**SPEECH TO THE COMPETITION LAW ASSOCIATION**

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Matrix Chambers

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# WHERE COMPETITION AND IP MEET

## Introduction

1. It is trite that competition law and intellectual property rights make for uneasy bed-fellows. And it is easy to see why. Competition law is concerned with the control of market power; and monopoly power triggers all kinds of warning lights to the competition lawyer. Yet intellectual property rights create just such monopolies.

2. The competition law fanatic would say “get rid of them”, these monopoly right are indefensible. But there is a reason I have labelled this person a “fanatic”. That view is too extreme to be tenable. Such rights have an obvious purpose and function in protecting innovation, and the investment in innovation.

3. Hence my opening remark that intellectual property rights and competition law have an uneasy relationship. Both have their place; but the basis for their co-existence is difficult to define.

4. I am going to have a go, not at answering the question, but at trying to work out why the question is so difficult. Let me begin by defining the scope of what I am

not going to talk about, both in terms of competition law and intellectual property law, and also certain aspects or traits of both that I think matter.

**Competition law**

5. I am going to limit myself to the Chapter I and Chapter II prohibitions. That is to say the control of cartels (anti-competitive agreements or arrangements) and the control of abuses by dominant undertakings (monopolies). I am going to treat these rules with a remarkably broad brush, and you must excuse, in advance, any brushstrokes that are so broad as to paint over nuance. I am not going to touch at all on the other limbs of competition law – mergers and subsidy control.

6. So much for the limits. Nextly, the traits – or trait, in this case – that seem to me to matter. One of the reasons competition law is so difficult – so subjective – is that it constitutes a legal constraint over rights that otherwise are lawfully exercisable. Let's take the case of an "overt" cartel, where the alleged infringement is evident for all to see, and the debate is whether there is an infringement or not. Interchange fees are a good example; most favoured nation clauses – *pace* Compare the Market/BGL – an even better one.

7. These are cases where what would normally be lawful conduct – freedom of contract, and all that – is rendered unlawful by the operation of competition law. In other words, competition law acts as a constraint on rights that an actor could otherwise lawfully exercise.

8. The same is true, almost by definition, of an abuse of a dominant position. Before an abuse can be an abuse, the actor must be dominant. What is lawful for the non-dominant undertaking is unlawful for the dominant undertaking.

9. When I have debated this, it is often said that this is a false point. It is no different from a speed limit. I can, in a speed limited area, lawfully drive up to the speed limit, but I may not exceed it.

10. I can see the point, but I think the distinction I am trying to identify still exists. The point is that there is no right to drive at above 30mph, where that is the limit; whereas the right to contract exists for all. Only in the case of certain persons in certain contexts is the exercise of that right unlawful and an infringement of competition law.

11. So bear with me…this is a trait I am going to be coming back to.

**Intellectual property**

12. I am going to limit myself to patents, and exclude consideration of all other intellectual property rights. I think that what I say about patents holds good – broadly speaking – for other types of IP, but there are (obviously) material differences.

13. A patent is the rights outcome of the so-called "patent bargain". In return for publishing an invention, the inventor receives a monopoly right of limited duration that entitles the inventor to prevent others, without their permission, from utilising the invention.

14. There is no obligation to patent an invention. The alternative – which may or may not be workable – is to keep the invention secret, not publish and not patent. In the case of inventive processes that may very well be an option. The possessor of the confidential process may well rely upon the protections conferred on trade secrets to preserve the secret for an unlimited duration, forgoing the benefit of the protections conferred on patented technology. That is the first trait that I would want to note.

15. The others are as follow. First, there are any number of worthless patents out there. The monopoly rights conferred are the same (I am assuming validity), but if the invention is of marginal use or can be side-stepped by other processes or designs, then its economic significance is not so great.

16. Secondly, and relatedly, there is no particular relationship between the development cost of a patent and the revenue it can generate. When we think of physical property – the goods seller *S* sells to buyers *B* in order to make a profit – the marginal cost of production (essentially, the variable costs) will play an important part in determining price. Of course, there will be fixed costs also, which will diminish with units produced – but variable costs can be quite an important factor.

17. In the case of patents, the costs are almost entirely fixed – they are the R+D incurred in reaching a patentable invention, and they are most unlikely to bear any relationship to the price the patent can command in the market, whether through transfer or marketing.

18. Thirdly, again in contradistinction to physical goods, and related to my second point, a patent can be licensed many times over without significant additional cost to the owner of the patent. How widely a patent is licensed will depend not on cost (the usual rules regarding volume of production really do not apply) but on the price exclusivity can command. The marginal cost of licensing an additional person is not, I think, material. On the other hand, the dilution of the monopoly is going to be quite material in terms of value.

**Re-framing the problem**

19. I want to try to re-frame the issues, to see if we can gain some greater clarity.

*(i) Do not be distracted by the patent "monopoly"*

20. It is important, I think, not to be beguiled by the overt monopoly inherent in the patent. That monopoly exists in the case of all granted patents, but in many cases will not matter at all, not because there is no monopoly – clearly there is – but because the monopoly does not matter, because it is not economically significant. I have touched upon the reasons for this.

21. There is great danger in attaching the label “dominant” to monopoly rights of limited economic significance. I have often wondered whether it is right to say, in a telecommunications context, that the “owner” of a particular number has significant market power in respect of that number. Of course, the communications provider can refuse to connect another communications provider to that number, and so has a monopoly that can be exploited. But does that make the “owner” of the number *ipso facto* dominant. Is it really right to define the market by reference to ability to terminate a call to one single number?

22. Equally, is it really right to define a market by reference to the monopoly rights that exist in relation to an economically worthless invention?

23. I am not sure that we should be so liberal in our attribution of the dominance characteristic. Surely, when considering dominance, one needs to factor in the wider context. In the case of the telephone number, the point is a systemic one. We want interconnectivity between different communications providers, and that means that collectively speaking the individual numbers matter. We want, in this case, end-to-end connectivity between different providers. But it is this systemic aspect that we are seeking to protect – a network or a platform, if you like – and it is that which drives the competition law outcome and ought to drive the analysis.

24. The position is, if anything, starker, in the case of standard essential patents. Again, they arise often in telecommunication network standards, where the objective is that purchasers of different hardware and software can all intercommunicate. So my Samsung in Germany can connect with your Huawei in America and my Apple in the UK.

25. Many, many, patents are declared essential to certain standards…and some of them actually are essential. But they derive their importance through the standard, not necessarily through any intrinsic merit. But because in declaring a patent to a standard, the inventor promises to offer a FRAND licence to anyone who wants it, a position of dominance is at once created and eliminated.

The dominance does not arise solely because of the patent monopoly bargain. In the case of a patent that only derives its importance from the standard, the patent monopoly may amount to no more than a background feature.

26. So context really does matter, and my sense is that unless we competition lawyers try to see the importance of property rights in their overall context, we will miss a trick, and get things wrong.

27. Before I leave this point, I have really been talking about the scope of the Chapter II prohibition. But don't think that Chapter I isn't relevant. Standard setting bodies – like ETSI in France – are acutely conscious that what they are doing may, unless they are very careful, infringe the European equivalent of the Chapter I prohibition, Article 101 TFEU. So the point I am making is not abuse of dominance specific. I will, in this regard, come to the decision in *Ping v. CMA* in due course…

28. So that is my first attempt a re-framing. Look at rights in their context; and pay especial regard to rights when they are part of a network or platform based environment, because that may either serve to eliminate or enhance the competition law implications.

### *(ii) It is property rights in general that matter*

29. My second re-framing is to ask what is special about intellectual property rights in general, and patents in particular? My answer, a little controversially, is not a lot.

30. Let me expand. Professor Honoré regarded ownership – the legal phenomenon that gives rise to the rights of an owner – as a bundle of rights, one of which is the right to exclude and another of which is the right to exploit.

31. We can see both of these in the patent. The patent owner can prevent someone from using their invention by an infringement action; or they can allow someone

to use their invention by giving them a licence, and monetise their invention thusly.

32. But exactly the same is true of real property and moveable property. If I own land, I can prevent trespass (the right to exclude) or I can allow someone to use my property through lease or licence (the right to exploit). The same is true of chattels. Take an aircraft. I can choose – if I am John Travolta or Tom Cruise – to own my own aircraft, and exclude all others from its use. Or, as an aircraft owner I can lease it to someone else to exploit; or I can operate it myself, but license passengers to fly for a given journey.

33. Analytically, apart from the question of tangibility, there is no particular legal difference between ownership over one type of property and ownership over another. And I am not sure that tangibility is or ought to be a material cause for differentiation.

34. So, I am edging towards the thought that my strapline – "where competition and IP meet" – is actually rather too narrow, and that we ought to be framing our thinking by reference to those cases where property rights and competition meet. Once we see things in that way, the uneasy relationship between IP and competition resolves itself into a broader tension between the exercise of property rights and their control via competition law.

**Competition law and markets**

35. The very fact that we are talking about the rights associated with property – the right to exclude, the right to exploit – betrays our political philosophy. Proudhon said that "property is theft"; and a Marxist would see property as a tool of class oppression. If one were to imagine the competition law of, let us say, the cold war Soviet Union – and I am not sure that they had competition law, so this is something of a counterfactual – then that law would be very different from ours. It would be concerned with the distribution of interests in property in a command economy. The process would to review forms of top-down allocation of goods, not market operations.

36. Our system is very different, and (as I say) is based on a market economy. Market economies operate by allocating resource according to willingness and ability to pay. We call the systems – or platforms – by which goods and services are bought and sold "markets". I am going to draw a very sharp – probably unduly sharp – distinction between the platform (the market in which goods and services are bought and sold) and the goods and services themselves. Hold that thought, because I'm going to be coming back to it.

37. Markets, and the market economies which rest on them, imply certain tools, which the law provides, in order to operate. I think there are four, basic, tools that a market economy requires: *(i)* a law of contract; *(ii)* a law of property; *(iii)* a law of persons; and *(iv)* a law of insolvency.

38. I am not going to discuss the latter two – persons and insolvency – and I have already mentioned, if only by implication, the first two. Their importance to a market economy is quite obvious: without these tools, we cannot have the bargains (contracts) that enable the transfer of resources (property); nor do we have the exclusionary and exploitative powers of property to make use of these resources. My point is that these tools are necessary not in any society – but in the Western democracies in which we live. The legal tools in a command economy would be very different.

39. It is these tools that inform and create the markets that we take for granted, and which are too little mentioned by competition lawyers. I think we make the mistake, in competition cases, of seeing markets as somewhat uniform things, phenomena that have only one form.

40. Yet the manner in which markets operate are quite individual. So we have ranges both of complexity and organisation. From the extremely organised (e.g. exchanges) to the *ad hoc* (e.g. the housing market). From the rather simple – the housing market is perhaps a good example – to the complexity in the market for the sale of insurance products, as described in *BGL*.

41. So, where am I going with all this? I'm supposed to be talking about the interface between competition and IP – or, as I have re-framed it, competition and property. I'm not supposed to be delivery a seminar on political economy, and I'm not very well equipped to do so.

**Embrace the complexity**

42. My point is that we are not going to understand the uneasy relationship between competition and property until we embrace – and seek to articulate in each case – the complex ecosystems in which goods and services are provided.

43. "Ecosystems" is a bit of a catch-phrase, deriving out of the current trend to work out how we regulate complex digital markets. But I would suggest that these ecosystems are no more than a new label for the complex markets which have existed for many years.

44. I used *BGL* – Compare the Market – as one such example. Standard Essential Patents and FRAND are another. Since I am in the final stages of writing my judgment in *Optis v. Apple*, I am going to confine myself to the very trite, but the Supreme Court's decision in *Unwired Planet* – affirming the approach of Birss J – has shown us how we can reconcile standards, which make standard essential patents valuable, with a control of market power, whereby we oblige both implementers (the makers of telecommunications equipment) and IP owners (the holders of portfolios of standard essential patents) to come to terms on the licensing of these IP rights. And if they cannot come to terms, why then terms will be imposed…

45. This is a very direct intervention into the monopoly of the patent owner, and is a very interesting tool for the control of market power. But the tool can only be understood if the richness of the market is first understood.

46. I'm going to move – in some haste, because I really do want to stick to the vanilla on this topic – to something related that does not constitute a case that is before me. Let's take Amazon, as something that has evolved from being a

provider of goods (books), acting as a competitor in the market competing with other providers of books (bookshops, etc), to becoming a market in its own right.

47. It is a matter of fact and degree, but Amazon (and I strongly suspect other platforms, like Google and Facebook) appear to have morphed from the providers of goods and services to the platform by way of which goods and services are provided. They are – if this is right – no longer (just) providers of goods and services, but the platform or market in which other producers' goods and services are sold. That, to my mind, is a very important distinction in competition law that goes well beyond the digital platform. It applies also to airports, payment systems and exchanges.

48. So, we need to keep a very close eye on what it is that comes before us in competition cases, and define, as closely as we can, what it is that we see. In that way, we may be able to impose greater objectivity in competition law.

49. Before I try to pull together the threads, let me leave you with one example of what I mean. You'll all recall the case of *Ping v. CMA*, where at all instances Ping was found to have infringed the Chapter I prohibition by restricting the circumstances in which Ping's franchisees to could sell golf clubs online. I am not a golfer, so you will have to forgive my ignorance, but Ping's USP was the bespoke fitting of golf club to customer. Basically, they wanted their franchisees to offer bespoke fitting to the buyers of golf clubs – and although they could not actually compel golfers to undergo a personal fitting, they could certainly ensure that sales without fittings were discouraged. So the agreement between Ping and its franchisees precluded internet and I think other remote sales. As I say, the CMA, the CAT and the Court of Appeal all found a Chapter I prohibition, and Ping – much to its chagrin – was fined accordingly.

50. I am not going to suggest that *Ping* was wrong. That would be a very presumptuous thing to do, given the quality and sheer competition law expertise of the judges involved. But I think it would be right to say that the case causes a degree of unease, when the competition lawyer tries to explain matters to the

lay person. Why, after all, can't Ping leverage its USP? Isn't that a special part of its product? Why should the franchisees be permitted – there being other golf clubs on the market: I don't think Ping could be said to be dominant – to dictate how Ping chose to brand itself?

51. Are we going to get to a stage where it is permissible to sell a franchisor's luxury goods in a manner that actually undermines the exclusivity of those goods? Selling a Rolls Royce from a run-down shop in a seedy-alleyway in one of the less salubrious parts of the United Kingdom?

**Conclusions**

52. So, my attempted answer to the apparently uneasy relationship between IP and competition is this:

    a. Don't get distracted by the monopoly nature of the patent. All property rights are exclusionary, and so monopolistic to this extent. But such rights are necessary in order to create the very market that competition law exists to control.

    b. Instead, make sure you see the exclusionary right in its true context, in all its complexity. Make sure you understand that complexity, and how the exclusionary right – or power – fits in. Don't let an economist opine unless they know an understand the context.

    c. When you have the complete picture – the context – then maybe you'll be able to apply competition law as the legal overlay that constrains the exercise of rights which – absent competition law – can lawfully be exercised.

Thank you for your attention.

If there is time for any questions, I will be more than happy to take them.