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Intellectual Property Rights and Competition in Standard Setting

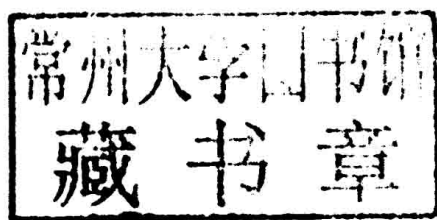
Objectives and Tensions

Valerio Torti

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Intellectual Property Rights and Competition in Standard Setting

Competition and intellectual property rights (IPRs) are both necessary for a market to work efficiently and to promote consumer welfare. Properly applied, intellectual property rules define a legal framework which allows undertakings to profit from their inventions. This in turn encourages competition among firms and enhances dynamic efficiency, to the benefit of consumer welfare. Standard setting represents one of the fields where the interaction between competition law and IPRs clearly comes to light. The collaborative goal of standard setting organizations (SSOs) is to adopt and promote standards that either do not conflict with anyone's right or, if they do, are developed under condition that patents are licensed under defined terms.

This book examines the tension between IPRs and competition in the standard-setting field which can arise when innovators over-exploit the rights they have been granted. The book compares EU and US jurisdictions with a particular focus on the IT and telecommunication industries. It scrutinizes those practices which could harm standard setting and its goals, looking at misleading conducts by SSO members which may breach the EU and US antitrust provisions on abuse of market power. Recent developments in EU and US standard setting are analyzed, highlighting the differences in enforcement approaches. The book considers how the optimal balance between IPR and industry standards can be struck, suggesting a policy model which takes into account both innovators' interests and SSO goals.

Valerio Torti is a Post-Doctoral Research Fellow at the Centre for Law and Business of the National University of Singapore.

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Forewords

It is with great pleasure that I write a foreword for *IPRs and Competition in Standard Setting: Objectives and Tensions* by Valerio Torti.

The book is published at a time when the perceived tension between the protection of intellectual property rights and competition law could not be more problematic, especially in the area of standard setting. On the other hand, there is now a reasonable amount of case law and enforcement practice in this area and a vast literature on the subject. Thus, this book can draw on experience and existing scholarship and gives a comprehensive and rigorous account of the problems. By way of example, the reader will find valuable accounts of the *Samsung* and *Motorola* cases in the EU and of the *Qualcomm* and *Rambus* litigation in the US. The different approaches to FRAND that have been adopted in practice or proposed by scholars are also thoroughly discussed.

The value of this book is that it goes much further than providing a thoughtful review of the existing knowledge. It does so, I think, in two ways. Firstly, the author understands the importance that the objectives of competition law and intellectual property law play in shaping rules and practical solutions. But the author also demonstrates, convincingly in my view, that the objectives of competition law and intellectual property protection are by no means necessarily in conflict. It is indeed not only desirable, but quite possible, to design rules that promote competition while remaining faithful to the need to protect investments that is the foundation of the recognition of intellectual property rights. Secondly, on the strength of this analysis, the author puts forward his own solution to the problem: *ex ante* disclosure of maximum royalties and other key licensing terms to be incorporated in the policy of standard setting organisations. As any solution that purports to be of general application, it is bound to be controversial. But the author is right that it does solve, if not all, many of the problems associated with *ex post* enforcement models such as an imaginative use of competition law that may have the undesirable effect of discouraging participation in standard setting organisations. In the author's model, competition law still has a role to play. But it is a role that is much better defined by the yardstick of compliance with the policy of the standard setting organisation rather than by vague and controversial concepts such as the EU law catch-all doctrine of "competition on the merits".

Dr Torti's book is a contribution to the scholarly debate on standard setting and competition law, but also, more generally, to the role of competition law in the globalised economy. From a somewhat specialist perspective, the book goes deep and wide in understanding law and policy in complex, ever-evolving areas. Because of this, it is to be commended to scholars and practitioners alike.

Professor Renato Nazzini
King's College London
London, 25 May 2015

Competition law is an extremely complex area of law in constant evolution, and whose underpinning principles cross paths with economics and market theories. Its pervasive effects embrace every aspect of the market economy including the intellectual property sector, where the impact of competition law is particularly controversial. Indeed, much debate traditionally surrounds the interaction between competition law and intellectual property law, as the impelling and atavistic desire for ownership protection of intellectual property rights inevitably must do battle with the need for competition and enhancement of technological process.

Within the area of intellectual property rights, standard setting has now assumed a preponderant role. The aim of standard setting organisations is to develop, coordinate and promulgate technical standards intended to address the needs of a wide base of affected adopters. Standards can cover various issues, such as standardisation of different grades or sizes of a particular product, standardisation of production processes or methods, or technical specifications in markets where compatibility and interoperability with other products or systems is essential. In a globalised economy, standards are more important than ever, as they often facilitate economies of scale, and secure multiple supply sources. Standards have their biggest impact on technology markets by providing the very foundation of interoperability. The development of electronic communications networks has seen a rise in the importance of interoperability between equipment used, between services provided, and between data exchanged. Most standards are voluntary in the sense that they are offered for adoption by people or by an industry without being mandated in law. Some standards become mandatory when they are adopted by regulators as legal requirements in designated domains. Within the European internal market, standards provide the additional benefits of contributing to the achievement of market integration within the EU. Common standards, be they of a governmental or private nature, help eliminate restrictions to trade among Member States.

Despite the existence of extensive literature unfolding the issues revolving around the tension between competition law and intellectual property rights, not enough attention has been paid until now to the issue of standard settings. This is surprising, as in this area the conflict between competition law and intellectual

property rights becomes particularly exacerbated and interesting. Standard setting agreements may be ultimately beneficial for consumers, as they may lead to the creation of new or better products. In the presence of competing technological solutions, it may well be more efficient for society to rely on one agreed technological standard instead of having to choose between the competing alternatives. Nevertheless, the setting of standards also gives rise to serious competition concerns. In order to introduce a new standard, standard setting organisations rely on standard setting agreements, which may represent an ideal opportunity to reduce or eliminate competition, by excluding competing technological solutions. This scenario may also ignite an opportunity for patent holders relevant to the standard to achieve excessive market power, enabling them to overexploit the rights they have been granted.

This book explores in detail the complexities arising from the application of competition law to standard setting, analysing the interplay between competition law and intellectual property rights, the tension between the application of competition law to standard setting organisations arising from the EU and US scenarios, and finally theorising a paradigm attempting to reconcile competition law and standard setting. The book is of an unwavering high standard. It is the most comprehensive, and perhaps also the most important work on the subject to appear in print in England. All who wish to understand more about the application of competition law to standard setting, from practitioners to academics and students alike will find this book invaluable. I am pleased to be able to welcome its appearance, and to warmly commend its contents.

Dr Andrea Lista
Associate Professor in Commercial Law
University of Exeter, UK

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