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Introduction: Towards a Fresh Contribution to a Critical Policy Dialogue

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Background to This Volume

The relationship between competition policy and the intellectual property (IP) system has at times been cast in terms of tension and even conflict. Both at the policy level and in actual practice, it can be tempting to assume that the two fields are inevitably divided by divergent or polarized sets of values and theoretical assumptions, by their distinct policy constituencies and private sector counterparts, and by incompatible conceptions of how commercial activity progresses public welfare – differences that can seem to be almost structural and incapable of coherent resolution. It is still not uncommon to hear references to the 'antitrust community' and the 'intellectual property community' as distinct, opposed groupings, seemingly fated to remain in agonistic counterpoint to one another. Even the common trope of 'balance' between the two fields is inherently zero-sum – by this logic, adding a certain degree of competition promotion on one side of the balance leads to a loss of IP protection on the other, and vice versa.

Thankfully, both the underlying policy framework of both fields and their interaction in actual practice can put to rest this superficially tempting but simplistic caricature of what is undoubtedly and ineluctably a complex, subtle and dynamic interrelationship. The two fields are increasingly seen as complementary and even mutually interdependent. Indeed, affirmation of the shared and complementary objectives of competition policy and the IP system has been a staple of competition agency guidelines for more than the last two decades.[1]

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[1] This evolution is reviewed in Anderson and Kovacic, 'The Application of Competition Policy vis-à-vis Intellectual Property Rights: The Evolution of Thought Underlying Policy Change', this volume, Chapter 2.

As an instrument of economic and development policy, the IP system cannot live up to its own policy objectives unless it is operating within a competitive market framework: contrary to the some more critical accounts, the IP system is not established to create 'monopolies' for their own sake. And the innovation, creativity and diversification – the dynamism – intended to be enabled and progressed by the IP system are appropriately understood to be valuable, welfare-enhancing forms of competition in their own right, not alternatives to competition.

The challenge of monitoring, understanding and optimizing the linkages between competition policy and IP has become an essential task and a positive responsibility for the contemporary policymaker in a host of interlocking fields. It is a central consideration in scholarly analysis, policy debate and the practice of law and policy dealing with innovation and creativity, technology policy and the impact of new technologies, international trade and development, consumer welfare, and concrete initiatives to ensure access to the fruits of innovation in areas as diverse as medicines and internet connectivity. The questions raised over the pivotal relationship between competition policy and the IP system have arisen in international relations and, increasingly, in an ever more diverse range of domestic jurisdictions, creating a compelling practical need for a broad-based, empirically-grounded, geographically inclusive and interdisciplinary dialogue – a need which has become all the more accentuated at a time of greater international interconnectivity and ever more complex and diverse cross-border economic relations.

This volume seeks to contribute to exactly this vital dialogue. It draws on a diverse range of international expertise and practical experience to enhance our understanding of the fast-evolving interrelationship between competition policy, the IP system and international trade and investment flows in today's global and knowledge-based economy. It aims both to survey the field systematically and to yield practical and policy insights that will be of interest to scholars and practitioners, including those working in national IP offices, competition agencies and international trade policy administrations, in addition to universities, think-tanks and other institutions. This survey is consciously based on a richer comparative and international perspective than has characterized past work in this area, recognizing in particular the important developments in emerging economies alongside the traditional, and more closely studied, established jurisdictions.

Existing Scholarship

To be sure, the volume builds on an impressive body of existing scholarly research on related topics, including several high-quality edited research volumes published in recent years. The more recent publications which we have found valuable include Roger D. Blair and D. Daniel Sokol (eds), *Antitrust, Intellectual Property, and High Tech* (Cambridge University Press, 2017); Steven D. Anderman and Ariel Ezrachi (eds), *Intellectual Property and Competition Law: New Frontiers* (Oxford University Press, 2011); Marcel Boyer, Michael Trebilcock and David Vaver (eds), *Competition Policy and Intellectual Property* (Irwin Law, 2009); Steven D. Anderman (ed.), *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge University Press, 2007); and Josef Drexl (ed.), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar, 2008). Michael A. Carrier (ed.), *Intellectual Property and Competition* (Edward Elgar, Series on Critical Concepts in Intellectual Property Law, 2011) provides a useful compendium of previously published 'classic' work in this subject-area. Robert D. Anderson and Nancy T. Gallini (eds), *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (University of Calgary Press for the Industry Canada Research Series, 1998) provided an earlier survey of related topics.

International Policy Discussions

In addition, several intergovernmental bodies and specialized agencies have examined the interface of competition policy and the IP system, reflecting sustained engagement in this area on the part of national policymakers and a consequent interest in sharing practical experience. Hence, alongside established scholarship, the past work of international organizations also provides a valuable foundation for the renewed international conversation on the interface of IP and competition policy that this volume is intended to inform and promote. We therefore briefly review this past work here, without suggesting that this review is comprehensive.

The WTO Working Group

At the 1996 Singapore Ministerial Conference, WTO Ministers established a Working Group on the Interaction between Trade and Competition Policy ('the WTO Working Group').[2] The mandate given

[2] This section of the chapter draws on material in Robert D. Anderson, 'Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work

to the Working Group at that time was to consider issues raised by Members relating to the interaction of the two policy fields, including anti-competitive practices, and to identify any areas that might merit further consideration in the WTO framework.[3] The ensuing work was most active from 1997 to 2003.

The Working Group gave considerable attention to the relationship between IP rights and competition policy in the early years of its work. Its discussions – centred on an exchange of domestic experience – contain many elements that still remain relevant to possible further work in this subject-area at the multilateral level. For example, the discussion took as a point of departure the recognition that competition policy can be an important factor in balancing the rights of producers under IP legislation, and in counteracting particular abuses. The debate recognized both the costs entailed by overly strict enforcement policies and regulations in the area of technology licensing and the dangers of an overly lax approach. The Working Group also took note of the evolution that has taken place in the enforcement policies of WTO members with experience in this area and attached importance to this as a basis for further analysis.[4]

As part of the checklist of issues suggested for study, the 1998 agenda included a further discussion on the relationship between the trade-related aspects of IP rights and competition policy. Overall, the view expressed was that a basic complementarity exists between IP law and competition law, and that a proper balance should be found in the level

of the WTO Working Group on the Interaction between Trade and Competition Policy', in Thomas Cottier and Petros Mavroidis (eds), *Intellectual Property: Trade, Competition and Sustainable Development* (University of Michigan Press, December 2002), chapter 17.

[3] *Singapore Ministerial Declaration*, Paragraph 20. Available at: www.wto.org/English/thewto_e/minist_e/min96_e/wtodec_e.htm. At the WTO Ministerial Conference in Cancun, Mexico, in September 2003, it was not possible to reach a consensus on the launching of negotiations on a multilateral framework on competition policy as had been proposed by the EU and various other countries in the run-up to the conference. Subsequently, the General Council of the WTO decided, as part of the so-called 'July package' of 2004, that no further work would be undertaken towards negotiations on competition policy (or on the separate issues of investment and transparency in government procurement) for the duration of the Doha Round; see WTO Document WT/L/579, 2 August 2004. Available at: www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm; and for related discussion, see Robert D. Anderson and Hannu Wager, 'Human Rights, Development and the WTO: The Cases of Intellectual Property Rights and Competition Policy' (2006) *Journal of International Economic Law*, 9(3): 707–747.

[4] See, for a more comprehensive discussion, Anderson, above note 1.

of protection accorded to IP rights.[5] However – and most strikingly – members expressed concerns even at that time as to whether the TRIPS Agreement provided enough guidance as to how to assess market abuse linked to IP rights. Summarizing, some highlights of the Working Group's deliberations on this subject are as follows:

- There was wide acknowledgement that competition laws are necessary to prevent abusive practices and ensure that inter-firm rivalry is not restricted to an extent beyond that intended by the IP laws, and thereby that the market assigns a fair and efficient value to such property.[6]
- The discussion in the Working Group recognized that the availability of substitutes for goods and technologies covered by IP rights is an empirical question to be determined on a case-by-case basis.[7] As discussed in this volume, this is a baseline assumption of economics-based approaches to antitrust analysis in this area.[8]
- There was a general recognition that licensing arrangements are normally pro-competitive and are an important vehicle for technology transfer. Where an individual licensing practice needs to be examined, this should normally be done on a case-by-case or 'rule of reason' basis by which the pro-competitive benefits are weighed against anti-competitive effects.[9]
- The point was made that the proper application of competition law should avoid both excessively stringent enforcement approaches, which can lessen innovation, and the weak or ineffective application of such law, leading to the abuse of market power. Either approach can have an adverse effect on output as well as an inhibiting effect on trade.[10]
- The view was also expressed that more attention should be paid to ensuring that IP rights themselves are underpinned by sound competition principles and that they promote global welfare. Over-protection of IP rights can contribute to the entrenchment of horizontal and vertical restraints, for example through patent pooling among competitors and the restriction of parallel imports. Some WTO members

[5] See the Report (1998) of the WTO Working Group on the Interaction between Trade and Competition Policy, WTO document WT/WGTCP/2 of 8 December 1998, Part C(III)(c). Available at: www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.
[6] WTO Document WT/WGTCP/2, above, note 5, paragraph 112.
[7] Ibid., paragraph 115.
[8] See, e.g., Anderson, above note 1.
[9] Ibid.
[10] WTO Document WT/WGTCP/2, above note 5, paragraph 117.

> suggested, further, that future negotiations in the area of IP rights should give equal weight to recognizing the risks of both under- and over-protection of IP rights.[11]

Without yielding agreement on specific negotiating proposals (on which there was no consensus), the Working Group showed significant depth of insight and relative commonality of views on important underlying issues. The suspension of the Working Group and its failure to reach consensus cannot, today, be taken as indicating a lack of interest among WTO members in competition policy and its relation to IP. To the contrary, it indicates the recognition of the long-standing need to cooperate on these issues – the new and emerging rationales in that regard are discussed in the section below.

Competition Policy in the WIPO Development Agenda

Clearly recognizing the need for further reflection on the competition–IP interface, the WIPO Development Agenda[12] tasked the organization with the provision of technical assistance to 'Promote measures that will help countries deal with IP-related anti-competitive practices, by providing technical cooperation to developing countries, especially least-developed countries (LDCs), at their request, in order to better understand the interface between IP rights and competition policies.'[13] WIPO was also instructed to address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues including the links between IP and competition,[14] and to consider how to better promote pro-competitive IP licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs.[15] Consequently, WIPO conducted or commissioned several studies and surveys on matters related to the competition–IP interface, notably on domestic IP and competition agencies, the question of

[11] WTO Document WT/WGTCP/2, above note 5, paragraph 118.
[12] A full account is set out in Nuno Pires de Carvalho, 'Competition Policy in WIPO's Development Agenda', this volume, Chapter 4.
[13] See the WIPO Development Agenda, Cluster A, Recommendation 7. Available at: www.wipo.int/ip-development/en/agenda/recommendations.html; see also Nuno Pires de Carvalho, 'Competition Policy in WIPO's development Agenda', Chapter 4, this volume.
[14] See the WIPO Development Agenda, Cluster B, Recommendation 22. Available at: www.wipo.int/ip-development/en/agenda/recommendations.html.
[15] Ibid., Recommendation 23. Available at: www.wipo.int/ip-development/en/agenda/recommendations.html.

exhaustion of IP rights, IP rights as a barrier to entry, franchising agreements, compulsory licensing and sham litigation.[16]

International Competition Network

The International Competition Network (ICN)[17] Working Group on advocacy has previously dealt with innovation support through competition policy and its interface with IP. Its findings suggest that competition law should (1) take a balanced view of the costs and benefits of a particular restriction, and (2) be enforced where IP rights are being used as instrument for the distortion of competition.[18] Additionally, the Unilateral Conduct Working Group has also delved into IP issues such as refusals to license IP rights and the application of the essential facility doctrine in that regard.[19]

Organization for Economic Co-operation and Development

The relationship of IP and competition policy has also been discussed extensively in the Competition Committee of the Organization for Economic Co-operation and Development (OECD).[20] Besides adopting

[16] See, e.g., 'Interaction of Agencies Dealing with Intellectual Property and Competition Law' (2011). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_1.pdf; 'Studies on the Interface Between Exhaustion of IP Rights and Competition Law' (2012). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_5_rev.pdf; 'An Analysis of the Economic/Legal Literature on the Effects of IP Rights as a Barrier to Entry' (2012). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_6_corr.pdf; 'Survey on Measures to Address the Interface between Antitrust and Franchising Agreements' (2011). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_4.pdf; Survey on Compulsory Licenses Granted by WIPO Member States to Address Anti-Competitive Uses of IP Rights' (2011). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_5.pdf; 'Study on the Anti-Competitive Enforcement of IP Rights: Sham Litigation' (2012). Available at: www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_6_rev.pdf.

[17] See, for relevant background, Hugh M. Hollman and William E. Kovacic, 'The International Competition Network: Its Past, Current and Future Role' (2011) *Minnesota Journal of International Law*, 20: 274–323, at 301.

[18] International Competition Network (ICN), 'Competition can boost and support innovation'. Available at: www.internationalcompetitionnetwork.org/working-groups/current/advocacy/benefits/report/themes/1.aspx.

[19] ICN Unilateral Conduct Working Group, 'Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws' (2010). Available at: www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_ReftoDeal.pdf.

[20] See, e.g., OECD. Available at: www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm.

several non-binding recommendations and a set of related 'best practices',[21] the OECD's work in this area has promoted the regular exchange of views and analysis on competition policy issues through the organization of roundtables, which include submissions from countries and the participation of invited experts.[22] In support of this work, the OECD has published background papers on topics such as those related to anti-competitive practices in the context of standard setting or patents and innovation.[23]

UNCTAD

UNCTAD has also undertaken important work on competition policy vis-à-vis IP rights. For example, in 2016, the 15th Session of the Intergovernmental Group of Experts on Competition Law and Policy examined the interface between the objectives of competition policy and IP with a focus on business practices in the acquisition or use of IP rights which may have an adverse effect on competition and innovation, and how competition agencies and other relevant government bodies may tackle these issues.[24] Discussions related to competition issues in the health sector were held in 2019.[25]

This Volume's Contribution

Given the extent of available literature on the topic, and the extensive past work of international organizations, knowledgeable readers may wonder what new insights the present volume offers, and whether it takes a distinct approach to the issues. The remainder of this chapter attempts to answer these questions. This section explains, in broad terms, the purpose and organization of the book and the fresh insights that it aims to contribute, informed by the more diverse recent experience and

[21] OECD, *Recommendations and Best Practices on Competition Law and Policy*. Available at: www.oecd.org/daf/competition/recommendations.htm.
[22] OECD, *Best Practice Roundtables on Competition Policy*. Available at: www.oecd.org/daf/competition/roundtables.htm.
[23] See, e.g., one.oecd.org/document/DAF/COMP(2019)3/en/pdf.
[24] Intergovernmental Group of Experts on Competition Law and Policy Fifteenth Session, Round Table on 'Examining the Interface between the Objectives of Competition Policy and Intellectual Property' (2016). Available at: http://unctad.org/meetings/en/SessionalDocuments/ciclp2016progRT1_en.pdf.
[25] See UNCTAD. Available at: https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1895.

analytical insights that the remarkable range of international authors have provided.

This volume, while standing respectfully on the shoulders of those mentioned above[26] – both the international policymakers and the impressive array of scholars – aims to complement the existing scholarly literature and international dialogue in five significant ways:

1. The contributions gathered together in this volume address the competition policy–IP interface from a *two-way perspective*: that is, the volume explores not only the application of competition policy toward the exercise of IP rights (the focus of much scholarly work in this area) but also, importantly, the significance of IP for competition and the shared underlying objectives and concerns of both policy fields. Indeed, one theme of the volume is to seek to articulate a more unified doctrinal perspective, embracing both competition policies and the IP system. At the same time, this approach recognizes and draws on the evolving approach of competition authorities over the past two decades in recognizing the inherent complementarity of the two fields.
2. The volume provides a *more widely comparative, globally inclusive and international treatment* of the various topics addressed than has, to our knowledge, been attempted previously. This is manifested not only by several contributions focusing on perspectives and experience in particular jurisdictions (e.g., in Europe; the United States and Canada; Asia; and Latin America) but also in other contributions emphasizing the transnational significance of particular trends and issues, and the role of related international policy instruments including the WTO TRIPS Agreement. The particular interests and perspectives of developing economies are addressed in several chapters.
3. The volume is *interdisciplinary* in nature (embracing both legal and economic approaches) and reflects both *academic and practitioner perspectives*. Indeed, a salient feature of the volume is the contributions of many authors who have been involved directly in the formulation and application of IP and competition policy at the national

[26] Acknowledgement is due to Suzanne Scotchmer, 'Standing on the Shoulders of Giants: Cumulative Research and the Patent Law' (1991) *Journal of Economic Perspectives*, 5(1): 29–41, and in turn to Isaac Newton (https://digitallibrary.hsp.org/index.php/Detail/objects/9792) and Bernard of Chartres for this metaphor. (See R.K. Merton, *On the Shoulders of Giants: A Shandean Postscript* (University of Chicago Press, 1965).)

and/or international levels, in various jurisdictions, in addition to prominent academics in the field.

4. The volume is intended to be directly relevant to contemporary policy and scholarly interests in both developing and developed countries, stemming as it does from the editors' and the authors' professional engagement with the related interests and topical concerns of policymakers, academics and analysts in many countries over an extended period.
5. Somewhat in contrast to much existing literature, the volume aims to show the relatedness of competition policy with the IP doctrine of 'unfair competition'. This is developed not only in a thematic contribution by one of the editors (Taubman) but in the chapters on relevant developments in Chile and in Pakistan, in particular.

While the volume aims to provide insights that are relevant to policy design and implementation in diverse jurisdictions or even worldwide, and to discern and address cross-jurisdictional trends and issues of common interest, it does *not* attempt to set out an overall set of policy recommendations that would necessarily be agreeable to all the contributing authors. Rather, the analysis, conclusions and policy recommendations (if any) of each chapter are the responsibility solely of the individual contributing authors, and do not necessarily reflect the views of the sponsoring organizations or the editors. This approach has, we believe, maximized possibilities for free expression and in-depth exploration of relevant themes and issues, thereby also optimizing the volume's contribution to policy development, scholarly reflection and a vigorous, open and informed debate. The overall goal – indeed the very impetus for this project – has been to create a stronger, broader and more up-to-date information platform for informed and engaged policy discussion and analysis in this area, with particular recognition of the information needs of developing country policymakers, rather than to preempt that policy development in the form of prescriptive recommendations or outright advocacy of particular policy preferences.

Overarching Themes

In the absence of such definitive conclusions, it may be helpful to note some overarching themes and concerns that thread through many, if not all, of the individual chapters. A first theme, congruent with views elaborated in the guidelines/policy statements of leading competition