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Market laws in conflict

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SINGAPORE is slowly but steadily achieving its goal of a knowledge-based economy. The 2004 National R&D Survey reported 765 Singapore companies with research and development operations, up from 260 in 1990. Singapore has also gone from 20 patents awarded in 1992 to almost 600 last year.

According to a National University of Singapore study commissioned by the IP Academy and Intellectual Property Office of Singapore, copyright-based industries accounted for 5.6 per cent of Singapore's gross domestic product in 2001 and are expanding at a faster rate than the economy as a whole. Intellectual property rights (IPRs) are therefore one of the key pillars in our fledgling knowledge-based economy.

The advent of competition law in Singapore looks set to change the way in which IPRs are used and exploited by IPR owners.

IPRs confer on their owners the right to exclude others from using or replicating the subject matter of such IPRs. This is a 'legal' monopoly. The Competition Act, on the other hand, seeks to enhance competition in Singapore. It prohibits agreements to prevent, restrict or distort competition and abuses of dominant positions in markets.

In other words, the Competition Act regulates 'economic' monopolies. Therefore, there is sometimes an uneasy balance between IPRs and competition law.

On Oct 3, the Competition Commission of Singapore (CCS) released a set of draft guidelines on the treatment of IPRs. These guidelines set out the CCS' views on the interplay between the Act and IPRs. They also explain how the CCS expects the Act to operate in relation to agreements and conduct pertaining to IPRs, and the CCS' intended approach in undertaking the necessary competition analysis.

The prevailing view is that an IPR does not necessarily confer market power, that is, an 'economic' monopoly. The exercise of any market power by an IPR owner may be also limited by the presence of actual or potential substitutes. The draft guidelines shed some light on the possible situations in which the CCS would conclude that an IPR confers market power.

The draft guidelines, which were put up for public feedback, are expected to affect patents much more than other IPRs. This is because, by their very nature, patents are more

likely than any other IPR to result in market power. Nevertheless, it is still possible for copyright and trademark owners to run foul of competition law.

The guidelines also describe how the CCS is inclined to view certain types of provisions that may be commonly found in agreements whereby IPRs are licensed by the IPR owners or licensor to the licensee. Licensing provisions under scrutiny include grant-backs, which are provisions where a licensee assigns or grants rights to the licensor over the licensee's improvements to the licensed technology and limits on the territory and field of usage.

Also under scrutiny are exclusivity and non-compete clauses and the practice of tying, whereby the licence requires the licensee to obtain products that are not covered under the licensed IPR.

In assessing the potential effect of a licensing agreement on competition, the CCS will consider the level of market power exercised by the parties to the agreement. The thresholds at which there will be an appreciable adverse effect on competition will be pegged at the licensor and licensee having an aggregate market share of (where they are competitors) 25 per cent and (where they are not competitors) 35 per cent. Unfortunately, the basis for these numerical thresholds is unclear, especially given that other jurisdictions apply different figures.

The draft guidelines describe certain considerations for conduct with possible anti-competitive implications, such as restrictions on licensees' ability to engage in independent R&D and refusal by IPR owners to grant a licence. They also consider the formation of technology pools, which are arrangements whereby multiple parties assemble a 'pool' of technologies, for licensing to both contributors to the 'pool' and third parties, and IPR owners' acquisition of competing technologies.

Jurisdictions such as the European Union have seen competition cases in relation to IPRs, with both licensing arrangements and the conduct of IPR owners (in particular, refusals to grant licences) being subject to attack. In addition, anti-trust concerns have arisen in the United States over resale price maintenance, which is the fixing of prices at which licensees of IPRs can resell the product. Even in Singapore, some commentators have advanced competition-based arguments over parallel imports and game console chip modifications.

The guidelines to be issued by the CCS would provide useful guidance to both IPR owners in terms of what is permissible, and actual and potential licensees in terms of what can form the basis of a legitimate complaint. As such, the public consultation exercise would give all stakeholders an invaluable opportunity to contribute their views.

The public consultation exercise is also particularly important to IPR owners who have recently entered into, or are contemplating, licensing agreements. While the

operative provisions of the Act come into effect on Jan 1, 2006, parties to agreements made on or before July 31, 2005, have a six-month extension (with possible further extensions) to renegotiate their licensing arrangements. But agreements made on or after Aug 1, 2005, are not entitled to this extension.

The public consultation is therefore a crucial opportunity for IPR owners to ensure their licensing practices are given proper consideration. Otherwise, they run the risk of contravening the Act if they are unable to reverse or modify their existing licensing arrangements.

Both competition law and intellectual property law are highly complex areas, and making sense of their interactions is even harder. However, as many Singapore businesses are licensees and increasingly owners of IPRs, these issues can no longer be ignored.

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