to interfere. Unless the market process is not functioning properly, as stated by the European Court of Justice (hereinafter CJEU) in *AstraZeneca*²⁵: '...the free exercise of an exclusive right, being a right which rewards investment or innovation, may be limited in the interest of undistorted competition on the common market'.²⁶

There are a number of EU cases which successfully have curbed the application of IP rights, including *Magill*²⁷, *IMS*²⁸, *Microsoft*²⁹, *Huawei*³⁰. The general theme in all cases has been to curtail the application of the IP right, rather than restricting the right itself. This is in line with the existence/exercise dichotomy developed under the EU free movement rules³¹: 'The injunction contained in...the contested decision to refrain from using rights under national trade mark law in order to set an obstacle in the way of parallel imports does not affect the *grant* of those rights but only limits their *exercise* to the extent necessary to give effect to the prohibition under [Article 101(1) TFEU]' (emphasis added).³²

The simple reason behind this policy is that in the EU IP rights are still seen as national rights and therefore the EU competition rules do not have jurisdiction to rule whether an IP right is valid or not.³³ Moreover, by establishing this legal hierarchy the CJEU can straightforwardly claim that there is no conflict between EU competition law and the IP laws of the Member States.³⁴

In the US the approach has also been to curtail the IP rights and challenge these only when their exercise interferes with the competitive process although the bar as highlighted in *Continental Paper Bag*³⁵ has been higher in comparison to the EU: 'such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive.'³⁶

Century, Harnessing the Power of Intellectual Property and Antitrust Law Oxford University Press, 2009 and Hovenkamp, Janis and Lemley *Supra* fn 1.

²⁴ Hovenkamp, *Supra* fn 9, p.59.

²⁵ Case T-321/05 *AstraZeneca*, ECLI:EU:T:2010:266, [2010] ECR II-2805.

²⁶ *Ibid.*, para 679.

²⁷ Case C-241-242/91P *RTE and IPV v Commission (Magill)*, ECLI:EU:C:1995:98, [1995] ECR I-743.

²⁸ Case C-481/01 P (R) *NDC Health v Commission*, [2002] ECR I-3401

²⁹ Case T-201/04 *Microsoft Corp. v Commission*, ECLI:EU:T:2007:289, [2007] ECR II-3601.

³⁰ Case C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, ECLI:EU:C:2015:477.

³¹ See Cases 56 and 58/64 *Consten and Grundig* *Supra* fn 21, see also Christopher Stothers 'Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law' Hart Publishing 2007, p. 28-29.

³² Cases C-56-58/64 *Consten and Grundig* *Supra* fn 21, at 345.

³³ Whilst trademarks, copyright (partly) and design rights are now part of EU law, patents remain outside and is governed by the European Patent Convention 1973, which is an international treaty signed by 38 countries permitting a unified application for a bundle of national patents <https://www.epo.org/law-practice/legal-texts/epc.html>> accessed 14/12/18.

³⁴ See Käseberg, *Supra* fn 23, p. 28-29.

³⁵ *Continental Paper Bag v Eastern paper Bag* 210 U.S. 405 (1908).

³⁶ *Ibid.* at 429, see also *Miller Insituform v. Insituform of North America Inc* 830 F.2d. 606 at 609.

*Glaxo Group*³⁷ clarified that there was a principal balance to be achieved between the two legal spheres: 'it is important to the public that competition should not be repressed by worthless patents, as that the patentee of a real valuable invention should be protected in his monopoly.'³⁸ Subsequently, in *In re Independent Service Organizations Antitrust*³⁹ the Federal Court held that the patentee's right to refuse to license its IP rights was only restricted to certain circumstance, in particular where the patent holder uses his 'statutory right to refuse to sell patented parts to gain a monopoly in a market beyond the scope of the patent'.⁴⁰ The US Courts have continued this line of arguments in successive cases steering clear of giving primacy to one statute over the other and thereby avoiding a discussing of a conflict between the two sets of rules.

That said, there was indeed a time where the two legal systems were said to be in conflict with each other and IP rights were given a much harsher treatment by the competition authorities,⁴¹ seeing patents as full-blown monopolies and the US adopted the 'Nine No-Nos' for the licensing and transfer of IP rights.⁴² The EU developed its own counterpart; a regulation of Technology Transfers.⁴³ A greater appreciation and emphasis on the underlying economic principles of competition law (strongly influenced by the Chicago School and Robert Bork's notion of consumer welfare)⁴⁴ followed in the enforcement of the competition rules. This allowed for a recognition of the economic benefits derived from IP rights, which in turn led the way to a more lenient approach to the interface between the competition rules and IP rights, acknowledging that not all IP rights are monopolies and the licensing of IP rights can indeed be pro-competitive.⁴⁵

In the last couple of decades there has once again been some change in the nature of the relationship between IP rights and competition law with a significant growth in technological markets and biotechnology markets which have resulted in an expansion of IP rights protection to an entirely new array of products in the information economy.⁴⁶ This, coupled with a greater awareness

³⁷ *United States v Glaxo Group*, 410 U.S. 52 (1973).

³⁸ *Ibid.* at 58.

³⁹ *Independent Service Organizations Antitrust v Xerox* 203 F.3d 1322 (Fed. Cir. 2000).

⁴⁰ *Ibid.* at 1327, but see also *Data General v Grumman Systems Support*, 36 F.3d 1147 (1st Cir. 1994) and *Image Technical Services v Eastman Kodak* 504 U.S. 451 (1992).

⁴¹ Anderman 2007, *supra* fn 16, p. 7.

⁴² Richard Gilbert and Carl Shapiro 'Antitrust Issues in the Licensing of Intellectual Property: The Nine No-Nos meet the Nineties' Brookings Papers, Microeconomics 1997, p. 389-349, https://www.brookings.edu/wp-content/uploads/1997/01/1997_bpeamicro_gilbert.pdf (accessed 30 May 2019).

⁴³ The first block exemption regulation for IP licensing was the Patent Licensing Regulation (1984) Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements, <https://publications.europa.eu/en/publication-detail/-/publication/6792169a-cad3-40d2-b532-173506379f6f/language-en> (accessed 30 May 2019).

⁴⁴ Bork *Surpa* fn 3, and R. Posner 'Antitrust Law, An Economic Perspective' University of Chicago Press, 1976.

⁴⁵ Case 78/70 *Deutsche Grammophon Supra* fn 21, para 16 and Case C-238/87 *Volvo AB v. Veng (UK) Ltd.* ECLI:EU:C:1988:477, [1988] ECR 6211, para. 8 and US Department of Justice and Federal Trade Commission 'Antitrust Guidelines for the Licensing of Intellectual Property' (6 April 1995), <https://www.justice.gov/atr/speech/1995-antitrust-guidelines-licensing-intellectual-property> (accessed 30 May 2019) confirmed in the updated 2017 version: US Department of Justice and the Federal Trade Commission 'Antitrust Guidelines for the Licensing of Intellectual Property, issued 12 January 2017 <https://www.justice.gov/atr/IPguidelines/download> (accessed 30 May 2019).

⁴⁶ Commission on Intellectual Property Rights (CIPR) Report 'Integrating Intellectual Property Right and Development Policy' London 2002 http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf (accessed 30 May 2019).

in the US and EU of IP rights as a form of wealth creation in information goods that spurred on competition internationally, meant that arguments for stronger protection of property rights were made and heard.⁴⁷ Noticeable was not only the increase of patents issued,⁴⁸ but also the increase of computer software patents issued on both sides of the Atlantic despite these supposedly being excluded from patentability.⁴⁹ There were also a move to ensure greater protection of subject matter in copyright.⁵⁰ The widening of the IP right protection was not just kept to the EU and US regimes, but was on a global scale with the emergence of the TRIPS agreement (the Agreement for Trade-Related Aspects of Intellectual Property Rights) in 1994 through WTO as noted above, which requires a minimum standard of protection for IP rights by WTO countries.

The antitrust and competition laws had to follow suit with the IP rights developments with appropriate methods to keep markets efficient and open. In certain areas the result of this was that there were clashes between the competition rules and IP rights.⁵¹ In other areas carefully drafted legislation sought to resolve the new conflicts and issues the widening of the IP rights had on the competitive markets such as the EU's Technology Transfer Block Exemption and matching Guidelines⁵² and the US' IP Licensing Guidelines.⁵³ The increase of IP rights as well as the broadening of the protection, has led to the development of new markets in IP rights that have not been prominent before. IP rights are truly valuable business assets for companies. Not just as an incentive to innovate and developing new products and protecting these, but they also act as bargaining tools and financial assets for the companies allowing them to trade in IP rights as will be explored further below.

The European Commission has yielded to this understanding that IP rights serve a greater economic welfare goal. It did so in its Guidance paper on Article 102 TFEU holding that an obligation to supply upon a dominant company may undermine its incentive to invest and innovate, particularly if competitors were permitted to free ride on their investments, and finding that this would not be in

⁴⁷ OECD 'Competition Policy and Intellectual property Rights' 1989

<http://www.oecd.org/regreform/sectors/2376247.pdf> (accessed 30 May 2019) and Michael Lehman 'The Theory of Property Rights and the Protection of Intellectual and Industrial Property' (1985) 16 IIC No. 5, 525.

⁴⁸ R. Merges 'As Many as Six Impossible Patents for Breakfast: Property Right for Business Concepts and Patent System Reform' (1999) 14 Berkeley Technology Law Journal 578.

⁴⁹ Article 52(c) European Patent Convention specifically excludes computer programs as a patentable subject matter, however, this clause has been circumvented in several cases, see for instance T 0931/95 (Controlling pension benefits system) of 8 September 2000, ECLI:EP:BA:2000:T093195.20000908, <https://www.epo.org/law-practice/case-law-appeals/recent/t950931ep1.html> (accessed 30 May 2019) and for UK case law: *Aerotel Ltd. v Telco Holdings Ltd & Ors* Rev 1 [2006] EWCA Civ 1371 (27 October 2006) para. 40, <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1371.html> (accessed 30 May 2019).

⁵⁰ See *Lotus Development Corp. v Borland Int'l Inc.* 49 F. 3d. 807 (1st Cir. 1995) and *Sony Corp. v Universal Studios Inc.* 464 US 417 and *Anderman*, *Supra* fn 16, p. 8.

⁵¹ See cases, such as *US v Microsoft Corp.*, 147 F. 3d 935 (D.C. Cir. 1998), *US v Microsoft Corp.* 253 F.3d 34 (D.C. Cir 2001) and *EU Microsoft*, T-201/04 *Supra* fn 29.

⁵² Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, p. 3–50, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.089.01.0003.01.ENG, (accessed 30 May 2019).

⁵³ US IP Licensing Guidelines, *Supra* fn 45.

interest of the consumers.⁵⁴ It also took a similar line of reasoning in its Technology Transfer Regulations, where it made clear that there is no presumption of IP licencing agreements giving rise to competition concerns:

‘Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation by the licensor and licensee(s). In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under [Article 101(3)TFEU] and balanced against the negative effects on competition. The great majority of licence agreements are therefore compatible with [Article 101].’⁵⁵

The US IP licensing Guidelines acknowledge a similar sympathetic view to IP rights and have in their most recent update continued an effects-based enforcement framework to ensure that competition is not harmed by IP rights ‘with respect to either existing or new ways to service consumers’.⁵⁶ claiming that ‘[the] antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.’⁵⁷

This section illustrates that on both sides of the Atlantic competition law and IP rights have locked horns in the past, although the current consensus is that the two legal spheres are complementary and can work together. To achieve this ‘truce’ the competition authorities are hesitant to interfere with the use of IP rights. Consequently, competition law will only be utilized in exceptional circumstance to curtail the use of IP rights. These exceptional circumstances are limited to situations where innovation is being stifled and where there is harm to consumers, as displayed in regards to the competition authorities’ policies on IP licensing agreements. For the interface to function properly there is therefore a strong reliance on the internal checks and balances of both the IP laws and competition rules to work effectively and an assumption that their overall goals are in alignment with each other. The following two sections will review the goals of IP rights and competition rules respectively.

3. The goals of IP rights

IP rights are inherently a negative right because they seek to stop others from doing certain things, such as copying, piracy and even third parties’ exploitation of their own independent ideas.⁵⁸ Yet, in return for the right to protect the innovation, the owner will need to disclose the details of the

⁵⁴ Communication from the Commission: ‘Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.’ OJ C 45, 24.2.2009, p. 7–20, para. 75 <http://ec.europa.eu/competition/antitrust/art82/> (accessed 30 May 2019).

⁵⁵ Communication from the Commission: ‘Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.’ OJ C 45, 24.2.2009, p. 7–20, para. 75 < <http://ec.europa.eu/competition/antitrust/art82/>> accessed 27 January 2019.

⁵⁶ US IP Licensing Guidelines, *Supra* fn 45, p. 2.

⁵⁷ *Ibid.* p. 3.

⁵⁸ Anderman, 2007, *Supra* fn 16 p. 5.

innovation and how it was achieved with the rest of the society and importantly, the protective right is territorial and time limited for the majority of IP rights.⁵⁹

The theories behind IP rights can largely be classified into two categories: utilitarian and non-utilitarian theories. The prominent theory is that of utilitarianism. It sets the goal of IP rights as enhancement of overall economic welfare based on the notion that the value of the technological invention lies in the ability to perform a task, do so more effectively and/or at lower costs and is thus closely connected to the economic justifications behind IP rights.⁶⁰ In achieving this goal the IP rights stimulate dynamic efficiencies and will indirectly promote consumer welfare through innovation, increased consumer choice and the potential stimulation of follow-on innovation. Moreover, the society will also benefit from the added knowledge by disclosure of the innovation, although these benefits have to be balanced with the cost to society for granting territorial protection/monopoly to the innovator for a period of time. As noted by Lopatka the argument is therefore that ‘periods of “monopoly” profits drive innovation, and it is the innovative process, more so than lower prices, that best serves consumers’.⁶¹ Utilitarianism is manifested in the United States Constitution which permits Congress to create patent and copyright laws ‘to Promote the Progress of Science and useful Arts’.⁶²

Additionally, the thinking behind utilitarianism is closely linked to both the inducement of commercialisation theory and the incentive/justice based theory, both of which see the grant of a patent as a reward. The argument of the inducement of commercialisation theory is that if the IP right is granted early in the development of the innovation to offer protection whilst the innovator finalises the innovation for use, then it will generate a strong incentive for the inventor to invest in R&D to further innovate.⁶³ The inducement of commercialisation is actually a requirement to obtain a patent both under the European Patent Convention, where the innovation has to be of industrial application,⁶⁴ and under the US patent law, which requires the invention to be ‘useful’.⁶⁵

In the case of the incentive/justice theory, the reward is granted for the offering of information about the innovation to society.⁶⁶ The society accepts the limitation on the use of knowledge, in return for a quicker dissemination of the knowledge that could lead to further innovation in the area.⁶⁷ The reward of the patent works both as an incentive to innovate, but also ensures fairness for the inventor, so that others cannot reap the benefits of his labour when he discloses it to the society.⁶⁸ This is crucial to ensure that the inventor can recoup the costs from the R&D of the

⁵⁹ With the exception of trademarks - see Inge Govaere ‘*The Use and Abuse of Intellectual Property*’ Sweet and Maxwell, p. 14 and Lehmann, *Supra* fn 47, p. 531.

⁶⁰ Peter S. Menell ‘1600 Intellectual Property: General Theories’ in Bouckaert, Boudewijn, Geest, Gerrit de (editors) ‘*Encyclopedia of law and economics*’ Edward Elgar, 2000, p. 130.

⁶¹ John E. Lopatka ‘*United States v IBM: A Monument to Arrogance*’ 68 *Antitrust Law Journal*, vol. 68, no 1, 145 (2000), p. 156, see also David J. Teece and Mary Coleman ‘The Meaning of Monopoly: Antitrust Analysis in High-Technology Industries’ 18 *Antitrust Bulletin* 801 (1998).

⁶² United States Constitution, Article 1, Section 8, Clause 8.

⁶³ Roberto Mazzoleni and Richard R. Nelson ‘The benefits and costs of strong patent protection: a contribution to the current debate’ *Research Policy* 27 1998. 273–284p. 276-77.

⁶⁴ EPC Art. 52 and 57.

⁶⁵ 35 U.S.C. section 101.

⁶⁶ Lord Oliver of Aylmerton *Asahi Kasei Kogyo KK's Application* [1991] RPC 485.

⁶⁷ Mazzoleni and Nelson, *Supra* fn 63, p. 278.

⁶⁸ John Stuart Mill ‘*Principles of Political Economy*’ 5th ed., New York, Appleton 1862, p. 932.

innovation, which are often sunk costs.⁶⁹ Without sufficient lead time, or sufficient mechanism to appropriate there would be underinvestment in knowledge production.⁷⁰ Justice Scalia embraced this theory in *Verizon v Trinco*⁷¹ by stating:

‘The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.’⁷²

Similarly, due to the intangible nature of knowledge it becomes in economic terms a non-excludable good, meaning that it is difficult if not impossible to exclude others from using the knowledge even if they have not contributed to the production of the knowledge.⁷³ As a result, this would mean that there is limited incentive upon innovators to create knowledge.⁷⁴ Knowledge is also seen as a non-rival good because the quantity available of the knowledge will remain constant regardless of the number of users, in other words the marginal cost of knowledge is zero.⁷⁵ There will be a cost to society when the producer of knowledge charges for that knowledge. This is in economic terms known as the deadweight loss.⁷⁶

The IP laws essentially seek to balance these two opposing problems by permitting a time limited protection as an incentive to innovate and thereby making the knowledge excludable. In return, once the protection has ceased, there is no restriction on the use of the knowledge as it passes in the public domain and thereby allows for its quick diffusion.⁷⁷ If balanced correctly the IP law will then ensure maximum return for both inventor and society. Additionally, knowledge is often also cumulative meaning that knowledge generates more knowledge and this will naturally also benefit the society.⁷⁸

Another theory also falling under the utilitarian umbrella, which is not dissimilar to the inventive/justice theory, is that of public interest, with the notion that the society can carry the harm from the monopoly if it benefits from the information received as well as incentivises additional innovations. In today’s society industries are working at different pace than each other in terms of the speed of innovation. With this in mind, it is worth asking if a ‘one-fit-all’ length of IP rights is really still suitable?⁷⁹ For instance, whilst there is some commercial sense in permitting an absolute monopoly of 20 years to pharmaceutical and chemical inventions, it appears rather

⁶⁹ Käseberg, *Supra* fn 23, p. 11.

⁷⁰ *Ibid*.

⁷¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2003).

⁷² *Ibid*. at 407.

⁷³ Lévêque and Ménière *‘The Economics of Patents and Copyright’*, The Berkeley Electronic Press 2004, p. 4-5.

⁷⁴ *Ibid.*, p.5.

⁷⁵ *Ibid*.

⁷⁶ Scotchmer, Suzanne *‘Innovation and Incentives’* The MIT Press, Cambridge, Massachusetts 2004, p. 37.

⁷⁷ Lévêque and Ménière, *Supra* fn 73, p.5.

⁷⁸ Käseberg, *Supra* fn 23, p. 10.

⁷⁹ See Michele Boldrin and David K. Levine *‘The Case Against Intellectual Property’* (March 2002). CEPR Discussion Paper No. 3273. <https://ssrn.com/abstract=307859>, (accessed 30 May 2019) and BH Hall and D. Harhoff *‘Recent Research on the Economics of Patents’* *Annual Review of Economics* (2012) Vol. 4, 541-565.

excessive for other inventions in industries such as telecommunication and computer programming, where the technology often becomes superseded within a couple of years.⁸⁰ The length of the patent protection for some innovations is therefore excessive and indicative of a system that is not in harmony with itself to achieve the optimum benefits for society as a whole.⁸¹ The same argument can be made in respect of copyright protection, which offers protection for life plus 70 years (in the UK), but many of the works produced have a commercial life span, which is much, much shorter, which again results in a deadweight loss for society without any significant benefits achieved for the author either.⁸² If too strong a protection is granted to the inventor, which would allow the inventor to shield the invention from society, then the society would bear the cost of the patent protection, but little benefit would be reaped from it and thus it compromises public interest. A similar argument can also be made in respect of the broadness of the IP right.⁸³ A broad IP right can deter other innovators specialising in the area from also innovating.⁸⁴ Furthermore, economic empirical research does not support a finding that weak IP protection will cause harm to innovation.⁸⁵ There is therefore a peculiar paradox within the IP rights system of rewarding private interest to promote public gain and the balance between the two seems to be out of quilter as a result of the expansion of IP rights without full consideration for how this would affect competition in particular in digital economy markets where the pace of innovation is faster than that of traditional markets.

Opposite of utilitarianism is the non-utilitarian theory, which primary goal is to accentuate the creator's moral rights: 'Of all things, the produce of a man' intellectual labour is most peculiar distinguishable as his own'.⁸⁶ In other words, this theory seeks to ensure that the creator's work remains his to control. The focus of attention is therefore on the moral entitlements to the invention rather than any overarching economic goals. This is best exemplified in the laws of copyright in Europe. For instance, copyright in French is called 'le droit d'auteur' meaning the author's right,⁸⁷ and within this entitlement there are not only the simple economic rights of stopping other people from copying the author's work, there are also moral rights to acknowledge authorship (paternity) and the safeguarding of the work from derogatory treatment (integrity) as seen in UK law.⁸⁸ In the US case *Microsoft*,⁸⁹ Microsoft argued that the prohibitions it had placed on the hardware manufacturers not to make alterations to the start-up and home screens were protected by the moral rights of the copyright it held on the operating software, in particular that of integrity. The

⁸⁰ Hovenkamp, *Supra* fn 9, p. 54.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Mazzoleni and Nelson, *Supra* fn 63, p. 275, see also J Farrell and C. Shapiro 'How Strong Are Weak Patents?', 98 *Am. Econ. Rev.* 1347, 1362 (2008) stating that 'weak' patents of questionable validity are very costly to society and suggesting a 'targeted application of resources' to improve the patent review process.

⁸⁴ J. Green and S. Scotchmer 1995 'On the division of profit in sequential innovation' *RAND Journal of Economics* 26, 20–33.

⁸⁵ Maria Alexandra Rossi, 'IPRs, Incentives and Innovation' Residential Training Entrance For Judges 2019 – Interaction of IP and Competition Law. January 31st, 2019 European University Institute, Fiesole.

⁸⁶ George J. Bell *Bell, Commentaries on the Law of Scotland*, 7th ed 1870, vol 1

https://archive.org/stream/BellCommentariesOnTheLawOfScotland7thEd1870Vol1/BellCommentaries7thEdV1_djvu.txt (accessed 30 May 2019).

⁸⁷ Code de la propriété intellectuelle, Version consolidée au 25 mars 2019, Article L-121-1.

⁸⁸ See Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, *OJ L 272, 13.10.2001, p. 32–36* and the UK Copyright, Designs and Patents Act 1988, section 77 and 80.

⁸⁹ *United States v Microsoft* 1998 WL 614485 (D.D.C. Sept 14, 1998).

argument however, was rejected by the Court since Microsoft could not offer any clear evidence of this and therefore was found to have exercised the copyright beyond its scope.⁹⁰

One consequence of the non-utilitarian theory is that the competition rules and IP law cannot be said to be fully complementary⁹¹ and as a bare minimum these populist goals embraced within the IP laws should be taken into consideration when reviewing the interface between the two legal spheres.

To conclude, the non-utilitarian theory's aim is to protect the moral rights of the IP rights and the utilitarian theories all embrace a reward/incentive/benefit to society cycle to protect the economic rights albeit that each theory places more emphasis on one of these steps in comparison to the others, however, the main aim for them all is to achieve overall economic welfare. Yet as Hovenkamp notes an ideal IP right would ensure:

'the optimal amount of innovation. Privately, this occurs when the amount of increasing investment in innovation just equals the incremental return. In order to be socially optimal, the returns must also net out the social value of the innovation and the inefficiency, or deadweight loss, that results from any exclusive rights that IP protection provides. A precisely tailored policy must determine the optimal duration and scope of intellectual property rights that would produce this result'.⁹²

However, this may be easy to review in theory and ex post of an innovation, it is a rather more challenging assessment to undertake ex ante,⁹³ and as a result recent developments in terms of rapid innovation in digital markets and technologies coupled with an expansion of IP rights and increase in patents grants and their width, have shifted the private/public balance in favour of private interests.⁹⁴ One example of this is the increase of Patent Assertion Entities and patent litigations as will be discussed below.

Consequently, there is a danger that the IP laws are no longer achieving overall economic welfare and there is therefore increased risk of consumer harm through the lack of cumulative innovation and that affects in the long-term consumer welfare.⁹⁵

3.1. Patent Assertion Entities

Patent Assertion Entities (hereinafter PAEs)⁹⁶ are creatures evolved as a direct result of the widening of the IP rights protection and the consequence of IP rights being valuable business assets and more

⁹⁰ *United States v Microsoft* 87 F. Supp. 2d 30 (D.D.C. 2000) at 40.

⁹¹ Kolstad, *Supra* fn 1, p. 8.

⁹² Hovenkamp, *Supra* fn 9, p. 54.

⁹³ *Ibid.*

⁹⁴ Kolstad, *Supra* fn 1, p. 8-9.

⁹⁵ Käseberg, *Supra* fn 23, p. 262-63.

than a mere incentive for innovation. PAEs are companies that specialise in enforcing and licensing patents, increasingly with more anti-competitive intent in mind, leading to patent litigations as a legal means to extort and injure other companies. The role of the PAE is primarily to purchase patents, and then sell or license them as assets or litigate against other companies when it is believed that these companies are infringing the patent that the PAEs own (patent assertion).

Over recent years there has been an increase in the US in the number of patent litigations and threats to sue made by PAEs.⁹⁷ PAEs now account for two-thirds of all patent suits in the US and this figure is even higher in high-technology industries.⁹⁸ In comparison, in the EU, PAEs are less common with around 10 percent of patent lawsuits in Germany and the UK from PAEs, yet these figures are on the rise.⁹⁹

This causes disruption to innovation and harms competition. It has been claimed that the root cause is a flawed patent system,¹⁰⁰ however, amending fundamental legislative faults within the patent system is a near impossible task¹⁰¹ and therefore the problem caused by certain PAEs' behaviour now lies with the competition rules to solve.¹⁰² This is naturally a cause for concern as there are elements to PAEs' behaviours which can best and should only be dealt with under IP Law. However where PAEs harm consumer welfare and engage in anticompetitive practices the competition rules should be activated to cease the behaviour.

Whilst it is difficult to measure to what extent PAEs have stifled innovation, it is clear that they have altered the markets and patents are viewed as an asset that can indeed be very valuable to companies and in some circumstances influence the company's ability to compete in or even enter a market.¹⁰³ Patent portfolios are used by companies to negotiate cross licensing agreements in markets where there are a high numbers of patents such as the market for smart phones. These markets create mutual dependence between competitors, because the licensing of patents from competitors is essential to gain access to specific technology and thereby be able to operate and

⁹⁶Sometimes also referred to as 'patent trolls', see J.K. Gregory 'The Troll Next Door' 6 J. Marshall Rev. Intell. Prop. L. 292 (2007), for a greater explanation on the history of the term 'Patent Troll'.

⁹⁷J. Bessen and M.J. Meurer 'The Direct Costs from NPE Disputes' Cornell Law Review (2014), 99, 387-424, p. 391. More generally: Federal Trade Commission: 'Patent Assertion Entity Activity: An FTC Study' October 2016 https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf (accessed 30 May 2019).

⁹⁸ Ibid., p. 9 and J. Mullin 'Trolls made 2015 one of the biggest years ever for patent lawsuits' Ars Technica, 5 January 2016 <https://arstechnica.com/tech-policy/2016/01/despite-law-changes-2015-saw-a-heap-of-patent-troll-lawsuits/> (accessed 30 May 2019).

⁹⁹ B.J. Love, C. Helmers, F. Gaessler and M. Ernicke 'Patent Assertion Entities in Europe' chapter in D. Sokol(ed.) 'Patent Assertion Entities and Competition Policy' Cambridge University Press 2017, p. 107 and 124, see also M.A. Lemley and A.D. Melamed 'Missing the Forest for the Trolls' chapter in Sokol, D. (ed.) 'Patent Assertion Entities and Competition Policy' Cambridge University Press 2017, p. 25.

¹⁰⁰ D. Lichtman and M. Lemley 'Rethinking Patent Law's Presumption of Validity' 2007 Stanford Law Review 60, 45-72.

¹⁰¹ See Farrell, and Shapiro, *Supra* fn 83.

¹⁰² D. Sokol 'Introduction: Patent Assertion Entities and Competition Policy' Chapter in D. Sokol (ed.) 'Patent Assertion Entities and Competition Policy' Cambridge University Press 2017, p. 1. See also J.D. Wright and D.H. Ginsburg 'Patent Assertion Entities and Antitrust: A Competition Cure for A Litigation Disease?' 79 Antitrust Law Journal No. 2 (2014), 501 and J.J.J. Jurata and A.R. Patel 'Taming the Trolls: Why Antitrust is not a viable solution for stopping Patent Assertion Entities' Geo. Mason L. Rev. [Vol. 21:5: 2014, 1251], p. 1258 – both articles advocate against the use of antitrust rules to solve this primarily IP law related problem.

¹⁰³ See Lemley and Melamed, *Supra* fn 99.

even innovate in that market.¹⁰⁴ This is often referred to as ‘patent thickets’ whereby if a company does not hold any patents it is unable to negotiate cross licensing agreements and is therefore relying on the goodwill of incumbent companies to license their patents to it, to enter the market. A good example of that is Google which, when it originally developed its android operating system, was in a rather weak negotiating position, as it had a relative small patent portfolio to that of Apple, who was holding patents that Google needed to continue to compete in the market. Google therefore purchased Motorola, purely for its patent portfolio to become a more equal negotiation partner to Apple. The hardware Google sold off to Lenevo.¹⁰⁵

Therefore, for larger companies the cost of innovation has probably not gone up per se as a result of patents becoming greater assets to companies and PAEs occasionally chasing quick wins in court, however, it probably has made it more difficult for smaller entrepreneurs and individual inventors to break into markets and this may mean that great innovations may not see the light of day. This barrier to entry is a competition concern, but one that is difficult to tackle as it would require proof of either abuse of a dominant position or collusion amongst the incumbent companies, before the competition rules can kick in.¹⁰⁶

As it stands, patent assertion is a legal right as part of patent ownership and a right that the owner is entitled to enforce regardless of how the ownership came about, e.g. through innovation or acquisition. The main cause of concern is the enforcement of so called ‘weak’ patents, i.e. patents granted that in fact are based on poorly drafted and too broad claims by inventors.¹⁰⁷ Empirical research on this matter however, indicates that all types of patent holders can have such weak patents – these are not unique to PAEs and consequently the fault lies not with these but the IP law system. Practising as well as non-practicing entities all take advantage of this flaw in the IP law sphere.¹⁰⁸

To conclude, the PAEs play a role in the stifling of innovation, but the true flaws lies within the IP law sphere itself. This means that it is not necessarily any form or use of the IP rights through assertion that negatively affects innovation, whether this happens is down to the individual company and the business strategy it pursues. This again will also be dictated by the type of market that that particular company operates in. Markets which are highly innovative are likely to have a higher level of IP rights and therefore more prone to patent assertions. There is no doubt that innovation is

¹⁰⁴ S. Wagner ‘Are Patent Thickets Smothering Innovation?’ Yale Insight 25 April 2015 <https://insights.som.yale.edu/insights/are-patent-thickets-smothering-innovation> (accessed 30 May 2019).

¹⁰⁵ Ibid., see also T. Chia ‘Fighting the Smartphone Patent War with RAND-Encumbered Patents’ 27 (2012) Berkeley Technology Law Journal 209.

¹⁰⁶ See also Lars Kjølbbe ‘Article 82 EC as Remedy to Patent System Imperfections: Fighting Fire with Fire?’ (2009) 32 World Competition 163.

¹⁰⁷ J. Xiao ‘In Defense of Patent Trolls: Patent Assertion Entities as Commercial Litigation Funders’ 16 Chi. -Kent J. Intell. Prop.36 (2016), p. 42, Lemley and Melamed, *Supra* fn 99, p. 24, and J.F. McDonough III ‘The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy’, 56 Emory L.J. 189, 190 (2006), p. 202. See also M.A. Lemley and B.N. Sampat ‘Is the Patent Office a Rubber Stamp?’ Emory Law Journal, Vol. 58, p. 181, 2008.

¹⁰⁸ Lemley and Melamed, *Supra* fn 99, p. 23-25 and C. Helmers, B.J. Love and L. McDonagh ‘Is There a Patent Troll Problem in the UK?’ Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 24, p.509, 2014, p. 546.

affected by the significant increase of patent assertion and this mostly in a negative manner.¹⁰⁹ By stifling innovation, the goal of the IP rights – to enhance overall economic welfare is no longer fully achieved as the reward/incentive/ benefit to the society cycle is broken. Instead the individual innovator is the one reaping the benefits whilst the society as a whole loses out demonstrating that the private/public reward/incentive balance built into the IP law is not functioning optimally.

4. The goals of competition rules

Extensive literature has already been written on this particular and indeed in itself very complex subject.¹¹⁰ The overarching purpose of the US and EU competition rules is to promote consumer welfare.¹¹¹ A caveat needs to be inserted here though as this is in fact too simplistic a view. In the 1960s, prior to Bork introducing the ‘consumer welfare’ goal into US antitrust,¹¹² the antitrust rules were seen to have many aims: defence of democracy by dispersion of economic power, protection of small business, wealth transfers and productivity.¹¹³ Moreover, the debate about the goals and theories behind the competition rules were far from settled then and certainly still are not today.¹¹⁴ Yet, Bork’s consumer welfare module has dominated the enforcement of the competition rules in both the US and the EU for the last fifty years.

The CJEU competition rules have for many years insisted that the consumer welfare goal had to be reached through the creation of an effective competitive process in the market place.¹¹⁵ The

¹⁰⁹ As Merges and Nelson note an increase in the width of patent protection will inevitably harm innovation R. Merges and R. Nelson ‘On the Complex Economics of Patent Scope’ (1990) 90 Columbia Law Review 839, p. 916.

¹¹⁰ See generally Bork, *Supra* fn 3, G. Amato ‘Antitrust and the Bounds of Power: the dilemma of liberal democracy in the history of the market’ Hart Publishing, 1997, Pinar Akman ‘The Role of ‘Freedom’ in EU Competition Law’ (2013) 33 Legal Studies (December), C.D. Ehlermann and L. Laudati (editors) ‘European Competition Law Annual 1997: Objectives of Competition Policy’ Hart Publishing, 1998.

¹¹¹ For a discussion of the US antitrust goals see Khan, *Supra* fn 20 Barry Lynn ‘Cornered: New Monopoly Capitalism and the Economics of Destruction’ 2010 and Mark Glick ‘The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust’ The Antitrust Bulletin (2018), 1-39. E. Fox ‘We Protect Competition, You Protect Competitors’ (2003) 26 World Competition 149. For EU competition law goals see: M. Monti ‘The Future for Competition Policy in the European Union’ Merchant Taylor’s Hall, London, 9 July 2001, SPEECH/01/340, http://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html (accessed 30 May 2019) and Massimo Motta ‘Competition Policy, Theory and Practice’ Cambridge University Press 2004, p.17-19.

¹¹² Robert Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. L. & ECON 7 (1966).

¹¹³ Glick, *Supra* fn 111, p. 2-3.

¹¹⁴ Harlan Blake and William Jones, ‘In Defense of Antitrust’, 65 COL. L.REV. 377 (1965); Robert Pitofsky, ‘The Political Content of Antitrust’, 127 U. Penn. L. Rev. 1051 (1979), L. Sullivan ‘Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?’ 125 U. Penn. L. Rev. 1214 (1977), K. Elzinga ‘The Goals of Antitrust Other than Competition and Efficiency, What Else Counts?’ 125 U. Penn. L. Rev. 1191, 1196 (1977), R. Lande ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’, 34 Hastings L.J. 65 (1982–83), Lina Khan, The Ideological Roots of America’s Market Power Problem, 127 Yale L. J. 960 (2018); Carl Shapiro ‘Antitrust in a Time of Populism’ (Working Paper, Oct. 24, 2017), Int. J. Ind. Org (forthcoming), <https://ssrn.com/abstract=3058345>, (accessed 30 May 2019) and Albert Allen Foer and Arthur Durst ‘the Multiple Goals of Antitrust’ The Antitrust Bulletin Volume: 63 issue: 4, page(s): 494-508.

¹¹⁵ See case C-501/06p *GlaxoSmithKline v Commission*, ECLI:EU:C:2009:610, [2009] ECR I-9291, para. 63, see also case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:T:2006:265, [2006] ECR II-2969,

suggestions Khan has made in her recent article on how to tackle online platform giants is very much in line with CJEU's traditional approach of focusing also on the structure of the market.¹¹⁶ It is no secret that the goals of EU Competition law are very much linked to the history and development of the EU, primarily in the relation to the creation of the internal market. EU competition law and policy therefore naturally have a broader framework it works within than 'merely' enhancing consumer welfare in comparison to the US antitrust rules, which have not had to factor in the creation of a level playing field in the form of an economic trade platform similar to the internal market. In fact, the notion of 'consumer welfare' as the overarching goal for EU Competition law is relatively new in contrast to US antitrust law, which introduced this concept already in the late 1970s.¹¹⁷ 'Consumer welfare' came into its own in the EU with the 'more economic approach'¹¹⁸ reform of EU competition law in 2004 and the introduction of Regulation 1/2003¹¹⁹. Commissioner Monti was one of the first commissioners to affirm the consumer welfare goal: 'the goal of competition policy...is to protect consumer welfare by maintaining a high degree of competition in the common market...[leading] to lower prices, a wider choice of goods, and technological innovation...'.¹²⁰ The revolution in the statement did not go unnoticed, as Kolasky, the then US Deputy Assistant Attorney General applauded the statement from Commissioner Monti and the drive to adopt consumer welfare as the unequivocally goal of EU competition policy.¹²¹

Whilst Commissioners after Monti continued this line of policy and the EU competition rules underwent the 'more economic approach' modernisation, academics and the CJEU grappled with this goal and how to marry it with that of the creation of the internal market, goals of fairness and

para. 109, case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* ECLI:EU:C:1973:22 [1973] ECR 215, para. 25 and C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, ECLI:EU:C:2009:343, paras. 38-39. and S. Bishop and M. Walker. *The Economics of EC Competition Law* 3rd edition, Sweet and Maxwell, 2010, p. 20-21.

¹¹⁶ See Khan, *Supra* fn 20, p. 717 and 803.

¹¹⁷ In *Reiter v Sonotone Corp.* 442 U.S. 330 (1979) the US Supreme Court stated quoting Bork (Bork 'The Antitrust Paradox' *Supra* fn 3: 'that Congress designed the Sherman Act as a "consumer welfare prescription."' At 343.

¹¹⁸ The modernisation was a reform of the EU competition rules both in relation to their enforcement (see Commission Press Release 'Commission finalises modernisation of EU antitrust enforcement rules' IP/04/411, Brussels 30 March 2004 http://europa.eu/rapid/press-release_IP-04-411_en.htm?locale=en, (accessed 30 May 2019)) and application, which supported the Commission's move to introduce an approach to the application of the competition rules which was more economic-based than previously. In particular, the Commission was keen to focus on the effects of the behaviour of the companies in alignment with the consumer welfare standard - see Liza L.Gormsen 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82EC' *European Competition Journal* (2007) Vol. 3 no. 2, 329-344.

¹¹⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1, 4.1.2003, p. 1-25*.

¹²⁰ M. Monti 'The Future for Competition Policy in the European Union' Merchant Taylor's Hall, London, 9 July 2001, SPEECH/01/340, http://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html (accessed 30 May 2019). Commissioner Almunia confirmed this during his rein in 2011 when he stated: 'Consumer welfare is not just a catchy phrase. It is the corner stone, the guiding principle of EU competition policy.' 'Competition – what's in it for consumers?' Poznan, 24 November 2011, SPEECH/11/803, http://europa.eu/rapid/press-release_SPEECH-11-803_en.htm?locale=en, (accessed 30 May 2019).

¹²¹ W.J. Kolasky 'North Atlantic Competition Policy: Converging Toward What? Speech at BIICL Second Annual International and Comparative Law Conference London, England, Friday, May 17, 2002, <https://www.justice.gov/atr/speech/north-atlantic-competition-policy-converging-toward-what> (accessed 30 May 2019).

freedom in business transactions as well as other social aims which have dictated previous EU competition law case law.¹²² The primary question has been on how to understand the concept 'consumer welfare'. Is it the consumer surplus, i.e. the difference between what consumers would be prepared to pay for goods and what they actually pay? Or is it to mean the aggregate measure of the surplus of all consumers? And who are these consumers? The Commission appears in some instances to treat both intermediate customers and end-users as 'consumers', which creates conflict for the overall aim.¹²³ As Nazzini notes:

'...consumer welfare is a politically acceptable way of arguing for an economic approach to competition law. The very mention of the word 'consumer' evokes ideas of fairness, redistribution, and protection of many and vulnerable, making this rhetoric attractive to politicians, policy-makers and competition officials. On the other hand, the consumer welfare objective may be applied so that, in many circumstances, it leads to precisely the same consequences as social welfare objective...Consumer welfare can be used as a populist slogan to sell, to the public, an economic approach to competition law.'¹²⁴

A similar debate has also taken place in the US, where some have noted that when Bork introduced the notion of 'consumer welfare', he did not actually mean the welfare of the end consumer, but 'total welfare'.¹²⁵ The term 'consumer welfare' is therefore misleading, but has worked well as a political flagship for the promotion of competition rules on both sides of the Atlantic,¹²⁶ and is followed by the US Courts¹²⁷: 'Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit'.¹²⁸ Yet, arguments have been made that by narrowing the focus to pricing and output the competition authorities have overlooked important structural aspects of competition, leading to more concentrated markets and in fact higher prices, the direct opposite to what the consumer welfare standard intended.¹²⁹

The current debate led by the New Brandeis movement argues that the US antitrust rules should return to its roots and focus on the structure of the market rather than 'overseeing concentrations of power that risk precluding real competition'.¹³⁰ Khan holds that 'the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends—including our interests as workers, producers, entrepreneurs, and citizens. It also mistakenly supplants a concern about process and structure (i.e., whether power is sufficiently distributed to keep markets competitive) with a calculation regarding

¹²² R.J. Van den Bergh and P.D. Camesasca *European Competition Law and Economics: A Comparative Perspective* 2nd ed., Thomson, Sweet & Maxwell, 2006, p. 39-53 and more generally Renato Nazzini *The Foundations of European Union Competition Law, The Objectives and Principles of Article 102* Oxford University Press, Oxford 2011, and Bishop and Walker, *Supra* fn 115.

¹²³ Pinar Akman "Consumer' versus 'Customer': the Devil in the Detail' [2010] 37 *Journal of Law and Society* 315.

¹²⁴ Nazzini, *Supra* fn 122, p. 44.

¹²⁵ Foer and Durst, *Supra* fn 114, p. 500.

¹²⁶ Nazzini, *Supra* fn 122, p. 44 and Eleanor Fox, 'Against Goals', 81 *Fordham L. Rev.* 2157 (2013), p. 2158-9.

¹²⁷ *FTC v Actavis, Inc.* 570 U.S. 137, 133 S.Ct. 2223, 2238 (2013).

¹²⁸ *National College Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) at 107-08.

¹²⁹ Khan, *Supra* fn 20, p. 738-39.

¹³⁰ *Ibid.*, p. 737.

outcome (i.e. whether consumers are materially better off). Antitrust law and competition policy should promote not welfare but competitive markets.¹³¹ Khan applies the rise of Amazon as an online platform giant as an example of the lack of teeth the consumer welfare doctrine in reality has to deal effectively with online platform monopolies, which strive to achieve growth over profit. Khan consequently concludes that in order to tackle the dilemmas thrown at the society by the digital economy and domineering online platforms, the consumer welfare theory should be abandoned and the focus needs to be firmly on the structure of the market and the competitive process. Her line of arguments are not dissimilar to those of Wils who comments about the adoption of the 'more economic approach' in the EU that it is 'unsound and not fit for the purpose of interpreting Article 102 TFEU'.¹³² Wils argues that the 'more economic approach' is not benefitting consumers but 'serves powerful special interests, namely those of the dominant companies and of the economics profession'.¹³³

Therefore, to ensure that the IP rights and competition rules remain complementary, attention should be paid to the competitive process in the assessment of markets and this would flag concerns regarding 'entry barriers, conflicts of interest, the emergence of gatekeepers and bottlenecks, the use of and control over data, and dynamics of bargaining power'.¹³⁴ In particular, the latter three are matters that the competition rules are supposed to tackle as a second-tier regulator of the IP rights. Focusing on the competitive process of the market will thereby allow the competition rules to better an overall economic welfare goal.

As noted above, the competitive structure of the market is still a priority for the CJEU. Though, the CJEU is often at the forefront of the development and promotion of the EU, it has taken its time to fully embrace the 'more economic approach' and the consumer welfare goal as was seen in *GlaxoSmithKline*:

'...there is nothing in [Art 101 TFEU] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, [Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but *also the structure of the market* and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price...'¹³⁵

With this statement, the CJEU has maintained its traditional approach that in its opinion the EU competition rules are not just about consumer welfare, but the functioning of the market place¹³⁶: 'Article [101 TFEU], like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the

¹³¹ Ibid.

¹³² Wouter J. Wils 'The Judgement of the EU General Court in *Intel* and the So-called "More economic approach" to Abuse of Dominance' (2014) 37 World Competition 405, p. 432.

¹³³ Ibid.

¹³⁴ Khan, *Supra* fn 20, footnote 187.

¹³⁵ C-501/06p *GlaxoSmithKline*, *Supra* fn 115, para. 63.

¹³⁶ See older case law such as case C-6/72 *Continental Can v Commission Supra* fn 115 where the CJEU stated as: 'Articles [101] and [102] seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market' para. 25.

market and thus competition as such.¹³⁷ Although it has to be recognised that these two goals will often be aligned, whilst in other situation this may not be the case. The CJEU has confirmed this stance in more recent cases acknowledging that the protection of the competitive market would lead to increased consumer welfare to the benefit of the EU as a whole. This was for instance the case in *TeliaSonera*,¹³⁸ where it held that '[the] function of [the EU competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union'.¹³⁹ In the more recent case of *PostDanmark II*, the CJEU, although accepting the application of a more economic approach via the 'as-efficient-as competitor test, maintained that it was only a tool amongst others to assess abuse and that the structure of the market and the weakening thereof were of importance in the assessment of abuse.¹⁴⁰ It is therefore difficult to say that the goals of the EU competition rules are purely about the enhancement of consumer welfare as the CJEU is persistently also referring to the market structure in its case law and although the Commission has keenly introduced the consumer welfare goal and an effect-based reasoning in many of its newer decisions,¹⁴¹ its general competition policies are much broader.¹⁴²

This was highlighted by the mission letter to Commissioner Vestager when she took up her position as Competition Commissioner, from President-elect of the European Commission Jean-Claude Juncker, requested that Vestager: '[Mobilised] competition policy tools and market expertise so that they contribute, as appropriate, to our jobs and growth agenda, including in areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion. In this context, it will be important to keep developing an economic as well as a legal approach to the assessment of competition issues and to further develop market monitoring in support of the broader activities of the Commission.'¹⁴³ Although the statement still refers to the economic approach discussed above it also signals a broader policy aim for the EU competition rules and in particular, that they cannot be left in a vacuum and have a sole focus of consumer welfare, but is in a constant 'use' in a battle to achieve growth for European markets and its citizen. Of course it is also of interest to note how similar these goals are to those of the US antitrust rules pre Bork's introduction of the consumer welfare goal.¹⁴⁴

We are therefore left with a confused and ambiguous picture of the goals of EU competition law. Whilst the Commission sought to simplify it to be 'just' about the enhancement of consumer welfare, case law makes clear that EU competition law, is clearly about so much more and the CJEU has not let go of the notion of market structure as an important asset to a healthy competitive market.

¹³⁷ Case C-8/08 *T-Mobile Netherlands*, *Supra* fn 115, para 38.

¹³⁸ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, [2011] ECR I-527.

¹³⁹ *Ibid.*, para. 22.

¹⁴⁰ Case C-23/14 *PostDanmark v Konkurrenserådet (PostDanmark II)*, ECLI:EU:C:2015:651 paras. 60-74

¹⁴¹ *Intel COMP/C-3/37.990* [2010] 4 CMLR 314, paras 1002-1576, and 1597-1616 and COMP/38.113, *Prokent/Tomra* [2008] OJ C219/11.

¹⁴² See Pinar Akman "'Consumer Welfare" and Article 82: Practice and Rhetoric' (2009) 32 *World Competition* 71.

¹⁴³ Juncker, *Supra* fn 19.

¹⁴⁴ See above.

US antitrust law has promoted ‘consumer welfare’ as the key goal for the last forty years,¹⁴⁵ however, the academic debate about the purpose of the competition rules is far from settled¹⁴⁶ and given the increased pace of digital economy markets and online platform, as well as the influence of increased IP rights in these markets there is an essential need to keep this debate open. There is also evidence that the consumer welfare standard may in fact not be as consumer ‘friendly’ after all.

The limiting of the aim of the competition rules to that of consumer welfare despite the greater socio-economic context within which the competition rules are regularly applied, can cause errors in law and risks an increase of ‘false negatives’ or under-enforcement as well as conflicts with different legal spheres, including that of IP law. Consequently there is danger that the competition rules can overlook the welfare benefits that producers may achieve through investment and innovation, as well as neglecting important indicators of harm caused by IP rights to the detriment of the competitive process.

5. Conclusion – are the goals of the competition law and IP rights out of kilter?

In the review of the goals of competition law and IP rights, this paper has found that there has been a shift in the goal within the spheres of IP rights and the goals of the competition rules remain unclear. The EU competition rules, although having set out consumer welfare as the standard to adhere to, is still plagued by a dysfunctional set of policy objectives that leave a trail of inconsistency. Moreover, there seem to be disparity between the CJEU and the Commission as to what aim is to be pursued: consumer welfare or an effective competitive process. Under US antitrust law, the consumer welfare goal seems to have come stuck with the rise of the online platform giants, who are not playing by the traditional rule book by pursuing growth over monopoly profit. Consequently, even if we accept that consumer welfare is the goal of competition law, it is not aligned to that of IP laws, as the latter seek to achieve overall economic welfare, they are therefore skewed from the outset. This in itself is a clear warning sign that the competition rules cannot work as an effective second-tier regulator of IP rights as would have been the case if their goals were complementary.

Whilst the overarching goal of IP rights of enhancing overall economic welfare in principle has not shifted, there has been a change in the balance of the reward/ incentive/benefits to the society cycle due to the expansion of both the number of IP rights but also the breadth of these, meaning that the individual inventors are still rewarded for the invention, but this is not passed onto society in the same abundance as previously – innovation is thereby stifled. This is evident from the increase of PAEs and patent litigations. PAEs can have a negative impact on competition causing harm to both competition and innovation if not restrained either through the IP laws or the competition rules. Importantly, the PAEs exemplifies that there is no longer a true alignment between the goals of competition law and IP rights.

As Merges and Nelson highlights: ‘...every potential inventor is also a potential infringer. Thus a strengthening of property rights will not always increase incentives to invent; it may do so for some

¹⁴⁵ Hovenkamp, *Supra* fn 9, p. 54.

¹⁴⁶ Lina Khan ‘The New Brandeis Movement: America’s Antimonopoly Debate’ editorial in *Journal of European Competition Law and Practice*, 2018, Vol. 9, No. 3, 131, Foer and Durst, *Supra* fn 114 and Glick, *Supra* fn 111.

pioneers, but it will also greatly increase an improver's chances of becoming enmeshed in litigation'.¹⁴⁷ Whilst the widening of the IP rights has clearly strengthened the rights of the initial innovator, follow-on or cumulative innovation is being hindered and this causes a negative effect upon the overall economic welfare goal. The result is that cumulative innovation is reliant on the competition rules to prevent foreclosure of IP heavy markets.¹⁴⁸ However, having competition rules that are unclear as to what goals to strive for and unable to tackle large corporations in dynamic markets effectively makes it remarkably difficult to conclude that the competition rules works effectively as second-tier regulator of the IP rights. Consequently, to re-align the competition rules and the IP rights adjustment will have to be made within the two legal spheres.

¹⁴⁷ Merges, and Nelson, *Supra* fn 109, p. 916.

¹⁴⁸ See for instance Käseberg, *Supra* fn 23, p. 262-63.