A COMPARATIVE STUDY OF INTERNATIONAL BEST PRACTICES EMPLOYED IN STRIKING A BALANCE BETWEEN THE FUNCTIONALITY OF COMPETITION LAW AND PROTECTION OF IP RIGHTS AS THEY OPERATE WITHIN THE MARKETPLACE

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DECLARATION

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ABSTRACT

The contemporary global economy is fundamentally shaped by the intricate yet subtle relationship between IP rights and competition law. These two legal disciplines may seem to have different goals at first, but they are actually two sides of the same coin that drive innovation and economic growth.

Intellectual property, which includes patents, copyrights, and trademarks, gives creators and innovators exclusive rights. These exclusive rights create limited monopolies designed to incentivise research, development, and creative output. On the other hand, competition law, also known as antitrust law, tries to stop monopolistic abuses and anti-competitive practices. It does this by making sure that the market is fair for all competitors, encouraging lower prices, and giving consumers more options.

The main goal of both IP rights and competition law is to improve consumer welfare and boost economic growth. But in practice, the exclusive rights that come with IP rights can give certain market players a lot of market power, which can lead to higher prices and make it harder for new competitors to enter the market. The challenge for legal authorities is managing the delicate balance between enforcing IP rights and ensuring fair competition.

This paper undertakes to carry out a comparative study of international best practices in striking this crucial balance. The goal of this research is to show how important this issue is to Uganda as a developing economy and to identify which international best practices may be adopted and effectively applied to the Ugandan context.

DEDICATION

To all the late bloomers, your time will come. Never lose faith.

I especially dedicate this research to all my family and friends. The list would be endless if I were to put all your names. I am forever grateful for all your support and belief in me. God bless you all.

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ABBREVIATIONS & ACRONYMS

IP – Intellectual Property

IP rights – Intellectual Property Rights

TRIPS – Trade Related Aspects of Intellectual Property

OECD – Organisation for Economic Cooperation and Development

WTO – World Trade Organisation

UNCTAD – United Nations Conference on Trade and Development

WIPO – World Intellectual Property Organisation

COMESA – Common Market for Eastern and Southern Africa

EAC – East African Community

TFEU – Treaty on the Functioning of the European Union

SEPs – Standard Essential Patents

R&D – Research and Development

FRAND – Fair, Reasonable and Non-Discriminatory

EU – European Union

UK – United Kingdom

US – United States of America

ECJ – European Court of Justice

CJEU – Court of Justice of the European Union

FTC – Federal Trade Commission

DOJ – Department of Justice

CCSA – Competition Commission of South Africa

CCI – Competition Commission of India

SMEs – Small and Medium Sized Enterprises

CNRA – Copyright and Neighbouring Rights Act

IPA – Industrial Property Act

TMA – Trademarks Act

1.0 CHAPTER ONE

1.1 Introduction

Intellectual property and Competition law are two critical pillars of managing today's economic landscape though they notoriously conflict because they serve opposing sides of the legal spectrum. However, there are common goals that both disciplines seek to achieve such as the need to foster creativity and innovation to promote socio-economic welfare along with freedom of choice for the consumer.

The interrelation between intellectual property law and competition law affects inclusive socio-economic growth in such a way that where the latter seeks to open doors for fair competition, the former appears to favour the monopolisation of economic reward & opportunities.

It has been said that Intellectual Property Systems develop in various economies with the underlying purpose of promoting social welfare through the stimulation of innovation, research and creativity[1]. However, Intellectual property law creates legal exclusivity over innovations and therefore the aim of protection of the various IP rights is at the nexus of enjoying the Intellectual Property[2].

Nonetheless, IP rights are exercised and commercialised in markets that are mostly regulated.

As a market regulatory tool, competition law can be (and is) used to determine the framework within which IP rights are commercialised.

Competition lies at the heart of any successful market economy and is crucial to the protection of consumers' interests[3]. It is governed by particular policies known as

[1] *WIPO Intellectual Property Handbook: Policy, Law and Use* (WIPO Publication No. 489 E), 2008 Reprint.
[2] ibid p.3
[3] Uganda law reform commission, *Study report on competition law*, 2004.

competition or anti-trust or anti-monopoly policy and seeks to promote healthy market competition by regulating the market in a particular economy

Competition law cannot be regarded in isolation from competition policy[4]. Competition policy includes promotion of fair competition directly or indirectly to create an efficient market[5] economy by way of measures that enhance competition in the market economy such as liberalised ownership requirements and economic de-regulation[6].

Simply put, competition law is enacted to carve out space for new entrants in the market by putting fetters on monopolistic anti-competitive behaviour of dominant enterprises and by checking collusive tendencies. It functions as a means to achieve consumer welfare and economic efficiency.

IP rights and Competition law closely interact in the regulation of different aspects of the business world. This can mainly be seen in two ways, namely; (i) the impact of IP rights in shaping the disciplines of competition law; and (ii) the application of competition law on the post-grant use of IP rights[7].

This creates a need for guidance on how competition law should apply to Intellectual Property so that market dynamism for consumers is maintained and to ensure access to essential technology as well as other creative works for producers of goods to continue innovating.

[4] Uganda Law Reform Commission Study Report (n3)
[5] ibid
[6] Alice Pham, Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control? CUTS International, Jaipur, India (2008) https://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf
[7] ibid

1.2 Background of the study.

1.2.1 Historical Background

History of Competition Law

The origins of competition policy (also known as antitrust) can be traced to the late nineteenth century in the United States as a response to the rise of trusts, a term that became a euphemism for big business.[8]

Wayne D. Collins gives an account that the Long Depression from 1873 to 1879 caused an asset price deflation even as unit production was increasing, which primary cause for the declining prices was overproduction and underemployment, both caused by technological advances. These factors gave rise to what became popularly known as ruinous, destructive, or excessive competition, that is, a competition that drives prices below a level that permits the producer to make a fair return on its productive efforts, in that Profit margins reportedly dropped by almost 80 per cent. The excessive competition gave rise to a merger wave where operations and holding of stock of another corporation were possible[9]. He gives an example of the Standard Oil combination[10] as a trust, which enabled the combination to exercise command and control over its operations much like a corporate holding company.

During the 1880s, trusts rapidly expanded for industrial consolidation, prompting states and the federal government to enact antitrust laws to regulate business competition and curb monopolistic practices. The first known case to be handled

[8] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective*, Havard Business School, Working Paper 19-110 (2019) at Page 3

[9] Michael Favour Otong, *NAVIGATING COMPETITION: ASSESSING THE EFFICACY OF THE COMPETITION ACT AS AN ANTITRUST POLICY FRAMEWORK IN UGANDA*, https://hdl.handle.net/20.500.12311/1416 , as accessed on 30th April 2025

[10] The Standard Oil Trust became the model for other trusts, illustrates the formation and operation of a trust. The 1882 agreement was joined by all of the stockholders and members of fourteen corporations and limited partnerships, the controlling stockholders and members of an additional twenty-six corporations and limited partnerships, and forty-six individuals, all of whom would be the beneficiaries of the trust

was by the state of Louisiana against a member of the American Cotton Oil Seed Trust[11]

The story of Antitrust policies in terms of legislation began in 1890 with the coming of the Sherman Act which became popular with many states adopting it making it a worldly celebrated principle. Competition policy developed further to address the risks of concentrated economic power, which the reformers worried could be used to effect political outcomes or undermine independent businesses through unjust practices.

Competition Law in Uganda

In Uganda, the concept of Competition emerged in 1998 with a proposed Competition Bill contented in a report Uganda Commercial Justice Sector Study commissioned by the Ministry of Justice and Constitutional Affairs along with the Ministry of Finance, Planning and Economic Development. This was never enacted. This Bill was followed by the signing of the EAC Treaty on the 30th of November 1999 which came into force in June 2000 and is projected as one of the fastest-growing regional groupings, the Treaty put in place provisions that prohibited practices that aimed to limit fair competition in trade among member states[12].

In 2004 the Uganda Law Reform Commission Study Report on Competition law noted that Competition law should not stifle business and investment but instead create a competitive environment in which firms can have a degree of certainty that they would not be subject to anti-competitive practices thus drafting a Bill which caught

[11] State v. Am. Cotton Oil Trust, 1 RY. & CORP. L.J. 509 (La. Civ. Dist. Ct. 1887)
[12] Ibid (n9) at page 4

the eye of the public and hence the discussion of competition policy took a main stage in Uganda[13].

The same report proposed that the Competition bill as it was then being proposed should deal with acts of unfair competition in intellectual property related businesses to deal with the economic harms caused by dominant business forms or monopolies as Uganda becomes more and more integrated into the global market[14].

In February of 2024, the President of Uganda assented to the Competition Bill coming into law which law in its long title acknowledges the need to promote and sustain fair competition and to prevent practices having an adverse effect on competition in the Ugandan market.

Historical background of the different IP

The different subject areas of intellectual property originate in different places and at different times. Very probably all these laws can be traced back to the system of royal privilege-giving which seems to have operated in most of medieval Europe[15]. The earliest official records of Intellectual Property date back to 1421 when an Italian inventor received the world's first modern patent. However, archaeological discoveries push the date as far back as 600 BCE[16].

During the early 1800s, the idea of global protection of IP rights floated among states. In 1883 the Paris Convention for the protection of industrial property brought clarity and cooperation among international jurisdictions. Three years later, the

[13] Uganda Law Reform Commission Study Report (n3)
[14] Ibid (n3)
[15] Dr. Peter Drahos, THE UNIVERSALITY OF IP RIGHTS: ORIGINS AND DEVELOPMENT, THE UNIVERSALITY OF IP RIGHTS:
[16] Abou Naja Intellectual Property, *History and Evolution of Intellectual Property*, https://abounaja.com/blog/history-of-intellectual-property

1886 Berne Convention for the protection of literary and artistic work extended the same protection to written expressions. In 1891 trademarks were also granted international protection through the Madrid Protocol which facilitated the international registration of trademarks[17].

This ushered in the various agreements later in the twentieth century such as the 1925 Hague Agreement regarding the international registration of industrial designs, the 1961 UPOV Convention for the protection of new varieties of plants, the 1989 Washington Treaty on Intellectual Property in respect of integrated circuits[18].

Uganda follows the common law legal system so it is only right that the roots of our intellectual property law regime are traced from the roots of the English intellectual property law regime.

Copyright protection, rooted in ancient times, initially emphasized moral over economic rights, with plagiarism condemned even in early societies, as seen in the first recorded dispute, *Finnian v Columba*[19]. By 1223, the University of Paris legalized academic text duplication, but low literacy and manual copying limited infringement concerns. The 15th-century Printing Revolution spurred book piracy leading to Richard III's 1483 Act promoting book imports[20]. Courts later recognized copyright as assignable, but licensing failed by 1695, prompting the 1709 Statute of Anne, the first formal law granting renewable 14 year rights to authors[21], possibly with input from Jonathan Swift[22]. Copyright expanded to engravings and lithographs in 1734-

[17] Ibid (n 15)
[18] Ibid
[19] https://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland as accessed on 26th April, 2025
[20] Bainbridge, David; *Intellectual Property* (8th ed, Longman 2010) at page 31
[21] The Statute of Anne is also known as the Copyright Act 1709 and was the first law that granted copyright protection to book authors.
[22] Bainbridge, David; (n20)

35, sculptures in 1798, dramatic works in 1833, and musical works in 1882, culminating in the 1886 Berne Convention[23]. The 1908 Berlin Act, revising the earlier Berne Convention extended protection to life plus 50 years and added choreography, architecture, and sound recordings to the coverage, introducing compulsory licensing and easing formalities. The Parliament Act 1911 in the UK aligned Commonwealth nations, while global harmonization continued through the 1952 Universal Copyright Convention[24].

Patent law in England traces back to 1311, when John Kempe, a Flemish weaver, received the first known letters patent, followed in 1449 by John of Utyman's grant for stained-glass manufacturing early examples aimed more at trade encouragement than invention protection. During Elizabeth I's reign, patents became widespread, often abused to raise royal revenue, prompting legal resistance like *Darcy v Allin*[25], which invalidated monopolies under common law. In response, the *Statute of Monopolies*[26] established modern patent principles, granting 14-year rights to true and first inventors of new manufactures while banning exploitative monopolies. Exceptions, like *Lairdet's 18-year patent*[27], were allowed with price controls. By 1718, written specifications became common, essential for clarity, as illustrated by Arkwright's 1785 spinning machine patent being voided for insufficient detail[28]. James Watt and later critics like Charles Dickens spurred reform, leading to the 1852 Patent Law Amendment Act, which created the Patent Office, introduced

[23] Berne Convention for the Protection of Literary and Artistic Works
[24] Bainbridge, David (n20)
[25] Darcy v Allin (1602) 77 ER 1260
[26] Statute of Monopolies (1623) 21 Jas. 1. c. 3
[27] Lairdet's Patent [1773] 1 WPC 52
[28] J. Hewish; *Rex vs Arkwright, 1785: A judgment for patents as information;* World Patent Information, Vol: 8, Issue 1, (1986) Pages 33-37; ISSN 0172-219; https://doi.org/10.1016/0172-2190(86)90135-3

classifications, and streamlined application[29]. The 1883 Patents, Designs and Trade Marks Act aligned UK law with the Paris Convention and replaced the monarch's seal with the Patent Office's[30]. In 1902, novelty searches were introduced to ensure originality, replacing the earlier deposit system, and the 1949 Patents Act consolidated and modernized the system, ensuring fair monopolies balanced with public interest[31].

Trademark law in England has roots in early common law, with *Southern v How* (1618)[32] marking an early deceit case where a clothier misused another's mark. As commercial marks gained value, courts such as in *Sykes v Sykes*[33] began developing principles of trademark protection, though litigation was costly and required proof of goodwill. In response to mounting pressure, Parliament passed the Merchandise Marks Act 1862, criminalizing trademark forgery. The Trade Marks Registration Act 1875 then established the first register; the Bass red triangle, for beer, became the first registered trademark. This was followed by the Patents, Designs and Trade Marks Act 1883, which consolidated protections. In 1905, the Trade Marks Act introduced a statutory definition of trademark, and in 1919 the register was divided into Part A for greater protections and Part B for less strict protections. The 1938 Act consolidated earlier laws but became notoriously complex, with courts like in *Bismag Ltd v Amblins*[34] criticizing its obscurity. The Trade Marks (Amendment) Act 1984 extended registration to service marks such as laundries and banks, effective from 1986, further complicating the statute. Additional amendments in 1986 and

[29] Bainbridge, David (n20)
[30] Ibid
[31] Ibid
[32] Southern v. How, Cro. Jac. 468 (K.B. 1618), 79 E.R. 400
[33] Sykes v Sykes (1824) 107 ER 834
[34] Bismag, Ltd v Amblins (Chemists), Ltd. [1940] 2 All ER 608 (CA)

1988 via the Patents, Designs and Trade Marks Act and Copyright, Designs and Patents Act added layers of complexity without simplifying the law[35].

Colonial to Post Colonial Era of IP Law in Uganda.

Uganda's Intellectual Property system traces its roots to the colonial times under British rule. This was enabled by the reception clause in the 1902 Order in council by which Uganda as a British Protectorate received the Acts of Parliament of United Kingdom including the Intellectual Property Statutes.

Through the Order in council, Uganda adopted the following Intellectual Property laws and this is how they have evolved over time;

- The English Patents Act Cap 82 Act No. 7 of 1939 which provided that anyone granted a patent in the United Kingdom, or one who acquired rights from the original grantee through assignment, could register the patent in Uganda so long as they applied within three years of the UK grant date and paid the required fees. Once registered, the patent holder or assignee would enjoy the same rights and privileges in Uganda as if the patent had been originally granted there[36]. It was revised by the Patents Act Cap 216 of 1964 which was later replaced by Industrial Property Act, 2014
- The law of copyright was introduced through the 1956 Copyright Act that was later replaced by Act 12 of 1964, Cap. 215 but its content remained without any modifications. This coupled with the fact that it was modelled on English law,

[35] David Bainbridge (n20)
[36] Knapp, Victor (ed); *International Encyclopedia of Comparative Law*; Kluwer Law International, Netherlands (2014)https://books.google.co.ug/books?id=qdFGLppsxcEC&pg=PP2&source=gbs_selected_pages&cad=1#v=onepage&q&f=false

outdated and incapable of accommodating the technological changes over time[37] led to the Copyright and Neighbouring Rights Act of 2006 Act 19 of 2006

- The United Kingdom Designs (Protection) Act Cap 218 which commenced in 1937 that provided for the protection in Uganda of industrial designs registered in the United Kingdom[38]. This was replaced by the Industrial Property Act, 2014.
- Britain's Patents, Designs and Trademarks Ordinance of 1912 under which the first trademark was registered in Uganda in 1913. The Trademarks Act, Act 14 of 1952, Cap 217 related to what trademarks are, the process of their registration and the rights conferred upon registration[39]. This was replaced by Trademarks Act, Act 17 of 2010.

Currently, the intellectual property legal regime in Uganda is made up of statutes including Trademarks Act Cap 225, Trade Secrets Protection Act Cap 80, Industrial Property Act Cap 224, Copyright and Neighbouring Rights Act Cap 222 among others as well as international agreements, conventions and treaties.

1.2.2 Contextual Background

In 2024, Uganda enacted its maiden legislation solely addressing Competition. This law has been hailed for the potential good it can be used to do in the market economy regarding aspects like; (i) comprehensive regulation of anti-competitive conduct by prohibiting anti-competitive agreements, abuse of dominant position and regulating mergers, acquisitions & joint ventures (ii) emphasizing the enforcement of consumer protection in ways such as fair pricing (iii) applicability across all industries and sectors without exemption. (iv) in regional integration by promoting

[37] Knapp, Victor (ed) (n 36)
[38] ibid
[39] Ibid

cooperation with regional competition authorities including the EAC and COMESA bodies.

Nevertheless, the Act has also been found to fall short in certain aspects inclusive of which are the failure to explicitly address IP related competition concerns (even though some of its provisions make an attempt) and failure to align with international standards like the TRIPS agreement on the interplay between IP rights and competition law.

Furthermore, Uganda's intellectual property legal and policy framework throughout its metamorphosis has never addressed or has never had to address the interaction between IP rights and competition which could be owed to the fact that competition law is fairly new to Uganda's jurisprudence.

And yet, it is imperative that a middle ground is found to manage the tightrope walk between protecting the rights of IP holders and ensuring fair competition in Uganda's economic markets.

1.3 Statement of the problem.

Art. 26 of the Constitution[40] provides for the right to own property, whether alone or in association with others. And that no one shall be forcibly deprived of his or her property or any related interest in it unless it is necessary for public use or to safeguard national defence, public safety, order, morality, or health, and such deprivation is carried out in accordance with the law.

This provision includes Intellectual Property seeing as it is classifiable as property[41].

[40] 1995 Constitution of the Republic of Uganda

[41] See for example, 35 U.S.C. § 261 (2006) (Patents shall have the attributes of personal property.); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 961 (2005) (Breyer, J., concurring) (Deliberate unlawful copying of copyrighted works is no less an unlawful taking of property than garden-variety theft.); Ruckelshaus v. Monsanto, 467 U.S. 986, 1003–04 (1984) (holding that Monsanto has a trade-secret property right under Missouri law, and that property right is protected by the Taking Clause of the Fifth Amendment.)

This, along with other domestic and international provisions of intellectual property law, ensure that owners of IP as property are granted exclusive economic and moral rights by the said IP[42]. But the grant of this exclusivity of rights can in some instances lead to market dominance which may in turn cause monopolistic behaviour that can stifle rather than promote innovation, especially when used to block competition and restrict access to a market.

On the other hand, *Art. 40(2)*[43] grants every person the right to engage in his or her profession and pursue any lawful occupation, trade, or business of his or her choice. And in keeping with this idea, *Art. 21(1)*[44] stipulates that all persons are entitled to equality before and under the law, enjoying equal protection across all spheres of political, economic, social, and cultural life, without discrimination in any respect.

This means that *Articles 40(2) and 21(1)*[45] collectively affirm the fundamental right of every individual to freely and lawfully practice any trade and guarantee equality before and under the law, prohibiting discrimination in all spheres of life inclusive of trade and business. These provisions establish a constitutional foundation that supports innovators' rights to compete in the market without arbitrary restrictions or exclusionary practices.

IP rights grant holders exclusive rights over creations to incentivize innovation; however, this exclusivity should not be absolute and should be exercised within the bounds of fair competition. When IP rights are used to unjustifiably exclude others

[42] See for example, Garfield Spence v. Airtel Uganda Ltd & Others HCCS No. 545 of 2015 (Hon. Justice Patricia Mutesi holding that Copyright is a form of property right that grants the exclusive ability to commercially utilise and benefit from particular types of creations.)
[43] Ibid (n 40)
[44] Ibid
[45] Ibid

from market participation they, in my opinion contravene *Article 40(2)*'s protection of the right to trade and *Article 21(1)*'s guarantee of equality.

Notably, Uganda's Competition Act[46] was just enacted in 2024 which means that it is still a new area of law. And whereas the Intellectual Property legal framework is not new as such, its application and enforcement has been feeble up until recent years meaning that it is also fairly untapped in potential.

This signifies that the application of both these laws is not yet necessarily as wide in coverage as might be envisioned on paper albeit trending upward. And further, this connotes that the interaction between the two laws is hardly looked at or thought of while enforcing either of the two areas of law in Uganda.

Even so, there have been instances in Uganda's jurisprudence where the interplay between IP and Competition Law has been exhibited. For example, in the case of ***Vas Garage Ltd v. MTN Uganda Ltd***[47] it was seen that the defendant company's abuse of its dominant position on the market affected both the plaintiff company's intellectual proprietary interest and fair market access.

All of this shows that there is a regulatory need to strike a reasonable balance and align the two legal disciplines so that the enforcement of IP rights does not hamper fair competition in the market. i.e how can the law protect the rights of holders of IP without allowing them the monopolisation of markets and abuse of their position of dominance to ensure that both policies effectively foster innovation and economic growth.

[46] Competition Act Cap. 66.
[47] Vas Garage Limited v. MTN Uganda Limited (Civil Suit No. 0689 of 2022) [2025] UGCommC 73 (21 April 2025)

The question at the heart of this research is whether a balance can be struck to align the protection and enjoyment of IP rights with Competition law to ensure fair competition in the market.

This research seeks to show how different legal jurisdictions approach the interaction between IP rights and competition law. By comparing these different approaches this research further aims to identify and evaluate best practices used in regulating the interaction between IP rights and competition law, the effectiveness of these best practices as well as how and which best practices can be applied in the Ugandan context.

1.4 Purpose of the study.

1.4.1 General Objective

To establish whether a middle ground exists between the enforcement of fair competition and the enjoyment of IP rights by their holders and how the two fields of law can effectively co-exist without stifling each other in the fostering of innovation and economic growth in Uganda.

1.4.2 Specific Objectives

1. To evaluate the effect of IP rights on fair competition.
2. To establish whether a delicate balance can be struck in order to align the enforcement of IP rights with Competition law.
3. To determine whether the fine line between the protection of the rights of IP holders and ensuring fair competition in the market can be managed.
4. To analyse and compare how different legal jurisdictions approach the interaction between IP rights and competition law.
5. To identify and evaluate international best practices used in regulating the interaction between IP rights and competition law and their effectiveness.
6. To compare best practices from the jurisdictions and formulate recommendations of which ones can be applied in Uganda.

7. To explore and propose how effectively these best practices may be applied in Ugandan context.

1.5 Research Questions

(a) How do IP rights affect fair competition in a market, and whether the negative effects of IP rights on fair competition can be mitigated?
(b) What mechanisms can be used to balance the enforcement of IP rights with competition law principles to maintain fair competition and promote innovation?
(c) How do different legal jurisdictions (particularly US, UK, India, South Africa) regulate the interplay between IP rights and competition law?
(d) What internationally recognised best practices exist for the harmonisation of IP protections with competition regulation, and how effective have they been across the different jurisdictions?
(e) How can some of these best practices be effectively adopted to the Ugandan context and what strategies can ensure their successful implementation?

1.6 Justification of the study

Uganda, as a developing capitalist economy, grapples with the complex task of balancing the incentive-based exclusivity offered by IP rights with the imperative of maintaining competitive market dynamics.

Both the Intellectual Property system and the newly enacted Competition Law are in formative stages, creating a significant knowledge and enforcement gap regarding their intersection. While IP rights are intended to stimulate innovation and investment, their misuse especially in markets dominated by a few key players can lead to anti-competitive practices that distort fair competition and hinder consumer welfare.

The simultaneous underdevelopment of these legal regimes increases the risk that IP rights may be weaponised to suppress market entry, entrench monopolies, and undermine innovation rather than promote it. Furthermore, limited public

awareness and understanding of IP and competition laws compound these risks by reducing the ability of businesses and consumers to recognize and assert their rights. This underlines the urgent need for context-specific research into how Uganda can regulate the interface between IP rights and competition law. Addressing these gaps is vital not only to prevent the abuse of dominance but also to strengthen legal frameworks that can ensure equitable access to markets in Uganda's evolving economic landscape.

This research seeks to address these gaps and its findings should be able to awaken the debate on what might appear to be a trivial lacuna in the grand scheme of Uganda's economic landscape yet it is pertinent to look at.

1.7 Significance of the study

This research is to critically examine whether and how a sustainable equilibrium can be achieved between the protection of IP rights and the promotion of fair competition within Uganda's legal and economic landscape. This research endeavour is a necessary step in navigating the complexities of a developing market economy. Promoting a level playing field, protecting consumer welfare.

This research as well aims to add on the existing literature as far as the development of legal and policy framework in the fields of IP rights and Competition law especially in the context of Uganda.

The findings of this research may be used in guiding legal and policy development in the fields of IP and Competition law to get more knowledge and techniques for developing system geared towards improved enforcement of both branches of the law in Uganda. research, advocacy, and targeted awareness initiatives

The study shall enable the researcher to acquire more knowledge and skill in the field being researched and further, this research is meant to help in the partial fulfillment of the requirement for the award of the degree in Bachelors of Laws

1.8 Scope of the study

This research focuses on how particular legal jurisdictions tow the line between the protection of IP rights and fair competition and how this can be applied to Uganda's commercial landscape. This research also highlights which international best practices Uganda can adopt to effectively apply in striking a balance between the protection of IP rights and fair competition in the business environment.

1.9 Definition of key concepts

Intellectual property & IP rights

Intellectual Property is a product of the human intellect[48] whilst IP rights are the legal rights associated with the creative effort[49] and fruits of the creative endeavours of human beings. These legal rights are governed by intellectual property law.

David Bainbridge defines IP rights as legal protections granted to creators and innovators over their intangible creations, safeguarding inventions, artistic works, designs, brand identifiers, and confidential information from unauthorized use[50].

Intellectual property law

Intellectual Property law is a branch of law which concerns legal rights associated with creative effort or commercial reputation and goodwill[51]. Intellectual property

[48] Dr Anne-Marie Mooney Cotter (ed); Law Society of Ireland, Intellectual Property Law Professional Practice Guides, (First published in Great Britain 2003 by Cavendish Publishing Limited) at page 22
[49] Bainbridge, David (n20) at page 66
[50] ibid
[51] ibid

law aims to prevent free riding, ensuring that creators can fully benefit from their work[52]. (a) information technology companies, such as Microsoft and Apple, which rely on copyright to protect their innovation in the software industry; (b) companies such as Coca Cola, or Pepsi Cola, who need to protect the formula for a soft drink, the recipes for which are confidential information; (c) companies such as Waterford Wedgewood, adidas, Gucci or Ferrari, who rely upon their brand name to enhance the value of their product[53].

Competition

Competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place. competition has been described as a process of rivalry between firms seeking to win customers' business over time[54]. It is a situation where anybody who wants to buy or sell has a choice of possible suppliers and customers at the terms they deem most favourable[55]. It is the way firms behave in the market place and how they respond to the actions of other suppliers and consumers[56].

Competition law

Competition law are the rules that are intended to protect the process of competition[57], competition law provides the framework for competitive activity. It protects the process of competition[58].

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[52] Ioannis Lianos; *A Regulatory Theory of IP: Implications for Competition Law*; Centre for Law, Economics and Society Working Paper Series 1/2008; https://discovery.ucl.ac.uk/id/eprint/10045081/1/Lianos_cles-1-2008new.pdf

[53] Law Society of Ireland Dr Anne-Marie Mooney Cotter (ed) (n 48) at page 2

[54] Whish R and Bailey D, *Competition Law* (7th ed, Oxford university press 2012) at page 3

[55] CUTS Centre for Competition, Investment & Economic Regulation, *Competition and Consumer Scenario in Uganda* (2003) at Page 44.

[56] Ministry of Trade, Industry & Cooperatives, *National Competition and Consumer Protection Policy Regulated Competition for Efficiency and Enhanced Consumer Welfare*, 2014

[57] Whish R and Bailey D (n54) at page 1

[58] Marco Colino S (ed); Competition Law of the EU and UK (7th ed, Oxford University Press 2011)

Competitive market

A competitive market is one in which a large number of sellers and buyers vie or compete for identical products or commodities, deal with each other freely, and retain the right of entry into and of exit from the market.

Competition policy

Competition policy refers to approaches of Governments to the promotion and protection of competition[59].

Fair competition

Fair competition generally means that businesses compete on the merits of their products or services, without using unfair or illegal methods to gain an advantage over their competitors[60].

Restrictive business practices

This means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, 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, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact[61].

Dominant position

Dominance is the ability to operate independently of competitive constraints from other market players. Dominance is assessed based on a number of factors including

[59] Ibid (n 56)
[60] https://www.fulcrumlaw.ca/law-dictionary/fair-competition
[61] UNCTAD; UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION TD/RBP/CONF/10/Rev.2

market definition, the level of existing competition, barriers to entry and historical patterns of market rivalry[62].

Dominant position of market power refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services[63]. This position of economic strength enables independent behavior by a dominant enterprise from competitors and consumers. A company may be deemed to have a dominant position if it can behave independently of competitors, customers, or consumers due to its size, market share, or other factors.

1.10 Literature Review.

This section majorly focuses on the analysis of already available literature on Intellectual Property and Competition law in addition to how the two legal disciplines interface. It should be noted that there are different scholars who have already made literature that are expressing their views about the legal and policy framework on the same and from these, the research draws analyses.

The purpose of this review is to delve into how different literature discusses the individual foundational objectives of both IP rights and competition law, and to analyse scholarly works relating to the theoretical foundations of both legal disciplines. This review is as well meant to explore the writings on the shared aspirations of IP rights and competition law and the points of their inherent conflict. This review is to show how various scholars have addressed the interaction between IP rights and Competition Law and further sheds light on the impact of IP rights on fair competition.

[62] COMESA Competition Regulations of 2004
[63] (n 60)

1.10.1 Introduction

The main goal of intellectual property law is to give the owners of intellectual property full control over it. This gives creators and inventors temporary monopoly rights, which is a way to encourage creativity and innovation by giving them financial rewards for their work. *Kritika Gurjar* notes that giving inventors IP rights is a direct way to encourage them, since temporary monopoly rights make them want to publicly disclose their creations[64]. This is meant to solve the free rider problem, which is when people use an inventor's work without paying them, which makes them less likely to come up with new ideas.

On the other hand, competition law has a different job to stop barriers to entry into the market and promote strong competition among many suppliers of goods, services, and technologies. Its main goal is to limit market power and get rid of monopolies, which will make markets fair and free, which is good for consumers in the long run. *Abounu Peter Onyilo* writes that the goal of competition laws is to make competition fair and free by getting rid of monopolies in the market[65].

Both IP rights and competition law have the same main goal: to encourage innovation, economic growth, and consumer welfare. *Juletha-Marié Dercksen* points out this shared goal, saying that competition law encourages innovation by creating a competitive environment that pushes businesses to improve quality,

[64] Gurjar Kritika; *IPR and Competition Law a Tussle or An Interplay* (2024). Available at SSRN: https://ssrn.com/abstract=4781112 or http://dx.doi.org/10.2139/ssrn.4781112

[65] Onyilo, A; *The Interoperation Of IP rights And Competition Law In Market Regulation: The African Experience* CULJ Vol 2 . (2023)

variety, and efficiency, even though they do it in different and sometimes conflicting ways[66].

David Bainbridge also stresses how important IP rights are to the economy by encouraging investment in new ideas, making it easier for businesses to use them through licensing, and building trust in brands to make the market more efficient[67].

The tension between the two legal disciplines therefore, is built in because IP rights give one person or entity control over a market, which seems to go against competition law's goal of keeping market power in check and allowing free competition[68].

A deeper look at this dynamic shows that there is a regulatory paradox where temporary IP rights are used to persuade creators to fund R&D by promising new ideas and progress[69]. Competition law then acts as a check against the abuse of these rights. It ensures that the temporary monopoly promotes innovation rather than stifling it or exploiting consumers[70].

John H. Barton writes that every type of intellectual property right goes against free-market principles because it stops people from copying things so that an inventor can get a monopoly rent and promote the progress of Science and useful

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[66] Juletha-Marié Dercksen; *The interface between competition and intellectual property law: Finding common ground and resolving the tensions between these areas of law from a South African perspective* (2023) Stellenbosch University http://hdl.handle.net/10019.1/127343
[67] Bainbridge, David; (n20)
[68] Akech, Migai, *Regulating Unilateral Market Dominance in Kenya: A Critique of the Competition (Amendment) Bill 2024* (November 20, 2024). Available at SSRN: https://ssrn.com/abstract=5130567 or http://dx.doi.org/10.2139/ssrn.5130567
[69] Bainbridge, David; (n20)
[70] Ibid (n 64)

Arts[71]. So, the problem is figuring out how long and how much IP protection to give so that the benefits of new products which come from these incentives and the benefits of marginal cost pricing which come from the freedom to copy are balanced.

This dynamic interaction is essential for long-term economic efficiency and societal benefit.

1.10.2 Theoretical Foundations

- Rationale and Objectives of IP Protection

The primary purpose of granting IP rights is to provide a robust incentive for inventors and creators. IP rights help solve the common free rider problem, which is when people take advantage of someone else's work without paying them. They do this by making sure that inventors can benefit by making money from their work. *Ioannis Lianos* explains that intellectual property is not scarce like physical property is. More than one person can use the same idea without making it less available. Free riders could use an invention without paying the creator if there were no protections in place. This would lower the incentives to come up with new ideas and lead to fewer new ideas[72].

Governments use IP rights to create artificial scarcity so that innovators can cover their costs and make money from their work. This keeps the market from failing. This incentive system works for a lot of different types of IP. For example, copyright encourages creativity by giving authors the exclusive right to control how their works are copied, distributed, and changed. Industries like music and film would have a

[71] OECD (1998), "*Competition Policy and IP rights : Key findings, summary and notes*", OECD Roundtables on Competition Policy Papers, No. 18, OECD Publishing, Paris, https://doi.org/10.1787/49d5957f-en.
[72] Ibid (n 52)

hard time staying afloat without this kind of protection. This short-term exclusivity is very important for encouraging expensive research and development, especially in fields like pharmaceuticals where there are high risks and a lot of money is needed to back them up. Trade secrets, by safeguarding confidential business information, uphold commercial morality, encourage investment in proprietary knowledge, and allow businesses to maintain a competitive edge without premature disclosure[73].

Beyond direct financial incentives, IP rights are important for sharing of knowledge to the public by inventors. *Acharya and Asthana* write that limited monopoly rights encourage inventors to share what they know rather than keeping it to themselves[74]. Public disclosure, especially through the patent system, helps the knowledge economy as a whole, which helps society to progress. *David Bainbridge and Claire Howell* explain that property rights generally encourage the spread of useful information because they make it less appealing for investors to keep things secret. When discoveries are kept secret, society loses out on valuable knowledge that could speed up new ideas[75].

Furthermore, IP rights embody a sophisticated dual mechanism: they grant exclusive control over intellectual assets, but this exclusivity is strategically designed to incentivize public disclosure and knowledge sharing[76]. Without this kind of protection, creators would have more reason to work in secret, which would make it harder for useful information to spread and slow down progress in society. This

[73] Ibid (n 52)
[74] Tarushi Acharya, Dr. K. B Asthana; *Exploring the Interplay between IP rights and Competition Law: Balancing Innovation and Market Fairness;* Journal of Emerging Technologies & Innovative Research (JETIR) March 2024, Volume 11, Issue 3 https://www.jetir.org/papers/JETIR2403A49.pdf
[75] Bainbridge, David; Howell, Claire; *Intellectual property asset management: how to identify, protect, manage and exploit intellectual property within the business environment* (Routledge, 2014)
[76] Bainbridge, David; (n20)

shows that IP's restrictive nature is a planned way to get more information out there and make things work better[77].

This balance between control, financial motivation, and sharing information helps both dynamic and static efficiency, which in turn boosts economic productivity and technological progress in nations. IP rights are an important part of modern economic activity[78]. In today's economies that depend on knowledge, intellectual property is often the most valuable asset for businesses. Many companies see their IP portfolios as the key to their success. The fact that US companies spend more than $1.1 trillion a year on intangible assets and that companies with well-managed IP portfolios tend to be more profitable shows that IP is not just a legal protection but also a core economic asset. This means that the effectiveness of IP systems has a direct effect on national productivity and global competitiveness, making IP a key driver of modern economic growth and corporate value[79].

- The core objectives of competition law

Competition law is an important set of rules that make sure markets work fairly, boosts economic efficiency, and protect consumers. The goals of competition law are generally agreed upon around the world, even though some may differ from one jurisdiction to another[80].

There is a global consensus about what competition law should do, but the specific laws and policies can be very different from one place to another depending on the history, politics, and social and economic situation of a certain jurisdictions. Still,

[77] Ibid (n 74)
[78] Bainbridge, David; Howell, Claire (n 75)
[79] Ibid
[80] Ibid (n 66)

most legal systems share the same goals, like protecting consumers and encouraging new ideas on the market[81].

A paramount objective of competition law is to encourage innovation and dynamic efficiency. *Juletha-Marié Dercksen* asserts that competition law encourages creativity and innovation by making sure that businesses are in a competitive environment where they want to make things better, more varied, and more efficient[82]. Most scholars agree that competition law should protect both price competition and competition based on innovation, since innovation is a major factor in human progress[83]. *Professor Migai Akech* backs this up even more by saying that competition encourages innovation because rival firms on the market want to make better and newer products to attract consumers[84].

Another core objective is the maximization of consumer welfare. In order to achieve lower prices, more choices of goods and services, and more overall efficiency for consumers, it is thought that competition must be protected. Competition encourages businesses to make better products and services by creating competition between them. This is good for consumers and the economy as a whole. This focus on consumer welfare is a common goal shared by most jurisdictions[85].

Competition law also seeks to protect the basic idea of competition and safeguard the economic freedom to do business. The process of competition is defined as the striving for customers and business by firms in a market. *Professor Migai Akech* explains that this involves preventing anti-competitive practices while ensuring that

[81] Ibid (n 66)
[82] Ibid
[83] Ibid
[84] Ibid (n 68)
[85] Ibid

firms compete fairly rather than colluding or abusing their dominance in a particular market[86]. As *Dercksen* quotes Zimmer and writes, the fundamental goal is protecting the other side of the market, which means that people who are in the market are safe from their counterparts using their market power[87].

Furthermore, competition law seeks to regulate market structures so that they are as close to perfect competition as possible, which is the opposite of monopoly[88]. It intervenes in markets where companies have a lot of market power, especially when such companies use their position to hamper inferior companies or hold them back.

In addition to these main goals, competition law also stresses the need for an economy to be able to adapt to changes, for prices to be competitive, for jobs to be created, and for global market opportunities to grow within a certain jurisdiction's economy[89].

1.10.3 Shared aspirations between competition law and IP rights.

IP rights and competition law have similar overarching goals of fostering innovation, stimulating economic growth, and improving consumer welfare, despite their seeming conflicts and different working methods. This section explains this important convergence and shows how both legal systems work together to support a thriving and forward-thinking economy when properly balanced.

Drawing from Osei Tutu's writings, *Juletha-Marié Dercksen* highlights that the main goals of intellectual property law are to foster innovation and advancement. She goes on to explain that this goal should be interpreted broadly to include human

[86] Ibid (n 68)
[87] Ibid (n 66)
[88] Ibid (n 68)
[89] Ibid (n 66)

progress as well as economic development. This more expansive view emphasises a common dedication to societal progress[90].

Because they actively promote investment in innovation, IP rights are essential to economic activity. Particularly in IP-intensive industries, these rights have a major positive impact on national productivity and job growth. *Acharya & Asthana* go on to defend the implementation of an intellectual property regime by emphasising how it guarantees inventors profit from their inventions, promotes the public sharing of discoveries, and makes commercialisation of technology easier[91].

At the same time, by maintaining a competitive environment, competition law actively promotes innovation. Businesses are constantly inspired to enhance the calibre, diversity, and effectiveness of their goods and services in such a setting. Since innovation is the primary force behind human advancement, there is widespread agreement that competition law should safeguard both price competition and, more importantly, competition driven by innovation. This is further supported by *Professor Migai Akech*, who asserts that rival businesses compete to create new and improved goods for customers, which fosters innovation. This intense competition propels development that is advantageous to society as a whole[92].

In the end, both legal systems strive to promote social welfare, economic expansion, and innovation despite their seeming conflict. By granting exclusivity, IP rights encourage investment in novel concepts and enable creators to recover their R&D expenses while making money off of their inventiveness[93]. By prohibiting

[90] Ibid (n 66)
[91] Ibid (n 74)
[92] Ibid (n 68)
[93] Ibid (n 52)

monopolistic practices that might otherwise impede technological and creative advancements, competition law actively fosters innovation while also assisting in ensuring that consumers have access to high-quality goods and services at fair prices[94]. IP rights and competition law are more related than antagonistic because they both aim to increase economic efficiency and benefit society. When properly handled, these two systems can support one another by fostering technological advancement and protecting the interests of consumers[95].

Strong IPR protection requires strict competition law enforcement, which requires cooperation to promote innovation and economic growth. IP rights are essential for innovation, but their exclusivity can lead to misuse that may impede innovation or keep out new competitors. Thus, competition law ensures that intellectual property protection benefits are realised within a framework that prevents monopolistic excesses, preserving the market's long-term dynamism and fairness. This mutually beneficial relationship guarantees that the short-term monopolies provided by IP fulfil their intended function without turning into tools of market manipulation[96].

1.10.4 Points of conflict between competition law and IP rights

Due to their radically different perspectives on market structure and control, IP rights and competition law are inherently and frequently contentiously at odds with one another. Although they both seek to promote economic development and innovation, there can be a great deal of tension between their seemingly opposite approaches. The fundamental conceptual conflict between the anti-monopoly position of competition law and the exclusive rights provided by intellectual

[94] ibid (n 65)
[95] Ibid
[96] ibid

property law is examined in this section, along with how and when the exercise of IP rights becomes a valid concern for fair competition.

a) A Fundamental Clash Of Concepts

Carlos M. Correa[97] noted that the nature of the rights granted by each legal domain is at the heart of the dispute. Intellectual property law purposefully gives the rightful owners of intellectual property the sole authority over them. This is a mechanism designed to encourage innovation by giving creators temporary monopolies over their creations. Competition law, on the other hand, actively works to promote competition among a variety of suppliers of goods, services, and technologies and to avoid market barriers.

The fundamental conflict between patent law and competition is highlighted by *Michael Trebilcock and Nancy T. Gallini*[98]. According to *Louis Kaplow*, a practice is usually considered anti-competitive and violates antitrust laws, but the patent grant rewards the patentee by reducing competition. Monopolistic possibilities are the price for innovation's dynamic benefits, and this is a conscious societal compromise[99].

In his argument, *John H. Barton* claims that all IP rights distort free-market principles. This suggests a deliberate policy choice to tolerate market distortions to maximise the benefits to society[100].

These views emphasise that IP rights and competition law conflict is a deliberate societal trade-off, not just a conceptual disagreement. This is a conscious policy

[97] Carlos M. Correa; *Intellectual Property and Competition Law Exploring Some Issues of Relevance to Developing Countries*; International Centre for Trade and Sustainable Development (ICTSD); Issue Paper No. 21
[98] ibid (n 71)
[99] Ibid
[100] Ibid

choice to tolerate short-term distortions of free-market principles like higher prices and limited access to promote innovation and long-term advancement as stated by *John H. Barton*[101].

Ioannis Lianos stipulates that the role of competition law then becomes essential in making sure that this price is still supported by the innovation that was encouraged and does not become an excessive burden on consumers or a barrier to future market dynamism[102].

In his explanation of this conflict, *Eashan Ghosh* points out that although the main goal of competition law is to safeguard the values that allow for effective market operation and stop anti-competitive behaviour by established businesses, IP rights holders are legally entitled to regulate access to their intellectual property and impose monopoly rents. This is in direct opposition to the goal of competition law, which is to limit this kind of market power[103].

Sumanjeet Singh draws attention to yet another aspect of the conflict, pointing out that although IP rights promote dynamic efficiency that is, long-term benefits from innovation, competition law has historically placed more emphasis on allocative efficiency, which guarantees that goods and services are produced at the lowest possible cost and made available to the largest number of people today[104].

Juletha-Marié Dercksen goes on to explain that although encouraging innovation is the common goal of both intellectual property law and competition law, they

[101] Ibid (n 71)
[102] Ibid (n 52)
[103] Eashan Ghosh; *Competition Law and IP rights with Special Reference to the TRIPS Agreement* (2010)
[104] Sumanjeet Singh; *IP rights and Their Interface with Competition Policy: In Balance or in Conflict?* (2010). Communication Policy Research South Conference, Xi'an, China, Available at SSRN: https://ssrn.com/abstract=1724463 or http://dx.doi.org/10.2139/ssrn.1724463

accomplish this in various and occasionally contradictory ways. Which can lead to tensions that must be controlled[105].

a) When IP rights Become a Concern for Fair Competition

According to *Whish and Bailey* IP rights do not grant market power or violate competition laws. Holders of rights in IP are not required to license their rights, and a dominant position is not an infringement. Competition authorities usually target abuse of dominant position, regardless of origin. This shows that competition law focuses on the exercise of IP rights, not their existence or market power[106].

Abuse of market dominance is different from legitimate dominance, regardless of whether it stems from intellectual property[107]. This distinction suggests that competition law is meant to prevent IP holders from misusing their statutory exclusivity. This nuanced approach allows IP rights to serve as an incentive and it regulates anti-competitive overreach.

When IP rights are used to engage in anti-competitive behaviour or to abuse a dominant market position beyond the legal bounds of the intellectual property right, they become a problem for fair competition.

The potential for monopoly power abuse and the potential harm caused by anti-competitive behaviour are the primary concerns for competition law with regard to IP rights. Market power becomes detrimental when it results in prices that are higher than what is required to guarantee efficient production or when the protection provided by IP rights impedes or distorts innovation[108]. According to *Carlos M.*

[105] Ibid (n 66)
[106] Whish R and Bailey D (n 54)
[107] Abuse of Market Power: Identifying and Preventing Anticompetitive Behaviour https://michaeledwards.uk/abuse-of-market-power-identifying-and-preventing-anticompetitive-behaviour/
[108] Ibid (n 68)

Correa, competition law may specifically address instances in which intellectual property is used for such[109].

Unilateral actions by companies with a dominant market position violate competition law and yet dominant firms, according to *Whish R and Bailey D*, must compete on the basis of merits rather than distort competition[110]. In this context, even when abusive behaviour involves IP rights, competition law may step in. Refusal to license can be regarded as an abuse of dominance in exceptional circumstances, such as when the protected technology has no alternatives and the refusal to license hinders product innovation or when the IP holder uses their power in a secondary market without a valid reason. Other instances of IPR-related abuse that are covered by competition law include monopoly pricing, which is especially pertinent in developing nations with fewer alternatives, and limitations on end users[111].

According to *Eashan Ghosh*, the real issue that competition law has is not with the existence but with the exercise of IP rights[112]. Accordingly, competition law does not aim to undermine the intellectual property system or render IP rights inherently invalid. Rather, the IP holder's actions more especially, when the exercise of those rights deviates into anti-competitive abuse are what cause its intervention. This means that the actions of the IP holder that distort competition outside the bounds of the lawful IP grant become the legal focus instead of the status of having an IP derived monopoly. This idea serves as a necessary check on overreach while enabling IP to carry out its incentive function.

[109] Ibid (n 97)
[110] Whish R and Bailey D (n 54)
[111] ibid
[112] Ibid (n 103)

Finding the ideal balance entails walking the tightrope between over protecting and under protecting of innovators' efforts. The objective is to provide the innovator with a strong enough incentive without postponing subsequent inventions or victimising customers for excessively long periods of time at exorbitant costs. *Ioannis Lianos* highlights that in order to promote innovation without setting up needless obstacles to access and cooperation, policymakers must carefully weigh the advantages of intellectual property protections against the high expenses of administering and upholding them[113].

1.10.5 Impact of IP rights on fair competition

Scholars have found that IP rights can impact fair competition both positively and negatively;

On one hand, IP rights grant a temporary monopoly, enabling creators to recoup for their expenditures in R&D and to also profit from their innovations. The possibility of significant financial returns motivates entities and individuals alike to engage in R&D thereby fostering an innovation culture and contributing to economic growth[114]. Without such protection, the potential for free riding would hinder innovation thereby impeding economic development and social progress[115].

Licensing agreements, joint ventures and research collaborations, enabled by IP rights, facilitate the flow of knowledge and innovations. This dissemination allows

[113] Ibid (n 52)

[114]Sheheen Marakkar, Anila K & Maglin M Raja; *A CRITICAL STUDY OF LEGAL CONTROL OF ANTICOMPETITIVE TRADE PRACTICES ASSOCIATED WITH INTELLECTUAL PROPERTY*; https://ijalr.in/volume-3-issue-4/a-critical-study-of-legal-control-of-anticompetitive-trade-practices-associated-with-intellectual-property-sheheen-marakkar-anila-k-maglin-m-raja/?form=MG0AV3&form=MG0AV3

[115] Ibid (n 64)

firms to build their technology basing on existing innovations and to expedite development and create new services or products[116].

Because they encourage innovation, IP rights ultimately result in a greater variety of products and services, an improvement in quality, and the possibility of lower prices in the long run. This is because competition becomes more intense after the exclusivity period of IP rights has expired.

On the latter side, the exclusive rights conferred by IP may result in monopolies or dominant market positions, thereby restricting competition and potentially hindering further innovation[117]. This is especially true when the holder of the rights in IP maintains a dominant position and employs exclusionary tactics which exceed the lawful limits of the intellectual property right[118].

Excessive intellectual property protection can create significant barriers to market entry for new entrants, particularly smaller entities and startups (SMEs), because of the financial and legal challenges involved in navigating extensive IP frameworks[119].

When access to essential facilities in IP is restricted it can impede the development of new or improved products, resulting in stagnation as established entities concentrate on patenting minor modifications rather than pursuing transformative innovations that can bring about actual change[120].

[116] Ibid (n 114)
[117] Ibid
[118] WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO); REFUSALS TO LICENSE IP RIGHTS-A COMPARATIVE NOTE ON POSSIBLE APPROACHES (2013) https://www.wipo.int/documents/743993/747687/refusals_license_IPRs.pdf/c353b0c8-70bf-75cf-9643-6f5c32eef61f?version=1.2&t=1671199880211
[119] Centre on Law and Information Policy; An Analysis of the Economic/Legal Literature on the Effects of IP Rights as a Barrier to Entry (2011)
[120] Ibid (n 114)

In monopolistic environments, the absence of competitive pressure in diminished output, increased prices, and inferior quality of goods or services, ultimately undermining allocative efficiency and consumer welfare[121].

1.10.6 Gaps in the literature which the research seeks to address.

The literature does not talk about third world economies like Uganda or even consider the context of how IP rights based anti competitive practices and abuses may affect innovation and development in third world countries like Uganda and yet, those too do have intellectual property law regimes and laws governing competition. This means that there is room for the interface of the two legal disciplines which is not catered for by the vast majority of scholarly literature on the interaction between IP rights and Competition law. This research seeks to play a role in filling that gap.

1.10.7 Conclusion

In conclusion, this literature review explored the relationship between IP rights and competition law, revealing their distinct yet ultimately complementary roles in shaping modern industry. It provided key findings highlighting the fundamental principles, shared objectives, inherent conflicts, and the impact of these two legal disciplines.

IP rights provide temporary monopolies and exclusive control, encouraging investment, innovation, and creativity. By encouraging idea disclosure and reducing free riders, this method boosts economic growth, especially in knowledge-intensive sectors.

[121] O'Donoghue, C. (2016) ' The Evolving Interface between European Competition Law and IP rights: Is there a Balance to be Achieved?', Plymouth Law and Criminal Justice Review, 8, pp. 156-180. Available at: https://pearl.plymouth.ac.uk/handle/10026.1/9028 http://hdl.handle.net/10026.1/9028

Competition law seeks to eliminate monopolies, promote fair competition, and avoid market obstacles to improve consumer welfare by offering more efficient, cost-effective, and diverse options.

IP rights create market dominance, while competition law limits it, causing perceived friction between these two domains. The literature shows that competition law prioritises intellectual property enforcement over their existence. Intervention is needed when IP rights are used for exploitative licensing, unilateral market dominance abuses, or cartel formation.

Despite their inherent conflict, both legal systems aim to promote social welfare, economic growth, and innovation. Competition law guarantees consumers access to high-quality products and services at reasonable prices and encourages innovation by prohibiting monopolistic activities that could stifle innovation. IP rights promote investment in innovative ideas through exclusivity.

The literature shows that competition policy and IP rights can work together to promote technological innovation and protect consumer interests. The strict enforcement of competition regulations is necessary to prevent the misuse of IP rights that could hinder innovation or exclude new competitors to maximise the benefits of intellectual property protection. Addressing conflicts between these areas requires prioritising innovation incentives and fair competition.

The constant emphasis on balancing IP rights and competition law suggests that this equilibrium is a dynamic process rather than a fixed goal. This suggests that the best interface adapts to social goals, market forces, and technology. To ensure that the regulatory framework adapts to new challenges, sustains innovation, and protects fair competition and consumer welfare, effective policy requires

continuous monitoring, re-evaluation, and modification. This dynamic process weighs the benefits of intellectual property protections against the high costs of maintaining and enforcing them to encourage innovation and reduce barriers to access and collaboration.

The relationship between competition law and IP rights is regulated, with one legislative framework balancing the other. IP rights drive innovation, but competition law ensures that they create a vibrant, competitive market rather than a monopoly. A careful and dynamic equilibrium is needed to create a market environment that fosters innovation, economic growth, and social benefit.

1.11 Research Methodology

Research Design

This research will employ a descriptive approach effective for understanding the legal standing on the correlation between Competition law and IP rights in Uganda as well as other jurisdictions. This approach will allow to identify and portray in detail the current status in Uganda, the legal frameworks surrounding them and the same for other jurisdictions.

A comparative study will provide insights into best practices across different legal systems which can be adopted for implementation in Uganda.

Data Collection

Primary Sources: National and International statutes and case law are to form the foundation of the legal analysis to understand the legal and policy framework as it is, being the very foundation of this research.

Secondary Sources: Text books, journals, reports, and online materials are to supplement the research in order to provide context and practical insights into how the correlation between competition law and IP rights operates in practice.

This research will be conducted by way of comprehensive desk review to ensure a thorough examination of doctrinal sources (legal principles) and non-doctrinal sources (practical applications). By collecting and analysing existing data and information that has already been published or recorded by others, in order to gain a broad understanding of the topic and identify the gaps in the existing knowledge pool, and provide a foundation for comparative analysis.

A comparative legal analysis will be carried out to highlight gaps and opportunities for improvement in Uganda's legal and policy framework regarding the correlation between Competition law and IP rights. Different laws, policies and practices from different jurisdictions will be looked at to identify similarities and differences, learn from the best practices in other countries, and potentially make recommendations for improvements in Uganda.

And for the case of the secondary sources, most parts will kept as originally recorded so as not to alter facts i.e. as extracted from books, journals, articles, newspapers, internet and other sources available in libraries physical and online.

Ethical Considerations

This paper does not contain any new research but a compilation of important existing material used in comparison to establish what can best be applied to the Ugandan context. And to ensure the truthfulness of the data analysis, links and all relevant information will be included so that contended matter can be independently verified. I will get permission, recommendation and approval from the relevant

authorities especially from the School of Law, UGANDA CHRISTIAN UNIVERSITY under the supervision of MR. GULUME LASTONE BALYAINHO

1.12 Limitations to the research

This study is limited by the availability of data regarding the interaction of IP rights with competition law and how the balance between the two is struck. This is because majority of the better sources are inaccessible as some are paywalled and others are not available in hardcopy in Uganda.

Moreso, the literature regarding how the least developed countries have approached the interaction of IP rights with competition law and how the balance between the two is struck is even harder to access.

The study is also limited by the time available for the research to be as thorough as possible.

1.13 Chapter Synopsis

This research consists of four chapters. Chapter one is basically an introductory chapter to the research with a detailed background of the research, the aims and objectives of the research, the reasons why this research is important and relevant, the scope of the research, and a detailed review of the literature on the subject of the research clearly showing how such literature informs this particular study.

The second chapter will look at the legal and policy framework of IP rights and Competition law, each independently and then how they interact in particular jurisdictions. That is US, UK, India, South Africa. This is done to carry out a comparative analysis and see what Uganda can borrow from each of these jurisdictions to adopt and effectively implement. This chapter will go a step further and look at the current legal and policy framework governing IP rights and

competition law in Uganda to see what and where Uganda as a developing legal and economic jurisdiction can borrow from others to fill in the legal and policy gaps at the intersection of IP rights and competition law to ensure that a balance is struck between the enjoyment of IP rights and fair competition.

The third chapter will delve into the specific principles of intellectual property and key concepts of competition law which are at the intersection of the two legal disciplines. This is meant to establish the particular ways in which and how the two legal disciplines interact Furthermore, this chapter will look specific anti-competitive practices and abuses involving IP rights in the various jurisdictions. This chapter also seeks to look at the Ugandan perspective of this intersection between IP rights and competition law. This will entail instances where IP rights have affected fair competition among other things.

The final chapter concluding this research will make a summation of the findings of the research and discuss the international best practices from the different jurisdictions and base on that to make recommendations of best practices that may be adopted and effectively applied to the Ugandan context.

1.14 Conclusion

It is important to strike a balance between IP rights and the law of Competition to ensure that whereas creativity is rewarded it does not then foster monopolies and anti-competitiveness to further stifle innovation by the less established. Uganda like other LDCs needs to address this and align with the changing times to avoid further detriment to its economic progress.

This chapter is basically an introduction to what the research is all about and how it is to be carried out.

2.0 CHAPTER TWO

LEGAL AND POLICY FRAMEWORK AT THE INTERSECTION BETWEEN IP RIGHTS AND COMPETITION LAW

2.1 Introduction

The chapter looks at the legal and policy framework of IP rights and Competition law, each independently, and then how they interact in particular jurisdictions. That is US, UK, India, South Africa. This is done to carry out a comparative analysis and see what Uganda can borrow from each of these jurisdictions to adopt and effectively implement.

This chapter will go a step further and look at the current legal and policy framework governing the IP rights and competition law in Uganda to see what and where Uganda as a developing legal and economic jurisdiction can borrow from others to fill in the legal and policy gaps at the intersection of IP rights and competition law to ensure that a balance is struck between the enjoyment of IP rights and fair competition.

2.2 International Legal and Policy Frameworks

The interaction between IP rights and competition law is a matter of international significance, addressed in various treaties and by international organizations. It is significantly shaped by international agreements and the work of international organizations.

These provide a foundational framework that member states often incorporate into their national laws, guiding national approaches to this complex interface.

The TRIPS Agreement by the World Trade Organisation

The Agreement on Trade Related Aspects of IP rights[122], a fundamental element of the global IP rights system, explicitly acknowledges and seeks to govern the relationship of IP rights with competition law. Particular provisions within the TRIPS agreement are pertinent to the balance being struck between IP rights and Competition Law and these are;

- ***Article 7*** on the objectives implies that the use of IP rights shouldn't be done in a way that jeopardises the greater good. The inclusion of this goal, which was largely motivated by requests made by developing nations during the TRIPS negotiations, validates a fair framework that combines the rights holders' interests with public policy considerations, establishing IP rights as tools to further larger societal goals rather than as ends in and of themselves[123].
- ***Article 8.2*** regarding the principles reiterates that IP rights are not absolute and provides a legal basis for regulatory safeguards to maintain market access and equitable competition, despite its limitations imposed by the necessity for TRIPS compliance. This is a crucial element since it signifies that TRIPS is a framework designed to provide developing nations the legislative latitude to tackle IP-related anti-competitive behaviours, especially for public interest goals such as technology transfer and access to treatments[124].

[122] https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

[123] Art.7 of the TRIPS agreement stipulates that the safeguarding and enforcement of IP rights should foster technological innovation and facilitate the transfer and dissemination of technology, benefiting both producers and users of technological knowledge, while promoting social and economic welfare and maintaining a balance of rights and obligations.

[124] Art 8.2 of the TRIPS agreement states that appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of IP rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

- ***Article 31*** regarding other use without authorisation of the holder, a Member State may permit the utilisation of a patented innovation without the patent holder's consent, either for governmental use or use by third parties sanctioned by the government. Prior to such utilisation, endeavours must be undertaken to secure authorisation under reasonable commercial conditions, save in instances of national emergency, extraordinary urgency, or public non-commercial use, wherein the rights holder must still be quickly notified. Furthermore, any use must predominantly benefit the domestic market, but exceptions exist for addressing anti-competitive acts[125].
- ***Article 40*** to do with control of anti-competitive practices in contractual licenses exhibits a direct link between intellectual property and competition This empowers members to adopt appropriate measures to prevent or control such practices, thereby legitimizing national competition law interventions in IP licensing[126].

Collectively, these provisions of the TRIPS agreement provide a framework that makes legitimate the actions by member states to curtail abuses of IP rights which affect fair competition ensuring that the protection of the IP rights is not detrimental to innovation and fair competition. This is particularly helpful in advancing the interests of less developed countries.

[125] Art. 31(k) of the TRIPS agreement primarily pertains to compulsory licensing and explicitly permits such licenses to rectify practices deemed anti-competitive through a court or administrative procedure. This further shows the agreement's flexibility in mitigating market failures caused by IP rights by establishing a direct link between competition law decisions and the implementation of a compulsory licence.

[126] Under Art.40 of the TRIPS agreement, Member states acknowledge that specific licensing practices concerning IP rights may hinder competition, adversely impacting trade and technology transfer. The Agreement permits Member states to characterise such acts as abusive in their legislation and it further enables them to implement suitable measures for regulation or prevention in accordance with other provisions. These actions may look at practices such as exclusive grant-back conditions, limitations on validity challenges, and coercive package licensing, in line with the relevant laws and regulations of Member States.

The World Intellectual Property Organization Guidance

WIPO as the global forum for intellectual property policies, information and cooperation plays a major role in shaping the understanding of the interface between IP rights and Competition law and ensuring that a balance is maintained in the enforcement of the two disciplines. Whereas its primary mandate is the promotion and protection of IP, WIPO actively acknowledges the importance of a balanced approach which considers public interest and competition. Through its Intellectual Property Handbook[127] and other policy documents, WIPO emphasizes that IP rights are necessary but not sufficient for innovation and it encourages the enforcement and adherence to competition law against abusive use of IP.

WIPO further advocates for cooperation between IP and competition agencies, stating that IP protection is pro-competitive but that agencies must work together to ensure a balance and supportive ecosystem. This indicates an evolving stance within WIPO, moving beyond a sole advocacy for strong IP rights to actively promoting the harmonisation and balancing its role with fairness in competition law. This shift reflects a growing global consensus that IP and competition are not merely co-existing but should actively collaborate for optimal outcomes in fostering innovation and economic development.

[127] Chapter 2 of the WIPO Intellectual Handbook at pages 130-132 is to the effect that Protection against unfair competition has been an integral part of industrial property rights since their formal recognition in the 1900 Brussels Diplomatic Conference, later codified in Art.10 of the Paris Convention. This protection is a useful addition in patents and trademarks. In a free market economy, competition fosters innovation and consumer choice, but it also necessitates regulation to prevent abuses. While self-regulation can help, legal enforcement remains crucial in ensuring fair competition. Competition law works alongside regulations, ensuring both market efficiency and ethical conduct. Its flexibility allows adaptation to evolving business practices, ensuring continuous consumer and competitor protection.

The Organisation for Economic Co-operation and Development

The OECD has significantly impacted the analysis of the relationship between competition law and IP rights. Through its Competition Committee and several working groups, it generates impactful papers and policy briefs that examine the important issues at the nexus of competition law and IP rights[128].

The OECD significantly contributes to the examination of the relationship between competition law and IP rights by highlighting best practices and advocating for uniform approaches among member countries[129]. The OECD's discussions and recommendations regarding SEPs and FRAND license terms have significantly influenced global policy and jurisprudence[130].

The United Nations Conference on Trade and Development

Particularly for developing countries, UNCTAD plays a vital role in addressing the interplay between IP rights and competition law. From a development perspective, it has consistently highlighted dimensions of IP rights that can flexibly be utilised to great effect by developing nations such as those embedded in the TRIPS agreement[131].

UNCTAD emphasizes the critical role of competition policy in preventing the abuse of IP rights[132] that could hinder access to essential technologies, medicines e.t.c. It

[128] https://www.oecd.org/en/publications/serials/competition-law-and-policy-reviews_g1g12773.html
[129] Ibid (n 71)
[130] Organisation for Economic Co-operation and Development*; Licensing of IP Rights and Competition Law*; DAF/COMP(2019)3 This paper was prepared by Pedro Caro de Sousa of the OECD Competition Division. The document benefitted from comments from Antonio Capobianco and Ruben Maximiano.
[131] Tenu Avafia, Jonathan Berger, Trudi Hartzenberg; *The ability of select sub-Saharan African countries to utilise TRIPs Flexibilities and Competition Law to ensure a sustainable supply of essential medicines: A study of producing and importing countries* (2006)
[132] The *UN competition rules and principles* (UNCTAD/RBP/CONF/10/Rev.2), an equitable framework for the control of restrictive business practices, aim to promote fair and effective competition while fostering economic development by curtailing restrictive business practices across all enterprises including state owned and multinational companies.

also advocates for technical assistance and capacity building for developing countries to enable them formulate and implements coherent IP and competition policies which are development oriented. Alot of literature from UNCTAD focuses on technology transfer and the impact of IP rights on innovative capabilities in developing economies. This approach ensures that IP systems support broader development goal which inherently includes preventing IP rights holders from abusing their rights.

Earlier Conventions

The Paris Convention for the Protection of Industrial Property,1883

While not directly regulating competition in the modern antitrust sense, the Paris convention is one of those which established the foundational exclusive rights that later became subject to competition law scrutiny. This convention covers patents, trademarks, industrial designs, and other industrial property rights.

Significantly, ***Article 10bis***[133] of the Paris Convention obliges member states to provide effective protection against unfair competition. Whereas the unfair competition spoken of in the Convention is not identical to contemporary anti-competitive practices, it shows an early recognition of the link between IP rights and market fairness. That if the exclusive rights granted are abused for instance

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They look at practices such as cartels, abuse of dominant market positions, anti-competitive mergers, and other practices that limit market efficiencies through horizontal, vertical, or abusive measures. Acknowledging the adverse effects of these practices on trade and development, the principles call for robust competition laws enforced with transparency and due process, complemented by international cooperation to build capacity particularly to support developing countries.

Governments are encouraged to strengthen their national legal frameworks regarding competition law and work collaboratively with one another to address cross border abuses of competition law.

To ensure sustained effectiveness, an institutional framework under UNCTAD including an Intergovernmental Group of Experts and periodic review conferences has been established to monitor, review, and continuously refine these equitable rules and make recommendations.

[133] Under the Paris Convention, member countries are to ensure that national are protected against unfair competition. Any competitive practices which violate the principles of honest practice and goodwill in industrial or commercial activities are deemed unfair and subject to regulation. This promotes fair trade by preventing unethical and deceptive business practices

through sham litigation or anti-competitive licensing terms, scrutiny by the national laws governing competition can be triggered which is in line with the TRIPS agreement.

2.3 African Continental and Regional Frameworks

Regional and sub regional entities in Africa have formulated and are actively formulating legal and regulatory frameworks to address the interplay between IP rights and competition law. The aim is to provide equitable market conditions and promote economic integration throughout the continent while fostering innovation and creativity.

African Continental Free Trade Area Protocols on IP and Competition[134]

The AfCFTA agreement has an aim to create a single market for goods and services across Africa, which signifies a significant step towards continental economic integration. To support this ambition, the AfCFTA has adopted particular policies.

The AfCFTA Protocol on Competition Policy is designed to eliminate restrictive business practices and abuse of dominance across African markets, establishing a dedicated Competition Authority to enforce these rules[135].

Although still being negotiated, the prospective AfCFTA Protocol on IP seeks to harmonise rules for the promotion, protection and enforcement of IP rights. The AfCFTA framework is expected to acknowledge the principles of TRIPS, including the flexibilities related to controlling anti-competitive IPR practices, as articulated in TRIPS Articles 8.2 and 40[136].

[134] Schonwetter, Tobias. (2024*); Protection against unfair competition—African Regional Intellectual Property Organization member states and South Africa*. Journal of Intellectual Property Law and Practice. 19. 10.1093/jiplp/jpae001

[135] Ibid (n 134)

[136] Ibid

The interaction between these two protocols will be crucial for the effective functioning of the single market. And their simultaneous adoption is a signal of the continental commitment to address the interface between IP and Competition law.

COMESA Competition Regulations of 2004

The Common Market for Eastern and Southern Africa has established one of the more developed regional competition law regimes in Africa. Its framework is strategically designed to ensure that IP rights are not used unjustifiably to segment the common market or to engage in practices that harm consumers and competition in the regional bloc. The existance of these regional regulations implies a broader desire for a unified market where IP related abuses and anti-competitive practices across borders are addressed, thereby pushing for a harmonised approach to the interface between IP and Competition.

The COMESA Competition Regulation apply to conduct that has an appreciable effect on trade between member states and restricts competition within the Common Market. Articles 16 and 19 of the COMESA Competition Regulations together form a dual tiered regulatory mechanism aimed at preserving competition in the Common Market as they look at anti-competitive behaviour through the restrictive and prohibited business practices. While Article 16 provides a general prohibition with room for justified exceptions, Article 19 identifies conduct that warrants automatic prohibition. Collectively, these two articles provide regulatory oversight to oversee potentially restrictive behaviours and a firm deterrence against anti-competitive behaviour[137].

[137]Art. 16 establishes a broad and flexible framework that prohibits any agreements, concerted practices or decisions by associations of undertakings that have the object or effect of preventing, restricting or distorting competition and that affect trade between COMESA member states. Such arrangements are deemed void unless they can satisfy strict exemption criteria namely; that they improve the production or distribution of

Furthermore, Articles 17 and 18 of the COMESA Competition Regulations deal with the determination and prohibition of the abuse of dominant position. They operate in sequence and depend on each other to regulate market dominance and to prevent its misuse in the common market[138]. Stronger market players are not penalised for success on the market per se but can be held accountable when their success is weaponised against their competitors and consumers.

Whereas IP rights are not explicitly carved out from these prohibitions, the general rule on anti-competitive agreements and abuse of dominance would apply to such conduct involving IP rights.

East African Community Competition Act and Regulations

Within East Africa, the EAC has established a dedicated competition law regime that explicitly caters for IP issues.

goods or that they promote technical or economic progress while allowing consumers to fairly benefit and not eliminating competition or imposing unnecessary restrictions.

Art. 19 provides details of the per se prohibited practices, meaning that they are illegal in and of themselves. These include price fixing, bid rigging, market or customer allocation, concerted refusals to deal and denial of access to essential facilities. These actions are viewed as inherently harmful to market integrity and consumer welfare and thus are not eligible for any exemption. Article 19 applies to both formal and informal arrangements.

[138] Art.17 provides the criteria for identifying when an undertaking, either alone or together with other undertakings, holds a dominant position.

Art.18 addresses the consequences of holding such a position. It recognises that dominance itself is not unlawful but the conduct constituting abuse of a dominant position is a breach and therefore it is prohibited. Prohibited abuses fall in the categories of; exclusionary conduct such as deterring entry, denying access to essential facilities, or applying discriminatory conditions on the market; and exploitative practices like unfair pricing, limiting production, or imposing unreasonable contractual terms.

Any assessment under Art.18 must be preceded by a rigorous determination of dominance under Art.17. The factors used to establish dominance also inform whether a particular behaviour is abusive of a dominant position. This ensures that the regulatory intervention is both principled and proportionate.

The East African Community Competition Act 2006 (as amended) prohibits agreements, abuses of market dominance[139] and unfair trade practices[140] within the East African common market.

The act states that a dominant firm shall not engage in a practice where IP rights are used abusively. This provision mirrors the language of Article 40 of the TRIPS agreement underscoring that IP rights are not absolute within the framework of EAC competition framework which is an example of the TRIPS agreement's transferability into regional competition law.

The East African Community Competition Regulations (2010) further implements the Act including guidance on access to IP when assessing dominance in merger reviews[141].

[139] The East African Community Competition Act defines dominant position in S.2 as a state of economic strength that enable an undertaking, alone or collectively with others, to act independently of competitors, customers, or consumers, to specifically foreclose effective competition.
The Act under S.8 identifies exploitative abuse as a form of abusive conduct. Actions include unfair imposition of high selling prices or low buying prices, limiting output or technological development and engaging nationality based discrimination.
S.9 of the Act identifies exclusionary forms of abusive conduct aimed to obstruct or get rid of competitors from the market including predatory pricing, price squeezing, refusal to deal or grant access to essential facilities, and tying arrangements
These rules are expressly extended to dominant firms with significant influence over small and medium-sized enterprises (SMEs) and on whom the SMEs economically dependent, thereby broadening the protective scope of the law and ensuring systemic protection across market structures.
S.10 deals specifically with vertical restraints imposed by dominant firms. It prohibits resale price maintenance, market foreclosure, and geographical restrictions that inhibit trade throughout the EAC. S.10 also outlaws misuse of IP rights to artificially extend market dominance.

[140] The East African Community Competition Act prohibits concerted anti-competitive practices under S.5, defining them broadly to encompass any written or oral, formal or informal agreement, arrangement or understanding between competitors that has or is intended to have an anti-competitive effect within the relevant market. These practices include price fixing, collusive tendering and bid rigging, market or customer allocation, and restraints on investment, input, output or sales. The Act further outlaws actions that block competitors from accessing markets as well as cross-border movement of goods and services within the East African market.
Exemptions are provided under S.6 for specific practices which positively contribute to production or distribution efficiencies and where their pro-competitive benefits outweigh the harm. Moreso, the East African Competition Authority may authorise other concerted practices that enhance efficiency, subject to market share thresholds and a net benefit analysis.

[141] See the schedule of The East African Community Competition Regulations (2010) for Direction 21

The key takeaway from the EAC framework is that IP rights must be exercised within the limits of the rights' legal protections and not in excess. Any abuse such as exclusionary licensing may trigger liability under competition law.

Together, these provisions construct a robust framework that prevents dominant firms from abusing their market power to the detriment of fair competition, market integration, and consumer welfare across the East Africa.

2.4 Comparative Analysis of Legal and Policy Frameworks from Various Jurisdictions

2.4.1 United States of America

The US is arguably the jurisdiction with the most elaborate intellectual property framework. It is also the birth place of modern antitrust law[142]. This means that the interface between the two legal disciplines is more likely to have been developed to a level unlike other legal jurisdictions.

- Competition Law Framework

The US relies on a robust federal antitrust law framework, principally comprising of the **Sherman Act (1890)**[143], the **Clayton Act (1914)**[144], and the **Federal Trade Commission Act (1914)**[145].

Sections 1 and 2 of the Sherman Act[146] prohibit agreements in restraint of trade and monopolisation respectively. The Clayton Act[147] addresses specific practices

[142] Bryan A Garner, Black's Law Dictionary (8th ed. 2004) at Page 291 defines Anti-Trust Law as the body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination.
[143] Sherman Antitrust Act 15 U.S.C. § 1 et seq.
[144] Clayton Act 15 U.S.C. § 12 et seq.
[145] Federal Trade Commission Act, 15 U.S.C. § 41 et seq.
[146] Ibid (n 143)
[147] Ibid (n 144)

such as mergers, tying, and exclusive dealing. The Federal Trade Commission Act[148] prohibits unfair methods of competition.

These laws are primarily by the Department of Justice's Antitrust Division and the Federal Trade Commission[149].

- Framework governing IP rights

The US IP framework provides strong federal protection for patents[150], trademarks[151] and copyrights[152]. IP rights are generally regarded as a valuable form of property as they bestow exclusive rights upon their holders as seen by US companies investing over $1.1 trillion annually in intangible assets, and firms with well-managed IP portfolios tending to be more profitable than those that do not actively engage in IP strategy[153].

- How the US Legal and Policy Framework Approaches the Interface between IP rights and Competition law

A thing that sets the US approach apart is that there is no specific law that stipulates IP rights as exempt from antitrust law. Instead, antitrust laws look at how IP rights are used, just like they do with other sources of market power[154]. Their system suggests that a patent does not necessarily give you market power and that there is no obligation to licence IP[155]. This view sees IP as being like other property, so the

[148] Ibid (n 145)
[149] https://www.justice.gov/atr/antitrust-laws-and-you
[150] Under the Patents Act of 1952 35 U.S.C. § 1 et seq
[151] Under the Trademark Act of 1946 15 U.S.C. § 1051 et seq (as amended)
[152] Under Copyright Act of 1976 17 U.S.C. § 101 et seq
[153] Bainbridge, David; Howell, Claire (n 75)
[154] Valentine Korah; THE INTERFACE BETWEEN INTELLECTUAL PROPERTY AND ANTITRUST: THE EUROPEAN EXPERIENCE; Antitrust Law Journal, 2002, Vol. 69, No. 3 (2002), pp. 801-839 by American Bar Association; https://www.jstor.org/stable/40843538
[155] SAMUEL R. MILLER; Antitrust Pitfalls in Intellectual Property Licensing (2003)

fact that an IP right exists, even if it creates a small monopoly, does not mean that it is anti-competitive[156]. Antitrust intervention is reserved for instances where the IP owner abuses market power through specific conduct, rather than challenging the IP grant itself[157]. This results in a higher threshold for intervention compared to other jurisdictions.

The DOJ and FTC's Antitrust Guidelines for the Licensing of Intellectual Property (2017)[158] clearly provide that the agencies use the same antitrust analysis for IP as they do for other types of property. They also provide that IP licensing is generally pro-competitive unless there are unreasonable restrictions. Most licensing agreements should follow an effects-based, rule of reason approach, but some things, like naked price-fixing, may be illegal per se[159].

In the U.S, there is a strong judicial restraint on compulsory licensing, which is almost never used in practice, except for a few limited situations like government march-in rights under Bayh-Dole or the compulsory licensing of foreign patents[160]. Most of the time, refusal to licence is not an antitrust violation[161]. This way of thinking comes from a strong belief that forcing licenses undermines the main incentive structure of IP the right of exclusivity and could stop investment in Research & Development. It shows a preference for market-based solutions and private negotiations, with antitrust as a last resort for extreme conduct[162].

[156] OECD *Licensing of IP rights and competition law* DAF/COMP/WD(2019)58
[157] Antitrust Guidelines for the Licensing of Intellectual Property Issued by the U.S. Department of Justice and the Federal Trade Commission (2017); www.justice.gov
[158] Ibid
[159] Ibid (n 156)
[160] Ibid (n 157)
[161] Ibid
[162] ibid

However, certain IP-related actions can lead to antitrust claims[163]. For instance, a patent misused to obtain anti-competitive pricing or a sham patent litigation can lead to antitrust liability, as can fraudulent procurement of a patent.

- Key Cases

Walker Process Equipment, Inc v Food Machinery & Chemical Corp (1965)[164] is a landmark decision addressing the intersection of patent law and antitrust regulations. The US Supreme Court examined whether enforcing a patent obtained through intentional deception of the Patent Office violated the Sherman Antitrust Act, potentially triggering treble damages under the Clayton Act. The Supreme Court held that if all the elements necessary to establish a monopolization claim under §2 of the Sherman Act are met, then enforcing a fraudulently procured patent thus undermining the integrity of the patent system and constituting an attempt to monopolize trade can indeed result in liability and the awarding of treble damages pursuant to §4 of the Clayton Act. Moreover, the Court underscored that while patent rights grant exclusive control over an invention, they are not absolute and must conform to broader public interests, particularly in maintaining competitive markets; accordingly, the ruling distinguished between malicious fraud, which nullifies the patent's antitrust exemption, and unintentional technical errors. This decision emphasized the necessity of defining the relevant market and assessing the competitive impact of the fraudulent patent to substantiate a monopolization claim. And further emphasizes the primacy of public interest in

[163] Ibid (n 157)
[164] Walker Process Equipment, Inc v. Food Machinery and Chemical Corporation (382 U.S. 172,86 S.Ct. 347,15 L.Ed.2d 247)

preventing monopolistic practices, especially when intertwined with fraudulent conduct in obtaining patents.

Verizon Communications v Law Offices of Curtis V Trinko (2004)[165] case arose from allegations that Verizon Communications, an incumbent local exchange carrier, violated antitrust laws by failing to adequately share its telecommunications network with competitors competitive local exchange carriers, or CLEC as required by the Telecommunications Act of 1996. The plaintiff, a customer of a CLEC, claimed Verizon intentionally degraded service to CLECs, harming competition and consumers.

The main issue was whether Verizon's alleged breach of its regulatory duties under the Telecommunications Act constituted an antitrust violation under Section 2 of the Sherman Act. The Supreme Court held that Verizon's conduct did not violate antitrust laws. Mere refusal to assist competitors, even if breaching regulatory obligations, does not establish an antitrust claim absent evidence of anticompetitive harm meeting Sherman Act standards.

The Court emphasized that non-compliance with sector-specific regulations does not automatically equate to an antitrust violation. Antitrust liability requires proof of anticompetitive conduct beyond regulatory breaches. The Court distinguished the case from Aspen Skiing Co. v. Aspen Highlands Skiing Corp., where a prior profitable course of dealing was terminated. Verizon had no such history of voluntary cooperation with CLECs; its actions were rooted in regulatory mandates, not a unilateral anticompetitive strategy. The Court expressed caution against

[165] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398 (2003)

expanding antitrust liability for refusals to deal, which could deter procompetitive collaboration

The decision narrowed the scope of antitrust liability for refusal to deal claims, reinforcing that such claims require evidence of a prior voluntary course of dealing terminated to harm competition. The US Supreme Court reaffirmed that even a firm with monopoly power generally has no duty to deal with competitors, setting a high bar for refusal-to-deal claims in antitrust. It also highlighted the primacy of sector-specific regulation over antitrust law in addressing certain market conduct, unless clear anticompetitive behavior under the Sherman Act is demonstrated.

In ***eBay Inc v MercExchange (2006)***[166] MercExchange a non-practicing entity holding a business-method patent for an online trust-based auction system sued eBay for infringement after unsuccessful negotiations for a licence. At the Supreme Court, it was clarified that Section 283 of the Patent Act requires application of the traditional four factor equitable test; irreparable harm, inadequacy of monetary relief, balance of hardships, and public interest, rather than categorical grant or denial. Court likened patent remedies to discretionary copyright injunctions. Justice Roberts's concurred and underscored the historical practice favouring injunctions, while Justice Kennedy warned of undue leverage by patent trolls. The Supreme Court held that non-practicing patent owners are not entitled to automatic injunctions, reflecting competitive concerns over patent hold-up. This decision reshaped remedies in patent litigation by reducing the rate at which injunctions were granted.

[166] eBay Inc. v. MercExchange, L.L.C. 547 U.S. 388 (2006)

In ***FTC v Actavis, Inc (2013)***[167] Solvay Pharmaceuticals sued generic challengers to its AndroGel patent but instead of litigating paid them to delay market entry and promote its drug, prompting the FTC to allege that these reverse payments unlawfully preserved monopoly pricing. The Supreme Court rejected the Federal Circuit's scope of the patent immunity, holding that such settlements warrant a rule of reason analysis rather than automatic safety, because patent validity is often uncertain and reverse payments can mask a transfer of monopoly profits that harms consumers. The Court distinguished these deals from ordinary settlements where infringers pay patentees observing that payments exceeding fair value for services suggest anticompetitive intent, and noted that the Hatch-Waxman framework's 180-day exclusivity for first filers further incentivizes collusion. Chief Justice Roberts's dissent cautioned that subjecting patent-based agreements to antitrust scrutiny beyond their statutory scope would chill settlements and invite second-guessing of patent validity. The Supreme Court established that reverse payment/ pay for delay settlements in pharmaceutical patent cases are subject to antitrust rule of reason analysis, meaning a brand's payment to a generic not to enter the market can violate Section 1 Sherman Act.
In the wake of Actavis, reverse payment rates declined, and the decision remains pivotal in balancing legitimate patent rights with consumer access to affordable generics.

In ***Illinois Tool Works Inc v Independent Ink, Inc (2006)***[168] Illinois Tool Works and its subsidiary Trident licensed patented printheads to OEMs on the condition that they purchase unpatented ink from the same source, prompting Independent Ink to allege a per

[167] Federal Trade Commission v. Actavis Inc. 570 U.S. 136 SUPREME COURT (2013)
[168] Illinois Tool Works Inc v Independent Ink, Inc 547 U.S. 28 (2006)

se illegal tying arrangement under the Sherman Act on the premise that the patent conferred market power. The Supreme Court unanimously rejected the notion that a patent automatically establishes market power, holding instead that plaintiffs must demonstrate actual market power in the relevant ink-supply market and that tying arrangements involving patented products are subject to a rule of reason analysis. The Court traced the outdated presumption of patent-derived power to the 1947 International Salt decision and noted Congress's 1988 amendment to the Patent Act, which abolished that presumption in patent-misuse doctrine, undercutting its continued use in antitrust cases. By aligning tying analysis with broader antitrust precedent such as Jefferson Parish Hospital Dist. No. 2 v. Hyde the decision dispelled automatic liability in patent based ties, shifted the burden onto plaintiffs to conduct detailed market-power inquiries, and underscored the Court's commitment to economic-realities over formalistic presumptions, thereby encouraging both competitive justification of restrictive practices and continued innovation.

In ***Eastman Kodak Co v Image Technical Services (1992)***[169] independent service organizations (ISO) that had begun offering lower-cost maintenance and parts for Kodak's photocopiers and micrographic equipment sued under §§ 1 and 2 of the Sherman Act after Kodak restricted ISO access to replacement parts and coerced OEMs and customers into exclusive service agreements. The Supreme Court reversed summary judgment for Kodak, holding that a manufacturer even without dominant share in the primary equipment market can wield appreciable economic power in a captive aftermarket due to customer lock-in, high switching and information costs, and incompatibility of third-party parts. The Court found genuine disputes as to whether Kodak illegally tied parts sales to its own servicing and unlawfully monopolized the service and parts markets. Rejecting Kodak's

[169] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)

argument that robust competition for equipment precludes aftermarket power, Court found Kodak to have abused its patent on photocopier parts by tying sales of parts to its parts supply services, leveraging its dominance to exclude rivals in the aftermarket. The decision thus established that aftermarkets are distinct for antitrust analysis, mandated fact-intensive inquiry into exclusionary conduct and lock-in effects, and reshaped jurisprudence on aftermarket monopolization.

United States v Microsoft Corp. (2001)[170] was a landmark antitrust case. The U.S. government alleged that Microsoft monopolized the web browser market for Windows, primarily through the legal and technical restrictions it put on the abilities of PC manufacturers and users to uninstall Internet Explorer and use other programs such as Netscape and Java. Microsoft's monopoly on the PC operating system market and the attempt to gain a monopoly in the internet browser market centered on Microsoft's dominance through bundling its Internet Explorer browser with its Windows operating system.

At the initial trial, the United States District Court for the District of Columbia ruled that Microsoft's actions constituted unlawful monopolization under Section 2 of the Sherman Antitrust Act of 1890, but the U.S. Court of Appeals for the D.C. Circuit partially overturned that judgment in 2001. The two parties later reached a settlement in which Microsoft agreed to modify some of its business practices.

In the case of ***Data General Corp. v. Grumman Systems Support Corp***[171] in the United States, the First Circuit held that refusing to license diagnostic software was not inherently anticompetitive. However, it stressed that such refusals could violate

[170] United States of America v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001),
[171] Data General Corp. v. Grumman Systems Support Corp., 36 F.3d 1147 (1st Cir. 1994)

antitrust law if they were used to illegally increase market control or stifle competition in neighbouring markets

In Re Independent Service Organisations Antitrust Litigation v. Xerox Corp[172], the Federal Circuit maintained Xerox's right to refuse to licence its copyrighted diagnostic software and patented parts, reiterating that patent holders' exclusionary practices are legal unless they are connected to fraud, bad faith, or more general anticompetitive behaviour. Which meant that an IP rights holder has no duty to licence according to the US laws governing antitrust law and IP rights

2.4.2 United Kingdom with aspects from the European Union

In the UK there are two systems of competition law: the domestic law and the law of the EU[173]. Furthermore the IP system in the UK is one of the oldest yet most well refined as evidenced by it case law precedents. This shows that the interplay of the two legal disciplines is appropriately catered for domestically and through components of EU law.

- Aspects of EU Competition Law Framework

The European Union's competition law framework is primarily governed by the Treaty on the Functioning of the European Union[174]. Art. 101 TFEU prohibits anti-competitive agreements between undertakings[175], while Article 102 TFEU prohibits

[172] In re Independent Service Organizations Antitrust Litigation v. Xerox Corp, 203 F.3d 1322 (Fed. Cir. 2000)
[173] Marco Colino S (ed) (n 58)
[174] Consolidated Version of the Treaty on the Functioning of the European Union OJ C326/13
[175] Article 101 establishes a framework meant to safeguard free competition within the European Union's internal market by outlawing any agreements, decisions made by associations of companies, or coordinated practices that disturb or restrict competitive forces across Member States.
Additionally, it bars practices that introduce unequal conditions for analogous transactions, thereby disadvantaging certain trading partners, as well as deals where contractual obligations are contingent on accepting unrelated supplementary commitments.
It further states that any agreement or decision falling within these prohibited acts is automatically void. However, there is room for exemption: if an arrangement demonstrably improves the production or distribution of goods or drives technical/economic progress and importantly, if it ensures that consumers

the abuse of a dominant position within the internal market[176]. Enforcement is carried out by the European Commission, alongside national competition authorities in member states.

- Applicable elements from the EU IPR Framework

A blend of particular national laws and other harmonised instruments like the Patent Convention[177], Copyright Directives[178], and Trademark Directives[179] protect IP rights in the EU. The doctrine of regional exhaustion of rights and compulsory licensing are important parts of EU facets of IP law

- Aspects of EU law applicable to the interface of IP rights and Competition law

The TFEU does not have a general IP exception from competition rules like the U.S. framework does[180]. The European Commission does give block exemptions to some types of agreements[181], most notably the Technology Transfer Block Exemption Regulation and its Guidelines[182]. These rules create safe harbours that allow

obtain a fair share of the benefits, it may be exempt, provided the restrictions imposed are absolutely necessary for achieving those benefits and do not enable the involved parties to nullify effective competition over a significant segment of the market.

[176] Article 102 addresses the issue of market dominance by prohibiting abuses of a dominant position within the internal market or a substantial part of it that could affect trade between Member States. An abuse may occur when a dominant company or group of companies imposes unfair trading conditions, either by directly or indirectly establishing skewed purchase or sale prices, or by manipulating other crucial conditions of trade. Article 102 covers situations where such a company restricts production, curtails access to markets, or impedes technical progress in ways that ultimately harm consumers.
It further condemns practices where a dominant undertaking applies inconsistent conditions to similar transactions with different parties, thereby creating an uneven playing field, or where contracts are made contingent upon accepting additional, unrelated obligations as dictated by customary commercial usage.

[177] Convention on the Grant of European Patents (European Patent Convention), 5 October 1973, 1065 UNTS 199

[178] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market

[179] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks OJ L 336, 23.12.2015, p. 1–26.

[180] Tom Romanoff; Comparison of Competition Law and Policy in the US, EU, UK, China, and Canada (2021) https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/?form=MG0AV3

[181] Marco Colino S (ed) (n 58)

[182] ibid

standard licence agreements (like FRAND, cross-licensing, and research collaborations) to be exempt from the restrictions of Article 101 if certain conditions are met[183]. This gives legal certainty and encourages pro-competitive licensing showing a practical way to balance IP incentives while keeping fair competition in mind.

One thing that makes EU competition law framework different is that it imposes a special responsibility on enterprises in a dominant market position not to impair competition[184]. This is a higher standard than merely refraining from anti-competitive conduct. It means that dominant IP holders have a duty to make sure their actions are not detrimental to the market. The EU is willing to impose licensing in exceptional circumstances, even for copyrighted works. This is a big difference from the U.S. approach[185].

EU law also allows for regional exhaustion of rights. This means that once a protected product is sold in the European Economic Area (EEA) with the consent of the IP owner, the IP right's holder cannot prevent its resale elsewhere within the EEA[186]. This principle ensures the free movement of goods within the single market.

[183] Marco Colino S (ed) (n 58)
[184] Ibid (n 118)
[185] Max Planck Institute for Intellectual Property and Competition Law; Copyright, Competition and Development (2013)
[186] Marco Colino S (ed) (n 58); This principle stems from the free movement of goods under Articles 34–36 TFEU. While Article 34 prohibits measures equivalent to import restrictions, Article 36 permits exceptions for IP protection, provided they are not used to unjustifiably partition the market Cases such as Deutsche Grammophon and Centrafarm established that IP rights are exhausted with the IP holder’s consent to the first EU sale. The doctrine prevents IP owners from blocking parallel imports.

- Key Cases

The ***Magill Case***[187]

This landmark case involved TV broadcasters (RTE) who refused to license their published TV schedule information. Three Irish and Northern Irish broadcasters refused to license the weekly schedules of their television programs to Magill, a publisher seeking to create a comprehensive, consumer-friendly guide. Each broadcaster published its own listings but denied access to third parties, effectively reserving the secondary market for itself[188].

The EC and later the ECJ found this refusal to license to be an abuse of dominant position under now Article 102 TFEU. The Court held that the circumstances were exceptional, noting: The broadcasters had a monopoly over essential information, TV listings, and no substitutes existed. Their refusal prevented the introduction of a new product a unified TV guide for which there was clear consumer demand. There was no legitimate justification for the refusal, and the information in question involved minimal creative input, weakening the copyright claim. The Court, applying an essential facilities concept, compelled licensing of copyrighted content[189].

The *Magill* case set a foundational precedent in the competition law-IP interface by holding that the refusal by broadcasters to license TV listing information constituted an abuse of dominance. This decision marked the first time the ECJ held that exercising exclusive IP rights could be anti-competitive under exceptional circumstances. The Court emphasized that the refusal prevented the emergence of a new product namely, a comprehensive TV guide depriving consumer of choice.

[187] Radio Telefis Eireann (RTE) & Independent Television Publications Ltd (ITP) v Commission of the European Communities. (C-241/91P) (C-242/91 P) [1995] ECR I-743; [1995] 4 CMLR 718
[188] Ibid (n 121)
[189] Ibid (n 154)

Although *Magill* paved the way for compulsory licensing in exceptional cases, its criteria were vague, prompting further clarification in later decisions such as *IMS Health*[190].

The ***IMS Health case***[191]: The Ruling and the Test

The IMS Health case involved a refusal to license a copyrighted database structure, deemed essential for competitors. It revisited and refined the principles articulated in Magill, testing the boundaries of compulsory licensing in the context of database copyright and market structure. IMS Health was the dominant provider of pharmaceutical sales data in Germany, which it organized using a proprietary and copyrighted brick structure, a geographical segmentation tool that had become widely adopted in the pharmaceutical industry. Two competitors, NDC and AzyX, attempted to enter the market with alternative zoning systems, but faced resistance from customers who preferred IMS's structure. These firms then began using IMS's structure without authorization, prompting copyright infringement litigation and an injunction. The European Commission, concerned that denying access would eliminate competition in the relevant market, issued interim measures requiring IMS to license the brick structure. The Commission's rationale rested on three key points; **(1)** The brick structure had become an industry standard, with no viable substitutes. **(2)** Without access, competitors would be entirely excluded from the market. **(3)** Consumer welfare would suffer due to reduced competition and choice.

The ECJ addressed the refusal by IMS to license its copyright-protected brick structure for pharmaceutical data. The Court established a four-part exceptional circumstances test for determining when a refusal to license constitutes abuse of

[190] Ibid (n 154)

[191] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG (C-418/01) [2004] ECR I-5039; [2004] 4 CMLR 28

dominance: **(1)** the product must be indispensable to operate in the downstream market, **(2)** the refusal must prevent the emergence of a new product for which there is potential consumer demand, **(3)** the refusal must lack objective justification, and **(4)** it must exclude all competition in the secondary market. The ECJ held that a refusal to license de-identified patient data for pricing analysis protected by database copyright was abusive because it excluded competitors in a follow-on market. This case further refined the essential facilities doctrine in the IP context. While groundbreaking, the test has faced criticism for its ambiguity particularly in defining what constitutes indispensability and a new product and for its uncertain applicability across diverse IP context[192]

The exceptional circumstances test, crystallized in *Magill*[193] and refined in *IMS Health*[194], remains the legal yardstick for evaluating when a refusal to license IP rights may breach competition law. Its four cumulative conditions; indispensability, prevention of a new product, lack of objective justification, and elimination of competition, offer a framework to reconcile exclusive rights with market openness. However, the test has faced sustained critique for its vagueness and inflexibility, particularly concerning how courts should assess indispensability or newness. As competition law continues to grapple with innovation-centric industries, calls for clearer, more adaptable guidelines to implement this test are intensifying[195]

In ***Microsoft Corp. v Commission (2004)***[196] the European Commission found Microsoft had abused its dominant position by bundling Windows Media Player with

[192] Ibid (n 121)
[193] Ibid (n 187)
[194] Ibid (n 190)
[195] Ibid
[196] Microsoft Corp. v Commission of the European Communities Case T-201/04 (2007)

its operating system and refusing to provide interoperability information to competitors, reinforcing Microsoft's software dominance. The ECJ upheld the Commission's decision in 2007, imposing significant remedies.

The case of ***Consorzio Italiano CICRA & Maxicar v. Renault***[197] addressed the refusal to license industrial design rights for auto spare parts. The ECJ held that IP cannot be used to shield anticompetitive conduct that blocks access to the repair and maintenance market, thus impairing competition.

In ***AB Volvo v. Erik Veng (UK) Ltd***[198] the ECJ accepted the general right to refuse licensing but found that such refusals could be abusive if exercised arbitrarily, discriminatorily, or with excessive pricing that harms consumers or impedes innovation.

In ***Huawei v ZTE (CJEU, 2015)***[199] the Court set out procedures for Standard-Essential Patent holders and implementers to negotiate injunctions on Fair Reasonable and Non-Discriminatory terms, balancing IP injunction rights with competition fairness.

AstraZeneca v European Commission[200] the CJEU ruled that AstraZeneca had misused its dominant position by deceiving patent offices and abusing the patent system to stop generic competition against its anti-ulcer medication[201].

- UK Competition Law Framework

[197] Consorzio Italiano della Componentistica di Ricambio per Autoveiculi (CICRA) and Maxicar v Régie des Usines Renault (53/87) [1988] ECR 6039
[198] Volvo v Erik Veng (238/87) [1988] ECR 6211
[199]Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH Case C-170/13
[200] AstraZeneca AB & AstraZeneca plc v European Commission (C-457/10) ECLI:EU:C:2012:770
[201] Neelakantan, Murali (2015) "The Interplay between Competition Law and IP rights in the Indian Healthcare Sector," National Law School Business Law Review: Vol. 1: Issue 1, Article 5. Available at: https://repository.nls.ac.in/nlsblr/vol1/iss1/5

The UK's competition law framework is primarily set out in the **Competition Act 1998**[202] and the Enterprise Act 2002. Chapters I and II of the Competition Act mirror Articles 101 and 102 of the TFEU, prohibiting anti-competitive agreements and abuse of dominant position, respectively. The **Enterprise Act 2002**[203] covers merger control and grants enforcement powers. Following Brexit, UK law continues to evolve, but it is still very aligned to EU law. UK courts often interpret UK laws in the same way that EU courts do[204]. The Competition and Markets Authority (CMA) enforces competition law in the UK.

- Framework governing IP rights in the UK

IP rights in the UK include patents governed by the ***Patents Act 1977***[205], copyrights governed by the ***Copyright, Designs and Patents Act 1988***[206] and trademarks governed by the ***Trade Marks Act 1994***[207].

Before Brexit, the UK was subject to European Block Exemption Regulations, like the Technology Transfer Block Exemption Regulation and the Research and Development Block Exemption Regulation. These rules protected certain types of IP licenses from antitrust risk. The UK still retains these EU-based block exemptions after Brexit[208].

- How the UK's Legal and Policy Framework Approaches the Interface between IP rights and Competition law

[202] Competition Act 1998.
[203] Enterprise Act 2002 amended by the Enterprise and Regulatory Reform Act 2013, which created the Competition and Markets Authority
[204] Ibid (n 180)
[205] Patents Act 1977
[206] Copyright, Designs and Patents Act 1988
[207] Trademarks Act 1994
[208] Ibid (n 184)

Despite the political separation, UK's competition law approach to IP remains fundamentally EU centered in its philosophy, particularly on issues of dominant firm behaviour and essential facilities. The Competition & Markets Authority continues to apply EU guidelines on IP licensing as guidance[209].

- Key Cases:

Unwired Planet v Huawei (UK Supreme Court, 2020)[210] case centered on disputes over standard-essential patents related to telecommunications standards (e.g., 3G/4G), which must be licensed under Fair, Reasonable, and Non-Discriminatory terms. Unwired Planet, a patent assertion entity, sued Huawei for infringement, seeking injunctions and a determination of FRAND licensing terms. The High Court had earlier ruled in favor of Unwired Planet, setting global FRAND rates and granting injunctions against Huawei. The Court of Appeal upheld this decision, leading to Huawei's appeal to the Supreme Court.

This landmark case affirmed that patent owners must grant global FRAND licenses if they seek injunctions, and that competition law can prohibit abuse of the patent system to extract supra-FRAND royalties. The Supreme Court held that UK courts may set global FRAND licensing terms for SEPs even when only some patents are UK-granted because telecommunications standards are inherently international. It affirmed that an implementer's refusal to accept those court-determined terms permits injunctions to curb hold-out tactics; and it clarified that non-discrimination under FRAND does not demand identical rates for all licensees but allows justified variations for example, reflecting market size or portfolio scope. By empowering

[209] Ibid (n 204)

[210] Unwired Planet International Ltd & Unwired Planet LLC v. Huawei Technologies Co Ltd & Huawei Technologies (UK) Co Ltd [2020] UKSC 37

English courts to impose global standards and enforce injunctions against unwilling licensees, the decision reduced multi-jurisdictional disputes, strengthened SEP holders' negotiating leverage, and balanced implementer interests, thereby entrenching the UK as a key forum for SEP litigation and shaping global patent licensing strategies. This case, along with Huawei v ZTE (CJEU 2015) and Conversant v Huawei, outlined the obligations of SEP holders and implementers in negotiating FRAND licenses. UK courts have taken a leading role in FRAND jurisprudence, positioning the UK as a key jurisdiction for SEP disputes and influencing international norms.

Pfizer Inc and Flynn Pharma Ltd (UK) case involved a 2600% price hike on epilepsy medication, demonstrating how post-patent pricing can remain unregulated in the absence of effective market competition, leading to interventions by competition authorities[211].

Philips v Remington (2003)[212] This case established that trademark law cannot be used to protect a shape marketed by one undertaking if the essential characteristics of that shape perform a technical function, reaffirming that a trademark's legal basis is clear identification of source, not protection from competition.

2.4.3 India

- Competition Law Framework

India's competition law is primarily governed by the Competition Act 2002[213], which prohibits anti-competitive agreements in Section 3, abuse of dominant position in

[211] https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs
[212] Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd C-299/99, European Union Court of Justice [2002] ECR I-5475 at [103]
[213] Competition Act 2002

Section 4, and regulates mergers in Section 5. The law is enforced by the Competition Commission of India (CCI)[214].

- Framework governing IP rights

India's IPR framework includes the Patents Act 1970[215], the Copyright Act 1957[216], and the Trade Marks Act 1999[217]. India has notably utilized **TRIPS flexibilities**, particularly in areas like pharmaceutical patents and compulsory licensing. India's patent laws permit compulsory licensing under specific conditions, such as if working requirements or public interest conditions like affordability are met[218].

- How India's Legal and Policy Framework Approaches the Interface between IP rights and Competition law

Section 3(5) of the Competition Act[219] is an important part of India's approach. It gives a specific, but limited, exemption to particular IP-related restraints. Section 3(1) indicates that agreements that are anti-competitive are prohibited. This section says that this does not limit a person's right to stop any violation of IPR or to set reasonable conditions that are necessary to protect any IPR. This gives patent and copyright holders some protection to impose licensing conditions they deem reasonable[220]. The CCI can interpret the meaning of reasonable conditions. This means that even with an IP carve-out, it is not a blanket immunity. The CCI can still look at IP licence terms to see if they have anti-competitive effects. India's approach

[214] Ibid (n 64)
[215] Patents Act 1970 (as amended)
[216] Copyright Act 1957
[217] Trade Marks Act 1999
[218] Ibid (n 184)
[219] ibid (n 213)
[220] Ibid (n 64)

is more hands-on than the U.S. and maybe even more flexible than the EU's block exemption system, which relies on pre-defined categories[221].

However, the IP carve out does not apply to unilateral conduct, so Section 4 can still look into dominant entities that abuse IP rights. Proposals in recent reform to exempt dominant IP owners from abuse provisions were rejected, showing India's willingness to subject IP enforcement to antitrust scrutiny. The CCI has asserted that it has the jurisdiction to handle IP cases and that IP laws do not always take precedence over competition law.

India's approach to compulsory licensing under the Patents Act (1970) is robust, particularly for public health reasons. This highlights a clear policy priority for India, leveraging IP law itself rather than solely competition law to ensure access to essential goods, particularly pharmaceuticals. India also applies the doctrine of international exhaustion, meaning that once a genuine product is sold anywhere in the world by the innovator, parallel imports into India cannot be prevented[222].

- Key Cases:

The matter of ***Ericsson v Micromax***[223] by Indian handset maker Micromax against Ericsson a Swedish telecom giant, alleged that Ericsson as a holder of SEPs for 2G, 3G and 4G technologies, had abused its dominant position by demanding for exorbitant royalties based on device prices rather than the patents' technical value, imposing rates and terms more onerous than global FRAND benchmarks, and bundling multiple patents to compel disadvantageous was deemed abusive under the law. The CCI found Ericsson dominant and

[221] Ibid (n 64)
[222] Ibid (114), ibid (113)
[223] Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (Publ), Case No. 50/2013 before the Competition Commission of India

held that SEP holders must license on fair, reasonable, and non-discriminatory terms without exploiting their position.

This landmark decision clarified that competition law, and not only sector specific regulation, governs SEP licensing in India, that control over essential patents confers market power subject to abuse of dominance, and that FRAND commitments are binding constraints on patent enforcement, thereby influencing both domestic and international approaches to SEP disputes.

In the case of ***FICCI-Multiplex v UPDF (2011)***[224] multiplex owners challenged a coordinated demand by film producers and distributors for higher box-office revenue shares culminating in a strike to halt releases as a horizontal anti-competitive cartel under Section 3(3) of the Competition Act, 2002, on the grounds that it fixed terms and inflicted an appreciable adverse effect on competition; the CCI, however, recognized the asymmetric monopoly of multiplexes as buyers, found the producers' collective negotiations to be a lawful countervailing response rather than a restrictive agreement, and dismissed the complaint, emphasizing that when weaker sellers unite solely to redress dominant-buyer imbalances without harming overall competition, their joint bargaining is permissible thus establishing a nuanced test under Section 3 that weighs market context and pro-competitive objectives in distinguishing legitimate collective action from unlawful collusion. This case showed that IP laws do not have any absolute overriding effect on competition law.

The case of ***Bayer Corp v Natco Pharma (2013***)[225] concerned Bayer's 2008 patent on the cancer drug Sorafenib Tosylate (Nexavar), priced at ₹280,000 per patient per month effectively excluding 99% of Indians in need and Natco Pharma's 2011 application for a compulsory license under Section 84(1) of the Indian Patents Act, 1970. Bayer had in 2010 Natco's request for a voluntary license which prioritizing universal access to life-saving

[224] FICCI - Multiplex Association of India vs United Producers/ Distributors Forum & Others Case No. 01/2009 [2011] CCI 32

[225] Bayer Corporation Vs. Union of India and Others [162(2009) DLT 371]

medicines. In this case, India granted its first compulsory license for Nexavar, a cancer drug. on grounds of affordability and non-working of the patent in India, demonstrating the active use of compulsory licensing provisions in the public interest. This case affirmed India's use of TRIPS flexibilities and the Doha Declaration's public-health imperatives, and sending a clear signal to patentees on the necessity of justifying pricing and facilitating local production.

The case of ***Shamsher Kataria v Honda Siel Cars India Ltd & Ors (2014)***[226] centered on allegations that fourteen automobile manufacturers, including Honda, Volkswagen, and Fiat, engaged in anti-competitive practices by restricting access to spare parts, diagnostic tools, and repair services to authorized dealers. This created a monopoly in the aftermarket, leading to exorbitant pricing up to 5,000% markup and exclusion of independent repairers. The CCI found that the manufacturers abused their dominant position by restricting the availability of spare parts and diagnostic tools, leveraging their IP rights to control the aftermarket. This case set a precedent for defining aftermarkets as distinct relevant markets in India and exhibited the strenuous relationship between competition law and IP rights.

2.4.4 South Africa

- Competition Law Framework

South Africa's competition law is primarily governed by the ***Competition Act of 1998***[227], which prohibits restrictive practices under Section 4 and abuse of

[226] Shri Shamsher Kataria v. Honda Siel Cars India Ltd & others Case No. 03/2011 [2014] CCI 26
[227] Competition Act 89 of 1998

dominance Section 8. The Act is enforced by the Competition Commission, the Competition Tribunal, and the Competition Appeal Court[228].

- IPR Framework

South Africa's IPR framework includes the ***Patents Act 1978***[229], the ***Copyright Act 1978***[230], and the ***Trade Marks Act 1993***[231]. Notably, South African patent law was amended in 2022 to introduce an explicit mandatory licensing scheme for public health, aligning with TRIPS flexibilities[232].

- How South Africa's Legal and Policy Framework handles the Interface between IP rights and Competition law

The general rules in the Competition Act do not contain an IP exception. But Section 10(4) is to the effect that a company may apply to the Competition Commission for an exemption from the cartels ban for any agreement or practice. Relating to the exercise of IP rights. This is not a blanket immunity; the Commission must issue an exemption order. The standard abuse of dominance rules cover the law to do with refusal to licence, tying, or excessive pricing. In 2018, Section 8 amended to make the ban on abuse more clear and to include price exploitation or foreclosure. It also made it clear what essential facilities are i.e refusing supply scarce goods or services[233].

South African authorities have been using competition law more and more to deal with IP-related abuses, especially in the healthcare sector, where IP rights can affect

[228] ITUMELENG LESOFE; FINDING THE RIGHT BALANCE BETWEEN THE ENFORCEMENT OF COMPETITION LAW AND THE PROTECTION OF IP RIGHTS (2017)
[229] Patents Act 1978
[230] Copyright Act 1978
[231] Trade Marks Act 1993
[232] Julia Sham-Guild; IS THERE TENSION BETWEEN THE ENFORCEMENT OF PATENT RIGHTS AND PROMOTION OF COMPETITION POLICY IN SOUTH AFRICA? (2023)
[233] Ibid

access to crucial medicines. It is important to note that even though the Patents Act has legal requirements for compulsory licensing, not a single compulsory licence has been granted in nearly four decades due to complex and burdensome procedures. Because of this failure, the people affected have had to turn to competition law, which has turned out to be a more effective, though indirect, way to achieve similar public interest goals. This shows how the two areas of law can work together in practice, especially in developing countries[234].

South African patent law requires that in cases concerning dependent patents or abuse of rights compulsory licenses are authorised to be granted. This includes failing to utilise a patent or charging excessive fees for it[235].

South Africa generally follows national exhaustion for patents, but allows international exhaustion for patents to do with medicines[236].

- Key Cases & Inquiries

In the matter of ***Roche Holdings AG, F. Hoffmann-La Roche AG & Roche Products (Pty) Ltd v South Africa Competition Commission*** the Competition Commission alleged that Roche Holding AG and its subsidiaries contravened sections 8(a) and 8(1)(a) of the Competition Act by charging excessive prices for the breast cancer drug Trastuzumab marketed as Herceptin in private and Herclon in public sectors between January 2011 and November 2020 and November 2015 to July 2020, conduct the Commission contended denied over 10,000 women nearly half of newly diagnosed HER2+ patients access to lifesaving treatment and infringed their constitutional rights to equality (s 9), healthcare (s 27),

[234] Ibid (n 232)
[235] Ibid
[236] ibid

dignity (s 10) and life (s 11). The Commission asked the Tribunal to impose the Act's maximum penalty for this human rights related implication abuse of market power[237].

In the ***Hazel Tau case***[238] this case, brought before the Competition Commission, involved allegations of excessive pricing and refusal to license patents for essential antiretroviral (ARV) medicines used to treat HIV/AIDS. The complainants argued this constituted an abuse of dominance, limiting access to life-saving treatments. The case was ultimately settled, with the pharmaceutical companies agreeing to grant licenses to generic manufacturers, significantly increasing access to affordable ARVs. While not a fully adjudicated decision on the merits, it is highly significant for demonstrating the potential for competition law intervention to address access and affordability issues related to patented essential goods, underscoring public interest considerations.

In ***Sasol Chemical Industries v Commission of SA (2015***)[239] the CCSA investigated Sasol's pricing practices for propylene and polypropylene, finding them excessive. On appeal, Court clarified that patent protection does not automatically justify higher prices under the excessive pricing law, stating that a patent holder's R&D expenses may affect the reasonableness of its price but this is not a licence to engage in excessive pricing. This indicates a willingness to use competition law to regulate prices where IP alone is insufficient.

[237] https://www.compcom.co.za/wp-content/uploads/2022/02/COMPETITION-COMMISSION-PROSECUTES-A-MULTINATIONAL-HEALTHCARE-COMPANY-ROCHE-FOR-EXCESSIVE-PRICING-OF-A-BREAST-CANCER-TREATMENT-DRUG.pdf

[238] Hazel Tau & others v. GlaxoSmithKline (Pty) Ltd and Boehringer Ingelheim (Pty) Ltd Competition Commission Case No. 2002Sep226.

[239]Sasol Chemical Industries Limited v Competition Commission (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC); [2015] 1 CPLR 58 (CAC) (17 June 2015)

2.5 The Ugandan Perspective

2.5.1 Overview of Uganda's competition law framework and IPR framework

Uganda prides itself on being one of the African countries with the most robust IP legal framework. This is made up of the ***Copyright and Neighbouring Rights Act***[240], ***Industrial Property Act***[241], ***Trademarks Act***[242], among others.

Furthermore in 2024, Uganda enacted its maiden legislation solely addressing Competition[243]. But before that there was the ***Uganda Communications Act***[244] and ***Communications (Fair Competition) Regulations***[245] tackling competition aspects in the telecommunications and broadcast sectors

In this section we explore whether Uganda's legal and policy framework addresses the intersection between IP rights and Competition Law, and if so, how goes about it.

- ***1995 Constitution of the Republic of Uganda***

Art. 26[246] provides for the right to own property, whether alone or in association with others. And that no one shall be forcibly deprived of his or her property or any related interest in it unless it is necessary for public use or to safeguard national defence, public safety, order, morality, or health, and such deprivation is carried out in accordance with the law.

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[240] Copyright and Neighbouring Rights Act, Cap 222
[241] Industrial Property Act, Cap 224
[242] Trademarks Act, Cap 225
[243] Ibid (n 46)
An Act to promote and sustain fair competition in markets in Uganda; to prevent practices having an adverse effect on competition in markets in Uganda; and for related matters.
The objective of this Act is to: (a) enhance the efficiency, adaptability, and growth of the Ugandan economy; (b) ensure competitive pricing and product options for consumers and producers; (c) foster employment and improve the socio-economic well-being of Ugandans; (d) create opportunities for Ugandans to engage in the global market while acknowledging the role of foreign competition in Uganda; and (e) ensure equitable access for all individuals to participate in the economy.
[244] Uganda Communications Act, Cap 103
[245] Uganda Communications (Competition) Regulations S.I No. 93 of 2019
[246] Ibid (n 40)

Art. 21(1)[247] stipulates that all persons are entitled to equality before and under the law, enjoying equal protection across all spheres of political, economic, social, and cultural life, without discrimination in any respect.

Art. 40(2)[248] grants every person the right to engage in his or her profession and pursue any lawful occupation, trade, or business of his or her choice.

The constitution through these provisions ensures that owners of IP as property are granted exclusive economic and moral rights by the said IP and establishes a constitutional foundation that supports innovators' rights to compete in the market without arbitrary restrictions or exclusionary practices.

These provisions enable the exclusive ownership of intellectual property as real property while also allowing for trade to be carried out in different sectors in a manner that is viewed as fairly competitive before the law.

- ***The Competition Act Cap 66***

S.9(1)[249] No individual or entity is permitted to engage in practices or enter into agreements that have the effect of hindering fair competition within the market.

S.9(3)[250] Anti-Competitive Horizontal Agreements entered into between competitors that directly or indirectly set purchase or selling prices; restrict production, supply, market access, technological advancement, or investment; or allocate markets or sources of production based on geography, customer type, market size, or any other dividing criterion are inherently harmful

[247] Ibid (n 40)
[248] Ibid
[249] Ibid (n 46)
[250] ibid

S.9(4)[251] Anti-Competitive Vertical Agreements between businesses at different levels of the supply chain are similarly prohibited if they include tying arrangements (requiring the purchase of one product as a condition for obtaining another), exclusive supply agreements (restricting a supplier to sell only to a particular buyer), exclusive distribution agreements (granting a distributor sole rights within a defined area), refusal to deal (unjustifiably denying business to other entities), and resale price maintenance (where a supplier controls the resale price of its products).

S.9(6)[252] In evaluating whether a practice or agreement adversely affects competition, the Ministry must take into account whether the conduct creates barriers to market entry for new businesses or forces existing competitors out of the market or consider any benefits to consumers, such as improved efficiency, innovation, or lower prices, which may justify certain practices despite their restrictive effects.

S.9(7)[253] subsection 6 against anti-competitive practices does not override the lawful enforcement of IP rights granted in Uganda. Individuals and entities are entitled to take reasonable measures to protect or commercially exploit their intellectual property, including imposing conditions that are necessary for this purpose. Such activities are exempt from being categorized as anti-competitive, provided they fall within the bounds of legitimate IP protection and do not serve as a facade for anti-competitive intent.

[251] Ibid (n 46)
[252] ibid
[253] Ibid

S.11(1)[254] No individual or entity is permitted to abuse a dominant position within any market. This prohibition is grounded in the objective of ensuring that firms possessing significant market power do not exploit their dominance in a way that undermines fair competition or harms consumers.

S.11(2)[255] To establish whether a person or enterprise holds a dominant position, the assesable factors are;

(a) Market Share Thresholds: A single entity is typically considered dominant if it supplies or acquires at least 30% of a specific good or service, or if three or more entities together control at least 60%, with one of them having the largest share. The Minister may adjust these thresholds through statutory instrument.

(b) Size and Resources: The financial capacity, operational scale, and overall corporate resources of the entity are considered, especially in comparison to its competitors.

(d) Economic Power and Commercial Advantages: Factors such as extensive product ranges, strong brand identity, vertical integration, customer loyalty, and robust distribution networks are examined.

(e) Technical Superiority: Ownership of key intellectual property such as patents, copyrights, or proprietary know-how can signal dominance if they offer a substantial competitive edge.

(f) Consumer Dependence: Where consumers have limited alternatives and rely heavily on one entity's products or services, this dependence is a strong indicator of dominance.

[254] Ibid (n 46)
[255] ibid

(g) Statutory or Government-Conferred Monopoly: Entities empowered by legislation, or which are state-owned, may possess market dominance by virtue of their legal or institutional status.
(h) Barriers to Entry: These include legal or regulatory hurdles, high start-up or marketing costs, economies of scale enjoyed by incumbents, technical constraints, or substantial customer switching costs that discourage new market entrants.
(i) Countervailing Power: The degree to which large customers or suppliers can influence or resist the dominant firm's behavior may mitigate or confirm dominance.
(j) Independent Market Conduct: A dominant firm can often set prices, determine quality or output levels, and control supply schedules without competitive constraints.
(k) Market Structure and Size: The concentration and scale of the relevant market affect the ease with which dominance can be established or maintained.
(l) Other Relevant Factors: Any additional circumstance that materially contributes to the market power of a firm may also be taken into account.

S.11(5)[256] For the purposes of subsection 1 a firm is considered to abuse its dominant position when it undertakes actions that unfairly exploit or suppress market competition such as;
(a) Unfair or Discriminatory Pricing and Conditions: Imposing prices or terms that are excessive, predatory, or that unfairly differentiate between trading partners without valid justification.

[256] Ibid (n 46)

(b) Restriction of Output or Technological Progress: Deliberately limiting production, obstructing market expansion, or stifling innovation in a manner detrimental to consumers.
(c) Obstruction of Market Access: Engaging in behavior that prevents current or potential competitors from accessing markets or customers.
(d) Imposition of Unrelated Contractual Conditions: Forcing contractual terms on other parties that are neither commercially necessary nor relevant to the transaction, effectively using market power to extract unrelated concessions.
(e) Leveraging Dominance Across Markets: Using a dominant position in one market to gain or maintain an unfair advantage in another distinct market.

In *S.13*[257], dominant entities are expressly prohibited from engaging in exclusionary conduct aimed at eliminating competition from the market. Such practices include;
(a) Predatory Pricing: Setting prices below cost with the intent to drive out competitors, often followed by price increases once rivals are eliminated.
(b) Price Squeezing: Charging high prices for essential inputs to downstream competitors while maintaining low retail prices, thereby squeezing competitors' margins.
(c) Cross-Subsidisation: Using profits from a dominant business segment to fund below-cost pricing or other anti-competitive activities in another segment to weaken competitors.
(d) Refusal to Deal: Unjustifiably denying supply or access to products, services, or partnerships necessary for competitors to operate effectively.

[257] Ibid (n 46)

(e) Denial of Access to Essential Facilities: Refusing access to crucial infrastructure or services that competitors require to enter or participate in the market.
(f) Tying Arrangements: Forcing customers to purchase a secondary product as a condition for obtaining a desired primary product, particularly when the secondary product is unrelated.
(g) Unjustified Discrimination: Applying different terms to different customers or suppliers without legitimate business reasons, thereby distorting competitive conditions.

These are all provisions in the Act that would ideally cater for IP related abuses of fair competition as well but this is in no way expressed in the Act.

- ***The Uganda Communications Act Cap. 103***

S.53[258] mandates the Uganda Communications Commission to promote, develop, and enforce fair competition within the communications sector. This includes ensuring that all businesses and service providers operating under the Act are treated equally and fairly. The Commission plays a pivotal role in maintaining a competitive environment by preventing anti-competitive conduct, monitoring market behavior, and fostering equitable participation among market players.

S.54(1)[259] Prohibits operators in the communications sector from engaging in any conduct intentional or otherwise that unfairly prevents, restricts, or distorts competition. Such practices are unlawful if they currently result in, or are likely to result in, harm to fair market conditions or to other market participants.

[258] Ibid (n 244)
[259] Ibid

S.54(2)[260] stipulates unfair competition to include;

(a) the abuse of a dominant market position, where an operator (acting alone or jointly) misuses its market power to exclude or limit competitors unfairly.

(b) entering into anti-competitive agreements or coordinated practices that distort market dynamics.

(c) anti-competitive structural changes to the market, such as mergers or acquisitions that lessen competition, are restricted.

S.55[261] While anti-competitive conduct is generally prohibited, the Commission has discretion to allow exceptions it in limited circumstances. An operator may be permitted to engage in conduct that would otherwise be deemed anti-competitive if, after a written determination, the Commission finds that the conduct significantly contributes to the improvement of goods or services or promotes the development of Uganda's communications sector in accordance with the Act. However, such conduct must not impose unnecessary constraints or allow the operator to substantially reduce competition in the market. Any permission granted must be carefully justified and proportionate to the benefits it claims to achieve.

S.56[262] provides that if, following an investigation, the Commission concludes that an operator has engaged in unfair competition, it may impose a range of sanctions. These include issuing a cease-and-desist order, directing the operator to halt the unlawful conduct immediately. Additionally, the Commission is authorized to impose financial penalties of up to ten percent of the operator's annual turnover. It may

[260] Ibid (n 258)
[261] ibid
[262] Ibid

also declare any anti-competitive agreements or contractual arrangements null and void.

- ***The Uganda Communications (Competition) Regulations S.I No. 93 of 2019***

Regulation regarding Fair competition

Reg. 3[263] is to the effect that the Uganda Communications Commission is charged with proactively fostering and safeguarding competitive conditions in the communications sector. It must promote, monitor, and enforce fair competition by investigating suspected breaches by any operator or related party, conducting formal proceedings, inquiries, and public consultations on anti-competitive conduct or proposed market control changes, and undertaking both sample based and comprehensive market studies to detect dominance and assess consumer impact. Where anti-competitive behavior is confirmed, the UCC is empowered to impose remedies, sanctions, penalties, notices, or orders to restore competitive balance and protect end users.

Reg. 6[264] stipulates that fair competition in the communications sector must align with established national, regional, and international competition norms and forbids any arrangements or activities that substantially lessen competition. Specifically, operators must not enter anti-competitive agreements or concerted practices, abuse a dominant market position, undertake mergers, takeovers, or structural changes that restrict competition, or employ other deceptive or unfair methods that distort market dynamics. Any act or omission by operators or authorized persons that appreciably prevents, restricts, or distorts competition whether intentional or negligent is deemed anti-competitive and subject to enforcement action.

[263] Uganda Communications (Competition) Regulations S.I No. 93 of 2019
[264] Ibid

Reg. 7[265] provides that unfair competition encompasses a broad array of prohibited practices by operators, including predatory, discriminatory, exploitative, or exclusionary pricing (e.g., price squeezes, cross subsidization, price discrimination), limiting production or innovation to disadvantage consumers, imposing unequal or unrelated conditions on equivalent transactions, and enforcing unjust network alterations to impose costs on interconnecting parties. Moreover, entities may not refuse to supply services or grant access without justification, tie the sale of facilities to unreasonable terms, set unfeasible interconnection thresholds, or fail to negotiate in good faith. Vertical restraints—such as resale price maintenance and exclusive dealing—and any agreements among operators to fix prices, share markets, or jointly boycott rivals are equally prohibited.

Regulation of market fairness and accessibility

Reg. 4[266] seeks to create a communications market in Uganda that is efficient, consumer friendly, and investment driven. Their goals include improving the efficiency and competitiveness of service provision; ensuring that services are accessible nationwide at fair prices; delivering services economically and to high performance standards that meet social, industrial, and commercial needs; promoting and maintaining fair market conduct among all participants; encouraging and facilitating new investment; supporting the growth and expansion of Uganda's communications industry; and mandating non-discriminatory, reasonable treatment in both core and value added communications services.

[265] Ibid (n 263)
[266] Ibid

Non-discrimination

Reg.9[267] ensures that operators must offer communications services on fair, reasonable, and non-discriminatory terms to all consumers and competing entities. Discrimination includes any unjustified variance in charges, practices, classifications, regulations, facilities, or services; overt or covert favouritism toward specific persons, classes, or localities; or actions that prejudice or disadvantage certain users or competitors. Refusing or failing to provide equivalent access or service quality, or granting unequal rates and conditions to non affiliated operators, is expressly forbidden. The UCC retains authority to identify and address any additional discriminatory conduct not enumerated.

Oversight of dominant operators

Reg.10[268] establishes clear, evidence based guidelines for identifying operators with significant market power. These will include quantifying market share through operator reports, automatic designation upon exceeding a defined share threshold, initiation of market studies, and solicitation of public and expert submissions. Once draft findings are prepared, the Commission must share them with the affected operator and, where appropriate, the public, affording the operator the right to present counterarguments before any formal designation or regulatory intervention takes effect.

[267] Ibid (n 263)
[268] Ibid

- The law governing IP rights in Uganda

This section is focused on the 3 main forms of IP in Uganda i.e. copyright, trademarks and industrial property. As elaborate as Uganda's intellectual property framework is, neither the CNRA nor the TMA expressly address Competition aspects of IP.

The IPA however, makes an attempt at doing so. The IPA includes competition law protections at various levels of patent regulation. This ensures that exclusive rights don't become tools for market foreclosure. It does so through these interdependent pillars constituted in its framework;

Prohibiting Anti-Competitive Licence Terms

Section 54 grants the Registrar the authority to deny registration of any licence agreement that includes unjustified restrictions detrimental to Uganda's economic interests. The Registrar assesses whether particular clauses, lack valid justification and result in net harm to the market. Subsection (2)(q) supposes that any term restricting territories, quantities, prices, customers, or markets is anti-competitive, particularly in the context of patent pools, cross-licensing, or international technology-transfer agreements, unless these restrictions are deemed appropriate and supplementary to legitimate cooperative research. Subsection (2)(aa) addresses discriminatory clauses that impose less favourable conditions on one licensee in comparison to others in similar situations. These provisions utilise the registration process as a primary mechanism to combat cartels, market division schemes, and secondary-line price discrimination, while maintaining genuinely pro-competitive collaborations[269].

[269] Section 54; Prohibited terms in licence contract

Compulsory Licences for Non-Working and Supply Failures

Subsection 1 of section 57 permits any individual to apply for a compulsory licence after four years from the filing date or three years from the day of grant of the patent if the invention is not being supplied or is not being supplied on reasonable terms in Uganda, thereby preventing patentees from hoarding or under-utilizing their inventions. The failure-to-work remedy incentivises right-holders to either localise commercialisation or risk losing exclusivity, thus protecting consumer welfare and facilitating market entry[270].

Compulsory Licences for earlier patents which block later patents

Subsection 1 of section 58 addresses scenarios in which a later patent represents a notable technical advancement but cannot be utilised without violating an earlier patent. Should the improvement demonstrate substantial economic importance, the owner of the later patent may secure a compulsory licence on the earlier patent as required to execute the subsequent invention. This prevents upstream patentees

(1) The Registrar may refuse to register a licence contract if the Registrar is of the opinion that any clause in the licence contract imposes unjustified restrictions on the licensee with the consequence that the contract, taken as a whole, is harmful to the economic interests of Uganda.
(2) Without prejudice to subsection (1), the following terms in a licence contract shall be taken to have the effect described in that subsection
(q) terms that impose restrictions on territories, quantities, prices, customers or markets arising out of patent pool or cross-licensing agreements or other international technology transfer interchange arrangements which unduly limit access to new technological developments or which would result in an abusing domination of an industry or market adverse effects on the licensee, except for those restrictions appropriate and ancillary to cooperative arrangements such as cooperative research arrangements;
(aa) terms that apply different conditions to similar transactions with other trading parties and placing the licensee at a competitive disadvantage;

[270] Section 57. Compulsory licence for non-working and similar reasons
(1) After the expiration of four years from the filing date of an application or three years from the grant of a patent, whichever last expires, a person may apply to the Minister for a licence to exploit the patented invention on the grounds that the market for the patented invention is not being supplied or is not being supplied on reasonable terms, in Uganda.

from restricting downstream innovators, balancing the rights of original inventors with the public interest in fostering follow-on innovation[271].

Relief for Anti-Competitive Practices

Section 59(1) mandates that applicants for compulsory licences demonstrate that they have engaged in good faith negotiations for the licence under reasonable terms. *Section 59(2)* notably exempts this requirement when the application pertains to anti-competitive practices, acknowledging that market abusers are unlikely to engage in good faith negotiations. Upon the establishment of grounds, Section 60 authorises the Minister to determine the scope, duration, and remuneration of the licence. In accordance with the TRIPS agreement, *Section 60(2)(a)* stipulates that compulsory licenses for semiconductor technology may be issued solely for public non-commercial use or to address anti-competitive behaviour identified through judicial or administrative processes, ensuring that remedies are proportionate and specifically targeted[272].

[271] Section 58. Compulsory licence based upon interdependence of patents
(1) Where a patented invention cannot be worked without infringing the rights derived from an earlier patent, the owner of the later patent may request the Minister for the grant of a compulsory licence with respect to the earlier patent to the extent necessary for the working of the invention, if the invention constitutes an important technical advance of considerable economic significance in relation to the invention claimed in the earlier patent.

[272] Section 59. Preconditions for grant of compulsory licences
(1) A compulsory licence shall not be granted unless the person requesting the licence —
(a) satisfies the Minister that the person has requested the owner of the patent for a contract licence but has been unable to obtain the licence contract on reasonable commercial terms and within a reasonable time;
(2) The requirement under subsection (l)(a) shall be waived in the case of a national emergency or other circumstances of extreme urgency or where the application is based on anti-competitive practices; except that the Registrar shall notify the owner of the patent as soon as reasonably possible of the waiver.

Section 60. Grant and terms of compulsory licences
(1) When considering a request for a compulsory licence, the Minister shall decide whether a compulsory licence may be granted and shall, if it decides in favour of the grant and after taking into account any terms agreed by the parties, proceed to fix the terms which shall be taken to constitute a valid contract between the parties and shall be governed by the provisions on contractual licences.
(2) When fixing the terms under subsection (1), the Minister shall ensure that the compulsory licence —

Exploitation of a patent by the State or a third party with government authorization.

Beyond private licences, *Section 65* authorizes the Minister upon adequate compensation to allow government agencies or authorized third parties to exploit a patented invention if public interest factors (e.g., health, security) demand it or if the Registrar finds that the patentee's own exploitation is anti-competitive. For semiconductor inventions, *subsection (15)* adds an extra safeguard: a court must first determine anti-competitive exploitation, and the Minister must be satisfied that government intervention will remedy the abuse. This two-step check balances the need to curb egregious monopolistic practices with respect for due process and the interests of IP rights holders[273].

Collectively, these provisions demonstrate a cohesive legislative makeup of the Act. It forbids restrictive licensing terms at the outset through S.54, offers specific compulsory-licence pathways for non-working under S.57 and blocking patents S.58, expedites relief from market abuse by eliminating procedural barriers by way of Sections 59–60, and permits direct state exploitation under stringent safeguards as

(a) is limited in scope and duration to the purpose for which it was authorised, and in the case of semi-conductor technology, shall only be for public non-commercial use or to remedy a practice determined after a judicial or administrative process to be anticompetitive;

[273] Section 65. Exploitation of patented inventions by government or by third parties authorised by government
(1) Subject to this section, where —
(a) the public interest, in particular, national security, nutrition, health, environmental conservation, national emergency or the development of other vital sectors of the national economy requires; or
(b) the Registrar determines that the manner of exploitation of an invention by the owner of the patent or the licensee of the owner of the patent is not competitive;
the Minister may, upon application to him or her in the prescribed form and after consultation with the Registrar and the owner of the patent, order that the protected invention shall be exploited by a Government ministry, a department, an agency or other person as the Minister may designate in the order subject to the payment of adequate compensation to the owner of the patent in accordance with this section.
(15) An order which relates to the exploitation of an invention in the field of semi-conductor technology shall only be made where the court has determined that the manner of exploitation of the patented invention by the owner of the patent or the licensee of the owner of the patent is not competitive and the Minister is satisfied that the issue of the order would remedy that practice.

per *S.65*. Integrating competition principles into patent registration, licensing, and enforcement within Uganda's framework preserves innovation incentives, mitigates exclusionary practices, and ensures access to essential technologies.

Interface between IP rights and Competition law

Intellectual Property and Competition laws are both fairly new areas of law in Uganda's jurisprudence, more so competition law. This means that the application of the laws and their enforcement is not necessarily as wide in coverage as envisioned by the law on paper. This further connotes that the IP & Competition law interface is even less catered for in Uganda's jurisprudence.

However, there have been recent developments through in Uganda's jurisprudence and discussions that pertained to the interplay between IP rights and Competition law.

2.5.2 The case of Vas Garage Limited v MTN Uganda Limited[274]

- *Facts of the matter*

In 2013, VAS Garage Ltd, a value-added services aggregator, entered into a Content Provision Agreement with MTN Uganda Ltd, under which VAS Garage would supply SMS, MMS, USSD and IVR content via UCC-issued short codes, and MTN would manage transmission and billing. The original Content Provision Agreement required VAS Garage to generate at least UGX 82 million per month; it was renewed in 2014 on an indefinite term, introduced a new billing platform and mandated compliance with Uganda Communications Commission's Do-Not-Disturb (DND) directive. As part of that renewal, MTN assumed custodianship of VAS Garage's

[274] VAS Garage Ltd v MTN Uganda Ltd (n 47)

profiled subscriber database, which VAS Garage had built at a cost of approximately UGX 300 million in marketing and technology.

In December 2014, MTN unilaterally expired VAS Garage's database citing the DND directive causing VAS Garage's billing platform to report zero successful billings. Although MTN briefly restored the database in mid-2015, by August 2015 it again deleted the database as a business decision, withholding over UGX 529 million in revenue. VAS Garage's repeated requests for reconciliation failed, so it lodged a complaint with the UCC. On 27 March 2018, the UCC ruled that MTN had no mandate to delete profiled databases and directed MTN to reconcile and remedy VAS Garage's losses which directions MTN ignored. VAS Garage thereafter instituted a suit to enforce the UCC decision, recover contractual sums with interest, seek special and general damages for unfair competition and conversion, and obtain a declaration of copyright and proprietary rights in its database.

- *Court's Resolution*

In resolving this case Justice Stephen Mubiru addressed the defendant company's Abuse of regulatory processes as they refused to adhere to the UCC directive issued, their Abuse of dominant position, and the Anti-competitive exclusionary practices. The defendant abused its dominant position under the Uganda Communications Act by unjustifiably denying the plaintiff access to its Value Added Services (VAS) customer database an indispensable resource derived from its general customer database that neither party could replicate thereby exercising monopoly-like control over critical infrastructure. Without any valid commercial or technical justification or available alternative data source, the defendant's refusal effectively foreclosed the plaintiff's entry and forced its exit from the VAS market, inflicting serious business losses. On 27 March 2018, the Uganda Communications Commission found

this denial violated Regulations 5(1) – (3) and 6 of the Fair Competition Regulations and contravened the Act's anti-foreclosure and fair-access provisions.

Court in this matter highlighted the defendant's anti-competitive intent and effect in leveraging its market power to determine who may compete, thereby undermining the objectives of fair competition and consumer welfare.

Regarding the essential facility doctrine, the defendant's exclusive control over the VAS database made denial of access to the plaintiff unreasonable, exclusionary, and in breach of both the Act and the Regulations thus a breach of fair competition.[275]

Court also considered the sui generis IP rights in a database as Mubiru, J elaborated as follows;

A database constitutes more than a mere repository of information; it is a systematic collection of independent works, critical data or other materials arranged in a methodical manner so that elements can be accessed, updated, or extracted by electronic or other means. Its value lies in the continuum.

A database embodies both the raw data, the facts, figures or works themselves, and the tools such as a database management system, that store, communicate and manipulate that data.

[275]The Uganda Communications Act and the Fair Competition Regulations create a robust framework that promotes competition and safeguards consumers against unfair practices. This regulation prohibits actions or omissions that unjustly hinder, limit, or distort competition, especially by entities in a dominant position, which is characterised by supplying or acquiring at least 25 percents of services or by three or less firms controlling half the market, enabling them to operate independently of competitors and customers.
Abuse of dominance includes exclusionary practices such as predatory pricing, exclusive dealing, refusal to deal, and denial of essential facilities or databases, as well as misappropriation through free-riding on significant investments. Exclusionary practices are unlawful if they negatively impact competition or consumers by leading to decreased output, increased prices, or reduced choices, without proportionate reward. These actions can increase competitors' costs, obstruct market entry, or eliminate competitors without valid commercial or technical justification.
The efficient competitor test evaluates whether certain conduct would eliminate a hypothetical equally efficient competitor through means other than merit-based competition.

Under traditional common law, property referred to tangible objects capable of physical possession. Electronic data, being non-material and easily replicated, did not conform to this model, as courts have long held that information in itself does not constitute goods or property. Contemporary legal theory however, conceptualises ownership as a bundle of rights. Rights to access, exclude, transfer or control, which can be disaggregated and held by different parties.

This paradigm shift provides legally certain protection for digital assets like databases, which, despite being intangible, possess definable boundaries, exclusive-control mechanisms e.g., cryptographic access keys and enduring economic value.

In response to gaps in protecting databases under traditional copyright, the EU enacted Directive 96/9/EC (1996), which was implemented in the UK through the Copyright and Rights in Databases Regulations 1997. This sui generis right automatically vests in the maker, the investor who assumes the risk associated with a database, without the need for registration. It protects substantial investments in the acquisition, verification, or presentation of data, regardless of any originality in structure or arrangement. It grants exclusive rights to prevent unauthorised extraction (transfer of contents) or re-utilisation (making contents public), whether in whole or in substantial part, and is renewable upon substantial new investment such as major additions or revisions.

According to the precedents established in National Provincial Bank v. Ainsworth and Kremen v. Cohen a right qualifies as property if it meets the following criteria; (1) it is definable, (2) it can be identified by third parties, (3) it is capable of exclusive possession or control, and (4) it is stable or permanent. Computer databases comprising distinct, allocable records and enforced by access-control technologies

meet these criteria, rendering them tradable, securable economic assets even outside the reach of statutory rights.

Copyright and Sui generis database rights are complementary but distinct forms of intellectual property. Copyright protects only author's own intellectual creation, requiring originality in the selection or arrangement of contents and safeguarding expressive form rather than underlying facts, whereas the sui generis right automatically grants protection based solely on substantial investment financial, technical or human in obtaining, verifying or presenting data, (sweat of the brow[276]), regardless of creative merit. Sui generis intangible property rights fill the gap where databases lack the originality threshold for copyright yet involve significant sweat of the brow, allowing right-holders to prevent unauthorized extraction or reuse of substantial portions of their compilations.

These rights function concurrently as the dual-layered framework positions sui generis rights within the realm of intellectual property yet as a unique mechanism explicitly designed to reward and secure the risks and skills involved in amassing valuable data collections.

A creative database may be eligible for copyright protection concerning its structure or arrangement, as well as sui generis protection for the investment involved. In

[276] Justice Mubiru in Vas Garage Limited v. MTN Uganda Limited (Civil Suit No. 0689 of 2022) [2025] UGCommC stated that for the purpose of copyright protection, the sweat of the brow approach, which acknowledges the industriousness or labour of the author as being relevant to the originality of a work, does not suffice. However, the sweat of the brow theory supports sui generis database ownership rights by arguing that significant investment in compiling a database, regardless of originality, warrants protection.
This model extends protection to the database's content, even if the facts themselves are not novel, incentivising the creation of databases by rewarding the effort and investment involved in their compilation. Therefore, a database may be recognised as property if, by reason of the selection or arrangement of the contents, it constitutes the author's own collection, conferring upon the owner the right to prevent unauthorised extraction and/or re-utilisation of the whole or of a substantial part of their data collections.
He further asserted that sui generis proprietary rights in databases are a distinct intellectual property right, separate from copyright, that protect the investment in creating a database, even if the database's structure or arrangement is not original.

contrast, purely factual data, which lacks copyright protection, can still be defended against free-riding through the database right.

Consequently, it was held that whereas compiling a database of phone records was inadequate for copyright as the arrangement lacks sufficient creativity, where it involves assuming the risk of substantial investment in its qualitative and/or quantitative collection, verification, arrangement or presentation (sweat of the brow effort made in compiling the data), that may create sui generis property rights therein. It was further held that sui generis proprietary rights in databases are a distinct intellectual property right, separate from copyright, that protect the investment in creating a database, even if the database's structure or arrangement is not original.

Even as this case did not directly address the way IP rights can be used to abuse fair competition, it shows that the two legal disciplines do in fact interact in Uganda's economic market and that the domination of one discipline by the other can be detrimental to business and to consumers. Thus, a delicate balance needs to be established to address this.

2.5.3 *A complaint by Ad Legal Uganda*[277]

Ad Legal is a Ugandan company that promotes consumer protection, and combats unfair competition. The company filed a competition complaint against Google Uganda and Google LLC, alleging monopolistic control and anti-competitive practices in Uganda's Android smartphone market. The complaint, filed under the Competition Act, highlights Google's restrictive agreements with local smartphone

[277] https://drive.google.com/file/d/1T7JEXMzFNoTR52uOUr-9Aup-82RbMNnX/view

manufacturers, MiOne Phones Uganda and SIMI Mobile Uganda and their monopolistic control in Uganda's Android ecosystem

Google's agreements such as the Mobile Application Distribution Agreement (MADA) and the Anti-fragmentation Agreement (AFA) stifle competition by compelling local android phone manufacturers to pre-install Google apps and limit the use of alternative operating systems.

The complaint urges the Ministry of Trade, Industry, and Cooperatives to investigate Google's market dominance, impose penalties, and ensure fair competition in Uganda's mobile ecosystem[278].

Google's agreements force local phone manufacturers to pre-install its apps & block competitors which shows abuse of a dominant position.

This complaint is similar to the case of ***Google and Alphabet (Google Android) v Commission***[279] at the Court of Justice of the European Union in which Google was fined 4.125 billion euros for having abused its dominant position by imposing similar anti-competitive contractual restrictions on manufacturers of mobile devices and on mobile network operators, in some cases since January 2011. These included restrictions in distribution agreements, requiring manufacturers of mobile devices to pre-install the general search (Google search) and (Chrome) browser apps to be able to obtain a licence from Google to use its Play Store. Restrictions were also contained in anti-fragmentation agreements, under which the operating licences necessary for the pre-installation of the Google Search and Play Store apps could be obtained by mobile device manufacturers only if they undertook not to sell devices

[278] https://adlegalug.com/google-competition-complaint/

[279] Google and Alphabet (Google Android) v Commission (2022) T-604/18

running versions of the Android operating system not approved by Google. Restrictions were also contained in revenue share agreements, under which the grant of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to their undertaking not to pre-install a competing general search service on a predefined portfolio of devices.

According to the Court of Justice of the European, the objective of all those restrictions was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements. This infringed Article 102 TFEU and Article 54 of the Agreement on the European Economic Area.

This case highlighted Google's abuse of dominant position through the IP in its software and set off a chain of similar suits in different jurisdictions against Google.

2.5.4 Gaps in the current Ugandan framework

Within Uganda's legal and policy framework the IPA, the Communications Act and its Fair Competition Regulations, are laws that make deliberate attempts at addressing the intersection between IP rights and Competition law

Outside of the very recent cases and complaints there have hardly been any concrete efforts in Uganda's jurisprudence to expressly address the interaction of IP rights and competition law.

It should be noted that Uganda has both a National IP policy[280] and a National Competition Policy[281]. However, the National IP policy does not put into

[280] MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS; NATIONAL INTELLECTUAL PROPERTY POLICY (2019)
[281] Ibid (n 56)

consideration the competition aspects of intellectual property and neither does the National Competition Policy address the IP related aspects of competition law. Therefore, there is a gap in the framework that requires to be filled to enable a balance to be struck between the enjoyment of IP rights and enforcement of fair competitive practices.

2.6 Conclusion

In conclusion therefore, this chapter has looked at the legal and policy framework governing IP rights and Competition law, each independently, and also addressed how they interact in particular jurisdictions. Further more a comparative analysis has been made to ascertain how the jurisdictions of the US, the UK, India and South Africa. In this chapter, Uganda's legal and policy framework pertaining to the interaction between IP and Competition has been put into perspective which helps to establish the gaps that need to be addressed. This is done to see what and where Uganda as a developing legal and economic jurisdiction can borrow from the relevant jurisdictions talked about in this chapter to adopt and effectively implement in order to fill in the legal and policy gaps at the intersection of IP rights and competition law to ensure that a balance is struck between the enjoyment of IP rights and fair competition.

3.0 CHAPTER THREE

THE INTERACTION BETWEEN IP RIGHTS AND COMPETITION LAW

3.1 Introduction

This chapter delves into the specific principles of intellectual property and key concepts of competition law which are at the intersection of the two legal disciplines. This is to establish the particular ways in which and how the two legal disciplines interact. Furthermore, this chapter will look at the impact of IP rights on fair competition in the market as well as specific anti-competitive practices and abuses involving IP rights in the various jurisdictions. This chapter as well seeks to explore the Ugandan perspective of this intersection between IP rights and competition law. Which will entail instances where IP rights have affected fair competition among other things.

3.2 Types of IP and how they may impede fair competition

Intellectual property includes a wide range of rights, each of which is meant to protect a specific type of creative or innovative work. These rights are different in terms of what they cover, how they are obtained, and how they are enforced. They also differ in how they interfere with fair competition.

- Copyright

Copyright keeps original works of writing safe. This includes a wide range of works, such as books, plays, music, and art, as well as adaptations like films, sound recordings, broadcasts, and typesetting of published editions. Copyright protects the way ideas are expressed. When someone creates something, they automatically get copyright, which gives them exclusive rights to reproduce, distribute, perform, and adapt their works.

Copyright safeguards original literary, artistic, and musical creations by granting exclusive rights for reproduction, distribution, and display. Although individual copyrighted works rarely confer significant market power, control over extensive collections, such as a large music catalogue or film portfolio, can establish dominance over a market[282]. This can pose challenges for new entrants aiming to build on existing works or engage in digital markets[283].

- Trademarks

Trademarks protect unique symbols that businesses use to set their goods or services apart from those of their competitors. The main goal of trademark protection is to keep people from getting confused and to protect the brand's reputation and goodwill in business. Trademark owners can stop other people from using marks that are identical or confusingly similar to theirs for goods or services that are related to those in which the trademark owners deal.

Trademarks protect brand identity and reduce consumer search costs by allowing products to be identified with one producer indefinitely[284]. While there is no restriction on how many trademarks can exist in a market, the infinite life of a trademark, especially when combined with a patent for a product, can create challenges for competition law by extending a monopoly[285]. Existing firms may also use trademark squatting or artificial product differentiation to block new players[286].

[282] Ibid (n 185)
[283] Ibid (n 119)
[284] Ibid (n 201)
[285] Ibid (n 201)
[286] Ibid (n 119)

- Patents

Patents give people the exclusive right to protect new inventions that solve problems. Patent protection covers new products, new processes (including any products that come out of them), and new ways to use old products. An invention must be new (not previously disclosed), not obvious (meaning it wouldn't be inventive to a skilled person in the relevant field), and able to be used in industry, in order to be eligible for patent protection. Patent holders can stop other people from making, using, or selling their invention.

Patents grant inventors exclusive rights to manufacture, utilise, and commercialise their inventions for a specified limited time period. This direct exclusivity inherently creates a temporary monopoly in the patented technology[287]. This can lead to hiking of prices and restricting access to essential facilities, especially in industries like pharmaceuticals where patents play a central role in innovation. The extensive nature of patent claims and the practice of strategic patenting may impede the entry of new competitors[288].

As an adjunct to the patent system, some countries have introduced Utility Models, also known as petty patents. These rights are typically granted for small, incremental innovations and are characterized by less stringent novelty criteria compared to full patents

[287] Ibid (n 232)
[288] Ibid (n 119)

3.3 Key concepts in competition law

The effective application of competition law relies on a precise understanding of some key concepts;

- ***Market definition*** is an important part of competition analysis because it establishes the relevant framework within which competition is assessed[289]. It is impossible to tell if a defendant has or is likely to get monopoly power or to measure their ability to lessen or destroy competition without a clear definition of the relevant market. This process includes both product and geographic aspects, which makes sure that the market dynamics are fully understood[290].

- ***Market Power*** is the ability of a firm to raise prices, lower output, limit product quality, or limit innovation without losing a lot of business to competitors[291]. Firms with a lot of market power can set the terms of trade, which can hurt consumers and distort the competitive process. This power can stem from various factors, such as having a large market share, controlling key inputs, network effects, or intellectual property. It is important to note that while the possession of market power itself is not illegal, its abuse is prohibited under competition law[292].

- ***Market Dominance*** or ***Dominant Position*** happens when an entity possesses substantial and durable market power, enabling it to profitably raise prices, limit output, stifle innovation, or restrict consumer choice without effective

[289]Competition Law Abuse of Dominant Position in US and EU by Vijay Kumar Singh https://ebooks.inflibnet.ac.in/lawp05/chapter/abuse-of-dominant-position-in-us-and-eu/
[290] Ibid (n 66)
[291] Ibid (n 107)
[292] Ibid

competitive constraints[293]. An entity is deemed to have a dominant position if it can act without regard for competitors or consumers[294].

Market dominance, like market power, is not illegal; however, abusing that position is prohibited[295]. *Juletha-Marie Dercksen* quotes Zimmer and asserts that the main goal of competition law, is to protect market participants against the exercise of market power or market dominance by their counterparts[296].

- ***Relative Market Dominance*** is a situation that arises when an entity possesses significant bargaining strength over its trading partners, creating an imbalance in economic power. Unlike general market dominance, which considers the overall competitive landscape, relative dominance focuses on the unfairness of individual transactions. It is expressed through concepts such as buyer power, a superior bargaining position, and economic dependence, where a weaker party relies on a stronger counterpart to compete effectively. These kinds of situations happen a lot in markets with few players or when buyers and sellers are dependent on each other for contracts and technology[297].

These principles are very important for a market economy because they let businesses succeed and grow through fair competition and innovation.

However, once a firm attains a dominant position, it incurs a special responsibility not to engage in conduct that restricts competition or exploits consumers[298]. This

[293] Ibid (n 68)
[294] Ibid (n 298)
[295] Zisha Rizvi; Decrypting the concept of abuse of dominant market position. Electronic copy available at: https://ssrn.com/abstract=3578864
[296] Ibid (n 66)
[297] Ibid (n 68)
[298] Michael Edwards, Demystifying Competition Law: A Guide for Businesses https://michaeledwards.uk/demystifying-competition-law-a-guide-for-businesses/#Abuse_of_Dominant_Market_Position

nuanced approach makes sure that competition law only steps in when market power is used to skew the competitive process, not when a company succeeds in the market because it has better products or is more efficient.

Abuse of Market Power and ***Abuse of Dominance*** refer to anti-competitive behavior by a dominant firm aimed at excluding competitors, preventing new market entrants, or exploiting consumers[299]. It manifests through actions that significantly lessen competition in a particular market. Such practices can distort markets, stifle innovation, reduce consumer choice, and ultimately lead to higher prices, harming competition and the economy as a whole[300]. Competition law prohibits the open or dubious abuse of dominance by a dominant businessperson, whether acting alone or in collusion with others[301].

Abuse of dominant position can manifest in various ways categorised into Exclusionary and Exploitative practices.

1. The goal of exclusionary practices is to impede competitors of an entity in a market and they do so in the following ways;

a) Predatory Pricing is where dominant firm deliberately lowers its prices to a loss-making level in an effort to drive out current competitors or discourage new ones. Once competitors are deterred, the dominant firm can then raise prices, often to higher levels, to recover the losses[302]

b) Exclusive Dealing and Loyalty Discounts are practices used by dominant firms to lock out competitors.

[299] Ibid (n 298)
[300] Ibid
[301] Ibid (n 295)
[302] Whish R and Bailey D (n 54)

Exclusive dealing restricts competitors' access to the market or necessary inputs by a supplier agreeing to sell its goods or services only to a specific buyer or a buyer agreeing to buy exclusively from a specific supplier thereby limiting competitors' access to the market or to essential inputs[303].

In a similar vein, loyalty discounts encourage consumers to purchase exclusively or primarily from a dominant company by providing discounts that are subject to reaching predetermined purchase thresholds. Even though these discounts seem harmless, they can have anti-competitive effects by deterring consumers from purchasing from competitors, which makes it more difficult to enter or grow a market[304].

An enterprise in a dominant position abuses its position when it binds buyers with a duty to source the majority of their needs from that enterprise alone.

c) Tying and Bundling

Tying is when a firm that dominates a certain product's market makes consumers buy a second product as a condition to acquire the first one. By extending market power from the tying product to the tied product, this tactic can foreclose competition. For tying to be considered abusive, it must have or be capable of having an anti-competitive foreclosure effect, restricting competition for customers interested only in the tied product[305].

Bundling involves offering multiple products together at a discount, which can make it difficult for competitors who specialize in only one of the bundled products to compete effectively[306].

[303] Whish R and Bailey D (n 54)
[304] Ibid
[305] ibid
[306] Ibid

When the tied or bundled products are in related markets and rivals in those markets are unable to provide a comparable offer, both tying and bundling are especially detrimental to fair competition[307].

d) Refusal to Supply/Deal

Refusal to Supply/Deal is the process by which a dominant entity prevents competitors from effectively competing by denying them access to essential inputs or services. Although firms typically have the freedom to select their trading partners, in some cases, a dominant firm's refusal may be considered an abuse[308].

e) Margin Squeeze

Margin Squeeze happens when a dominant, vertically integrated company that controls both the upstream and downstream markets sets the price of the upstream inputs at a level that prevents downstream competitors from making a profit to remain competitive in the market[309].

f) Miscellaneous Abuses of dominant position include vexatious or sham litigation and misuse of regulatory processes[310].

2. Exploitative Practices directly harm consumers through price increments

a) Excessive Pricing

When a dominant company sets prices that are much higher than what would be anticipated in a competitive market without providing any explanation for cost or quality improvements, this is referred to as excessive pricing, or price gouging[311].

[307] Whish R and Bailey D (n 54)
[308] Ibid
[309] Ibid
[310] Ibid
[311] Ibid (n 298)

While firms are generally free to set their prices, those with substantial market power have a special responsibility not to exploit their position[312].

The challenge for regulators in addressing excessive pricing lies in defining when prices become excessive and proving that they are not justified by the firm's costs or other legitimate business reasons[313].

In addition to being exclusionary, excessive prices can also be interpreted as a constructive refusal to supply when a dominant firm charges exorbitant prices for access to essential facilities[314].

b) Price Discrimination

When a business buys or sells various quantities of a good or service at prices that don't accurately reflect variations in supply costs, this is known as price discrimination[315]. This may involve charging different prices for comparable goods or the same price when costs differ[316].

A dominant firm should not apply dissimilar conditions to equivalent transactions in a way that places trading partners at a competitive disadvantage.

Price discrimination can be detrimental to competition by distorting downstream markets and limiting fair market access, or it can be exploitative, such as charging higher prices to consumers who have limited purchasing power[317].

[312] Whish R and Bailey D, (n 54)
[313] Ibid (n 298)
[314] Whish R and Bailey D, (n 54)
[315] ibid
[316] Ibid
[317] Whish R and Bailey D, (n 54)

Anti-competitive Agreements

Competition law prohibits agreements between businesses that restrict competition. This includes both explicit agreements, such as formal contracts and implicit or "gentleman's agreements" where businesses informally collude to manipulate the market[318]. There are two main types of anti-competitive agreements:

a) Horizontal Agreements

Competitors at the same supply chain level enter into horizontal agreements. Price-fixing is the most prevalent type, in which companies agree to set prices at a specific level, thereby undermining the inherent competitive forces in the market. Because they erode the competitive process and result in higher prices, lower output, and less innovation, horizontal agreements are especially detrimental to consumers. Market sharing (customer and territory allocation) are other forms[319].

b) Vertical Agreements

Companies at various supply chain levels, like manufacturers and distributors, enter into vertical agreements[320]. When they contain provisions that limit competition, like resale price maintenance, where a manufacturer sets the lowest price a retailer may charge for its goods, these can become problematic[321]. Certain agreements are deemed so detrimental that they are inherently unlawful, but others might be permitted if they can be supported by efficiency arguments or offer pro-competitive advantages[322]. This is especially important for small and medium-sized businesses (SMEs), who might sign agreements to enhance supply chains or cut expenses[323].

[318] Ibid (n 298)
[319] Ibid
[320] Ibid
[321] Ibid
[322] Ibid
[323] Ibid

Merger Control

A key component of competition law is merger control, which governs mergers and acquisitions to prevent unfair market dominance. If two large companies merge, the resulting entity may become so dominant that it reduces competition, potentially leading to higher prices and fewer choices for consumers[324]. Merger control laws in the majority of jurisdictions mandate that companies notify competition authorities of mergers that reach specific thresholds[325]. Then authorities determine whether a substantial lessening of competition is likely to result from the merger. If it does, the merger might be prohibited or permitted under specific restrictions, like selling off a portion of the company[326].

Cartels

These are a specific type of anti-competitive agreement between businesses to engage in practices that restrict competition, such as fixing prices, limiting production, or rigging bids in public tenders[327]. In almost every jurisdiction, cartels are prohibited, and companies that participate risk harsh consequences, such as hefty fines and criminal prosecution[328]. Even informal discussions between competitors about prices or market share can lead to investigations[329]. While typically explicit, firms with market power may engage in more subtle forms of horizontal agreements, such as information sharing or signalling future pricing strategies, which can distort competition without requiring explicit collusion[330].

[324] Whish R and Bailey D, (n 54)
[325] ibid
[326] ibid
[327] Ibid
[328] ibid
[329] Ibid
[330] Ibid

3.4 Specific Abuses of Fair Competition Involving IP rights and how various jurisdictions have made attempts at regulating them

The interaction between competition law and IP rights is most evident in practical scenarios where the exercise of IP rights can impact market dynamics. This section details these.

1. Licensing of IP Rights and Competition Law

Competition law plays a crucial role in the licensing of IP rights, as it facilitates innovation and cooperation, while also fostering competition. However, licensing agreements can have anticompetitive effects, potentially leading to cartels or foreclosing markets for new entrants[331]. Competition authorities must determine whether a specific licensing agreement is more likely to bolster or undermine competition[332]. This means that while IP licensing can stimulate innovation and efficiency, they may also incorporate restrictive clauses that curtail competition[333].

Licensing agreements pertaining to patents, copyright, and trademarks are all subject to scrutiny under competition law frameworks, such as Article 101 of the TFEU[334]. Copyright and software licenses have faced particular assessment regarding restrictions on market partitioning and clauses related to decompilation. The licensing of copyright-protected databases has also been a focal point in cases like the IMS Health Case[335]

[331] Competition Law and Intellectual Property: Balancing Rights and Restrictions https://michaeledwards.uk/competition-law-and-intellectual-property-balancing-rights-and-restrictions/#Abuse_of_Dominant_Position
[332] Ibid (n 114)
[333] OECD, Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences, OECD/LEGAL/0162 (2025)
[334] Whish R and Bailey D, (n 54)
[335] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG

The right of refusal to license is at the very core of IP rights, recognized in international agreements like the TRIPS Agreement[336]. This negative right is pivotal to the exclusivity that IPRs afford, empowering innovators and creators to dictate how and by whom their innovations are used[337]. Many jurisdictions, including the United States, affirm the lawfulness of unilateral refusals to license. However, legal systems also concede that this right is not absolute and may be circumscribed in exceptional situations, particularly when it clashes with overriding public interest or the principles of competition law[338].

IP rights can be abused in licensing arrangements, as they can create an environment conducive to anti-competitive behavior. The structure and content of these agreements, such as exclusivity, territorial restraints, or tying arrangements, can significantly impact competition[339].

Vertical agreements in licensing involve relationships where the agreement affects complementary activities, such as an IPR holder licensing a firm that utilizes the rights as an input in its production. These agreements are often viewed as mechanisms for coordinating incentives between upstream licensors and downstream licensees, thereby lowering transaction costs and curbing opportunistic behavior. However, they can still produce anti-competitive outcomes, especially if enforced by entities holding dominant market positions[340].

Horizontal agreements, where licensors and licensees are actual or potential competitors, are more likely to raise competition concerns than vertical

[336] Ibid (n 184)
[337] Ibid
[338] Ibid (n 184)
[339] Ibid
[340] Whish R and Bailey D, (n 54)

agreements[341]. IP rights can also be exploited to buttress traditional cartel activities by functioning as a horizontal restriction[342].

Exclusive dealing, tying arrangements, exclusive grant-back clauses, direct price-fixing, market allocation among licensees, and cross-licensing arrangements between holders of substitutable technologies to fix common prices constitute abuses of IPRs within licensing agreements[343].

Jurisdictional approaches

Jurisdictions globally have developed distinct approaches to the intersection of IP licensing and competition law.

The United States generally upholds a patent holder's right to refuse licensing. The DOJ-FTC Antitrust Guidelines for the Licensing of Intellectual Property (2017) treat IP akin to any other form of property under antitrust analysis, advocating a rule of reason approach and rejecting the presumption that IP automatically confers market power. The U.S. maintains a high threshold for compelling an IP holder to license its rights[344].

The EU tends to adopt a more interventionist stance. Article 101 TFEU is applied to assess restrictive clauses in licensing agreements, while Article 102 TFEU addresses abuses of a dominant position, which can include refusals to license under specific, exceptional circumstances. The EU also imposes a special responsibility on dominant firms not to impair effective competition and is generally stricter on practices like minimum resale price maintenance[345].

[341] Whish R and Bailey D, (n 54)
[342] Ibid
[343] Ibid
[344] Ibid (n 157)
[345] Robert D. Anderson and William E. Kovacic; The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change; Staff Working Paper ERSD-2017-13 (WTO)

The United Kingdom's courts largely mirror EU competition law principles, particularly concerning whether a refusal to license IP rights can constitute an abuse of dominance. UK courts also scrutinize practices such as tying or bundling of licensed IP with other products or services, often applying principles derived from EU jurisprudence[346].

India possesses robust provisions for compulsory patent licensing, allowing third parties to apply for a license if, after three years, an invention is not worked locally or is not available at an affordable price. Indian courts have also shown a greater openness to compelling the licensing of essential technologies under abuse-of-dominance rules[347].

South Africa's competition law does not explicitly mandate compulsory licensing. However, Section 8(1)(c) of its Competition Act prohibits the refusal to supply essential facilities or access to any service to a competitor[348]. By analogy, if a patented invention or network were deemed indispensable, South African authorities could theoretically order access[349]. Public interest considerations play a significant role in the South African competition regime[350].

Cases

- EU

IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG: The ECJ held that a dominant firm's refusal to license a copyright-protected database (a brick structure

[346] Ibid (n 121)
[347] Mor Bakhoum; Intellectual Property Rights (IPRs) Competition Law and Excessive Pricing of Medicines (Access to Medicines and Vaccines (pp.277-296) 2021)
[348] Ibid (n 228)
[349] Ibid (n 232)
[350] Ibid (n 97)

for pharmaceutical sales data) could constitute an abuse of dominance under exceptional circumstances. These include if the license is indispensable for carrying on business in a secondary market, the refusal is likely to exclude all competition on that market, it prevents the emergence of a new product for which there is potential consumer demand, and the refusal is unjustified. This case is a key example of the application of the essential facilities doctrine to intellectual property

Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (Magill): In this the ECJ found that the refusal by broadcasters, who held a dominant position, to license their copyrighted TV program listings was an abuse. This refusal prevented the emergence of a new product (a comprehensive weekly TV guide) for which there was clear consumer demand, and the refusal was without objective justification.

- UK

Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd & Conversant Wireless Licensing SÀRL v Huawei Technologies (UK) Co Ltd and ZTE Corporation

This landmark Supreme Court case confirmed that UK courts have the jurisdiction and are competent to determine global FRAND license terms for a multi-national SEP portfolio. It also established that a SEP holder can obtain an injunction against an implementer who is unwilling to take a license on the terms determined by the court to be FRAND. The ruling emphasized that FRAND implies a single set of fair, reasonable, and non-discriminatory terms, though what is FRAND can fall within a range and can vary based on the specific circumstances of different licensees. UK

courts generally mirror EU law principles regarding refusal to license and abuse of dominance, as seen in their application of principles from cases like *Magill*.

- US

In Re Independent Service Organizations Antitrust Litigation the Federal Circuit upheld Xerox's unilateral right to refuse to sell its patented parts and license its copyrighted diagnostic software to Independent Service Organizations (ISOs). The court affirmed that exclusionary conduct by a patent or copyright holder is generally lawful unless linked to illegal tying, fraud on the Patent Office, or sham litigation. This case strongly supports the IP holder's right to exclude.

In Data General Corp. v. Grumman Systems Support Corp the First Circuit ruled that a refusal to license copyrighted diagnostic software was not per se anticompetitive. However, it acknowledged that such refusals could violate antitrust laws if they were part of a scheme to unlawfully expand market control or suppress competition in an adjacent market, though the burden of proof for such claims is high.

In FTC v. Qualcomm Inc. (2020) the Ninth Circuit reversed a district court decision that had found Qualcomm's SEP licensing practices including a “no license, no chips” policy and refusal to license to rival modem chip suppliers violated antitrust laws. The appellate court found that Qualcomm's conduct, while potentially aggressive, did not meet the high standard for antitrust liability in the context of its IP rights

- India

In FICCI Multiplex Association of India v. UPDF the Competition Commission of India (CCI) found that a collective refusal by film producers and distributors to

license their films to multiplexes, with the aim of dictating terms, constituted an anti-competitive agreement that limited market access and harmed consumers.

CCI v. Google LLC & Ors. (2023)[351] the CCI found Google to have abused its dominant position in multiple markets in the Android mobile device ecosystem. Practices deemed anti-competitive included restrictive licensing terms for its Play Store and mandating the pre-installation of its entire suite of applications (Google Mobile Services). Google was fined and directed to cease and desist from such practices and modify its conduct, including offering fairer licensing terms for app developers and OEMs.

- South Africa

In Hazel Tau & others v. GlaxoSmithKline (Pty) Ltd and Boehringer Ingelheim (Pty) Ltd: CCSA secured voluntary licensing agreements from pharmaceutical firms, effectively achieving outcomes akin to compulsory licensing through competition law, due to the failure of statutory compulsory licensing provisions.

In Multichoice Group Ltd and Caxton and CTP Publishers and Printers Ltd[352] the Competition Tribunal dismissed allegations that Multichoice, a dominant broadcaster, had abused its dominance in relation to digital content licensing and its refusal to license certain sports rights. However, the case underscored the continued scrutiny of IP-linked exclusivity agreements in media markets, clarifying that not all exclusivity arrangements violate competition law unless they demonstrably harm market access or substantially prevent or lessen competition.

[351] Google LLC v Competition Commission of India 2023 SC 88 Civil Appeal Number 229 of 2023
[352] Caxton And CTP Publishers And Printers Limited and Others v Multichoice Proprietary Limited and Others (140/CAC/MAR16, 08/36380) [2016] ZACAC 2 (24 June 2016)

2. Predatory pricing

A dominant firm setting prices below cost to eliminate competitors, with the intent of raising prices later is anti-competitive[353]. This strategy, combined with intellectual property rights, creates significant entry barriers[354]. If proven, it violates competition law. India's Competition Act 2002 explicitly prohibits predatory pricing by dominant enterprises under Section 4(2)(a)(ii)[355]. In the EU, landmark cases like ***AKZO Chemie***[356] and ***Tetra Pak***[357] have established tests for identifying predatory pricing, focusing on pricing below average variable cost or below average total cost with an intentional plan to exclude competitors. Distinguishing legitimate aggressive pricing from anti-competitive predation in IP-intensive markets is challenging, especially in sectors like software or digital content.

Price squeezing

This is where an upstream IP owner, who also competes downstream, charges high prices for an IP-derived input while maintaining low retail prices for its own downstream product, preventing the downstream competitors from operating profitably[358]. While not exclusive to pure IP cases, it is important to remain vigilant to situations where an IP holder controls such and uses it to squeeze rivals, for example, through tying practices in platform services. This practice is particularly potent when the upstream input is an IP-protected technology, granting dominant firms control over a critical input[359]. In the EU, price squeezing is recognized as an

[353] Ibid (n 282)
[354] Whish R and Bailey D, (n 54)
[355] Gurjar Kritika; IPR and Competition Law a Tussle or An Interplay (2024). Available at SSRN: https://ssrn.com/abstract=4781112 or http://dx.doi.org/10.2139/ssrn.4781112
[356] AKZO Chemie BV v Commission of the European Communities (1991) C-62/86, [1991] ECR I-3359
[357] Tetra Pak International SA v Commission of the European Communities C-333/94 P, [1996] ECR I-5951, OCL 170 (EU 1996)
[358] Whish R and Bailey D, (n 54)
[359] Ibid (n 282)

exclusionary abuse under competition law, highlighting how market power can be leveraged to foreclose competition[360].

Excessive pricing

It refers to charging excessively high prices for IP-protected goods, especially by IP holders with significant market power[361]. In the EU, while excessive price as a stand-alone abuse under Article 102 TFEU is controversial, the European Commission successfully intervened in cases like Aspen Pharmacare, where the company increased prices by up to 1,000% on off-patent cancer medicines[362]. The Aspen case further highlighted that companies can exert monopolistic power not due to active IP protection, but due to barriers to generic entry and the absence of effective substitutes, often without additional R&D investment to justify price increases. The ***Pfizer/Flynn case*** in the UK involved a 2600% price hike on epilepsy medication[363], demonstrating how post-patent pricing can remain unregulated in the absence of effective market competition, leading to interventions by competition authorities using cost-plus pricing assessments and contextual analyses.

In the US, antitrust law generally permits monopolists to raise prices unless the price hike indicates broader monopolization, lacking a clear excessive pricing doctrine per se[364].

Conversely, in India, while there is no explicit excessive pricing clause in the Competition Act, the Patents Act allows for compulsory licensing if a patent holder fails to make the invention available at reasonably affordable prices[365].

[360] Whish R and Bailey D, (n 54)
[361]Ibid (n 107)
[362] https://ec.europa.eu/competition/antitrust/cases/dec_docs/40394/40394_235_3.pdf
[363] https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs
[364] Ibid (n 157)
[365] Ibid (n 184)

In South Africa, courts, as clarified in Sasol v Commission, have held that a patent owner's R&D cost does not justify an abusive price increase. The Hazel Tau & others v. GlaxoSmithKline (Pty) Ltd and Boehringer Ingelheim (Pty) Ltd case in South Africa highlighted the potential for competition law to address issues of access and affordability related to patented essential goods through allegations of excessive pricing[366].

The ***AB Volvo v. Erik Veng (UK) Ltd***[367] case in the ECJ accepted the general right to refuse licensing but found such refusals could be abusive if exercised arbitrarily, discriminatorily, or with excessive pricing that harms consumers or impedes innovation.

In copyright, excessive pricing for royalties or access to protected works is actionable under abuse-of-dominance rules when prices bear no relation to value or cost[368].

3. Pooling

Pooling refers to agreements between two or more owners of differing intellectual property to license to each other or to third parties[369]. These arrangements can offer pro-competitive benefits such as integrating complementary technologies, promote interoperability, especially where multiple patents are essential to a single standard, lowering transaction costs for multiple licenses, and preventing expensive litigation over overlapping rights[370]. However, pooling can also be used for anti-competitive goals like price fixing, restricting output, or allocating territories[371]. Concerns also

[366] Ibid (n 232)
[367] Volvo v Erik Veng (238/87) [1988] ECR 6211
[368] Ibid (n 282)
[369] ibid (n 6)
[370] ibid
[371] ibid

arise if non-essential patents are included or if access is denied to non-members. Pooling and cross-licensing arrangements among competitors inherently carry a higher risk of collusion[372]. In the US, U.S. v. New Wrinkle found pooling to facilitate price-fixing[373].

4. Cross-Licensing

Cross-licensing arrangements, similar to pooling, involve agreements between several IP holders to license to one another or to outside parties[374]. These arrangements are common in industries with complex technologies and overlapping patents[375]. Cross-licensing can be pro-competitive by promoting efficiency when technologies are complementary, facilitating technology sharing, and reducing litigation[376]. However, if they involve substitutable technologies or do not provide compensating efficiencies, they may reduce competition, lead to trade restrictions, create covert market allocations, or deter new entrants[377]. Exclusion from cross-licensing among parties with collective market power can also hinder competition.

5. Patent Thickets

Patent thickets are situations where an overlapping set of patent rights requires firms seeking to commercialize new technology to obtain licenses from multiple patentees[378]. This phenomenon is common in industries like computing and telecommunications[379]. Patent thickets complicate innovation and

[372] Ibid (n 199)
[373] Gurjar Kritika; IPR and Competition Law a Tussle or An Interplay (2024). Available at SSRN: https://ssrn.com/abstract=4781112 or http://dx.doi.org/10.2139/ssrn.4781112
[374] ibid (n 6)
[375] Pierre Régibeau and Katharine Rockett; The Relationship Between Intellectual Property Law and Competition Law: An Economic Approach (2004) https://repository.essex.ac.uk/2851/1/dp581.pdf
[376] Organisation for Economic Co-operation and Development (n 130)
[377] ibid (n 6)
[378] Ibid (n 345)
[379] ibid

commercialization by raising transaction costs, increasing legal risks, where a product incorporates numerous patented components, each requiring a separate license. This accumulation of patents can stifle innovation, where too many property rights impede overall progress[380].

While competition law could theoretically break up thickets through compulsory cross-licensing, most jurisdictions encourage solutions through patent offices or private bargaining, such as the formation of patent pools[381]. The EC has noted that pharmaceutical companies have secured hundreds or even thousands of patents to protect the same medicine, creating patent clusters that deter generic entry due to legal uncertainties. In South Africa, patent thickets are employed in the pharmaceutical sector to obstruct generic competitors, sustaining artificial monopolies and contributing to excessive pricing[382].

6. Evergreening

Evergreening is particularly prevalent in the pharmaceutical sector, where brand-name drug manufacturers make minor modifications to an existing patented product to obtain new patents, thereby extending the life of the patent and delaying generic competition[383]. These modifications often involve new formulations that may offer little therapeutic benefit but are sufficient to secure new patent protection, effectively extending monopoly profits and delaying the entry of cheaper alternatives[384].

[380] Ibid (n 114)
[381] Ibid (n 345)
[382] Ibid (n 228)
[383] ibid
[384] Ibid (n 119)

Evergreening is widely criticized as anti-competitive because it undermines public interest in access to affordable medicines and stifles follow-on innovation[385]. It exploits the boundaries between what constitutes a patentable invention and what constitutes an anti-competitive practice, by extending market exclusivity through incremental, non-transformative changes.

India's Patents Act attempts to address this vice through Section 3(d), which prevents the patenting of mere new forms of known substances unless they show significantly enhanced therapeutic efficacy, serving as a statutory response to evergreening[386].

7. Patent Trolls

Patent trolls, formally known as Non-Practicing Entities (NPEs), are entities that acquire patents not to produce goods or services, but primarily to assert them against alleged infringers, often through litigation or threats of litigation, to extract licensing fees[387]. This practice can stifle innovation and deter market entry, particularly for small and medium enterprises (SMEs) that lack the resources to defend against costly and protracted legal battles[388]. Patent trolls show flaws in the patent system as they shift focus from productive innovation to rent-seeking through litigation, hampering legitimate innovation.

8. Pay-for-Delay

Pay-for-delay agreements, also known as reverse payment settlements, are a type of anti-competitive practice found mostly in the pharmaceutical sector. These settlements occur when brand-name drug manufacturers pay generic firms to

[385] Ibid (n 228)
[386] Ibid (n 347)
[387] https://www.law.cornell.edu/wex/patent_troll
[388] Ibid (n 119)

postpone the launch of their cheaper alternatives, effectively extending monopoly profits and delaying generic competition[389].

In many cases, patent infringement disputes lead to agreements between brand-name and generic companies in an effort to prevent competition. The generic is compensated for not entering the market and delaying access to cheaper alternatives through these horizontal agreements, which indicate anti-competitive intent.

Different jurisdictions treat pay-for-delay agreements differently. In the US, the Supreme Court, in FTC v. Actavis, Inc. (2013), established that these reverse payment settlements are subject to antitrust scrutiny under the rule of reason standard, recognizing them as potentially anti-competitive practices and rejecting blanket immunity[390]. Similarly, EU competition authorities have actively tackled pay-for-delay payoffs, imposing significant fines on pharmaceutical companies found to have engaged in such practices, as illustrated in cases like Servier, Lundbeck, and BAT v Commission. The Lundbeck case specifically illustrates how paying generics to stay out of the market violates Article 101 TFEU. In the UK, the CMA has investigated such agreements, finding them to infringe UK competition law for instance in the Paroxetine case[391].

9. Mergers & Acquisitions that Hinder Fair Competition

Mergers and acquisitions involving firms with extensive intellectual property portfolios can significantly alter competitive dynamics, potentially affecting not

[389] Ibid (n 345)
[390] UNCTAD; Examining the interface between the objectives of competition policy and intellectual property TD/B/C.I/CLP/36 (2016)
[391] Whish R and Bailey D, (n 54)

only downstream product markets but also upstream innovation markets[392]. In today's innovation-driven economy, patent portfolios provide both offensive and defensive benefits, serving as critical assets that drive competitive differentiation and protect market position. Authorities scrutinize such mergers to evaluate whether they inhibit innovation, limit access to essential technologies, or create excessive market power that could harm consumers[393]. Traditional merger review often focuses on current product market concentration. However, in IP-intensive industries, mergers can significantly impact innovation markets by combining or eliminating competing R&D efforts[394]. This requires competition authorities to assess not just existing market shares but also the potential for future innovation, which is inherently more speculative and challenging[395]. The acquisition of key patents can create barriers to entry for future innovators, even if current product markets appear unaffected. For example, Google's acquisition of Motorola Mobility was scrutinized by the European Commission for its SEP-related implications, and FRAND commitments were imposed to mitigate competition risks[396]. The US Department of Justice measures the antitrust legality of corporate mergers against guidelines that aim to prevent the creation or enhancement of market power. This ensures that M&A activities, while potentially pro-competitive through synergies, do not lead to undue market concentration or a reduction in the incentives for future innovation.

[392] Ibid (n 375)
[393] Ibid (n 345)
[394] ibid
[395] ibid (n 375)
[396] ibid (n 345)

3.5 Ugandan instances where IP rights have been used to hamper fair competition

- ***Of Multichoice Uganda and its dominance on the Ugandan pay-tv market***[397]

Multichoice, operating as DStv and GOtv, holds a substantial market power in Uganda's satellite tv sector, having significantly influenced media consumption habits over the past three decades. This dominant position has allowed the company considerable leeway in its pricing strategies, which have frequently drawn consumer frustration.

A cornerstone of MultiChoice's market dominance is its strategic leveraging of exclusive broadcasting rights for premium content particularly live sports. These rights, a form of copyright are particularly critical for their popular bundle of sports content channels known as SuperSport. By securing exclusive access to televise highly demanded international sports content in Uganda, Multichoice has had a dominant position in the satellite tv market. This exclusive access has allowed the company to dictate high subscription prices and limit consumer choice, as alternative providers cannot offer the same sought after programming, effectively entrenching Multichoice's monopolistic position in the pay-TV market.

MultiChoice's dominant position in the Ugandan market has recently been challenged by the spread of cheaper “Chinese” streaming devices such as Starsat, Mediastar, Senator Tiktok Pro Forever, Red Tiger Digital Satellite Receiver, Digisat DX Mini Combo[398]. These devices offer unauthorised access to the same international sports content on which Multichoice has built its dominant position in Uganda, and more

[397] https://www.ceo.co.ug/ucc-asks-unbs-to-probe-entry-of-devices-illegally-streaming-multichoice-and-other-pay-tv-content/
[398] https://trumpetnews.co.ug/2025/02/24/why-ugandans-now-prefer-cheap-chinese-devices-over-stale-outdated-and-expensive-dstv/

content from other service providers often through a one-time purchase, making them highly attractive alternatives for consumers dissatisfied with Multichoice's high prices and perceived poor content value. This shift in consumer preference has resulted in significant financial losses for Multichoice over the past 3 – 5 years.

In response to this development, Multichoice has lodged complaints with the Uganda Communications Commission regarding the illegal importation, sale and installation of these streaming devices, alleging violations of its exclusive broadcasting rights. UCC has acknowledged Multichoice's exclusive rights and has issued warnings, seeking intervention from the Uganda National Bureau of Standards to curb the trade of these unauthorized devices. However, the regulatory response has been met with significantly negative public sentiment as most people are viewing it in the way of the regulators siding with a dominant player in the market instead of working out a way to mitigate the excessive pricing which is an abuse of its dominant position.

The MultiChoice scenario vividly illustrates how strong IP rights, specifically exclusive broadcasting rights, can foster market dominance and allow for unfettered pricing power. This exclusivity, while intended to incentivize investment in content acquisition, can be perceived as abusive when it leads to high prices and a lack of content innovation which affects consumer welfare negatively.

- ***The matter of Intel Corp v Intel Computers Ltd*** [399] ***on Trademark Infringement***

This case exhibited exclusionary conduct by the plaintiff, a multinational corporation. We have seen in this very chapter how holders of rights in IP can weaponise litigation to abuse the IP rights they possess against smaller entities. This

[399] Intel Corporation v Intel Computers Ltd (Civil Suit No. 821 of 2019) [2022] UGCommC 90 (9 August 2022)

matter was comparable to that as the plaintiff sought to declare infringement of its trademark against an entity that was not even in the same line of business and was using the mark in good faith. Even though the matter was decided in favour of the defendant, it exhibited how intellectual property may be used to hamper fair competition.

- ***The ARVs shortage in the 90s and early 2000s***

Uganda's HIV/AIDS epidemic highlighted tensions between patent holders and generic drug manufacture. Before 2001, antiretroviral drugs (ARVs) were prohibitively patented and expensive. The Doha Declaration on TRIPS flexibilities allowed Uganda to import and later develop generic versions of ARVs, lowering costs. However, the initial patent monopoly barriers had kept prices high and limited access to the medication.

This section has shown that there is a need to address the interplay between IP rights and Competition law in Uganda's jurisprudence due to the ease with which consumers and competitors are unfairly treated by dominant holders of rights in IP. Thus the relevant institutions and policy makers ought to look into streamlining the two legal disciplines for the sake of the consumer and the competitors in inferior positions.

3.6 Conclusion

This chapter has explored the principles of intellectual property and how they may hinder fair competition. It has further explored the key concepts of competition law which are at the intersection of the two legal disciplines. This is to establish the particular ways in which and how the two legal disciplines interact. Furthermore, this chapter has looked at the specific anti-competitive practices and abuses

involving IP rights in the US, UK, India and South Africa. In this chapter went further to delve into the intersection between IP rights and competition law in the Ugandan setting by looking at current instances where IP rights have affected fair competition. All of this allows for a comparison to be made regarding the jurisdiction with the most appropriate balance between the enjoyment of IP rights and the enablement of fair competition and what can be learnt from each different jurisdiction for the policy makers in Uganda to try and emulate.

4.0 CHAPTER FOUR

INTERNATIONAL BEST PRACTICES AND HOW THEY CAN APPLY TO UGANDA

4.1 Introduction

This chapter is looking at the international best practices from the different jurisdictions and base on that to make recommendations of best practices that may be adopted and effectively applied to the Ugandan context. This chapter is also to summarily recap what has been looked at in this research and draw a conclusion regarding a way forward.

4.2 International Best Practices from various jurisdictions that enable an equilibrium to be maintained between the enjoyment of IP rights and enablement of fair competition.

- The Merger Doctrine in US Copyright Law

The merger doctrine is an important part of U.S. copyright law that says you can't protect an idea if its expression and the idea itself are so closely linked that they can't be separated. The doctrine keeps copyright from becoming a de facto monopoly over basic ideas by not giving exclusive rights in cases where there are only a few or even one way to express those ideas[400].

The merger doctrine is based on the idea that copyright only protects expressive forms, not the ideas themselves. When functional limitations, industry standards, or concerns about efficiency make other expressions impossible, the expression of the idea merges with the idea and must stay uncopyrightable. This internal limiting factor works together with fair use and copyright misuse to stop overreach before it

[400] Ariel Katz & Paul-Erik Veel; BEYOND "ESSENTIAL FACILITIES": INNOVATION, INTELLECTUAL PROPERTY AND COMPETITION POLICY ACROSS THE ATLANTIC (2010)

happens[401]. It does this by putting competition-friendly guardrails right into the copyright system instead of relying on outside antitrust enforcement.

While the U.S. embeds the merger doctrine as an ex-ante check within its copyright system, the European Union lacks a parallel internal limitation. Instead, EU authorities often invoke competition law ex post as illustrated by the Magill case.

This contrast highlights two policymaking philosophies: the U.S. approach internalizes competition safeguards within IP law, whereas the EU relies on external regulatory tools to correct overreach.

The merger doctrine encourages an environment where both creators and competitors can come up with new ideas without worrying about the law by keeping core ideas and functional building blocks in the public domain. It stops unnecessary monopolies, helps new businesses get started, and strikes a balance between protecting creativity and not stifling the shared foundations of future progress.

- The Doctrine of Exhaustion (First-Sale Doctrine)

The Doctrine of Exhaustion, also known as the first-sale doctrine, limits an IP rights holder's control over a specific item once it has been legitimately sold[402]. After an authorized first sale of a patented, trademarked, or copyrighted product, the IP owner cannot restrict its resale, transfer, or distribution[403]. This rule stems from the intangible nature of IP separate from the tangible goods it protects and ensures that downstream owners enjoy full ownership rights, preventing absurd perpetual controls[404].

[401] Ibid
[402] WIPO; INTERFACE BETWEEN EXHAUSTION OF INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW; CDIP/8/INF/5 REV
[403] Marco Colino S (ed) (n 58)
[404] ibid

The territorial nature of IP often clashes with free-trade principles. TRIPS Article 6 permits WTO members to choose national, regional, or international exhaustion regimes without WTO dispute challenge, underscoring national sovereignty in balancing IP control against consumer welfare and competition[405]. The Paris Convention similarly preserves territorial independence while allowing exhaustion flexibility[406]. More permissive regimes generally lower prices and broaden access via parallel trade; restrictive regimes sustain segmented markets and price discrimination. International bodies like UNCTAD recommend broader exhaustion for developing economies to encourage affordability and technology diffusion while cautioning against undermining legitimate IP incentives[407].

By extinguishing post-sale IP controls, exhaustion prevents anti competitive practices such as resale price maintenance, territorial segmentation, and downstream use restrictions. It fosters robust secondary markets, consumer choice, and lowered prices[408]. Exhaustion also constrains dominant IP holders from leveraging rights to impede competition, making it a pivotal doctrine at the intersection of IP protection and competition policy[409].

- Case-by-Case/Rule-of-Reason Analysis

A creature of the US legal framework, the rule-of-reason doctrine in antitrust law has emerged as the most effective way to assess enforcement and licensing of intellectual property[410]. This is because it is more flexible than strict per se rules and the blanket IP exemptions. With this effects-based approach, authorities look

[405] Ibid (n 103)
[406] Ibid (n 402)
[407] Ibid
[408] Ibid
[409] Ibid (n 402)
[410] Ibid (n 157)

at the actual or likely competitive impact of behaviour by weighing pro-competitive benefits such as technology dissemination, economies of scale, innovation incentives against anti-competitive harms like market foreclosure, collusion, tied-product leveraging[411].

It is especially applied in tying & bundling, resale price maintenance, as well as patent pools & cross-licensing[412].

By moving away from blanket prohibitions, the rule of reason approach ensures that competition authorities can adapt to novel IP and competition hurdles to strike a balance between fostering innovation and preventing abuse[413].

- Utilizing TRIPS Flexibilities

The Agreement on Trade-Related Aspects of Intellectual Property Rights embeds critical flexibilities particularly in Articles 6, 8, 31, and 40 that empower WTO members states to tailor IP enforcement in support of competition policy, access to essential goods, and public policy objectives[414].

Article 6 Permits members to adopt national, regional, or international exhaustion regimes, allowing parallel importation to lower prices and enhance cross-border competition.

Article 8 Recognizes members' rights to adopt measures necessary to protect public health, nutrition, and to promote the public interest in sectors of vital importance.

[411] OECD, Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements, OECD/LEGAL/0248 (2025)
[412] ibid
[413] Ibid (n 157)
[414] Ibid (n 103)

Article 31 Authorizes compulsory licenses including for anti-competitive conduct, non-working of patents, or public health needs ensuring access to essential technologies and medicines without infringing WTO obligations.

Article 40 Encourages members to address licensing practices and other restrictive provisions that may unduly restrain trade or competition, such as unjustified territorial restrictions or price-fixing clauses.

These flexibilities strike a balance between incentivizing innovation and safeguarding consumer welfare. By enabling compulsory licensing and liberal exhaustion regimes, monopoly pricing can be mitigated, technology transfer can be fostered, and dynamic competition can be encouraged. Such measures are particularly vital for developing countries facing public health emergencies or high-cost patented medicines[415].

For instance, India has actively employed TRIPS flexibilities in its pharmaceutical sector, issuing compulsory licenses and endorsing international exhaustion to facilitate affordable access to life-saving drugs[416].

South Africa introduced an explicit mandatory licensing framework for public health, alongside parallel importation and government-use provisions, aligning its domestic patent law with TRIPS flexibilities through an amendment to improve access to medicines[417].

[415] Yu, Peter K., The Objectives and Principles of the TRIPs Agreement. Houston Law Review, Vol. 46, pp. 797-1046, 2009, Available at SSRN: https://ssrn.com/abstract=1398746
[416] Ibid (n 347)
[417] Ibid (n 228)

- Issuing clear guidelines and directives that clarify how competition law treats IP-related conduct

To provide businesses with legal certainty and predictability, many jurisdictions issue comprehensive guidelines or rulings that clarify how competition law treats IP-related conduct. The OECD explicitly recommends that authorities provide such public guidance on IP practices under competition law[418].

Prominent examples include the EU Technology Transfer Block Exemption Regulation (TTBER) and its accompanying guidelines, which outline safe harbors for certain types of IP licenses that are presumed to be pro-competitive[419]. Similarly, the U.S. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property serve a comparable role in signalling enforcement priorities[420]. Such transparency helps innovators design compliant licensing agreements and reduces the risk of inadvertent breaches, thereby fostering legitimate IP commercialization. This approach supports the overall goal of encouraging innovation by providing a predictable regulatory environment.

- Appropriate and Tailored Remedies to the specific facts of the case and should fully address the identified harm

When competition law is breached due to IP abuses, the remedies imposed should be designed to restore market conditions effectively[421]. International best practice dictates that remedies must be tailored to the specific facts of the case and should fully address the identified harm[422]. These remedies may include terminating the

[418] Ibid (n 411)
[419] Marco Colino S (ed) (n 58)
[420] Ibid (n 157)
[421]Ibid (n 421)
[422] Ibid

anti-competitive conduct, imposing structural remedies such as divestitures of IP assets, or, in certain circumstances, compelling licensing of the IP.

Critically, when a court or competition authority compels the licensing of IP as a remedy, it should ensure reasonable compensation to the rights-holder. This dual requirement balances the need to remedy anti-competitive exclusion with the imperative to respect innovation incentives[423]. It ensures that compulsory licensing, while a powerful intervention, does not become so punitive as to deter future R&D. The goal is to correct market distortions while preserving the fundamental incentive for future innovation by providing a fair return on investment, even if under compulsion.

- National and International Cooperation as well as Inter-Agency and Multilateral Coordination in IP and Competition Policy

Effective governance of the IP competition interface hinges on seamless domestic and international collaboration[424]. National competition authorities and intellectual property offices should forge formal partnerships conducting joint sector inquiries in IP-intensive fields like pharmaceuticals and telecoms, sharing evidence on patent holdings and licensing practices, and aligning policy guidelines to avoid market distortions. Coordinated enforcement actions ensure that anti-competitive IP abuses don't slip through regulatory gaps. Beyond borders, multilateral forums such as the OECD Competition Committee, WIPO's Development Agenda, and UNCTAD facilitate the exchange of case studies, best practices, and capacity-building[425], while regional models like the EU's integrated framework or COMESA and AfCFTA protocols offer

[423] Ibid (n 346)
[424] OECD, Recommendation of the Council on Intellectual Property Rights and Competition, OECD/LEGAL/0495 (2025)
[425] Ibid (n 130).

blueprints for embedding competition disciplines in IP regimes. Bilateral and plurilateral cooperation agreements further enable joint investigations and mutual assistance. Together, these domestic and cross-jurisdictional efforts foster consistent standards, reduce legal uncertainty, and extend enforcement reach. Although overcoming institutional silos and harmonizing legal frameworks remains challenging, such coordinated action is essential to balance innovation incentives with robust competition safeguards.

- Advocacy and Capacity Building

Effective balance requires informed enforcement and proactive engagement. Competition authorities and IP offices increasingly cooperate, with WIPO and the OECD encouraging training of IP judges and agencies on competition issues. Organisations like the International Competition Network (ICN) facilitate working groups on IP-competition convergence. Many nations now promote FRAND commitments for standard patents, require transparency in licensing, and encourage IP holders to commit to non-anti-competitive behaviour. This fosters a competition culture among stakeholders, including government agencies, academia, business groups, and consumer associations.

4.3 Recommendations for Uganda

Uganda, having recently enacted its Competition Act and with an IP legal system just starting to be effective, is at a pivotal juncture in shaping its IP-Competition interface. Drawing upon international best practices and the comparative experiences of the US, EU, UK, India and South Africa the following recommendations are proposed to effectively apply these best practices within Uganda's intellectual property and competition law framework.

- Review and Refine aspects of the legal framework governing the IP-Competition interface for clarity

Uganda's Competition Act in Section 9(7) currently grants a broad exemption for enforcing intellectual property rights insulating IP holders from competition scrutiny even when licensing terms may be collusive or exclusionary. While this recognizes the legitimacy of protecting IP, it risks shielding anti-competitive conduct and stifling innovation in dynamic sectors like digital markets and pharmaceuticals. To align with international best practices, Uganda could narrow Section 9(7) by introducing a reasonableness test akin to India's requirement that conditions be genuinely necessary and proportionate to IP protection and empower a body which will be in charge of enforcing competition law to review abusive licensing terms. Alternatively, as Australia did in 2019, Uganda might repeal its IP exemption altogether and apply an effects-based rule-of-reason analysis, subjecting any restrictive IP licensing practice to competition law if it harms market dynamics. Such reform would shift the default from blanket immunity toward targeted scrutiny of market effects, balancing IP incentives with robust competition safeguards.

Uganda's new Competition Act rightly highlights refusal of access to an essential facility and tying arrangements as abuses, but it should be bolstered by clear, IP-specific definitions and by enshrining TRIPS Article 40 principles. In practice, detailed guidelines must specify when a patent, copyright or proprietary data qualifies as an essential facility drawing on the CJEU's Magill and IMS Health tests for indispensability and absence of substitutes and delineate how tying prohibitions apply to bundling IP-protected products or licenses. Explicitly incorporating TRIPS Article 40 would affirm that antitrust measures can invalidate licensing restraints

with adverse trade or technology-transfer effects, such as unjustified territorial limits or price-fixing clauses. Together, these legislative clarifications and international benchmarks will give the Uganda the doctrinal precision needed to strike the right balance between safeguarding IP incentives and preventing anti-competitive licensing practices.

- Publish Clear Guidelines

The state policy makers ought to consider publishing clear, comprehensive IP-licensing guidelines modelled on the EU Technology Transfer Guidelines to give businesses the certainty they need to self-assess compliance. These guidelines must identify generally acceptable clauses such as narrowly tailored field-of-use exclusivity and reasonable, non-exclusive grant-backs and flag suspect provisions including price-fixing royalties, market-allocation restrictions, or tying arrangements lacking pro-competitive justification. To further foster innovation and ease regulatory burdens, the guidelines ought to establish exemptions regimes for public interest research and development collaborations.

- An enabling specialised institutional framework

The state could look into setting up specialised bodies to deal with competition related matters. Countries like South Africa have a Competition Commission, A Competition Tribunal and a Competition Appeals Court. Which shows that they prioritise matters of competition for the good of the nation.

- Align policies with international framework

Uganda should deepen its engagement with international and regional IP and competition frameworks to strengthen the practice of balancing IP and

Competition Law. Practically, this means aligning domestic law with TRIPS flexibilities and WIPO best practices

By adopting these measures Uganda can better balance IP exclusivity with competition. These steps draw directly on international best practices and the comparative experience of its peers, ensuring its markets remain both innovative and competitive

4.4 Summary and conclusion of the research

This research has explored the complex relationship between intellectual property rights (IP rights) and competition law, a critical nexus for fostering innovation, economic development, and consumer welfare. IP rights have been seen to grant exclusive control over intellectual assets, which serves as an incentive for innovation, creativity, and investment, addressing the free-rider problem and encouraging public disclosure of inventions. Competition law has been seen to protect the competitive process itself, preventing market entry barriers, dismantling monopolies, and ensuring fair competition. This benefits consumers through lower prices, wider choices, and enhanced efficiency.

The interaction between these two legal domains revealed that despite their distinct mechanisms, both IP rights and competition law share the overarching objectives of promoting innovation, economic growth, and broader social welfare. The international consensus, strongly influenced by frameworks like the TRIPS Agreement, recognizes this intersection and legitimizes national efforts to curb abuses of IP rights through competition law. Global bodies such as WIPO, the OECD, and UNCTAD advocate for a balanced approach, generally favouring effects-based analyses over rigid per se rules when assessing conduct involving IP rights.

Competition authorities worldwide intervene when the exclusivity granted by IP rights is leveraged to engage in anti-competitive practices that stifle further innovation, harm consumer welfare, or unjustifiably exclude competitors. Such practices can include abusive licensing terms, unilateral abuses of dominance, the formation of cartels facilitated by IPR pooling, anti-competitive merger activities involving significant IPR portfolios, or strategic patenting practices like patent thickets and evergreening designed to unlawfully prolong market exclusivity or deter entry.

Chapter Four of the research demonstrates that while there is no single, universally applicable model for balancing IP rights and competition law, common principles and best practices do emerge. National approaches vary, reflecting distinct legal traditions, economic priorities, and developmental stages. Key international best practices include the adoption of effects-based analysis, the importance of clear guidelines for businesses, Regional frameworks in Africa, such as those within COMESA, the AfCFTA, and the EAC, are also increasingly integrating IP and competition policies, signalling a commitment to harmonized enforcement.

For Uganda, the recent enactment of its Competition Act presents a significant and timely opportunity to learn from these international and regional experiences and to refine its own IP and Competition framework. To foster a legal environment that effectively rewards creators while safeguarding market contestability and promoting consumer welfare, this research culminates in several recommendations.

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