On March 26, 2014, an international Seminar entitled “Intellectual Property and Antitrust: conflict or synergy?” has been hosted at the Italian Antitrust Authority headquarters in Rome.

The Seminar focused on these two interlinked aspects of the market – Intellectual Property and Antitrust – with the view to show that, within a broader legal and economic framework, they are not necessarily meant to conflict. The event was also an opportunity to present the second edition of the Master's Degree in “Competition and Innovation Law” organized by the University LUISS Guido Carli and the Università Europea di Roma.

The works were opened by Prof. Giovanni Pitruzzella, President of the Italian Antitrust Authority, followed by a welcoming speech by Prof. Gustavo Ghidini, from the LUISS Guido Carli, where the delicate intersection among intellectual property, antitrust and fundamental rights (i.e. health) revealed the request for a unifying principle for the detection of the prevailing interests.

The first session of the Seminar focused on trademarks, and featured speeches by Prof. Giovanni Cavani (University of Modena and Reggio Emilia), Dr. Anna Argentati (Antitrust Authority) and Dr. Gianni Capuzzi (LUISS Guido Carli). The analysis highlighted the important relationship between brand, market transparency and consumer protection, leading to the limits of the existing protections and on the conceivable ones.

Panelists tackled the problem of the existence and effectiveness of controls on collective, guarantee and certification trademarks, in order to avoid that such certifications resolve themselves in a mere promotional statement. The extended entitlement to their registration provided by the “new” 1992 Trademark Law was found to contribute to the flourishing of a series of registrations that were supposed to ensure quality in the most diverse sectors of production (the most famous example: the “bio” products). The “certification” underlying these signs has also been considered on one hand a powerful competitive advantage, and on the other hand a poor “communication”, unable in itself to inform consumers on what these “qualities” are, who certify them and what the standards are.

On this regard, Prof. Cavani identified critical issues both in the phases of ex-ante and ex-post controls. In Cavani opinion, in fact, none except the applicant, by way of “self-certification”, ensures that the qualitative characteristics underlying the collective trademark justify the claimed protection. It may therefore happen that a collective trademark

* European University of Rome.
guarantees quite generic and inconsistent merits. In this perspective, the first problem to be tackled is the vagueness of the guaranteed qualities, notably with regard to their control.

In this context, the significant contribution of the Italian Antitrust Authority in the agricultural and food sector, in which the quality policy represents a key competitive strategy, was highlighted by discussants. There is no contrast, then, between intellectual property and antitrust rules, when it comes to collective trademarks, especially when they have the function of ensuring a competitive leverage in the sector (through quality). The Antitrust Authority protects the pro-competitive role, sanctioning any use by which the collective trademark may become a vehicle for false information about the quality of the product or the service, therefore influencing purchasing decisions by consumers. The final objective of the Authority, in this matter, appears to facilitate competition on the merits.

In the following panel, a series of issues regarding copyright were nicely raised by Prof. Valeria Falce (Università Europea), flanked by two discussants, Dr. Antonio Buttà (Antitrust Authority) and Prof. Francesco Graziadei (LUISS).

Prof. Valeria Falce firstly underlined the “one-to-one correspondence” between copyright and antitrust regulations, emphasizing the antitrust positive shift from a merely “containing” role to a really “pro-active” function. As underlined by Prof. Falce, time has passed from the classical economic theory, according to which copyright is expression of a market failure, in the belief that the author’s exclusive rights represents an obstacle to a productive and efficient market. A modern idea of competition now prevails, leading to a common denominator governing both copyright and antitrust, as they are different tools that promote, using different techniques, similar purposes.

Of course, this approach has been authoritatively confirmed by the recent rulings of the Italian Constitutional Court and by the International and Community trends in connection to “technology transfer agreements”, recognizing that both intellectual property and competition laws pursue similar objectives, namely the enhancement of consumer welfare and the promotion of a correct allocation of resources. The contribution of both regulations is therefore useful to promote innovation and to ensure its competitive exploitation.

Moving on to the effectiveness front, Prof. Falce made it clear that the antitrust enforcement envisages two functions, one anti-restrictive and the other pro-active. Whereas the first is well explored, the second is worth of further analysis in connection to its capability to create and maintain an open and efficient distribution market incentivizing innovation in copyright-related markets.

Looking closer at copyright in the perspective of convergence with competition policies, two main novelties were highlighted: i) the (almost) liberalization of collecting societies, following the 2004 Antitrust Authority report and leading to the opening of the collective management system in the neighbouring rights field; ii) the mainstream interpretation given to the “Levi law” (n. 128 of 2011) on fixed prices of books so as to reconcile the Italian system with the
acquis communitaire. On both of them Prof. Falce commented, identifying benefits, limits and proposals to enhance a more consistent and sound legal environment.

The last session of the conference focused on patents, with the report of Prof. Emanuela Arezzo (University of Teramo) and the contributions of the two discussants Dr. Luca Arnaudo (Antitrust Authority) and Prof. Andrea Stazi (Università Europea di Roma).

The starting point was the above-mentioned teleological theory of convergence of intellectual property and competition law. Reviewing the new trends on the abuse of patents and in the practices of strategic patenting, such as clusters or patent thickets, the ever-greening of the patent and the divisional patent, the negative effects on competition were tackled. It was shared by the participants that these effects are especially amplified by the fact that patent protection is advanced at the time of the publicity of the application and by the fainting of the burden to implement the patent. The need for a systematic approach to legal issues was also high-lighted, in order not to compartmentalize the classification of each case, that, on the contrary, should be examined in the light of fundamental rights and on the basis of hierarchy and proportionality criteria.

In this scenario of intersection of fundamental rights, which are not only the freedom of economic initiative protected by antitrust law and protection of intellectual property rights, regulation and law enforcement should be accordion-like, capable to expand and compress case-by-case, in order to let the main interest prevail. Prevalence should not mean exclusivity though, because otherwise it would be an abuse of right pursuant to Article 54 of the EU Charter of Fundamental Rights. The underlying principle of this framework is subsidiarity, between regulations but also between institutions.

The closing remarks were delivered by Prof. Steven Anderman (University of Essex), who gave the audience important insights on the current “accommodation” of EU competition law with intellectual property law. The basics of the EU approach were summed up recalling that the EU Court of Justice has long established that the competition rules prevail when the owners of intellectual property exercise their rights in ways that contravene Articles 101 and 102 TFEU or when a merger involving intellectual property rights threatens to substantially impede competition in a market. To this regard, Prof. Anderman recalled that under the logic of the competition rules, some conduct by patentees can amount to anticompetitive misuse of a patent. For example, if a patentee misleads the patent authorities about the timing of its period of exclusivity and the patentee is dominant in a relevant market that could be a violation of the competition rules.

At this point, three important features of the logic of the competition rules applying to intellectual property cases were outlined. First, it was said that, even though the legal monopoly conferred by a patent or industrial copyright is no longer viewed automatically as a real monopoly, a firm owning an intellectual property protected product can find itself being assessed as being in a dominant position because of the narrow market determinations.
of the Commission. Secondly, it was reminded that, in assessing abusive conduct, the “accommodations” in the competition rules with the incentives of intellectual property rights have been modified in the interests of protecting effective competition and technological development. Thirdly, it was also reminded that the normative or rule based approach of the EU when assessing exclusionary conduct makes the competition rules apply strictly, more strictly than US antitrust law in its application to intellectual property rights.

Finally Prof. Anderman concluded highlighting, as previously emerged during the conference, that competition rules, even with their stricter approach, have synergies with the intellectual properties laws. However, he warned that to understand these synergies, it is necessary to see that they occur not so much in conjunction with the incentive effect of the intellectual property laws but rather with the provisions in the intellectual property laws which attempt to balance protection for “first inventor” inventions with “follow on” innovation. The goal of these rules is therefore to strike a balance in favour of plural sources of innovation in an industry as opposed to individual sources of innovation where the protected intellectual property owner attempts to use its market power to block other sources of innovation.