

Political Economics
Competition
and Regulation

11

Claudia Schmidt

Refusal to License
Intellectual Property Rights
as Abuse of Dominance



PETER LANG

Internationaler Verlag der Wissenschaften

Contents

Table of Abbreviations.....	XIII
1 Introduction	1
2 The Situation to Date	5
2.1 Abuse of Dominance and Article 102 TFEU.....	6
2.1.1 Brief Introduction to Article 102 TFEU.....	6
2.1.2 Reform of Article 102 TFEU.....	8
2.1.2.1 The More Economic Approach	8
2.1.2.2 Framework for Assessing Abusive Conduct.....	9
2.2 An Overview of Article 102 TFEU Intellectual Property Cases.....	11
2.3 Comparison with American Caselaw	20
2.3.1 An Overview of Abuse of Intellectual Property Rights Cases.....	20
2.3.2 Are There Systematic Differences Between U.S. and EU Decisions?.....	24
2.4 The European <i>Microsoft</i> Case: Introduction of the Incentives Balance Test?.....	27
2.4.1 The Decision of the Commission	28
2.4.2 The Judgment of the CFI.....	32
2.4.3 Discussion of the Microsoft Decision	35
2.4.3.1 The Requirement of Indispensability	35
2.4.3.2 Elimination of Competition	36
2.4.3.3 The New Product Requirement	37
2.4.3.4 Objective Justification and the Incentive Balance Test.....	38
2.5 Criteria for Refusal to License in the Article 102 TFEU Guidance Paper.....	42

2.6 The Incentives Balance Test as a New Instrument in Competition Policy?.....	45
3 Do Competition Policy and Intellectual Property Rights Stand in Conflict With Each Other?.....	47
3.1 Interface between Competition Law and Intellectual Property Law.....	47
3.1.1 Conflict Theory.....	48
3.1.2 Theory of Complementarity	51
3.2 Innovation as a Common Objective.....	53
3.2.1 Justification of Intellectual Property Rights	53
3.2.2 Economic Goals of Competition Policy	56
3.2.3 Interface of Competition Policy and Intellectual Property Law from an Economic Perspective	59
3.2.4 Tension between European Competition Rules and Intellectual Property Rights	60
3.3 Interplay of Competition Law and Intellectual Property Rights as a Means of Fostering Innovation	63
3.3.1 Under Which Circumstances Should Competition Law Interfere with Intellectual Property Rights?	63
3.3.3 The Incentives Balance Test as a Means to Redefine Intellectual Property Rights	66
3.4 Conclusion: What We Have Learned So Far.....	68
4 The Appropriation of Innovation: How Can We Assess the Necessity of Intellectual Property Rights?.....	71
4.1 The Optimal Design of Intellectual Property Rights in Law and Economics	72
4.1.1 Patents.....	72

4.1.1.1	Optimal Length.....	73
4.1.1.2	Optimal Breadth	76
4.1.1.3	Optimal Combination of Length and Breadth for Single Innovations.....	79
4.1.1.4	Optimal Combination of Length and Breadth for Cumulative Innovation	81
4.1.1.4.1	Limits of Patents with Cumulative Innovation... 81	
4.1.1.4.2	Licensing Agreements as Solution	83
4.1.2	Copyrights.....	86
4.1.2.1	Theoretical Approach to Optimal Design	87
4.1.2.2	Empirical Assessment of Optimal Copyright Scope.....	88
4.1.3	Intermediate Result: Necessity of Case-by-Case Design of Intellectual Property Rights	90
4.2	Innovation Research: What Do We Know about the Appropriability Conditions for New Knowledge?	92
4.2.1	Preconditions for Successful Innovation and Imitation	93
4.2.1.1	Influence of Different Knowledge (Sources) and Routines	93
4.2.1.2	Spillovers, Absorptive Capacity, and Path Dependence ...	96
4.2.2	Empirical Results.....	99
4.2.2.1	Effectiveness of Intellectual Property Rights in Protecting R&D	99
4.2.2.2	Why Firms Do or Do Not Patent.....	103
4.2.3	Alternative Strategies to Appropriate R&D Returns.....	106
4.2.3.1	Secrecy.....	106
4.2.3.2	Lead Time	109
4.2.3.3	Complementary Assets and Technologies.....	111
4.2.3.4	Other Appropriation Strategies.....	114

4.2.4	Intermediate Result: Limited Relevance of Intellectual Property Rights for Appropriation of R&D Returns	115
4.3	Innovation in Markets with Network Effects	118
4.3.1	Theoretical Digression on Innovation and Market Structure	118
4.3.2	Markets with Network Effects.....	122
4.3.2.1	Characteristics of Network Industries	122
4.3.2.2	Competition, Innovation, and Intellectual Property Rights in Networks and Standards.....	125
4.3.3	Intermediate Result: Considering Differences between Market Structure, Industry Features, and Innovation	128
4.4	Conclusion: Redefining Misallocated Intellectual Property Rights with Competition Policy	129
4.4.1	Summary of the Previous Results.....	129
4.4.2	Limited Practicability of the Incentives Balance Test.....	132
5	Towards a New Test to Assess Refusal to License Intellectual Property Rights Cases.....	135
5.1	Experiences from Previous Caselaw: Discussion of the Criteria for Abusive Conduct.....	136
5.1.2	Indispensability Criterion and Elimination of Competition.....	136
5.1.3	Defining Harm to Consumers: Prevention of a New Product or Impediment to Innovation	141
5.1.4	Objective Justification	144
5.2	General Standards to Assess Exclusionary Conduct	145
5.2.1	No Economic Sense Test and Profit Sacrifice Test.....	145
5.2.2	Equally Efficient Competitor Test.....	148
5.2.3	Consumer Welfare Test and Disproportionality Test.....	150
5.3	Introduction of the Innovation Effects and Appropriability Test.....	153

5.3.1 Basic Idea.....	153
5.3.2 Design and Structure of the Test in Detail	155
5.3.2.1 Detecting the Anti-Competitive Effects	155
5.3.2.1.1 Indispensability for Competition in a Secondary Market	155
5.3.2.1.2 Harm to Consumers.....	158
5.3.2.2 Are Intellectual Property Rights Necessary to Protect the Innovation?	160
5.3.2.2.1 Methodological Approach.....	160
5.3.2.2.2 The Criteria in Detail	163
5.3.2.3 Imposing the Remedy	166
5.3.2.3.1 Choosing the Right Remedy	167
5.3.2.3.2 Enforcement and Supervision	171
5.4 Critical Acclaim	173
5.4.1 Analysis of the Anti-Competitive Effects	173
5.4.1.1 Indispensability Criterion and Elimination of Competition	173
5.4.1.2 Consumer Harm.....	174
5.4.2 Objective Justification	176
5.4.2.1 Incentives Balancing v. Appropriability Test.....	176
5.4.2.2 Efficiency Defense v. Appropriability Test.....	179
5.4.3 Problems related to the Innovation Effects and Appropriability Test	181
5.5 Intermediate Result	183
6 Lessons Learned and Open Questions	187
6.1 Summary of the Results	187
6.2 Fields of Further Research.....	190

6.2.1 Implementing a Dynamic Perspective..... 190

6.2.2 Differentiation between the Various Types of Intellectual
Property Rights (One Size Cannot Fit All)..... 192

6.3 Conclusion 193

Bibliography..... 195