

## COMPETITION POLICY AND INTELLECTUAL PROPERTY IN TODAY'S GLOBAL ECONOMY

The fast-evolving relationship between the promotion of welfare-enhancing competition and the balanced protection of intellectual property (IP) rights has attracted the attention of policymakers, analysts and scholars. This interest is inevitable in an environment that lays ever greater emphasis on the management of knowledge and innovation and on mechanisms to ensure that the public derives the expected social and economic benefits from this innovation and the spread of knowledge. This book looks at the positive linkage between IP and competition in jurisdictions around the world, surveying developments and policy issues from an international and comparative perspective. It includes analysis of key doctrinal and policy issues by leading academics and practitioners from around the globe and a cutting-edge survey of related developments across both developed and developing economies. It also situates current policy developments at the national level in the context of multilateral developments, at WIPO, WTO and elsewhere.

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Cambridge University Press

978-1-107-19436-6 — Competition Policy and Intellectual Property in Today's Global Economy

Edited by Robert D. Anderson , Nuno Pires de Carvalho , Antony Taubman

Frontmatter

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TODAY'S GLOBAL ECONOMY

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CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-107-19436-6 — Competition Policy and Intellectual Property in Today's Global Economy  
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CAMBRIDGE  
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,  
New Delhi – 110025, India  
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107194366](http://www.cambridge.org/9781107194366)

DOI: 10.1017/9781108157827

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First published 2021

Printed in the United Kingdom by TJ Books Limited, Padstow Cornwall

*A catalogue record for this publication is available from the British Library.*

ISBN 978-1-107-19436-6 Hardback

ISBN 978-1-316-64568-0 Paperback

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## JOSEPH WILSON

Joseph Wilson is a former Chairman and founding Commissioner of the Competition Commission of Pakistan, where he served, for three consecutive terms of three years each, from November 2007 to November 2016. Dr Wilson is an Adjunct Professor at McGill University's Faculty of Law, where he teaches International Competition Law, among other courses, and is a senior consultant at Dr Wilson and Associates.

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## PREFACE

ROBERT D. ANDERSON, NUNO PIRES DE CARVALHO AND  
ANTONY SCOTT TAUBMAN

Two major trends – the disruptive impact of new technologies and policymakers' increasing attention to knowledge and human capital as critical ingredients for economic and social welfare – converge today on the intersection between competition policy and the intellectual property (IP) system. Both these sets of regulatory tools are undergoing significant transformation and evolution, for instance in adapting to the digital environment and applying new conceptions of the knowledge economy. Hence, the interaction between these two areas is equally dynamic. This volume aims to provide a broad, inclusive and contemporary platform for a renewed international conversation on this vital area of policy and practice.

Competition policy was, years ago, considered a preoccupation largely of a handful of developed countries. This is no longer the case, a key development that has driven the genesis and elaboration of this book. Framing a positive and mutually supportive linkage between competition policy and the IP system has become an active area of engagement, policy development and practical implementation in jurisdictions around the world, including in each of the BRICS (Brazil, Russia, India, China and South Africa) countries and in other major developing and transition economies. Moreover, renewed policy debate and significant enforcement initiatives have been evident recently in major established jurisdictions such as the European Union and the United States. At the multilateral level, competition policy has been an area of active review in the WIPO Development Agenda, just as policy settings relating to IP were a particular focus of the World Trade Organization (WTO) Working Group on the Interaction between Trade and Competition Policy. The interface of competition policy and IP has, moreover, been a long-running topic of discussion in the work of the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) and is now also receiving attention in the framework of the International

Competition Network (ICN), the global network of competition enforcement agencies.<sup>1</sup>

Awareness is growing, as well, of the potential for policy clashes and the consequent need for renewed international dialogue to support the development and implementation of sound and balanced norms in this area. For instance, a recent OECD paper has pointedly observed:

The multijurisdictional nature of IP-affected markets poses problems for competition enforcement. It may occur that a compulsory licensing remedy, in order to be effective, needs to extend beyond the territorial scope of the jurisdiction which adopts that remedy. Such a remedy raises issues of international comity and co-operation, reflecting the tension between the territorial scope of domestic patents and the extraterritorial aspects of anticompetitive IP-related conduct.<sup>2</sup>

And in discussing the future agenda of the ICN, the global network of competition enforcement agencies, Makhan Delrahim, until recently US Assistant Attorney General for Antitrust, has observed as follows:

One issue ripe for deeper discussion is the intersection of intellectual property and antitrust, and I would strongly support efforts in ICN to make progress in this area. We need to be sure that antitrust enforcement does not impede the incentives for innovation that intellectual property laws provide.<sup>3</sup>

The possibility that enforcement actions taken in a particular jurisdiction may have repercussions for other jurisdictions, and that a deeper international dialogue may be warranted in this regard, is equally an important underlying supposition of this volume.

Against this background, the purpose of this book is to survey developments and policy issues in this area from an international and comparative perspective. The book as a whole does *not* aim to resolve definitively ongoing debates, nor to defend or advocate particular approaches to policy and enforcement issues in this area, although the

<sup>1</sup> See International Competition Network, 'Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws, prepared by the Unilateral Conduct Working Group, April 2010'. Available at: [www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_SR\\_ReftoDeal.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_ReftoDeal.pdf).

<sup>2</sup> OECD Secretariat, 'Licensing of IP Rights and Competition Law', DAF/COMP(2019)3 (29 April 2019). Available at: [one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](http://one.oecd.org/document/DAF/COMP(2019)3/en/pdf).

<sup>3</sup> See 'Assistant Attorney General Makan Delrahim Delivers Remarks at New York University School of Law' (New York, 27 October 2017). Available at: [www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law](http://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law).

participating authors were free to and have expressed relevant views in their individual capacities. The aim of the volume as a whole is to present an array of perspectives that will serve as a resource for the process of review and reflection that we see emerging in this area, in policy and academic circles.

There is, of course, a large body of academic literature on particular policy and enforcement issues concerning the interface of IP and competition or antitrust law, as well as on the general relationships between these two policy areas. Much, though not all of this literature, however, focuses on approaches taken in particular developed jurisdictions, notably the European Union and the United States.<sup>4</sup> The intent of this volume is to build upon and extend this existing literature, in particular by deepening and broadening the comparative dimension of the analysis; by responding to more recent developments; and by setting out for reflection possible collective action problems in this area.

Apart from the participating authors' contributions to their individual chapters, for which we are deeply grateful, a number of colleagues have contributed to the volume's preparation in other important ways. Antonella Salgueiro Mezgolits, Nivedita Sen and Nadezhda Sporysheva (all of whom also participated as contributing authors) served very ably as editorial assistants at various stages of its production. Among these, Sporysheva, in particular, deserves our thanks for her steadfast and essential coordination of the project and her careful work on multiple authors' texts, over an extended period. Elena Cima, in addition to co-authoring Chapter 1, provided a careful and thoughtful review of select chapters as well as serving as a sounding board on the overall project. Our long-time colleague, Anna Caroline Mueller, provided helpful perspectives, expertise and advice at critical stages of the book's preparation. Audrey Franchet and Karyn Russell provided able and efficient administrative support throughout the process.

For his encouragement and support, warm thanks are expressed to Xiaozhun Yi, Deputy Director-General of the WTO responsible for the work of the Intellectual Property, Government Procurement and Competition Division in the Secretariat. At the World Intellectual Property Organization, Giovanni Napolitano provided essential

<sup>4</sup> Roger D. Blair and D. Daniel Sokol (eds), *Antitrust, Intellectual Property, and High Tech* (Cambridge University Press, 2017), for example, represents an important exception to this general observation, in that it includes perspectives from a number of emerging economies.

coordination and support in moving the project to completion. Warm thanks are also due to Anthony Martin and Heather Sapey-Pertin of the WTO's Information and External Relations Division for their advice and support throughout the project.

This volume sprang initially from the rich and invigorating conversations on related topics that the three editors have enjoyed together over many years. For further helpful and enriching discussions on related issues, we wish to thank, at a minimum, the following persons: Fred Abbott; Thomas Cottier; Josef Drexler; Eleanor Fox; Nancy Gallini, with whom Anderson co-edited an early volume on the topic;<sup>5</sup> Alberto Heimler; Frederic Jenny; Bill Kovacic; Adrian Otten, a friend and mentor to all of us; Mike Scherer, a giant and pioneer of the entire field of industrial organization; and Jayashree Watal, Hannu Wager and Pierre Arhel, friends and collaborators of all of us.

At Cambridge University Press, we are indebted to Kim Hughes for her encouragement and support at a critical early stage, and to Denise Bannerman, Marianne Nield and Catherine Smith for their patience and support as the project continued through to its completion.

Lastly, we record our love and appreciation to our spouses and children, for their continuing forbearance and support. This book is for them.

The opinions and conclusions contained in the contributions to this volume are the sole responsibility of the individual authors and should not be attributed to the organizations with which they are affiliated. All errors and omissions are the full responsibility of the authors. This includes contributions prepared by professionals from the WTO and WIPO Secretariats. None of the chapters purports to reflect the opinions or views of the Members of the WTO and/or WIPO or of their Secretariats. Any citation of chapters in this volume should ascribe authorship to the individuals who have written the contributions and not to the WTO and WIPO. Furthermore, nothing in this book is intended to provide a legal interpretation of the WTO Agreements or of WIPO legal instruments. In addition, none of the terminology used in any of the chapters has any implications for the sovereignty of any of the Members of the WTO and/or WIPO.

<sup>5</sup> Robert D. Anderson and Nancy T. Gallini, *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (University of Calgary Press, 1998; to be reissued shortly in the Routledge Revivals series).

## EDITORIAL NOTE

The opinions and conclusions contained in the contributions to this volume are the sole responsibility of the individual authors and should not be attributed to the organizations with which they are affiliated. All errors and omissions are the full responsibility of the authors. This includes contributions prepared by professionals from the WTO and WIPO Secretariats. None of the chapters purports to reflect the opinions or views of the members of the WTO and/or WIPO or of their Secretariats. Any citation of chapters in this volume should ascribe authorship to the individuals who have written the contributions and not to the WTO and WIPO. Furthermore, nothing in this book is intended to provide a legal interpretation of the WTO Agreements or of WIPO legal instruments. In addition, none of the terminology used in any of the chapters has any implications for the sovereignty of any of the members of the WTO and/or WIPO.

References to current events and authors' biographies are up to date as of January 2020, to the best of the knowledge of the editors, but may be subject to significant changes in the subsequent period prior to this volume's final publication date.

Cambridge University Press  
978-1-107-19436-6 — Competition Policy and Intellectual Property in Today's Global Economy  
Edited by Robert D. Anderson , Nuno Pires de Carvalho , Antony Taubman  
Frontmatter  
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