



NATIONAL RESEARCH UNIVERSITY  
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**EXTENDING THE SCOPE OF  
ANTITRUST LEGISLATION OVER  
THE AREA OF EXCLUSIVE IP-  
RIGHTS EXERCISE: EVIDENCE  
FROM RUSSIA**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW  
WP BRP 39/LAW/2014

This Working Paper is an output of a research project implemented as part of the Basic Research Program at the National Research University Higher School of Economics (HSE). Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

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## **EXTENDING THE SCOPE OF ANTITRUST LEGISLATION OVER THE AREA OF EXCLUSIVE IP-RIGHTS EXERCISE: EVIDENCE FROM RUSSIA<sup>2</sup>**

This paper deals with the issues of competition law and IP law interaction. Current Russian legislation provides absolute immunity from extending the antitrust prohibitions over the exercise of exclusive IP-rights. The idea of the article is that this approach needs to be revised. Russian court practice, legal doctrine and economic theory necessitate more flexible antitrust regulation in the area of IP. The analysis of US, EU, and Japanese models of legal regulation has revealed different approaches to the issues of antitrust policy in this field of social relations. Therefore, this paper suggests a different concept of regulation – keep the general immunity from the application of antitrust prohibitions to rightholders, but make it conditional. At the same time, in order to ensure the optimal balance between private and public interests and to maintain the incentives for innovative activity, antitrust legislation should provide a system of guarantees for rightholders.

JEL Classification: K21

Key words: competition law, IP law, anticompetitive exercise of IP-rights, Russian antitrust legislation, economic approach, balance of interests, amendments to legislation

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<sup>2</sup> The research is carried out in the framework of the HSE Basic Research Program in 2014.

## Introduction

Competition law and IP law have several areas of interaction which necessitate an interdisciplinary approach to the regulation of corresponding social relationships. Today it is reasonable to outline two such areas – the prevention of unfair competition in the form of illegal IP-rights (IPRs) use by third parties, and the problem of exclusive IPR anticompetitive abuse.

Traditionally, researchers have paid attention to the first aspect of competition law and IP law interaction<sup>3</sup>. In 1900, the “Paris Convention for the Protection of Industrial Property” was supplemented with the Article 10-bis, designed to prohibit “any act of competition contrary to honest practices in industrial or commercial matters”. A lot of such acts relate to illegal use the objects of intellectual property. Nowadays, a majority of countries have provided the same prohibitions in their national legislation. Russian legislation is not an exception – Article 14 of the Federal Law “On Protection of Competition”<sup>4</sup> and some provisions of the Russian Civil Code Part IV stipulate prohibitions to commit acts with the objects of IP which can be treated as the acts of unfair competition with objects of IP-rights.

The second aspect – the problem of antitrust regulation in the area of IP-rights exercise – has become increasingly important. Moreover, the contradictory nature of this problem strengthens the tension of academic debates on the question. The contradictoriness is in the widespread opinion that antitrust law and IP law pursue opposite purposes – the former was designed to ensure competition and prevent monopolization in the markets, but the latter was designed to provide rightholders with a legal monopoly to use the results of their intellectual activity. Therefore, in the academic community, there are a lot of contrasting points of view on this problem.

The interaction between antitrust law and IP law has attracted the attention of American and European researchers for a long time. The first research papers in this area appeared in the 1970s–1980s, but the problem has not lost its relevance. Today, it is possible to find many papers<sup>5</sup> devoted to this question.

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<sup>3</sup> See Lee Heiman, Trademarks and Unfair Competition, 4 Loy. L.A. Ent. L. Rev. 281 (1984); Thomas McCarthy, Trademarks and Unfair Competition, West Group (1992); etc.

<sup>4</sup>The Federal Law N 135-FZ “On Protection of Competition” dated as of 26.07.2006

<sup>5</sup>Research Handbook on Intellectual Property and Competition Law. Edited by Josef Drexl. Edward Elgar Publishing, 2008; Steven D. Anderman. The Interface Between Intellectual Property Rights and Competition Policy, 2009; Herbert Hovenkamp, Mark A. Lemley. IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law (Vol. 1,2) Aspen Law & Business; Lslf edition, 2009; Katarzyna Czapracka. Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches. Edward Elgar Publishing, 2010; Mariateresa Maggiolino. Intellectual Property and Antitrust: A Comparative Economic Analysis of US and EU Law. Edward Elgar Publishing, 2011; etc.

However, in Russia this problem has not been taken into account for a long time, and only over the last several years it has become possible to observe some attempts<sup>6</sup> at researching the issues of antitrust law application to IP-rights exercise. Nevertheless, the relevance of this problem in Russia is predetermined by an unresolved confrontation<sup>7</sup> between different governmental and non-government bodies regarding the necessity to amend the provisions of the Federal Law “On Protection of Competition”, which provides absolute immunities from the application of antitrust prohibition in the area of IP-rights exercise. In particular, para. 4 Art. 10 and para. 9 Art. 11 of the foregoing law stipulate that prohibitions to the abuse of a dominant position and to conclude anticompetitive agreements are not extended over the actions (agreements) on the exercise of exclusive IPR. Thus, this research has not only academic interest, but also practical importance.

The main purpose of the present research is to clarify the possibility and advisability of applying the antitrust prohibitions to the actions on the exercise of exclusive IP-rights. The second purpose is to elaborate some proposals on how to create an optimal model of legal regulation based on the balance between protecting rightholders’ interests and ensuring an efficient competitive environment.

This research includes a range of tasks which are reflected in the structure of the paper.

Firstly, it looks at different points of view on the question of necessity to extend the antitrust legislation over the area of exclusive IPR exercise. The purpose of this study is to determine the most reasonable and convincing positions on the issue and outline general trends in the prospective development of Russian antitrust legislation in relation to IP-rights.

The task of the second section is to consider the economic arguments for antitrust law application to the actions of IPR holders. It also includes an analysis of the economic approach to determining whether antitrust intervention is reasonable in particular cases or not.

The third section reviews different models of extending antitrust legislation over the actions of rightholders (through examples from the EU, USA and Japan), and outlines the specifics of each model, with both its strong and weak points.

The paper concludes with suggestions on how to elaborate an optimal model of legal regulation for Russia taking into account its economic, legal specifics, etc. This model is based on the compromise between private and public interests, and complies with requirements of flexibility, effectiveness and legitimacy.

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<sup>6</sup> See Pavlova E.A., Kalyatin V.O. Suspicya M.V. Civil Law and Antitrust Law Regulation of Exclusive Rights: Instrument for Choose? // Competition and Law. 2013, N 4. – P. 50-60; Gavrilov D. Antitrust Regulation and Protection of Intellectual Property: Search of the Balance // Competition and Law. 2013. N 3 – P. 15-21; Voznesensky N., Gnusina Yu. Is It Possible to Restrict the Disposition of the Results of Intellectual Activity by the Measures of Antitrust Law? // Corporate Lawyer. 2012. N 6 (Supplement) – P. 25-30; Vojnikanis E.A. IP Law in Digital Era: the Paradigm of Balance and Flexibility. Moscow. 2013; etc.

<sup>7</sup> «Federal Antimonopoly Service will prevent the holders of patents and trademarks from becoming monopolists» // Mode of access: <http://izvestia.ru/news/543396#ixzz2IsQYyPpW> (last visited 23.07.2014)

## **Amendments to the Federal Law “On Protection of Competition”: “pro” and “contra”**

Analyzing the evolution of Russian antitrust legislation in relation to exclusive IP-rights indicates that the legislation originally followed a trend for a potential application of antitrust law<sup>8</sup> to the area of IP-rights but subsequently took the path of providing the absolute immunity from interference of antitrust legislation within the area of IP-rights exercise.

It seems that this approach is due to the lack of Russian antitrust policy maturity of the Russian antitrust policy, the inability to take into account the specifics of IP-rights at the early stages of development, and in the need to find the balance between private and public interests. In such a situation, the principle of “do no harm” was probably the best solution. Nevertheless, when aiming to improve the efficiency of antitrust policy it is advisable to raise the question of bringing back to life the mechanisms of preventing anticompetitive abuse of exclusive IP-rights in order to ensure favorable competitive environment, sustain innovation and increase social welfare.

Concerning the need for amendments to the Federal Law "On Protection of Competition" and the necessity to impose antitrust restrictions in the area of IPR exercise, several contradictory points of view have been developed. These opinions can be divided into two groups: “for amendments” and “against amendments”.

One of the main arguments against the exclusion of immunities from the Federal Law “On Protection of Competition” is based on the inadmissibility of antitrust law intervention within the area of IPR exercise, because “issues of exclusive IPR exercise and their limitations relate to the competence of the Russian Civil Code” and the exercise of IP rights in accordance with the provisions of the Civil Code Part IV cannot be considered as an infringement of law<sup>9</sup>. In addition, according to several authors, “the legal regulation in the area of IP rights already stipulates the system of measures designed to prevent an abuse of the rightholders’ exclusive position. Among such measures the following issues can be outlined: temporary protection of exclusive rights, the list of unprotected objects, compulsory licenses and other types of special licenses, the possibility of pre-term termination of the rights for a number of objects, the free use cases specified in the Civil Code and others”<sup>10</sup>.

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<sup>8</sup>Para. 2 of Art. 2 of The Law of the RSFSR dated as of 22.03.1991 N 948-1 “On Competition and Restriction of Monopolistic Activity in Commodity Markets” stipulated the following provision: “The act is not applied to relations regulated by the norms of protection of inventions, industrial designs, trademarks and copyright except the cases when rightholders deliberately use their rights in order to restrict competition”.

<sup>9</sup> This position had been outlined in the Decision of the Federal Arbitrazh Court of Moscow Circuit dated as of 21.03.2011 N KG-A40/1705-11, particularly the court pointed out that “exclusive IP right is the legal restriction of competition itself”

<sup>10</sup>Pavlova E.A., Kalyatin V.O. Suspicyyna M.V. Civil Law and Antitrust Law Regulation of Exclusive Rights: Instrument for Choose?// Competition and Law.2013, N 4. – P. 50

Also, advocates of non-interference within the area of IP-rights emphasize the fact that today there is no practical need for changes to the model of legal regulation. The logic of this position is based on the following assertions: “any changes in the legislation should be based on the real-life needs for such changes concerning the economic situation or some gaps in regulation, conflict of laws arising a number of court litigations; in this case all proposals are not accompanied with neither specific practical examples of trials that took place in Russia and got an ambiguous resolution nor any economic calculations which indicate the need for antitrust regulation in the area of exclusive rights”<sup>11</sup>. Moreover, these authors contend that even when the prevention of anticompetitive actions in the area of IP is needed, there is an opportunity to immediately apply Article 10 of the Civil Code, which prohibits the exercise of civil rights in order to restrict competition and abuse of dominant market power.

Despite the arguments against the interference of the competition law in the area of IPR exercise, none of them seem to be entirely convincing and irrefutable.

First of all, in spite of the fact that the establishment of IP-rights relates to the competence of civil law, it cannot be said that the establishment of antimonopoly limits of IP-rights also relates to the exclusive prerogative of civil law<sup>12</sup>. It seems more reasonable to relate the regulation of this matter to the special-purposed branch of legislation specialized in the protection of competition. Competition law is a specific branch of law based largely on economic approaches, unlike most other branches of law; therefore it is impossible to substitute its institutions with civil law constructions.

The argument that IP law already contains all the necessary mechanisms for preventing the anticompetitive exercise of IP rights (compulsory licensing, etc.) is also disputable, since civil law provides the legal constructions (e.g. public contract, contract of adhesion, etc.) that can be applied in antitrust policy but cannot fully substitute a complex system of antitrust regulation. German lawyer, Josef Drexl, commented on this issue highlighting the need to develop such a model of antitrust intervention in the area of IP rights so as to “guarantee that the use of very roughly hewn IP systems does not harm the delicate dynamics of competition and, ultimately, consumer welfare”<sup>13</sup>.

Besides, the fears relating to the negative effect of antitrust intervention in the exercise of IP-rights are largely exaggerated, as the task of antitrust law consists not in the destruction of

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<sup>11</sup>Pavlova E.A., Kalyatin V.O. Suspicyyna M.V. Op. cit.

<sup>12</sup>European literature on the issue distinguishes the notions “existence” and “exercise” of exclusive IP right (Elena Cortés, Adam Dawson, Catriona Hatton. IP and Antitrust// The European Antitrust Review 2014. Mode of access: <http://globalcompetitionreview.com/reviews/53/sections/177/chapters/2063/>)

<sup>13</sup>Research Handbook on Intellectual Property and Competition Law. Edited by Josef Drexl. Edward Elgar Publishing, 2008. P. XV

legal frameworks for protection of IP rights, but in preventing the abuse of legal monopolies in the cases when these actions lead to prevention, restriction or elimination of competition”<sup>14</sup>.

Secondly, the thesis that no amendments to the existing antitrust regulation have to be made because of no practical need is controversial enough. The lack of large practical need is not a reason for keeping an ambiguity in legal regulation, especially on a matter which is fundamental from a legal point of view and which cannot be ignored. Moreover, the lack of court litigations involving the holders of IP-rights in the Russian Federation can be directly linked with the lack of legal grounds for satisfying the claims of antimonopoly authorities. It is important to note that the potential for disputes about exclusive IP-rights in Russia exists at least for the reason that largest IPR holders are transnational corporations which running businesses through all over the world, including the Russian Federation.

Moreover, the analysis of some typical court decisions reveals<sup>15</sup> the tendency to evade the absolute immunities and apply adjacent prohibition (such as unfair competition or others) in order to prevent the abuse of exclusive IP-rights. Such an undesirable tendency dictates the necessity to enact more flexible legislation in this area.

Finally, the point of view that direct use of the Article 10 of the Russian Civil Code is enough for an effective prevention of anticompetitive exercise of IP rights seems to be an even weaker position. The weakness of this position consists at least in two grounds. The first one is that this point of view can be extended to all civil relationships by reducing all antitrust regulation to Art. 10 of the Civil Code. However, it is obvious that reducing the whole branch of legislation to the scope of one article with extremely abstract substance is a flaky approach to the antitrust policy. The same argument is valid for the area of IP rights.

The second weak point of this approach is that the abstract and widely interpreted substance of Art. 10 puts IPR holders in the position of greater uncertainty and instability, when their destiny depends entirely on the discretion of a law enforcer. A special antitrust regulation, by contrast, “defines and specifies the limits of civil rights in the area of competition law”<sup>16</sup>, thereby creating a stable legal framework with a minimum degree of uncertainty and risk for the participants of civil relations.

The arguments in favor of amending the antitrust legislation seem to be more convincing. The most important and decisive argument is the reference to the experience of other countries whose antitrust legislation has been successfully applied to the area of IPR exercise.

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<sup>14</sup> Gavrilov D. Antitrust Regulation and Protection of Intellectual Property: Search of the Balance// Competition and Law. 2013. N 3 – P. 15

<sup>15</sup>Cases N A40-3954/10-149-52, N A45-4580/2013, N A82-4553/2010, N A40-60322/10-12-360

<sup>16</sup> Voznesensky N., Gnusina Yu. Is It Possible to Restrict the Disposition of the Results of Intellectual Activity by the Measures of Antitrust Law? // Corporate Lawyer. 2012. N 6 (Supplement) – P. 25

The possibility to spread antitrust prohibitions to IPR holders is provided by the legislation of “the USA, Germany, Japan, France, Great Britain and other EU countries, and the EU itself as a quasi-public entity with its own antitrust system”<sup>17</sup>. Gennady I. Nikerov remarked, “in developed countries the monopoly power of the IPR holders is limited, in particular, they cannot use their IP rights in order to harm competitors”<sup>18</sup>.

Furthermore, some authors stand on the position that “antitrust law is able to some extent to correct the gaps and imperfections of the current system of IP rights, to adjust the legislation to the needs of the new information economy”<sup>19</sup>. It is obvious that “legal regulation always lags behind the dynamics of economic processes, and antitrust regulation relying primarily on empirical evidence but not on formal rules able to smooth this “congenital defect” of the legal system”<sup>20</sup>.

However, the most reasonable position on the issue of intervention of antitrust law in the area of IP rights is probably the point of view that such intervention is possible, but it has to be carried out very carefully. It is important to take into account that depriving rightholders of the immunities from antitrust intervention «creates serious problems for them, because the risk of losing control over the exclusive right reduces dramatically the incentive to invest money and time in the development of new innovative products, as the stimulus to innovation is the guarantee for the innovator to obtain within a certain statutory period some monopoly (exclusive) benefits and privileges in relation to the result of intellectual activity”<sup>21</sup>. Thus, the challenge for the legislator in this area is to develop such a model of regulation which would provide an optimal balance between ensuring effective competition and preserving the incentives for innovation.

## **The Economic Approach to the Issue**

Traditionally, the functions of competition law and IP law were considered in parallel with each other. It seemed that competition law was designed to stimulate the so-called ‘static efficiency’ (to ensure the allocation efficiency in existing markets). IP law, in turn, was considered as a tool for enhancing the ‘dynamic efficiency’, i.e. efficiency through innovations,

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<sup>17</sup> Nikerov G. I. Anticompetitive Use of Intellectual Property // Civil and commercial Law of Foreign Countries. Moscow, 2004. – P. 525 - 530

<sup>18</sup> Nikerov G. I. Op. cit.

<sup>19</sup> Vojnikanis E.A. IP Law in Digital Era: the Paradigm of Balance and Flexibility. Moscow. 2013

<sup>20</sup> Vojnikanis E.A. Op. cit.

<sup>21</sup> Voznesensky N., Ghusina Yu. Op.cit.

creation of new products. In such a paradigm, IP law and competition law could co-exist and not to interfere with the competence of each other<sup>22</sup>.

Over time, it became possible to observe a certain relationship between the functions of competition law, IP law and their influence on the dynamics of economic growth. In particular, such point of view became dominant that competition law and IP law pursue the single goal – to ensure long-term economic efficiency. This approach presumes that the engines of economic growth are both intellectual property institutions and the mechanisms of market competition<sup>23</sup>. Therefore, it is reasonable to talk about the interaction of these two branches of law.

In some cases, the exclusive privilege for rightholders is a catalyst for economic growth and innovation, but strong competition can also be an inhibiting factor for innovations. For example, as a rule, without strong IPR protection in markets with a low degree of concentration and a strong competitive environment there are reasons for reducing investments in research and development. Business entities need to have guarantees for monopolistic commercialization of innovations in order to cover extra costs. Under such circumstances it is difficult to promote innovative economic growth in a particular field without maintaining exclusive rights on the use of new technologies and obtaining some benefits from them.

Nevertheless, sometimes exclusive IP-rights can be a factor that weakens competition and slows further development in particular sectors. Rightholders abuse of their accumulated market power and inflict damage to public welfare. In such cases, antitrust regulation can decrease the negative effect of exclusive rights.

Thus, ensuring the economic efficiency and enhancing public welfare requires the development of a flexible, interdisciplinary, co-operative approach based on the optimal balance of functions between both IP law and competition law.

The economic method involves an assessment of positive and negative effects from the use of antitrust measures in the area of IPR in order to compare them and determine the economic justification of such intervention. Some researchers insist on an individual analysis for each specific situation. In particular, Joseph Drexler stated his position as follows: “Rejecting the view of some economists that the costs of intervention in the use of an IPR will never be

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<sup>22</sup> Milton Handler Lecture The Intersection Between Antitrust and Intellectual Property Part 1-3// Mode of access: <http://www.youtube.com/watch?v=pAwydXRmKyY> (last visited 30.07.2014)

<sup>23</sup> These issues are covered in the studies on Law and Economics. See, for example: Scotchmer S. Standing on the Shoulders of Giants: Cumulative Research and the Patent Law. //Journal of Economic Perspectives. 1991.Vol.5. P. 29-41; 8. Merges R., Nelson N. On the Complex Economics of Patent Scope //Columbia Law Review. 1990. Vol.90. N. 4. P. 839-916; 9. Landes W., Posner R. An Economic Analysis of Copyright Law.//Journal of Legal Studies.Vol.18. N. 2. P 325- 363

outweighed by what can be won, I, Josef Drexl, advocate a thorough evaluation of the effects of a given behavior on innovation in the relevant market as a basis for intervention”<sup>24</sup>.

Thus, the main idea of the economic approach to the issue of extending antitrust legislation over the area of IPR is an individual complex assessment of the impact of antitrust intervention. The interference is justified if the negative effect is smaller than the positive effect.

However, despite its sufficient rationality and reasonableness, this approach entails several serious challenges.

Firstly, the economic method of assessing costs and benefits of antitrust intervention ultimately raise the value for society at the expense of reducing the benefits for rightholders. In this regard, one of the main challenges is to save and maintain the incentives for innovative activity.

The second problem is the lack of an adequate methodological framework for assessing the effects of antitrust intervention in the area of IP-rights exercise. It is quite difficult to compare static and dynamic efficiencies in the same system of measures. This problem is a serious challenge, first of all, for economic science. Economists have to develop and improve the methodological framework for the effective use of this approach.

Nevertheless, the economic approach seems to be the most effective one in the context of the universal regulation when IP law confronts competition law, since this approach allows ensuring optimal balance of antitrust intervention in the area of IP-rights. For this reason, many countries have begun using such a method in order to determine whether to apply antitrust measures to the owners of exclusive rights.

Further research will cover the foreign models of extending antitrust prohibitions over the area of IP-rights (USA, EU, and Japan). Some specifics, the strong and weak sides of each model will be outlined and analyzed for the purpose of taking them into account during elaborating proposals for changing the Russian model.

## **Different Models of Regulation: the USA, the EU and Japan Experience**

In spite of the fact that the problem of preventing anticompetitive exercise of IPR is a universal problem, different countries solve it differently. The most frequently mentioned approaches to the legal regulation in this area are the models of the US, EU and Japan.

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<sup>24</sup>Research Handbook on Intellectual Property and Competition Law. Edited by Josef Drexl. Edward Elgar Publishing, 2008. P. XVI

## The EU model

The most regulatory approach to the issues of interaction between IP law and competition law is presented in the European Union. Articles 101 and 102 of “The Treaty on the Functioning of the European Union” (the Treaty)<sup>25</sup> provide general prohibitions against the abuse of a dominant position and to conclude anticompetitive agreements. These prohibitions are also extended over the area of IPR exercise.

However, para. 3 Art. 101 of the Treaty contains a clause (Art. 13 of the Federal Law “On protection of Competition” contains a similar clause) on the inapplicability of the general prohibitions to the acts (agreements) which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It is obvious, that a lot of acts and agreements in the area of IPR can be put under these exceptions. Thus, the legislation of the EU provides some immunity from the intervention of antitrust law into the exercise of IPR. These immunities can be stipulated in the decisions of the European Court of Justice, in the Regulations of the EU Commission<sup>26</sup>, etc. These acts cover the so-called ‘block exemptions’, but this list of immunities is not exhaustive. Individual immunity can be provided by a court in particular cases.

For example, The Regulation N 772/2004 “On the application of the Treaty to categories of technology transfer agreements” applies to design and model rights and software copyright licenses. In order to strike the right balance between the protection of competition and the protection of IPR, this block exemption regulation creates an area of certainty for most licensing agreements. The guidelines also specify how Article 101 of the Treaty on the Functioning of the European Union should be applied to agreements not falling within the area of certainty<sup>27</sup>. The Regulation includes three groups of licensing practices: admissible, conditionally admissible and prohibited practices.

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<sup>25</sup> See: Consolidated Version of the Treaty on European Union// Official Journal of the European Communities, C 83. 30.3.2010. – P.88.

<sup>26</sup> Commission Regulation (EC) No 772/2004 of 7 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements; Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements; etc.

<sup>27</sup> See [http://europa.eu/legislation\\_summaries/competition/firms/126108\\_en.htm](http://europa.eu/legislation_summaries/competition/firms/126108_en.htm)

This superficial review of the European model, as well as the analysis of court practice<sup>28</sup> allows us to draw the conclusion that today European legislation is one of the most pro-competitive, actively preventing the abuse of IPR. A disadvantage of this approach is that it reduces rightholders incentives to create and introduce innovation into the market. Nevertheless, a huge amount of block exemptions with comprehensive guidelines can provide greater certainty and predictability for rightholders. Undoubtedly, the latter factor is the strongest positive feature of the European approach. European courts try to ensure a reasonable balance between the application of antitrust prohibitions and the provision of immunities for rightholders<sup>29</sup>.

## **The Model of the USA**

The American model of regulation contrasts with the model of the EU. Despite the significant role of the Sherman Act (1890) and the Clayton Antitrust Act (1914), American antitrust law is mostly based on case law<sup>30</sup>. In addition, American antitrust prohibitions extend over a narrower list of IPR exercise cases<sup>31</sup>.

In order to specify some rules on determining the balance between antitrust law and IP law, the U.S. Department of Justice and the Federal Trade Commission issued the Antitrust Guidelines for the Licensing of Intellectual Property (1995). These guidelines are based on the idea that IP law and antitrust law share the common purpose of promoting innovation and enhancing consumer welfare. This flexible approach embodies three general principles:

- for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property;
- the Agencies do not presume that intellectual property creates market power in the antitrust context;
- the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally pro-competitive.

The assessment of licensing practices is based on two traditional rules of American antitrust law – the rule of reason and ‘per se’ rule. The former presupposes the evaluation of the effects of a particular practice. The latter prohibits some acts (agreements) without the necessity to determine anticompetitive effects.

It is important to note, that the distinctive feature of the American model is the absence of comprehensive guiding rules ensuring the certainty of law-enforcement. G. Schindler once

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<sup>28</sup> See Case ECJ 4/6/95 Magill Decision, Case T-201/04 Microsoft Corp v Commission

<sup>29</sup> See Case C-7/97, Oscar Bronner [1998] ECR I-7791

<sup>30</sup> See, for example, Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006); MCI v. ATT 512 U.S. 218; 114 S. Ct. 2223; 129 L. Ed. 2d 182 (1994); Verizon Communications Inc v. Trinko, LLP, 540 US (2004)

<sup>31</sup> Katarzyna Czapracka. Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches. Edward Elgar Publishing, 2010. – P. IX

remarked that, “from the outset, the Antitrust Guidelines do not attempt to give certainty, but rather provide a framework for analysis that will be employed equally, though possibly filled differently, by the Agencies and undertakings. The TTBER [The EC Regulation N 772/2004], on the other hand, provides clear-cut rules that should not allow for different interpretations by the Commission and undertakings”<sup>32</sup>.

## **The Model of Japan**

The Japanese approach to the problem differs from the abovementioned approaches. In contrast to the USA and the EU, the Japanese Antimonopoly Act in Art. 21 excludes from its scope all actions with the use of IPR according to the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, and the Trademark Act. Actually, Russian legislation stipulates a similar provision. Nevertheless, Japanese legislation provides an opportunity to extend the scope of antitrust law over the area of IPR if there is any anticompetitive exercise of these rights.

In 1999, the Guidelines for Patent and Know-how Licensing were enacted in Japan. In 2007, these guidelines were substituted for the Guidelines for the Use of Intellectual Property under the Antimonopoly Act<sup>33</sup>. Both acts contain a rule on the possibility to extend antitrust prohibitions over the area of IPR in cases when acts of rightholders do not comply with the “exercise of IP-rights” notion. According to the provisions of the 2007 Guidelines, the Antimonopoly Act is applicable to the acts which “deviate from or run counter to the intent and objectives of the intellectual property systems, which are, namely, to motivate entrepreneurs to actualize their creative efforts and make use of technology, in view of the intent and manner of the act and its degree of impact on competition”<sup>34</sup>.

The Guidelines also include comprehensive advice on how to determine the anticompetitive nature of a particular act or a particular agreement. Moreover, the document provides some kind of methodology for analyzing the effects.

Generally, Japanese legislation is quite balanced in the issues of interaction between IP law and competition law. Nevertheless, law-enforcement authorities have an unreasonably large amount of discretion when determining whether to apply antitrust prohibitions.

Next, the research will be concentrated on elaborating an optimal model of legal regulation which could be implemented into the current Russian legislation.

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<sup>32</sup> Schindler G. Wagging the Dog? Reconsidering Antitrust-Based Regulation of IP-Licensing // Marquette Intellectual Property Law Review. 2008. Vol. 12. N 1. – P. 74

<sup>33</sup> Mode of access: [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.files/070928\\_IP\\_Guideline.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/070928_IP_Guideline.pdf)

<sup>34</sup> Para 1 Part II of The Guidelines for the Use of Intellectual Property under the Antimonopoly Act (2007)

## The Proposed Model of Legal Regulation

What model of legal regulation should be elaborated for the Russian legislation? Obviously, neither absolute immunity for the area of IPR, nor full the extension of general prohibitions can be effective as a model of regulation. It is necessary to suggest some flexible and balanced model which can take into account the multidirectional interests of rightholders and society, and which is able to adjust to different circumstances individually.

Considering all the studied factors, it would be best to keep common immunity for rightholders, but to refuse its absolute nature. It is necessary to enact a clause providing the possibility to impose antitrust prohibitions on rightholders if there is a substantial and unreasonable restriction of competition.

According to the Constitution of the Russian Federation, the legislator is entitled to restrict rights (including IP-rights) to protect competition as an element of the Russian constitutional system<sup>35</sup>. However, according to the constitutional principles such restrictions should<sup>36</sup>:

- be enacted as a federal law;
- ensure the balance between private and public interests;
- be justified;
- be proportional;
- be necessary for the protection of competition;
- not block the substance of a right (stimulating innovations, receiving benefits from use of IP objects).

Thus, in order to minimize the negative effects of enacting a clause on the application of antitrust prohibitions, a set of guarantees for rightholders has to be provided. Exemptions from the immunity have to be unambiguous for rightholders and reduce the extent of antimonopoly bodies' discretion in the issues of extending antitrust legislation over the area of exclusive IPR exercise.

For this purpose, first of all, the legislator has to elaborate and put into effect a uniform methodology for analysis of negative and positive effects in order to determine the "substantiality and unreasonableness" of damage to competition inflicted by a rightholder. As the basis for this methodology, foreign experience can be used. For example, some ideas for the analysis could be adopted from the EC Regulation N 772/2004, the US or Japanese guidelines, etc. Secondly, it is important to stipulate a closed list of cases when it will be possible to raise the

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<sup>35</sup> Part. 3 Art. 50 of the Constitution of the Russian Federation

<sup>36</sup> See Decision of the Constitutional Court of the Russian Federation dated as of 16.07.2004 N 14-P

question on the application of antitrust prohibitions. Thus, the position of rightholders will be defined and less risky.

Probably, some actions (agreements) have to be 'per se' prohibited. However, such prohibitions should be limited by the practices which obviously contradict the purposes of both competition law and IP law.

For greater protection of rightholders, there can be established the institute of voluntary, preliminary examination of prospective actions (agreements) on compliance with antitrust regulations. The permission of the antimonopoly body has to exclude the liability of rightholders for the anticompetitive effect of their actions.

Thus, this research proposes not to stipulate a list of permissible practices. The proposal is to presume the general exclusion of the area of IPR from the antitrust prohibitions scope with a few specific exceptions. The challenge is to elaborate a system of thorough "filtering" of rightholder' actions in order to apply antitrust measures only in the cases of extreme necessity. It seems that this approach is the most compromising and protects both the interests of rightholders and the public interests.

To specify possible cases of anticompetitive exercise of exclusive IP-rights, The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) in Art. 40 provides the following examples of such licensing practices:

- exclusive grantback conditions;
- conditions preventing challenges to validity;
- coercive package licensing.

The agreement stipulates that "nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights" (para. 2. Art. 40). Thus, The TRIPS Agreement does not bound the member states with a closed list of anticompetitive practices, but entitles them to provide other prohibited practices in the national legislation. For example, such list can be supplemented with the following practices:

- conditioning the sales of goods under the pretext of exclusive IP-rights exercise;
- mutual restriction in the use of a particular technology;
- prohibiting a research and development in a particular area;
- cross-licensing;
- etc.

In addition to the exhaustive list of anti-competitive practices, the antitrust legislation should provide other guarantees for the rightholders, such as:

- inadmissibility to determine a dominant position only on the basis of possessing the exclusive IP-rights;
- the possibility to appeal the decision of the antimonopoly body with reference to the provision on the admissibility of a particular practice (Art. 13 of the Federal Law “On Protection of Competition”);
- granting a transition period (e.g. one year) to bring prohibited practices in accordance with the new antitrust regulations.

Special attention in the new model of regulation should be paid to the clearer differentiation of monopolistic activity and unfair competition with the use of exclusive IP-rights. Article 14 of the Federal Law “On Protection of Competition” should stipulate that the actions which can be deemed as monopolistic activity (regardless of whether these specific actions are prohibited or not), cannot be qualified as unfair competition. Such a legislative solution would reduce the risk of a broad interpretation of unfair competition and extending this prohibition over the acts of monopolistic activity which have immunity from the application of antitrust measures.

The proposed model of legal regulation, providing the opportunity to prevent monopolistic activity in the area of IP-rights, at the same time, ensures the legitimate interests of rightholders, protects them from unreasonable interference in the exercise of their rights, maintains sufficient incentives for innovation, and allows carrying out balanced and step-by-step antitrust policy in the area of IPR exercise.

It can be concluded that this model of legal regulation can help to provide an optimal balance between the protection of private interests of rightholders and ensure an effective competitive environment. This model fully complies with Russian constitutional principles, what makes it not only efficient but also legitimate.

## **Conclusion**

The interaction of competition law and IP law is a complex and multifaceted research object. The complexity lies in the nature of these two phenomena. Competition law is intended to prevent monopolistic activity, but IP law, in turn, is based on providing monopoly (exclusive) rights to the objects of intellectual property. However, in the first case, it is monopoly in the economic sense, but in other case it has strictly legal sense. In addition, competition law and IP law, in the end, pursue a common goal – to ensure long-term economic development. Therefore, it is reasonable to raise questions about the interaction of these two branches of law.

The Russian approach to extending the scope of antitrust legislation over the area of exclusive IP-rights exercise over the last 20 years has followed a tendency of gradual 'absolutisation' of immunity from applying antitrust prohibitions to the rightholders. Previously, this approach was justified due to undeveloped antitrust control mechanisms, inability to take into account the specifics of IP-rights, etc. Nevertheless, the modern law-enforcement practice and legal doctrine indicate the need to reform this approach.

This research has shown that establishing limits to the exercise of exclusive IP-rights for the purposes of competition protection is the subject of special antitrust legislation. Moreover, the measures stipulated by the Russian Civil Code (including the provision on abuse of rights - para. 2 part.1 Art. 10) are not sufficient for effective antitrust policy in the area of IP, therefore they cannot fully substitute mechanisms of antitrust legislation.

For the most balanced application of antitrust prohibitions in the area of IP-rights in foreign doctrine, an economic approach to the issue was developed. The idea is to weigh positive and negative effects from the interference of antitrust prohibitions in the exercise of exclusive IP-rights in particular cases. On the basis of this analysis, a conclusion has to be made whether it is reasonable to apply antitrust measures or not. It should be noted that this approach is not just a theoretical discovery. In one form or another it has already been implemented in many foreign legal systems. However, in its implementation it is important to provide a system of guarantees for rightholders in order to maintain innovative activity incentives.

The analysis of foreign models of legal regulation has revealed different approaches to the issue of antitrust policy in the area of IP (the models of the USA, EU and Japan were used as examples). This demonstrates the absence of a universal formula of legal regulation in this area of social relations. Thus, foreign experience can only be a guiding line for changes, but not a pattern to copy.

This paper suggests a different concept of antitrust regulation in the area of IP. The suggestion is to keep the general immunity from the application of antitrust prohibitions to rightholders, but make it conditional. At the same time, The Federal Law "On Protection of Competition" should provide a number of guarantees from unreasonable interference in the exercise of exclusive IP-rights.

In conclusion, it should be noted that the problem of ensuring effective, innovative and competitive economic development requires complex interdisciplinary research. It seems that on the actual stage of its solution the main task of legal science is to suggest more flexible legal regime providing a framework for the most balanced application of legal tools to economic entities. The present paper was just an attempt to solve this problem by proposing a new model of legal regulation. Meanwhile, the implementation of this new model has to be accompanied by

a comprehensive economic analysis of both the general principles of interaction between competition law, IP law, and particular cases of anticompetitive exercise of exclusive IP-rights.

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