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Are IP rights really statutory monopolies?

Two confusing economic theories mingled with commercial-economic perspectives often make many businesspeople scratch their heads and frown. On the one hand, the policy of a free-market economy encourages competition. On the other hand, because intellectual property rights (IPRs) are said to provide exclusive rights in a number of circumstances, IPRs are understood to be anti-competitive.

This has led people to conclude that IPRs are monopolies, but this way of thinking is incorrect. IPRs protect the rights owner from unfair competition, not competition generally.

To appreciate the relationship between both concepts, one must understand that IPRs are incentives granted by the government to the creator of a new "work" in exchange for providing opportunities for others to learn from and improve on it. This is what is called the cycle of innovation.

Both vigorous protection of IPR and reasonable enforcement of trade competition laws act to stimulate and encourage innovation. IP protection allows creators and researchers to recover the costs of investment in the cycle of innovation by granting some limited-term protection in the market from so-called free-riders or copycats.

If companies or individuals wish to compete with an innovator, they can freely do so through their own innovative techniques and creative problem-solving. Anti-competition laws also ensure that firms compete, and by competing, seek new means of advancement, and tend to balance or prevent dominant firms from unfairly abusing a market.

IP laws were implemented not only to provide incentives to industry, but also to foster public interest. IPR holders trade off the limited-term "exclusive rights" with certain obligations to society. Patents, for example, are time-limited in nature and are part of the "fair" trading system.

Patents play an important role in enabling further innovation because of the public disclosure function: a patent applicant must disclose how his invention is produced and teach how it works. Disclosure of technical information that would otherwise be kept secret is an important aspect of all scientific research and development and acts as the quid for the quo of legal protection.

There are also several balancing tools in policy and at law to justify the grant of market power to an IPR holder. Examples of such balancing tools include the fair-use exemption in copyright, the doctrine of exhaustion of rights, exemptions for reverse engineering, and the ability to void unfair commercial terms restricting competition in licensing agreements.

With copyright, an act of another person which does not conflict with the normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate right of the owner of copyright is not deemed an infringement. Exhaustion of an IPR derives from "the first sale doctrine", which embraces the concept that whenever a product protected by IPR is sold, the bundle of IP rights associated with the product is "exhausted" at the stage of the first sale.

The power to grant IPRs resides with the government authorities, who provide safeguards against abuse of market power. The role of the IP official is to exercise discretion under local law to decide whether an application for an invention is sufficiently innovative to add value to the public to the extent that it deserves exclusive rights. The director-general of the Department of Intellectual Property is vested with the exclusive authority to review licensing arrangements for IPRs to remedy unfair anti-competitive practices. Courts are also empowered to rule on the validity of a grant of IP rights and to examine whether a dominant market player is unfairly using IPR to distort a market.

IP and anti-trust laws are not mutually inconsistent, but instead are both directed at the enhancement of consumer welfare. The long-term benefits for society to be derived from granting IP protection far outweigh the short-term costs associated with an IPR owner's ability to recover some return on his investment in innovation during the term of protection.

The careful balance has resulted in tremendous advances in technology, health care, and quality of life for all Thais, and should be given the respect it deserves.

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