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- Contribution from Spain -

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This attached document from Spain is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 7-8 October 2025 in Asunción, Paraguay.

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Session II: Competition and Intellectual Property

– Contribution from Spain –

1. This contribution addresses the relationship between competition and intellectual property, which is the theme of Session II of the OECD-IDB Latin American and Caribbean Competition Forum (LACCF) to be held on 7-9 October 2025 in Asunción (Paraguay).

2. The first section of the contribution introduces issues related to intellectual and industrial property in Spain. The second section addresses the relationship between intellectual and industrial property and competition law. The third section addresses the Spanish framework for determining general tariffs by intellectual property rights collecting societies and the powers of the Spanish National Markets and Competition Commission (CNMC in Spanish) in this regard.[1] Finally, the fourth section summarises some of the main competition cases related to intellectual and industrial property rights in Spain.

1. Introduction: intellectual and industrial property rights in Spain

3. In Spain, intellectual property rights in the strict sense (which include both copyright and related rights) have traditionally been distinguished from industrial property rights (industrial designs, patents, distinctive signs, etc.). However, following the convention in the English-speaking world and the terminology proposed in this forum, both rights will hereafter be referred to jointly as "intellectual property rights".

4. Intellectual property rights protect and encourage investment and innovation, resulting in artistic, literary, cultural, technological, scientific and industrial growth, as well as economic progress, innovation, well-being and social cohesion. Therefore, defending and promoting intellectual property rights helps build and strengthen more sustainable and competitive artistic, cultural, technological and business models, with positive effects for citizens and society as a whole.

5. According to the findings of a report[2] jointly prepared by the EUIPO[3] and the EPO,[4] in general, EU companies that hold intellectual property rights generate 23.8% more revenue per employee and pay 22% higher salaries than companies without these rights. According to that report, the sectors with the highest percentage of holders of at least one intellectual property right are: (i) information and communication, with 14.8%; (ii) manufacturing industry, with 14.2%; (iii) water supply, sewage, waste management and decontamination activities, with 12%; and (iv) professional, scientific and technical activities, with 10.7%.

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[1] This contribution has been prepared by CNMC staff and should not be considered an official position of the CNMC, except for the official documents mentioned throughout the text.

[2] Intellectual property rights and firm performance in the European Union, First-level analysis report, January 2025, EPO and EUIPO, Munich and Alicante. https://www.euipo.europa.eu/es/publications/firm-level-analysis-report-january-2025

[3] European Union Intellectual Property Office

[4] European Patent Office

6. In the specific case of Spain, the 2024 results of the Satellite Account on Culture in Spain[5] show that the cultural sector alone, which includes all activities related to copyright and related rights whose main asset is intellectual property, accounts for 3.3% of Spain's gross domestic product (GDP) and 3.4% of gross value added (GVA).[6] Furthermore, according to data from the 2024 Labour Force Survey prepared by the National Statistics Institute, the Ministry of Culture estimates that 771 000 jobs depend on this sector, which represented 3.6% of total employment in Spain in that year.[7]

7. In terms of all forms of intellectual property, another report by the EUIPO and the EPO concludes that the economic activity of intellectual property rights-intensive companies accounts for 27.5% of all jobs and 43.2% of Spain's GDP.[8]

8. Intellectual property is a multidimensional phenomenon, with cultural, social and economic impacts. Acknowledging its social function, the Spanish Constitution recognises and protects literary, artistic, scientific and technical production and creation as one of its fundamental rights.[9] The Treaty on the Functioning of the European Union (TFEU) includes artistic and literary creation among the areas to be promoted and establishes that the common commercial policy shall be based on uniform principles regarding the commercial aspects of intellectual and industrial property,[10] among others.

9. In Spain, the regulation of intellectual property rights is scattered among a series of acts that specifically regulate one or more set categories.

10. Distinctive signs (trademarks, collective marks, certification marks and trade names) are jointly regulated by the Trademark Act.[11] This act, together with the Regulation

[5] The Satellite Account on Culture in Spain is a statistical operation of the Ministry of Culture under the National Statistics Plan. Its aim is to analyse culture as a means of generating wealth by evaluating its direct contribution to Spain's GDP using the National Accounts of Spain, with the National Statistics Institute collaborating in terms of the methodology.

[6] Cuenta Satélite de la Cultura en España, Avance de resultados 2020 - 2022 (Revisión 2024) [Satellite Account on Culture in Spain, Advance results for 2020–2022 (Revision 2024)], Ministry of Culture, Madrid . https://www.cultura.gob.es/servicios-al-ciudadano/estadisticas/cultura/mc/csc.html

[7] Empleo cultural [Cultural employment]. 2024, Ministry of Culture, Madrid. https://www.cultura.gob.es/dam/jcr:e460466a-304e-49ba-bee3-d65b435cbba6/empleo-cultural-2024.pdf

[8] IPR-intensive industries and economic performance in the European Union, Industry-level analysis report, fourth edition October 2022, EPO and EUIPO, Munich and Alicante. https://www.euipo.europa.eu/es/publications/ipr-intensive-industries-and-economic-performance-in-the-european-union-industry-level-2022

[9] Constitutional protection established in Article 20.1.b), framed within Section 1a, which contains fundamental rights and public liberties, alongside such fundamental rights as freedom of expression, academic freedom and the right to information.

[10] Articles 167.2 and 207.1, respectively.

[11] Act 17/2001, of 7 December 2001, on Trademarks (hereafter, Trademark Act).

on the European Union trade mark[12] and the Madrid Protocol,[13] also regulates other types of international trademarks that impact Spain, including European Union trademarks and international registrations with effect in Spain and the European Union.

11. In terms of quality schemes protected by intellectual property rights, the protection of designations of origin and geographical indications for wines, spirits and agricultural products is currently regulated uniformly throughout the European Union by Regulation (EU) 2024/1143[14] and, in the case of craft and industrial products, by Regulation 2023/2411.[15] Regulation (EU) 2024/1143 also contains rules on the protection of traditional terms in the wine sector and traditional specialties guaranteed.

12. Regarding forms of intellectual property related to inventions, the Patent Act[16] regulates patents, utility models and supplementary protection certificates. The Plant Variety Act,[17] meanwhile, regulates the protection of new plant varieties, alongside European legislation that governs the granting of plant variety rights with uniform protection throughout the European Union.[18]

13. Similarly, the protection of the design or appearance of a product is regulated by the Designs Act;[19] in this case there is also an industrial property title for the protection of designs and models in the European Union.[20]

14. Halfway between inventions and designs, integrated circuits with electronic functions are protected in Spain by the Topographies of Semiconductor Products Act,[21] which regulates the protection of the structure and layout of the various elements and layers that make up these products.

[12] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

[13] Protocol Relating to the Madrid Agreement Concerning the International Registration of Trademarks, adopted in Madrid on 27 June 1989, as amended on 3 October 2006 and 12 November 2007.

[14] Regulation (EU) 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographical indications for wine, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products. As of 13 May 2024, this regulation replaced the scattered regulations on the protection of these figures that had previously been established through Regulation (EU) 1151/2012 of the European Parliament and of the Council of 21 November (for foodstuffs), Regulation (EU) 1308/2013 of the European Parliament and of the Council of 17 December (wines) and Regulation (EU) 2019/787 of the European Parliament and of the Council of 15 January (spirit drinks).

[15] Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753; in force from 16 November 2023.

[16] Act 24/2015, of 24 July 2015, on Patents (hereafter, Patent Act).

[17] Act 3/2000, of 7 January 2000, on the Legal Regime for the Protection of New Plant Varieties.

[18] Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights.

[19] Act 20/2003, of 7 July 2003, on the Legal Protection of Industrial Designs (hereafter, Designs Act).

[20] Council Regulation (EC) 6/2002 of 12 December 2001, on Community designs.

[21] Act 11/1988, of 3 May 1988, on the Legal Protection of Topographies of Semiconductor Products.

15. There is also a Trade Secrets Act[22] to regulate the protection of any technological, scientific, industrial, commercial, organisational or financial information or knowledge that is secret and has business value (also known as industrial secrets or know-how).

16. Finally, copyright and related rights are protected in Spain under the Intellectual Property Act.[23]

2. Intellectual and industrial property and competition law

17. Both competition law and intellectual property law are designed to promote a system that creates incentives for dynamic competition for better and more diversified products and services, by excluding competition by imitation and enhancing competition by substitution. This leads to an increase in consumer and societal well-being.

18. However, the laws differ in the means used to achieve this ultimate objective. Intellectual property legislation promotes creativity and innovation by establishing legal barriers to entry (monopolies for a specified period of time), while competition law promotes freedom of entrepreneurship by prohibiting conduct that may restrict or distort competition.

19. Within the Spanish and EU body of competition law, intellectual property does not have any specific treatment or any type of legal exemption of its own. The treatment accorded to intellectual property rights by competition law is defined by the application of the Act on the Defence of Competition,[24] its corresponding regulatory developments and the TFEU, as well as the accumulated decision-making practice of the competition authorities and the case law of the courts.

20. However, there are express references to the application of competition law within the scope of intellectual property legislation.

21. The law that contains the most of these references is the Intellectual Property Act. As well as safeguarding the application of competition law in relation to database protection[25] or the administration, collection and management of collecting societies,[26] Article 20.4.g) of the Intellectual Property Act contains a reference to the now-repealed regulation preceding the current Act on the Defence of Competition, relating to the application of competition law in negotiations for the authorisation of cable retransmission of works protected by intellectual property rights:

> *"4. The retransmission by cable defined in the second Paragraph of Paragraph 2. f) of this Article within the territory of the European Union shall be governed by the following provisions:*
>
> *[...]*

[22] Act 1/2019, of 20 February 2019, on Trade Secrets.

[23] Royal Legislative Decree 1/1996, of 12 April 1996, approving the Consolidated Text of the Intellectual Property Act, Regularising, Clarifying and Harmonising the Applicable Statutory Provisions (hereafter, Intellectual Property Act).

[24] Act 15/2007, of 3 July 2007, on the Protection of Competition (hereafter, Competition Act).

[25] Articles 40 ter and 137 of the Intellectual Property Act.

[26] Articles 161.3 and 179.2 of the Intellectual Property Act.

f) Where, for want of agreement between the parties, it is not possible to enter into a contract for the licence of cable distribution, the parties may apply to the Intellectual Property Mediation and Arbitration Board for mediation.

The provisions of Article 193 of this Act and those of the Royal Decree implementing those provisions shall be applicable to the mediation provided for in the foregoing Paragraph.

g) Where either of the parties abuses his negotiating position to prevent the initiation or prosecution in good faith of negotiations for the authorisation of cable distribution, or without valid justification obstructs the negotiations or mediation referred to in the foregoing Subparagraph, the provisions of Title I, Chapter I of Act 16/1989, dated 17th July, on the Defence of Competition shall apply."

22. In similar terms, but this time relating to negotiations for authorising the exercise of exclusive reproduction rights and for making press publications by press publishers and news agencies available to the public, on the one hand, and to providers of information society services, on the other, the Intellectual Property Act refers to the application of competition law as follows in the third paragraph of its Article 129 bis:

"3. Publishers of press publications and news agencies may authorise the exercise of the rights recognised in paragraph 1 of this Article to information society service providers. Authorisations shall be negotiated in accordance with the principles of contractual good faith, due diligence, transparency and respect for the rules of free competition, excluding the abuse of a dominant position in the negotiation."

23. The current Designs Act, meanwhile, expressly refers to the possibility of applying competition regulations to remedy those situations in which the abusive exercise of an exclusive right affects free competition. In particular, the regulation contains the following reference in section V of its explanatory memorandum:

"No specific compulsory licensing regime is foreseen, as is the case with patents. In the case of design, the situation is different, since these are creations of form, and possible limitations to the exercise of the exclusive right of its holder for reasons of public interest will only be justified when the abusive exercise of this right from a dominant position affects free competition. In such cases, the establishment of an abuse of rights and the competition legislation would be sufficient to put a stop to any abusive practices and to adopt the appropriate measures to oblige those responsible to eliminate any consequences and to pay the corresponding penalties."

24. The current Patent Act fully acknowledges this phenomenon, which is why paragraph X of its explanatory memorandum contains the following reference:

"Today, cases of lack of or insufficient operation are basically limited to shortages or other abuses arising from anti-competitive practices or dominant positions, which can be addressed through competition law or through direct government intervention for reasons of public interest. These possibilities for action were already provided for in the 1986 Patent Act and are maintained, with some variations, in the current one.

The new Act therefore reorganises and simplifies the regulation of compulsory licenses, eliminating numerous articles linked to the pre-TRIPS (Trade-Related Aspects of Intellectual Property Rights) concept of exploitation. However, two new cases of compulsory licenses are included. These are the need to put an end to practices that a final administrative decision at the national or EU level, or a judgment, has declared contrary to competition law, and compulsory licensing of

patents relating to the manufacture of pharmaceutical products for export to countries with public health problems as provided for in Regulation (EC) No. 816/2006 of the European Parliament and of the Council of 17 May 2006, which regulates them."

25. This clear example is demonstrated in the express classification of the new category of "[c]*ompulsory licensing to remedy anti-competitive practices*" in Article 94 of this Patent Act. This category was not reflected in the bill, but was introduced at the suggestion of the CNMC, which reported the following in relation to compulsory licensing which, at the time, already appeared in the explanatory memorandum of the proposed law:

"However, recent developments in the field of competition that occurred after the Patent Act of 1986 must be taken into account. Since that date, decisions[27] have been made at the EU level that have addressed the antitrust treatment of the abusive exercise of an intellectual property right, such as patents.

Thus, the creation of a compulsory licence in certain cases of abuse of dominance may be a potentially useful remedy.

The power of the CNMC to oblige a company to share essential assets with its competitors through a compulsory licence when necessary to solve competition problems is legally protected by Article 53.2 b) of Act 15/2007, of 3 July, on the Defence of Competition (LDC in Spanish), which empowers the CNMC Council to impose "specific conditions or obligations, whether structural or behavioural".

Given the circumstances indicated in the preceding paragraphs, and the role of the CNMC to ensure competition in all markets and productive sectors, in accordance with the provisions of Act 3/2013, of 4 June, creating the National Markets and Competition Commission, the proposed draft bill is welcomed. It notes in its explanatory memorandum that such licences are linked "to anti-competitive

[27] "*Judgment of 6 April 1995, RTE and ITP v. Commission, or 'Magill' (Joined Cases C-241/91 P and C-242/91 P, Rec. p. I-743) and Judgment of 29 April 2004, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, Case C-418/01, Rec. 2004 p. I-05039, 'IMS' case. In these two judgments of 1995 and 2004, the Court of Justice of the European Union determined the conditions under which such a refusal can be considered abusive, namely: a) the refusal is likely to preclude all competition in a downstream market; b) it hinders the emergence of a new product for which there is potential consumer demand; and c) the refusal is not justified by objective considerations.*

Moreover, in the European Commission Decision of 9 December 2009 in the Rambus case relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement (Case COMP/38.939-RAMBUS), the Commission considered that a company had abused its dominant position by demanding excessive royalties for its patent licenses in the framework of a standardisation agreement. The case ended with the European Commission accepting the remedies proposed by Rambus.

That is why from an economic point of view it could be pro-competitive, and sometimes even necessary, to require licenses based on the assessment of being Fair, Reasonable and Non-Discriminatory (FRAND) when the patent is vital for access to a market, i.e. ensuring that the essential technology protected by a patent is accessible to users under fair, reasonable and non-discriminatory conditions (Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements 2011/C 11/01 OJEU 14.01.2011). See also, Microsoft v Motorola, Case No. 2:10-cv-01823 (Western District of Washington Court Decision) and in the EU, European Commission Decision COMP/M.6381 - Google/Motorola Mobility."

practices or dominant positions that can be addressed through competition law or through direct intervention by the government for reasons of public interest."[28]

26. In addition, in the field of block exemption regulations relating to the application of Article 101.3 of the TFEU, which allows for certain exceptions to the prohibition of anti-competitive agreements or practices, there are two regulations closely linked to intellectual property rights: (i) Regulation 316/2014 on certain categories of technology transfer agreements;[29] and (ii) Regulation 2023/1066 on certain categories of research and development agreements.[30]

27. These regulations, which are directly applicable in Spain, establish the conditions for considering that certain categories of agreements comply with the provisions of Article 101.3 of the TFEU and, therefore, that they do not contravene European Union competition rules. This circumstance may occur either because the agreement does not have an anti-competitive effect or because, if it does, the positive effects of the agreement outweigh the negative ones.

28. Therefore, although intellectual property does not have its own regulations within competition legislation and the general rules of this legislation must be applied, its specificities are incorporated into other legislative texts and case law.

3. The determination of general tariffs by intellectual property rights collecting societies in Spain

29. Since the reform of the Intellectual Property Act by Act 21/2014 of 4 November[31] entered into force in 2015, intellectual property rights collecting societies must establish simple and clear general tariffs that determine the remuneration required for the use of their repertoire. This means these entities must approve new general tariffs adapted to the criteria established in former Article 157.1.b) of the Intellectual Property Act (now Article 164.3).

30. The law regulates how the amount of these general tariffs should be set, stipulating that the economic value of the use of the rights to the protected work or service in the user's activity must be considered and a fair balance sought for both parties. To this end, Article 164.3 of the Intellectual Property Act establishes that at least the following criteria must be taken into account:

- the degree of effective use of the repertoire in the user's activity as a whole
- the intensity and relevance of the use of the repertoire in the user's activity as a whole

[28] "*It should be recalled that the resolution in question would become enforceable under the terms provided for in Article 57 of Act 30/1992, of 26 November 1992, of the Legal Regime of Public Administrations and Common Administrative Procedure*."

[29] Commission Regulation (EU) 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to certain categories of technology transfer agreements.

[30] Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements.

[31] Act 21/2014, of 4 November, amending the revised text of the Intellectual Property Act, approved by Royal Legislative Decree 1/1996, of 12 April, and Act 1/2000, of 7 January, on Civil Procedure.

- the breadth of the repertoire, understood as the works and services whose rights are managed by a collecting society
- the economic income obtained by the user from the commercial exploitation of the repertoire
- the economic value of the service provided by the collecting society to enforce the application of tariffs
- the rates established by the collecting society with other users for the same type of use
- the rates established by counterpart collecting societies in other Member States of the European Union for the same type of use, provided that there are like-for-like bases for comparison.

31. Likewise, Article 164.4 of the Intellectual Property Act provides that the methodology for determining the general tariffs shall be approved by order of the Ministry of Culture, following a report from the CNMC. The order currently in force in this respect is Order CUD/330/2023, of 28 March.[32]

32. When processing this order, the CNMC issued a report in which it analysed the suitability, from a competition standpoint, of the methodology for determining the tariffs prior to its approval.[33] In this report, the CNMC made a series of specific recommendations regarding the articles of the regulation. It also recommended including, whenever possible, the preferential application of tariffs referenced to the effective use of the repertoire and a criterion of distribution rules that guarantee alignment between what is collected and what is distributed.

33. The Intellectual Property Act also regulates the Intellectual Property Commission in its articles 193 to 195. This national advisory body attached to the Ministry of Culture is responsible for mediation, arbitration and tariff determination in the field of copyright and related rights. These functions are carried out by the First Division of the Intellectual Property Commission (SPCPI in Spanish).[34]

34. The SPCPI carries out its oversight role by ensuring that the general tariffs established by collecting societies are fair and non-discriminatory. To do so, it must assess, among other things, whether the minimum criteria provided for in Article 164.3 of the Intellectual Property Act are applied. In the event that the SPCPI finds a breach of these obligations, it must notify the CNMC and submit all relevant information.[35]

[32] Order CUD/330/2023, of 28 March, approving the methodology for determining the general tariffs of intellectual property rights management societies for the use of their repertoire and the content of the financial report that must accompany the general tariffs (Order CUD/330/2023).

[33] Report IPN/CNMC/013/22 of 21 June 2022.

[34] Article 193.2 of the Intellectual Property Act.

[35] Article 194.4 of the Intellectual Property Act and Article 30 of Royal Decree 1023/2015, of 13 November, setting forth the regulations governing the composition, organisation and functioning of the First Division of the Intellectual Property Commission.

35. Likewise, the SPCPI may issue resolutions updating or developing the methodology for determining general tariffs referred to in Article 164.3 of the Intellectual Property Act, for which the law also requires that a report be requested from the CNMC.[36]

36. The SPCPI is also responsible for determining the tariffs for the exploitation of collective management rights.[37] To this end, the Intellectual Property Act establishes that when there is no agreement between the parties within six months of the formal start date of the negotiation, the SPCPI has the power to establish the amount of remuneration required for the use of works and other benefits of the repertoire of the collecting societies, the form of payment and the other conditions necessary to give effect to the rights. These tariff determination procedures may be initiated at the request of either the collecting society in question, a user association, a broadcasting company or a particularly significant user. These decisions, which can be appealed in the administrative courts, are published in the Official State Gazette. Their application is general in scope for all holders and liable parties with respect to works and services used in the same way and users in the same sector.

37. In determining these tariffs, the SPCPI must observe, as a minimum, the criteria established in Article 164.3 of the Intellectual Property Act. It may request a prior report from those public bodies that exercise their functions in relation to the markets or economic sectors affected by the tariffs to be determined – one of which is the CNMC when operating in all markets and productive sectors –,[38] as well as from the corresponding user associations or representatives.

38. The four most recent reports issued by the CNMC pursuant to this regulation are: INF/CNMC/092/25,[39] on determining the tariffs applicable to wireless television broadcasters and digital platforms, cable operators and other entities with multichannel offerings, for the use of phonograms included in the repertoires of AGEDI with respect to phonogram producers and of AIE with respect to the rights of artists and performers; INF/DC/164/24,[40] on determining the tariffs applicable to regional radio and television broadcasters for the use of the VEGAP repertoire in relation to visual works incorporated into audiovisual works and recordings; INF/DC/403/23,[41] on determining the tariffs applicable to cable pay-television operators for the use of the VEGAP repertoire; or

[36] Last paragraph of Article 194.3 of the Intellectual Property Act and second final provision of Order CUD/330/2023.

[37] Article 194.3 of the Intellectual Property Act.

[38] In accordance with the provisions of Article 5 of Act 3/2013, of 4 June, on the creation of the CNMC.

[39] Report of 28 April 2025 issued in the framework of the tariff determination procedure of the First Division of the Intellectual Property Commission in Case E-2023-001 AGEDI-AIE-ATRESMEDIAMEDIASET: INF/CNMC/092/25.

[40] Report of 12 November 2024 issued in the framework of the tariff determination procedure of the First Division of the Intellectual Property Commission in Case E-2022-002 FORTA-VEGAP: INF/DC/164/24.

[41] Report of 11 October 2023 issued in the framework of the tariff determination procedure of the First Division of the Intellectual Property Commission in Case E- 2019-001 VEGAP-TELEFONICA: INF/DC/403/23.

INF/DC/121/22,[42] on determining the tariffs applicable to accommodation establishments to exploit in their establishments the rights corresponding to the producers of audiovisual works and recordings.

39. Some of the most relevant issues that these reports recurrently evaluate are:

- The establishment of tariffs for effective use: The CNMC considers that in order to set efficient tariffs, these should be directly linked to the effective use of the repertoire by the user, as well as to the economic value of the service provided by the collecting society. The general rule should be to establish tariffs according to actual use. This type of tariff should only be waived in cases where there are exceptional circumstances that make it impossible for the tariff to reflect the criteria set out in Article 164 of the Intellectual Property Act or due to the excessively high cost of determining the degree of actual use or its intensity. The tariff model to be adopted should enable users to efficiently manage their costs through a method that enables them to adjust how they use the repertoire in question.
- Disaggregation of tariffs corresponding to different types of use: A disaggregated tariff should be established for each of the different types of rights provided for in the Intellectual Property Act in order to further determine the appropriate tariffs for reproduction and public communication purposes. This includes making works available to the public, while ensuring compliance with the provisions of the regulations and the principles of competition and economic efficiency. In particular, a disaggregated tariff should be established for each of the different types of acts of communication to the public considered in Article 20 of the Intellectual Property Act.
- Non-presumption of universality of the collecting societies' repertoire: It is necessary to define the repertoire in an appropriate and transparent manner and to manage it effectively without presuming it to be universal, in accordance with the legal criterion of breadth.
- The economic income obtained by the users: The use of the economic income obtained by the user linked to the commercial exploitation of the repertoire as a criterion for determining the tariff must take special account of the relevance (principal or secondary) of such exploitation for that specific type of user, adjusting reasonably and proportionately when it is ancillary and instrumental to the users' main activity.
- Setting the price for the service provided by the collecting society: The effective application of the general principles of efficiency and good management must be sought, in order to avoid artificially increasing the costs of providing the service. As such, the price for the service provided must reflect the costs of the collecting society and not be formulated as a percentage of the tariff, thereby encouraging efficient management.

[42] Report of 27 July 2022 issued in the framework of the tariff determination procedure of the First Division of the Intellectual Property Commission in Case E/2018/003 EGEDA-CEHAT: INF/DC/121/22.

4. Cases of competition law application related to intellectual and industrial property rights in Spain

40. To guarantee effective competition between companies, the CNMC must also ensure that intellectual property rights are exercised in accordance with the regulations that recognise them and are not abused.

41. In Spain, there are many cases of competition law being applied in the field of intellectual property rights. For the sake of completeness, in this contribution we will address only a recent sample of them.

42. Where intellectual property rights collective management organisations are concerned, the Spanish competition authority has extensive experience in applying competition law to their conduct in the markets in which they operate. The resolution of the case of *DAMA-UNISON RIGHTS VS SGAE* will first be mentioned in order to illustrate this series of cases.

43. Second, there is another series of cases arising from the exercise of intellectual property rights by their holders. As an example, a mention will be made of the *MSD* case of abusive litigation and that of the *DENIAL OF LICENCE TO USE THE WORK OF DALÍ*, which was dismissed by the CNMC Council.

44. Third and finally, the case of *GOOGLE RELATED RIGHTS* against Alphabet, INC. and its subsidiaries will briefly be mentioned as an example of those cases related to downstream markets for users to exploit intellectual property rights.

4.1. Cases related to intellectual property rights collective management organisations

45. Intellectual property rights collective management organisations are non-profit organisations authorised by the public administration to manage, on their own behalf or that of others, intellectual property rights for, and in the interests of, various rights holders. These organisations are regulated by Articles 147 to 192 of the Intellectual Property Act.

46. The CNMC has extensive experience in prosecuting abuses of dominant position committed by collective management organisations in line with European case law in this domain. As such, CNMC resolutions have reported various breaches of Article 2 of the Defence of Competition Act and Article 102 of the TFEU.

47. Noteworthy among these are the resolutions relating to conduct consisting of: (i) imposing unfairly excessive and/or discriminatory fees on concert promoters, television or radio broadcasters or hotels and restaurants for the exploitation of content protected by intellectual property rights;[43] (ii) imposing abusive conditions on members of intellectual property rights collecting societies in order to make it difficult for them to switch to alternative collecting societies or to distribute the amounts collected in a discriminatory manner;[44] or (iii) excluding competing collective management organisations or alternative management operators by preventing them from accessing the intellectual property rights management market.

[43] Examples of the above include the CNMC Council Resolution of 6 November 2014 (S/0460/13, SGAE Conciertos), the CNMC Council Resolution of 9 July 2015 (S/0466/13 SGAE Autores), or the CNMC Council Resolution of 26 November 2015 (S/0500/13 AGEDI/AIE RADIO).

[44] Resolution of 30 May 2019 (S/DC/0590/16, DAMA VS SGAE).

48. Regarding the third type of conduct, below is a reference to DAMA-UNISON RIGHTS VS SGAE, the most recent case resolved by the CNMC in relation to intellectual property rights collective management organisations.

4.1.1. The case of DAMA-UNISON RIGHTS VS SGAE[45]

49. The Spanish Society of Authors, Composers and Publishers (SGAE in Spanish) is a private entity dedicated to the defence and collective management of the intellectual property rights of a very large number of members (including authors, publishers and heirs). It was founded in 1899 and manages millions of musical, dramatic, choreographic and audiovisual works in its repertoire.

50. The SGAE was authorised to act as an intellectual property rights collecting society by Order of the Ministry of Culture of 1 June 1988. Its members include more than 99 000 musicians, 11 000 authors of audiovisual works (scriptwriters, screenwriters and directors) and 9 500 playwrights and choreographers. It also manages rights for the partners of foreign companies with which it has representation agreements, and is a member of the main international copyright organisations.

51. The CNMC Council considered that the SGAE abused its dominant position over the years under investigation by designing and applying tariffs that, as a whole, can be considered unfair and capable of hindering the entry or continued presence of other current or potential competitors.

52. Central to the conduct in question was that the SGAE had designed and applied effective use tariffs that were uneconomical in comparison with averaged availability rates, in such a way that they did not, on the whole, represent a real alternative to the latter for either radio or television broadcasters. This would have driven the vast majority of users to pay averaged availability rates for the SGAE's repertoire instead of true effective use tariffs, which decision-making practice and case law on the application of competition law (both national and EU) consider preferable.

53. The first anti-competitive consequence of this situation was that the effective use tariff offered did not constitute a real alternative; this resulted in the vast majority of users paying the SGAE a price that was totally or partially unrelated to their actual use of the repertoire, both in terms of the number of works and the intensity of their use. As such, the SGAE applied tariffs in a generalised manner that were unfair because they did not reflect the intensity of the use value. This is despite the fact that it could have offered an effective use tariff that would have represented a real option for a significant portion of users, without incurring disproportionate costs.

54. In addition to the exploitative effect of applying a tariff largely unrelated to effective use, the widespread application of an averaged availability rate led to another anti-competitive effect, this time of an exclusionary nature, as this type of tariff could hinder the entry and expansion of competitors.

55. Availability rates can pose a significant barrier to entry, because if an averaged availability rate (similar to a flat rate) is paid for the use of a repertoire as large as that of the SGAE, users have drastically limited incentives to contract other alternative repertoires. Otherwise, despite reducing the use of their repertoire, they would still have to pay the same availability rate to the SGAE, in addition to the cost of using the rights of the alternative provider's repertoire.

[45] CNMC Council Resolution of 19 June 2024 (S/0641/18, DAMA-UNISON RIGHTS VS SGAE).

56. Therefore, the actions of the SGAE regarding the design and negotiation of its tariffs – which resulted in the application of availability rates to the detriment of an effective use tariff for a vast majority of users – were classed by the CNMC Council as abuses of dominant position in relation to both audiovisual and musical intellectual property rights.

57. In addition, the CNMC Council indicated that, for the specific case of intellectual property rights over musical works, the exclusionary effect reported was reinforced by SGAE's conduct, namely the inclusion of two types of clauses or statements in its contractual relationships with radio and television users: (i) those in which its repertoire was presented as universal; and (ii) the indemnity clauses against possible claims by third parties regarding the use of rights not belonging to its repertoire. The inclusion of such clauses or statements in their contracts with users further limited the incentives of such users to contract with the SGAE's competitors.

4.2. Cases related to the exercise of intellectual property rights by their holders

58. This group of cases refers to those in which it is the intellectual property rights holders themselves who, shielded by the protection afforded them by their exclusive exploitation rights, may exceed the scope of those rights and thereby engage in anti-competitive conduct.

4.2.1. Case of MSD[46]

59. In October 2022, the CNMC fined MERCK SHARP & DOHME (MSD) around 39 million euros on the grounds that its conduct constituted an anti-competitive abuse of litigation (or sham litigation) as a means of hindering and delaying the entry of new companies offering alternative generic products.

60. The sanctioned company held a patent protecting its contraceptive vaginal ring, the first to be marketed in Spain. As a result, the pharmaceutical company enjoyed a monopoly on this technology between 2002 and 2018.

61. A competitor had developed an alternative vaginal ring to the one protected by MSD's patent and began marketing it in June 2017. In response to this generic ring entering the market, MSD applied to the courts for an interim injunction, invoking the protection granted by its patent to stop the manufacture and sale of the ring by its competitor in Spain.

62. The adoption of the interim injunction by the Spanish court led to a halt in the manufacture, distribution and marketing of the new competing vaginal ring throughout Europe, as the production of this product is centralised in Spain.

63. These interim injunctions were ultimately revoked when it was proven that MSD had provided misleading information and deliberately concealed relevant factual and technical information from the court that adopted them. By then, however, the halt in manufacturing had already led to the artificial extension of the exclusion right granted by the patent and, therefore, of MSD's dominant position, altering how the affected market developed.

64. The CNMC decision found that the objective of the legal actions undertaken by MSD was not to enforce its patent rights. Instead, the CNMC Council understood that these actions were exercised within the framework of a plan to prevent the new operator from entering the market for as long as possible. It concluded that MSD abused its dominant position by bringing unfounded legal actions with the purpose of harassing its competitor.

[46] CNMC Council Resolution of 21 October 2022 (S/0026/19, MERCK SHARP DOHME, S.A.).

4.2.2. Case of the DENIAL OF LICENCE TO USE THE WORK OF DALÍ [47]

65. The CNMC has also analysed cases in which the potentially anti-competitive nature of conduct is aimed at preventing the holder of an intellectual property right from granting a licence. Specifically, in 2024, a complaint relating to the denial of a licence to use the work of Salvador Dalí was dismissed because the alleged abuse of a dominant position due to the holder's refusal to grant a licence was not considered proven.

66. The foundation holding the licence denied the complainant's authorisation request for the manufacture and sale of furniture based on sketches by Dalí that they had legally acquired. The commercial venture consisted of making limited editions of 350 pieces of each of the six sculptural works from Dalí's sketch, to sell as furniture.

67. The decision dismissed the complaint on the grounds that the refusal by the foundation holding the rights was not considered capable of excluding competition in the market affected by the practice, namely the manufacture and marketing of high-end furniture. The main justifications were the existence of numerous alternative plastic arts and the small scale of the complainant's business plan in a market worth more than 7 billion euros per year.

4.3. Cases related to the exploitation of intellectual property rights by users

68. Finally, the following CNMC case concerns the conduct of the user of intellectual property rights in obtaining authorisation from the rights holders.

4.3.1. Case of GOOGLE RELATED RIGHTS[48]

69. The GOOGLE RELATED RIGHTS case is currently under investigation by the CNMC's Competition Directorate. This case investigates a series of practices that could involve an abuse of Google's dominant position with respect to publishers of press publications and news agencies established in Spain and constitute acts of unfair competition that could distort free competition and affect the public interest.

70. The practices under investigation are related to Google's possible imposition of unfair commercial terms on publishers of press publications and news agencies established in Spain for the use of its copyrighted content.

71. This is a paradigmatic case, as it focuses on a possible abuse of a dominant position by the licensee of an intellectual property right and not by the rights holder or licensor, as has been customary to date in this domain.

5. Conclusion

72. The complementarity between competition law and the law protecting intellectual property rights requires that competition law respect these rights. However, this does not preclude the application of competition law to the way in which intellectual property rights are exercised on the market by their holder.

[47] CNMC Council Resolution of 21 February 2024 (S/DC/004/21, DENIAL OF LICENCE TO USE THE WORK OF DALÍ).

[48] Press release of the initiation decision of 28 March 2023 (S/0013/22, GOOGLE RELATED RIGHTS).

73. There are currently some loopholes in the legislative design of certain intellectual property rights regulations that prevent their own regulatory framework from exercising the much-needed and desirable internal control over the exercise of these rights. Therefore, especially with respect to some of these types of intellectual property rights that have a greater impact on the market power granted to their holders, the external control exercised by the competition authorities will continue to play an essential role in preventing abuses that stifle incremental innovation and slow down technological and cultural progress.

74. As such, given the increasing digitalisation of business and the importance of intellectual property rights in the information and communications technology sector, everything suggests that in the coming years more cases will continue to arise in this area of convergence between competition law and intellectual property law, with increasing degrees of complexity and sophistication.