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COMPETITION, ANTITRUST AND INTELLECTUAL PROPERTY LAW

The most important segment of economic policy is, certainly, the establishment of healthy competition. By this is meant the existence of several companies that produce the same type of goods and fight for customers. The desire of each manufacturer is their products become part of the most consumer baskets. Since most vendors do not develop network of consumers and not enough good story to keep on the market, they must constantly improve their product through quality, appearance, packaging and the like. When all manufacturers are trying to get their constant activity to its customers, then we say that there is healthy competition. We have to state that Serbia, although competition law is implemented, does not have healthy competition. In this paper we will show different kinds of unfair competition and offer some solutions.

Keywords: *competition, monopoly, anti-unfair competition law, intellectual property law, development.*

JEL classification: K11.

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КОНКУРЕНЦІЯ, АНТИМОНОПОЛЬНЕ ЗАКОНОДАВСТВО І ПРАВО ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

У статті показано, що найбільш важливим сегментом економічної політики є створення здорової конкуренції. Під цим мається на увазі наявність декількох компаній, які виробляють один і той самий тип товарів і борються за клієнтів. У більшості виробників не розвинена мережа споживачів і недостатньо сил, щоб триматися на ринку, вони повинні постійно вдосконалювати свою продукцію – її якість, зовнішній вигляд, упаковку тощо. Коли всі виробники намагаються утримати клієнтів, ми говоримо, що це здорова конкуренція. У Сербії, хоча Закон про конкуренцію і прийнято, немає здорової конкуренції. У цій статті показано різні види недобросовісної конкуренції та запропоновано деякі рішення щодо її усунення.

Ключові слова: *конкуренція, монополія, закон про боротьбу з недобросовісною конкуренцією, право інтелектуальної власності, розвиток.*

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КОНКУРЕНЦИЯ, АНТИМОНОПОЛЬНОЕ ЗАКОНОДАТЕЛЬСТВО И ПРАВО ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

В статье показано, что наиболее важным сегментом экономической политики является создание здоровой конкуренции. Под этим подразумевается наличие нескольких компаний, которые производят один и тот же тип товаров и борются за своих клиентов. У большинства производителей не развита сеть потребителей и недостаточно сил, чтобы держаться на рынке, они должны постоянно совершенствовать свою продукцию – ее качество, внешний вид, упаковку и т.д. Когда все производители пытаются получить клиентов, мы говорим, что это здоровая конкуренция. В Сербии, хотя Закон о конкуренции и принят, нет здоровой конкуренции. В этой статье показаны различные виды недобросовестной конкуренции и предложены некоторые решения по ее устранению.

Ключевые слова: *конкуренция, монополия, закон о борьбе с недобросовестной конкуренцией, право интеллектуальной собственности, развитие.*

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Introduction. Competitiveness is a measure for success of developmental processes at the market which determines the value of goods and services, and also economic feasibility of human and material resources (Bosnjak, 2005, p. 130). This is the definition of competition, which really works in developed countries as well as accurate. For its achievement the existence of strong financial institutions, effective fiscal policy and based competition on innovation are vital.

Another problem related to competition is public companies that hold a natural monopoly, such as electricity, gas, water etc. In a developed country there is an accurate calculation related to the collection of these services, and users are informed in advance. Public companies need to expose as much competition as possible – not only through privatization, but also through public-private partnerships, management contracts, benchmarking.

It is necessary to change habits of employees at enterprises, because the development of entrepreneurship is a good way for the development of healthy competition. Specifically, we must change the habits of leaders through ongoing training and education to encourage employees to create a strong company. One of the models, acceptable everywhere in the world, is Hersey's situational model of leadership.

The most important for Serbian economic development is to strengthen the competitiveness of economic factors (costs, prices, exchange rate, subsidies, export credits, tax breaks) and technological competitiveness factors (quality, design, delivery, service). Serbia is a small and underdeveloped European country and it should provide open and competitive economy for possible production in specific part of the market. From the standpoint of the competitiveness important is strengthening the capacity of businesses, industries and sectors of the economy to win the market and increase market share as a measure of competitiveness, and increase elasticity of exports to world demand and the level of specialization of production for export.

The comparative advantage of Serbia is definitely in the production of organic food, for which real demand all over the world exists.

1. Nature and basis of IP. Intellectual property (IP) refers to creations of mind: inventions, literary or artwork, symbols, names, images, and designs used in commerce. So, intellectual property is divided into 2 categories: industrial property, which include patents for inventions, trademarks, industrial designs and geographical indications, and copyright law, which includes novels, poetry and plays, films, musical works, artistic works such as drawings, paintings, photographs, sculptures, and architectural design.

Intellectual property is something unique, something that is the fruit of human creativity and ingenuity. Much of this is classified under human creativity, therefore it can be Rembrandt's pictures, as well as an agricultural machine that will facilitate the work of farmers. Most common inventions of today are certainly associated with information technologies and systems. To cover and protect each invention, intellectual property includes 2 major areas which are: copyright and related rights and industrial property. The most important is that intellectual property in each of these cases stimulates progress through constant transformation of society, thus adding value to our lives.

Protection of intellectual property has become an area of crucial importance, not only because of globalization and increasing competition in business, but also

because of the advantages of the Internet and various other intellectual creations. Intellectual property protection is closely related commercialization activities that will create new value and profit for a company, so that can't be resolved on case basis. So the most important is a good strategy and creating a favorable business environment where it can be applied.

Legal protection of IP requires planning and management framework that includes procedures and employ the resources and staff to match the scientific expertise of a company and contributes to achieving the desired goals and position in the business world. Successful exploitation of IP can be a good basis for further investment in research and development, and also can become one of the largest sources of revenue for the companies that are struggling to remain profitable.

All justifications for IP protection, whether based in economics or morality, must contend with a fundamental difference between ideas and tangible property (Lemley, 2007, p. 2). Tangible property that has physical substance and can be touched (furniture, cars, jewelry). This means that possession of a physical thing is necessarily exclusive (if I have you can't). Concept of property lies in the right granted to the "owner" of a thing or a piece of land to exclude others from use of it (Lemley, 2007, p. 2). Regardless the industry where someones invention belongs, its protection, through a system of national and international rules is necessary for the encouragement and financing of innovation and creativity, leading to economic, cultural and social progress.

Intellectual property encourages the dissemination of knowledge, which results in the formation of high quality products and services, what guarantees their originality and quality. Also, if used correctly can be a means to eradicate poverty through trade. In today's economy, the tendency is to increase investments in intangible assets. When a company has money to spend, it is more often directed on to research and development than on new plants and equipment. But intellectual property is, by its very nature, less tangible than physical capital, and is therefore susceptible to theft. The major problem, especially in underdeveloped and developing countries, is the lack of a good legal framework to support innovators and bring prosperity to them.

2. Nature and basis of Antitrust. Antitrust law protects competition and competitive processes by preventing certain types of conduct that threaten a free market (Lemley, 2007, p. 5). The guiding principle of modern antitrust law is that competition is generally desirable in order to achieve economic efficiency, though other more "populist" goals are often articulated. The application of antitrust legislation has changed over time and has been more or less restrictive depending on the attitude of society and administration.

Practices like deceptive advertising, passing off, counterfeit of non-protected product concepts and configuration, trade secret protection, disparagement of competitors, predatory practices (sales below cost, discrimination, tie-inc etc.) may come under the heading of unfair competition (Ullrich, 2005). Acts against unfair competition shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices and at the same time it shall protect the interests of public under undistorted competition (The Act Against Unfair Competition, 2005).

TRIPs Agreement Art. 40 grants intellectual property license agreement restricting competition in the right to regulate, also, TRIPs combined with legislation provides that embodied the spirit and legal values that country also needs to develop appropriate anti-trust rules try to keep their intellectual property policy and flexibility to trade.

3. IP & Competition (Antitrust). Intellectual property (IP) law subjects intellectual assets to owners' exclusive control, but competition law, on the other hand, seeks to avoid market barriers and benefit for consumers by ensuring that a multiplicity of suppliers of goods, services and technologies may effectively compete against each other (WIPO, 2007, p. 9). The relationship between these two areas of law poses uniquely difficult challenges to policymakers, particularly in developing countries, the majority of which have little or no tradition in the application of competition law and policies.

The analysis of the relationship between IP and competition disciplines may be limited to the interactions between laws relating to the acquisition and exercise of IP, on the one hand, and competition law, on the other (WIPO, 2007, p. 10). This broad set of regulations integrates what may be called a country's "competition policy" (full set of policies and institutions that affect a country's competitive environment).

While IP law deliberately subjects intellectual assets to the exclusive control of right owners, competition law seeks to avoid market barriers and benefit consumers by encouraging competition among a multiplicity of suppliers of goods, services and technologies (Kovacic, 2005, p. 2). Laws governing intellectual property rights protect inventors from competition in order to create incentives for them to innovate (Canton, Gertner, 2003, p. 2). Innovation presents a basis for the survival of any company that wants to survive in globalization. The development of information networks and the availability of all information related to existing innovation is a difficult job for young company to survive and succeed in income brackets.

Conscious of the importance of new ideas, policy package of new services and their conscientious leaders miss no opportunity to protect an idea created by some of the intellectual property rights. Although statistic shows that only a small percentage of protected ideas are actually implemented successfully in practice, but it is worth to try and right through the system to enable the company to perhaps becoming a leading company based on implemented ideas.

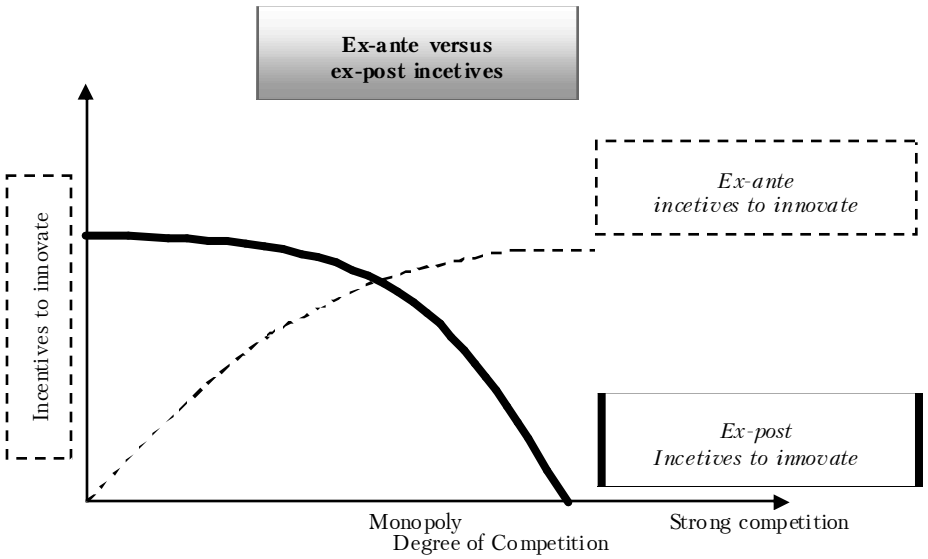
Christian Wichard, deputy director general of the WIPO Global Issues Sector, said that litigated patents were less than 1% of the patents granted, and companies "pretty much only sue when they are sure there's a chance to invalidate". So it is "probably more a shock that 50% of patents resist the challenge" (Mara, 2010). But you can be on the side of other 50%.

The role of IP in achieving competitiveness at a market can be of great importance.

On the one hand, companies involved in creative business innovation, provide income and on the other hand, those who do not have sufficient resources and management skills developed (although all companies should be sure to put as a priority), provides a mission and a path to success. Of course, a good idea is to know the proper send off, and it is now impossible without a good leader.

The predominant concept is that IP and competition laws are complementary: they both aim at promoting innovation and competition (Ghidini, 2005, p. 6).

However, the respect of IPRs under competition law is premised on the assumption that intellectual property is properly obtained. Problems arise when particular intellectual property rights have not been obtained in the proper manner or are not deserved. Patent protection in the absence of novelty and non obviousness can harm innovation by eliminating the incentives for a patent holder and others to engage in further pursuit of something that is novel and non-obvious (Azcuenaga, 1995).



Graph 1. **Tension between competition and IP**

On Graph1 we notice the difference between ex ante an ex post (Matthew, 2010):

1. Lower ex-post competition increases incentives to innovate due to the need to make a return.
2. Lower ex-ante competition decreases incentives to innovate, less incentive to "escape" competition.

Increasing competition today leads to higher incentives to escape through innovation, but lower profits if innovation can't be appropriated (Matthew, 2010). In two period model ideal is strong competition today followed by IP tomorrow. But with ongoing innovation what is ex-post today is ex-ante tomorrow, thus the stronger the IP, the lower the competitive incentive for the next set of innovations (Matthew, 2010).

To conclude, IP laws provide the incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression, and competition laws may be invoked to protect these same incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms vigorous rivalry among firms (Competition Buareu, 2000, p. 5).

Given that competition law may result in limitations on the terms and conditions under which the owners of IP rights may transfer or license the use of such rights to

others, and on the identity of those to whom the IP is transferred or licensed (Competition Buareu, 2000, p. 5).

Prevention of unfair competition is directed against acts or practices in the course of trade or business, contrary to good business practices. The notion of unfair competition covers various activities related to economic competition in the broad sense and has a wider scope of intellectual property.

Rules to prevent unfair competition and those for the prevention of restrictive business practices (antitrust laws) are inter-related and complement each other to ensure efficient operation of market economy through the preservation of fair business and freedom of competition, and in a scale, and protect the interests of consumers (Markovic, 2007, p. 6). Certain rules to prevent unfair competition supplements, as the second, more limited line of defense, protection of intellectual creations and commercial symbols when they are not protected by industrial property rights. However, there are differences between the protection of registered industrial property rights, such as patents, registered industrial designs, trademarks registered and protection against unfair competition, on the other hand.

While industrial property rights are recognized on the basis of applications filled by Institute of Industrial Property, and give exclusive rights related to the subject matter of protection, more limited protection against unfair competition is not based on the recognition of rights, but on the assumption that acts contrary to good business practice should be prohibited (Markovic, 2007, p. 6).

While the rights of registered industrial property act as the primary obstacle to the right of unfair competition acts as a secondary filter. Protection against unfair competition is related to intellectual creations and commercial symbols, especially in the following 3 cases (Markovic, 2007, p. 7–10):

- Confusion, discrediting, misconception;
- Taking undue advantage ("free copying");
- The use of undisclosed information ("confidential").

Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering economic benefits (Competition Buareu, 2000, p. 3).

Market power refers to the ability to maintain prices above competitive levels for a considerable period or to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time (Competition Buareu, 2000, p. 3).

4. Do trademark create monopolies? This question is very interesting because from the legal perspective, trademark is an exclusive right, that is to say a legal monopoly, which pursues the aim of creating new information. It is an intellectual property right attributed to an owner, at least in the first instance to provide an incentive to produce information that is not itself the good being exchanged (as is in the case of patent and copyright), but rather an accessory element to the exchange of other products (Ramello, 1990, p. 4).

It is true that trademarked product A is a monopoly, since no other firms produce perfect substitute of that product, where identity includes the trademark. But on other hand other firm can produce a product B, identical to product A in everything (quality first of all), except its sign.

In that way we have perfect substitutes with equal value to consumers, with same price and no ability to create market power. The first firm can put higher price on its product, but with the risk to lose costumers.

In this example products A and B will face a perfectly elastic demand, and will have to be sold at marginal cost and zero profit (Economides, 1988, p. 532–533). This situation is not desirable for these market participants, and because of that creation of good trademark and advertising is most important for good business.

Persuasive advertising can change the image of a product, it can add attributes to the product as seen by costumer. This kind of advertising connect mental image with physical commodity. In practice we can find different situations where mental image of product sells it, but in most cases good quality is on the first place. We have to agree that good quality creates strong and durable brands. But if a company want earn with good brand it has to register it, because anyone can imitate it. Instead of that with strong trademark law, companies get possibility to compete in a special way.

Conclusion. From the economic point of view, competition is a rivalry process to achieve better results, ability to achieve success in markets leading to a highly productive economy and improved living standards for the entire population. This represents a kind of goal, which is easily attainable if there is a good economic policy, and more importantly, the regulatory framework. The aforementioned framework is necessary because of frequent irregularities. Anti-Unfair Competition Law is the only anti-monopoly law to control participants and prevent the creation of monopolies, mergers or cartels. However, analysts point out the lack of clarity in the law regarding the most important part, the vision and the goal. Imprecision is emphasized as the main drawback.

What Serbia needs to achieve in near future is to make such laws adequate.

Innovations are often in the fields in which Serbia has no comparative advantages. It is impossible to fight with innovations in the automotive industry with the countries like China, which comparative advantage is based on low prices, or with Germany, which is known by high quality of industrial products. Serbia is an agricultural country, so innovations should be done in this field. Also creation of good brand based on healthy food and developed trademark law, will be easily achieved provided the goals are clearly defined.

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