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THE INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW IN KENYA

BY

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DEDICATION

I dedicate this project to my deceased mother, Mrs. Salina Rotich who encouraged me to pursue the master's degree and began the journey with me but never lived to witness its completion. Mum, I hope that I make you proud. You were the wind beneath my wings when you were alive and are now the angel who watches over me. This is for you.

LIST OF ABBREVIATIONS

IPR- Intellectual Property Rights

ICN- International Competition Network

OECD- Organisation for Economic Cooperation and Development

UC- Unfair Competition

TM- Trade Mark

UM- Utility Model

TS - Trade Secret

GI- Geographical Indication

PVR- Plant Variety Protection

PBR- Plant Breeders Right

ID- Industrial Design

CAK- Competition Authority of Kenya

TFEU- Treaty on the Functioning of the European Union

TTBE - Technology Transfer Block Exemption.

WIPO- World Intellectual Property Institute

EAC- East Africa Community

EACCA-East Africa Community Competition Act

EACCC-East Africa Community Competition Commission

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Morton Salt Co v GS Suppiger Co. 314 U.S. 488 (1942)

NDC Health v IMS Health, Case C-418/01

Nungesser v Commission (Maize Seed) Case 258/78 [1982] ECR 2015

Parke, Davis & Comapny v Probel and others, Case 24/67

Precision Instrument Manufacturing Co. v Automotive Maintenance Machinery Co. (1945) 324 US.

United States v. Microsoft Corporation 253 F.3d 34

Verizon Communication v Law offices of Curtis (2004) 540 US 398-407

Volve and Veng (1988) ECR 6211

ABSTRACT

The interaction between competition law and intellectual property law has often attracted divergent views from scholars and practitioners of each respective sphere of law. Whereas some argue that the two are in conflict with each other and cannot be reconciled. The aforementioned tension between competition law and intellectual property law has been traced to the objectives of each. On the one hand, intellectual property rights confer upon their owners an exclusive right to behave in a particular way while on the other hand competition law strives to keep markets open. Other scholars have argued that, in real sense and practice, the two are actually not in conflict but rather that they complement each other. The question then becomes, is there really an irreconcilable difference between the two areas of law? This paper seeks to establish how the two aspects of law interact and seeks to propose that there be created a balance to alleviate the perceived conflict between the two.

This paper will identify the areas in which the balance can be struck. It will also seek to establish how the Kenyan legislative framework as well as the courts has dealt with the conflict. It will proceed from understanding the goals and objective of both intellectual property law and competition law. This will provide the backdrop against which the alleged conflict originates from. A comparative study with other developed jurisdictions will be undertaken so as to advise on the route that should be taken by Kenya on the interface and a conclusion drawn on how the two areas relate and recommendations drawn from the issues identified in the study made.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

Modern economy, which is characterized by innovation and technological development, has posed challenges to competition law and policy. Innovation has in the recent times become one of the key drivers of the economic growth of both public and private corporations. In fact, innovation and new technology cuts across various sectors of the economy mainly in the telecommunication and industrial sectors.[1]New markets have emerged and revitalized the economy as a result of the introduction of new products and services.[2] The interface between intellectual property, one of the key inducements of innovation, and competition law has consequently gained significant attention. This is because the concept of intellectual property generally appears to conflict with competition law principles.[3] The European Court of Justice in *NDC Health vs IMS Health* stated that 'competition law and intellectual property have never been easy bedfellows'.[4]However, some scholars have argued that competition law and intellectual property are actually complementary and that the

[1] Robert Pitofsky (2001) "Challenges of the New Economy: Issues at the Intersection of Antitrust And Intellectual Property") 68:3*Antitrust Law Journal* 913-924, <http://www.jstor.org/stable/40843501> (accessed 23 July 2015).
[2]Dennis W. Carlton and Robert H. Gertner (2003) "Intellectual Property, Antitrust, and Strategic Behavior" 3 *Innovation Policy and Economy* (IPE)., pp 30-33<http://www.jstor.org/stable/25056152> (accessed 23 July 2015).
[3]*ibid*
[4]*NDC Health* v. *IMS Health* [2004] All E.R. (E.C.) 813; see also Ian Eagles (2004) "Copyright and Competition Collide" 64:3 *The Cambridge Law Journal*, pp.564-566 <http://www.jstor.org/stable/4500832> accessed 23 July 2015

conflict between the two is exaggerated.[5] The interface between the two arouses one key challenge, if these are the two widely differing perspectives are to be taken, how and where can a balance be stricken between the seemingly conflicting objectives of *'incentivizing and rewarding individual innovators and keeping markets open to their competitors".*[6]

The relationship between competition law and intellectual property has not been fully explored in Kenya. There is limited published literature in the area. Further, the competition law bodies, key being the Competition Authority of Kenya (CAK), the Competition Tribunal and the courts have not explored the area under research. This paper therefore seeks to understand the interface between the two spheres of law in Kenya as well as undertake a comparative study with other developed jurisdictions on the subject so as to establish whether Kenya can borrow some lessons from these jurisdictions and suggest the way forward for the country with respect to the subject under research.

1.2 Background

The aim of business and enterprise is to make and maximize on profit margins which in turn leads to increased economic growth and development.[7]Such increased economic growth may result in establishment of powerful economic forces which can be harmful to individuals, markets and the society generally.[8] In order to create

[5]Herbert J Hovenkamp, 'The Intellectual Property-Antitrust Interface' (2008) U Iowa Legal Studies Research Paper No. 08-46; Issues in Competition Law,<http://ssrn.com/abstract=1287628> accessed 05 March 2016)
[6]Richard Whish & David Bailey, *Competition Law (*Oxford University Press, Oxford, 8th ed, 2015) 768.
[7]Ibid 4
[8]ibid.

efficient markets and promote consumer welfare, there is need to regulate the excessive economic powers and deter abuse of the same. Competition therefore plays a significant role in achieving a balance in the market.[9]First, competition encourages innovation and the efficient use of available resources in the production of quality goods and services at favourable prices.[10]Second, it creates a fair opportunity for growth and development of new enterprises in the markets.[11]However, barriers to competition encourage anti-competitive practices and lead to inefficient markets. Such barriers are as a result of abuse of dominant positions in the markets or inadequate government regulation through laws or implementation of the available regulation.[12]

Competition law and policy is the government's mode of intervention in the creation of competitive markets through eradication of market barriers and restrictive trade practices.[13]Competition law regulates practices that would otherwise be harmful to competition. These practices include: anti-competitive agreements such as agreements to fix prices, or to share the market or to restrict output; abusive behaviour by dominant players who have substantial market power; mergers; and public restrictions of competition.[14]Competition law seeks to protect both consumers

[9]Mark Furse (2006) *Competition Law of the EC and the UK*, Oxford University Press, Oxford, 5thed pp2.
[10]Cornelius Dube,(2008)" Intellectual Property Rights and Competition Policy" (CUTS International, 2008) <http://www.cuts-international.org/pdf/viewpointpaper-IPRs-CompPolicy.pdf>(accessed on 17 August 2016).
[11]Supreet Kaur (2011) *Interface Between Intellectual Property and Competition Law*<http://ssrn.com/abstract=1802450>(accessed 23 July 2015).
[12]Carlos M. Correa (2007) "Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing Countries" at <http://www.iprsonline.org/resources/docs/corea_Oct07.pdf>(accessed 22 July 2015).
[13]Joanna Goyder and Albertina Albors Lloren *Goyders EC Competition Law*, Oxford University Press, Oxford, 5thed,) 17.
[14]eg government regulations and policies etc.

and competitors and also to redistribute economic power and wealth. However, mere enactment of competition law is inadequate in the establishment of a competitive market.[15] This is because other than the conduct of the firm, the competitiveness of an economy is also influenced by the external environment in which they operate.[16] In order to effectively assess the competitiveness of an economy and make appropriate reforms, there is need to assess the key sectors in the economy and their impact on competition in the market.[17]

Intellectual property (IP), on the other hand, has been regarded as the recognition, protection and promotion of the work or product of the mind; of human creativity embodied in tangible form. Intellectual property law refers to the law that deals with the legal rights in creative works of the mind.[18]The subject matter of intellectual property includes artistic works, inventions, marks and designs. Intellectual property grants exclusive rights over intellectual assets.[19]The rationale for this is to; first, provide an incentive to innovation by rewarding inventors with exclusive moral and economic rights to the intellectual assets.[20] Second, intellectual property also promotes product differentiation through new product development resulting from innovation which in turn facilitates consumer choice and enhances competition

[15]Nick Godfrey (2008)"Why is Competition Important For Growth and Poverty Reduction?" ,OECD Global Forum on International Investment <http://www.oecd.org/investment/globalforum/40315399.pdf> (accessed 26 November 2015)
[16]ibid.
[17]Ibid
[18]ibid.
[19]William Cornish, David Llewelyn& Tanya Aplin (2013) *Intellectual property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell, London, 8th ed, pp3.
[20]Tanya Aplin and Jennifer Davis (2013) *Intellectual Property Law: Text, Cases and Materials* Oxford University Press, Oxford pp4-13.

among the different market players.[21]Third, intellectual property encourages the dissemination of information and knowledge hence encouraging innovation by protection of the ideas and information.[22]

Intellectual property has in the recent times gained recognition due to the development of the knowledge based economy as well as the surge in the levels in innovation. This has resulted in increased awareness and protection of intellectual property. Such recognition and protection has necessitated the analysis of the relationship between intellectual property with, and its impact to other areas of the economy, key among them being competition in the markets.

1.3 Statement of the Problem.

The Constitution provides for the protection of intellectual property[23] and as well as consumer protection rights[24]. The Competition Act, 2010 which is the substantive law on competition law, defines and provides for protection of competition through prohibiting restrictive trade practices and agreements that are aimed to distort competition.[25] There are several intellectual property statutes that govern the acquisition and use of intellectual property rights in Kenya.[26]

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[21]World Intellectual Property Organisation (2013) "World Intellectual Property Report Brands – Reputation and Image in the Global Marketplace" <http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf > accessed 24 July 2015.

[22]*ibid*

[23] See Articles 11(5) and 69 (1) (b) of the Constitution.

[24] Article 46 of the Constitution makes provisions for consumer rights which include the right to goods and services of reasonable quality and access to the information necessary for them to gain full benefit from goods and services

[25] The preamble of the Act states that the purpose of the Act is "to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct"

[26] These are the Industrial Property Act 2001, the Seeds and Plant Varieties Act, Cap 326, the Mark Act, Cap 506, the Copyright Act, No. 12 of 2001 and the Anti-Counterfeiting Act, 2008

Inasmuch as the Competition Act makes provisions for limitations of the enjoyment of intellectual property rights, there are no express mechanisms and thresholds set out in the Act to guide the implementation of the same and more specifically an indication of when an intellectual property right becomes an intellectual property wrong thus necessitating the intervention by competition law. The problem which therefore arises from this is how a balance can be struck on the interface between competition law and intellectual property law. The question that follows from this and what the research seeks to address is: how and to what extent, can competition law interfere with the enjoyment of intellectual property rights? The research will seek to establish current legal provisions on the subject as well as understand how the competition law bodies and the courts in the country have attempted to address these issues.

1.4 Justification of the Study

The push for economic development calls for an analysis relationship between the key factors in the economy. Innovation and competition are some of the key elements in Kenya's attempts to transform from a low income economy to a middle income economy. Kenya Vision 2030[27] has innovation as one of its foundations. Several books and journal articles have been written worldwide, mostly in the developed economies on the relationship between competition law and intellectual property.

There is however a shortage of literature in Kenya on the convergence and divergence of competition law and intellectual property law. Further, the said relationship remains largely unadjudicated in the country. Generally, questions of competition law

[27] See Kenya Vision 2030, Popular Version at page 6 accessible at < http://www.vision2030.go.ke/vision-2030-publications/>

and intellectual property are largely unadjudicated in Kenya. The lack of a proper procedural and systematic guideline within the law on how the relationship can be treated exposes the country to potential disastrous legal questions which cannot be answered by the law. The current framework has not kept up with the dynamism of the innovation sector of the economy. This research paper is therefore intended to fill the gap in literature on the relationship between competition law and intellectual property in Kenya. Further, this paper makes recommendations on how Kenya can set clear guidelines to guide the implementation of the law relating to interface between competition law and intellectual property law.

1.5 Research Objectives

This research paper has both general objective and specific objectives which are as follows:-

1.5.1 General objective

The general objective for the research is to undertake an analytical study of the relationship between competition law and intellectual property law with a specific focus on Kenya.

1.5.2 Specific objectives

The specific objectives to be discussed are as follows:-

i. To establish the goals and objectives of both competition law and intellectual property law;
ii. To assess the extent to which competition law and intellectual property law are in conflict with each other and the point of convergence between the two;

iii. To assess the extent to which the Kenyan legal, regulatory and institutional framework governs the relationship between competition law and intellectual property law; and

iv. To determine the extent to which Kenya can draw lessons from developed jurisdictions on the treatment of the relationship between the two seemingly conflicting areas of law and more particularly the European Union (EU), the United Kingdom (UK) ,United States of America (USA) and the Republic of South Africa.

1.6 Research Questions

This research is guided by the following questions:-

i. What are the goals of competition law and intellectual property law?

ii. Is there a conflict between competition law and intellectual property law?

iii. How does the Kenyan legal, regulatory and institutional framework make provisions on the interaction between competition law and intellectual property? Is the same comprehensive?

iv. To what extent can Kenya draw lessons from the EU, UK, USA and South Africa regarding the management of the interface between competition law and intellectual property law?

1.7 Hypothesis

This research is premised on the author's hypotheses that:-

i. The goals and objectives of competition law and intellectual property law are at loggerheads and cannot be reconciled;

ii. There is a glaring gap in the Kenyan legislative, regulatory and institutional framework for the interaction between competition law and intellectual property law.

iii. There is a need to have comprehensive guidelines that will ensure a balance between the protection of the enjoyment of rights created by the intellectual property on the one hand and maintaining an open and competitive market as required under competition law, on the other hand.

1.8 Literature Review

Although a wealth of literature on the global relationship exists between competition law and intellectual property, there is an apparent gap in the literature regarding the domestic treatment of the relationship in the Kenya. This is the gap which this paper seeks to fill. However, many important aspects of this paper, relating to both form and substance, have been crafted with heavy reliance being placed on the existing literature published in developed competition law jurisdictions. The relationship between intellectual property law and rights granted thereunder and competition law has attracted attention from various authors. These scholars have sought to understand the relationship between the two areas of law. Some authors have argued that competition law and intellectual property are inherently in conflict as intellectual

property rights grants, to some extent, exclusivity to its owners whilst competition law is aimed at promoting competition and keeping markets open.[28]

Some authors have argued that on the face of it, intellectual property rights protect individual rights while competition law protects the public interest through the protection of the markets.[29]On the other hand, others have increasingly taken a more positive view by regarding the relationship between the two and have argued that that the two areas of law are complementary to each other and that there is no real conflict between the two and that in fact 'the two realms can, not only co-exist but also complement each other'[30].As has been stated, these scholars and authors who have published on the relationship under discussion are mostly drawn from developed competition law systems. The case for the developing systems is different. Very limited literature has been published to elucidate the growing interface between the two spheres of the law. This research project will, therefore, seek to fill this apparent gap.

Richard Whish and David Bailey in their book "Competition Law"[31]have argued that the supposition that there is tension between intellectual property rights and competition law is 'simplistic and wrong'.[32] They acknowledge that it is easy to suppose that there is an inherent tension between the two areas of law. They indicate

[28]Richard Whish & David Bailey (n 6) 756.
[29]Gitanjali Shankar and Nitika Gupta, 'Intellectual Property and Competition Law: Divergence, Convergence, And Independence' (2011) 4 NUJS L. Rev. 113 <http://nujslawreview.org/wp-content/uploads/2015/02/gitanjali.pdf> (accessed 18 August 2016).
[30]ibid
[31]Richard Whish & David Bailey (n 6) 768.
[32]ibid 769.

that the tension between the two arises because while intellectual property rights confer to its owners a degree of exclusivity, competition law seeks to ensure that the markets are kept open[33] but in reality, this is not the position. In their opinion, the complex matter of modern competition policy is to determine the point at which the exercise of an intellectual property right could be harmful to the consumer that competition should intervene and override the intellectual property right.[34]These arguments are important as they note the existence of the apparent tension and argue for the creation of a balance between the two regimes of law which is a key argument of this study. However, the authors have limited their discussion to the EU and the UK legal system. This study shall assess the relationship from a Kenyan perspective.

G Goyder, Joanna Goyder, and Albertina Albers- Llorens in their book "Goyder's EC Competition Law"[35]have stated that there is an inherent conflict between the existence and exercise of intellectual property rights and competition policy[36]. They argue that whereas the former necessarily give a degree of exclusivity and protection to their owners, the latter prohibits restrictions of competition[37].This notwithstanding, they acknowledge the "key aim of both sets of rules is generally accepted to be fostering innovation for the benefit of consumers"[38]. The approach taken by the authors does not provide a standpoint on the relationship between the two areas of the law. It also discusses the relationship between the two in the European Union and the

[33]Ibid.
[34]Ibid.
[35]D.G Goyder, Joanna Goyder and Albertina Albors-Llorens, (2009) "*Goyder's EC Competition Law*"., Oxford: Oxford University Press, Oxford , 5th ed.
[36]Ibid at 261.
[37]Ibid.
[38]Ibid.

United Kingdom, which are well-developed competition law systems. This paper will take a specific standpoint while adopting a Kenyan understanding of the topic.

Alison Jones and Brenda Sufrin in their book "EU Competition Law: Text, Cases and Materials"[39]argue that the generally accepted position regarding the relationship between intellectual property law and competition law is that the two do not have competing aims but rather that they both pursue the promotion of consumer welfare[40]. They state that the relationship between IPRs and competition law has always been an uneasy one[41].They acknowledge that competition law can interfere with the enjoyment of intellectual property right. They focus on the EU view on the relationship. They do highlight that in some instances in the EU, competition law has directed firms to compulsorily issue licenses to others. The authors, like the authors above, have limited themselves to the EU which is a developed competition law system. This research takes a localised approach to the discussion.

Khemani R.S in the book "Framework for the Design and Implementation of Competition Law and Policy"[42] notes that that intellectual property rights (including patents, trademarks, copyrights, registered industrial designs, and integrated circuits) have featured importantly in several recent competition law cases in western jurisdictions[43]. He posits that in most cases, the exercise of intellectual property rights

[39]Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (New York: Oxford University Press, 2012, 4th ed).
[40]ibid 711.
[41]Ibid.
[42]Khemani R.S (ed.) *Framework for the Design and Implementation of Competition Law and Policy*" (World Bank, 1999).
[43]ibid 80.

is consistent with the goals of competition policy. He takes the approach of complementariness of IPRs and competition law.[44]He argues that IPR strengthens competition by providing incentives for the development and production of new products and production processes. In his opinion, if there are no abuses in the acquisition and exercise of these rights, then the existence and exercise of such rights should not usually be a source of concern to antitrust authorities'[45].Khemani does not dwell a lot on the relationship between IPRs and competition law. He mainly discusses competition law matters without paying a lot of attention to the relationship between the two under the United States of America competition law system. It does not discuss the developing systems such as the Kenyan competition law system.

The view taken by Barry J Rodger and Angus MacCulloch is that the ownership of an IPR is not in itself an abuse but rather the use of such right may amount to an abuse[46]. In their book "Competition Law and Policy in the EC and UK" they argue that the co-existence of IP rights and competition law has always been problematic[47]. They note that IPRs encourage innovation by rewarding the innovator with exclusivity although this may lead to the innovator having statutory dominance[48]. The authors, in their analysis of the relationship between IPRs and competition law, have only discussed the two against the applicable law in the EU and the UK. They have not analysed the

[44]Ibid.
[45]Ibid.
[46]Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Routledge-Cavendish, 4th ed.2009).
[46] ibid 134.
[47]ibid.
[48]ibid.

relationship from a developing countries perspective whose challenges differ from the ones faced by the developed systems.

Ioannis Lianos and Rochelle C. Dreyfuss[49] in their working paper "New Challenges in the Intersection of Intellectual Property Rights with Competition Law" argue that despite the complementary nature of the relationship between competition law and intellectual property there is a conflict between competition law and intellectual property law. They argue that intersection between competition and intellectual property law revolves around the scope and value of intellectual property rights; and the nature of the rights and the intent of the intellectual property holder. In addition to that, they argue that intellectual property rights are not monopolistic *per se* and therefore it is wrong to have argued on monopoly grounds as a basis for the conflict between competition law and intellectual property. They also discuss economic balance tests that weigh the restriction of anticompetitive acts involving intellectual property rights and the potential benefits of these intellectual property rights especially in inducing innovation. The study argues that there is a need for the re-conceptualization of intellectual property rights to provide for cumulative innovation and the reorientation of competition law to include innovation as an objective of competition law. Their paper calls for further investigation into the interface between competition law and intellectual property law. It does not take a decisive standpoint on the same. This research undertakes the further study proposed by the authors but within a different context, this being the Kenyan one.

[49]Ioannis Lianos& Rochelle C. Dreyfuss "New Challenges in the Intersection of Intellectual Property Rights with Competition Law" (Centre for Law, Economics and Society CLES 2013).

Prof Carlos Correra of the University of Buenos Aires, Argentina,[50] argued in his paper "Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing Countries" that there exists a conflict between intellectual property law and competition law. His paper focuses on anti-competitive practices involving intellectual property rights that undermine competition in the markets. These include the undue acquisition and enforcement of intellectual property rights. He also argues that some of the challenges facing developing countries as a result of the intersection between competition law and intellectual property law are due to lack of or inadequate legislation, poor implementation, and absence of appropriate policies. He argues for the adoption of a competition policy, enactment of strict competition laws and guidelines and their implementation to facilitate the competitive use of intellectual property rights. This paper is largely in concurrence with Prof. Correa's view on the relationship. It also agrees with his perspective on the challenges facing developing countries on the intersection between the two areas of law. However, this paper departs from his discussion by taking a narrower context specific to Kenya.

Gesner Oliveira and Thomas Fujiwara[51] in their paper: "Intellectual Property and Competition as Complementary Policies: A Test Using an Ordered Probit Model" argue that intellectual property and competition law are interdependent and

[50]Carlos M. Correa (2007) "Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing Countries" <http://www.iprsonline.org/resources/docs/corea_Oct07.pdf> accessed 22 July 2015.

[51]Gesner Oliveira & Thomas Fujiwara Intellectual Property And Competition as Complementary Policies: A Test Using An Ordered Probit Model <http://www.wipo.int/export/sites/www/ip-competition/en/studies/study_ip_competition_oliveira.pdf> accessed 24 July 2015).

complimentary. They recognize that a conflict exists to the extent that intellectual property grants exclusive rights which are monopolistic in nature and competition law aims at eradicating monopolies for consumer welfare. In their study, they adopt the 'Probit test' which affirms the assertion that IP and competition law are interdependent. They conclude that there is a need for cooperation between competition law and intellectual property. They, however, fail to propose the means to be taken towards such co-operation. This research will make a proposal for the co-operation through recommending a publication of guidelines for implementation of the 'cooperation' within the Kenyan jurisdiction.

Prof Mark Lemley in his article "Property Intellectual Property and Free Riding" argues that open competition has always been the norm.[52] Intellectual property has always been an exemption to the norm in that it has only been protected in the US to the extent that it encourages innovation. He, however, notes that the legal and institutional framework in intellectual property specifically in the United States is shifting towards more intellectual property protection which is becoming a norm in itself. He argues that this poses a threat to competition. He proposes that there should be a provision for intervention by competition law in IPRs. The approach taken by this author favours more protection of intellectual property rights with very limited allowance for interference by competition law and other areas of law. This research disputes this approach and advocates for balancing rather than favouritism of one area

[52]Mark A. Lemley (2005) "Property Intellectual Property and Free Riding" <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tlr83&div=30&id=&page=> accessed 29/1/2016.

of law over the other. The author's assessment is based on a developed jurisdiction while the research is in a developing country (Kenya) perspective.

Mitchel Boldrin and David Levine in their article "Economic and Game Theory: Against Intellectual Monopoly argue that property can be protected without the grant of intellectual property such as patents and copyright.[53] They argue that intellectual property is a means of suppressing competition and innovation. They refer to the intellectual property as a monopoly of ideas and argue that in its absence there will be enhanced competition and innovation in the market. They argued that intellectual property is a double –edged sword in the sense that by granting the exclusive rights, it rewards the inventor but it also blocks innovation and creativity. Such an opportunity cost outweighs social benefit gained. This research does not agree with the authors' arguments that the intellectual property is a means of suppressing competition and innovation but rather, it argues for a more positive relationship between competition law and intellectual property law.

Christina Bohann and Hebert Hovenkamp in their article, "IP and Antitrust: Reformation and Harm"[54] have stated that the there has been a suspicious view on the relationship between competition law and intellectual property law. They trace the origin of the suspicion to the end of World War II where competition law and intellectual property were driven in different directions due to the perception and belief that anti-trust law shielded small businesses from competition that would have promoted consumer welfare. Similarly, intellectual property 'expanded entitlements

[53]Mitchel Boldrin and David K Levine in their article "Against Intellectual Monopoly" in 21:6 *Syracuse Science & Technology Law Reporter*<http://jost.syr.edu/wp-content/uploads/6_Azzarelli-SSTLR-Vol.-21-Fall-2009-FINAL.pdf> accessed 29 January 2016.

[54]Christina Bohann and Hebert Hovenkamp in their article," IP and Antitrust: reformation and Harm (2010).

for the benefit of patent and copyright holders often at the expense of innovation which always relies on the works of predecessors as wee as robust public domain'. The scholars, however, go ahead to state this perception as being a misconception. They argue that the goals of both competition law and intellectual property law are aimed at a common end of promoting competition. They seem to favour the complementarities school of thought to the relationship between intellectual property law and competition law. They advocate for convergence by looking at the end rather than the functions of each. Christanna Bohann and Herbert Hovenkamp are however misguided in their standpoint as often times the protection of intellectual property rights stifle competition through exclusivity and hence creating quasi-monopolies. The two cannot, therefore, be said to be having the same aims and objectives. A balance based approach shall be taken in this paper.

Stephen Yelderman, [55]whilst discussing the effect of patent challenges on competition has argued that a patent is not in itself anti-competitive.[56]He posits that unless a patent is found to be diminishing competition, then a challenge to such patent cannot be successful. [57]He states that challenges to patents ought to be looked at from an objective perspective since inasmuch as it is recognised that patents confer market power, many of them do not necessarily do so and market power cannot be necessarily be inferred from " the mere fact of a patent grant". From a relationship perspective, it can be inferred from Yelderman's article that on the face of it, patent

[55]Stephen Yelderman, Do Patent Challenges affect Competition< *writtendescription.blogspot.com/2016/02/steven-yelderman-**do-patent-challenges**.html* > accessed 15 September 2016).
[56]Ibid.
[57]Ibid 16.

grants (and by extension other intellectual property rights) may be regarded to be anti-competitive but this ought not to be the case. Yelderman's argument is that perceived anti-competitiveness should be put to an objective test before concluding that a patent is anticompetitive. The test is whether the patent grant diminishes competition. Yelderman, therefore, agrees that there is a conflict between enjoyment of patents and competition law hence the need for objective tests. This paper will take a similar approach to Yelderman but with a wider view of general intellectual property rights and also with the focus on Kenya.

Lionel Bentley and Brad Sherman have, in their book, "Intellectual Property Law" [58]have acknowledged that indeed there is tension between competition law and intellectual property law. While discussing the effect of competition law on the exploitation of copyright[59], they state that a copyright entitles an owner to use the property in a manner which he or she so wishes and that the copyright owner cannot be compelled to apply their rights in a particular manner. This is the exclusivity of a right. They, however, acknowledge that there are circumstances in which competition law may require a property owner to make available the right for use by the public. They state that operators in dominant positions have a special responsibility not to allow their conduct to impair competition.[60]They acknowledge that competition law may limit the enjoyment of a copyright. The perspective taken by the authors is focused on the EU and UK approach. This paper shall seek to provide the Kenyan

[58]Lionel Bently and Brad Sherman, *Intellectual Property Law*, 4th edn (Oxford University Press, 2014)

[59]Ibid 286-289.
[60]Ibid 287.

understanding of how and when competition law may interfere with intellectual property right.

William Cornish, David Llewelyn, and Dr. Tanya Taplin in their book, "Intellectual Property: Patents, Copyright, Trademark and Allied Rights"[61]appreciate that competition "can enhance the welfare of consumers by reducing prices to them and providing them with greater choices". They propound that intellectual property rights are only granted if the enjoyment of the same is not prejudicial to competition. They acknowledge that there is an unending tension between competition law and intellectual property. They categorise the proponents of each of the areas of law into two: those that stress the virtue of conferring protection in form of property and those that 'would calculate scrupulously the degree of protection needed to procure new production of material' so as to avoid the abuse of market power. The authors have argued that there are two underlying considerations to the relationship between competition law and intellectual property:-

i. Protection of intellectual property has the capacity to create monopolies through the creation of market power which may be greater even when given special public policies and may in the end stifle competition itself; and

ii. If an investment of resources to produce ideas or to convey ideas is left unprotected ,it will prey to the attention of a competitive imitator who will not be obliged to pay for anything he takes and accordingly there will be little

[61]William Cornish, William; David Llewelyn, and Tanya Aplin, "Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights". (2013). 7th ed. Sweet and Maxwell.

incentive to invest in the idea or information and the consumer may be poorer as a result.

The authors argue that the only way out of the dilemma that comes with the conflict between competition law and intellectual property law is to make the best practicable estimates of the dangers that unjustified monopolies may produce and on the other hand to assess the degree to which a claimant's investment will be open to dissipation if not accorded this right. This research paper is, in principle, in agreement with the position taken by the authors. The key departure will be the focus of the discussion which will be Kenyan.

David I Bainbridge[62] on his part has argued that there is an irreconcilable conflict between the basic monopoly concept of a patent and Article 102 of the TFEU which prohibits the abuse of dominant position within the EU. He acknowledges that the owner of an important item protected under intellectual property might be 'tempted to use his position to control a market to the disadvantage of competitors and consumers alike'. He argues that the IP owners may deter or prevent other competitors from developing similar products and hence charge high prices for the products. This habit of charging high prices is what is prohibited by competition law. He argues that the interference of competition law in IPRs is the basis of the irreconcilable differences between the two areas of law. This research shall depart from this arguments by moving towards a balanced perspective with a bias to Kenyan legal system.

[62]David I. Bainbridge, "Intellectual Property", Pearson Longman, Ninth Edition, 2009.

In a CUTS (Consumer Unity & Trust Society) International sponsored write up, Alice Pham has argued that competition law and intellectual property law are bound together by the economics of innovation and intricate web of legal rules that seek to balance the scope and effect of each policy.[63]Although she admits that the relationship between competition law and intellectual property rights is a complex and widely debated one, she argues that competition law and intellectual property are not in conflict with each other and any perceived conflict is a mere misconception. She argues that IPRs do not necessarily create monopolies but only become illegal when they are abused. She states that competition law and intellectual property rights complement each other through promoting 'an efficient and dynamic marketplace through innovation'. In arguing for convergence between competition law and IPRs, she states that competition is not the end goal of competition law just as IP protection is not the end goal of IPR. This research is in convergence with the author's arguments save that the context of the discussion is narrowed down to Kenya.

Pierre Regibeau and Catherine Rocket[64]have argued that intellectual property law and competition law differ in their functions and goals. They argue that the main function of intellectual property is to assign rights to assets that may have economic value whilst competition law's main function is to regulate the use of IPR when they are a source of market power. Competition law's main goal is to minimise the adverse

[63]See Alice Pham (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur, India<http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf>(accessed 05 October 2016).

[64]Pierre Regibeau and Katharine.Rockett, "The relationship between intellectual property law and competition law: An economic approach" in Stephen Anderman (Ed.), The Interface Between Intellectual Property Rights and Competition Policy, Cambridge University Press, Cambridge, MA (2007).

effects of market power which may come with IPR. They indicate that competition law and intellectual property intervene at different stages of an asset in the sense that IPRs are assigned at the point of creation of the asset while competition law intervenes once the innovation has been used and has become the basis of market power. The scholars argue that the conflict between IP and competition law is less "avoidable" than they seem. They further state that IP law should adjust to competition law changes so as to limit the conflict. The scholars, therefore, acknowledge the conflict between competition law and IP and therefore the need for a balance. This research agrees with this argument to the extent that there is a need for a balance between the two whilst addressing the Kenyan view to the issue.

Alexandre de Streel and Pierre Larouche[65] take a historical perspective to the relationship between innovation and competition policy. Their discussion is based mainly on an analysis of the previous literature on competition policy and more specifically: The Theory of Schumpeter; The Theory of Arrow and The Theory and Empirical Analysis of Anghain et al. The Theory Schumpeter posits that the negative relationship between competition law and innovation. According to Schumpeter, competition is not an incentive for innovation but the real incentive for innovation is the future monopoly rent. The Theory of Arrow, on the other hand, posits that the relationship between competition law and intellectual property is positive in the sense that competition is an incentive for innovation. The third theory of Anghain posits that the relationship between competition law and intellectual property is an inverted

[65]Alexandre de Streel and Pierre Larouche, Disruptive Innovation and Competition Policy Enforcement (October 20, 2015). OECD Working Paper DAF/COMP/GF (2015)7.<http://ssrn.com/abstract=2678890>(accessed 05 October 2016).

'U' relationship: too little or too much competition is negative for innovation. The writers finally conclude that and therefore competition agencies should protect the process of innovation by limiting its interference to circumstances of abuse of the IPRs. This research is in agreement with the conclusion proposed by the writer but the arguments are taken from a developing country's perspective rather than from the developed competition law systems on which the author's background is based.

World Intellectual Property Organization (WIPO) takes the Anghain thought to the relationship between competition law and intellectual property[66].It posits that intellectual property in the right dosage is pro-competitive. However, IPRs may be barriers to entry hence anti-competitive when they are abused or used in a way that is contrary to the law.

Peter R Dickson, in his article on "Evolutionary theories of competition and aftermarket antitrust law"[67] argues for strong intellectual property rights protection. He states that the protection of intellectual property rights must be an imperative strategic aim of the United States government. He argues that if there must be any error, that error must be in favour of intellectual property. Peter R. Dickson posits that the thinking that ideal competition is between many imitators is middle headed and wrong. He states that such 'ideal competition' scenario drives innovation and intellectual property rents out of the market. He admits that there is a conflict between a public policy that promotes intellectual property by granting intellectual

[66]http://www.wipo.int/ip-competition/en/>.

[67]Peter R Dickson, Evolutionary theories of competition and aftermarket antitrust law *Antitrust Bulletin;* Spring 2007; 52, 1; ABI/INFORM Globalpg. 73 http://www.antitrustinstitute.org/files/Evolutionary%20theories%20of%20competition%20and%20aftermarket%20antitru_081320081456.pdf.

property rights for limited periods of time on the one hand and the antitrust policy that is limited IPRs so as to encourage competition on the other hand. He argues that if the two policies are well managed, there can be benefits to the IPR owners as well as increased innovation. He states that the role of policymakers and the courts is to ensure that there is a balance between innovation and allocative efficiency. He concludes by stating that a judicial and regulatory framework that just focuses on the promotion of intellectual property rights protection produces anti-competitive effects and consequently reducing consumer welfare. On the other hand, he states, a judicial and regulatory framework that focuses mainly on limiting property rights is "too limiting and will produce a decline in innovation and in consumer welfare". This research will take a similar approach to the relationship between intellectual property and competition law in Kenya.

It has been observed that some scholars have adopted a negative approach towards the relationship between competition law and IPRs by arguing that there is a fundamental tension between the two and that the same are contradictory in nature .It has also been noted that some scholars have adopted a generous approach to the relationship. In the generous approach, intellectual property law and competition law are considered to be complementary to each other as IPR are being the exceptions to the general rule against monopolies. It is in these exceptions that a balance is struck.

1.9 Theoretical Framework

This study is mainly informed by three schools of jurisprudence: the classical theory of competition; the labour theory and the utilitarian theories. It also borrows from various other schools of thought.

According to classical competition theory proponents led by Adams Smith, free markets regulate themselves in the absence of the intervention by the state. The markets are purely driven by market forces of demand and supply.[68] In such markets, competition is perfect hence there are lower prices, better quality products, a wider choice of goods and services and greater efficiency which promote consumer welfare.[69] Such benefits of competition could not be achieved under conditions of a monopoly. The classical theorists argue that in perfectly competitive markets, there are not barriers to entry or exit from the markets, products are homogenous and everyone is perfectly informed. Further, in these markets firms are numerous and none of them is large enough to influence prices and each act independently.[70]This theory has been used to justify the intervention of competition law in the use and enjoyment of intellectual property rights.

The theory of perfect competition has however been criticized for being idealistic as it does not reflect conditions in actual practice. In reality, markets are not perfect and competition is not perfect. Barriers to entry may exist in the markets, undertakings may collude to fix prices and large firms may abuse their dominance negatively

[68] ibid
[69] Cf The neo classical economic theory, social welfare is also maximized in conditions of perfect competition.
[70] Einer Elahuage and Damien Geradin Global Antitrust and Economics (2nd ed., Thomson Reuters, Foundation Press, New York ,2011) at 1

impacting on competition. Secondly, it has been argued that limited monopolies are justified to promote innovation and development that requires large capital investments are higher risks for example research and development in intellectual property. Baumol has argued that in perfect competition, small and medium size firm lack the motivation and resources to innovate and hence become less competitive.[71]

The labour theory proceeds from the premise that the entire world is initially owned in common but one may remove property from the commons by improving it through his labour and which the state is under an obligation to protect and enforce.[72] The labour theory of natural law theory was advanced by John Locke. Locke argued that a man is the owner of his own labour. This theory is applicable to intellectual property in the sense that an individual has taken raw materials that were held in common and put in his labour to contribute to the finished product[73] and therefore he is entitled to whatever he removes from the state of nature and whatever he creates by application of his labour. Such a creation is his property exclusive of claims by other men. This theory has been used to justify the grant of intellectual property rights and their exclusivity.

Inasmuch as the labour theorists propagate for exclusive ownership of one's labour, the theory has two provisos to it:-

i. Products of labour must remain available to the commons if removing them would not leave 'enough and as good' in common for others.

[71] WJ Baumol, Free Market Innovation Machine :Analysing the Growth Miracle of Capitalism (Princeton University Press, Princeton NJ,2002) at 44-45
[72]William Fisher,n.59 at 454.
[73]Ibid.

ii. The property should not be wasted.

The above provisos have been interpreted to mean that property should be owned exclusively only if such ownership would result in harm. This theory does not provide a strong intellectual property rights protection but it seems to advance the theory that protection must meditate between ownership rights of the creator and the rights of others to us the information that would otherwise be available to commons.

The utilitarian theory was advanced by several theorists including Jeremy Bentham and John Stuart Mills.[74] It argues for the protection of intellectual property rights as an incentive for innovation. However, such protection is subject to limitations for in order to balance individual interests and social welfare and also to minimise effects of monopoly exploitation. John Stuart Mill argued that the reward ought not to be excessive. It should be proportional to the benefits accrued to the consumers. This theory has been widely used to justify limitations on intellectual property. This is due to the recognition of the relationship between intellectual property and technological development and the fact that intellectual property could hinder development due to its exclusive nature. Such limitations would include restrictions on abuse of exclusive rights and dominant position acquired through the intellectual property in order to foster competition in the markets.

In light of this, the study examines the goals and objectives of both competition law and intellectual property law against the theories discussed above. The Kenyan legislative, regulatory and institutional framework on the area of study shall be highlighted and compared with the practice in the European Union, the United Kingdom, the United

[74] *ibid* 130.

States of America (U.S.A) and South Africa. It examines to what extent the schools of through can be reconciled through the creation of balances along the utilitarian school of thought.

1.10 Research Methodology

The method used to gather information for this paper was through the use of the library and internet sources. The use of library and internet sources was advised by the availability literature in developed jurisdictions in the area which provided a starting point for a research in an area which has not been explored in Kenya. The research is meant to provide a starting point for further research on the area.

The library and internet research provided a background understanding of previous literature published on the subject which set the foundation for the study. The use of the qualitative research helped in the analysis of the relationship between competition law and intellectual property through the study of their respective goals and objectives as well as their points of divergence and convergence. An analysis of the law, published books, scholarly papers, journal articles and other relevant studies carried out by competition or anti- trust and intellectual property bodies were also undertaken.

A comparative study technique is undertaken in the research in order to obtain and understand what other jurisdictions have framed and enforced their laws relating to the topic under study. The comparative study looks at the case laws as well as the published guidelines by the said jurisdictions so as to provide a guidepost on how the relationship between the two areas of the law ought to be treated.

1.11 Limitations of the Study

The study has taken a specific focus on the Kenyan legislative, regulatory and institutional framework for a comparative study with European Union, United Kingdom, United States of America and the Republic of South Africa. Other developed and developing jurisdictions have not been discussed. Further, the research methodology adopted in this research is desk based and may not fully explore the institutional and implementation questions which may be fully through the collection and analysis of primary data which this research could not undertake due to lack of institutional presence at the time of the study.

1.12 Chapter Breakdown

Chapter 1 will provide a succinct introduction to the subject under study. It shall provide the background to the research, the research problems and justifications to the study and provide the research methodology that was utilised in undertaking the research.

Chapter 2 will focus on the interface of intellectual property law and competition law. It will give a detailed analysis of the goal and objectives of both laws before discussing points of the divergence and convergence between the two. This shall provide the basis for discussion of the relationship between the two in the Kenyan context.

In Chapter 3, the legislative, regulatory and institutional framework that governs the

interface between competition law and intellectual property in Kenya will be discussed. It is in this chapter that the relevant legal provisions that affect the subject under research as well as how the enforcement of the law has been undertaken with respect to the matter. The adequacy or inadequacy of the law in dealing with the apparent conflict between the two shall also be discussed in this chapter.

Chapter 4 analyses the provisions in the laws of the European Union, the United Kingdom, the United States of America and South Africa. The three jurisdictions are among the most developed in both the law and practice of competition or anti-trust law as well as intellectual property law and the attendant rights. Kenya's competition law system has been developing steadily since the 1980's. An analysis of the competition rules of the UK as well as the rules set out in the Treaty for the Functioning of the European Union (TFEU) as well as the enforcement thereof provides more succinct discussion on the research under study since the European Courts have had on several occasions made landmark decisions on the subject. This may, therefore, rouse an idea of how the relationship between competition law and intellectual property law ought to be treated in Kenya. In addition, the United States have a well-developed competition system and use a different approach to the interface of antitrust and intellectual property. Since it is not clear at the moment which approach Kenya will pursue in the event of a conflict between competition law and intellectual property rights, the analysis of the provision in the United States could also act as a guide for the competition law enforcement in the country. The South African competition law system is more developed than the Kenyan system. A study of the application and enforcement of competition law in the country can

provide a direction and guidance on how the relationship between competition law and intellectual property ought or ought not to be handled in Kenya as the same is still developing though at an advanced level.

Chapter 5 shall deal with the summary of findings conclusions and recommendations on the application of competition law on intellectual property rights in Kenya.

CHAPTER TWO

THE GOALS AND OBJECTIVES OF COMPETITION LAW AND INTELLECTUAL PROPERTY LAW.

2.1 Introduction

This chapter will discuss the goal and objectives of both competition law and intellectual property law. It will seek to define and understand what constitutes competition and the law governing it as well as defining the term intellectual property. The purpose of the aforementioned discussion is to provide a background against which the conflict between competition law and intellectual property law will be discussed and understood. The overview of the interaction between competition law and intellectual property law will also be discussed in this chapter.

2.2 Goals and Objectives of Competition Law

2.2.1 Defining Competition

In order to understand the goals of competition law, one first needs to understand what the term 'competition' entails. Competition has been defined as the process of rivalry between firms in order to increase sales and make profits by defeating and establishing superiority over others.[75] Competition is 'the driving force behind markets".[76]According to Adam Smith, the adoption of the concept of competition is based on the premise that free markets are more efficient than state regulated or

[75]Richard Whish & David bailey (2012) *Competition Law*,7th ed, Oxford University Press, New York, pp3; See also Oxford Dictionary's definition of 'competition' wherein competition is defined as ' *the activity or condition of striving to gain or win something by defeating or establishing superiority over others'*.
[76]Ibid.

managed markets in catalyzing economic growth.[77]Economically speaking, competition can be said to be a situation where competitors in a market seek to have as many consumers consuming their goods and services over their rivals in the market so as to increase market shares and earn more profit.[78]In an idealistic state, there is freedom to compete and the markets are efficient and competition is perfect.[79]However, the reality is that markets are not efficient and there is no situation of perfect competition. There are other factors which affect the markets such as the existence of barriers to entry, collusion by competitors to increase prices, some players may be dominant and may abuse such dominance, harmful government policies and legislation amongst others could significantly harm competition. Competition law, therefore, comes in to intervene in the markets so as to bring balance in the markets and steer them towards perfect competition.[80]

2.3 Goals and Objectives of Competition Law.

An understanding of the goals and objectives of competition law is an essential part of understanding the overall concept of competition law. A definition of the goals and objectives of competition law is important for two reasons: first, it informs law enforcement and application and second, it increases accountability of the enforcers

[77]Cf Adam Smith (1776) *The Wealth of Nations,* Penguin, 1999.
[78]Maher M. Dabbah, *International and Comparative Competition Law*, Ed. Cambridge University Press, Cambridge, 2010 at 20.
[79]In a perfectly competitive market, firms can enter and exit markets instantly with minimal or no costs, everyone is perfectly informed and firms are so numerous that none of them is large enough to influence prices by altering prices and all act independently.
[80]Alice Pham (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur, India, pp 2.

of competition law.[81] The overall aim of competition law has been said to be the 'protection of competition in order to maximise consumer welfare'.

Some scholars and institutions have categorised the goals of competition law into three[82]:-

i. Economic goals- Here, the main objective of competition law is to ensure that economic efficiency is maximised;
ii. Political goals-the purpose of competition law in this perspective is to 'block private accumulations of power and protect democratic government'[83];
iii. social and moral goals-competitive process was 'disciplinary machinery' for character development.

The International Competition Network (ICN), in 2002 and subsequently in 2007 and 2011 conducted a survey among some of its states on countries' goals and objectives of competition law and the following ten (10) objectives were identified: from promoting consumer welfare and maximizing efficiency, ensuring economic freedom, ensuring a level playing field for SMEs, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatization and market liberalization, and promoting competitiveness in international markets.[84]Out of these objectives, the main ones are: promotion of competition, enhancing efficiency and increasing consumer welfare. These goals that discussed as hereunder:-

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[81]Stucke, Maurice E., Reconsidering Antitrust's Goals (August 3, 2011). Boston College Law Review, Vol. 53, University of Tennessee Legal Studies Research Paper No. 163. Available at SSRN: https://ssrn.com/abstract=1904686 or http://dx.doi.org/10.2139/ssrn.1904686 ,pp 558.
[82]Ibid.
[83]Ibid.
[84]International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies 31 (2007) [hereinafter 2007 ICN Report]< www.internationalcompetitionnetwork.org/uploads/.../doc827.pdf> accessed 02 October 2016
internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

i. **Enhancing efficiency**

Efficiency as an objective of competition law and policy refers to the aim of competition to achieve the greatest benefits for the society.[85] Efficiency resulting from competition is divided into three categories: productive efficiency, allocative efficiency, and dynamic efficiency. The analysis of these efficiencies is significantly based on the assumption of the existence of perfect competition markets.[86]

Perfect competitive markets achieve production efficiency which refers to the production of goods at the lowest cost possible.[87] Due to competition, suppliers would strive to minimize their cost of production to be able to maintain their customer base and make profits. Minimization of the cost of production requires efficient use of resources and ultimately leads to lower prices for the customers. Allocative efficiency, on the other hand, is achieved through the distribution of resources to the production of goods and services that consumers are willing to buy. This refers to producing the appropriate quantity of goods that consumers are willing and capable of buying in the market.

Dynamic efficiency refers to how well markets deliver innovation and technological progress. The relationship between innovation and competition is quite complex. It

[85]Johns and Sufrin (2011) ,*EU Competition Law: Text, Cases and Materials, op. cit*pp4.
[86]Richard Lipsey&Alec Crytsal (2011)*Economics* , 12th ed Oxford University Press, pp153-155.
[87]Richard Whish & David Bailey (2012) *Competition Law,op.cit*pp3.

has been argued that competitive markets incentivize innovation by firms to ensure their survival in the market.[88]

ii. **Promotion of Consumer Welfare**

The Organisation for Economic Co-operation and Development (OECD) has defined consumer welfare as being 'the individual benefits derived from the consumption of goods and services' and is assessed economically by looking at the consumer surplus.[89]Consumer surplus refers to the difference between what consumers would be prepared to pay for goods and services and what they pay. The competition law seeks to achieve consumer welfare through enhancing economic efficiency which may result in quality goods, proper pricing, a variety of products and services among others.

iii. Protection of competition

Competition laws and policies may also be used by the government as a tool or measure to protect a certain market structure.[90]This is through the protection of fair rather than free competition to facilitate the growth of small or medium enterprises and encourage entrepreneurship.

[88]Philippe Aghion (2005) et. al "Competition And Innovation: An Inverted-U Relationship" *The Quarterly Journal of Economics*, pp 703; see also Clovis Hopman et. al (2010) The relation between competition and innovation: Empirical results and implementation into WorldScan" a report prepared for CPB Netherlands Bureau for Economic Policy Analysis, pp4.
[89]Ibid.
[90]Johns and Sufrin (2011) ,*EU Competition Law: Text, Cases and Materials*, *op. cit* 4.

2.4 Goals and objectives of Intellectual Property Law

2.4.1 Defining Intellectual Property

Intellectual property refers to the creation of human mind.[91] The subject matter is new ideas generated from a human mind and applied to human needs and desires for human benefit and commercial goodwill.[92] These ideas are embodied in a tangible form such as books, drawings, graphics, machinery, designs among others.

Intellectual property law protects and promotes appropriate human creativity.[93] It regulates the creation, use, and exploitation of mental or creative labour.[94] It is a body of rights which vary in accordance with the various forms in which the human intellect expresses itself. The common thread in the rights is that they are exclusionary as they prohibit third parties from the use and exploitation of the subject of the rights.[95] The rights also preserve the integrity of the creations.

Intellectual property is divided into two broad categories:[96]

a) Copyright and related rights; and

b) Industrial property. This includes: patent; unfair competition (UC);trademark (TM, ®); utility model (UM); trade secret (TS); geographical indication (GI); mask work or layout of integrated circuits; plant breeder's right (PBR) or

[91]Catherine Colston& Jonathan Galloway (2010) Modern Intellectual Property Law, 3rded Routledge, New York pp2.
[92]Ibid.
[93]Hector MacQueen, Charlotte Waelde& Graeme Laurie (2008) Contemporary Intellectual Property: Law and Policy, Oxford University Press, New York pp4.
[94]Lionel Bentley & Brad Sherman (2009) *Intellectual Property*,3rded Oxford University Press, New York pp2.
[95]Colston& Galloway (2010) Modern Intellectual Property Law, op. cit p 2.
[96]David Bainbridge (2012) *Intellectual Property*, 9thed, Pearson Publishers, London pp4.

Plant Variety Protection (PVP); animal breeder's right and industrial design (ID)[97].

These categories of intellectual property rights protect different forms of intellectual property. For example, patent rights are granted in respect of inventions that are technological improvements which contain elements of inventiveness.[98]Copyright protects original expressions which are embodied in a tangible, material or fixed form or medium.[99] The subject matter of copyright includes music, art, sound recordings, broadcasts, graphics and literary works among others. Trade Marks are rights granted to distinguish the goods and services of one trade mark owner from those of the competitors and to protect the goodwill or investment by trade mark proprietors.[100]

2.4.2 Goals and objectives of Intellectual Property Law

An understanding of the objectives of intellectual property shall provide a basis for the understanding of the interaction between intellectual property law and competition law. The objectives are analysed as follows:-

i. Protecting information and ideas of an innovator/creator.

This is one of the main goals of intellectual property. The creator of an intellectual property is given the exclusive right to own and explore the innovation or creation to the exclusion of others. This right gives the creator a 'monopoly' of sorts over his or

[97]Ibid.
[98]William Cornish, David Llewelyn and Tanya Aplin (2001) Intellectual Property: patents, Copyright. Trademarks and Allied Rights, Sweet & Maxwell, London pp7.
[99]Ibid 8.
[100]MacQueen, Waelde& Laurie (2008) Contemporary Intellectual Property: Law and Policy *op.cit*pp5.

her creation.[101]This is applicable to all classes of intellectual property although such protection is sometimes subjected to limitations. For instance, trademarks and trade secrets are limited by time, limitations in law, while contractual limitations may limit the protection of trade secrets true for all different kinds of intellectual property. Patent holders also enjoy a qualified monopoly in the sense that there may be requirements in law for compulsory licensing[102] of a patent.[103] The holder of a plant breeder's right also enjoys limited ownership as the process of reverse engineering[104] is legal.[105] Copyright and related rights benefit from relative monopoly as other creators are not prohibited from coming up with the same or similar idea independently.[106]

ii. Encourage disclosure

The grant of intellectual property encourages the creators and inventors to disclose the details of their creations to the society. Such disclosure is necessary and desirable in the society as it forms a foundation for further innovation.[107] Such a disclosure is only possible if the creator and innovator are assured of protection from imitation which would cost much less that the cost incurred by the inventor.[108] In the absence

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[101] William Cornish & David Llewelyn & Tanya Aplin *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 7ed (2010) 6.
[102]Compulsory licensing is the situation where a government can order the intellectual property right holder to issue a license to a certain company subject to reasonable remuneration to be paid by the licensee for the purpose of improving social welfare by satisfying domestic demands.
[103]William Cornish & David Llewelyn & Tanya Aplin,n 129 at 7.
[104]Reverse engineering is the process the reproduction of another manufacturer's product following detailed examination of its construction or composition.
[105]Catherine Colston and Jonathan Galloway*Modern Intellectual Property Law* 3ed (2010) 35.
[106]Ibid.
[107]Bentley & Shermann (2009) *Intellectual Property Law* op. cit pp4.
[108]Ibid pp5.

of property protection, creators would resort to secrecy for protection which would be unfavourable for the society.

iii. Eradicate market failures and unjust enrichment

If everyone is allowed to use the results of innovation and creativity freely, it would discourage innovation as other people in the market would wait for one to make the investment in research and development of an innovation and then use the results without incurring investment cost hence leading to market failure.[109] They would be reaping where they have not sown which does not only cause unjust enrichment [110]but also considered morally reprehensible, especially where someone else has a stronger claim to what is being reaped.[111] By discouraging innovation, the economy will be adversely affected as innovation is an essential element of a competitive free market economy.

In summary, intellectual property law seeks to protect the innovators or creators of an intellectual asset and grants to them the right to control the use of the same (subject to some limitations) so as to encourage innovation and to ensure that the innovators or creators earn profits from their investment of both time and resources.[112]Without the protection of intellectual property rights, the innovators or

[109]William Landes & Richard Posner (2003) The Economic Structure of Intellectual Property law, Harvard University Press pp13-14.
[110]Michael Spence (2002) Justifying Copyright in Mc Clean and Schubert (ed.s) Dear Images: Art, Copyright and Culture pp 389-403.
[111]Tanya Aplin& Jennifer Davis (2009) Intellectual Property: Text, cases and Materials, Oxford University Press, pp 8.
[112] WIPO *Intellectual Property Handbook: Policy, Law and Use* (2008) 3 <http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf <(accessed 19 October 2016)

creators would lack incentives to innovate and hence lead to stagnation of economic development of countries which are now driven by innovation.[113]

2.4.3 The relationship between Competition Law and Intellectual Property Law

As was highlighted in the first chapter, the relationship between competition law and intellectual property law has been a controversial subject over the years. It has been argued to be both complementary and conflicting.[114]The key purpose of competition law, it has been stated, is to facilitate access to markets and redistribute market power.[115]This is aimed at preventing concentration of market power among few firms and undertakings which are prone to abuse it to the detriment of the economy and consumer welfare.[116] On the other hand, intellectual property rights grant exclusive rights which many have described as legal monopolies.[117]

It is from this perspective that in the early 20th century, the relationship between IP and competition law was mainly described as 'contradictory'.[118] Scholars perceived a fundamental tension between the objectives of IPRs and competition law: one was providing individuals with a monopolistic power, and the other was preventing them from monopolistic conduct.[119] It was argued that IP law resulted in 'the very same

[113]DI Bainbridge *Intellectual Property* 9ed (2012) 18.
[114]Johns and Sufrin (2011), *EU Competition Law: Text, Cases and Materials*, *op. cit*pp 710.
[115]Carlos M. Correa (2007) "Intellectual Property and Competition Law," A paper submitted to the ICTSD Programme on IPRs and Sustainable Development, pp 1.
[116]Ibid.
[117]CfJennifer Davis (2008) *Intellectual Property Law*, 3rded Oxford University Press, pp 4-8.
[118]Whish (2012) *Competition Law, op. cit* pp769; see also Keith E. Maskus& Mohamed Lahouel (1999) "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement" presented at the World Bank Global Conference on Developing Countries and the Millennium Round, Geneva, September 20-21, 1999, pp 10.
[119]Richard Whish and David Bailey (2012) *Competition Law op. cit* 769.

market conditions' that competition seeks to eradicate.[120] However, this negative approach towards the relationship between competition law and intellectual property law has been considered rather simplistic and mostly inappropriate.[121]

The conflict with reference to monopoly is that intellectual property rights are monopolistic. They, therefore, enhance the concentration of market power which competition law seeks to distribute in the market.[122] This presumption is however not entirely appropriate for the following reasons. First, some scholars have argued that the description of intellectual property rights as monopolistic rather than exclusionary is misleading.[123] This is because IPRs are not monopolistic in the absolute sense. The monopoly is limited in terms of time and it is subject to competition with similar products, similar trademarks among others unless the invention is such a radical; step forward with an absolute lack of substitutability. Therefore, IPRs grant powers over specific products and not whole relevant markets.

Second, intellectual property rights do not always give their holders automatic profit.[124] It's only when the invention is accepted in the market on its merits that the holder is rewarded through profits. Third, it is misleading to assume that IPRs

[120]*Morton Salt Co.* v. *GS Suppiger Co.* (1942) 314 U.S. 488 at 492. 214; see also *Bement*v. *National Harrow Company*, 186 U.S. 70 (1902) at 91.
[121]Tom and Newberg "Anti and Intellectual Property: From separate bv spheres to Unified Field" (1997) in *Anti Trust Journal* (2:5) pp 167.
[122]Paul Torremans (2010) *Holyoak &Torremans Intellectual Property Law*, Oxford University Press, 13.
[123]Ibid.
[124]Ibid; see also Hanns Ullrich (1989) "The Importance of Industrial Property Law and other legal measures in thePromotion of technological Innovation" in *Industrial Property* 3:2 at 102.

necessarily create or enhance market power.[125] Market power is achieved when a firm is capable of successfully increasing its prices and selling beyond the competitive prices and when it is capable of operating independent of suppliers, customers, and competitors among other market players. Intellectual property rights do not always have this effect on firms. Therefore IP protection confers exclusive rights but hardly ever confer a real monopoly.

Additionally, "restricting the use of market power" is not the appropriate description of the aim of competition policy. One of the basic tenets of antitrust is that market power is not, by itself, illegal.[126]There is a need for some degree of market power to facilitate the existence of economies of scale and scope, transaction costs economics and innovation which ultimately enhance economic efficiency. Competition law is concerned when there is an abuse of the market power. For when an intellectual property right holder gains market power through the invention of certain products, he shall be deemed to abuse the market power if they use it to unlawfully drive competitors out of the market or if they charge consumers extremely high prices. Therefore, merely challenging the possible market power granted by intellectual property rights is not essentially an objective of competition law.[127]

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[125]Gesner Oliveira & Thomas Fujiwara (2007) "Intellectual Property And Competition as Complementary Policies: A Test Using An Ordered Probit Model" pp6 at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAAahUKEwi-0PCG5erIAhUJbRQKHU0rC7g&url=http%3A%2F%2Fwww.wipo.int%2Fexport%2Fsites%2Fwww%2Fip-competition%2Fen%2Fstudies%2Fstudy_ip_competition_oliveira.pdf&usg=AFQjCNGVBKn8eiJiS4YrwvwnEjSmiuv9sA&sig2=Uh_QQTRCr-kJP27c1H-WXg (accessed 28/10/2015).

[126]Nancy Gallini and Michael Trebilcock, (1998) "Competition Policy and Intellectual Property Rights", in Robert Anderson and Nancy Gallini (eds) *Competition Policy and Intellectual Property Rights in the Knowledge based Economy*, University of Calgaru Press pp 67.

[127]Gesner Oliveira & Thomas Fujiwara (2007) "Intellectual Property And Competition as Complementary Policies: A Test Using An Ordered Probit Model" op. cit pp6.

This led to the development of a new positive approach towards the relationship between IPRs and competition law. In the new approach, IPRs and competition law were not treated as being inherently at odds with each other, rather, as different means towards the same goals hence complementary.[128]Bohannan and Hovenkamp refer to IP and competition law as 'two blades of the same scissors' in that they both have the same goal which is to promote public welfare.[129]

2.5 The conflict between Competition Law and Intellectual Property Law

As earlier discussed, the relationship between competition law and intellectual property is viewed from two different perspectives: from the conflict perspective and from the complementarities perspective. This section shall discuss the extent to which there exists a conflict between competition law and intellectual property law.

First, there is an apparent conflict which is based on the premise that competition law and policy seeks to promote consumer welfare, enhance efficiency and generally creates competitive markets through maintaining access to markets and preventing foreclosure or monopolization of markets.[130]Intellectual property, on the other hand, seems to go against the access to markets policy through granting innovators exclusive rights and legal monopoly (though the grant of exclusive rights) that

[128]Cf *Precision Instrument Manufacturing Co*. v. *Automotive Maintenance Machinery Co*. (1945) 324 US806, pp813.
[129]Christina Bohannan and Herbert Hovenkamp (2010) "IP and Antitrust: Reformation and Harm" in *Boston College Law Review*, (51),pp 905.
[130]Stephen D Anderman and John Kallaugher, (2006) *Technology Transfer And The New EU Competition Rules: Intellectual Property Licensing After Modernization* (Oxford University Press).

prevent exploitation of the innovation by others.[131]Such legal monopoly, depending on available substitutes in the market can lead to market power which is essentially what competition law seeks to regulate and discourage.

However, as discussed above, this argument is regarded as simplistic. Instead, scholars argue that there exists a conflict between the two systems of law in cases where there is a deviation from the true purpose of intellectual property protection. It is argued that the apparent conflict between competition and intellectual property is as a result of ignoring the purpose of intellectual property rights which is to encourage and incentivize innovation. This approach is based on the utilitarian justification of IPR which is to the effect that IP protection should not be more than what is needed to incentivize innovation and eventually harm the public.[132]

Deviation from the purpose and nature of intellectual property rights has been first attributed to the alleged 'incompleteness of intellectual property'.[133]Intellectual property law and policies are viewed as an imperfect system of regulations that are sometimes based on unexamined assumptions and the inherent uncertainties that exist in the IPR itself.[134]This refers to the difficulty and impossibility of determining the legal boundaries of knowledge which ultimately makes it impossible to certainly determine the boundaries of IPRs.

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[131]Jennifer Davis (2008) Intellectual Property Law op. citpp 5.
[132]David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (Toronto: Irwin Law, 2011) at 23.
[133]CompareSoudeh N. Nouri (2007) "When an Intellectual Property Right Becomes an Intellectual Property Wrong: Re-examining the Role of Section 32 of the Competition Act", A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Master Of Law at Faculty of Law, University of Victoria pp 7.
[134]Richard Gold *et al.* (2004) "The Unexamined Assumptions of Intellectual Property, Adopting an Evaluative Approach to Patenting Biotechnological Innovation" (18:4) pp. 273.

This uncertainty results in wide vague interpretations on the scope of some intellectual property rights. For example, there have been controversies on whether copyright protection should also be granted to protect the three-dimensional objects that are made from other three-dimensional objects. This is because copyright protection has essentially been applied to drawings of the objects and not the actual objects themselves. Recently, the trends in the development of patent law have led to the emergence of a 'pro-patent' era where patent rights are generously granted. This is based on the phrase 'anything under the sun that is made by man' is patentable. The introduction of technology has made the process of determination of IPRs even more complex. The uncertainty which provides for a leeway for expansive interpretations of the scope of IPRs offers protection than is necessary and efficient for the consumer welfare, innovation, and economic growth which are beyond the ideal scope of IPR.[135]

Secondly, the deviation has been attributed to the abusive exercise of the exclusive IPR which ultimately violates the principles of competition policy. Abuse of intellectual property would be in the form of first, the use the IPR rights of the owners in a manner that violates competition law.[136] For example, the exclusive rights as granted by IPRs could lead to substantial market power [137]which may be used to lessen competition in the market through exclusionary conduct such as refusal to deal by dominant undertakings enterprises or collusive activities such as price

[135]Richard Gold, "Commentary - Mending the Gap: Intellectual Property, Competition Law, and Compulsory Licensing" in Marcel Boyer, Michael Trebilcock& David Vaver, eds., *Competition Policy and*
Intellectual Property (Toronto: Irwin Law, 2009) at 396.
[136]Kathryn Judge, "Rethinking Copyright Misuse" (2004) 57:3 Stan. L. Rev. 901 at 902.
[137]Not always though.

fixing and market allocation among others. Again, abuse of IP could also be in the form of an extension of the rights beyond the legitimate exclusive rights granted to the IPR holders.[138]

2.6 The Complimentary nature of the relationship between Competition Law and Intellectual property

There has been a shift, in the recent times, from the negative perception of the relationship between competition law and intellectual property law to a more positive and complimentary view of the relationship. The basis for this shift is explained below:-

First, it has been argued that both areas of law have similar objectives of achieving the greatest benefits for the society. Competition law is aimed at achieving consumer welfare through enhancing efficiency. Firms under competitive pressure will be less complacent and will have more incentive to innovate and get market power.[139] Intellectual property has an objective to achieve greater benefits for the society through incentivizing, encouraging and facilitating innovation which provides better conditions for the price, quality, and diversity of products available to consumers; it possesses the same final goal as competition policy, which is to promote welfare.[140]

Second, the innovation has been said to be a key element as well as the end result for both competition law and intellectual property law. Competition law seeks to achieve

[138]In *Morton Salt Co v GSSuppiger Co* the US Supreme Court held that the patent holder misused its patent by tying the sale of a patented good to the sale of a non-patented good therefore illegally extending the scope of the granted patent rights.
[139]Johns and Sufrin (2011), *EU Competition Law: Text, Cases and Materials*, *op. cit*pp 711.
[140]Torremans (2010) *Holyoak&Torremans Intellectual Property Law*, op. cit pp14.

innovation which is essential for competitive markets through dynamic efficiency. Product market competition and strict competition policy are efficient motivators of innovation.[141]Intellectual property seeks to promote innovation which is the backbone of intellectual property through providing protection of end results as an incentive to further innovation.

Third, the proponents of complementariness have posited that some forms of intellectual property foster competition in the market. For example, trademarks facilitate identification of goods and dispel any confusion appertaining to the source of goods or services.[142]This encourages undertakings to earn and maintain goodwill through consistent quality standards and fair pricing. This enhances competition between the firms to enhance each firm's goodwill.

Fourth, intellectual property laws have been said to make a contribution to effective competition and maintaining access to markets through internal doctrines and limits that strive to create a balance between initial investors and subsequent investors.[143] Examples of such doctrines include the requirement of 'originality' and the doctrine of fair use in copyright laws; requirement of 'novelty' and 'non-obviousness' and compulsory licensing in patent laws; and distinctiveness in trademarks.[144]These internal doctrines play a significant role in delimiting the scope of IPR to prevent its abuse. However, they are self-sufficient. There is a need for external elements

[141]L Pepeerkorn 92003) "IP Licenses and Competition Rules: striking the Right Balance " 26 World Competition 527, 527-8.
[142]William lands & Richard Posner (1988) *The Economics of Trademark Law* 78 TM Rep 267.
[143]Whish (2008) Competition law *op.ci t*pp 770. compare Bentley and Sherman (2009) Intellectual Property Law *op. cit* 286-294.
[144]Ibid.

imposed by other systems of law such as competition law. To this extent the two systems of law are complementary.

2.7 How Competition Law creates a balance to Intellectual Property Rights

Competition law has three main focus areas namely: restrictive trade practices, abuse of dominance and mergers and acquisitions. The first two are of interest in this research as they the areas in which interaction between competition law and IPRs can be established. This section shall, therefore, provide an understanding of intervention of competition law in the enjoyment of IPRs.

2.7.1 Restrictive trade practices

Restrictive trade agreements are defined as agreements between undertakings or concerted practice of undertakings whose object or effect is to prevent, lessen or distort competition.[145] These agreements could be between undertakings on the same level of production (horizontal agreements) or between market players at different levels of production for example manufacturers/suppliers and distributors (vertical agreements). Horizontal may restrict competition where they involve price fixation, market allocation, collusive tendering, practicing minimum resale price maintenance; controlling production, market outlets or access, technical development.[146]In the context of intellectual property, this may be illustrated by the following examples. Licensees may be required not to sell the products below a certain price, or to exclusively deal with specific distributors or suppliers or the IPR owner may restrict

[145]Richard Whish and David Bailey, (2012) Competition Law, Oxford University Press, Oxford 7th ed.
[146]Ibid, see also Joanna Goyder and Albertina Albors Goyder's EC Competition Law, 5th Edition, OUP Oxford, 2009 at 82, 95.

production of the goods to facilitate price fixation.[147]Vertical agreements tend to be less able to affect production or distribution chain. However, in instances where either party has market power and or there exist a lack of substitutes and barriers to entry, vertical agreements may have the effect of market foreclosure.[148]

2.7.2 Abuse of dominance

Abuse of dominance refers to practices that allow an undertaking to preserve, entrench or enhance its market power. In the European Court Justice in the landmark case of *Hoffman La-Roche v Commission of the European Community* defined dominance as:

> *"a position of economic strength by an entity enabling it to prevent effective competition in the relevant market through behaving independently of its competitors and customers.[149]"*

It allows an undertaking to act independently of its customers and competitors. The existence of dominance may derive from a substantial market share but depends on an assessment of production, supply, and demand. It is the abuse of dominance rather than dominance itself that is prohibited. This is the conduct, by dominant firms, which has the object of distorting, restricting or eliminating competition hence amounting to an abuse of dominance.

[147]Hector Macquen*et. al* (2008) *Contemporary Intellectual Property: Law and Policy*, Oxford University Press, Oxford at 833.
[148]Ibid.
[149](1976) Case No. 85.

The dominance test is guided by the presumption that if an undertaking controls a share of 50 percent or more of the supply of goods and services, it is deemed to be dominant.[150] However, due to the fact that market share is not conclusive; another significant criteria for the determination of dominance is the market power. Other factors include barriers to entry, countervailing power, product differentiation, and the stability of market shares.

All IPRs give some form of exclusive rights to the owners. However, this does not mean that the IPR automatically acquires a dominant position. The determination of the existence of dominance is based on economic statistics on market power and the Small But Significant and Nontransitory Increase In Prices (SSNIP) Test. That is, would there be a change in demand due to change in price? Would consumers have substitutes? In light of this, if the price of a well-advertised and branded product exceeds reasonable expectations, consumers may opt for less branded but cheaper substitutes. However, in light of the increased knowledge economy, fuelled by technological advancements, medicine essential to human health and to compilations of information that cannot be obtained elsewhere, intellectual property has increasingly drawn the attention of competition law especially in respect of abuse of dominance.[151]

[150]Section 4 (3) of the Competition Act of Kenya; see also section 23 of the Competition Act.
[151]Ibid.

2.8 Application of Competition Law to Intellectual Property

It has been argued that rules of competition law should not apply to intellectual property as it would stifle innovation.[152] This would have the effect of granting intellectual property transaction immunity against competition law. This argument is however based on flawed assumptions.[153] Intellectual property should not be immune to competition law as Intellectual Property is just like any other property. The grant of intellectual property rights is founded on the argument that intellectual property is just like any other property and therefore ought to be protected.[154]Intellectual property laws are meant to put intangible assets on an equal footing as the tangible assets. Subsequently, owners of intellectual property would have the rights over such property including the right to returns from the property.[155]

The distinction between intellectual property and other forms of property is increasingly unclear especially at this time when intellectual property (IP) laws cover assets that are essential to competitiveness in the 'digital economy' markets.[156] This raises an issue in the context of competition law. Where a certain conduct with respect to property is illegal under competition law, should it be immune from competition rules by the mere fact that it is intellectual property? This would seem to contradict the purpose of intellectual property law to make intangible property equivalent to tangible property.

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[152]Simon Genevaz (2004) Against Immunity for Unilateral Refusals to Deal in Intellectual Property: Why Antitrust Law Should Not Distinguish Between IP and Other Property Rights, 19: 2*Berkeley Technology Law Journal*, 741-784.
[153]Ibid.
[154]William M. Landes& Richard A. Posner, (2003) *The Economic Structure of Intellectual Property Law* 374.
[155]Edmund W. Kitch, (2000) *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53
[156]VAND Law Review at 1727-32.

Therefore intellectual property should be equivalent to other property rights for the purposes of competition rules and doctrines such as the rules against refusal to deal, tying and bundling and the doctrine of essential facilities.[157]

However**,** it should be noted that the exclusive rights are inherent in intellectual property just like other property systems. They are geared not only towards providing a reward system but also to incentivize innovation.[158]Innovation is also one of the goals of competition law and it should therefore not discredit exclusionary IP-related privileges.[159]According to the underlying policy considerations in the grant of intellectual property rights, right holders ought to be allowed to appropriate the revenues stemming from their inventions or creations.[160] Therefore, certain conduct that would otherwise be illegal under competition law such as refusals to deal, should be deemed legal when they purport to protect the owner's lawful return. This is because to prohibit property owners from such right is to negate their property rights and is to incur the kind of cost that the competition law seeks to avoid.

Therefore, when the firm is under examination for abuse of dominance, there is a need to consider whether exclusionary privileges are manipulated to leverage market power in markets unrelated to the patented or copyrighted product;[161]and whether the

[157]*Intergraph Corp.* v. *Intel Corp*., 195 F.3d 1356, 1362 (Fed. Cir.1999).
[158]Lionel Bentley & Brad Sherman (2009) *Intellectual Property*, Oxford University Press, Oxford, 3rded at 9.
[159]Compare Dynamic Efficiency: see Alison Johns & Brenda Sufrin (2014) *EU Competition Law: Text, Cases, and Materials*, Oxford University Press, Oxford.
[160]Simon Genevaz (2004), *op.cit*.
[161]An example of leveraging intellectual property would be when patent or copyright owners may refuse to deal in order to extend their dominance in the market for the product embodying their intellectual property right into another market, copyright owners take advantage of interoperability requirements and use the exclusionary rights inherent in the copyright grant to gain market power

conduct in blocks rivals entry or thwarts their productive effort. If the exclusive rights granted under intellectual property are leveraged to create anti-competitive market conditions, then the conduct should be subjected to competition rules. Cases of intellectual property leveraging or being abusive should, therefore, turn on the scope of the reward to which the intellectual property owner is legally entitled.

2.9 How Intellectual Property Law balances Competition Law.

2.9.1 IP rights are not absolute limitations

Exclusionary rights attached to the tangible or intangible property are the 'essence' of the grant of ownership.[162] The exclusion of competitors 'is the very essence of the right conferred by the patent as it is the privilege of any owner of property to use or not to use it, without question of motive.'[163]As much as exclusion is a key attribute in any form of private property, the right to exclude is never absolute. It does not include the right to monopolize markets in an anticompetitive way. On the contrary, all exclusionary rights are qualified, existing 'only to the extent that they serve a socially-acceptable justification.'[164]Intellectual property is subject to limitations. It is also not privileged regarding competition enforcement. However, there might be exceptional circumstances where they are exempted from competition rules.

The following are some of the ways through which intellectual property laws open up intellectual property to competition.

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for components that are part of the same system as the product embodying the copyright, but that bear no relation to the protected creative expressions.

[162]Scott Kieff(2011) Removing Property from Intellectual Property and (Intended?) Pernicious Impacts on Innovation and Competition, 19:1 *Supreme Court Economic Review*, 25-50.

[163]*Cont'lPaperBagCo.*v. *E. Paper Bag Co.*,210 US 405, 429 (1908).

[164]Ibid.

2.9.1.1 Expiration Time

IP is of limited duration.[165]For example in Kenya copyright only subsists for 50 years after registration and patents for 20 years after registration. The rationale is to ensure that eventually, IP falls into the public domain for consumer and social benefit.[166] This limits the exercise of the exclusive rights such that once the rights expire; the creation or invention is put on public domain and other players are allowed to use it. This allows for competition with respect to the product embodying the intellectual property.

2.9.1.2 Property Rules vs Liability Rules

Property rules keep an entitlement in the hands of its owner unless the owner consents to use or transfer.[167]For example, injunctions aimed at preventing such use or transfer, and enhanced damages for deterrence. Property rule treatment in the context of intellectual property (IP) has been heavily criticised for resulting in excessive transaction costs, anti-commons, hold-ups, thickets, and trolls, retard both competition and innovation and ultimately economic growth.[168] It prevents deals from being sealed and executed. This could lead to the prevention of socially productive uses of the intellectual property. [169]

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[165]Sihanya*op. cit.*
[166]William Cornish and David Lewekllyn (2013) "Intellectual *Property, Patents Copyright, Trade Mars and allied Rights* "Sweet & Maxwell, London at 16.
[167]Kiefop,cit: see also Guido Calabresi& A. Douglas Melamed, (1972)Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harvard Law Review 1089, 1092
[168]Ramon Casadesus Masanell & Daniel F. Spulber, (2000) "The Fable of Fisher Body," 43 Law& *Economics* at 67.
[169]James E. Krier& Stewart J. Schwab, (1995).Property Rules and Liability Rules: The Cathedral in Another Light, 70 *New York University Law Review* 440, 450-51.

In order to minimize these consequential costs arising from the strict and absolute enforcement of property rules, there was a need to create a system that allows trespass at a cost.[170] This has commonly been referred to as the shift from property rules to liability rules.

Liability rules allow infringement when the owner refuses to consent, or when the owner is not even asked. The infringer is then required to pay an amount of money the to the property owner who proves in court to be attributable to the objectively measured damages caused by the infringement. For example in the patent and copyright systems damages are provided as part of the civil remedies of infringement.

2.9.1.3 Limitations on Intellectual Property

Intellectual property rights only extend to acts done for industrial or commercial purposes and not to acts done for experimentation or scientific research, private study, and criticism and public interest which include competition among others.[171]They are also limited by provisions on compulsory licenses for reasons of public interest or interdependence of patents. Other specific limitations include fair dealing for copyright and the doctrine of exhaustion in the patent system.

2.10 Conclusion

The focus on the relationship between competition law and policy and intellectual property systems has significantly shifted from a conflicting perspective towards a complimentary approach. This has been influenced by the realization that the two

[170]Ibid.

[171]Waelde*op.cit*: see also 455.S.38(1) IPA(K) 1989 for the provisions to this effect.

systems of law strive to achieve the same goals of efficiency, consumer welfare, and innovation. In addition to that, the systems contain mechanisms that complement each other in striving to achieve their similar goals. The apparent conflict between the systems stems from imperfections in their application and interpretation. In light of the fact that a harmonious relationship between the two systems of law is necessary for their efficiency, there is a need for mechanisms to resolve the imperfections and create a balance where the systems actually conflict.

CHAPTER THREE

3.0 KENYA'S LEGAL, REGULATORY AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

This Chapter discusses the Kenyan legal and regulatory framework which governs the interaction between competition law and intellectual property. This discussion shall be based on the foundation set in chapter two which provided a concise discussion on the convergence and divergence of the goals and objectives of the two areas of law as well as how each area of law provides a balance for the other. This chapter shall, therefore, pick up from this understanding and shall seek to establish what the Kenyan framework provides in that respect as well as the application of the same. Essentially, this chapter shall seek to answer the second research question as to the sufficiency of the Kenyan legal, regulatory and institutional framework in providing a balance between the two areas of law.

3.2 Legal and Regulatory Framework

3.2.1 The Constitution

Article 40 of the Constitution provides for the right to own property of any description. Further Article 40 (5) imposes an obligation on the state to support, promote and protect intellectual property rights.[172] However, Article 24 of the Constitution provides that a right in the constitution shall only be limited by law taking into consideration the nature of the right, the importance of the limitation and

[172]Article 40 ,Constitution of Kenya 2010.

the nature and extent of the limitation.[173] To this extent intellectual property is not an absolute right and is subject to the limitations provided for in the competition rules as long as they are justifiable.

3.2.2 Competition Act, 2012

The Competition Act is the substantive legislation on the regulation of competition in Kenya. It is aimed at creating and maintaining competition in Kenya.[174]This is by regulating mergers and take-overs, prohibiting restrictive trade practices and abuse of dominance. The institution mandated with the enforcement of the Act is the Competition Authority of Kenya.[175] The Authority has further elaborated on the provisions provided in the Act through several guidelines which shall be relied upon below.

3.2.2.1 Restrictive trade practices

Section 21(1) of the Competition Act prohibits restrictive agreements. These are defined as "all agreements between undertakings, and concerted practices of undertakings or decisions of associations of undertakings which have the object or effect of preventing, distorting or lessening competition." These included both vertical and horizontal agreements. Further, Section 21(3) of the Act sets out a list of examples of agreements that may constitute an anticompetitive agreement. They include agreements that 'amount to the use of an intellectual property right in a manner that goes beyond the limits of legal protection.'[176]

[173]Article 24, ibid.
[174]See the Preamble to the Competition Act, 2010.
[175]See Sections 7 and 9 of the Act.
[176]Section 21(3)(h).

According to the CAK guidelines, the use of intellectual property rights in a manner that goes beyond the limits of legal protection involves the imposition of unreasonable conditions on licensees.[177] For example, the imposition of a condition that goes beyond what is necessary to protect the IPR or where the licensing arrangement is likely to affect adversely the prices, quantities, quality or varieties of goods and services.

The following are some of the listed examples constituting restrictive trade agreements relating to intellectual property.[178]

(a) Territorial Restrictions where a patent licensee is restricted to certain geographic regions or groups of customers.

(b) Undue influence over the quality control of the licensed patented product beyond what is necessary for guaranteeing the effectiveness of the licensed patent.

(c) Exclusive licensing agreements such as grant backs and acquisitions of IPRs, cross-licensing by undertakings in oligopolistic market, including, patent-pooling agreements whereby firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing prices and supply quotas; and tie-in arrangements where a licensee may

[177]Paragraph 49 of the Competition Authority of Kenya Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the Competition Act at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiMxrzStbXKAhWI7hoKHXKzAKEQFggdMAA&url=http%3A%2F%2Fwww.cak.go.ke%2Findex.php%2Fstatusregulations%2Fthe-competition-act-no-12-of-2010%2Fdoc_download%2F46-restrictive tradepractices.html&usg=AFQjCNEj3KYbNnDIke-vuXPQ6G4ul_-Q4A&sig2=oaKufTGHHmOt7gzbrupkzQ (accessed 19/1/2016).
[178]Ibid, p 50

be required to acquire raw materials solely from the patent holder, thus foreclosing other producers on the market from accessing the license.

(d) Vertical price-fixing agreements

(e) Royalty arrangements where the licensee has to pay royalties for the patented product as well as unpatented information relating to the patent.

(f) Research and development or standard setting arrangements where there is an agreement among undertakings to develop a new technology or set a standard for an industry and only just a few of the undertakings in the market can viably engage in this venture to the exclusion of other efficient competitors and. to the detriment of consumers.

(g) Tying and coercive arrangements where a licensee may be coerced by the licensor to take several licenses in the intellectual property even though the former may not need all of them.

(h) Application of certain conditions applied to trademark use where the owner of a trademark imposes territorial restrictions on the licensee of a trademark, limiting the licensee to the manufacture and sale of the trademark to a specified geographic area or market or where the trademark owner grants licenses for the sale of a trademark product on the condition that the licensee also takes unwanted or broader bundle/package of products.

(i) The imposition of other undue restrictions on the licensee, such as, limiting the maximum use the licensee may make of the patent, setting a specific or minimum price at which the patented product may be sold, imposing a territorial restriction on sale after the first authorized sale of the patented

product has occurred or imposing a restriction on the licensee from using, selling or licensing a competitor's technology.

3.2.2.2 Abuse of dominance

Section 24(1) prohibits any abuse of a dominant position by an undertaking in a market for goods or services in Kenya.[179]In order to establish the existence of abuse of dominance, there is need to establish first that the undertaking is dominant. Secondly, that the conduct prevents effective competition in the market through the exploitation of its ability to act independently of its competitors and customers.

A dominant position is defined under Section 4(3) of the Act as a position in a market where the undertaking has a 50% market share in the production, supplies, distribution of goods and services. However, according to the CAK guidelines market shares are not conclusive determinants of dominance.[180]Market power is also an essential element in the determination of dominance. Market power refers to a dominant position that allows an undertaking to act independently of its competitors and customers.[181]

In the determination of market power and dominance, several factors are taken into consideration. These include the degree of customer perception; prevalence and penetration of innovation; the ability of the undertaking to exercise market powers

[179]Section 24 (i) of the Competition Act
[180]Paragraph 74, Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the Competition Act *op. cit.*
[181]Whish &Bailey, *op. cit.*

over a sustained period of time the role of imports in the market and the existence of barriers to entry among others.[182]

Assessment of abuse is pegged on the determination of whether results in foreclosure; exclusion of rivals; exploitation of consumers or strengthens barriers to entry. Exploitative abuse refers to conduct by a dominant undertaking that exploits customers or suppliers without necessarily affecting the competition process for example through excessive pricing.[183] Exclusionary abuse refers to conduct that leads to the removal of an actual or potential competitor or the suppression or weakening of competition in a market. They include predatory pricing; discount schemes; raising the costs of entry; and unjustifiable refusal to deal.[184]

The guidelines acknowledge the exclusionary nature of intellectual property rights. It also recognizes that there is need to reward creators and innovators and to protect them from free riders who not only discourage innovation but also competition.[185]These aspects are therefore taken into consideration when dealing with cases involving intellectual property.

However, the guidelines also acknowledged that IP can confer a dominant position on the right holder with respect to certain goods and services. Therefore, an abuse may be as a result of such dominance. Examples of abuse of dominance with reference to intellectual property include using the rights to prevent the development of a new product or impose unreasonable conditions.

[182]Paragraph 74 *op.cit*
[183]Paragraph 82 *op. cit*
[184]Paragraph 85, ibid.
[185]Paragraph 92, ibid.

3.2.2.3 Exemptions under the Act

The Competition Act has also provided for exceptions of certain arrangements. The rationale behind this is that these arrangements possess redeeming qualities and it is in the public interest that they are upheld. Certain intellectual property arrangements are exempt from competition rules in accordance with Section 28(1). This is because some of these arrangements may result in economic efficiencies such as dynamic efficiencies through bolstering technological developments.[186]

The guidelines identify some of the arrangements that may be exempted they include:[187]

(a) an arrangement aimed at exercising an intellectual property right derived under Kenyan law
(b) an arrangement where the involved undertakings are not competitors and have insignificant market shares
(c) licensing or transfer arrangement where there are no risks of creating or enhancing dominance.
(d) Refusal to deal where the refusal does not prevent, restrict or lessen competition.

Whereas the Competition Act makes provisions for limitations of the enjoyment of intellectual property rights, there are no express mechanisms and thresholds set out in the Act to show when an intellectual property right becomes an intellectual property wrong hence necessitating the intervention by competition law.

[186]Ibid, Paragraph 114
[187]Competition Guidelines, Paragraph 113.

3.2.3 Copyright Act, Act No.12 of 2001

The Copyright Act contains general exceptions and limitations to the exclusive rights granted. Whatever falls within the exceptions and limitations constitutes lawful conduct and excludes liability for infringement. In particular, it is an attempt to balance rights holder's rights with the interests of users. Section 26(1) of the Copyright Act provides, inter alia, that copyright in literary, musical, artistic or audiovisual works is subject to four sets of exceptions and limitations. First, copyright does not include the right to control. "fair dealing" for purposes of criticism, review, scientific research, private use and reporting of current events for as long as the author is acknowledged as such.

Second, copyright does not cover the inclusion of not more than two short passages of a copyright-protected work in a collection of literary or musical works that is for use by an educational institution. The third exception and limitation are the broadcasting of a work, or reproduction of a broadcast, for educational purposes in an educational institution. The fourth exception and limitation are the reproduction under the direction or control of the Government or by public libraries, non-commercial documentation centres and research institutions, "in the public interest" and where no income is derived from the reproduction. These provisions are elaborated in sections 26-29 of the Act.

These limitations are however limited to non-commercial arrangements and may have very little impact on competition activities. The limitation with an impact on

competition is the grant of compulsory licenses. Sections 31 and 33 of the Act [188] provide for first ownership and the transfer of copyright through contractual licensing, assignment, and compulsory licensing. The Act permits the competent authority to grant compulsory licenses where the authors of copyrighted works refuse to republish or withholds the work from the public without justifiable reasons.[189]

3.2.4 Industrial Property Act, Chapter 509

Patent rights are also subject to certain limitations. These limitations are provided for in section 38 of the Industrial Property Act.[190]First, patent rights only extend to acts done for industrial or commercial purposes and not to acts done for experimentation or scientific research. Second, patent rights are limited to the provisions on the term of the patent which currently is 20 years after which the patent falls into the public domain and could be used by competitors.[191] Third, patent rights are subject to compulsory licenses, public interest or based on interdependence of patents and state exploitation of patented inventions.[192]

3.2.5 Trademarks Act, Chapter 506

The most important aspect of trademark law in Kenya in this context is the doctrine of unfair competition. The development of a trade mark requires a heavy investment of skill and judgment in choosing the mark.[193]The doctrine of unfair competition prohibits fraudulent, deceptive or dishonest trade practice involving a competitor's

[188]Cf sections 13, 14 and 17 of the 1966 Act.
[189]Section 33, Copyright Act Cap 130.
[190]Section 38, Industrial property Act Cap 509.
[191]Cf Article 33 of TRIPS Agreement *op. cit*.
[192]CfSihanya*op.cit.*
[193]Ibid.

trademark. Such conduct is illegal under the Trade Marks Act.[194] The doctrine of unfair competition, in this case, does not only protect right holders but also encourages proper competition through the provision of quality goods and services. It prevents freeloaders from reaping where someone else sowed (an established trademark).

3.2.6 East African Competition Act, 2006

Kenya is a member of the East African Community (EAC) which has enacted the East African Competition Act. The Act is largely similar to the Kenyan Competition Act and is largely unimplemented since its enactment. The institutions established under the Act have also not been operationalised although the East African Community Competition Authority (EACCA) was anticipated to begin work in the current financial year of 2016/2017.[195] One of the key objectives of the EAC Competition Act is 'providing incentives to producers within the Community for the improvement of production and products through technical and organizational innovation.'[196] This recognises the importance of protection of intellectual property rights to competition. However, Article 10 (1) (d) prohibits the abuse of intellectual property by dominant undertakings.

As has been indicated, the EAC Competition Act has not been fully operationalised and therefore there has been no application of the same to the regional competition spectrum against the intellectual property law. A quick reading of the Act, however,

[194]Sections 7 and 8 of the Trade Marks Act Cap 506.
[195]*https://www.trademarkea.com › News › Burundi News*
[196]Article 3(a) (vi) of the East African Competition Act,2006

highlights inadequacies of the regional Act. The law is incomprehensive and there are no guidelines for application of the Act to intellectual property. Further, the EAC has yet to enact a regional Intellectual Property law against which the intervention of competition law can be identified.

3.2.7 World Trade Organization (WTO) - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994)[197]

Kenya is a member of the WTO and is a signatory to the TRIPS Agreement and therefore it has to comply with the provision therein. The subject matter of the Agreement covers the following areas: Competition, Copyright and Related Rights (Neighbouring Rights), Enforcement of IP and Related Laws, Geographical Indications, Industrial Designs, Industrial Property, Layout Designs of Integrated Circuits, Other, Patents (Inventions), Plant Variety Protection, Trade Names, Trademarks, Transfer of Technology, Undisclosed Information (Trade Secrets), Utility Models.[198]The question of competition law shall be discussed exclusive of the other areas.

Article 8.2 of the TRIPS Agreement stipulates that "appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international

[197]The TRIPS Agreement was adopted on April 15, 1994 at Marrakesh and its entry into force was on January 1, 1995.This is also date which Kenya signed the Agreement and the same came into force on that date.

[198]World Intellectual Property Organisation (WIPO) <http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=22&treaty_id=231> accessed 23 September 2016.

transfer of technology." This provision, therefore, recognises that the Member State's have a right to subject the exercise of intellectual property rights to competition laws.[199]Further, Article 40 (1) of the Agreement appreciates that certain IPR licenses may impede competition and ought to allow member states to control such anti-competitive practices.[200]

The TRIPS Agreement, therefore, allows for member states to provide means for the intervention of competition law in the enjoyment of IPR if the same is found to be anti-competitive.

3.3 Institutional Framework

3.3.1 Competition Authority of Kenya.

The Competition Authority of Kenya (CAK) is established under Section 7(1) of the Competition Act, 2010.CAK is the body that is mandated to enforce the Competition Act[201] through enhancing the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.[202]It is empowered to investigate complaints from legal or natural persons and consumer bodies on matters competition.

[199]See Article 8(2) of the TRIPS Agreement available at https://www.wto.org/english/docs_e/legal_e/27-**trips**.pdf *(accessed 11 November 2016).*
[200]Article 40 (1) provides thus 'Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.'
[201]Section 9 (a) of the Competition Act.
[202]See the CAK website <http://www.cak.go.ke/index.php/about-us>.

CAK has not made any determination on the relationship between competition law and intellectual property law although it has provided brief guidelines in the application of the same under the Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the Competition Act.[203]

3.3.2 The Competition Tribunal

The Competition Tribunal is the first body to which appeals against the decisions of CAK are filed. The Tribunal is established under Section 71 of the Act. There are no decisions which have been taken by the Tribunal as the regulations governing its function have not been published.

3.3.3 The High Court

Section 53(1) of the Competition Act provides that the High Court is the final court for adjudication of competition disputes .It provides 'A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision is served on him and the decision of the High Court shall be final. There have been no appeals to the High Court on competition matters since the enactment of the Act since the Competition Tribunal had not been operationalised.

[203]Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the Competition Act<www.cak.go.ke/images/docs/**Restrictive-Trade-Practices-Guidelines**.pdf>(accessed 10 November 2016).

3.4 Conclusion

This Chapter sought to analyse the extent to which the law create a balance between competition law and intellectual property. From the aforementioned discussion, competition law acknowledges the inherent exclusionary nature and provides for rules and exceptions to govern intellectual property rights. Intellectual property law also has measures to ensure the creation and maintenance of competition despite its exclusionary nature. All these measures are geared towards the promotion of both competition and innovation through both regimes. To this extent, the Kenyan legislation makes significant attempts to create a balance between the two regimes of law. However, the law does not provide for specific regulations to govern the interaction between competition law and intellectual property exclusively.

CHAPTER FOUR:

4.0 COMPARATIVE STUDY: THE EUROPEAN UNION, UNITED KINGDOM, UNITED STATES OF AMERICA AND SOUTH AFRICA.

4.1 Introduction

The previous chapters discussed the measures adopted by competition law and intellectual property law to create a balance between the two systems of law with a specific focus on the legal framework in Kenya. This chapter shall attempt to undertake a comparative study of the measures adopted in other jurisdictions. These jurisdictions include the EU, UK, US and South Africa.

4.2 The United Kingdom perspective on the interface between competition law and intellectual property law.

The UK competition law is mainly governed by two laws: the Competition Act 1998 and the Enterprise Act 2002. These laws are largely supported by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (discussed below).

The Competition Act, under Chapter 1 prohibits agreements, decisions or practices which limit the control, production, markets, technical development or investment. The import of this is that the IPR licenses which in one way or another, lead to limiting the markets are prohibited.[204] The Act also prohibits the abuse of dominant

[204] See Chapter 1 of the Competition Act

positions by dominant players in the market.[205] It has been noted that IPR may make it owner dominant and hence should such owner abuse that position, then the competition law interferes and remedies such abuse. The Enterprise Act, 2002 provides the implementation mechanisms for the Competition Act. It provides that it is a criminal offense for individuals dishonestly to engage in prohibited acts.[206] The Competition and Markets Authority (CMA) is the institutional and regulatory body which is mandated to powers to investigate competition law abuses and penalise the abusers.[207] Penalties can include fining the wrongdoers, disqualifying the directors or imprisonment or fines for individuals found to have engaged in anti-competitive conduct.

As has been stated, competition law in the UK is modeled upon are Articles 101 and 102 the TFEU discussed below.[208] In the event of a conflict between the application of the UK national competition law and the TFEU, the EU law takes precedence and hence the EU law applies where there is a conflict of laws.[209]

4.3 European Union competition policy on intellectual property

The competition regime of the European Union is governed by the Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU). The treaty identifies Competition as one of the important economic aspects. The competition rules in the EU are embodied in articles 101 and 102 of the TFEU.[210] The

[205] See Chapter II prohibitions which are modeled on Article 102 of the TFEU
[206] <https://www.gov.uk/government/organisations/competition-and-markets-authority>
[207] ibid
[208] Richard Whish and David Bailey at 76
[209] ibid
[210] Compare Article 81 and 82 of the Treaty European Community.

commission has stated that the object of the competition clauses in the treaties is to enhance consumer welfare by and allocation aimed at creating an efficient common market among the member states of the EU. Specifically, the treaty provides rules for that prohibit restrictive trade practices[211]and abuse of dominance.[212]The European Commission is mandated to enforce the treaty on competition matters. This section shall focus on the law on restrictive trade practices and abuse of dominance in relation to intellectual property rights in the European Union.

4.2.1 Restrictive Agreements

Article 101 of the TFEU prohibits "agreements between undertakings, decisions of associations and concerted practices which may affect trade between member states and the object and effect of which is to prevent, restrict or distort competition within the common market."Article 101 aims at protecting competition in the common market in order to enhance consumer welfare and ensure that there is an efficient allocation of resources. [213]

Further, Article 101 of the TFEU lists some of the prohibited agreements. They include agreements that:[214]

1. Directly or indirectly fix purchase or selling prices or any other trading conditions;
2. Limit or control production, markets, technical development or investment;

[211]Article 101 of the Treaty on the Functioning of the European Union.
[212]Article 102 of the TFEU; see also William Cornish et. al (2013) Intellectual Property: Copyright, Trademarks and Allied Rights Sweet & Maxwell, 8th ed 47.
[213]Guidelines on the application of Article 81 (3) of the Treaty (2004/c101/08; see also Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements 2014/C 89/03.
[214]Article 101 (1) of the Treaty on the Functioning of the European Union.

3. Share markets or sources of supply;
4. Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
5. Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The relationship between competition law and intellectual property in the EU has been addressed in detail through guidelines by the commission and decisions of the European Court of Justice. These institutions have developed principles and guidelines over time that govern the intersection between competition law and intellectual property. The guidelines state that the relationship between intellectual property and competition laws is complementary. It recognizes that both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources.[215]

Generally, intellectual property is subject to the rules and regulations of competition law. The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention.[216]However, the guidelines recognize that the creation of intellectual property rights often entails substantial investment and that this is often a risky

[215]Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements 2014/C 89/03.
[216]also Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements 2014/C 89/03.

endeavor.[217] In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. The innovator should be free to seek appropriate remuneration for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. These factors ought to be taken into consideration in the analysis of arrangements involving intellectual property rights and may lead to some exemptions.

At the onset of the dealing with competition and intellectual property concerns, the ECJ adopted a very restrictive approach.[218] Agreements relating to intellectual property were subject to competition law restrictions in spite of the broader economic benefits that may have arisen as a result of the agreements.[219]In *Consten & Grundig v EEC Commission,* Grundig granted Consten an absolute territorial protection for distribution of Grundig's product in France.[220] This was by imposing restrictions and bans on other importers and entering into a licence agreement which authorized the exclusive use by Consten Grundig's trademark.

The ECJ held that Article 81(now Article 101) of the TEC applied to both horizontal and vertical agreements.[221] It further held that an agreement between a manufacturer and distributor who are not in competition might have an adverse effect on competition between one of them and a third party and therefore distortive of competition. The court considered the licensing of the trademark material factor in

[217]Ibid.
[218]Hector Macqueen Charlote Waelde& Graeme Laurie (2008) Contemporary Intellectual Property: Law and Policy, Oxford University Press, Oxford, pp 830
[219]*ibid.*
[220]*Consten&Grundig*v *EEC Commission case* C-56/64 [1966] ECR 429.
[221]Article 101 of the TFEU.

the attempt to ensure for Consten's absolute territorial exclusivity. The court granted an injunction arguing that such an injunction does not affect the grant of the rights but only amounts to a limitation of the exercise of the rights. This has commonly been referred to as the existence or exercise dichotomy.[222]

However, in the *Windsurfing International v Commission Case,* the court adopted a different approach commonly referred to as the subject matter approach.[223]Windsurfing made a sailboard and applied for patents in several countries. The company then entered into a number of licensing agreements that had clauses tying patented goods to unpatented goods. Both the commission and the ECJ found that the clauses that went beyond the subject matter of the patent were anti-competitive. This approach was more liberal as compared to the exercise and distinction dichotomy.

Additionally, in the analysis of competition and intellectual property cases, the Commission and the ECJ carry out an economic analysis of an agreement on the relevant market.[224]Agreements whose precompetitive effects outweigh anti-competitive effects may be upheld. In *Nungesser* v *Commission* (*Maize seed case*), a French Institute developed a new variety of beans and held plant breeders rights over the variety under France and German laws. Part of the German rights was partly licensed and partly assigned to a German undertaking such that the German undertaking enjoyed absolute territory exclusivity. The French Institute refused to license another undertaking to sell the goods in Germany. The agreement was also to

[222]Macqueen *et.al op.cit*
[223]*Windsurfing International* v *Commission Case* C-193/83(1986) ECR 611.
[224]Cf application of the rule of reason.

the effect that the French Institute will not export the seeds to Germany nor will it allow other undertakings to export the seeds.

The Commission, applying the per se rule, argued that the grant of the exclusive rights contravened the provision. However, the ECJ applying the rule of reason sought to reconcile the objectives of free competition between member states and the wider competitive benefits of exclusive licenses of IP rights. The court distinguished the exclusive license (open license) from closed licenses. The court argued that open licenses were acceptable as some exclusivity might be essential to encourage potential licensees to invest in a new product. Therefore the exclusive license agreement was upheld, however, the requirement that the French institute was to bar other undertakings from exporting the seeds to Germany was held to be anticompetitive and illegal.[225]

The TFEU provides that certain agreements may be exempted from the rules on restrictive trade practices. Article 101 (3) provides for exemptions for agreements that contribute to the improvement of "production or distribution of goods; or towards promoting technical or economic progress whilst allowing consumers a fair share of resulting benefit."[226]This is on condition that such agreements do not eliminate competition.

[225]Cf Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements Oj 2004/c 101/02, para 33.
[226]Cf Article 81 of the TEU.

There are also block exemptions.[227]A block exemption specifies conditions under which certain types of agreements are exempted from the prohibitions in Article 101.[228]If an agreement complies with the criteria in the block exemption then the agreement is automatically valid and enforceable. Block exemptions exist in a number of areas including vertical agreements;[229] research and development,[230] technology transfer agreements[231] and car distribution agreements.[232]

The relevant block exemptions for IP are technology transfer agreements. The current block exemption on technology transfer is governed by the Technology Transfer Block Exemption.[233] TTBER is important for undertakings which enter into technology transfer agreements dealing with patents, know-how, software, copyright. It provides guidelines on the type of restrictions that are exempted and those that are prohibited. These are divided into hardcore and excluded restriction.[234] In the assessment of these clauses and restrictions, the TTBER differentiates between competitors and non-competitors. Arrangements with hardcore restrictions are not exempted under the TTBER. Examples of prohibited restrictions are:

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[227]Macqueen *et. alop.cit.*
[228]Ibid.
[229]Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Art 81 (3) of the Treaty to categories of vertical agreements and concerted practices.
[230]Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Art 81 (3) of the Treaty to categories of research and development agreements.
[231]Commission Regulation (EC) No 722/2004 of 27 April 2004 on the application of Art 81 (3) of the Treaty to categories of technology transfer agreements.
[232]Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Art 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.
[233]Regulation 2349/84, OJ 1984 L219, amended by Regulation 151/93, Oj 1993L21/8 and Regulation 2131/95, Oj 1995 L21 4/6, amended by Guidelines on Application of Article 81 of the EC Treaty to technology transfer agreements (2004/C 101 /02) (TTBER Guidelines).
[234]Alison James & Brenda Sufrin (2011) *EU Competition Law*, Oxford University Press, Oxford, 4[th]eds, 735.

1. Restrictions on a party's ability to determine its prices when selling products to third parties.
2. Limitation of outputs except for limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of licensees in a reciprocal agreement.
3. Restriction of the licensee's ability to exploit its own technology on the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.
4. Allocation of markets with exceptions of certain restrictions and obligations such as the obligation on the licensor not to license the technology to another licensee in particular territory; and the obligation on the licensee to produce with the licensed technology only within one or more technical fields of use or one or more product markets; the restrictions, in a non-reciprocal, of active and passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party.

For parties who are not competing, the prohibited clauses include:

1. The restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products
2. The restriction of a part's ability to determine its prices when selling products to third parties
3. The restriction of active or passive sales to end users by a licensee which is a member of a selective distribution system and operates at the retail level.

Arrangements with excluded restrictions do not fall under the TTBER. They require an individual assessment of their anti or pro-competitive effects. Their inclusion in an agreement does not prevent the TTBER from applying to the rest of the agreement. Examples of excluded agreements include restrictions on both part's research and development activities; obligations limiting the ability of the licensee to exploit its own technology among others.

Agreements that are a violation of Article 101 of the TFEU are void and unenforceable.[235]The commission may impose fines.[236] In some jurisdictions such as the UK directors of the undertaking in question may be disqualified.[237]

4.2.2 Abuse of dominance

Article 102 of the TFEU prohibits abuse by one or more undertakings of a dominant position within the EU. A dominant position in the EU has been defined as a position of economic strength that enables an undertaking to act independently of his customers, competitors, and suppliers among others. Abuse refers to conduct by a dominant firm which will seriously and unjustifiable distort competition.[238] Article list the following examples of abuses:[239]

(a) unfair pricing and unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

[235]Article 101 (3) of the TFEU.
[236]Guidelines on the method of setting fines imposed pursuant to Art 23(2) (a) of Regulation no.1/2003(2006/C210/02.
[237]Macqueen op. cit.
[238]Compare an objective test.
[239]Refusal to deal not listed but Community courts have decided that article 82's scope encompasses refusals to licence and have, in a number of decisions, laid down conditions at which such a refusal is abusive. The remedy for an abusive refusal to licence an IPR is to impose a compulsory licence onto the holder of the IPR.

(c) applying dissimilar conditions to equivalent transactions

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary

(e) obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The commission and the ECJ recognize that all IPRs give some form of exclusive rights to the owner but it does not necessarily imply the undertaking has a dominant position has a dominant position and is able to exert market power.[240] However, the expansion of scope and subject matter of IPRs has increased the focus on Article 82 on intellectual property.[241]Therefore there are exceptional circumstances where certain IPR may constitute an abuse. Examples of such instances as identified by courts in the *Renault* and *Volvo* cases are the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level and the decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.

Several principles and guidelines have been developed by the commission and the ECJ over time in relation to abuse of dominance and intellectual property rights**.** First, mere ownership of IPR does not confer dominance. This has been held so by the ECJ in the cases of *Parke, Davis v Probel Case,*[242] and *Deutsche Grammophon* v

[240]Parke, Davis, v Probel Case C-24/67[1968] ECR 55.
[241]Macqueen *et. al op,..cit.*
[242][1968] C-24/67ECR 55.

Metro Case.[243] In *Parke* the court held that for the existence of abuse of dominance in relation to intellectual property the following three must exist: a dominant position, abuse of dominant position and the possibility of distortion of trade between member states. The ownership of patent does not automatically present the three conditions unless the use of the patent degenerates to abuse.[244]

Second, is in reference to abuse of dominance rules on refusal to supply and IPs exclusive rights. The most common area of conflict is in relation to refusal to supply. IP grants the right holder exclusive rights. Should competition law limit these rights through its rules on refusal to deal? This was discussed by the ECJ in the case of *Volvo v Veng.*[245]Volvo refused to license its designs to its spare parts manufacturers. The ECJ held that "the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing without its consent, products incorporating the design constitutes the very subject matter of his exclusive right."[246] It follows that a proprietor cannot be obliged to grant to third parties licenses over his works even in return for a reasonable royalty. Refusal to deal in these circumstances cannot in itself constitute an abuse of a dominant position. Refusal is not prohibited unless it is on exercise exceeding the subject matter. The court held that if the proprietor had refused to supply the spare part that the consumers needed then this would amount to an abuse of dominance.

[243][1971]C-78/70 ECR 487.
[244]*ibid.*
[245][1988] C-223/87 ECR 6211, [1989] 4 CMLR 122.
[246]Ibid.

This issue was also discussed in *RTE and ITP* v *Commission* commonly known as *Magill.*[247]The court held that mere ownership of IPR cannot confer a dominant position. The exclusive right of reproduction is part of the author's right so that a refusal to grant a license even if it is the act of an undertaking holding a dominant position cannot in itself constitute an abuse of a dominant position. However, the exercise of an exclusive right by the proprietor may in exceptional circumstances amount to abusive conduct. In this case, the refusal of broadcasting companies to avail information on relying on copyright had prevented the emergence of a new product which had elicited consumer demand amounted to be abusive. Other exceptional circumstances would include the absence of actual or potential substitute for the product for which a license is sought.

This matter was also considered in *IMS Health* v *NDC Health*.[248]The court affirmed its decision in the previous cases to the effect that exclusive right of reproduction forms part of an IPR owner's rights. A refusal to grant a license even by a dominant undertaking does not by itself constitute an abuse of dominance. The court set cumulative criteria to be met: First, the undertaking which requested the license must intend to offer new services not offered by the IPR owner and for which there is potential consumer demand; Second, the refusal cannot be objectively justified; Third, the refusal must be such as to exclude competition on a secondary market due to the indispensability of the product in question.

[247]*RTE and ITP* v *Cameroon (Magill)* joined cases C-241/91 P and C242/91P[1995] ECR 1-743.
[248]*[2004] Case* 418/01 AII ER (EC) 813.

4.3 United States of America Anti-trust law and intellectual property Law.

The United States competition regime known as antitrust law is governed by three main statutes. First, the Sherman Act which prohibits contracts and arrangements in restraint of trade.[249] The Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive practices.[250] The Clayton Act deals with specific activities and practices that are not dealt with in the Sherman Act such as merger regulation.[251] The institutions mandated with the enforcement of these statutes are Federal Trade Commission and U.S Department of Justice.[252]

Initially antitrust law and intellectual property were viewed as two conflicting disciplines. However the recognition of their common goals, competition and innovation have led to a shift in the perception of their relationship.[253] The modern understanding of these two disciplines is that antitrust laws and intellectual property work together resulting in new and better technologies, products, and services to consumers at lower prices.[254]

The importance of the relationship between antitrust laws and intellectual property led to the development of the Antitrust Guidelines for the Licensing of Intellectual

[249]The Sherman Antitrust Act (1890).
[250]The Federal Trade Commission Act of 1914
[251]The Clayton Antitrust Act of 1914.
[252]US Department Of Justice & Federal Trade Communication, (2007).Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition at https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf (accessed 27/1/2016).
[253]Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).
[254]U.S. Dep't Of Justice & Fed. Trade Comm'n, (2007) "Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition" *op. cit.*: see also U.S. Dep't Of Justice & Federal Trade Comm'n, (1995) "Antitrust Guidelines For The Licensing Of Intellectual property Intellectual Property."

Property. The guidelines provide for three key principles governing intellectual property transactions with antitrust concerns. First, agreements involving intellectual property will be analyzed using the same antitrust rules applied to agreements involving any other property.[255] This principle is based on the notion that intellectual property is similar to other forms of property. In the *United States* v. *Microsoft Corp,* the Court of Appeal IP disagreed with the notion that an IP rights holder had absolute and unfettered right to use intellectual property as it wishes. It further stated: "That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability."[256]

The guidelines argue that just like other property rights, intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. And just other like the other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect.

However, the guidelines note that IP has some unique characteristics that make it different from other forms of tangible property. First, intellectual property is susceptible to easy misappropriation as compared to other forms of property. Second, the creation of intellectual property may involve high costs yet the marginal costs of using intellectual property law may be low. Third, intellectual property rights boundaries are quite uncertain. Fourth, IP valuation faces more difficulty as

[255]Antitrust-Intellectual Property Guidelines (1995) *op.cit.*
[256]*United States* v. *Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 200); see also section 71(d)(4) of the Patent Act. it does not create antitrust immunity for unilateral refusals to license patents.

compared to other tangible property and the fact that intellectual property rights are limited in time. In light of these considerations, the guidelines provide that the antitrust analysis of intellectual property arrangements should take these factors into consideration.[257]

Second, the Guidelines state that an intellectual property right does not necessarily create market power. The determination of market power is significantly pegged on the availability of substitutes for the relevant product. The shift from the presumption of market power was informed by courts decisions in several cases[258] and the amendment to the Patent Code eliminating the presumption of market power in the patent misuse context.[259]

In the determination of the existence of market power, the agency looks at the availability of substitutes for the protected technology or product and whether the intellectual property right holder can act independently of his other market players.[260]

In addition to that, monopoly acquired through lawful means is not prohibited by anti-trust laws and consequently, the exercise of monopoly power, including the charging of monopoly prices in such circumstances is not anticompetitive.[261] The same principle applies to monopoly power that is based on intellectual property rights. As Richard Posner argued that it is not a violation to acquire a monopoly

[257]Antitrust-Intellectual Property Guidelines (1995) op.cit
[258]United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).
[259]See 35 U.S.C. § 271(d)(5) (no relief for patent misuse "unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned."
[260]Ibid; see also U.S. Dep't Of Justice & Fed. Trade Comm'n, (2007) "Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition" *op. cit.*
[261]*Verizon Commc'ns Inc.* v. *Law Offices of Curtis*

lawfully through means such as innovation which elicit intellectual property protection.[262]

Third, the Guidelines state that intellectual property licensing is generally pro-competitive because it allows firms to combine intellectual property rights with other complementary factors of production such as manufacturing and production facilities and workforces. Licensing provides the IPR owner with a means for commercialization of the intellectual property. It also facilitates the transfer of technology and its integration with other complementary factors of production.[263]This allows for efficient exploitation of intellectual property rights benefiting consumers and the expected returns from licensing encourage innovation.[264]

The Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission address complex antitrust questions related to conduct involving the exercise of intellectual property rights.[265] The Agencies must apply antitrust principles to identify illegal collusive or exclusionary conduct while at the same time supporting the incentives to innovate created by intellectual property rights. Condemning efficient activity involving intellectual property rights could undermine that incentive to innovate, and thus slow the engine that drives much economic growth in the United States. However, failure to challenge illegal collusive or exclusionary conduct, involving intellectual property as well as other forms of property, can have substantial negative consequences for consumers.

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[262]Richard A. Posner, Antitrust in the New Economy, 68.
ANTITRUST L.J. 925, 930-31 (2001).
[263]Antitrust Intellectual Property Guidelines (1995).
[264]Ibid.
[265]U.S. Dep't Of Justice & Fed. Trade Comm'n, (2007) "Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition" *op. cit.*

There are several issues that raise the most antitrust intellectual property concerns. These include intellectual property license agreements; tying and bundling; patent licenses, royalties, and patent pools. The Agencies apply the rule of reason analysis of the Antitrust-IP Guidelines to assess intellectual property licensing agreements, including non-assertion clauses, grant-backs, and reach-through royalty agreements. For example in tie arrangements the agencies will look at the following factors: whether the seller has market power in the tying product; whether the arrangement has an adverse effect on competition in the relevant market for the tied product, and whether the efficiency justifications for the arrangement outweigh the anticompetitive effects."[266] This also applies to cross licenses and patent pools, resale price maintenance arrangements.[267]

Intellectual property licenses are subject to review under of the Sherman Act. In the analysis of antitrust arrangements, the agencies and the courts consider the following: First, whether the arrangement is a unilateral or concerted action. Concerted actions are subject to strict antitrust analysis. Second, whether the arrangement is horizontal or vertical. Vertical licenses are generally considered to have pro-competitive effects and therefore analyzed under the rule of reason whereas horizontal agreements are subject to greater scrutiny based on the per se rule.[268]

In the refusal to deal agreements, the antitrust analysis proceeds on the following assumptions: First, IPRs do not automatically confer a monopoly. Second exclusive

[266]*U.S. Philips v. International Trade Commission*, 424 F.3d 1179 (Fed. Cir. 2005).
[267]Leegin Creative Leather Products, Inc. v. PSKS, 551 U.S. 877 (2007).contrast Lucas Arts Entertainment Co. v. Humongous Entertainment Co., 870 F. Supp. 285 (N.D. Cal. 1993).
[268]FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986): see also American Motor Inns v. Holiday Inn, 521 F.2d 1230, 1249-1250 (3d Cir. 1975).

rights are an inherent aspect of intellectual property rights.[269]In *Verizon Communication v Law Offices of Curtis v. Trinko, LLP*, 540 US. 398, 407 (2004), which marginalized the essential facilities doctrine as a source for a unilateral duty to deal, it appears less likely than ever that a unilateral refusal to license will be the sole basis for the imposition of antitrust liability. This does not mean, however, that IP owners can impose restrictive terms in their licenses or *collectively* refuse to license with certain antitrust impunity.

Exclusive dealing arrangements are evaluated under section 1 of the Sherman Act and section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Analysis of exclusive dealings is based on the rule of reason.[270]The guidelines recognize that intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. However, certain exclusive conduct may have anticompetitive effects. The agency considers whether the conduct promotes the exploitation and development the protected technology; whether the conduct anti-competitively forecloses the exploitation and development of competing technologies. In recent cases in the United States, several exclusive arrangements have been upheld.[271]

[269]Cf Section 271(b) of the Patent Act was amended in 1988 to the effect that one cannot be deemed guilty of misuse for refusing to license or use any rights to the patent; see *Grid Sys. Corp.* v. *Texas Instruments, Inc*., 771 F. Supp. 1033, 1037 n.2 (N.D. Cal. 1991); *Image Technical Servs*.v. *Eastman Kodak Co*., 125 F.3d 1195 (9th Cir. 1997).

[270]Tampa Electric Co. v.Nashville Coal Co., 365 U.S. 320 (1961).

[271]Sewell Plastics, Inc. v. Coca Cola Co., 720 F. Supp. 1196, 1213 (WD.N.C. 1989); United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

4.4 The Republic of South Africa

The competition law regime in South Africa is governed by the South African Competition Act 89 of 1998. The aim of the competition Act in South Africa is to promote and maintain competition to enhance efficiency and facilitate economic development and advancement of social and economic welfare.[272]The South African Competition Commission is the government institution mandated with the enforcement of the Act.

The Act is applicable to all economic activities in South Africa, which would include all types of IPRs. Thus, the exercise of all types of IPRs is subordinated to scrutiny under the provisions of the Competition Act. The competition act prohibits restrictive trade practices and arrangements which include restrictive horizontal and vertical agreements and abuse of dominance.[273]

Section 4 of the Act prohibits vertical horizontal agreements or concerted practice if they have the effect of substantially preventing, or lessening, competition in a market. Examples of prohibited horizontal and vertical agreements are:

1. direct or indirect fixing
2. market allocation on the basis of customers, suppliers, territories, or specific types of goods or services; or
3. collusive tendering; or
4. resale price maintenance

[272]Section 2 of the Competition act 89 of 1998; see also Correara*op.cit.*
[273]Cf sections 4, 5, 7 and 9 of the Competition Act 89 of 1998.

Further, Article 4 provides that the agreements may be exempted if it is proven that the agreements result in any technological, efficiency or another pro-competitive gain that outweighs the anticompetitive effect.

The Act also prohibits abuse of dominance.[274] Section 7 of the Act defines dominance as the market share of at least 45 percent or less that 45 per cent of market power. Examples conduct that amounts to an abuse of dominance include: excessive pricing; refusal to grant access to an essential facility and other forms of exclusionary conduct such as such as restricting suppliers or consumers from dealing with competitors; refusing to supply goods; tying and bundling; and predatory pricing. However, the conduct is allowed if the efficiency or technological or other pro-competitive gain outweighs the anti-competitive effect effects.

The Act specifically provides for exceptions from prohibitions. The Commission may grant exemptions where the agreements contribute to the following: maintenance or promotion of exports; promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; change in productive capacity necessary to stop decline in an industry; and or the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry. Section 4 provides for the application to the commission for exemption in relation to intellectual property rights.

[274]Section 8 of the Competition Act 89 of 1998.

The pharmaceutical industry is South Africa is the most affected. In 2003, the South African Competition Commission found that pharmaceutical firms GlaxoSmithKline South Africa (Pty) Ltd (GSK) and Boehringer Ingelheim (BI) had contravened the Competition Act of 1998 by abusing their dominance with respect to the production of antiretroviral medicine.[275] The issue was however settled when the firms agreed to grant voluntary licenses.

There is however little jurisprudence on the how competition law in South Africa relates to intellectual property. There are no guidelines from the commission on the relationship between competition and intellectual property rights. Most of the measures adopted to facilitate a balance are detailed in the intellectual property regime, for example, the provisions on limitations on intellectual property rights and compulsory licenses.[276]

4.5 Conclusion

Like Kenya, the European Union, the United Kingdom, the United States of America and South Africa approach to the relationship between competition and intellectual property is more of complementary as opposed to antagonistic. The four regimes recognize the importance of both intellectual property and competition law in economic development. The regimes with the exception of South Africa provide detailed guidelines on the areas of concern in intellectual property and competition.

[275]Alice Pham (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?' CUTS International, Jaipur, India, 24.

[276]Section 56(2) (d), Patents Act No. 57 of 1978).

South Africa has limited guidelines and provisions on the relationship between competition and intellectual property.

However, the European Union and the United States have more jurisprudence with more specificity as compared to Kenya and South Africa. There are several court decisions in the two regimes that significantly contributed to the jurisprudence on competition and intellectual property.

CHAPTER 5

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This Chapter is the last section of the project. It shall provide a summary of the discussions that have been had in the previous chapters. The research hypotheses stated in the first chapter have been tested in the preceding discussion and this chapter shall seek to confirm whether the hypotheses have been proved or disproved.

The first Chapter of this study discussed the background of this study on the relationship between competition law and intellectual property. It highlighted the study research objectives and research questions[277]as well as a concise study of existing literature on the research problem. The second chapter undertook a study on the goals and objectives of competition law and intellectual property law. It also highlighted the application of each area of law to the other and how one provides a balance to the other. The third chapter studied the legal, regulatory and institutional framework on the subject under study. This chapter revealed the lack of proper legal mechanisms as well as enforcement measures with respect to the intersection between competition law and intellectual property law. The fourth chapter undertook a comparative study of other competition jurisdictions and more specifically the EU, UK, US and South Africa in an attempt to establish whether there are some lessons that can be borrowed by Kenya.

[277]See Chapter 1 of this thesis.

5.2 Conclusion

This paper sought to test the following hypotheses: that the goals and objectives of competition law and intellectual property law are loggerheads and cannot be reconciled and that the Kenyan legal, regulatory and institutional framework for the interaction between competition law and intellectual property law is incomprehensive as it does not provide sufficient guidelines on how the balance between the uninhibited enjoyment of rights created by intellectual property and interference on the same by competition law. These hypotheses were tested in the discussions in chapters two and three of the research. The first hypothesis was proved negative while the second hypothesis has proved positive.

The research established that inasmuch as the relationship between competition law has long been viewed to be uneasy and one marred with conflict, the uneasiness has been found to be misplaced. The basis of the uneasiness was found to originate from the goals of each area of law in the sense that intellectual property is seen as granting exclusive rights that create monopolies whereas competition law strives to prevent the creation of monopolies. However as discussed in this research, this approach is rivaled by the complementary approach which argues that competition law and intellectual property is complementary in nature as they serve common goals. It has been established that most competition jurisdictions are moving towards this favourable approach to the application of competition law to intellectual property rights. This positive attitude has informed the harmonization of intellectual property

and competition law in legislative frameworks of the different jurisdictions such as the EU, UK, US, South Africa and even Kenya. It is against this backdrop that the first hypothesis has been negated.

With respect to the second hypothesis, the discussion under chapter three confirmed that the Kenyan legal, regulatory and institutional framework is insufficient insofar as the application of competition law to intellectual property rights is concerned. It has been established that the law has not provided comprehensively for the treatment of the relationship and the guidelines published by CAK are shallow. Further, it was noted that the regulatory framework governing competition law issues generally have not been fully operationalised as was cited in the case of the Competition Tribunal. It was also noted that the composition of both the CAK board as well as the Competition Tribunal does not specifically make provision for an intellectual property law expert to be appointed. The import of this is that decisions regarding the intervention by competition law in intellectual property rights may not be fully addressed hence unfair decision. In addition to this, it was established that the Competition Tribunal under the Competition Act 2010 has not commenced its sittings. This is due to lack of requisite rules to guide the operations of the Tribunal.

5.3 Recommendations

The research has identified a number of gaps in the literature as well as in the legal and regulatory framework under chapter three. In that respect, this section, therefore,

makes recommendations on how the gaps can be filled. The recommendations are as hereunder:-

5.3.1 Legislative amendments to the law governing the interface.

As previously highlighted in this research, the substantive law that governs the interface between completion law and intellectual property is the Competition Act. It was established under chapter three was that whereas the Act does not provide for express mechanisms and thresholds to guide users on when an intellectual property right becomes an intellectual property wrong thus necessitating the interference by competition law. In the light of this, this research makes the following proposals for amendments to the legal framework governing the interface between competition law and intellectual property law:-

5.3.1.1 Establishment of a special Competition /IP Tribunal

Under the current legislative dispensation, and has been highlighted in chapter three, competition law questions and disputes are first addressed to the CAK and in the event that a party is not satisfied with outcome therefrom, an appeal can be made to the Competition Tribunal and thereafter to the High Court. It was noted that the composition of this Tribunal does not specifically require the inclusion of an intellectual property law expert and the decisions of the Tribunal may be faulted for not addressing the intellectual property issues in competition law as comprehensively as should be addressed. In the circumstances, it is suggested that there be established

a special tribunal to deal with issues or disputes relating to interaction between competition law and intellectual property law.

The need for the special tribunal is advised by the fact that the current Kenyan economy has moved towards innovation and as such there can be anticipated increased issues touching on the protection of such innovations as which shall also bring in competition concerns. The composition of the tribunal ought to be made up of individuals possessing expertise in both competition law and intellectual property law. The mandate of the tribunal should be to handle matters relating to the two areas of law as well as help in shaping the law on the subject through proposals for policy reform.

The key areas that the proposed tribunal ought to cover as far as the is concerned are:

i. Abuse of dominant positions;
ii. Refusal to deal;
iii. Restrictive trade agreements;
iv. Tying agreements ;
v. Exclusive licenses;
vi. Mergers and acquisitions;
vii. interoperability agreements, particularly in the technological and telecommunication sector.

The tribunal may be set up to work within the current competition law spectrum.

5.3.3.2 Amendment to Section 28 of the Competition Act.

Section 28 of the Act provides for exemption of certain agreements or practice from the application of competition in relation to any agreement or practice relating to the 'exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights'. This particular provision does not provide comprehensively on the criteria for granting the exemptions. It is suggested that this section is expanded to provide for the criteria for an exemption so as to prevent abuse. Guidance on the amendments can be undertaken against the backdrop of the established jurisprudence in the EU,UK,USA and South Africa which can be instrumental in helping to shape the reforms.

5.3.3.3 Empowerment of the competition law and intellectual law institutions.

The research has noted that the current institutional framework governing the interface between competition law and intellectual law property lack requisite powers and compositions to handle diverse issues which relate to either sector. These bodies ought to be empowered through capacity building to understand the relationship and be able to separate the issues that are within and without its remit and know when to refer a matter to the above proposed special tribunal.

5.3.2 Publication of specific guidelines on the relationship between competition law and intellectual property law.

There is a need for specific guidelines to be published by the CAK to provide the manner in which the relationship can be managed. Currently, the guidelines are

included are loosely contained in the Competition Authority of Kenya Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the Competition Act. Formulation of specific guidelines will help in shaping the law and practice in the area and also to make easy to identify gaps in the law which require filling.

Kenya can use the guidelines that have been developed by the UK,EU, the USA in dealing with the interaction between competition law and intellectual property law as a foundation to develop the comprehensive guidelines in IPR use and licensing issues.

5.3.3 Implementation of the EACCA should be prioritised

The implementation of the EACCA should be prioritised so as to establish a regional competition regime similar to the EU which shall guide cross border competition and intellectual property concerns.

5.3.4. Suggestions for further research

This research has attempted to provide a baseline on the interface between competition law and intellectual property law. The efficiency of the institutional frameworks governing the the same was not fully exploited in this research. This is an area that might require further research as to establish the efficiency of the systems under the attendant legislative framework.

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