

Chicago-Kent College of Law

From the Selected Works of David J. Gerber

January, 1996

The Implications of the New Regime for Global Competition Policy: Intellectual Property Rights, Economic Power, and Global Technological Integration

David J. Gerber, *Chicago-Kent College of Law*

INTELLECTUAL PROPERTY RIGHTS, ECONOMIC POWER, AND GLOBAL TECHNOLOGICAL INTEGRATION

DAVID J. GERBER*

In my introduction to this Symposium I suggested that the expansion of international intellectual property rights in the context of global technological integration called for the development of new perspectives for assessing this phenomenon and its implications.¹ In this Essay I explore the value of one such perspective.

My starting point is the claim—I think incontrovertible—that the consequences of conferring rights frequently depend on the power relationships within which those rights operate. In the context of intellectual property rights, for example, this means that granting a monopoly right to an international industry leader such as Microsoft is likely to have consequences quite different from those that would ensue if the same rights were granted to a local computer whiz in New Delhi. In assessing the international expansion of such rights, therefore, it may be revealing to examine the relationship between intellectual property rights and economic power.

I will here refer to this relationship between power and rights as the “power-weighting” of rights. In general, rights can be said to be “weighted” in proportion to the economic power of the holders of those rights: as the economic power of rights holders increases, so does the weighting of the rights they hold. This term provides a convenient label for identifying the central object of our concern—i.e., the extent to which economic power conditions the operations and consequences of a rights regime—here, the international intellectual property rights regime.

Viewing the expansion of international intellectual property rights from this perspective reveals potential public policy concerns. We notice, in particular, that this expansion of rights is occurring at the same time that certain forms of economic power also appear to be increasing. This combination of increased power and expanded rights may produce harm to the process of international economic competition.

* Professor of Law, Chicago-Kent College of Law.

1. See David J. Gerber, *Global Technological Integration, Intellectual Property Rights, and Competition Law: Some Introductory Comments*, 72 CHI.-KENT L. REV. 357 (1996).

This Essay sketches aspects of the interplay between expanded rights and the increased economic power of holders of those rights; suggests a framework for assessing potential harms from this interplay; and offers a cautious proposal for responding to such harms. I emphasize that this is an Essay in the sense in which the label was first used by Michel de Montaigne—i.e., it is a venture of exploration onto new terrain.

I. ELEMENTS OF ECONOMIC POWER

Before looking at the power-weighting issue in the context of intellectual property rights expansion and technological integration, it may be important to comment on the concept of power that I am using here. The term is used in a wide variety of contexts and often with little explanation of how it is being used. As a result, there is often much confusion about its referents.²

I here use the term to refer generally to the capacity of private economic actors to coerce other economic actors—i.e., to cause them to do what they otherwise would not do (or, conversely, to refrain from doing what they otherwise would do) without compensating them for such act or omission.³ This is not the place to engage in theoretical elaboration of this concept of power, but I will identify two of its forms that, at least under certain circumstances, may create the potential for harm to the process of competition. We will return to them in a bit more detail later.

One is what is often called market power (or monopoly power). This concept refers basically to the capacity of one or more firms to raise or otherwise influence the price at which goods or services are sold on a market, usually by virtue of having a dominant position on the market. It is a standard economic concept that often plays an important role in national competition law systems. Because it is likely to be familiar to most readers of this Essay, it needs no further comment here. More important for our purposes is the capacity of one or

2. An additional concern in using the concept of power relates to the ideological “baggage” that it sometimes carries, particularly in the United States. Those who refer to power, especially in relation to economic issues, are often assumed to have a particular ideological perspective—namely, a “left” or, in the United States, a “liberal” perspective. In U.S. academic writing, the concept “power” is most often employed by sociologists, whose proclivities in this context are often somewhat suspect among economists, lawyers, and economic policy makers. As to this problem, I can only state that my use of the term does not, as far as I am aware, derive from any ideological agenda or depend on any ideological framework for interpretation.

3. The leading theoretician of economic power is probably the German economist Helmut Arndt. See, e.g., Helmut Arndt, *WIRTSCHAFTLICHE MACHT: TATSACHEN UND THEORIEN* (3d. ed., Munich 1980).

more firms to hinder the competitive conduct of rivals, particularly by excluding them from the process of competition. I will refer to this form of economic power as the “power to impede.”⁴ Boycott is a common example. Here a firm or group of firms may have the capacity to impede a competitor from obtaining supplies or concluding sales, not through competition—providing better goods or services—but through some form of coercion. This form of power is often referred to in national competition law systems in the context of “exclusionary conduct,” but there are significant disparities in conceptualization.

II. GLOBAL INTEGRATION AND THE POWER-WEIGHTING OF INTELLECTUAL PROPERTY RIGHTS

When we view the expansion of international intellectual property rights from a power-weighting perspective, we discover that it is intertwined with two other interrelated processes—one technological, one economic—that tend to increase the economic power of some rights holders. It is the confluence of these three processes—legal, technological, and economic—that creates public policy concerns. I here look at some aspects of the relationships among these processes—how they fit together, what consequences their interaction might have for international competition, and how the international community might assess and respond to these relationships.

A. *Technological and Economic Integration*

I use the term “technological integration” to refer to the creation and expansion of technological “networks”—i.e., technological interdependencies of economic functions. Technologies may be considered interdependent where the value of one such technology is eliminated or significantly reduced if its participation with others in the network is restricted. For example, a satellite communication system may contain numerous components—computer hardware, software, machines, etc.—each of which may derive all or most of its value from its role in this technological unit and its interactions with other components of the network.

Such networks may create or enhance the economic power of those who control them because the capacity to exclude from the network may be used to coerce or to impede those who seek access to it.

4. I have borrowed the term from German competition law. For discussion, see David J. Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TULANE L. REV. 57, 77 (1987).

In general, we can expect this capacity to vary with the perceived value that inclusion in the network has for an owner or user of component technology. In our hypothetical network of telecommunications technologies, for example, those who control such a network may acquire considerable power over suppliers of component products or technology whose only source of value is inclusion in the network. This description is obviously oversimplified, but it illustrates the basic idea.

Increasing technological integration refers to one or more of several changes in the characteristics of technological networks. Such networks may, for example, tend to become "larger" in the sense that they include more components. They may also become "tighter" in the sense that components are increasingly interdependent—i.e., there are fewer options outside of a specific network available to those (owners or users of component technologies) who seek inclusion or access to that network. Finally, a particular network may become more important in the sense that access to it may become increasingly necessary for competitive survival.

Each of these changes may, in turn, tend to increase the economic power of those who control access to the network. For example, if owners, producers, or users have fewer options outside the network, the value of inclusion in the network increases, and the capacity of "controllers" to coerce or influence in exchange for access increases. On the international level, such technological integration appears to be increasing, particularly in key areas such as telecommunications.

Accompanying this process of technological integration is the more familiar process of economic integration. Although this process obviously has many aspects, for our purposes it refers to the increasing concentration of economic units of increasing size under common control. In other words, more units of production and/or more economic functions are becoming subject to the control of the same decision-makers.

B. Interactions

Each of the three processes that we have identified—technological integration, economic integration, and the expansion of international intellectual property rights—thus tends to enhance the capacity of some firms to exclude others from competition or impede their capacity to compete. Intellectual property rights represent governmental authority to exclude, while in the other two cases this capacity does

not derive from public authority, but is an aspect of private economic power. The confluence of these processes thus leads to an aggregation of the capacity to exclude.

But the power-enhancing effects of these three process may not merely be aggregated, they may also be multiplied. They may tend to reinforce and magnify each other. Where larger technological networks are under the control of diminishing numbers of decision-makers who also have expanded legal monopolies with respect to the components of such networks, each process enhances the power-weighting consequences of the other two.

This brief excursus on the relationship between economic power and the expansion of intellectual property rights is necessarily general and superficial. It is intended merely to indicate the potential value of a particular perspective and to suggest the likelihood of certain consequences rather than to substantiate claims about the degree to which they actually exist. It should be enough, however, to suggest the need for further investigation of these effects.

III. IDENTIFYING POTENTIAL HARMS TO COMPETITION

Even if, as seems likely, the interplay of expanded intellectual property rights with technological and economic integration often increases the economic power of some holders of those rights, thus enhancing the power-weighting of those rights; this does not, in and of itself, harm the process of competition. The next step in the analysis is to ask whether this interplay poses significant risks of harm to competition and, if so, by what means.

It is important to emphasize here that our concern is not with power itself. Economic power is often merely the product of economic efficiency, and competition law is intended, *inter alia*, to promote such efficiency. Moreover, we have no basis for believing that such power is harmful in its own right. Our concern is instead with the consequences of particular forms of conduct that may be encouraged by this interplay between rights and economic power. We will look first at traditional economic criteria of harm, and then we will widen our lens to look at other factors relating specifically to the protection of competition on the international level.

A. *Economic Criteria*

From a purely economic perspective, the primary risk of harm to competition arises from exclusionary conduct. The basic idea is that

competition is harmed where coercion is used to exclude a competitor or potential competitor from the opportunity to compete in a particular market, or to reduce its capacity to compete there. Where a firm engages in coercive conduct to eliminate or impede competition, we have "exclusionary conduct." Note that it is the *opportunity to compete* on an unimpeded basis that is at issue. If a firm does not have the capacity to compete effectively on the market, its fate should not be a concern of competition law.

Such exclusionary practices may harm competition in several ways, of which I will mention only two. First, they tend toward monopoly. A firm that can use coercive capacity to gain a competitive advantage over its rivals is likely, *ceteris paribus*, to acquire over time a dominant position on the market and thus achieve power to influence prices on that market. Moreover, such practices are likely to render a dominant position so achieved more durable than it would be if achieved through competitive performance.

Second, exclusionary practices tend to create welfare losses because outcomes on the market are influenced, to that extent, by factors other than performance, and thus scarce resources tend to flow to suboptimal recipients. If Firm A achieves success vis-à-vis its competitor, Firm B, by impeding firm B's capacity to compete rather than through superior performance, economic resources are misdirected to reward inferior rather than superior performance.

The combination of increased technological and economic integration with expanded international intellectual property rights poses a threat to competition because it increases the likelihood of such exclusionary conduct. This effect is likely to the extent that the confluence of these processes increases the capacity to engage in such conduct and the rewards that can be anticipated from such conduct.

We can expect the capacity to engage in such conduct to increase as more firms possess extended monopoly rights that, in turn, protect technological networks that are larger, tighter, and more important for competitive survival. The capacity to exclude increases because rights to exclude are expanded, and because they "apply" to an "object" or "sphere of economic activity" which is larger, alternatives to which are fewer and access to which is of increased value.

This means that we also can expect the rewards of engaging in such conduct to increase as a result of the increased value attached to participation in and/or access to such networks. The capacity to exclude from large networks in which high value is attached to participa-

tion is likely to be more profitable than a similar capacity with regard to a smaller network where the value of such participation is lower.

The increased power-weighting of rights envisioned here also may exacerbate the harmful consequences of such conduct in some situations, although this is more conjectural. In general, we would expect this effect because the capacity to exclude from large technological networks in highly concentrated industries is more likely to move the network-controlling firm into a position of dominance than would be the case if the networks were smaller and the industry less concentrated. Other factors such as reduced strategic flexibility may, however, offset or curtail this effect.

B. Politico-Economic Criteria

As I indicated in my introduction to this issue, however, the process of international competition is conditioned by the existence of political boundaries and thus involves factors that are not within the purview of economic theory. Thinking about protecting harm to competition on the international level requires, therefore, consideration of harms other than purely economic harms.⁵ Recall that the central idea here is that on the international level the existence of state-related boundaries makes government conduct a conditioning component of the competitive process, because the existence of nation-states in and of itself creates obstacles to trade, and because governments can, and often do, restrict and distort the flow of goods, services, and capital across their borders. In general, political cooperation—the cooperation of governments in the reduction of barriers to trade and investment—is likely to increase competition, whereas reduced support of that agenda will have the opposite effect.

If we look to these “politico-economic” criteria of harm, the power-weighting of international intellectual property rights creates additional public policy concerns because the expansion of international intellectual property rights in the context of rapidly increasing technological and economic integration may inhibit such governmental cooperation. This is likely where the increased power-weighting of intellectual property rights is perceived by governments as a threat to their interests. Where, for example, foreign interests own intellectual property rights that allow them to control a large technological network and they seek to enter the market of a developing country, their

5. See, Gerber, *supra* note 1, at 357.

capacity to exclude may harm local competitors, influence the political situation, and the like.

Where a government perceives these potential harms as greater than the benefits it expects to receive, it may take measures to reduce or eliminate these anticipated effects. It may, for example, directly or indirectly increase constraints on the conduct of such firms, selectively increase their costs or reduce protection of relevant intellectual property rights, all of which may harm international competition.

The probability that a particular government will engage in such competition-restraining conduct is likely to depend on a variety of economic and political factors, including the size and scope of the market and the level of economic development. It is likely to be higher, however, in developing countries and countries with small markets. Such markets generally have fewer and weaker competitors, and governments tend to be less stable and more susceptible to this type of protectionist pressure.

IV. THE NEED FOR AN INTERNATIONAL RESPONSE: WHAT ABOUT NATIONAL COMPETITION LAWS?

If then the power-weighting of intellectual property rights poses threats to the process of international competition, how do we best respond to such threats? How do we go about deciding whether the harm justifies responses at the international level and which types of response are likely to be most effective? A preliminary question is whether existing national competition laws may be an adequate response to the problem. If national competition law regimes can deal adequately with the problem, there is little point in trying to develop an international response.

At first glance reliance on national competition law systems might appear promising. There are now competition law systems, with varying degrees of influence and sophistication, in many countries and in the European Union, and many, probably most, of these systems include provisions that are intended to combat exclusionary practices. Moreover, in some of these systems such provisions are reasonably effective.

Closer analysis reveals, however, that a purely national response is not likely to be effective. One obstacle involves disparities among states with regard to competition law. Competition laws of consequence are rare outside of Europe, the United States, and Japan, which means that in much of the world there are either no such sys-

tems or they are of minimal significance. Moreover, even where there are effective competition law systems, there is little consistency in their treatment of exclusionary conduct. To rely on national systems would, therefore, lead to highly uneven treatment of such conduct.

In addition, competition law systems tend either not to exist at all or to be weakest in those countries in which the risks of harm to international competition may be greatest; developing countries typically have weak or no competition laws, but it is here that the risks to competition are often particularly acute. From the "pure" economic perspective, for example, the markets are often small and the international competitive capacities of local industries tend to be limited. As a result, the capacity for controllers of networks to acquire dominance and/or exercise coercion over such firms is likely to be greater. This then also harms international competition from a politico-economic perspective, because it increases the likelihood that local governments will seek to protect local firms and markets.

A second problem with relying on national legal systems is that the treatment of exclusionary practices tends to be less successful than the treatment of many other types of problems, such as horizontal restraints. In most systems exclusionary practices are treated under provisions that combat "abuse of a market-dominating position." These provisions are often perceived as less important than those dealing with more prominent and easily-recognized threats to the competitive process such as cartel behavior, and thus there has been less experience with these provisions. There also has been less effort invested in developing and refining their content and application. Moreover, the application of these provisions has often encountered significant problems of conceptualization and of proof that have hampered their effectiveness.

Finally, and perhaps even more fundamental, national competition laws are not designed to deal with the full range of factors involved in protecting international competition. They articulate and enforce norms within a specific national markets, where many of the issues which we have here identified as likely in the context of international competition do not arise. For all of these reasons, then, reliance on national competition laws would be a haphazard and unreliable response to the problem.

V. FASHIONING AN INTERNATIONAL RESPONSE

A. *Response Criteria*

If then there is to be an effective response to the problems associated with the power-weighting of the new international intellectual property rights regime, it is likely to have to be created on the international level. But what kinds of criteria should be used in fashioning such an approach? The primary criterion should, of course, be its probable effectiveness in deterring the conduct identified here as potentially harmful. The paucity of experience with the use of international legal tools in this area may, however, make it difficult to assess effectiveness, and thus a second general criterion should be the importance of caution in developing such a response.

This lack of experience also suggests that the response strategy should be as focused as possible, venturing no farther than required by the specific problem at hand and utilizing the least intrusive means available. The broader and more intrusive the response, the greater the unanticipated consequences are likely to be, and the more political resistance it is likely to encounter. Broader initiatives, such as the Munich draft code, may eventually be of use in this area,⁶ but their fate is uncertain, and none appear to have focused on the power-weighting issue.

Finally, systemic criteria deserve an important role in fashioning a response. Any response to the problem of power-weighting should be designed to "fit" as well as possible into the current international law system, that is, it should support rather than hinder other operations and objectives of that system such as increased political cooperation among states or protection of the environment.

B. *A Cautious Proposal*

Applying these criteria, I suggest establishing as a legal norm the general principle that these newly-expanded intellectual property rights may be restricted where they are "abused," i.e., where they are used to impede competition. My objective here is not to develop a detailed proposal for making such a principle operative. That would require careful analysis of many factors in the context of specific deci-

6. For discussion by one of the Munich draft code's principal drafters, see Wolfgang Fikentscher, *The Draft International Antitrust Code ("DIAC") in the Context of International Technological Integration*, 72 CHI.-KENT L. REV. 533 (1996).

sion-making situations. The following remarks merely sketch one version of how such a proposal might be structured and implemented.

The basic idea is that if the international community has created risks of harm to competition by expanding international intellectual property rights protection, an appropriate response would be for that community to restrict the use of those rights where they are used to produce such consequences. The proposal is, therefore, narrowly focused on the specific public policy concerns that derive from the confluence of economic and technological integration with the expansion of intellectual property rights. Its basic claim is that the interaction of expanded rights with enhanced economic power threatens harm, and thus constraining the exercise of those rights should reduce the likelihood of such harm.

The key normative concept is "abuse," which I here define narrowly to code those forms of exclusionary conduct that we have discussed here—namely, the use of power-weighted rights to impede competitors. For these purposes, therefore, the core content of the term should be relatively clear. As with any central concept, there would be some uncertainty about its scope, but it should be sufficiently precise to allay fears of inordinate expansion that might interfere with international trade and investment.

This principle could be given authoritative articulation in an international agreement that might be negotiated within the framework or under the auspices of the World Trade Organization ("WTO"). The content of the principle could be elaborated in such an agreement, and examples or guidelines relating to its interpretation could also be provided.

Such an agreement also would establish a procedural mechanism for dealing with violations. It seems unlikely that there would be sufficient political support for placing the implementation of such a principle in the hands of an international organization such as the WTO, and no international organizations are currently in a position to implement such a proposal effectively. It may be appropriate, therefore, to provide that the state parties to the agreement would be authorized to apply the principle themselves through whatever procedures they choose. A state may wish to use primarily judicial or primarily administrative mechanisms; the choice would be theirs. The sanctions would be limited to reductions in the protection of intellectual property rights, including, perhaps, suspension of the exercise of those rights, mandatory licensing, and the like.

In order to assure consistency in states' application of the standard, develop the substantive content of the norms, and discourage short-term protectionist uses of this authority, the agreement should provide that state decisions applying this principle would be appealable to the appellate board of the WTO. Furthermore, appealed decisions would not become effective until disposition of the appeal. The system would thus give states a good deal of latitude in determining how they apply the principle, subject, however, to supervision by an international tribunal.⁷

C. Benefits of the Proposal

Articulation of this principle in such an agreement should help to deter the kind of exclusionary conduct that we have identified as a public policy concern. It would establish a standard of conduct supported by the international community, and this is likely, in and of itself, to create significant compliance pressures. International corporations generally seek to avoid conduct that is considered a violation of legal norms, if for no other reason than to avoid the negative publicity such violations often entail.

There are also grounds for expecting the compliance-inducement mechanism to be reasonably effective. In locating primary responsibility with the national governments, it would authorize governments to act where they perceived harm as a result of such "abusive" conduct. These governments would then be in a position not only to create significant pressure for compliance, but also directly to implement any decisions. The international protection of intellectual property operates through obligations on states with regard to national intellectual property rights, and national governments would be authorized to alter the rights they themselves create. Moreover, the actions of national governments would be legitimated and "internationalized" because they would be acting "on behalf" of the international community, thus presumably enhancing pressure for compliance.

This proposal should also promote international competition by encouraging governments to reduce obstacles to competition. Without such a system, governments that wish to respond to the threats posed by the kinds of exclusionary conduct discussed here have only two options. They can impose unilateral protectionist measures, which are often concealed and often also affect other conduct, or they

7. I assume that such an arrangement would not violate the Trade-Related Aspects of Intellectual Property Rights agreement or any other international agreement.

can reduce enforcement of intellectual property rights generally. This proposal would channel the desire to respond into agreed forms, thus increasing the transparency of such actions, inducing governments to make responses specific rather than general and presumably constraining government activity that might harm competition.

Among the advantages of such a proposal is the relative ease with which it could be implemented. Establishing the principle and putting the system into operation would not appear to require the resolution of large numbers of political conflicts. The international community has recently expanded these international intellectual property rights, and thus it can also agree to impose certain restrictions on the use of those rights in order to deter harmful use of them. If this is done soon, claims of interference with vested rights should be limited.

This proposal also meets other criteria that we suggested as important for evaluating responses to the power-weighting problem. It is narrow and focused directly on the specific problem at hand. It would not implicate other types of economic conduct, nor would it establish new bureaucracies. It focuses the normative response precisely at the point where the two relevant regimes—protection of intellectual property interests and protection of competition—intersect.

The major objection to such a proposal is likely to be that it might harm international investment and undermine the goals that led to the expansion of the rights in the first place. It seems relatively unlikely, however, that it would have a significant effect on investment. These rights are very new, and international investment seems to have gotten along rather well without them, so to merely provide some limits on their use is hardly likely to harm international investment. This is, after all, a laser approach—it relates only to a specific form of conduct and specific rights, and the use of the WTO as a control instance should assure that it does not become overly aggressive. More importantly, the states are still in control, and they still have every incentive to preserve international investment, so they are not likely to use these tools in a way that would deter such investment.

CONCLUSION

In this Essay I have sought to do what I call for in my introduction to this issue, that is, develop a perspective on the new intellectual property rights regime that reveals potentially important consequences of that regime. This perspective focuses on the potential harms to the process of international economic competition that may

result from the interaction of expanded rights and increased economic power. I also have proposed a response to the consequences that this perspective reveals.

This perspective utilizes as a starting point perceptions of harm and mechanisms of response that currently exist. National legal systems have, for example, recognized the potential harms to the process of competition that arise where economic power is used to impede or otherwise coerce market participants. The challenge is, however, to adapt such domestic ideas for use on the international level and—where this is inadequate—to go beyond them to new conceptual territory. The characteristics and potential consequences of the new intellectual property rights regime indicate the importance of carefully considering such responses.