



# Intellectual Property and Competition: From Saxophone to K-Pop

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# Adolph Sax

46 patents between 1843 and 1849



# K-POP

BTS' brands, copyright, designs, patents and licensing

# Introduction

- Unfair competition vs antitrust
- Regulations vs antitrust enforcement
- IP and competition: some case law
- Online platforms, competition and IP
- IP and Competition Guidelines
- What we do @WIPO in this area
- What next ?

# IP & Competition Policy

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Two broad areas of interest, at the intersection of IP and Competition:

**Antitrust**: merger review (e.g. merging IP portfolios)  
abuse of dominance/market power (e.g. refusal to deal, compulsory licensing)  
collusion (e.g. pay for delay, market partitioning)  
licensing practices (e.g. tie-in, grant-back)

**Unfair competition/consumer protection**:

deceptive and misleading advertising  
(causing confusion)  
damaging another company's reputation  
disclosure of secret information

# Unfair Competition Rules

## An Introduction

- Sometimes confused with competition law
- Traditionally for the protection of creative investments made by businesses
- More recently as a tool for consumer protection (e.g. 2005/29 EU Directive on B2C commercial practices as amended by Directive (EU) 2019/2161)
- Competition law enforcement Agencies often responsible also for consumer protection enforcement (in Switzerland two separate bodies for antitrust enforcement and for consumer protection)

# Unfair Competition

## Main Principles

- Causing confusion
- Damaging goodwill/reputation
- Misleading the public
- Discrediting competitors
- Disclosing secret information

# Unfair Competition: Relevance for IP

- actions for infringement of patents, trademarks, or copyrights
- actions for wrongful appropriation of trade names, trade dress, and trade secrets
- actions for publication of defamatory, false, or misleading representations

# Unfair Competition and Antitrust Enforcement

- The notion of unfair competition shifts, based on changing notion of fairness/honesty
- In antitrust enforcement, changes occur mainly because of evolving economic approaches
- Shift from protecting the honest businessman to protecting consumers
- Some practices fall under antitrust enforcement or unfair competition depending on jurisdiction (e.g. sham litigation)

# Tension between IP and Competition Policy?

Conflicting principles ?

- Intellectual property rights confer upon their owners an exclusive right to behave in a particular way
- The degree of immunity/protection affects firms' rivalry – competition law and policy strive to keep markets open

# Holding IP Right ≠ Holding Market Power

- General understanding that IP rights do not automatically confer market power (or market dominance)
- After some ambivalence on that, also the USA Supreme Court rejected the assumption patent = market power [*Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006)]

# The Nature of Intellectual Property

- IP is characterized by the differentiating function (and capacity) of the intangible assets that are IP's subject matter
  
- The (i) intangible nature of assets,
- their (ii) differentiating capacity, and
- Their (iii) susceptibility of being used in economic activities
  - **are the elements that characterize IP**

# The Nature of IP (cont.)

- IP is based on core concepts such as: novelty, inventiveness (non-obviousness), originality, secrecy, distinctiveness, reputation
- All these concepts are synonymous with differentiation

# The Nature of Competition

- The purpose of competition law enforcement is not to protect the individual competitors, but rather the competitive process
- The competitive process is the ability of firms to compete with each other based on their unique assets (products, services)
- Those unique assets are the differentiating element that gives each firm a competitive advantage (big or small) over its competitors

# Complementarity between IP and Competition

- Both IP and Competition protect the differentiating elements that help:
  - companies build their reputation
  - consumers make their economic choices

# Why is WIPO working on IP and Competition?

- Part of the WIPO 2007 Development Agenda (DA)
- «Competition policy useful to limit IP monopoly rights» (Nigeria, South Africa, Argentina, Brazil)
- Competition policy/law to promote technology transfer
- Three of the 45 DA Recommendations refer to competition

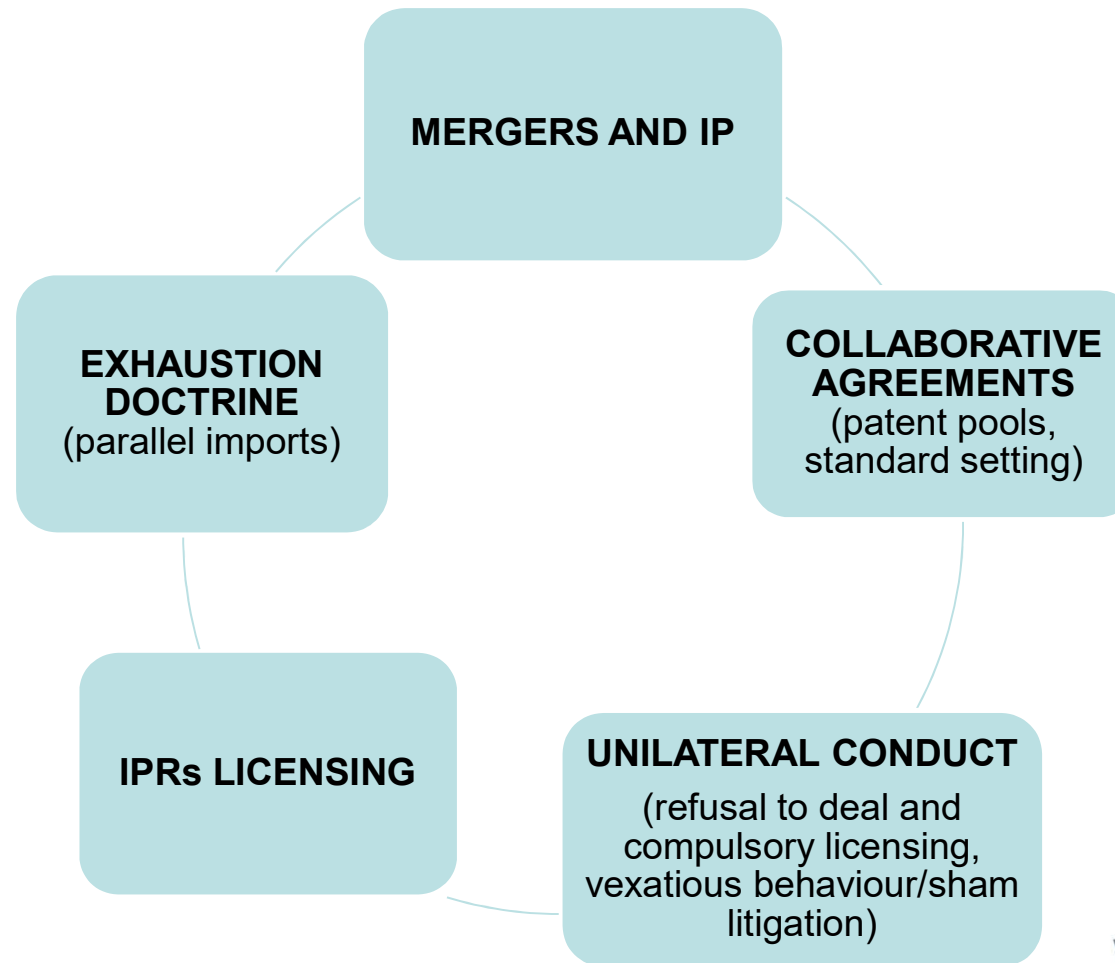
# What WIPO does on IP and Competition

- Promote IP and Competition Agencies collaboration
- Prepare comparative studies and surveys
- Provide technical assistance and legal advice to member states
- Encourage pro-competitive licensing practices

# What WIPO does not do on IP and Competition

- No norm setting
- No international harmonization of substantive IP-related competition rules
- No specific advice on individual cases

# The IP&CP interface – Five areas



# Main areas of concern for developing and emerging economies

- Excessive prices/royalties
- Sham litigation/abuse of rights
- Distribution channels
- Trademark “Squatting”

## Case study - (Abuse of dominance case)

- Two pharma companies A and B produce worldwide the drugs necessary for the cure of a deadly disease
- Direct sale in national markets (at different prices)
- Refusal to license the manufacturing to a local company
- Local prices much higher than international prices (50%-200%)
- Case lodged with Competition Tribunal
- Companies decide to settle before a decision is made

# Questions for discussion

- 1. Do you think that a patent holder has always the right to decide the price of her products no matter how high they are, particularly in the pharmaceutical sector ?
- 2. Do you think a patent holder has always the right to refuse to license her patent?
- 3. What kind of evidence do you think a NCA needs for a robust excessive price case ?
- 4. Excessive prices cases are extremely difficult to prove and therefore the defendants are rarely found in breach of competition rules. Nonetheless A and B decided to settle: why do you think they did that ?

## South Africa

### Anti-Retroviral Drug Competition Investigation (2003)

The South Africa Competition  
Commission investigates  
GlaxoSmithKline and Boehringer  
Ingelheim

- Denied a competitor access to an essential facility
- Excessive pricing for their respective drugs (separate therapeutic classes)
- Engaged in an exclusionary act



Case referred to Competition Tribunal  
Companies settled the case and  
provided cheaper and more extensive  
licenses



## Facts of the case:

- Increasing number of people affected
- Annual cost of treatment: 12,000 USD
- Annual average income: 2,600 USD
- Prices by GSK and BI were between 50% and 200% higher than intl best price for branded drugs
- Companies refused to license to SA firms
- **Is that enough evidence for excessive prices case?**
- **Why did companies settle despite case was very difficult to prove?**



# Article 31 TRIPS

## ■ Other Use Without Authorization of the Right Holder

Provisions to be respected:

- (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. (...)
- (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use (...)

# Article 31 TRIPS (cont.)

- (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur

# South Africa: Recent Developments

- June 2017: investigation against three major pharma companies (Roche, Pfizer and Aspen)
- Excessive pricing of cancer medicines
- October 2017: Competition Commission drops the case against Aspen as revenues for concerned medicines were very low
- The investigation against Pfizer is still ongoing
- For Roche, in February 2022, the Competition Commission has referred the case to the Competition Tribunal for making the drug (Trastuzumab) not accessible to more than 10,000 patients

# South Africa: Recent Developments (cont.)

- November 2024: the Competition Tribunal granted Cancer Alliance the right to intervene as a participant in the referral proceedings
- Cancer Alliance will be able to file submissions concerning also “*the relationship between competition and patent law, and the appropriate approach to be adopted by the Tribunal when dealing with excessive pricing referrals in respect of patented products in general, and patented medicines in particular...*”

# Main IP-related conducts by the Pharma Industry that may raise competition concerns

- Product hopping
- *Evergreening*
- Divisional patents (in some jurisdictions) (Pfizer, Italy, 2011)
- Patent settlement agreements (pay-for-delay)
- De-registering pharmaceutical products (Reckitt Benckise, UK 2011)
- Disparagement practices (Sanofi/Plavix, France, 2013)
- Excessive prices (China, 2023, Northeast Pharm (haemodialysis) + Jinyao Pharma (cancer treatment))
- Sham litigation

# China: NDRC vs Qualcomm (2015)

- Qualcomm dominant in the license of SEPs for wireless communication standards and in the supply of baseband chips
- Found guilty of:
  - Excessive royalties on Chinese mobile device manufacturers (no list of patents included in license, unfair cross-licensing, excessive royalty rate applied to wholesale device price)
  - Bundling (SEPs and non-essential patents)
  - Unfair terms of sale (no-challenge clause)

# China: NDRC vs Qualcomm (cont.)

## ■ Remedies:

- not to bundle SEPs with non-essential patents
- not to impose no challenge clauses
- to refrain from imposing royalty-free grant-back clauses
- not to charge royalties for expired patents
  
- royalty rates on the basis of 65% instead of 100% of handsets wholesale price

# Case Study - Patent Pool

- The National Competition Authority has recently been approached by the complainant Odyssey, who is concerned about the development of the newest mobile communications network – 10G.
- Most of the research and development relating to this new network has been carried out by four of the world's major mobile telecommunications companies. They have formed a patent pool which includes the patents they each have relevant to the 10G network.
- The four companies account for more than **90% of the mobile communication business** in the Country.
- They claim that the patent pool is highly pro-competitive and will enable the 10G communications network to become the new standard. The RCC Competition Authority's preliminary investigation shows that the pool is an open pool and that any company who wants to can obtain a licence to the pooled patents.



- The complainant Odyssey has raised the following concerns:
  - The pool administrator only offers one licensing option – for all patents in the pool. One cannot pick and choose which patents they want – you have to take them the whole package.
  - Three of the companies in the pool each have a patent (in the pool) which effectively covers the same thing but each one relates to a slightly different 10G interface technology.

- As the complainant does not believe it needs a licence for all three of these interfaces, it decides to seek a licence outside the patent pool. It directly approached two of the patent owners. They were prepared to grant a licence outside of the pool arrangements but each of them requested a very high (and identical) fee. As a consequence, the single licence would be more expensive for the complainant than licensing through the patent pool.

# Questions for discussion

- *Discuss the concerns raised by the complainant.*
- *Can you identify possible competition concerns or is this only a legitimate protection of IP rights?*
- *What is the relevant market?*
- *What is the market position of the parties?*
- *What theory of harm can you conceive?*
- *What legal basis could you apply to this conduct?*
- *What further investigative steps would you take before opening a possible formal investigation?*

# Sham litigation in Brazil: the Eli Lilly case (2015)

- Eli Lilly held a patent for a production process concerning a breast cancer treatment drug (Gemzar)
- Between July 2007 and March 2008 launched a series of lawsuits with the National Health Surveillance Agency and the Regional Federal Court to prevent competitors to market similar drugs treating other types of cancer
- According to the Brazilian Competition Tribunal (CADE), Eli Lilly abused the regulatory/judicial system by knowingly providing false/misleading information in order to widen the scope of its patent claims

# Sham litigation in Brazil: the Eli Lilly case (2015)

- CADE imposed a fine of about 11m USD to Eli Lilly also for charging excessive prices during the (groundless) litigation process
- CADE found Eli Lilly guilty of sham litigation for filing lawsuits in several jurisdictions, providing false/misleading information with the only purpose of deterring competition
- **Can we consider in principle that petitioning the government or the court to protect IPRs may not be granted protection from antitrust enforcement?**
- **In case we do, what requirements should be met?**

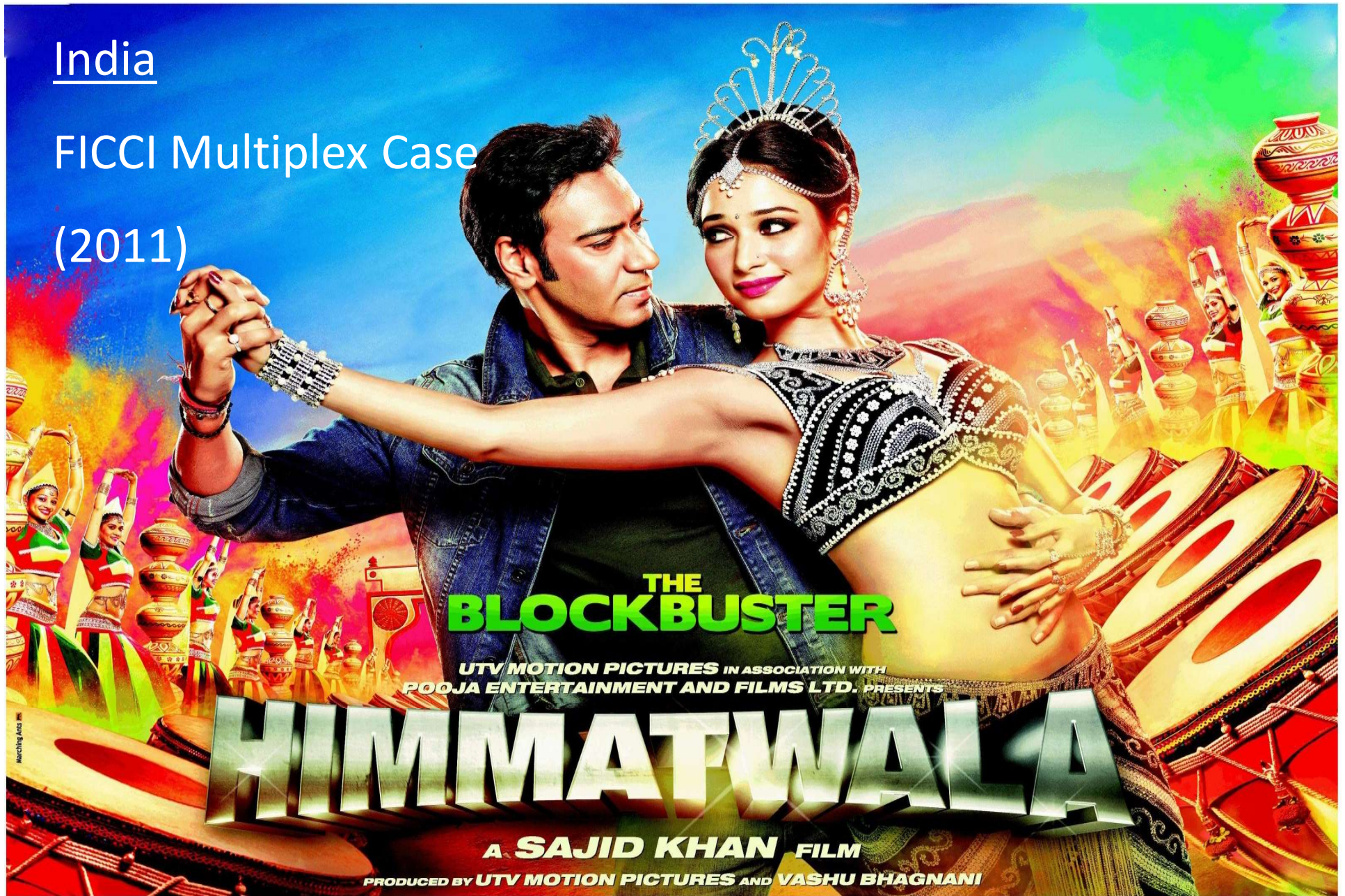
# Sham Litigation - Criteria

- Very few cases as standard of proof is very strict
  - No reasonable litigant could expect success
  - The action only serves the purpose to harass competitors and eventually to eliminate competition
- In the US: Noerr-Pennington doctrine
  - Antitrust immunity when petitioning for government action but denied when above criteria apply
- In the EU: ITT Promedia – Case dismissed by the Commission and the General Court

India

FICCI Multiplex Case

(2011)



Bollywood film  
producers and  
distributors to gain  
larger share of  
Multiplex revenues

Decided not to offer  
their movies to  
Multiplexes

Proposed much higher  
royalties for showing  
movies

Cease and desist order  
+ fine imposed on  
defendants



# Trademark “Squatting”

- Registering a trademark that protects a good, service, trading name of another company
- Often negotiating with squatters is cheaper and faster than going to Court
- A squatter may well operate within the law (e.g. foreign trademark is not considered to be well known)

# Trademark “Squatting” (cont.)

- A squatter may register a trademark in classes not covered by existing trademark (Chivas Regal tm in China for clothing)
- Squatters may pursue importers/distributors (by having their imports seized at the border) instead of brand owner directly

# Trademark “Squatting” – 2013 Antitrust investigation in Chile

- 2013 antitrust case in Chile
  - Compañía Cervecerías Unidas (CCU), largest brewery in Chile (80% market share)
  - Registered a large number of trademarks of its mostly foreign competitors
  - Squatted trademarks were enforced against competitors to deter entry
  - CCU eventually settled and withdrew 25 TMs

## Case study (monopolization, collusion, sham litigation)

- Complaint by car parts manufacturers for alleged monopolization
- Automakers accused of eliminating competition in the car spare parts market
- Complainants claim groundless legal actions against them (sham litigation)
- Carmakers never received requests to license the production of their design-protected spare parts

# Questions for discussion

- 1. Do you think that an IP right on car spare parts design should only concern the primary market (i.e. at the time of a car's first sale) or also the secondary market ? Why?
- 2. Do you think that consumers' interests in having cheaper car spare parts should prevail over the IP rights held by car manufacturers?
- 3. What elements should be taken into consideration by NCA in reaching a conclusion on the case?

# ANFAPE v. Car Manufacturers (Brazil, 2018) – Design-related case

- 2007 complaint by ANFAPE:
- Monopolization and lock-in effect in the spare parts aftermarket
- Abusive exercise of IP rights



# ANFAPE v. Car Manufacturers (Brazil, 2018) – Design-related case (cont.)

- In March 2018 CADE dismisses the case:
- Carmakers were simply exercising their IP rights
- Aftermarket condition should not be dealt with through antitrust investigation



# Digital Markets and Online Platforms

- Digital Markets

- Trading environment where goods/services are exchanged using digital technology (binary code used to record information to be shared electronically)

- Online Platforms

- Systems where users interact based on content, services, functionalities – two-sided markets: two distinct user groups that provide each other with network benefits

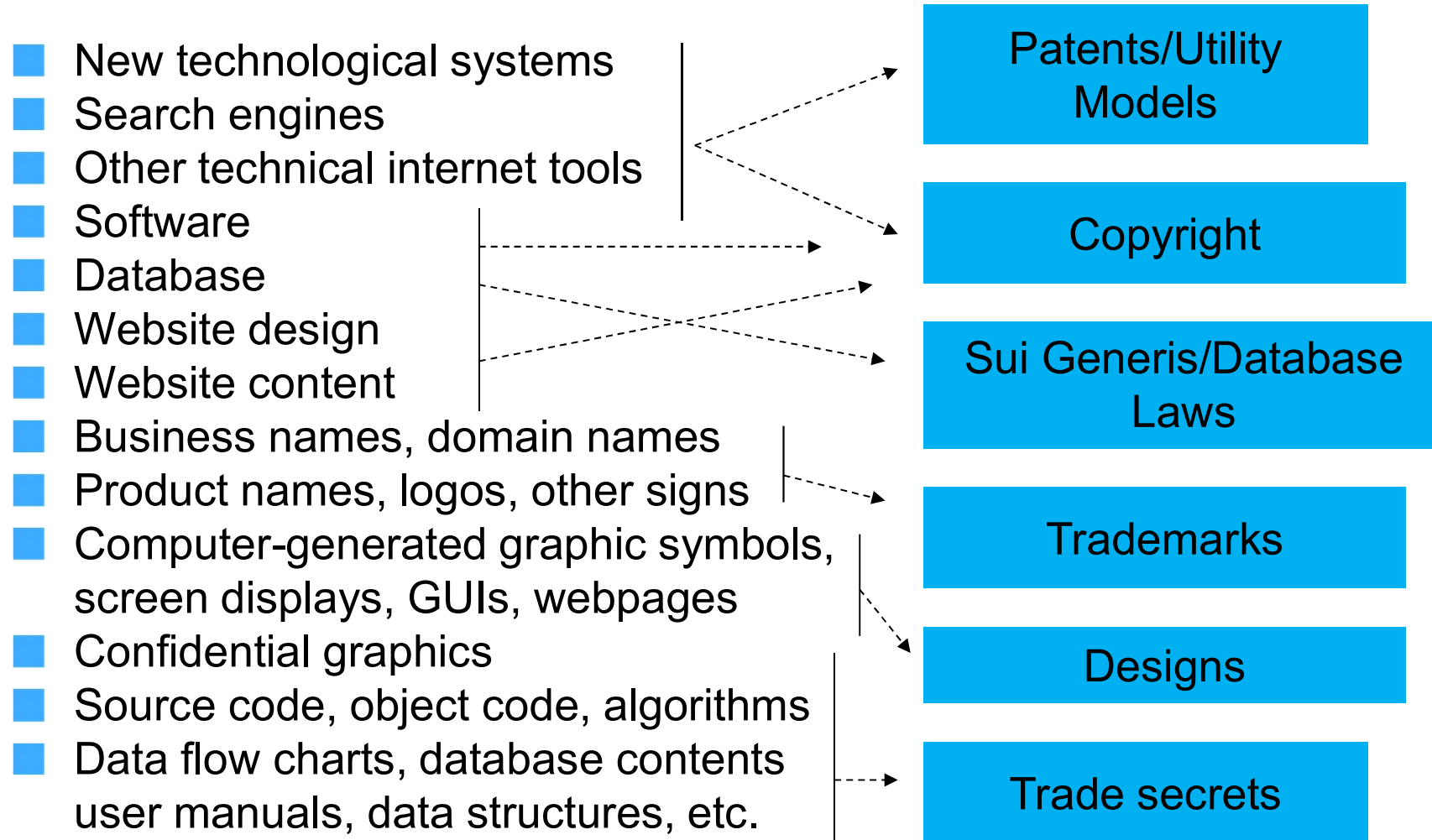
# Protecting web-based platforms

## What elements are protected?

- New technological systems
- Search engines
- Other technical internet tools
- Software
- Database
- Website design
- Website content
- Business names, domain names
- Product names, logos, other signs
- Computer-generated graphic symbols, screen displays, GUIs, webpages
- Confidential graphics
- Source code, object code, algorithms
- Data flow charts, database contents, user manuals, data structures, etc.

# Protecting your intangibles through IP

## Type of protection (different IP rights involved)





University of Alicante (2019-2020)

# Digital Platforms Competition Cases

- Google (**Indonesia** 2025 on mandatory use of Google Play Billing on Google Play Store; **India** 2022 on Android ecosystem and on Play Store policies; Italy 2023 on data portability);
- Apple (EC 2020 on self-preferencing and exclusivity i.e. only Apple Pay was allowed + apps distribution through Apple Store)
- Amazon (EC Commitment Decision 2022 on Buy Box and Prime Programs, no more use of non-public data from its marketplace sellers)
- Facebook (Germany 2019 on data pooling)

The list continues...

# IP and Competition Policy @WIPO

- The work we do @WIPO
  - IP, data competition and online platforms
    - Patent analytics and killer acquisitions
  - IP, environment and competition
  - IP, Regulation, Competition and Collective Management Organizations
  - Unfair competition toolkit

# What next?

Significant competition enforcement in developing and emerging economies

As IP becomes a crucial competitive asset => more IP-related competition cases

Stronger cooperation between IP agencies and Competition authorities

