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COLLABORATIVE FRENEMIES: EXPLORING THE INTERPLAY BETWEEN INTELLECTUAL PROPERTY AND COMPETITION LAW IN GHANA

Francisca Kusi-Appiah[1] & Richard Dua-Ansah[2]

ABSTRACT

Intellectual property rights generally put right holders in a dominant position in the marketplace, and rightly so, as their rights grant them some time-limited monopolies. Competition policy, on the other hand, seeks to prevent the abuse of a dominant position by regulating competition to ensure a fair market. In view of the aforesaid, there appears to be a conflict between the two legal frameworks. There are, however, some attempts at responding to the concerns of competition policy in intellectual property laws. The paper recognizes the absence of a comprehensive competition regime in Ghana. Employing a doctrinal approach to data collection and analysis, the paper reviews the points of convergence and divergence between intellectual property laws and competition policy in Ghana. The paper briefly explores the successful and challenging resolution of IP and competition law conflicts in some African countries. The paper concludes that the attempts at addressing competition concerns by the use of intellectual property legal regimes are not enough. The paper calls for proactive steps to be taken toward the passage of a comprehensive competition legal regime to ensure a fairer market, thereby promoting free trade in Africa.

Keywords: Intellectual Property, Competition Policy, Interplay, Monopolies, Free Trade

[1] Senior Lecturer & Vice Dean, Law School - University of Professional Studies, Accra & Senior Managing Consultant - K-App Law, Accra, Ghana; LLB (KNUST, Ghana), Barrister-at-Law (Ghana School of Law), EENR LLM (UH, Houston –Texas) & PhD (UD – CEPMLP, UK). Email: kusi-appiah.francisca@upsamail.edu.gh.

[2] Lecturer & Course Coordinator - Law School - University of Professional Studies, Accra; Head of Legal Unit - Presbyterian Church of Ghana; Partner – Kyidom Chambers, Accra Ghana; BA Political Science (UG, Ghana) & LLB (UG, Ghana), Barrister-at-Law (Ghana School of Law), MIP (Africa University, Zimbabwe), PhD Candidate (UG, Ghana). Corresponding author: richard.dua-ansah@upsamail.edu.gh.

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INTRODUCTION

Intellectual property law is the legal regime for the protection of knowledge goods. It is the area of law that concerns legal rights associated with creative effort or commercial legal rights associated with creative effort or commercial reputation and goodwill.[3] Intellectual property protection allows a rights holder to exclude others from interfering with or using the property right in specified ways. In other words, intellectual property rights are the exclusive rights conferred upon the creator or the inventor of the property to use and enjoy his creation or invention exclusively. It also affords inventors and authors, in the case of copyright, protection from imitation and gives rights holders substantial discretion over how to use or license their intellectual property.[4] The World Intellectual Property Organization (WIPO) is the United Nations specialized agency responsible for the development and protection of intellectual property rights. It assists governments and organizations to develop the policies, structures and skills needed to harness the potential of intellectual property for economic development.[5] It coordinates international treaties regarding intellectual property rights. Its 184 member states comprise over 90% of the countries of the world, that participate in WIPO to negotiate on intellectual property matters such as patents, copyrights and trademarks.[6]

The role of intellectual property rights (IPRs) in shaping the future of developing economies and least-developed countries (LDCs) cannot be overstated. The Commonwealth Secretariat and the United Nations Conference on Trade and Development (UNCTAD) collaborate to harness intellectual property rights for innovation, development and economic transformation in least-developed

[3] Brainbridge D, Intellectual Property 2002
[4] J. Richard G and J. Weinschel A, 'Competition Policy for Intellectual Property: Balancing Competition and Reward' <http://elsa.berkeley.edu/users/gilbert/wp/Antitrust_and_IP.pdf> accessed 7 February 2024
[5] Esrat Jahan and Md. Rajib Hasbat Shaki, 'The Enforcement of Intellectual Property Rights in Bangladesh' (2018) 8 62-85
[6] Encyclopedia "The World Intellectual Property Organization (WIPO)" (2025) Worldmark Encyclopedia of Nations <http://www.encyclopedia.com/topic/World_Intellectual_Property_Organization.aspx> accessed on 5 December, 2024

countries.[7] In addition, the agreement between the UN and WIPO promotes creative intellectual activity and facilitates the transfer of technology related to industrial property to developing countries to accelerate economic, social and cultural development.[8]

Competition law, on the other hand, is the legal framework put in place to regulate competition in the market and to ensure a fair market. It is also referred to as antitrust law. The efficient functioning of market economies depends on an effective competition policy, which is becoming increasingly important in the current environment of deregulation and market globalization. Competition law regulates practices that would otherwise be harmful to competition. These practices include price fixing, market sharing, market restraint, mergers and abuse of dominant positions.[9] Competition law is in vogue within the market economy regulation space. It has emerged as a tool adopted by many jurisdictions to safeguard the competition process within the market.[10]

The purpose of competition law is to ensure a fair marketplace for consumers and producers by prohibiting unethical practices designed to garner greater market share than what could be realized through honest competition. Therefore, competition law preserves competition in the market and tries to prevent monopolization where possible to allow entry of competitors in the market.

Intellectual property rights and competition law are separate legal regimes with distinct objectives and purposes but "both competition law and intellectual property law share the same basic objective of promoting consumer welfare and

[7] UNCTAD, 'Intellectual Property: A Potential Game-Changer for Least Developed Countries' *United Nations Publications: Rights and Permissions.* (29 January 2024) <https://unctad.org/news/intellectual-property-potential-game-changer-least-developed-countries> accessed 20 February 2024

[8] Background Reading Material on Intellectual Property, WIPO publication no. 659E, ISBN 92-805-0184-4, pg. 37-38

[9] Any law, 'Comprehensive Guide To Competition' (Law Thought, 22 May 2023) <https://www.anylaw.com/media/2023/05/22/a-comprehensive-guide-to-competition-law/#:~:text=Competition%20law%20is%20a%20body%20of%20law%20that,other%20practices%20that%20restrict%20or%20limit%20marketplace%20competition.> accessed 14 February 2024

[10] Esther Koomson,"Developing without a Competition Legislation: An Analysis of Competition Law in Ghana and its Impact on Competition and Development" 2020: 1-3

an efficient allocation of resources".[11] Intellectual property laws promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. Similarly, competition law puts pressure on undertakings to innovate.[12] Therefore, intellectual property and competition laws are important to support innovation and guarantee competitive operation. On the one hand, intellectual property rights complement the competition policies by safeguarding the inventor's rights in the market from exploitation by other competitors; on the other hand, competition policies prevent any abuse of rights at the hands of the intellectual property owners.[13] Competition law and Intellectual property rights in a way balance each other in the sense that while intellectual property laws protect the innovation and creativity of inventors and creators thereby granting them some form of monopoly, competition law regulates the potential abuse of the monopoly by an intellectual property rights holder.

Although there is a common area where both intellectual property and competition law intersect with each other, their objectives sometimes conflict with each other.[14] The relationship between intellectual property and competition law has some significant focus. This is because the concept of intellectual property generally appears to conflict with competition law principles. The European Court of Justice in *NDC Health v IMS Health*[15] stated that 'competition law and intellectual property have never been easy bedfellows.'[16] While competition law seeks to achieve competition in the marketplace by moving away from monopolies,

[11] Maggiolino M and Zoboli L, '121The Intersection Between Intellectual Property and Antitrust Law' in Irene Calboli and Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021) <https://doi.org/10.1093/oso/9780198826743.003.0009> accessed 30 August 2024

[12] Commission Notice - Guidelines on the application of Article 81 EC to technology transfer agreements, (2004/C 101/02)

[13] Singh A, 'Patent and Competition Policies: What Is the Degree of Compatibility' <https://www.globalpatentfiling.com/blog/patents-and-competition-policies-what-degree-compatibility?utm_source=mondaq&utm_medium=syndication&utm_term=Intellectual-Property&utm_content=articleoriginal&utm_campaign=article> accessed 7 February 2024

[14] Kaur Supreet, 'Interface between Intellectual Property and Competition Law: Essential Facilities Doctrine' (West Bengal National University of Juridical Sciences 2011) <https://ssrn.com/abstract=1802450 o> accessed 14 February 2024

[15] NDC Health v. IMS Health [2004] All E.R. (E.C.) 813

[16] Eagles I, 'Copyright and Competition Collide. The Cambridge Law Journal, 64(3), 564–566. Http://Www.Jstor.Org/Stable/4500832' [2005] Cambridge University Press

intellectual property rights generally confer some monopoly rights to creators, which could lead to substantial market power, a situation that competition law generally seeks to avoid.

As innovation and trading take off in the Ghanaian market and, by extension the wider African market, it is expedient that the state of the law on competition and intellectual property are clearly set out to guide business activities and investments. Therefore, this research starts by reviewing the laws on competition and intellectual property in Ghana and how they intersect. The different types of intellectual property rights and their regulating legal regimes are examined in the light of competition law. References are specifically made to copyright and related rights, which, through the copyright law, protect literary, artistic, musical, and choreographic, among other works. For industrial property rights, a discussion of the protection for inventions through patent law, and distinctive marks through trademarks law, among others, are undertaken. As regards both intellectual property rights and competition law, and particularly for competition policy, a review of how sub-regional and regional policies and regulations relate to the national legal framework is undertaken.

The paper further discusses the interaction of IP and competition law in selected African countries, such as South Africa, Tanzania, Kenya, and Nigeria. The paper suggests that Ghana could learn from these countries by balancing international standards with local market dynamics, protecting communal knowledge, and building regulatory capacity for enforcement in the emerging digital market. This paper employs a qualitative content analysis and comparative study.

REGIONAL AND SUB-REGIONAL COMPETITION REGIMES

As earlier indicated, competition encourages innovation and the efficient use of available resources in the production of quality goods and services at favourable prices.[17] It creates a fair opportunity for the growth and development of new enterprises in the markets.

[17] Cornelius Dube, "Intellectual Property Rights and Competition Policy" (CUTS International, 2008)
<https://www.cuts-international.org/pdf/VP-IPRs-CompPolicy.pdf >accessed 7th February 2024

Ghana is a state party to the Economic Community of West African States (ECOWAS). At the sub-regional level the process of establishing a common market in West Africa heavily depends on competition law and, consequently, ECOWAS has made significant provision for competition in collaboration with the West African Monetary and Economic Union (UEMOA). [18] The ECOWAS Regional Competition Policy Framework consists of two supplementary regulations: the Supplementary Community Competition Rules and the Modalities of their application within ECOWAS, and the Establishment, Functions, and Operation of the Regional Competition Authority (RCA) for ECOWAS.

Article 3 of the ECOWAS Supplementary Act on Rules and Modalities provides that the purpose of the Supplementary Act is to promote, maintain and encourage competition and enhance economic efficiency in production, trade and commerce at the regional level and prohibit any anti-competitive business conduct that prevents, restricts or distorts competition at the regional level.[19] Article 1 of the RCA Supplementary Act[20] establishes a regional body known as the ECOWAS Competition Authority, which implements the ECOWAS Community Competition Rules.

The ECOWAS Competition Regulations serve as a building block for the African Continental Free Trade Area (AfCFTA) Competition Protocol, which requires all state parties to have competition laws.[21] This is well reflected in Article 12(3) of the AfCFTA Protocol on Competition, which provides that State parties without competition law and enforcement bodies shall enact competition laws and establish competition enforcement bodies upon entry into force of this Protocol or their accession to the Fact Agreement.[22] Out of 54 signatories, Ghana is one of the very first countries to have signed and ratified the AfCFTA, hence the need to enforce the provisions and Protocols of the AfCFTA.

[18] Union Economique et Monétaire Ouest Africaine, UEMOA, in French
[19] Supplementary ACT A/SA.1/06/08 Adopting Community Competition Rules And The Modalities Of Their Application Within ECOWAS
[20] Supplementary ACT A/SA.2/12/08 On The Establishment, Functions And Operation Of The Regional Competition Authority For ECOWAS
[21] Ebokpo R, 'Nigeria, Ecowas And The Road To The AfCFTA' (20 February 2020)
[22] Article 12(3) of the Protocol to the Agreement establishing the African Continental Free Trade Area on Competition Policy.

At the continental level, the African Continental Free Trade Area (AfCFTA) aims to create a single market for goods and services and boost intra-African trade. It is no surprise that the objective of the AfCFTA Competition Protocol is to provide for an integrated and unified African continental competition and to enhance competition with the AfCFTA for improved market efficiency, inclusive growth, and the structural transformation of the African economies.[23] The protocol further states that the State Parties shall endeavour to harmonize their competition laws to ensure consistency with the Protocol.[24]

Competition laws and regulations at the sub-regional and continental levels promote fair business practices through healthy rivalry to stimulate innovation for the benefit of consumers. Agreements and practices that restrict fair business practices are prohibited under competition regimes. Restrictive trade agreements are agreements between undertakings or concerted practice of undertakings whose object or effect is to prevent, lessen, or distort competition.[25] Examples of restrictive agreements include exclusivity (exclusive dealing and refusal to deal), formation of cartels (vertical or horizontal along supply chains), price fixing (resale price maintenance or excessive pricing), market sharing, tying and bundling (of copyrighted works), rebate and loyalty systems (especially for dominant distributors), and bid rigging and distorting public tenders.

COMPETITION LAW IN GHANA

The General Legal Framework

Currently, there is no comprehensive competition legislation or regime in Ghana. A draft Competition Bill titled "Competition Act, 2008" had been laid before Parliament but has not yet been passed into law. The principal objective of the Competition Bill is to maintain and encourage competition in markets, to promote and ensure fair and accessible competition, and to protect the welfare and interest of consumers. Under the Competition Bill, provision is made for the establishment of the Competition Commission of Ghana. The Commission's mandate would be to monitor trade activities to safeguard fair trade standards and prevent trade

[23] ibid Article 6
[24] ibid Article 12(5)
[25] Whish R and Bailey D, 'Competition Law', Oxford University Press (2012)

restrictions as per the preamble to the Bill. The Bill also proposes the establishment of a Competition Tribunal to resolve issues related to the decisions of the Competition Commission.

In the absence of a properly so-called competition regime, what comes close to an attempt at addressing the concern relating to anti-competitive practices in the marketplace is the passage of the Protection Against Unfair Competition Act, 2000 (Act 589). This law was passed in apparent response to Ghana's obligation under the Paris Convention for the Protection of Industrial Property of 1883 as revised (the Paris Convention) which requires member States to provide effective protection against unfair competition.[26] As can be gleaned from the provisions of Act 589, the scope of the protection afforded against anti-competitive practices is limited, as it only relates to unfair business practices such as causing confusion with respect to another's enterprise, damaging another's goodwill or reputation, misleading the public, and abuse or breaches relating to trade secrets. Act 589 is not intended to and does not address the core issues of anti-competitive practices that constitute or lead to an abuse of a dominant position in the market.

There are, however, pieces of legislation in specific sectors that seek to regulate competition in the given sector of the economy, most of which border on merger controls.

Sector Specific Competition Laws

In the banking sector, the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930) provides that the conclusion of certain transactions, mergers, and acquisition arrangements relating to a bank, a specialized deposit-taking institution, or a finance holding company requires the approval of the Bank of Ghana (BOG).[27] In considering the application for approval, the BOG is enjoined to consider, among others, the effect of the proposed transaction on competition.[28]

Pursuant to the Securities Industry Act, 2016 (Act 929), takeovers, mergers and acquisitions in the securities industry are to be reviewed, approved and regulated

[26] Article 10 of the Paris Convention
[27] Section 52 of the Act 930
[28] Section 54 of the Act 930

by the Securities and Exchanges Commission (SEC).[29] The SEC Regulations[30] also mandate the SEC to review the offer documents, but there is no clear requirement for the said review to address the potential for such arrangement to lead to anti-competitive practices. In the mining sector, Section 47 of the Minerals and Mining Act, 2006 (Act 703) requires prior approval of the Sector Minister for any merger of mineral rights. The responsibility for the review of merger applications also rests with the Director of Minerals Commission. Even though provision is made for the prior approval of a merger, neither the principal legislation nor the Regulations[31] impose an obligation to assess the impact of such applications for merger on competition. This is unlike the comparable legislative provision in the banking sector.

The telecommunication sector appears to be the most regulated sector as far as competition is concerned, and this is made possible through the Electronic Communications Act, 2008 (Act 775). Among others, engaging in anti-competitive pricing and other related practices in order to lessen competition is prohibited.[32]The energy sector also has a fair share of anti-competitive provisions in the National Petroleum Authority Act, 2005 (Act 691). The formation of cartels, and the gaining, holding or securing of a monopoly position by a person within that industry is not only prohibited but makes the mere holding of a monopoly illegal per se, and there are criminal sanctions for certain culpability.

Challenges Associated with the Status Quo

Implementation of a comprehensive competition law framework in Ghana may face several challenges, including the complexity of the legal framework, the need for capacity building for regulatory bodies, and the impact of globalisation on competition.[33] This is largely due to the absence of competition legislation or a

[29] Section 3(h) of Act 929
[30] SEC Regulations, 2003 (L.I. 1728)
[31] The Minerals and Mining (General) Regulations, 2012 (L. I. 2173) and the Minerals And Mining (Licensing) Regulations, 2012 (L.I. 2176)
[32] Section 6(1) of Act 775
[33] Kunko IK, 'Unfair Competition Law in Ghana: Unravelling the Scope, Evolving Jurisprudence, Challenges and Future Directions' (2024) 19 Journal of Intellectual Property Law & Practice 853; Aryeetey E, 'Chapter 15: The Institutional and Policy Framework for Regulation and Competition

centralized national policy direction. The first step is to put in place the comprehensive legal framework to enable such a system to be tested when implementation is rolled out. To overcome some of these challenges, it has been suggested that strategic approaches such as harmonization of competition legal frameworks, capacity building, and international cooperation can be adopted.[34] However, the successful implementation of competition law also depends on the broader economic and political context in Ghana, political will, and alignment of competition objectives with national economic goals.[35] Fostering a competitive local business environment through public procurement policies can indirectly support the effectiveness of competition law.[36]

INTELLECTUAL PROPERTY AND COMPETITION LAW

Although Ghana has yet to have a comprehensive competition law, it has intellectual property laws, which appear to have principles conflicting with the general competition law principles. This is because IP laws grant some level of monopoly. Some attempts are, however, made in the intellectual property laws to address anti-competitive practices, and this paper analyses the extent and adequacy of these attempts.

Intellectual property rights are broadly classified into two categories: copyright and related rights on one hand, and industrial property rights on the other hand. Copyright and related rights, through the Copyright Act, protect literary, artistic,

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in Ghana', *Leading Issues in Competition, Regulation and Development* (Edward Elgar Publishing 2004) <https://www.elgaronline.com/view/9781843764823.00025.xml> accessed 18 January 2025

[34] Waked DI, 'Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement Using Resource-Based Evidence' [2010] SSRN Electronic Journal <http://www.ssrn.com/abstract=1638874> accessed 18 January 2025

[35] Koomson E, 'Developing without a Competition Legislation: An Analysis of Competition Law in Ghana and Its Impact on Competition and Development' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3903953> accessed 18 January 2025; Fox EM and Bakhoum M, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (Oxford University Press 2019) <https://books.google.com.gh/books?id=-wJ6DwAAQBAJ>18 January 2025

[36] Khemani RS, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries* (World Bank 2007); Dutz M and Khemani RS, 'Competition Law & Policy'

musical, and choreographic works.[37] Related rights under Act 690, also referred to in the literature as neighbouring rights, are mainly the rights of the performer and those of the broadcasting organizations. The Copyright Office, headed by the Copyright Administrator and which falls under the Ministry of Justice and Attorney General, has the mandate to administer copyright and related rights in Ghana. It is noteworthy to add that even though there is a registration system for copyright works, registration of works is not mandatory in Ghana, neither is registration of works a prerequisite for the protection of such works. There is automatic protection of copyright work once it is created.[38]

Industrial property rights, on the other hand, are those rights to other intellectual creations outside of copyright. The key ones are inventions, which are protected through patent law, distinctive marks which are protected by the trademark's legal regime, industrial designs, and designations of origin, and plant varieties, among others. The Ghana Industrial Property Office (GHIPO),[39] also under the Ministry of Justice and Attorney General is the office mandated to administer industrial property rights in Ghana.

Roscoe Pound[40] observed that '*in a civilized society man must be able to assume that they may control what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order'*. This can be considered as the whole idea behind the existence of the regime for the protection and enforcement of intellectual property rights. The objective of intellectual property rights is generally to protect the creativity and innovation of authors and creators of intellectual assets from having their work copied or dealt with without the consent of such creators. In protecting such creations, however, care must be taken to respect the concerns of competition law and policy.

[37] Section 1(1) of the Copyright Act, 2005 (Act 690)
[38] This regime of automatic protection is pursuant to the provision in Article 2(2) of the Berne Convention for the Protection of Literary and Artistic Works which leaves the requirement or otherwise of a registration system as a means of protection to the discretion of member countries of the Berne Union
[39] This office was previously the Industrial Property Office/Section of the Registrar General's Department,
[40] Pound R, Outline of Jurisprudence, in Stone Julius (1870)-1964

What follows is a discussion of how specific intellectual property rights interact with competition policies and their implications for the market and free trade.

Copyright and Competition Law

Copyright and competition law are two distinctive yet intersecting legal domains that play a pivotal role in regulating market dynamics and protecting intellectual property rights.[41] In the current economic environment, the intersection of competition law and copyright law is critical. Each plays a crucial role in their respective fields: while competition law encourages fair competition and prevents market dominance, promoting an open and dynamic marketplace, copyright law on the other hand grants exclusivity for the original works of creators, encouraging creativity and innovation.

In Ghana, the Copyright Act, 2005 (Act 690) regulates copyright in the country. Section 1 of the Copyright Act lists certain works that are accorded copyright protection, and these include literary work, artistic work, musical work, sound recording, audio-visual work, choreographic work, derivative work, and computer software or programmes. A person who has an interest in an artistic work, literary work, music, sound recording, audiovisual work, choreographic work, computer software, a computer programme, or a derivative work, may apply to the Copyright Office for the registration of the person's interest in the work.[42]

The case of *Pearson Education Limited v Morgan Adzei*[43] is one of the notable cases that discuss the extent of application and protection under the Copyright Act. In that case, the respondent, who was the plaintiff in the trial court, was the author of a novel entitled: "Woes of the African Mother". The novel was selected by the West African Examination Council as one of the prescribed texts for prose in the English Language paper for the academic years 2004 to 2006 for the Basic Education Certificate Examination ("BECE"). A recommendation was therefore made that 450,000 copies of the respondent's novel at a unit cost of 20,000 cedis

[41] Bytescare, 'Copyright and Competition Law' (24 August 2023) <https://medium.com/@bytescare/copyright-and-competition-law-4a8d7bb8029> accessed 7 February 2024
[42] Copyright Regulation, 2010 L.I 1962, Regulation 1
[43] [2011] 2 SCGLR 864

be ordered. The respondent's grievance was that the appellant had published a work entitled "Gateway to English for Junior Secondary Schools Pupil's Book 3" which included, as Appendix 6, a summary of the respondent's novel. The respondent averred that by including a summary of his work as Appendix 6 in its publication, the appellant had in effect rendered the recommendation by the GES to purchase 450,000 copies of his novel nugatory and therefore caused him great loss and damage. The court had to resolve whether there was an infringement by the publishers. The Supreme Court of Ghana, interpreting the scope and extent of Section 2 of the Copyright Act, held that what was replicated in the summary was only the general idea of the novel, and was excluded from copyright protection. Thus, the court underscored the principle that copyright protection does not extend to ideas, concepts, procedures, methods or other things of similar nature.

The mere ownership of intellectual property rights cannot confer a dominant position. The exclusive right of reproduction is part of the author's right, so 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 as was held in the case of *RTE and ITP v Commission***,** commonly known as the *Magill case*.[44] A dominant company may abuse copyright by tying, refusing to license, foreclosing competitors, and using excessive royalties, restricting others from accessing or using their copyrighted work among other tactics, to gain some form of economic power in the market. Copyright holders may try to use their exclusive rights to limit competition or prevent others from using their copyrighted works in certain ways.[45] This can go a long way to hinder innovation and limit consumer choices. The Supreme Court case of *Pearson Education Limited v Morgan Adzei*[46] which reiterated that copyright protects expression of ideas and not ideas per se, offers a fair balance between copyright owner and other users of such protected works, enabling innovation and creativity without undue restriction.

Exercising an exclusive right by the proprietor may, in exceptional circumstances, amount to abusive conduct if the intention is to prevent the innovation of new products for consumers. To throw more light on this is the *Microsoft* case, where

[44] 7RTE and ITP v Cameroon (Magill) joined cases C-241/91 P and C242/91P[1995] ECR 1-743.
[45] Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 528- 29 (6th Cir. 2004).
[46] Pearson (n42)

it was discovered that the copyright holders of the companies were abusing their market position through a variety of means. The European Commission concluded in the Microsoft case [47] that the business was dominant and held computer programme copyright. The investigation began in response to a complaint made by a rival of Microsoft, against whom Microsoft had declined to give information on interoperability that would have allowed rivals to create rival workgroup server software that was Windows platform compatible. After the investigation, the European Commission (EC) fined Microsoft €497 million for abusing its dominant position in the market for multimedia players, work group server services, and PC operating systems.

Among the abuses included, firstly, refusal to supply its competitors with interoperability information for operating PC Windows with other systems and to use that information for the purpose of developing/distributing products competing with Microsoft's products. Secondly, the court found the tied sale of Windows Media Player software together with the Windows client PC operating system abusive, hence leaving no choice for consumers and foreclosing the multimedia player market to smaller competitors. The court ruled that the Copyright Act does not cover Microsoft's defence of the 'right of integrity'. The court completely dismissed the copyright argument and ruled that one must look at the actual intent of Microsoft's action. The court found that, in this case, removing Microsoft's Internet Explorer from the home screen and promoting another Internet browser (for example, the Netscape Navigator) in the boot screen would not compromise Microsoft's creative expression. The court stated, *"a copyright holder is not entitled to employ the perquisites in ways that directly threaten competition"*.

The Ghanaian case of *Ransome Kuti v Phonogram Ltd*[48] examines how an original copyright holder may try to restrict competition even after granting the exclusive right to another party. The plaintiff created and composed a musical work entitled ''Everything Scatter'' in Nigeria and by an agreement made between the plaintiff and Phonogram Ltd. (Nigeria) the plaintiff assigned to Phonogram Ltd. (Nigeria) and their successors-in-title and assigns the sole and exclusive right to produce and reproduce the musical works on records and tapes as a single album as well as

[47] Microsoft Corp. v. Commission (2007; T-201/04)
[48] Ransome-Kuti v. Phonogram Ltd. [1976] 1 GLR 220-223

recordings on cassette tapes and cartridges all over the continent of Africa for a period of three years. Phonogram Ltd. (Nigeria) in turn licensed its sister company, the defendants, to reproduce the said musical work in Ghana for them. The plaintiff alleged an infringement of the copyright in his musical work and sued, praying for an order to restrain the defendant from further publishing and selling the musical works.

The court held that, since the copyright in the musical work was vested not in the plaintiff but in the Nigerian company exclusively for the whole of the African continent for a period of three years, the said company had every right to license the defendant company under Section 10 of the then Act 85[49] to reproduce the tapes in this country which were part of the continent of Africa. The defendants had, therefore, not infringed the plaintiff's copyright, and the plaintiff had no cause of action against them. The court, thus, did not allow the use of copyright to restrict competition and, worse of all, in a situation where a licence had earlier been granted.

In Ghana, the Copyright Act of 2005 regulates copyright in various fields, including literary, artistic, musical, and computer software. Although a dominant company can abuse copyright by tying, refusing to license, foreclosing competitors, using excessive royalties, and restricting access to copyrighted work, the *Pearson Education Limited v Morgan Adzei* case provides a fair balance between copyright owner and users, enabling innovation without undue restriction. According to the Supreme Court of Ghana, copyright protection does not extend to ideas, concepts, procedures, or methods of similar nature. A discussion of the intersection between selected industrial property rights and competition law now follows.

Patents and Competition Law

The Patents Act, 2003 (Act 657) and the Patent Regulations, 1996 (L.I. 1616) constitute the legislative framework for the protection and enforcement of patents in Ghana. The Ghana Industrial Property Office of the Registrar General's Department is the issuing office of a patent in Ghana. The Act defines a patent as

[49] The Copyright Act in force at the material time, which was later repealed and replaced with the Copyright Act, 2005 (Act 690)

the title granted to protect an invention, and an invention is defined as an idea of an inventor, which permits in practice the solution to a specific problem in the field of technology.[50] An invention qualifies for a patent if it is new, involves an inventive step and is industrially applicable.[51] The patent holder is granted an exclusive right to control the use of an invention within the country for a period of twenty years from the filing date or where applicable the priority date.[52] To the extent that the patent regime grants some level of monopoly to the right holder, patent and competition law seem to conflict with each other.

The statutory provision on the duration of a patent means that inventors are granted a temporary monopoly on their inventions, allowing them exclusive rights for a specific duration of twenty years. The concern arises when the exclusivity may be seen or involved in an anti-competitive practice. It is instructive to note that Section 11 of the Patents Act provides that the exploitation of the patented invention in the country by a person other than the owner of the patent shall require the owner's consent. Hence, one cannot exploit or use a patent owner's patent if the owner has not given consent by way of a licence or otherwise. Granting such a licence is at the discretion of the patentee or the owner of the patent as the case may be.

In the Ghanaian case *Rhone-Poulence SA v Ghana National Trading Corporation,*[53] the plaintiffs sought an interim injunction order against the defendant to prevent them from violating the patent rights of the plaintiffs in Ghana, specifically related to the drug metronidazole. The two plaintiffs were limited liability companies, with the first plaintiff being the owner of United Kingdom Patent No. 836854, covering the invention "New imidazole derivations and processes for their preparation." The patent was later registered in Ghana as Patent No. 522. The second plaintiff was a manufacturer that dealt mostly with pharmaceutical and medical preparations and was the sole and exclusive licensee of the first plaintiff in respect of the United Kingdom patent and all other patents sealed in other countries, including Ghana Patent No. 522. The drug in question,

[50] Section 1(1) and (2) of Act 657
[51] Section 3(1) of Act 657
[52] Section 12(1) of Act 657
[53] Rhone-Poulence SA v. Ghana National Trading Corporation (1972) 2 GLR 109

metronidazole, was manufactured and sold by the second plaintiff under the trade name Flagyl, and the plaintiffs claimed that the defendant was infringing on their patent rights related to this drug.

The court held that the defendant, in carrying out its objects, is required to respect the patent rights of others and to conform to the laws of the land, as well as to the generally accepted trade practices as required of any trading firm or organization. The court further held that the second plaintiff was the exclusive licensee, wholly owned subsidiary of the first plaintiff in Ghana, and therefore had every right to take proceedings in respect of infringements committed after the grant of its licence and the patentee can also join the suit as plaintiff.

Aside from pursuing civil remedies for infringement, the Act further provides criminal sanctions for certain scales of infringement. Section 37 of Act 657 provides that a person who knowingly performs any acts referred to in section 11(2) in the country without the consent of the owner commits an offence and is liable to a fine not exceeding two thousand penalty units or to imprisonment for a term not exceeding two years.

To avoid exclusivity and abuse of the dominant position of a patent holder under competition law, the patent holder must grant licenses or permits for the use of the patent under fair, reasonable and non-discriminatory (FRAND) terms. Refusal to license and refusal to supply are two key points of contention when negotiating the complex relationship between intellectual property and competition law, especially concerning patents. This raises the possibility of abuse of the dominant position. In the *Parke, Davis v Probel Case*,[54] it was decided that to establish an abuse of dominance with intellectual property, the following three must exist: a dominant position, abuse of dominant position, and the possibility of distorting trade between member states. Patent ownership does not automatically present the three conditions unless the use of the patent degenerates into abuse.

To avoid abuse of monopoly by a patent holder under Ghana law, a provision is made for the issuance of a non-voluntary licence by the court upon request if the court is satisfied that the patented invention is not exploited or is insufficiently exploited. This request can be made after the expiration of either a four-year period

[54] Parke, Davis, v Probel Case C-24/67[1968] ECR 55

from the date of filing the patent application or a three-year period from the date of patent grant, whichever period expires last.[55] The grant of a non-voluntary licence, however, is not automatic, as the patent owner provides reasons relating to the circumstances that exist, which justify the non-exploitation or insufficient exploitation of the patented invention in the country.[56] The provision for the grant of a non-voluntary licence, otherwise referred to as a compulsory licence, is an attempt by the patent legal regime to reduce the possibility of an abuse of a dominant position by a patent holder. To the extent that reason can be given for the refusal of an application for the grant of a non-voluntary licence, we hold the position that this is an insufficient mode of curtailing a possible abuse of monopoly.

Pursuant to the Patents Act of 2003 and the Patent Regulations 1996, which are the legislative framework for protecting and enforcing patents in Ghana, new, inventive, and industrially applicable inventions qualify for the grant of a patent. The patent holder has exclusive control over the invention for twenty years. The court in Rhone-Poulence SA v Ghana National Trading Corporation emphasized the need to respect the patent rights of others. To avoid exclusivity and abuse of the dominant position of a patent holder under competition law, the patent holder must grant licenses or permits for the use of the patent under fair, reasonable, and non-discriminatory (FRAND) terms.

Trademarks and Competition Law

The most common intellectual property rights concern for champions of competition law and policy relates to trademarks. It is not unusual for trademark owners to seek to impose contractual restrictions that prevent others from exploiting their products. As would be demonstrated soon, a trademark is one of the intellectual property rights which can be potentially held in perpetuity. As a result, the proprietor of a trademark, if not properly controlled, could wield a dominant position in the marketplace to the extent that it could lead to abuse.

The Trademarks Act, 2004 (Act 664) as amended by the Trademarks (Amendment) Act, 2014 (Act 876) hereinafter referred to as the Act or the

[55] Section 14(1) of Act 657
[56] Section 14(2)

Trademarks Act unless otherwise specifically referenced, regulates trademarks. Section 1 of the Trademarks Act defines a trademark as any sign or combination of signs capable of distinguishing the goods or services of one undertaking from the goods or services of other undertakings. A trademark may consist of words, personal names, designs, letters, colours, numerals, shapes, holograms, sounds or a combination of these elements.

The Protection Against Unfair Competition Act, 2000 (Act 589) also provides an all-inclusive and embracing definition for a trademark, according to which a trademark includes marks relating to goods, marks relating to services and marks relating to both goods and services.[57] This broad definition reflects the inclusive nature of trademark protection, covering tangible products, services, and combinations of both. In *Robert Ashie Kotei Ventures v Sadat Car Accessories Enterprise and the Registrar of Trademarks*,[58] the plaintiff's case was that it was the proprietor of the registered trademark "CARRYBOY". Prior to the registration of the mark, it had been the authorized sole dealer of fibreglass canopies and had established goodwill of the goods in Ghana. It was averred that the defendant had infringed the trademark by importing and selling goods identical to those for which the trademark was registered. Mr. Robert Ashie Kotei, the managing director of the Plaintiff Company testified for the plaintiff. His evidence was that the plaintiff had been importing various "CARRYBOY" products since 1998 and was given exclusive distributorship in January 2000 by the manufacturer, TRKB Ltd.

The Defendants contended that the plaintiff did not have title to the said trademark and that at the time the plaintiff purportedly registered the trademark, it had already been validly registered by the manufacturers of the said product. The onus was on the defendant to prove its assertions and it failed to do so. The plaintiff on the other hand proved that the defendant was engaged in the importation of "CARRYBOY" fibreglass canopies from unauthorized sources thus infringing its rights. The court entered judgment for the plaintiff. The ownership of a trademark confers upon the property holder the right to use a particular mark or symbol and the right to exclude others from using the same or similar mark or symbol. This may be contrary to competition law without more, to the extent that competition law frowns upon

[57] Protection Against Unfair Competition Act, 2000 (Act 589), section 10
[58] Unreported High Court Judgment in Suit No. IPR/8/07

monopolies. But the right holder has spent time and other resources in creating the trademark and hence, is entitled to the accompanying rights.

As intimated earlier, a trademark is by far the only intellectual property right, which can potentially be held in perpetuity. This is because the Act does not only provide the duration of a trademark to be ten years from the filing date of the application for the registration, but it goes on to provide that the registration of a trademark may be renewed for a consecutive period of ten years upon the payment of the prescribed renewal fees.[59] The effect of these provisions is that so long as the trademark proprietor or the successors in title continue to renew the registration, the mark and rights attached thereto can be held ad infinitum.

The proprietor of a trademark is granted exclusive right to the use of the registered mark. Thus, a person other than a registered owner of a trade mark shall not use the mark in relation to any goods or services for which the trade mark was registered without the agreement of the owner.[60] This Act confers upon the registered owner to take legal recourse against individuals involved in unauthorized use of the registered mark or activities that could potentially lead to infringement. Act 664 provides that the registered owner may institute court action against any person who infringes a registered trademark by; using a registered mark without permission or performing acts, which make it likely that infringement may occur.[61] This section serves as a key provision safeguarding the exclusive rights conferred upon trademark registration, offering a legal foundation for protection against infringement.

The Trademarks Act, 2004 and the Protection Against Unfair Competition Act, 2000 regulate trademarks, covering goods and services. The Act grants exclusive rights to use the registered mark and allows the owner to take legal recourse against unauthorized use or activities that could lead to infringement. Trademarks are crucial for competition law and policy as they can be held in perpetuity because of the ability to renew every ten years. This may lead to abuse if not controlled.

[59] Section 11 of Act 664
[60] Section 9(1) of Act 664
[61] Section 9(2) of Act 664

Industrial Designs and Competition Law

Design rights protect the aesthetic appearance of a product. In Ghana, design rights are protected by the Industrial Designs Act, 2003 (Act 660). The Act defines an industrial design as a composition of lines or colours, any three-dimensional form or any material, whether or not associated with lines or colours. A textile design is also considered an industrial design where the composition, form or material gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft.[62]

The right to register an industrial design lies with the creator of the design. Section 3 of Act 660 states that where a person creates an industrial design, the right to the registration of that industrial design belongs to the creator. This provision gives the sole right of registration to the creator, and the registration of the design shall be for a period of five years from the filing date of the application for registration.[63]

Section 9 of Act 660 also provides that the exploitation of a registered industrial design by persons other than the registered owner shall require the consent of the owner. Therefore, persons cannot use or exploit one's design without obtaining consent from the owner. The section makes it clear that unauthorized use of a registered industrial design is not permissible under the law. It establishes that the owner of a registered industrial design has the exclusive right to control its exploitation, and others must seek the owner's consent before using or exploiting the design in any way. Section 14 of Act 660 establishes the procedures and requirements for submitting license contracts related to registered industrial designs or applications to the Registrar. While maintaining confidentiality, it emphasizes the importance of recording these contracts, with a subsequent publication of references to provide transparency and regulatory oversight within the realm of industrial design licensing.

On the refusal to supply as a concern for competition policy, the European Court of Justice (ECJ) case of *Volvo v Veng*[64] is instructive. In this case, Volvo refused to license its design to spare parts manufacturers. The ECJ held that "the right of

[62]Act 660, section 1
[63] ibid, section 10(1)
[64]Volvo v Veng [1988] C-223/87 ECR 6211, [1989] 4 CMLR 122

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 subject matter of his exclusive right." It follows that a proprietor cannot be obliged to grant third parties licenses over his works even in return for a reasonable royalty. Refusal to deal with another under these circumstances cannot constitute an abuse of a dominant position. Refusal is not prohibited unless it is an exercise exceeding the subject matter. The court held that if the proprietor had refused to supply the spare part that the consumers needed, this would amount to an abuse of dominance.

Like any of the other intellectual property rights, the various transactions and licences that may be granted are susceptible to abuse of that dominant position which has been made possible by virtue of the exclusive rights granted to the right holder. The Industrial Designs Act of 2003 in Ghana safeguards design rights, allowing creators to register unique products or handicrafts. Unauthorized use requires owner consent. Section 14 outlines license contract submission procedures, emphasizing transparency and regulatory oversight. However, exclusive rights can lead to abuse.

EXPLORING CASES IN GHANA WHERE COMPETITION REGIME COULD HAVE MADE A DIFFERENCE

The lack of a comprehensive competition legal and policy regime can potentially lead to unfair competition in the marketplace. The following is a discussion of two cases in which the Ghanaian court could have applied competition laws in resolving them if Ghana had competition laws at the time.

The first case is *Robert Ashie Kotei Ventures v Sadat Car Accessories Enterprise and The Registrar Of Trademark.*[65] In this case, it was seen that the plaintiff had been the authorized sole dealer of fiber glass canopies. This is construed as a monopoly of the trademark under competition law even though the trademark is a lawful right. The plaintiff claimed infringement of his trademark and had the right to restrict others from using the trademark. Although monopolies are not prohibited in Ghana, often the monopolies may result in a dominant position,

[65] Unreported High Court Judgment (n 58)

which would require the watchful eyes of the competition regulators to prevent any abuses. If Ghana had a competition regime, the Competition Commission or the appropriate administrative body could have intervened despite the existence of a trademark. In the absence of a competition regime, the vehicle to investigate and draw conclusions as to the existence or otherwise of an anti-competitive practice is not taken advantage of.

The second case is *Implex Projects Limited v Oware Wiafe and Gabriel Boakye.*[66] The case of the plaintiff was that it was a company registered in the UK, and was the registered proprietor of the trademark(s) BG and/or NEXUS, which was originally owned by Implex (Export Services) Ltd but was subsequently transferred to it. The plaintiff averred that Ghana is its assigned territory and that it dealt in Ghana through Serboat Electricals Ltd and Sardave Electricals Ltd and had succeeded in establishing goodwill and fame for its products. It was averred that the defendants who dealt with electrical accessories had imported into Ghana from an unknown destination and were selling fake electrical goods, namely sockets identical and/or bearing the plaintiff's registered trademark BG and/or NEXUS. The plaintiff alleged that this had caused a drastic fall in its sales thereby occasioning a substantial loss of the plaintiff's earnings. The defendants denied that the plaintiff is the registered proprietor of the trademark or has an exclusive right to import the products into Ghana. The court found that indeed the plaintiff was the registered proprietor of the trademark and entered judgment in favour of the plaintiff.

The existence of a comprehensive competition law in Ghana would have raised a legal issue on market sharing as indicated by the facts as averred by the plaintiff. In addition, an examination of the plaintiff's exclusive right to determine if it amounted to an abuse of a dominant position would have been explored. The absence of a comprehensive competition law and policy denies the courts an opportunity to explore the existence or otherwise of an abuse of a dominant position. Once a finding of fact is made as to the validity of an intellectual property right, infringement is determined without an analysis of possible abuse of the said

[66] Unreported High Court Judgment in Suit No. OCC/31/08

right. The court is a court of law and, understandably, it limits the exercise of its judicial activity within the confines of the law.

In Ghana, two cases, *Robert Ashie Kotei Ventures v Sadat Car Accessories Enterprise* and the *Registrar of Trademarks and Implex Projects Limited v Oware Wiafe and Gabriel Boakye*, demonstrate the potential of a comprehensive regime to address anti-competitive practices. The absence of a comprehensive competition law and policy limits the courts' ability to explore the existence or abuse of a dominant position, limiting their judicial activity within the law.

INTERACTION OF IP AND COMPETITION LAWS IN SELECTED AFRICAN COUNTRIES

In the absence of a comprehensive competition law in Ghana to aid the assessment of the interaction between IP and competition law, this section briefly explores the interface between IP and competition law in selected African Countries. The reconciliation of intellectual property (IP) and competition law in African countries requires a balance between these two legal domains. The African Continental Free Trade Area (AfCFTA) negotiations have highlighted the importance of balancing IP rights with competition policies to promote fair competition and safeguard consumer interests.[67] African countries have engaged in international networks to harmonize competition laws, which helps address cross-border anti-competitive practices and fosters a collaborative approach to enforcement.[68]

IP and Competition in South Africa

The South African Competition Act 89 of 1998 promotes competition to enhance efficiency and facilitate economic development. The South African Competition Commission enforces the Act, which applies to all economic activities, including intellectual property rights (IPRs). The Act has established a robust competition

[67] Gachuiri E, *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?* (UN 2020)
[68] Buthe T and Kigwiru VK, 'The Spread of Competition Law and Policy in Africa: A Research Agenda' [2020] African Journal of International Economic Law

regime, facilitating the prosecution of cartels and abuse of dominance, contributing to a more competitive market environment.[69]

South Africa has successfully developed strong competition institutions to implement a robust competition law framework that addresses market barriers and promotes fair competition, particularly in key sectors like telecommunications and finance. [70] However, the interaction of IP and competition laws still faces challenges, particularly in aligning with international standards and addressing local market dynamics,[71] especially through cases such as the Microsoft cases.[72] The pharmaceutical industry in South Africa is the most affected, with GlaxoSmithKline South Africa and Boehringer Ingelheim found to have contravened the Act by abusing their dominance in antiretroviral medicine production. To sustain and build on current successes, South Africa must address the influence of international competition policies and the need for resource enhancement in local institutions.

IP and Competition in Tanzania

Similarly, Tanzania has made progress in reconciling intellectual property (IP) and competition law conflicts, with the Fair Competition Act of 2003(Act 8 of 2003). The Fair Competition Commission (FCC) and Fair Competition Tribunal, as established by the Fair Competition Act, resolve all competition and IP-related issues. The Tanzanian IP legal framework, rooted in Western capitalist principles, often conflicts with communal ownership traditions, particularly concerning indigenous knowledge.[73] However, the Commercial Division of the High Court

[69] Mncube L and Ratshisusu H, 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' (2022) 11 Journal of Antitrust Enforcement 74
[70] Howell BE and Potgieter PH, 'Effective Competition and Ineffective Mobile Industry Regulation in South Africa' (2022) 46 Telecommunications Policy 102317
[71] Makhaya G, Mkwananzi W and Roberts S, 'How Should Young Institutions Approach Competition Enforcement? Reflections on South Africa's Experience' (2012) 19 South African Journal of International Affairs 43; Wise R, 'Dopamine, Learning and Motivation' (2004) 5 Nature reviews. Neuroscience 483
[72] Hlatshwayo, N., 'The Challenges of IP Protection and Competition Enforcement: An Analysis of the Microsoft Decisions (US and EU) and their Implications for South African IP and Competition Law', 2008(2) *Journal of Information, Law & Technology (JILT)*, <http://go.warwick.ac.uk/jilt/2008_2/hlatshwayo> accessed 18 January 2025
[73] Kihwelo PP, 'Indigenous Knowledge: What Is It? How and Why Do We Protect It?: *The Case of Tanzania*' (2005) 8 The Journal of World Intellectual Property 345

of Tanzania has played a role in interpreting IP matters and aligning with global frameworks like TRIPS, which has aided in the resolution of conflicts between IP and competition laws.[74] The implementation of competition law has significantly increased access to telecommunications, demonstrating the positive impact of a competitive regulatory environment.[75] The FCC's dual role in investigation and adjudication has raised questions about fairness and impartiality in competition disputes including the adequacy of remedies for aggrieved parties.[76] The current IP laws do not adequately protect communal knowledge, highlighting a gap in the legal framework that needs addressing to ensure equitable benefit sharing.[77] A more inclusive IP framework that respects communal ownership and the separation of powers within competition law enforcement bodies are critical areas for improvement in Tanzania.

IP and Competition in Kenya

In Kenya, the Competition Act No. 12 of 2010 has modernized Kenya's competition policy, addressing issues like market dominance and anti-competitive practices.[78] The Communication Authority of Kenya (CAK) has played a crucial role in regulating the telecommunications sector where market dominance persists.[79] Often, resource limitations and overlapping jurisdictions affect the effective regulation of market dominance, particularly in the telecommunications sector and therefore, clearer delineation of roles and mandates is needed to address

[74] Faustin Kihwelo Paul, 'Intellectual Property Rights Jurisprudence in Tanzania: Turning an Eye to the Commercial Division of the High Court' (2006) 9 Blackwell Publishing Ltd 673
[75] Temu G, 'The Role of Competition Law in Promoting Access to Telecommunication Services in Tanzania: Taking Stock of the Developments so Far' in Siti Fazilah Abdul Shukor and others (eds), Advances in Public Policy and Administration (IGI Global 2023) <https://services.igi-global.com/resolvedoi/resolve.aspx?doi=10.4018/979-8-3693-0390-0.ch002> accessed 28 January 2025
[76] Mallya E, 'Powers of the Fair Competition Commission in the Current Inquisitorial Approach of Handling Competition Complaints in Tanzania: A Lesson From South Africa' [2023] SSRN Electronic Journal <https://www.ssrn.com/abstract=4351580> accessed 27 January 2025
[77] Kihwelo (n 72)
[78] Mudida R and Ross T, 'Kenyan Competition Policy After Ten Years of the Competition Act: A Progress Report' (2022) 60 Review of Industrial Organization
[79] Mwakatumbula HJ, Moshi GC and Mitomo H, 'Consumer Protection in the Telecommunication Sector: A Comparative Institutional Analysis of Five African Countries' (2019) 43 Telecommunications Policy 101808

these issues.[80] The Copyright Act of 2001 balances rights holders' interests with users', limiting non-commercial arrangements and patent rights through unfair competition doctrine, which prohibits fraudulent, deceptive or dishonest trade practices related to competitor's trademark, under the Industrial Property Act, Chapter 509. [81] Addressing these challenges requires policy revisions and enhanced cooperation between regulatory bodies to ensure a more cohesive approach to competition and IP law. Although Kenya and Tanzania have integrated competition law to foster innovation in mobile money services,[82] challenges such as diverse development levels, corruption, and digital market dynamics persist.[83]

IP and Competition in Nigeria

The fairly new Nigerian Federal Competition and Consumer Protection Act of 2019 aims to protect consumers and promote fair competition by curbing anti-competitive practices and protecting consumer rights. [84] Nigeria's creative industries, including textiles, fashion, music, and film, are thriving in a competitive market, demonstrating the potential of IP and competition laws to work synergistically.[85] However, integration of IP and competition laws remains fraught with challenges, including outdated IP statutes and enforcement issues.[86] Nigeria's traditional knowledge protection efforts under a sui generis regime highlight the tension between intellectual property (IP) regimes and cultural preservation,

[80] ibid
[81] Jerobon RC, 'The Interface Between Competition Law And Intellectual Property Law In Kenya' (University Of Nairobi 2016) <https://erepository.uonbi.ac.ke/bitstream/handle/11295/99140/Jerobon%20_The%20Interface%20Between%20Competition%20Law%20And%20Intellectual%20Property%20Law%20In%20Kenya.pdf?sequence=1>
[82] Rafe Mazer and Philip Rowan, 'Competition in Mobile Financial Services: Lessons from Kenya and Tanzania' [2016] The African Journal of Information and Communication (AJIC) <https://ajic.wits.ac.za/article/view/13626> accessed 27 January 2025
[83] Tiwari SP, 'Organizational Competitiveness and Digital Governance Challenges' [2022] SSRN Electronic Journal <https://www.ssrn.com/abstract=4068523> accessed 27 January 2025
[84] Enyinnaya Uwadi, 'Prospects and Challenges of Implementing Competition Law in Developing Countries: A Review of the Nigerian Federal Competition and Consumer Protection Act, 2019'
[85] Bankole Sodipo, *Intellectual Property Reform in Nigeria* (1st edn, 2022)
[86] ibid

requiring tailored legal frameworks.[87] Nigeria's legislative gaps and weak institutional capacity also pose significant challenges to effective enforcement.[88] While Nigeria has made strides in aligning IP and competition laws, the journey is ongoing, necessitating reform in IP statutes and improved enforcement mechanisms. Learning from other jurisdictions, such as South Africa and Tanzania, could provide valuable insights into Nigeria's legal evolution.[89]

The Federal Competition and Consumer Protection Act of 2019 in Nigeria presents challenges in implementing competition law in developing countries, including regulatory capacity and judicial efficiency.[90] Alternative perspectives suggest that tailored solutions considering each country's unique socio-economic context may be more effective. Successes in reconciliation included the inclusion of IP and competition policy in the AfCFTA Phase II negotiations and international cooperation. Continuous fostering of regional cooperation and harmonizing laws could enhance the effectiveness of IP and competition law frameworks across Africa.

TECHNOLOGICAL TRENDS AND THE RELATIONSHIP BETWEEN IP AND COMPETITION LAWS

The discussion on the interaction between IP and competition cannot end without examining how the impact of technology is affecting that relationship. Emerging technologies, such as Artificial Intelligence (AI), big data, blockchain, and the Internet of Things (IoT) are significantly altering the relationship between intellectual property (IP) and competition laws.[91] AI ownership concerns include

[87] Ibidapo-Obe O, *Competition Law and Socio-Economic Advancement: Nigeria as a Case Study : Giving a Hungry Man a Silk Tie?* (Middlesex University 2022) <https://books.google.com.gh/books?id=d3y0zwEACAAJ> accessed 28 January 2025
[88] ibid
[89] Uwadi E, 'Prospects and Challenges of Implementing Competition Law in Developing Countries: A Review of the Nigerian Federal Competition and Consumer Protection Act, 2019' [2019] SSRN Electronic Journal <https://www.ssrn.com/abstract=3863955> accessed 28 January 2025
[90] ibid
[91] Weber RH, 'Disruptive Technologies and Competition Law' in Klaus Mathis and Avishalom Tor (eds), *New Developments in Competition Law and Economics*, vol 7 (Springer International Publishing 2019) <https://link.springer.com/10.1007/978-3-030-11611-8_11> accessed 28 January 2025

potential monopolies and stifling innovation due to data amassing. Big data and analytics raise questions about ownership and licensing, while blockchain can facilitate decentralized licensing and ownership models. IoT devices require interoperability and data privacy concerns intersect with IP and competition law. Strategies for addressing these emerging technologies have included modernizing IP frameworks, establishing AI-generated guidelines, developing data ownership and licensing frameworks, and exploring blockchain-based IP, as these technologies transform industries and legal landscapes.[92]

However, the rapid pace of technological advancement often outstrips regulatory capacities, leading to potential conflicts between economic objectives and ethical considerations. Consequently, the traditional legal structures struggle with technological advancements, causing uncertainties, especially with the rise in IP-related competition cases.[93] To effectively protect emerging technologies, guidelines involving strengthening competition enforcement, promoting interoperability, and addressing algorithmic bias are crucial.[94] Implementing the "Essential Facilities Doctrine" can prevent the misuse of IP rights and ensure fair competition.[95] International cooperation on IP and competition policy is also advantageous along with regular monitoring and multi-stakeholder engagement to promote a dynamic regulatory environment. Therefore, amending international agreements like TRIPS can enhance the integration of IP, competition, and human rights laws, warranting access to essential technologies[96] and balancing innovation with responsible practices, fostering consumer trust, and boosting market reputation.[97]

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[92] Ibrahim IA and Zoppolato DG, 'Emerging Technologies and the Law: From "Catch Me If You Can" to "Law by Design"' (2024) 13 Global Journal of Comparative Law 148
[93] ibid
[94] Akpobome O, 'The Impact of Emerging Technologies on Legal Frameworks: A Model for Adaptive Regulation' (2024) 5 International Journal of Research Publication and Reviews 5046
[95] Shashank Jain and Sunita Tripathy, 'Intellectual Property and Competition Laws: Jural Corelatives' (2007) 12 224
[96] Brown A, 'Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology' [2012] Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology
[97] Kennedy Darvishi, Lee Liu, and Sumner Lim, 'Navigating the Nexus: Legal and Economic Implications of Emerging Technologies' (2022) 16 Institute for Law and Economics Studies 172

CONCLUSION

We have demonstrated in this paper that even though there are pockets of provisions scattered in a few legislations, including intellectual property laws, which appear to deal with anti-competitive practices, they do not come close to dealing with the main concerns of competition regime.

Exclusivity under competition law refers to a situation where a company, often a dominant player in a market, engages in practices that restrict or eliminate competition by granting exclusive rights to certain entities or individuals. Such practices can have significant implications for market dynamics, consumer choice, and overall economic welfare. Competition laws are designed to prevent anticompetitive behavior and maintain a level playing field in the marketplace.

Intellectual property rights (IPR) including copyright, patents, trademarks and industrial designs, can give rise to competition law issues. The majority of the time, IPR holders with significant market power if not outright dominance must exercise extra caution when it comes to the implications of their actions for competition law, as an undertaking enjoying a dominant position is especially obligated to refrain from actions that could stifle competition. Even though there are some attempts to prevent unfair competition within the laws governing the exercise of intellectual property rights, the likelihood of abusing a dominant position with one's IPR is high in the absence of a comprehensive competition law and policy.

Since Ghana does not currently have a working competition law, the specific clashes between intellectual property and competition law may not be capable of being explicitly addressed in the legal framework. However, Ghana can learn from South Africa, Tanzania, Kenya and Nigeria to reconcile the interaction between IP and competition law by balancing compliance with international standards and local market dynamics, protecting communal knowledge, and building regulatory capacity to address enforcement in the emerging digital market.

The enactment of a competition legislation in Ghana will provide a legal framework to address competition-related issues more comprehensively and promote fair competition in the market. Ghana, being one of the very first countries to have signed and ratified the Agreement establishing the African Continental Free Trade Area (AfCFTA), should be at the forefront of concluding a legislative

framework for competition law and policy. This would be a way of showing commitment to the cause of the AfCFTA, whose secretariat is hosted by Ghana.

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