

Abstract

The relationship between competition law and intellectual property (IP) rights is often viewed as adversarial. Competition law strives to maintain effective competition as a way of achieving effective allocation of resources and thereby contributing to consumer welfare. IP rights, on the other hand, provide the IP holder with a legal monopoly for a limited period of time, which shield the IP holder from competition. Although the ultimate goal of competition law and IP rights is to contribute to consumer welfare, the methods used to achieve this goal – creating a monopoly on the one hand and maintaining competition on the other hand – seem to be in conflict.

This thesis examines the interaction between competition law and patent rights. In particular, it considers whether patent rights can be restricted by the "essential facility doctrine", both under US antitrust law and EU competition law.

The essential facility doctrine (EFD) was developed in US jurisprudence as a type of monopolization claim under Section 2 of the Sherman Act. The doctrine has four elements: (1) control of an essential facility by a monopolist, (2) a competitor's inability to practically or economically duplicate the facility, (3) denial of use of the facility to the competitor, and (4) feasibility of providing access to the facility. If these elements are proven, the monopolist is found in violation of Section 2 of the Sherman Act.

To examine the interaction between patent rights and the EFD, this thesis is divided into two parts: Part I considers the interaction under US antitrust law, while Part II under EU competition law.

Part I is further divided into two sections. The first section deals with the application of the doctrine to tangible assets, such as physical infrastructure. A sample of 70 court cases dealing with the EFD is reviewed. It is found that the doctrine was successfully used only in 4 (6%) cases of this total. It was rejected in the rest, mostly because the plaintiffs failed to prove one or more elements of the doctrine. Based on the cases reviewed, this section contains a detailed description of how U.S. courts evaluated individual elements of the doctrine. The section concludes with a critical assessment of the doctrine, both by the author as well as compiled from literature.

The second section of Part I focuses on the application of the EFD to patents. Relevant court cases are reviewed. It is found that the application of the doctrine to patents is rare, due to the fact that refusal to grant a licence is a statutory patent right. Absent other unlawful behaviour, the Federal Circuit holds that the patent holder can refuse to grant a licence without violating the Sherman Act, even if the licence is requested by a competitor and other elements of the EFD are fulfilled. However, this conclusion is not definitive, as there persists a circuit split between the Federal Circuit and the Ninth Circuit. The latter maintains that if the plaintiff proves that the refusal was a sham, intended to conceal anticompetitive behaviour, the EFD may still be applicable.

Part II of the thesis deals with EU competition law and is also divided into two sections. The first section deals with application of the doctrine to tangible assets. It is found that the doctrine has been used only in a few dozen cases. These cases are reviewed and a detailed description is presented of how courts evaluate elements of the essential facility doctrine. It is found that the elements are defined in a similar way to the US, with one possible exception: courts in the US hold that the the facility cannot be duplicated if the competitor is unable to do so "economically or practically". In the EU, the facility cannot be duplicated only if the competitor, having the same resources as the monopolist, is unable to do it.

The second section of Part II again focuses on the application of the EFD to patents, as well as related IP rights. In the EU, existence of IP rights is within the exclusive jurisdiction of member states and is thus outside of the scope of EU competition law. The exercise of IP rights may, however, fall within the scope of competition law, depending on whether the rights belong to the specific subject matter of the particular IP right or not. For patents, the specific subject matter comprises: (1) the exclusive right to place a patented product on the market for the first time, either directly or through licensing to third parties, and (2) the right to oppose infringement. According to EU jurisprudence, simple refusal to grant a patent licence falls within the specific subject matter. It means that the refusal is not in violation of Article 102 of the TFEU, even if other elements of the EFD are met. A different situation may occur if the refusal includes an abusive element, such as a demand for unreasonably high licensing fees. In such a case, the refusal may be considered in violation of Article 102 of the TFEU.

With regard to copyright, the EU jurisprudence has developed a special set of rules for situations where the copyright holder operates in one (primary) market, and the copyrighted material is an indispensable input for business in a separate downstream (secondary) market. If the refusal to grant a licence (1) is preventing the emergence of a new product in the secondary market for which there is a potential consumer demand, (2) is unjustified, and (3) will exclude competition in the secondary market, then the refusal is abusive and in violation of Article 102 of the TFEU. This set of rules is similar to the EFD, with one exception: licensor and licensee operate in different markets and therefore are not competitors. Although these rules were developed for copyright, there is no reason why they should not apply to patents.

In conclusion, in both the US and EU, the essential facility doctrine may be used to force the owner of a tangible asset to share it with competitors, thereby limiting the owner's property rights. In both jurisdictions, IP rights in general and patent rights in particular enjoy enhanced protection from competition law. Refusal to grant a patent licence is recognized as a statutory right in the US, and as a specific subject matter right in the EU, thus shielding the patent holder from competition law in cases where such right is exercised. Refusal to grant a licence, therefore, cannot be found in violation of competition law, even if the patent licence may be considered an essential facility by competitors.