

Intellectual Property & Antitrust

Contributing editor
Peter J Levitas



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GETTING THE
DEAL THROUGH 

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Intellectual Property & Antitrust 2016

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Intellectual property

1 Intellectual property law

Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed, or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Intellectual property rights are granted by virtue of the Act on Copyright and Neighbouring Rights (the CNRA) and the Industrial Property Law Act (the IPLA). They exceed the minimum required by the WTO Agreement on TRIPs.

Copyrights and neighbouring rights are not subject to any kind of registration and an author enjoys their protection irrespective of complying with any formalities. A work (namely, any manifestation of creative activity of an individual nature established in any form) is in copyright from when it is established, even if its form is incomplete. In general, an author's economic rights expire 70 years after the author's death, whereas moral rights are unlimited in time and independent of any waiver or transfer. Economic rights may be transferred to another person; a contract of transfer shall be made in writing otherwise it is null and void. Such a contract covers the fields of exploitation specified expressly therein. Even if a contract stipulates the transfer of all economic rights, the author retains an exclusive right to permit the exercise of its derivative copyright unless a contract stipulates otherwise. A contract may not provide provisions concerning all the works of an author to be produced in future and may provide only for fields of exploitation known at the time of its conclusion. A work may be subject to a licence, namely, a contract for its use. A licence covers the fields of exploitation specified expressly therein. An author may authorise the use of his or her work within the fields of exploitation specified in the contract and state a scope, territory and time of such use. As to the time of use, the CNRA provides that, unless the contract stipulates otherwise, a licence authorises the use of a work for five years in the territory of the state in which the licensee has its seat. Additionally, a licence granted for more than five years is always and definitely deemed, after the lapse of that period, as granted for an indefinite time. It is important to note that a licence for an indefinite time may, in general, unless the contract stipulates otherwise, be terminated with only one year's notice. An exclusive licence shall be made in writing, otherwise it is null and void. If there is no clear provision on transferring a right it is deemed that an author has granted a licence. An important provision limiting authors' economic rights is provided by article 116 of the IPLA, which states that products manufactured by means of an industrial design and put on the market after the lapse of the right in registration granted for such a design do not benefit from the protection of author's economic rights in a work under the provisions of the copyright law.

The IPLA deals with inventions, utility models, industrial designs, trademarks, geographical indications and topographies of integrated circuits as well as with obtaining patents, rights of protection and rights in registration by entitled persons. The Patent Office of the Republic of Poland grants a patent when the statutory requirements are satisfied, in particular where an invention is new, involves an inventive step and is capable of industrial application. The term of a patent is 20 years counted from the date of filing of a patent application with the Patent Office.

A utility model, that is, any new and useful solution of a technical nature affecting shape, construction or durable assembly of an object, may be protected by a right of protection granted by the Patent Office. The term of this right is 10 years counted from the date of filing of a utility model application with the Patent Office.

For an industrial design, that is, any new and unique character appearance of the whole or a part of a product resulting from the features of, in particular, the lines, colours, shape, texture, or materials of the product and its ornamentation, a right in registration may be granted. The term of this right is 25 years counted from the date of filing of an industrial design application with the Patent Office.

For a trademark, that is, any sign capable of being represented graphically and being capable of distinguishing the goods of one business entity from those of other business entities, a right of protection may be granted. The term of this right is 10 years counted from the date of filing of a trademark application with the Patent Office. The term of protection may, at the request of the rightholder, be extended for subsequent 10-year periods in respect of all or of a part of the goods. All these industrial property rights may be transferred and licensed in writing. The IPLA provides for restricted licences. Moreover, in certain cases, especially in the case of patent abuse, a compulsory licence may be granted. The impact of competition law on exercising or licensing IP rights is discussed in the following questions.

2 Responsible authorities

Which authorities are responsible for granting, administering or enforcing IP rights?

Pursuant to the IPLA, the Patent Office is in charge of receiving and analysing applications seeking protection for inventions, utility models, industrial designs, topographies of integrated circuits, trademarks and geographical indications as well as keeping appropriate registers. The Patent Office is also empowered to decide in matters related to granting patents and supplementary protection rights.

There is no authority dealing with granting, administration or enforcement of copyright. Nevertheless, the CNRA provides a regulation of collective management societies as associations composed of authors, performers and producers. The collective management societies are in charge of granting licences and collecting and redistributing royalties to copyright holders in certain areas of copyright exploitation. Moreover, it is assumed that a collective management society is authorised to protect rights with respect to the fields of exploitation covered by collective management and that it has a capacity to sue within this scope.

3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

As regards enforcing IP rights granted by the CNRA and the IPLA, both civil and criminal proceedings before ordinary courts are available. Under the IPLA some of the cases concerning the criminal liability of a perpetrator will be decided according to the provisions governing the procedure applied in cases concerning petty offences. Moreover, the IPLA brings a litigation procedure before the Patent Office. This procedure is applicable

in particular in cases of the invalidation of a patent, a supplementary protection right, a right of protection or a right in registration as well as on the granting of a compulsory licence for exploiting an invention, a utility model, industrial design or a topography. On conclusion of the litigation proceeding, the Patent Office issues a decision. The provisions of the Code of Administrative Procedure apply accordingly to the litigation procedure before the Patent Office in cases not regulated by the IPLA. Lastly, the provisions of the Act on Suppression of Unfair Competition (the UCSA) regarding the civil and criminal liability for acts of unfair competition are enforced in civil and criminal proceedings as well as in the procedure applied in cases concerning petty offences.

4 Remedies

What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

Provisions regarding IP rights provide for different types of remedies depending on which IP right has been violated.

In cases of an infringement of a right holder's economic copyright, the right holder may request compensation for damages resulting from the infringement according to the general rules of the civil code or pursuant to the provisions of the CNRA. According to the CNRA the right holder may demand that the person who infringed its economic rights pays double the amount of the appropriate remuneration. Moreover, the right holder may demand that a perpetrator makes a statement of an appropriate content and in an appropriate form or that the perpetrator of the deliberate infringement committed within the framework of economic activity pays an appropriate sum to the Fund for the Promotion of Creative Activity. According to the special provisions of the CNRA regarding computer programs, the right holder may demand that a user of a computer program destroy its technical means, including computer programs, used only to facilitate illegal removal or circumvention of the technical protection measures.

The right holder whose moral rights have been violated may, for example, demand a cessation of breach of its exclusive rights, as well as demand that the perpetrator makes a public statement of the appropriate content and form. In cases of culpable violation of moral rights, the court may award a certain amount of money to the right holder to compensate for the harm done.

As far as the infringement of the IP rights mentioned in the IPLA is concerned, a patent holder, whose patent has been infringed, may demand that the infringing party ceases the infringement or surrenders the unlawfully obtained profits and redresses the damage, when the infringement was deliberate. The rightholder may demand cessation of acts threatening infringement of the right. On request of the rightholder, the court may order unlawfully manufactured or marked goods to be withdrawn from the market or destroyed. It is also possible that the court will hand the aforementioned products over to the right holder on account of the sum of money to be adjudged to the right holder.

5 Nexus between competition and IP rights

Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

Only the IPLA mentions competition and provides that suppression of unfair competition is governed by a separate legal act, namely, the UCSA. Further, the IPLA declares that its provisions concerning the abuse of rights by the patent holder or licensee do not prejudice the provisions on counteracting monopolistic practices. The IPLA also provides that, in cases of an invention concerning semiconductor technology, a compulsory licence may only be granted to counteract unreasonable anticompetitive practices. Moreover, upon a request of the president of the Office of Competition and Consumer Protection (OCCP president) the Patent Office will issue a decision on the lapse of a trademark protection right where, as a result of the actions of the proprietor or, with its consent, of any third party, the trademark may mislead the public, in particular, as to the character, properties or geographical origin of goods.

6 Patent cooperation treaties and other agreements

Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

Poland joined WIPO in 1975 and ratified the WIPO Patent Cooperation Treaty in 1990. Moreover Poland is a signatory of other international treaties concerning Industrial Property like the Paris Convention for the Protection of Industrial Property; the Madrid Agreement Concerning International Registration of Marks along with the relevant Protocol thereto; the Strasbourg Agreement Concerning the International Patent Classification; the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks; the Convention on the Grant of European Patents along with the relevant amending Act thereto; the Singapore Treaty on The Law on Trademarks along with the relevant Regulations thereto; the Hague Agreement concerning the International Registration of Industrial Designs; and the Locarno Agreement Establishing an International Classification for Industrial Designs.

7 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

According to the UCSA, deceptive practices may be recognised as unlawful acts violating or threatening interests of another business entity indicated in article 3 of the UCSA. Moreover, deceptive marking of goods or services with a trademark may be recognised as misleading designation of products or services mentioned in article 10 of the UCSA. Under the UCSA the right holder may request the business entity that committed the act of unfair competition to, inter alia, cease prohibited activities or remove its effects, as well as compensate a caused loss and release unlawfully gained profits.

Regardless of the above, according to the IPLA, marking goods with a counterfeit trademark or a registered trademark that a business entity is not entitled to use, for the purpose of placing them on the market or placing on the market goods bearing such trademark, is liable to a fine, limitation of freedom or even imprisonment for a period of up to two years.

8 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

Even before the WIPO Treaties entered into force in Poland, the CNRA in its wording of 9 June 2000 actually met all requirements of the WIPO Treaties regarding TPMs and DRM. As a result of the WIPO Copyright Treaty's entry into force on 23 March 2004 as well as the WIPO Performances and Phonograms Treaties on 21 October 2003, the wording of relevant provisions of the CNRA has been amended and the aforementioned treaties' requirements are being met.

There is neither legislation nor case law limiting the ability of manufacturers to incorporate TPMs or DRM. However, TPM or DRM might be challenged under general competition law. Moreover, the lack of information on TPMs or DRM on the product or its packaging may be qualified under the UCSA as an act of unfair competition if it misleads consumers as to the usefulness or important features of the products.

9 Industry standards

What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

There is neither legislation nor case law dealing directly with the impact of proprietary technologies in industry standards. However, according to article 82.1(2) of the IPLA, if a patentee abuses its patent, a compulsory licence can be granted. Theoretically, patent ambush could be qualified as such an abuse and give the right to obtain such a compulsory licence. A compulsory licence is always non-exclusive, namely, it does not prevent other parties

from being granted a licence, as well as the patent holder from concurrent exploiting of the invention. See also question 22.

Competition

10 Competition legislation

What statutes set out competition law?

Polish competition law is set out in the Act on Competition and Consumer Protection of 2007 (the ACCP). The ACCP contains a catalogue of prohibited anticompetitive practices (including but not limited to direct or indirect price-fixing, sharing markets of sale or purchase, limiting or controlling production or sale) and rules relating to abuse of a dominant market position. The ACCP provides for situations in which transactions between business entities (eg, mergers and takeover of control) are subject to notification to the central government administration body competent in the protection of competition and consumers – the OCCP president, as well as remedies and sanctions that may be imposed for unlawful actions.

11 IP rights in competition legislation

Do the competition laws make specific mention of any IP rights?

The ACCP states that it is without prejudice to the rights arising under provisions on the protection of intellectual and industrial property. However, it applies to agreements entered into by business entities, in particular licence agreements, as well as to other practices of exercising the aforementioned rights.

The Council of Ministers, empowered by article 8.3 of the ACCP, has adopted two regulations mentioning IP rights. The first is the Regulation of 17 April 2015 on the exemption of certain categories of technology transfer agreements from the prohibition of agreements restricting competition (binding until 30 April 2027). Under this regulation, a transfer of technology agreement means an agreement by which one business entity grants another a licence to use an intellectual property right or know-how for the production of goods. The second is the Regulation of 13 December 2011 on the exemption of certain specialisation and research-development agreements from the prohibition of agreements restricting competition. This regulation provides certain provisions on the usage and transfer of intellectual property rights within the scope of specialisation and research-development agreements.

12 Review and investigation of competitive effects from exercise of IP rights

Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The OCCP president is the competent authority dealing with the competitive effect of an agreement or conduct, including those related to IP rights. The key instruments used by the OCCP president are proceedings concerning competition-restricting practices: prohibited agreements (cartels) and abuses of a dominant position. Such a proceeding may end with a decision ordering the business entity to cease its restricted activities and pay a financial penalty. Further, the OCCP president has the authority to permit or prohibit mergers and, when deciding on this issue, it investigates the competitive effect. The decisions of the OCCP president are appealable to the Court for Competition and Consumer Protection.

13 Competition-related remedies for private parties

Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

A private party, understood as a consumer, has no specific competition-related remedies. It may obtain damages under the general rules of the Civil Code after bringing an action to ordinary courts. However, a private party may inform the OCCP president about violations of consumer rights and the OCCP president may subsequently initiate proceedings and issue a decision recognising the given practice as infringing collective consumer rights and ban the practice. Such a decision will not result in awarding damages to the party, but it may be prejudicial in judicial civil proceedings.

14 Competition guidelines

Have the competition authorities or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

The competition authority has not yet issued any guidelines or statements concerning the overlap of competition law and IP.

15 Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

As stated in question 11, the ACCP is applicable only to agreements concerning IP rights entered into by business entities, in particular licence agreements, as well as to other practices of exercising IP rights. The two regulations adopted by the Council of Ministers indicated in question 11 provide for exemptions from competition law.

16 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

The doctrine of 'copyright exhaustion' has applied in Poland since the CNRA came into force and concerns copyrights as well as neighbouring rights. In 2004, Directive No. 2001/29/EC of 22 May 2001 was implemented. Renting or lending an original or a copy of a piece of work for use is exempt from the doctrine, which means that it requires permission from the right holder. An effort to control pricing of products sold downstream is generally forbidden by competition law. Preventing 'grey marketing' or contracting out of the doctrine may be qualified as contrary to competition law.

17 Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

Concerning preventing 'grey marketing' with regard to copyrights, see question 16. As regards other IP rights holders, especially patent or trademark rights holders, their attempts to prevent 'grey marketing' of products first sold in EEA may be qualified as contrary to the competition law. The doctrine of exhaustion applies not only to copyrights, but also to other IP rights. However, if there are legitimate reasons, a holder of a trademark may oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market. An authorisation for the distribution of products is necessary if the imported products were first sold outside the EEA.

18 Jurisdictional interaction between competition laws and IP rights

Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

As regards claims concerning copyrights common Civil Courts are competent. The OCCP president is the competent administrative body in competition-related matters. The OCCP president issues decisions, which may be challenged before the Court of Competition and Consumer Protection as the court of first instance.

Under IPLA some cases (see question 3) may be resolved exclusively before the Patent Office; rules of the Code of Administrative Procedure apply accordingly if not regulated by IPLA. In such cases final decisions of the Patent Office are appealable to a competent Administrative Court as the court of first instance.

On the other hand IPLA provides that cases concerning determination of the authorship of an inventive solution or of a right to a patent, remuneration, inter alia, for exploiting an inventive solution, invention, utility model or topography for state purposes, declaration of a right to exploit an invention or a right to use a geographical indication or loss of the latter are handled by common civil courts under the general rules of Civil Procedure.

Merger review**19 Powers of competition authority**

Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Pursuant to the ACCP, if the turnover of participants of the planned concentration in the financial year preceding the year of the notification exceeds the amount indicated in respective provisions of the ACCP, the participants are obliged to obtain prior clearance of the OCCP president before completion of the merger.

Under the ACCP the control of the OCCP president covers transactions that affect or are likely to affect competition in the market regardless of whether the merger involves IP rights or not. Hence, the OCCP president has the same powers with regard to reviewing the mergers involving IP rights as it does with regard to any other merger. As for sanctions for implementing a merger without the prior clearance of the OCCP president, see question 29.

20 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The OCCP president's assessment of the competitive impact of a merger involving IP rights does not differ from traditional analysis of a merger. However, the OCCP president should take into consideration provisions of the Regulation of 13 December 2011 mentioned in question 11 as the competition rules referred to in article 6 of the ACCP prohibiting restrictive competition agreements do not apply to agreements that meet the requirements set forth in the said regulation.

21 Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

The OCCP president may challenge such a merger when it affects or may affect competition in the market, in particular by a creation or strengthening of a dominant position. However, the OCCP president may issue by way of decision a consent for an implementation of such concentration in the event that waiving the concentration prohibition is justifiable, for example, the concentration brings economic development or technical progress and it may exert a positive impact on the national economy in Poland. The procedure does not differ when a merger in which IP rights are not a focus is reviewed.

22 Remedies to address the competitive effects of mergers involving IP

What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The IPLA provides for specific regulations that allow, in some circumstances, the granting of a compulsory licence. The Patent Office may grant the compulsory licence to exploit another person's patented invention when it has been established that the patent has been abused or it is necessary to prevent or eliminate a state of national emergency, for example, in the field of the protection of public order or human life and health.

Moreover, the compulsory licence may be granted in the situation of dependence of patents when the invention of another person cannot be used without violation of the rights of the earlier patent holder and the exploitation of the invention that is the subject matter of the dependent patent involves an important technical advance of considerable economic significance. However, as with inventions concerning semiconductor technology, a compulsory licence may only be granted to counteract unreasonable anticompetitive practices.

Compulsory licences in the meaning of the IPLA cannot be granted on the grounds of the ACCP; however, the OCCP president's decision

ordering the ceasing of the practice as it restricts competition may give some grounds for granting the compulsory licence according to the provisions of the IPLA. Moreover, the OCCP president may impose an obligation upon the parties of the merger or accept their obligation to grant the licence to their competitor and clear the concentration upon fulfilment of this condition. The licence is granted on the basis of relevant provisions.

Specific competition law violations**23 Conspiracy**

Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

Agreements between competitors to transfer or license intellectual property are subject to the OCCP president's analysis as to their conformity with competition law. Such agreements may be recognised as restricting competition when they contain provisions that affect or may affect competition by fixing prices, determining terms and conditions of sales, etc. As discussed in question 15, agreements between competitors that meet the requirements set forth in the Regulation of 13 December 2011 mentioned in question 11 are excluded from application of the rules prohibiting competition-restricting agreements mentioned in article 6 of the ACCP.

Moreover, the management of copyright by a collective management society is subject to evaluation as to its conformity with the provisions regarding competition-restricting practices (judgment of the Supreme Court, 6 December 2007, III SK 16/07 and the decision of 2 July 2013, III SK 63/12). It means that agreements concluded by collective management societies that affect or may affect competition are challengeable under competition law. For example, see question 33.

24 Reverse payment patent settlements

How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

Reverse payment patent settlements may be recognised as agreements whereby the parties limit production or share markets of sale and, as a result, are anticompetitive.

25 (Resale) price maintenance

Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

Setting minimum resale prices for licensees shall be recognised as a competition-restricting agreement, since the ACCP forbids concluding contracts aimed at direct or indirect price-fixing. However, in general, recommending resale prices for licensees is not considered illegal. This issue is not treated differently in the context of anticompetitive effect from any other market practice.

26 Exclusive dealing, tying and leveraging

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

Tying, that is, making the conclusion of an agreement subject to acceptance or fulfilment by the other party of other performances is not prohibited per se under the ACCP. It is illegal only if it constitutes a part of a competition-restricting agreement or an abuse of a dominant position, both requiring that there is neither a substantial nor a customary relation between the tying and tied goods. The limits on a business entity compelling or preventing the use of other products by using IP rights are set by provisions of the ACCP concerning the prohibition of competition-restricting practices, as well as by provisions of the IPLA concerning the abuse of a patent or other industrial property rights. Moreover, the Civil Code includes provisions (on 'prohibited contractual clauses') aimed at consumer protection, similar to those concerning tying under the ACCP. However, unlike the ACCP they concern making the conclusion, contents or performance of a contract contingent upon conclusion of another contract, which is not directly related to the contract comprising such a provision. As regards exclusive dealing it is, like tying, not prohibited per se. To be prohibited it has to constitute a competition-restricting agreement under the ACCP and cannot be one of the exemptions stated therein. The burden of evidence for the case of an exemption rests upon the concerned business entity.

Update and trends

New provisions of the IPLA shall come into force on 1 December 2015. The amendment shall include, inter alia, 'relief in novelty' with regard to inventions that may be patented. The general rule applying to inventions is that one may be patented if it is regarded as new (ie, has never been disclosed in any manner anywhere in the world). As a result of the amendment it shall be possible to obtain a patent to an invention despite revealing thereof by third persons if the actual inventor applies for granting a patent to such a new invention within six months, provided that such a disclosure was caused by an obvious abuse with regard to the actual inventor or its legal predecessors. This amendment of IPLA is another tool (aside from actions under competition law or CNRA) for the further protection of entrepreneurs whose trade secrets were illegally obtained or used by third parties.

27 Abuse of dominance

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

In some situations the exercising of exclusive rights in specific circumstances may form an abuse prohibited by competition law. For example, a right holder's refusal to license may be recognised as an abuse of a dominant position when the refusal relates to the subject of an IP right that is indispensable to the exercise of a particular activity in a relevant market and there is no objective justification for the refusal, and the right holder is a business entity that may act independently of competitors or contracting parties to a significant degree. According to the court's judgments and decisions of the OCCP president, the following practices were recognised, inter alia, as an abuse of a dominant position in respect of IP rights:

- making the conclusion of a phonographic contract subject to bearing the costs of manufacturing a hologram by the licensee. The court stated that receiving the hologram charge by a collective management society was not necessary for a proper performance of reproduction rights to the records; and
- making the conclusion of a collective management agreement subject to empowering the collective management society to grant an exclusive joint public performance, mechanical, radio and TV licence.

28 Refusal to deal and essential facilities

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

Refusal to license IP rights may be recognised as an infringement of competition law when a dominant business entity has access to an essential facility (the subject of an IP right that is indispensable to the exercise of a particular activity in a relevant market) and exercises the right exclusively without objective justification for the refusal to grant access to the essential facility. If the right holder refuses to grant access to the patented invention the IPLA provides for specific regulations that might lead to compulsory intervention in the right holder's exclusivity (see also question 22). Exercise of IP rights in this context does not differ from similar non IP-related conduct.

Remedies

29 Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

The OCCP president may issue a decision ordering a business entity that violated competition law to cease the restrictive or illegal conduct and pay a financial penalty of up to 10 per cent of its preceding year's turnover. As for mergers affecting competition, the OCCP president may undertake to restore the state of competition by, for example, ordering the business entity to sell a part of its shares or to dispose of the entirety or part of their assets of one or several business entities. The OCCP president may also impose a financial penalty of the aforementioned amount. In the case of delay in execution of the OCCP president's decisions, the business entity may be liable to a financial penalty constituting an equivalent of up to

€10,000 per each day of delay. Moreover, competition-restricting agreements or their respective parts are null and void.

Additionally, the business entity may request compensation or damages resulting from the infringement according to the general rules of the Civil Code.

30 Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

There are no special remedies under the ACCP that are specific to IP matters.

31 Scrutiny of settlement agreements

How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

The ACCP provides a broad definition of an agreement, which may be subject to the OCCP president's analysis. As a result, there is no difference between analysing a settlement agreement terminating an IP dispute and any other agreement regarding IP rights from the perspective of competition law. An agreement whereby one party agrees not to compete in respect of the patented product may be recognised as infringing the provisions of the ACCP regarding competition-restricting agreements (limiting or controlling production or sale as well as technical development or investments), unless such agreement meets the requirements specified in the Regulation of 13 December 2011.

Economics and application of competition law

32 Economics

What role has competition economics played in the application of competition law in cases involving IP rights?

Like in other countries of the European Union, economics plays an important role in the application of competition law. Recently, economic theories have been applied in cases decided by the OCCP president, such as in a case of 27 June 2013 (decision No. RWR 17/2013, available on the website of the OCCP) where the testimony of economic experts was heard as well as in the case of 16 December 2013 (decision No. RKT 46/2013, available on the website of the OCCP). Another important case was decided on 16 July 2010 (decision No. DOK 6/2010, available on the website of the OCCP) and concerned a prohibition-restricting agreement entered into by PKN Orlen SA, the biggest Polish oil refiner and biggest petrol retailer. An interesting decision where economic theory was applied is the decision of the OCCP president of 11 February 2004 (decision No. RWR 7/2004, available on the website of the OCCP) concerning Polskapresse sp zoo, one of the biggest publishers in Poland. Polskapresse sp zoo failed to notify the intention of concentration to the OCCP president, who as a result imposed a financial penalty of 235,850 zlotys. The position of the OCCP president on the application of economic analysis in cases of anticompetitive concentrations of business entities was presented during the meeting of the Competition Committee of the OECD in 2004.

The importance of economics in competition law cases involving IP rights is difficult to indicate as there have only been minor cases where it has been considered. However, in a decision of the OCCP president of 21 July 2009 (decision No. RWA-10/2009), economics played an important role in finding that the collective management society the Polish Society of Authors and Composers (ZAiKS) had abused its dominant position.

Recent cases and sanctions

33 Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In its decision of 29 August 2008 (decision No. 6/2008), the OCCP president found that the agreement between two collective management societies, ZAiKS and the Association of Polish Filmmakers (SFP) entered into on 29 December 2003 restricts competition and as such is prohibited under the ACCP. Due to the aforementioned decision, the OCCP president obliged the parties to cease the competition-restricting

practice resulting from the agreement and imposed financial penalties upon them respectively 1 million zlotys and 250,000 zlotys. In its agreement ZAiKS and SFP, inter alia, fixed minimum fees collected from commercial users for the reproduction of audiovisual works on copies for individual use. The fixed minimum fees were applied, inter alia, when collecting fees from publishers whose publications included DVDs of films with papers or magazines. Appeals to the Court for Competition and Consumer Protection filed by ZAiKS and SFP have been dismissed. On 1 March 2012 the Court of Appeal (the second instance court) dismissed the appeals of ZAiKS and SFP. The judgment is final and valid. In this case, the Supreme Court refused to hear a cassation of ZAiKS and SFP (decision of 2 July 2013, III SK 63/12). Moreover, the Supreme Court made an important general statement saying that the provisions of CNRA admitting a conclusion of agreements by and between collective management societies on provision of licences and collecting remuneration do not exclude an application of competition law as to these agreements.

34 Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

See question 33.



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