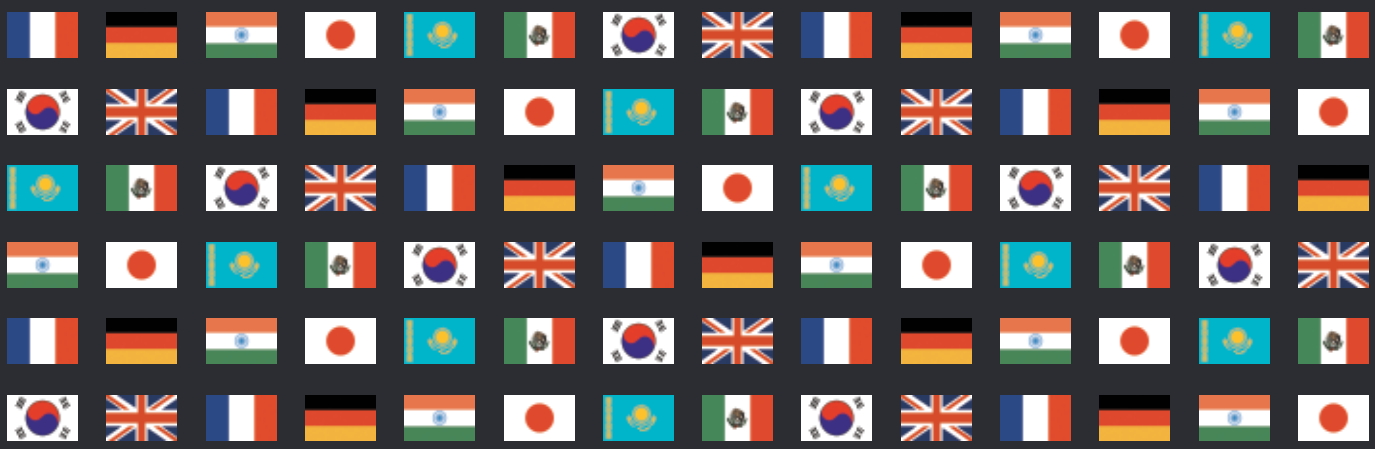
Intellectual Property and Antitrust 2021

Contributing editors
Peter J Levitas and Matthew A Tabas



LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2007
Fifteenth edition
ISBN 978-1-83862-353-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Intellectual Property & Antitrust

2021

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Arnold & Porter Kaye Scholer LLP

Lexology Getting The Deal Through is delighted to publish the 15th edition of *Intellectual Property & Antitrust*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Peter J Levitas and Matthew A Tabas of Arnold & Porter Kaye Scholer LLP, for their assistance with this volume.

LEXOLOGY
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London
November 2020

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This article was first published in December 2020
For further information please contact editorial@gettingthedealthrough.com

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United Kingdom

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INTELLECTUAL PROPERTY

Intellectual property law

1 Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

IP rights in the UK are protected by a combination of UK and EU derived legislation and UK case law. Unless extended, after the Brexit transition period ends on 31 December 2020, EU law will cease to apply to the UK. EU regulations will only continue to apply in UK domestic law (by virtue of the European Union (Withdrawal) Act 2018 (the 'EU Withdrawal Act')) insofar as they are not modified or revoked by regulations under the EU Withdrawal Act, which will repeal the European Communities Act 1972 as from the end of the transition period. The EU Withdrawal Act includes provisions to convert the existing directly applicable EU law into domestic UK law by way of statutory instruments. This will mainly apply to EU Regulations, which would otherwise cease to apply after Brexit, and also to statutory instruments implementing EU Directives, where the statutory instruments were adopted pursuant to the ECA 1972.

Patents are protected under the UK Patents Act 1977, and substantive national patent law across Europe has been partially harmonised by the European Patent Convention 1973. Patent protection lasts for 20 years, and can be extended for medicinal and plant protection products by a supplementary protection certificate (SPC) under EU Regulation 469/2009 (for medicinal products by up to five-and-a-half years) and Regulation 1610/96 (for plant protection products by up to five years,). Following Brexit, UK patent law, including the patent enforcement system in the UK, will remain unchanged. The Patents (Amendment) (EU Exit) Regulations 2019 (the 'Patents Regulations 2019') (as further amended by the Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050)) will come into effect at the end of the transition period on 31 December 2020. These regulations will bring current EU legislation into UK law as far as possible, to maintain current systems and processes.

After the end of the transition period, the process of applying for a UK SPC, the timescale, documentation, fees for the application, the requirements, scope of protection and duration of SPC will remain the same. However, there will be some changes that impact upon SPC law:

- authorisations from the European Medicines Agency (EMA) for the purposes of SPCs will be converted into equivalent UK authorisations. Holders of existing SPCs, which were based on authorisations from the EMA, may need to provide information to convert it to the equivalent UK authorisation; and
- new applications for a six-month paediatric extension to SPCs will be considered based on provisions in the UK's Human Medicines Regulations 2012.

The SPC manufacturing waiver came into effect in the UK on 1st July 2019, by way of updates to the SPC Regulation via Regulation (EC) No. 2019/933 (the 'SPC Waiver Regulation'). The SPC waiver applies to SPCs which were (1) applied for after 1 July 2019; and (2) applied for before 1 July 2019 but which come into force after that date (in such cases the waiver will only be applicable from 2 July 2022 onwards). The SPC waiver does not apply to SPCs that were already in force on 1 July 2019. The SPC waiver allows a European Union manufacturer of generics and biosimilar products to manufacture medicines protected by an SPC without the consent of the SPC holder either for exports outside the EU (where the protection either expired, or does not exist); or to make and stockpile medicines during the six months before the expiry of the SPC, for launch in the EU on day-1 of SPC expiry, or both. As the SPC waiver came into force after the Patents Regulations 2019 were made on 4 April 2019, a number of the SPC waiver provisions would not operate effectively under UK law after the transition period. Following a consultation conducted by the UK government in 2019, the UK government has published revised draft legislation to address this issue. It is anticipated that this legislation will be passed in advance of the end of the transition period.

Registered trade marks are protected under the UK Trade Marks Act 1994 and EU Regulation 2017/1001 (the EUTM Regulation). Unregistered trade marks, including the overall 'get-up' of a product or service, are protected by case law under the tort of passing off. Protection for unregistered trade marks can last indefinitely, the same applies to registered trademarks as long as the registrations are successfully renewed every 10 years.

Registered and unregistered designs are protected under the UK Copyright, Designs and Patents Act 1988 (CDPA) and Registered Designs Act 1949, and EU Regulation 6/2002 (the Community Designs Regulation) (to the extent applicable post Brexit). The duration of protection varies from three to 25 years, depending on the nature of the right.

The UK Parliament has passed the Designs and International Trade Marks (Amendment etc) (EU Exit) Regulations 2019 (as further amended by the Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050)) to provide for Brexit related amendments on to designs and trade mark law. Once the transition period expires:

- registered EU trade marks, Community designs (RCDs), unregistered Community designs (UCDs), and international design and trade mark registrations designating the EU will no longer be valid in the UK. These rights will be immediately and automatically replaced by equivalent UK rights. A supplementary unregistered design right (SUDR) will be created to replace the former UK part of the equivalent RCD. The SUDR will subsist alongside the current UK UCDs with the same scope and duration as the current UCD right; and

- pending EU trade mark and RCD applications can be re-filed with the UK IPO as a new UK trade mark application within a period of nine months from 1 January 2021 and retain the earlier filing date of the pending application.

Copyright protection is governed by the UK CDPA, and specific aspects of copyright law have been (and continue to be) harmonised by a number of EU Directives. The duration of copyright protection varies, depending on the nature of the work; literary, dramatic, musical and artistic works are protected for 70 years from the end of the year in which the author dies.

Given that a substantial part of UK copyright law is derived from the EU copyright framework, there are references in UK copyright law to the EU, the EEA, and member states. Some of these references occur in the UK's implementation of EU cross-border copyright arrangements which apply only within the EU and EEA and provide reciprocal protections and benefits between member states. The UK government has introduced the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (as further amended by the Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050)), which remove or correct references to the EU, EEA or member states in the UK copyright legislations to preserve the effect of UK copyright law. The reciprocal cross-border arrangements will be amended or brought to an end as appropriate. The regulations are due to come into force on 1 January 2021, and may be amended further to take into account negotiations between the EU and UK during the transition period which ends on 31 December 2020 (unless extended).

As the UK and all EEA member states are members of international treaties on copyright that ensure eligible works (including databases that are original) are protected in all treaty countries. Such protections are unaffected by Brexit.

Databases are protected as copyright works under the CDPA, and by sui generis database right under Directive 96/9 (the Database Directive) as implemented by the CDPA. Copyright in a database lasts for 70 years, and sui generis database right for 15 years. The UK implemented the Database Directive through the Copyright and Rights in Databases Regulations 1997.

After the end of the transition period, UK citizens, residents, and businesses will not be eligible to receive or hold database rights in the EEA for databases created on or after 1 January 2021. UK owners of databases created on or after this date will need to consider alternative means of protection in the EEA, such as licensing arrangement or relying on copyright protection. Database rights that exist in the UK or EEA before 1 January 2021 (whether held by UK or EEA persons or businesses) will continue to exist in the UK and EEA for the rest of their duration. UK legislation will be amended so that only UK citizens, residents, and businesses are eligible for database rights in the UK for databases created on or after 1 January 2021.Trade secrets are protected by the common law of breach of confidence, and the UK has enacted legislation in the form of the Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597) to implement the Trade Secrets Directive (2016/244).

The enforcement of IP rights across Europe has been harmonised to some extent by Directive 2004/48 (the Enforcement Directive). In addition to restrictions arising out of competition law, key restrictions on the ability to enforce IP rights include the risk of incurring liability for groundless threats of IP infringement, the law of which has been significantly reformed in the UK by the Intellectual Property (Unjustified Threats) Act 2017, and specific defences to infringement and restrictions on available remedies for each right. The formalities for assignments and licences, and the effect of failing to register a transaction in relation to a registered right, vary between different rights and are provided for in the relevant legislation.

Overall, the protections afforded under UK IP law to trade marks, copyright, designs, patents and trade secrets exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Responsible authorities

2 Which authorities are responsible for granting, administering or enforcing IP rights?

The UK Intellectual Property Office (IPO) is responsible for the grant and administration of UK patents, SPCs, trademarks, and registered designs. The European Patent Office is responsible for the prosecution (including post-grant opposition) of European patents which, when granted, can designate the UK as a territory where the patent is validates. The UKIPO and EPO are not EU institutions and their operation will be unaffected by Brexit.

The EU IPO is responsible for the grant and administration of EU trade marks and RCDs, which provide protection in the UK before the end of the transition period. After the end of the transition period, any new UK rights created to replace EU trade marks, RCDs, and international trade mark and design right registrations designating the EU will no longer be valid in the UK, will be under the purview of the UK IPO.

The Trading Standards Authorities play a role in investigating IP infringement and conducting prosecutions for criminal IP enforcement, and the UK customs and border authorities can take action to assist in IP enforcement, but IP enforcement is primarily via civil litigation in the courts.

Proceedings to enforce IP rights

3 What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

IP rights are primarily enforced in the UK via civil court proceedings, and the English High Court is the most common venue. IP proceedings in the English High Court are heard in the Chancery Division, and different specialist lists are available:

- the Intellectual Property Enterprise Court (IPEC) can hear any IP claim of relatively low complexity and value: the IPEC is generally suitable for claims which can be tried in two days or less, damages are capped at £500,000 and recoverable legal costs are subject to a cap of £50,000;
- the Patents Court can hear claims relating to patents, registered designs, semiconductor topography rights and plant varieties. There is no cap on damages or recoverable legal costs; and
- all other IP claims can be heard in the Intellectual Property List of the Chancery Division, of which the Patents Court and IPEC are sub-lists.

Decisions of the English High Court can be appealed (with permission) to the Court of Appeal and the Supreme Court. Post Brexit, questions on EU law will no longer be referred to the Court of Justice of the European Union.

The UK IPO offers a mediation service, which can mediate infringement disputes relating to all types of IP, and can also provide a non-binding opinion on infringement of a patent or supplementary certificate. However, the IPO cannot make a binding decision on infringement of any IP right.

Remedies

4 What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

The remedies available in a civil action for IP infringement (in line with the Enforcement Directive) are an injunction to restrain infringement, an order for delivery up, erasure or destruction of infringing goods, damages or an account of profit, and a declaration that the right is valid and has been infringed. Copyright and trademark infringement can also give rise to criminal liability in certain circumstances; it is theoretically possible to pursue a private prosecution, but not common.

IP holders can also request the UK customs authorities to detain suspected infringing goods.

Nexus between competition and IP rights

5 Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

UK IP and competition legislation does not address the interplay between competition law and IP law.

UK IP case law has addressed the interplay between competition and IP law in cases where an alleged infringer asserts that IP rights (IPRs) in the relevant goods have been exhausted, or that the IP holder's behaviour in enforcing its rights is anticompetitive.

The body of case law on the nexus between IPRs and competition law is largely driven by EU competition cases. For example, there have been a number of recent European cases in respect of reverse payment patent settlement agreements. There are also a number of cases on when the use of IPRs can amount to abuse of dominance.

Patent cooperation treaties and other agreements

6 Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

The UK is a signatory to the WIPO Patent Cooperation Treaty, the Madrid Protocol, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the European Patent Convention (to which the UK will continue to be a member of post Brexit). Whilst the UK was a signatory to the Agreement on a Unified Patent Court, the UK government decided in July 2020 to withdraw its ratification of the Agreement on a Unified Patent Court. Since leaving the European Union, the UK no longer qualifies for membership to the Unified Patent Court.

Remedies for deceptive practices

7 With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

It is theoretically possible for a dominant company to abuse its market power by engaging in deceptive practices. In such a case, the remedies would be the same as for other breaches of competition law.

The Consumer Protection From Unfair Trading Regulations 2008 (CPUT) prohibit unfair commercial practices, including copycat packaging (promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer). CPUT is enforced by public authorities and can be relied on by consumers, but does not give rise to a right in favour of affected businesses.

Technological protection measures and digital rights management

8 With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

The UK has implemented EU Directive 2001/29 (the 'Copyright Directive'), which requires member states to provide legal protection against the circumvention of TPMs and the removal or alteration of electronic rights management information, and ensure that the use of TPMs does not prevent the exercise of exceptions to copyright.

There have been no recent cases where TPM or DRM protection has been challenged as a breach of competition law. That said, as with other IPRs, it is theoretically possible for TPM or DRM-related conduct to be investigated and prohibited if its object or effect restricts competition.

Industry standards

9 What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

The European Commission has published guidelines (OJ 2001 C3/2), which are applied in the UK, on the applicability of article 101 of the Treaty on the Functioning of the European Union (TFEU) to standardisation and horizontal cooperation agreements. These provide that where technology is adopted as an industry standard the agreement must provide for access on fair, reasonable and non-discriminatory (FRAND) terms or it could be a breach of competition law.

The Commission decisions in *Motorola* (C-39985/2014) and *Samsung* (C-350/08) of April 2014 were the first to provide some guidance on the compatibility of standard-essential patent (SEP) injunctions with the EU competition rules. The Commission recognised that seeking an injunction is a legitimate remedy against a patent infringer, but it held that applying for an injunction based on SEPs may be an abuse of a dominant position where the patent holder has given a voluntary commitment to license on FRAND terms and where the injunction is sought against a licensee that is willing to enter into a licence agreement on FRAND terms. The CJEU's judgment in *Huawei v ZTE* (C-170/13) in July 2015 clarified the circumstances in which an injunction can and cannot be sought without infringing competition law and sets out a general roadmap of behaviour for both parties.

In August 2020 the Supreme Court handed down the long-awaited judgment in the joint appeal of *Unwired Planet International Ltd v Huawei Technologies Co. Ltd & Anor* and *Huawei Technologies Co Ltd & Anor v Conversant Wireless Licensing SARL & ZTE Corporation* [2020] UKSC 37.

The Supreme Court dismissed both appeals and upheld the decisions of the Court of Appeal and the High Court holding that:

- the English Court has the jurisdiction and may properly exercise its power, without both parties' agreement to: (1) grant an injunction in respect of a UK patent that is an SEP unless the implementer of the patented invention enters a global licence of a multinational patent portfolio; and (2) determine the terms of that licence. Whilst the national courts have the jurisdiction to determine validity and infringement of national patents, a national court such as the UK court is empowered under the IPR policy of the European Telecommunications Standard Institute (ETSI) to determine FRAND. An implementer such as Huawei would remain free to challenge a particularly important national patent and seek a change in royalties should that be successful;

- the FRAND undertaking under ETSI's IPR Policy is a single composite obligation instead of three distinct obligations separately (ie,, 'fair'; 'reasonable'; and 'non-discriminatory' individually and separately). There is no requirement for SEP owners to grant licences on terms equivalent to the most favourable licence terms to all similarly situated licensees; and
- the Supreme Court affirmed that there is no mandatory requirement to follow the protocol set out by the CJEU in its judgment in *Huawei v ZTE* to avoid infringing article 102 for behaving in an abusive manner. Seeking a prohibitory injunction without notice or prior consultation with the alleged infringer will infringe article 102. To avoid infringing article 102, the nature of the notice or consultation required before a SPE owner brings an action for a prohibitory injunction will depend on the circumstances of the case.

COMPETITION

Competition legislation

10 | What statutes set out competition law?

UK competition law is contained in the following key statutes: the Competition Act 1998, the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015.

The provisions of Chapter I (prohibiting anticompetitive agreements) and Chapter II (prohibiting abuse of dominance) of the Competition Act mirror the EU equivalent found in articles 101 and 102 of the TFEU, respectively. Section 60 of the Competition Act provides that the UK courts must interpret these provisions in line with EU law, including European Commission decisions and European court judgments.

The Enterprise Act contains the UK's merger control provisions. The UK operates a voluntary system for merger notifications.

The Enterprise Act also contains the cartel offence, a criminal law offence potentially affecting individuals involved in price-fixing, market sharing, bid rigging or output limitation.

IP rights in competition legislation

11 | Do the competition laws make specific mention of any IP rights?

No. UK competition law does not make specific reference to IPRs. However, EU law is directly applicable and therefore agreements that fall within one of the EU block exemptions will be exempt from the application of the Chapter I provisions and article 101 of the TFEU. A number of block exemptions make specific reference to IPRs:

- the Technology Transfer Block Exemption Regulation (Commission Regulation (EU) No. 316/2014) (TTBER);
- the R&D Block Exemption Regulation (Commission Regulation (EU) No. 1217/2010);
- the Vertical Agreements Block Exemption Regulation (Commission Regulation (EU) No. 330/2010); and
- the Specialisation Block Exemption Regulation (Commission Regulation (EU) No. 1218/2010).

Review and investigation of competitive effects from exercise of IP rights

12 | Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The competition authority in the UK is the Competition and Markets Authority (CMA) and it reviews and investigates compliance with competition law. The CMA's remit includes the review and control of the acquisition, sale or exercise of IPRs insofar as they affect competition. Conduct in the UK that may have an effect on trade between EU member states can come under the jurisdiction of the European Commission.

The CMA applies and enforces the Chapter I and II provisions concurrently with the sector regulators in relation to their respective areas. There are a number of sector regulators, for example: Ofgem (gas and electricity), Ofwat (water), Ofcom (telecommunications and post), ORR (rail and road), CAA (airport and air traffic), NHS Improvement (healthcare in England), the FCA and the PSR (financial services and payment systems). They can investigate potential breaches of competition law, impose fines, impose interim measures and give directions to bring infringements to an end. Both the relevant regulator and the CMA are likely to be involved in a Competition Act complaint in relation to a regulated industry.

The Competition Appeal Tribunal (CAT) is a specialist competition tribunal and hears appeals against the decisions of the CMA and the sector regulators made under the Competition Act. It also hears appeals from merger and market investigation cases. An appeal from the CAT can be made to the Court of Appeal. Follow-on and standalone claims for competition law damages can be raised in the High Court (and the Court of Session in Scotland) and in the CAT.

Competition-related remedies for private parties

13 | Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Competition-related damages in respect of IPRs can be recovered in the same way as for breaches of competition law generally.

Private enforcement of competition-related damages comes in two forms: follow-on and standalone actions. Follow-on cases are claims for damages where the infringement of competition law has already been established by a competition authority (such as the Commission or the CMA). For these claims, the claimant can rely on the infringement decision and the action only assesses the quantum of damage suffered. In standalone cases, the claimant has to prove the breach of competition law before going on to the issue of damages. Both types of claim can be heard in either the High Court (or the Court of Session in Scotland) or the CAT.

The UK regulations (SI 2017/385) to implement the EU Damages Directive (Directive 2014/104/EU) came into force on 9 March 2017. The regulations apply to claims relating to cartels arising on or after 9 March 2017, although some aspects of the regulations apply to claims where the cartel existed before that date. The Directive seeks to facilitate competition law damages claims across the EU. In its consultation documents, the UK government stated that it considered that the UK rules were largely in line with the requirements of the Directive and therefore significant changes to UK legislation were not required. This was the case in particular following the reforms introduced by the Consumer Rights Act 2015. Nonetheless, the implementation of the Directive amended the Competition Act 1998, the Civil Procedure Rules and the CAT Rules in some significant respects.

The future development of private damages claims is unclear following the UK's vote to leave the EU. However, divergence seems unlikely, at least in the short term.

Competition guidelines

14 | Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

No. The CMA has not issued any specific guidance on the overlap of competition law and IP. However, the CMA will have regard to guidelines developed by the Commission. See, for example, the Technology Transfer Guidelines (OJ 2014 C 89/03), which set out the Commission's approach to assessing the competitive effects of technology transfer agreements.

Exemptions from competition law

15 | Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

No. In UK competition law there are no uses of IPRs that are specifically exempt from the application of competition law. However, a number of EU block exemptions make specific reference to IPRs (see, for example, the Technology Transfer Guidelines OJ 2014 C 89/03). Agreements covered by a block exemption will be exempt from the application of the Chapter I provisions. There are no IPR-specific exemptions from the Chapter II provisions.

Copyright exhaustion

16 | Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

The doctrine of copyright exhaustion is contained in national legislation. Sections 16(1)(b), 18(1) and 18(2) of the CDPA 1988 establish the copyright holder's exclusive right to issue (ie, distribute) copies of their work to the public. Section 18(3)(a) contains the principle of exhaustion, stating that the subsequent distribution of copies of a work will not infringe the copyright holder's distribution right.

The principle also applies to the UK as derived from the EU rules on the free movement of goods. Once a good has been placed on the market (ie, the distribution right has been exercised), there is no right to prevent the subsequent movement of that particular right throughout the EEA. The UK government has implemented the Intellectual Property (Exhaustion of Rights)(EU Exit) Regulations 2019 (as further amended by the Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050)) in relation to the position on exhaustion of rights in the UK post Brexit. After the end of the transition period for Brexit (which ends on 31 December 2020), there will be asymmetric regional exhaustion in the UK: whilst the UK will continue to recognise EEA exhaustion (which means that UK IP owners will not be able to prevent parallel imports from the EEA), the EU has confirmed that rights will not be considered to be exhausted if the goods are first placed in the UK market before being imported to the EEA. Therefore, UK businessmen will need to check if they need to obtain EEA-based IP owner's permission before they export goods from the UK to the EEA.

Import control

17 | To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

The position of import control in respect of goods flowing from EEA into the UK will be unchanged post Brexit. The doctrine of copyright exhaustion is contained in national legislation as well as being contained in EU law from the perspective of protecting the free movement of goods. Subject to the doctrine of implied licence, if a UK IPR holder markets its products outside the EEA, it can control the unauthorised import of those products into the EEA.

Jurisdictional interaction between competition laws and IP rights

18 | Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

The UK competition authority is the CMA. It is the body that reviews and enforces competition law complaints and investigations.

The CAT has jurisdiction to hear follow-on and standalone actions and to undertake fast-track actions for simple claims involving small and medium-sized enterprises. The High Court (and the Court of Session in Scotland) also has jurisdiction to hear competition cases.

IP proceedings in the English High Court are heard in the Chancery Division.

CP Rule 30.8 provides that claims dealing with Chapter I or II of the Competition Act will be transferred to the Chancery Division.

MERGER REVIEW

Powers of competition authority

19 | Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes, the Competition and Markets Authority (CMA) has the same authority with respect to reviewing mergers involving IP rights (IPRs) as it does with any other merger. The acquisition or sale of IPRs alone will only amount to a relevant merger situation if it constitutes the acquisition or sale of a business. For this to be the case, the IPRs must constitute a business with a market presence to which a market turnover can be clearly attributed.

Analysis of the competitive impact of a merger involving IP rights

20 | Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The UK competition authorities apply the same general competition law principles to mergers involving IPRs that they apply to mergers involving any other form of property. Under the Enterprise Act, the substantive assessment is whether or not the merger will result in a substantial lessening of competition.

The existence of IPRs can play a part in defining the relevant market in which goods or services are sold and, as a result, what market the competitive effects of the merger need to be assessed in respect of. For example, in a situation where a manufacturer holds significant IPRs that allow it to prevent other manufacturers from producing spare parts for its products, the substitutability of the other manufacturers' products could be reduced. This could result in a narrow definition of the relevant market for those spare parts. The strength of IPRs held by incumbent market participants may also be considered a barrier to entry into a market. Similarly, where parties hold complementary IPRs or IPRs for alternative technologies a merger could give rise to significant issues. Where licences are held, particularly in the medium or short term, more complex issues can arise on whether the IPRs are to be ascribed to the licensee or the licensor.

Challenge of a merger

21 In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

The UK competition authorities apply the same analysis to transactions involving the transfer of IPRs as they would apply to a transaction involving any other property. IPRs can be relevant in identifying barriers to entry and definition of relevant market.

Remedies to address the competitive effects of mergers involving IP

22 What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The main remedy applied to address the competitive effects of mergers involving IPRs is divestiture, either by licensing or assignment. The aim is that the parties acquiring the IPRs should be able to compete effectively with the merged entity.

The CMA has published guidance on merger remedies (CMA87), which contains guidance on IPR remedies. According to the guidance, for licensing of IPRs to be effective as a remedy it must be sufficient to significantly enhance the acquirer's ability to compete with the merged entity. Such a remedy may not be effective if it needs to be accompanied by other resources (such as sales networks) to enable effective competition and these are unlikely to be available to the acquirers of the IPRs. Where the terms of an IPR remedy result in a material ongoing link between the merger parties and the parties gaining the IPR (eg, providing access to new releases or upgrades of technology or data), the measure may take on some of the characteristics of a behavioural commitment, which requires ongoing monitoring and enforcement.

Given these difficulties in crafting effective IPR-based remedies, where possible, the UK competition authorities generally prefer to divest a business including IPRs rather than relying on IPR remedies alone. The view is that the business including the IPRs is more likely to include all that the acquirer needs to compete effectively with the merged entity.

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

23 Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

The Chapter I provisions do not generally prevent IP rights (IPRs) from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct. That is, agreements that have as their object or effect the restriction, prevention or distortion of competition in the UK will breach the Chapter I provisions. IPR-related agreements that fix prices, limit or control production or supply, or involve market sharing or allocation are likely to be considered infringements. This means that the way an IPR is used can become subject to competition law enforcement (for example, the reverse payment settlement cases).

Under the Enterprise Act, it is a criminal offence for an individual to agree with one or more other persons to make or implement (or cause to be implemented) arrangements relating to at least two undertakings involving the following prohibited cartel activities: price-fixing, market sharing, limitation of production or supply and bid rigging. A person who is guilty of the cartel offence is liable for up to five years' imprisonment or an unlimited fine.

IPR pools, where two or more parties assemble a package of protected works either for their own use or for licensing to third parties, can raise competition law liability. Such pools can create efficiencies for both the right holders and the right purchasers. However, they may limit third-party access to the pools or foreclose opportunities for rivals who are not part of the pool. This has not yet been examined in the UK, but the Technology Transfer Block Exemption Regulation (TTBER) Guidelines (OJ C 89, 28 March 2014, pp 3-50) contain a framework for assessing the application of EU competition law to the pooling of protected works.

Scrutiny of settlement agreements

24 How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

In the same way as any other agreement, a settlement agreement terminating an IPR infringement dispute must comply with UK competition law. The TTBER Guidelines deal with this directly. They address the licensing of technology rights in settlement agreements as a means of settling disputes or avoiding a situation in which one party exercises its IPRs to prevent the other party from exploiting its own technology rights. These agreements can breach competition law where the settlement leads to a delayed or otherwise limited ability of the licensee to launch the product on any of the markets concerned. If the parties to such an agreement were competitors and there was a significant value transfer from the licensor to the licensee, there may be a risk of it constituting market allocation or market sharing. Cross-licensing in settlement agreements may also be anticompetitive where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what was required. Additionally, non-challenge clauses in settlement agreements may breach competition law where an IPR was granted following the provision of incorrect or misleading information.

Agreements that could be problematic from a competition perspective include patent settlements that may lead to a delay of generic entry in return for a value transfer from the originator company to the generic company. Settlement agreements in which the regulator considered the patent holder to have known that the patent did not meet the patentability criteria have also been scrutinised from a competition law perspective. In particular, regulators have shown interest where the patent was granted following the provision of incorrect, misleading or incomplete information.

Reverse payment patent settlements

25 How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

In February 2016, the Competition and Markets Authority (CMA) fined GlaxoSmithKline (GSK) and a number of generic companies £45 million in respect of certain patent settlement agreements related to the antidepressant paroxetine (branded Seroxat by GSK). In the same investigation, the CMA issued a 'No Grounds for Action' decision in respect of IVAX Pharmaceuticals UK's agreement with GSK. The fined parties have appealed the CMA's decision to the CAT, which, on 8 March 2018, referred a number of questions to the CJEU. On 30 January 2020, the CJEU issued its decision in the preliminary ruling referral. This was hot on the heels of Advocate General Kokott's opinion the week before. The Court's decision is notable for its depth and breadth. It found, broadly agreeing with AG Kokott, that an agreement to settle a patent dispute may constitute a restriction of competition by object or by effect and that entering into such an agreement may be an abuse of a dominant position.

The ongoing case of *Secretary of State for Health and others v Servier Laboratories Ltd and others* [2013] EWCA Civ 1234 concerns patent settlement agreements relating to the patent for perindopril and alleged attempt to delay market entry. The claim was brought after the European Commission initiated an investigation into those agreements.

In September 2016, the General Court of the European Union (General Court) delivered its judgment in *Lundbeck* (Case T-472/13). The court dismissed the appeal against the Commission's decision and found that, in specific circumstances, reverse payment patent settlements could amount to a restriction of competition by object. The General Court's decision was appealed to the CJEU. Lundbeck, a Danish pharmaceutical company, appeared at the EU court along with several generics manufacturers for an oral hearing in January 2019. On 4 June 2020, Advocate General Kokott delivered her opinion concluding that the General Court's judgment should be upheld. The final judgment is still pending. While this is a European case, rather than a UK one, it will have a significant impact on the application of competition law in the UK to reverse payment patent settlements.

In December 2018, the General Court partially overturned the EU Commission's decisions in Perindopril (*Servier v Commission* and *Krka v Commission*), confirming that a patent settlement agreement can be a restriction by object. The General Court narrowed somewhat the EU Commission's expansive reading of what constitutes a value transfer in the context of a patent settlement and also expressly permits settlements that are not pan-EU but that have different outcomes in different parts of the EU. This decision was appealed by the EU Commission and is now pending judgment from the CJEU.

In July 2017, the European Commission adopted a Statement of Objections in respect of an agreement between Teva and Cephalon over allegedly delaying the sale of generic modafinil. On 8 June 2020 the European Commission sent a supplementary Statement of Objections in which it sought to clarify its assessments of the parties' arrangement as a restriction 'by object'. These cases make it clear that reverse payment patent settlement agreements are still very much in the crosshairs.

(Resale) price maintenance

26 Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

IPR licences are treated in the same way as other agreements in this context. A licence that imposes (directly or indirectly) a minimum resale price for goods or services will likely infringe the Chapter I provisions. Price-fixing and resale price maintenance agreements are seen as hard-core restrictions and are also excluded from the block exemptions. For example, the block exemptions will not apply to price fixing.

In September 2020, the CMA published an addendum to its leniency guidelines in RPM cases. Companies that apply for 'Type B' leniency on or after 24 September 2020 will only receive a 50 per cent penalty discount in RPM cases. Type B leniency applies to the first applicant to report and provide evidence of a cartel, when the CMA is conducting a pre-existing investigation into the reported cartel conduct.

Exclusive dealing, tying and leveraging

27 Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

The Chapter I and Chapter II provisions do not generally prevent IPRs from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct and should be assessed on a case-by-case basis. IPR-related agreements dealing with exclusive dealing can infringe the Chapter I provisions. For example, an IPR-related exclusive dealing arrangement that prevents a manufacturer from distributing outside a certain territory may be seen as a form of market sharing. Additionally, a dominant company could infringe the Chapter II provisions by only granting a licence to a licensee who agrees to buy unrelated products or services.

Abuse of dominance

28 Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Even a dominant company has the right to choose its trading partners and dispose of its IPRs freely. However, certain IPR-related conduct can be seen as abusive and contrary to the Chapter II provisions. Such conduct can include abusive defence of patent litigation, acquisition of competing technology, discriminatory licensing practices, refusal to license (in exceptional circumstances) and the charging of unfair prices for goods or services protected by IPRs. In October 2017, the CMA announced that it had launched four separate antitrust investigations into alleged anticompetitive practices regarding generic products in the pharmaceutical industry. Three of the cases were being examined for potential abuse of dominance (alongside alleged horizontal practices). In one of these cases (*MSD/ Remicade*), the CMA issued a final decision in March 2019, deciding that, following the statement of objections, there were no grounds for action (ie, the case was closed without an infringement finding). One important point arising from this decision is that the CMA rejected the submission that the as-efficient competitor test (AEC price/cost test) would have prevented the CMA from finding foreclosure as established.

Over the past few years, a number of authorities (particularly the CMA) have started or completed investigations into excessive pricing of pharmaceuticals. One of the common features is that they involve products that at one stage were patent-protected. After patent expiry, the company, often following a sale of the product, changed the status from branded to generic and then increased the price by many multiples beyond the historic price. In finding that the prices were unfair, the authorities have typically relied (among other things) on the fact that the drugs had long been off-patent. In a long-running excessive price case against Pfizer and Flynn Pharma, in June 2018, the CAT held that the CMA had misapplied the relevant legal test. In December 2018, the Court of Appeal granted the CMA permission to challenge the CAT's ruling. On 10 March 2020 the Court of Appeal handed down its judgment. It re-affirmed the CAT's decision that the question of abuse and penalties be remitted to the CMA but it upheld the CMA's ground that the CAT had erred by requiring the CMA to identify a hypothetical benchmark price in assessing whether prices were excessive. This highlights the challenges faced by regulators when bringing these cases.

In light of the Court of Appeal's decision the CMA issued supplementary statements of objections for two ongoing investigations under article 102/Chapter II into liothyronine and hydrocortisone relating to excessive and unfair pricing.

The strength of IPRs may also be considered a barrier to entry into a market, leading to a narrower market definition and, as a result, could make it more likely that the holder of the IPRs could be considered to be in a dominant position.

Refusal to deal and essential facilities

29 Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

The refusal to grant a licence (i.e. a refusal to deal) may constitute an abuse of dominance in exceptional circumstances. The UK position mirrors the EU competition law.

In 2013, the Court of Appeal dismissed an appeal by Chemistree Homecare Limited against the High Court's refusal to grant it an interim injunction in a case concerning an alleged refusal to supply a patented medical product (*Chemistree Homecare Ltd v Abbvie Ltd [2013] EWCA Civ 1338*). The Court held that Chemistree did not have a real prospect of showing that Abbvie had a dominant market position. It had not provided sufficient evidence to establish that the relevant product market comprised only Abbvie's product.

In July 2015 the European Court of Justice in *Huawei TechnologiesCo Ltd v ZTE Corp, ZTE Deutschland GmbH* laid out criteria for when a SEP-holder is entitled to seek an injunction against a potential licensee (without violating antitrust laws). On 26 August 2020, the Supreme Court provided further interpretations of this decision and ruled in *Unwired Planet International Ltd. v. Huawei Technologies (UK) Co. Ltd. andHuawei Technologies Co. Ltd. v. Conversant Wireless Licensing SARL* that so long as the SEP-holder is a willing licensor on FRAND terms, the holder may seek an injunction without abusing its dominance. The 'non-discriminatory' prong of the FRAND offer need not be a single 'most favoured' rate for all licensees. In addition, the court held that English courts have the power to enjoin an SEP-implementer (unless it enters into global FRAND licence of a portfolio that includes foreign patents) and to determine royalty rates and terms of such a licence.

REMEDIES

Remedies for violations of competition law involving IP

30 What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

The remedies for violations of competition law involving IP rights (IPRs) are the same as those for breaches of competition law generally.

The CMA can accept binding commitments offered by the parties to address infringements of the Chapter I and II provisions. It also has the power to impose financial penalties of up to 10 per cent of the worldwide turnover of an undertaking for such infringements. Additionally, it can give such directions as it considers appropriate to bring the infringement to an end. The CMA has a wide discretion in this respect, but can include directions to cease certain behaviour or to set up systems to prevent continuance of the infringements.

The CMA can also impose interim measures where it has a reasonable suspicion that there has been an infringement and the measures are necessary to protect the public interest or to prevent significant damage to particular persons or businesses. In such cases, it can give any directions that it considers appropriate to prevent the harm feared. There is no requirement that the directions be ones it could give in a final order, nor that the measures be temporary and conservatory.

The courts (including the CAT) can grant injunctions and award damages. The infringing party can also face criminal liability.

Competition law remedies specific to IP

31 Do special remedies exist under your competition laws that are specific to IP matters?

No.

ECONOMICS AND APPLICATION OF COMPETITION LAW

Economics

32 What role has competition economics played in the application of competition law in cases involving IP rights?

Regardless of whether IP rights (IPRs) are involved, economics plays an important role in competition law cases. Economic analysis is relevant at the stage of assessing the anticompetitive effects of behaviours and conduct, but it is also important in determining the relevant markets for goods and services.

RECENT CASES AND SANCTIONS

Recent cases

33 Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In February 2016, the Competition and Markets Authority (CMA) (in a case started by its predecessor, the Office of Fair Trading (OFT)) fined GSK and two other pharmaceutical companies (the generic companies) in relation to anticompetitive patent settlement agreements. The CMA found that the generic companies agreed to delay the launch of their generic versions of the drug paroxetine in return for substantial payments by GSK. The CMA also found that GSK abused its dominant position in the UK market by seeking to delay the generic companies' entry into the market. The OFT had previously alleged that a third generic pharmaceutical company had entered into an anticompetitive agreement with GSK. However, the CMA issued a no grounds for action decision in respect of that agreement. The CMA's decision was appealed to the CAT, which, on 8 March 2018, referred a number of questions to the CJEU.

The CMA has recently closed and opened a number of investigations into excessive pricing of pharmaceuticals.

The English High Court has recently decided several cases relating to the enforcement of SEPs and FRAND licensing obligations.

Remedies and sanctions

34 What competition remedies or sanctions have been imposed in the IP context?

In 2010, the OFT fined Reckitt Benckiser £10.2 million (reduced from £12 million as part of an early resolution agreement) for the abuse of its dominant position on the market for the NHS supply of certain medicines. The claim related to product evergreening.

In 2016, the CMA fined GSK and two other generic pharmaceutical companies a total of £45 million for agreeing to delay entry of generic versions of paroxetine, for which GSK held certain patents in the UK. The CMA's decision was appealed to the CAT which, on 8 March 2018, referred a number of questions to the CJEU. In August 2019, the CMA provisionally accepted a £10.1 million settlement from Aspen over an agreement that prevented the entry of a competing version of the drug fludrocortisone. Unusually, Aspen has agreed to pay its customer, the NHS, £8 million without the government launching court proceedings. Aspen will additionally pay a maximum fine of £2.1 million if the CMA concludes that competition law was infringed.

There are also a number of cases in which the CMA has issued a statement of objections that may lead to fines at a later stage. For example, the CMA in February 2019 provisionally found that Auden Mckenzie and Waymade broke the law by agreeing not to compete for the supply of hydrocortisone tablets to the NHS. In a supplementary statement of objections, on 12 February 2020, the CMA also alleges that these agreements constitute an abuse of a dominant position.

UPDATE AND TRENDS

Key developments

35 Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

The hot topic in all areas of UK law continues to be the United Kingdom's exit from the EU. The UK left the EU on 31 January 2020 and entered into a 'transition period' set to expire on 31 December 2020. In February 2020 both the EU and the UK published their negotiation mandates. The EU was clear that it expects a future partnership which prohibits anti-competitive agreements. The UK agreed but has made clear that this does not require legal or regulatory alignment with the EU. In the short term, UK law remains unchanged. The consequences for UK competition and IP law will largely depend on the outcome of negotiations before the end of the transition period and, in particular, the level of access to the single market and the corresponding level of free movement requirements. In October 2018, the Competition (Amendment, etc) (EU Exit) Regulations 2019 were published, which has since been approved by Parliament. This has the effect of adapting the EU competition regulations to become a set of domestic competition regulations in the event of, and only in the event of, a no-deal Brexit.

The Competition and Markets Authority (CMA) published guidance in March 2019 on the effect of a no-deal Brexit on merger control cases that are 'live' on exit day. If agreed terms cannot be reached by the expiry date of the transition period, the UK has indicated its intentions to cease to apply the EU rules. As such the EU prohibitions under article 101 and 102 TFEU would no longer be applicable in the UK. Any anti-competitive behaviour in the UK would be subject to examination by the CMA under the Chapter I and II CA98 prohibitions, which for now closely mirror the EU provisions. If the behaviour effects trade within the UK and trade between the remaining EU member states, there will be a high likelihood of parallel investigations by EU and UK authorities, with an increased burden to businesses. Divergent outcomes will also pose some risk, although EU case law is likely to remain influential in practice for some time.

On 26 August 2020, the Supreme Court ruled in *Unwired Planet International Ltd. v. Huawei Technologies (UK) Co. Ltd.andHuawei Technologies Co. Ltd. v. Conversant Wireless Licensing SARL* that so long as the SEP-holder is a willing licensor on FRAND terms, the holder may seek an injunction without abusing its dominance.

Coronavirus

36 What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Coronavirus has tested the way competition law operates as regulators seek to ensure that competition law rules do not act as a barrier to efforts to recovery. The European Commission published a temporary framework for assessing possible cooperation projects, acknowledging the benefits it can have during the pandemic. It has also provided informal 'comfort letters' to cooperating competitors concerned about compliance. The Commission also adopted an exceptional derogation from EU competition rules for the milk, flowers and potatoes sectors as part of a package to support the agricultural food sector. Similarly, the CMA published guidance on competitor collaboration in the UK and exclusions in relation to cooperation agreements between groceries providers, health service providers, the dairy sector and Isle of Wight ferry routes. The CMA intends to operate on a business-as-usual basis for the purposes of its merger control function.

In June 2020 the UK government made changes to the Enterprise Act 2002 to allow for government intervention in foreign takeovers of businesses that are directly involved in the Coronavirus response.

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ISBN 978-1-83862-353-1