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- Contribution from Costa Rica -

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Session II: Competition and Intellectual Property

– Contribution from Costa Rica[*] –

Intellectual Property Rights and Competition Law in Costa Rica: Structural Tensions, Regulatory Challenges, and Institutional Experiences

1. Introduction

1. The interaction between intellectual property (IP) and competition law represents one of the most sensitive and complex issues in contemporary economic governance. On one hand, IP rights (IPRs) – such as patents, copyrights or utility models – confer temporary exclusivities aimed at incentivizing innovation, protecting investments in research and development (R&D) and encouraging intellectual creation. On the other hand, competition law pursues precisely the opposite: to dismantle barriers, limit market power and preserve open access to essential inputs and products.

2. The coexistence between the two legal regimes, although conceptually tense, is possible when structured around the principles of proportionality, non-discrimination and economic rationality. This tension has been recognized in multiple international forums, such as the World Trade Organization (WTO) in the Doha Declaration on TRIPS and Public Health (2001), [1]and more recently by the Organization for Economic Cooperation and Development (OECD) in its 2023 Recommendation on Intellectual Property Rights and Competition (OECD, 2023).[2]

3. In this context, the role of competition authorities in developing economies becomes crucial. These entities must balance respect for industrial and copyright rights with the obligation to prevent abuses derived from these rights, such as the unjustified refusal to license essential technologies, excessive pricing of patented medicines or the use of contractual clauses that inhibit competition in adjacent markets (Gómez, 2020).[3]

4. Faced with this situation, *Law No. 10511 of September 4, 2024*, which amended the Patent Law, consolidates an already existing relationship between the industrial property regime and competition law, by strengthening the powers of the Commission for the Promotion of Competition (COPROCOM) as the competent authority to determine whether a patent holder or licensee engages in anticompetitive practices. These include, but are not limited to, unjustified refusal to license, shortages from the market on reasonable terms, or excessive pricing. Although the principle of intervention of COPROCOM was already recognized by systematic interpretation of the Law on the Promotion of Competition and the Patent Law, this reform provides an express and detailed regulatory framework that

[*] Costa Rica Contribution (COPROCOM and SUTEL)

[1] World Trade Organization. (2001). Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2). Adopted on 14 November 2001.

[2] OECD, Recommendation of the Council on Intellectual Property Rights and Competition, OECD/LEGAL/0495

[3] Gómez, M. (2020). Intersection between competition and patents: towards a pro-competitive exercise of patent rights in the pharmaceutical sector (Research Paper No. 105). South Centre.

facilitates its operation and coordination with public health policy and technological innovation.

2. Principles of Interaction Between Intellectual Property and Competition Law

5. The interrelationship between IP and competition law has traditionally been described as a structural tension between exclusivity and equality of access, innovation and efficiency, or incentives and rivalry in the market. This relationship, far from being conflictive by nature, must be understood as complementary, provided that both systems are applied within their respective limits and based on principles of proportionality and dynamic balance.

6. The main purpose of the IP regime is to stimulate innovation and creativity by granting temporary exclusive rights to their holders. In the case of patents, this recognition translates into the exclusive right to manufacture, use, sell or license an invention for a period of 20 years in accordance with the Patent Law and international instruments.

7. From an economic point of view, these rights are justified as mechanisms for internalizing research and development costs, offering a return to those who take significant technological risks. However, that same exclusivity may translate, in certain contexts, into a position of dominance or market power, especially when the protected object lacks proximate substitutes or involves essential goods such as medicines, seeds or software.

8. Comparative jurisprudence has identified multiple scenarios where the exercise of these rights can lead to unjustified restrictions on the market, such as abusive refusal to license, excessive prices or the use of patents to exclude competitors through pay-for-delay agreements, manipulation of the procurement procedure (evergreening) or horizontal concentrations of portfolios (OECD, 2019).[4]

9. The coexistence between IP and competition requires a guiding principle of regulatory balance: incentives for innovation should not overwhelm the public interest in access, effective rivalry and dynamic efficiency. This balance has been affirmed by the OECD (2023), when it points out that competition law does not challenge the existence of IPRs, but limits the negative effects that may arise from their abusive or disproportionate exercise.

10. In practical terms, the balance is operationalized through legal exceptions (such as compulsory licenses), proportionality analysis in the context of anticompetitive practices, and the review of concentrations involving strategic intangible assets. Costa Rica has recently made progress in this direction with the adoption of Law No. 10511, which amends the Patent Law to improve the grounds for compulsory licensing for competition reasons, with the formal intervention of COPROCOM.

11. The international IP and competition policy architecture has evolved to recognize that exclusive rights are not absolute. Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) stipulate that IPRs must contribute to innovation and social welfare and that countries may take measures to protect public health and prevent abuses of rights (WTO, 1994).[5]

[4] OECD (2019), "Licensing of IP Rights and Competition Law", *OECD Roundtables on Competition Policy Papers*, No. 230, OECD Publishing, Paris, https://doi.org/10.1787/6a74221e-en.

[5] World Trade Organization. (1994). *TRIPS Agreement*. Part I–VII.

12. This principle was reinforced by the Doha Declaration on TRIPS and Public Health (WTO, 2001), which underscored the right of countries to use all TRIPS flexibilities, including compulsory licensing, to ensure access to essential medicines. In the words of paragraph 4 of the Declaration: *"The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health"* (WTO, 2001, WT/MIN(01)/DEC/2).[6]

13. In 2023, the OECD adopted a formal Recommendation on IP and Competition, consolidating normative principles for the analysis of IPR-related business practices. Among them are:

- The full application of competition law to IPR-related practices.
- The proportional use of structural or behavioral remedies.
- Institutional cooperation between competition authorities and IP offices.
- Protecting access to key technologies (OECD, 2023).

14. By incorporating into its legislation the possibility for the competition authority to activate compulsory licenses in the event of practices such as unjustified refusal of licenses or market shortages, Costa Rica aligns its domestic legislation with these global principles and offers a valuable regulatory model for the region.

3. Compulsory Licenses Based on Competition

15. The figure of compulsory licensing is one of the main regulatory tools to correct imbalances derived from the exclusive exercise of IPRs, in particular patents. Although compulsory licenses have traditionally been conceived as access mechanisms for reasons of public health or general interest, there is a consolidated doctrinal and jurisprudential line that also recognizes them as a remedy against anti-competitive behavior.

16. The approval of Law No. 10511 of September 4, 2024, which amended the Costa Rican Patent Law, has explicitly incorporated the grounds of defense of competition as one of the enabling grounds for the granting of compulsory licenses. The amended Article 19 establishes that the State may grant a compulsory license: *"To remedy anticompetitive practices, when the Commission for the Promotion of Competition (Coprocom) determines that the holder or licensee of the patent has engaged in such practices."*

17. The Act takes a modern view of possible abuses of patent law. The main practices that may justify a pro-competitive intervention are identified below:

- **Unjustified refusal to license**: a dominant company that refuses to license essential technology may constitute abuse, especially if the refusal does not respond to technical, capacity or confidentiality reasons, and generates exclusionary effects. This conduct has been sanctioned in European jurisprudence from the *Magill* case (C-241/91 P) to *Microsoft* (T-201/04).
- **Excessive or discriminatory prices**: in certain circumstances, the charging of manifestly disproportionate prices for patented products may constitute an abuse of a dominant position, especially when there is a clear disconnection between the price demanded and the economic value of the product or service. This type of conduct has been subject to scrutiny by competition authorities, as in the Aspen

[6] World Trade Organization. (2001). *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2), adopted on 14 November 2001.

Pharma case (AT.40394) before the European Commission, where it was investigated whether price increases in oncology drugs responded to legitimate economic criteria or if they implied an exclusionary and exploitative practice contrary to competition (European Commission, 2017).[7]

- **Lack of supply**: failure to comply with the duty to exploit the invention or to meet local demand under reasonable conditions may justify the granting of a licence to third parties. This criterion is in line with Article 5A of the Paris Convention.
- **Restrictive clauses or vertical exclusivities**: The use of contractual terms in licenses that unduly restrict trade, access to substitute technologies, or impose tied sales could be considered abuse under Article 12 of Law No. 7472.

18. This new legal framework strengthens the intervention of the competition authority as a prior or enabling step for the Industrial Property Registry to grant a compulsory license, giving COPROCOM a quasi-judicial role in this context. It also introduces normative certainty in what previously had to be derived by systemic interpretation between the IP regime and the competition regime.

4. Experience in Highly Relevant IP Cases

19. Although COPROCOM's technical guides do not develop anautonomous or extensive treatment of IPRs, they do contain sufficient tools to integrate them into the economic analysis of the market and concentration operations. Both the Guidelines for the Analysis of Substantial Market Power (2024) and the Guidelines for the Notification and Analysis of Economic Mergers (2024) expressly recognize intangible assets—including patents, trademarks, and trade secrets—as relevant elements in the assessment of market power, barriers to entry, and anticompetitive risks.

20. A review of recent cases before COPROCOM reveals that, although there is still no sanctioning jurisprudence whose central axis is an abuse of IP, concentration operations have been analyzed where IP constitutes the economic core of the transaction. This pattern is particularly visible in sectors such as pharmaceuticals, mass consumption, hospitality, technology, agribusiness and digital services.

21. In all these cases, IP was not an accessory element, but a strategic asset whose possession or control conditions the market structure, competitive differentiation and the real possibility of entry of new agents. The operations analysed show that IP can take different forms:

- **Trademarks and brand reputation** (Hyatt–ALG, ILP–Unilever, Florex–Whole Foods, CODISA Data Center, JV La Florida–Café Britt, Grupo Angular–Pharmatech).
- **Trade secrets and know-how** (beverage formulas, chemical and pharmaceutical manufacturing processes, hotel management methodologies).
- **Exclusive sanitary or regulatory registrations**, which function as legal barriers (Angular-Pharmatech Group in pharmaceuticals, operating licenses in telecommunications).

[7] European Commission. (2020, July 14). Antitrust: *Commission accepts commitments by Aspen to reduce prices for six critical cancer medicines by 73% to address excessive pricing concerns.*

- **Standardized franchise and management systems** (Hyatt–ALG, premium hotel brands).
- Technological infrastructure and associated rights (CODISA Data Center, Liberty–Itellum).

22. In markets where brand loyalty, technological exclusivity or regulatory registrations are decisive, IP becomes a hard barrier that cannot be easily overcome with investment in physical capital. This is evident in pharmaceuticals (brands and health registrations), hospitality (global brands and franchises) and data centers (brands and technical reputation).

23. In premium segments, such as hospitality, mass consumption brands and eco-sustainable products, the reputation linked to the registered trademark generates a competitive advantage that cannot be replaced by price. IP in these cases is not only an input, but the main vehicle for positioning.

24. In several transactions (ILP–Unilever, Hyatt–ALG, Florex–Whole Foods, Grupo Angular–Pharmatech), the value of the transaction lay almost exclusively in the acquisition of IP's assets and not in production capacity or infrastructure. This reinforces that, for the analysis of competition, intangibles can have more weight than tangibles.

25. Finally, in the exercise of its function as competition advocate, COPROCOM has developed a clear doctrinal line on the interaction between IP and competition, which combines the defense of incentives for innovation with the prevention of abuses derived from exclusive rights.

26. In **Opinion COPROCOM-023-2021**, the Commission supported the reform of the Patent Law (Law No. 10511) that introduced the possibility of granting compulsory licenses for anticompetitive practices, stressing that the temporary monopoly conferred by a patent, without regulatory correctives, can translate into abusive market power and affect access to essential goods such as medicines.

27. In **OP-015-2023**, on the bioequivalence of medicines, it warned that technical requirements, although legitimate to protect public health, can become barriers to entry if they are not implemented with criteria of proportionality and reasonable deadlines, affecting the entry of generics.

28. In the same sector, in **OP-014-2024** and **OP-001-2022** on the promotion of competition in medicines, it recommended enabling parallel importation and making sanitary registrations more flexible as mechanisms to reduce artificial barriers derived from exclusive protection.

29. Finally, in technological and digital markets, **OP-011-2023** and **OP-004-2024** – on the deployment of 5G networks and digital platforms, respectively – identified that technological licenses, regulatory authorizations, and control over critical infrastructure can become regulatory or contractual monopolies, with the potential to restrict competitors' and users' access to essential technologies.

30. These positions show a consistent view: IP must coexist with competition policies that prevent market capture, mitigate the risk of exclusion, and ensure that innovation translates into effective benefits for consumers and new entrants.

5. Future Vision

31. The challenge is not only normative but also effective implementation. COPROCOM is now able to initiate precedent-setting cases in the region on the application of competition law to IPRs, generating a solid and predictable jurisprudence that will serve as a guide for IP owners, competitors and users alike.

6. Sectoral Perspective of the Superintendence of Telecommunications (SUTEL): Intellectual Property, Competition and Informality in Telecommunications Markets

32. The Superintendence of Telecommunications (SUTEL), as the sectoral competition authority in Costa Rica, has identified a particularly complex interaction between IPRs and the conditions of competition in the telecommunications sector. The phenomena of informal economy and digital piracy directly affect both network operators and service providers operating within the legal framework, as well as IPR holders. Practices such as content piracy and service provision outside the regulatory framework distort the competitive process and generate negative impacts on investment, innovation and consumer welfare. SUTEL, as part of its activities in advocacy and promotion of competition, in 2024 presented a report on "*Informality and Competition in the telecommunications market*", in which the different factors and problems around informality and competition are analyzed[8].

6.1. Regulatory Context and Competences of SUTEL in Matters of Intellectual Property and Competition

33. In accordance with Article 2 of Law 9736 (Law for the Strengthening of the Competition Authorities) and Articles 29 and 52 of Law 8642 (General Telecommunications Law), SUTEL is the competent authority for the application of the sectoral competition regime in the telecommunications market, with powers to prevent, investigate and sanction anticompetitive conduct, as well as to develop competition promotion and advocacy activities.

34. The national legal framework protects IP through the Constitution (Article 47), national legislation, among other instruments, as well as international conventions ratified by the country. In the telecommunications sector, IP is of dual importance: on one hand, rights to audiovisual content, software, trademarks and transmission technologies are strategic assets for network operators; on the other hand, the illegal exploitation of these assets through digital piracy or unauthorized provision of services results in a competition problem, by generating undue advantages for those who operate outside the law.

35. By virtue of its powers, SUTEL may act against these conducts from the perspective of competition, when they involve artificial barriers to entry, market distortions or conduct that affect dynamic efficiency and access to telecommunications goods and services.

[8] Available in: https://sutel.go.cr/sites/default/files/06440-SUTEL-OTC-2024%20Informe%20sobre%20economi%CC%81a%20informal%20y%20competencia%201.pdf

6.2. Piracy and Illegal Provision of Services as an Issue of Intellectual Property and Competition

36. In the Costa Rican telecommunications market, the most frequent cases of IP infringement with an impact on competition, correspond to the piracy of audiovisual content and the illegal provision of telecommunications services. These phenomena are manifested mainly through:

- Illegal resale of content: unauthorized transmission of pay TV channels or live events (e.g. sports) using Internet Protocol Television (IPTV) platforms or other digital means.
- Unauthorized Network Access: Illegal connections to cable TV, Internet, or mobile data services.
- Unlawful online distribution: Using social media, websites and apps to provide access to protected content without the copyright holder's permission.
- Use of infrastructure without an enabling title: operation of networks or provision of services without concession or authorization, in violation of Law 8642.

37. These practices directly violate the IP rights of content creators and distributors and, at the same time, distort the competitive process by allowing operators or providers without a license to offer artificially low prices thanks to the evasion of regulatory, tax and licensing costs.

6.3. Economic and Competitive Impacts

38. The sectoral survey carried out by SUTEL in 2024 indicates that 63% of formal operators and service providers consider themselves affected by informality and digital piracy, and that the highest incidence is in companies that simultaneously offer Internet access and subscription television, where content piracy reaches 81% of affectation.

39. The report carried out by SUTEL shows that piracy and the illegal provision of services generate multiple impacts:

- On network operators and service providers: decreased revenue (40% of respondents), customer churn (34%), signal theft and network fraud (18%). These effects reduce the incentives to invest in infrastructure, technological innovation, and legitimate content acquisition.
- On IP holders: reduction of income derived from licenses and exploitation of works, affecting the sustainability of business models based on creativity and innovation.
- On the State: loss of tax revenues and weakening of collection, as well as higher costs of inspection and sanctions.
- On consumers: exposure to computer security risks, theft of personal data, poor quality of service and absence of guarantees or consumer protection mechanisms.

6.4. Implications for Market Definition and Substantial Power Analysis

40. From a competition perspective, informality presents a significant methodological challenge: illegal operators or suppliers are often not considered in the relevant market definition, which can distort the assessment of the level of competition and the existence of substantial market power. This is exacerbated in telecommunications markets with few

formal participants, where the presence of illegal competitors can alter the real structure of supply and underestimate barriers to entry.

41. Content piracy and the illegal provision of services can also modify consumer behavior and shift demand to unauthorized channels, affecting the market shares of formal operators and conditioning their ability to compete.

6.5. Relationship with Intellectual Property and International Principles

42. The link between IP and competition in the Costa Rican telecommunications sector is reflected in the fact that piracy simultaneously involves:

- IPR infringement: breach of licenses, copyrights and related rights.
- Competitive distortion: undue cost advantage for illegal operators and suppliers, unfair competition and reduced incentives for investment.
- Systemic risks: weakened innovation, loss of investor confidence, and erosion of the rule of law.

43. These issues align with the concerns that the OECD has identified in its 2023 recommendation on IP rights and competition, in particular the need to fully apply competition law to IP-related practices, to use proportionate remedies, and to strengthen institutional cooperation between competition authorities and IP authorities.

44. In Costa Rica, SUTEL and COPROCOM coordinate on cases that combine IP and competition aspects, although informality poses additional challenges due to the difficulty of identifying and sanctioning illegal operators and suppliers and the cross-border nature of many infringements.

6.6. Strategies and Measures to Address the Problem

45. Actions taken by operators, service providers and by SUTEL itself include:

- Awareness campaigns on the risks and effects of contracting illegal services.
- Technological investments in systems for detecting and blocking unauthorized signals.
- Sectoral coordination between operators for the exchange of information and joint actions.
- Collaboration with content providers and Over the Top (OTT) platforms to strengthen control measures.
- Sanctioning actions against illegal service providers and unauthorized use of the radio spectrum.
- Competition advocacy to make visible the negative impact of piracy on innovation, investment and user well-being.

46. These strategies, however, need to be complemented by a comprehensive approach that combines effective enforcement of competition law, IP protection, international cooperation and strengthening the technical capacities of authorities.

6.7. Conclusions on the Telecommunications Market

47. From SUTEL's point of view, the experience in Costa Rica shows that:

- The protection of IP rights in the telecommunications market is a prerequisite for preserving fair competition and fostering innovation.
- The informal economy, including content piracy and illegal provision of services, erodes investment incentives and limits the development of dynamic and efficient markets.
- The interaction between IP and competition in this sector requires a balance between the defense of exclusive rights and the elimination of undue competitive advantages arising from their infringement.
- Inter-institutional cooperation between the sectoral competition authority, the national competition authority and IP entities is essential to address the multidimensional nature of the problem.
- The phenomenon has a regional and cross-border component, so international cooperation, regulatory harmonization and the exchange of best practices are key to addressing it.

48. In sum, the coordinated implementation of competition and IP protection policies in the telecommunications sector not only contributes to reducing informality and piracy, but also strengthens the digital ecosystem, stimulates innovation and ensures that the benefits of competition translate into real improvements for consumers and end-users.