INTERNATIONAL SYMPOSIUM ON INTELLECTUAL PROPERTY AND COMPETITION IN A GLOBALIZED ECONOMY
National Graduate Institute for Policy Studies (GRIPS)
Tokyo, February 22, 2011

The Interface between Intellectual Property and Competition Policy – A Global Issue?
1. The IP/Competition interface in International Treaties
(i) The IP/Competition interface in the Paris Convention
Article 5(A)(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

- historical background
- meaning of the provision and practical impact
Article 4bis(1)  Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether Members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

- historical background and possible meaning
- independence, territoriality, exhaustion, parallel imports and antitrust
Article 6(3) A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin.

- historical background and meaning
**Article 10bis(1)** The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

- Article 10bis is not a provision of COMPETITION LAW (or ANTI TRUST), but rather of UNFAIR COMPETITION. Unfair competition and competition law (antitrust) are not the same. Unfair competition is part of industrial property and, thus, part of competition policy. But it is not competition law. Competition law protects competition per se, it does not protect competitors directly. Unfair competition protects competitors directly, it does not protect competition.
(ii) The IP/Competition interface in the TRIPS Agreement
Article 6 and the Declaration on the TRIPS Agreement and Public Health, of 2001 (Exhaustion)

Article 7 (Objectives)

Article 8(2) (Principles)

Article 21 (Licensing and Assignment of Trademarks)

Article 31(k) (Compulsory Licenses)

Article 40 (Control of Anti-Competitive Practices in Contractual Licenses)
- The overall rationale and thrust of the competition-related TRIPS provisions
- The interaction of Paris 5(A)(2) with 8.2 and 31(k) of TRIPS
- Practical impact
(iii) The IP/Competition interface in the United Nations Set of Principles and Rules on Competition, of 1980
Section D: Principles and Rules for enterprises, including transnational corporations

4: Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
(e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e., belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices.

- Interaction with 6ter of Paris.
Section E - E. Principles and Rules for States at National, Regional and Subregional levels

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.

- Interaction with Article 10bis of Paris, and 39.3 and 40.3 of TRIPS
2. The IP/Competition interface in a globalized economy
The multilateral provisions on the interface IP/Competition reveal that this is a global issue in the sense that it may have an impact on international trade.

However those provisions express a fragmented and incoherent approach.

But is harmonization really necessary?
First, let us note: IP is essentially pro-competitive to the extent it protects differentiating intangible assets used in business. Without IP there is no differentiation (of companies, of goods, of services) either by means of knowledge, reputation, origin, etc.

Per definition, there should be always a manner for competitors to compete with an IP-owner. Whereas a patent covers a better mouse trap, it means that there is a worse mouse trap available.
IP, therefore, is anti-competitive when it is wrongly dosed: too much IP and too less IP are anti-competitive. The reason is that poorly dosed IP does not protect differentiating assets:

- copyright for TV lists
- patents for genes
- trademarks for functional signs
- ineffective enforcement

These are examples of anti-competitive IP: competitors simply cannot go around those assets. The problem is not with IP, but with the dose.
Well dosed IP is anti-competitive only in two circumstances:

- when the barrier to entry results from regulation (mandatory or voluntary standards - in the latter case, it depends on how much of market power is in the hands of those companies that joined)

- when rights are (unilaterally or bilaterally) abused in a way that maintains or leads to a dominant position.
That said, the correct answer to the query may be elsewhere:

- IP does not perform the same way in all countries (its performance is inherently linked to the organization of national societies and their economic structures)
- the enforcement of competition law is based on market share and market power; markets may be global but their dimensions correspond to the geographical limits of the law
- convergence in competition law is desirable, so as to avoid that inconsistent approaches reduce the thrust of global businesses, but multilateral cooperation seems to be, so far, the preferred approach
as far as the interface IP/Competition is concerned, convergence might be sought so as to address:

(a) the anachronism in the meaning of abuses, by delinking them from lack of exploitation

(b) forfeiture (divestiture) in the case of certain genuine abuses (anti-competitive or not)

(c) problems of inconsistency between
   - 8.2 and 31(k) of TRIPS with Article 5(A)2 of Paris
   - 6 of TRIPS and D(4) of the UN Set with 4bis and 6ter of Paris

(d) the possible extension of the notion of abuses to other IP rights (including under the Berne Convention)
Thank you.

nuno.carvalho@wipo.int