

1. Coopetition: the role of IPRs

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1.1 THE GENERAL PHENOMENON: ITS DRIVING FACTORS, ITS BASIC CONTRACTUAL EXPRESSION

More and more typically, collaboration between competitors (hence: coopetition) is the way of creating innovation, and doing business at large, in a contemporary economic scenario which increasingly requires that both R&D and production of goods and services be based on multiple technological contributions.

Coopetition is an expression of contractual freedom, a functional profile of the ‘freedom to conduct business’ as per Article 16 of the Charter of Fundamental Rights of the European Union (CFREU), which translates into the right to choose if, when, how, and with whom to cooperate for entrepreneurial purposes and projects.

In particular, such collaboration is pursued in order to create ‘value networks’¹ that:

- achieve lower costs and higher research and development (R&D);
- develop and expand markets;
- address major technological challenges;
- comply with new regulations; and
- develop new industry standards.²

¹ See E.G. Carayannis and J. Alexander, ‘The Wealth of Knowledge: Converting Intellectual Property to Intellectual Capital in Co-opetitive Research and Technology Management Settings’ (1999) 18 *Int. J Technology Management* 326.

² K. Blind, B. Ebersberger and A. Lorenz, *Coopetition, Cooperation and Competition as Determinants of Companies’ Appropriation Strategies*

The philosophy of sharing as a prerequisite for the achievement of more advanced efficient industrial models stretches well beyond the field of information technologies and those *lato sensu* related to communications, which we usually think of in terms of network industries. That philosophy indeed permeates also more traditional sectors, in which industries have established – ‘silently’, in order not to tarnish the image of ‘uniqueness’ of products – production models largely based on projects developed in common, where the distinctive/competitive function is primarily entrusted to differentiation in design, trademarks, marketing policies, and so on.

Coopetition is built on a delicate, often fragile, balance of two opposite logics of interaction: the competitive paradigm driven by conflicting interests, which ‘under the surface’ nurture opportunistic, when not ‘hostile’ behavioral temptations, and the collaborative paradigm driven by common interests in a certain area.³

1.2 COOPETITION-FOR-INNOVATION: THE ROLE OF IPRs

Coopetition is particularly relevant and critical (even from a juridical perspective), when aimed at technological innovation. The challenges posed by such factors as shrinking product life cycles, the need for heavy investments in research and development, convergence of multiple technologies and paramount importance of technological standards, as well as similar features of the contemporary ‘speed-based’ multifaceted technological scenario, typically forbid that a single firm can create all the innovations needed to successfully compete. Conversely, firms that are capable of, and available for, peer collaboration have better chances to outperform competitors than those which rely only on internal resources and expertise.⁴ Thus, in sum, mutual access and sharing amongst agreed

(February 2013), p. 3 *et seq.*, available at <http://ssrn.com/abstract=2145165> or <http://dx.doi.org/10.2139/ssrn.2145165>.

³ See *ibid.* p. 5.

⁴ See D. Lim, ‘Beyond Microsoft: Intellectual Property, Peer Production and the Law’s Concern with Market Dominance’ (2008) 18 *Intell. Prop., Media and Entertainment LJ* 291, especially 327.

partners emerges as an optimal, possibly ‘the’ optimal, paradigm for producing innovation.

Self-evidently, in technological coopetition, intellectual property rights (IPRs), patents in particular, play a crucial role. (The role is ‘crucial’, not ‘indispensable’, as it is quite possible, and not infrequent, that the collaboration concerns unpatented, even unpatentable, technology.)

Indeed, as the most important knowledge is normally covered by IPRs, patents and copyrights enhance the competitive value of the coopetitor’s contribution to the collaborative venture,⁵ thus making cooperation with patent and/or copyright holders reciprocally more attractive. This is due to:

- (a) the *erga omnes* defensive power, which makes IPRs protected technology more valuable as enforceable against any free-riders, including third parties possibly benefiting in some manner from a violation of a contractual duty concerning the use of the patented technology – thus, the entitlement of patents provides a much stronger (‘absolute’) protection than the ‘relative’ one ensured by contractual remedies;
- (b) the intrinsic ‘certification’ of innovative value that patents express: a value maximized when patents are standard essential patents (SEPs):⁶ in other words, when they have no actual substitutes for achieving, or achieving efficiently, a specific purpose, as will be discussed below.

In sum, entitlement of IPRs interacts with the exercise of freedom of contract, acting both as *economic* incentive to seek-and-choose partners and to be sought-and-chosen by partners, and as legal

⁵ See K.M. Saunders, ‘The Role of Intellectual Property Rights in Negotiating and Planning a Research Joint Venture’ (2003) 7 *Marquette Intell. Prop. L Rev.* 75; D.R. Gnyawali and B.J.R. Park, ‘Co-opetition Between Giants: Collaboration with Competitors for Technological Innovation’ (2011) 40 *Research Policy* 650.

⁶ SEPs are ‘patents that are essential to the standard (in that they must be practiced to accomplish the standard)’ (Judge J. Robart, Order No. C101823JLR, in *Microsoft v. Motorola*, 24 September 2013, p. 3).

instrument for reciprocally granting, and being granted, partners of the collaborative venture, an *erga omnes* protection against free-riders.

We wish to emphasize the reference to ‘inclusion’ as the other face of Janus. We disagree with the current *vulgata* that identifies and symbolizes in the exclusive/excludent profile, almost exhausting in it, the content, and the very function, of IPRs. Indeed, while the exclusive/excluding ‘face’ of the patent acts as a Damocles’ sword against *possible, occasional* contractual and non-contractual violations of the patent or the patent-related covenants, ‘inclusive/including’ profile is instrumental to the *ordinary, permanent*, day by day entrepreneurial activity aimed at the cooperative development and exploitation of innovation.⁷

1.3 DUAL LEVEL OF REGULATION OF PATENT (ALSO SEPs) BASED COOPETITION: THE CONTRACTUAL RELATIONS AMONGST COOPETITORS

The subject matter evokes a systemic framework built at two basic legal levels:

- (1) at an internal level – in other words, a contractual one – related to the covenants and duties reciprocally binding the parties of the coopetitive venture;
- (2) at an external level, related to the impact of the same venture on the market, in particular on dynamic competition.

Let us synthetically check the main tenets of each of such levels of discipline.

(1) The first level focuses on duties grounded on objective ‘good faith’ in the pre-contractual phase, the framing and interpretation of the contract, the execution thereof. Duties, thus, stemming

⁷ See G. Ghidini and A. Stazi, ‘Freedom to Conduct a Business, Competition and Intellectual Property’ in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham (UK)/Northampton, MA, Edward Elgar, 2015), pp. 410–20.

from the overarching principle of ‘fairness and loyalty’ (as translation of the German concept of *Treu und Glauben*), requesting that each party, in pursuing its own interest, ‘preserve’ – instead of boycotting – the contractual interest of the counterpart(s); and in this sense ‘protect’ the other party’s trust in the establishment of a fairly balanced equilibrium of interests. Indeed, said duties, including reasonableness in fixing conditions, transparency/disclosure, and so on, are poignantly called by German doctrine ‘protection duties’ (*Schutzpflichten*), normatively stemming from section 241.2 BGB.⁸

This is equally true of other continental European national legislation, such as articles 1337, 1366, 1375 of the Italian Civil Code, and it is equally true, in substance, of common law contractual regimes. Such ‘protection duties’ were acknowledged by Judge Robart in his Order no. C10-1823JLR, in *Microsoft v. Motorola*, 24 September 2013, as duties based on the *Restatement (Second) of Contracts*, Section 205 ‘Duty of good faith and fair dealing’ (on the concept of ‘good faith’ of the Uniform Commercial Code, Section 1-201).

1.4 PROCOMPETITIVE BOUNDARIES TO COOPETITIVE AGREEMENTS

(2) The various forms of coopetition do not generally exclude the involved firms maintaining a reciprocal effective degree of competition, particularly, but not solely, as concerns ‘downstream’ market level. This is true not only because coopetitive relations are unstable, as nurturing opportunistic and hostile ‘temptations’ of reciprocally competing partners, nor ‘just’ because of antitrust constraints. Indeed, coopetitive initiatives may well *per se* have a positive impact on the prospects of dynamic competition. When competing firms cooperate, not only do they facilitate their own technological and product/service development and leverage the knowledge across related businesses within the firms’ activity, but they also have a strong incentive to benchmark each other and

⁸ Bürgerliches Gesetzbuch (BGB), in the text defined by the *Gesetz zur Modernisierung des Schuldrechts*, 26 November 2001, in force 1 January 2002.

prepare for future competition, which is enhanced because they become more ‘informed’, and richer in innovative capacity. Thus, present peace may well prepare for future ‘dynamically competitive’ (healthy) wars.

Moreover, as a consequence of the institution of a cooperative venture, excluded followers may imitate and respond to industry leaders’ actions, giving rise to a sort of ‘group-to-group’ competition.⁹

Thus, at the end of the day, these kind of ‘alternative’ cooperative initiatives may create new dynamics in the value chain, hence result in less concentrated ‘one-sided’ market dominance, with consequently less need for intervention by antitrust authorities.¹⁰

However, as hinted, antitrust authorities, carrying their big stick while not always speaking softly, keep a watch that the collaborative venture does not exceed its virtuous aims and does not transform itself into an agreement in restraint of trade, from the perspective of Article 101 of the EU Treaty. In European Union law, such control is normatively ensured by the discipline of specialization agreements and exchanges of technology, a discipline that tends to favor cooperation agreements while preventing the risk of degenerating into an appreciable restriction of competition.

This ‘separation of the wheat from the chaff’ is entrusted to the well-known exemption Regulations on R&D (Regulation (EU) 1217/2010) and technology transfer agreements (Regulation (EC) 772/2004 and related Guidelines, both under review by the European Commission). According to the new draft version of the Guidelines, in particular, the creation and operation of a technology pool falls outside Article 101(1) of the Treaty on the Functioning of the European Union, irrespective of the market position of the parties, if, among other conditions:

- sufficient safeguards are adopted to ensure that only essential technologies (which therefore by necessity are also complements) are pooled;
- sufficient safeguards are adopted to ensure that exchange of sensitive information is restricted to what is necessary for the creation and operation of the pool;

⁹ See Gnyawali and Park, n. 5 above, p. 652.

¹⁰ Lim, n. 4 above, p. 301 *et seq.*

- the pooled technologies are licensed out to all potential licensees on fair and non-discriminatory (FRAND) terms.¹¹

1.5 THE CASE OF SEPs

Whenever the cooperative venture profits from either patents that embody or contribute to build a standard, and in particular in the hypothesis of standard essential patents (SEPs),¹² the antitrust perspective stretches to that of Article 102 TFEU. There must be an analysis of dominance, since SEPs *presumably*¹³ confer dominance /market power (see the recent US-EU cases *Apple v. Samsung* and *Microsoft-Apple v. Motorola*). In recent years the number of SEPs-related litigation has been increasing.¹⁴ Now, in such cases, and upon finding of market power, the antitrust authorities require that FRAND access to the resulting standards and related IPRs be granted even to third party competitors.¹⁵

1.6 A FINAL QUESTION

Finally, we leave open to doubt the possibility that access to SEPs might be systemically equated to the access that the patentee of a high-tech derivative invention may claim to the previous, ‘original’

¹¹ See Draft Communication from the Commission: Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, C(2013)924 draft, paras 234–9 and 243 *et seq.*

¹² See n. 6 above.

¹³ We disagree with the Commission’s assumption that SEPs confer dominance *per se*. True, SEPs ‘are a market’ on their own. But the test for market power should be the absence of valid substitutes, based on different standards, for achieving the same functional result. Aspirin enjoyed market power until other drugs based on different pharmaceutical standards (for example, Tylenol = paracetamol) proved to be valid remedies for the same kind of illnesses.

¹⁴ See K. Blind and T. Pohlmann, ‘Trends in the Interplay of IPR and Standards, FRAND Commitments and SEP Litigation’ (2013) *Les Nouvelles* 177.

¹⁵ The subject obliged to grant such access will be, if the SEP remains owned by a single firm, the same firm; if the SEP is conferred in a patent pool, the access duty will fall on the pool.

patent she has worked on, in order to obtain green light to industrially realize and market her invention. Such hypothesis, as is well known, is foreseen by Article 31.1 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), which (as many national legislations, even *ante*-TRIPs, do) allows the derivative inventor to obtain a FRAND license (possibly crossed with that obtainable by the original inventor on the improvement). The effect of this mechanism is that both patentees will be able to compete offering an overall more advanced technology ($A+B = B+A$). This enhances innovation and consequently dynamic competition, and benefits consumers who will ‘immediately’ have access to the technological advancement – also at duopoly, rather than monopoly, prices. All this without any need of ad hoc investigations as to whether the original patentee has market power.

Hence, our question whether, whenever access to a SEP is requested for the purpose of developing and marketing a downstream (and thus ‘derivative’) innovation, the TRIPs norm might be applied by analogy *without*, as hinted, the need for an assessment of dominance/market power (and related costly proceedings).

Might such analogy be denied due to the difference of objectives (the TRIPs patent law rule ‘just’ aims at enhancing innovation, whereas antitrust aims at enhancing competition)? We doubt it. On one side, as shown, the TRIPs rule enhances dynamic competition. On the other side, however, isn’t also the objective of enhancement of innovation an overarching goal of constitutional rank, just as much as defense of competition, thus allowing the interpreter to apply the rule that pursues it to substantially common scenarios of conflicting interests related to the sharing of essential technology?

That is our question, which we leave open. Should the answer be negative, we however express the wish that a future reform of the patent regime might expressly extend the Article 31.1 TRIPs mechanism to requests for access to SEPs for industrially realizing and marketing downstream innovation.