

Dr. Fatih Buğra ERDEM

**THE SUPPRESSION OF INNOVATION:
TESTING THE OPEN NATURE
OF ARTICLE 102 TFEU**

Table of Contents

Foreword	V
Table of Contents	VII
List of Abbreviations	XIII

Chapter 1 Introduction

1.1. The Rationale of the Research	3
1.2. The Scope of the Research.....	4
1.3. Research Questions	11
1.4. Literature Review.....	12
1.5. Contribution to the Knowledge.....	19
1.6. Methodology	20
1.1.1. Doctrinal research methodology	21
1.2.2. Economic analysis of law.....	22
1.3.3. Comparative research methodology.....	25
1.7. Structure of the Book	28

Chapter 2
Theoretical Framework Of Innovation
Suppression

2.1. Introduction	31
2.2. Definition of innovation.....	32
2.2.1. Innovation, product design and law.....	34
2.2.2. The relationship between innovation and competitiveness....	38
2.2.2.1. Promoting innovation	40
2.2.2.2. Essential facilities doctrine	44
2.2.2.3. Essential facilities doctrine as a check and balance mechanism between the IP and competition laws	47
2.3. The concept of the new economy	50
2.4. Characteristics of the new economy.....	53
2.4.1. Creative destruction	55
2.4.2. Disruptive innovation.....	60
2.4.2.1. Potential problems regarding disruptive innovation.....	62
2.4.2.2. Is disruptive innovation absolute must for businesses to consider?.....	65
2.5. The cost of innovation: the trade-off between price, quality and innovation	65
2.5.1. The trade-off between innovation and the environment	68
2.5.2. The social cost of innovation	71
2.5.3. The environmental cost of innovation	72
2.6. Conclusion	73

Chapter 3
Suppression of Innovation in the Context of
EU Competition Law

3.1. Introduction	77
-------------------------	----

3.2. Analysis of innovation considerations in the framework of EU competition law	78
3.2.1. Past, present and future of EU competition law: Aims, reforms and practical considerations	78
3.2.1.1. Background of EU competition law: Fundamental theories from the US Antitrust Law.....	78
3.2.1.2. The Sui Generis Form of EU Competition Law.....	81
3.2.1.3. Innovation and EU competition law	84
3.2.2. Actual and potential problems concerning the impediment of innovation in terms of EU competition law.....	90
3.2.2.1. The Densification of Innovation-related Considerations by the EC.....	93
3.2.2.2. The Current Perspective of the European Commission on Innovation	96
3.2.2.2.1. The EC's approach to innovation in antitrust matters.....	97
3.2.2.2.2. Innovation considerations in merger analyses....	100
3.3. Theoretical analysis of innovation suppression in terms of competition and intellectual property laws	103
3.3.1. Suppression of innovation as an anti-competitive practice....	104
3.3.2. Relevant patent theories on innovation suppression.....	106
3.3.3. How and why technology is suppressed?.....	108
3.3.3.1. The lawfulness of innovation suppression practices	111
3.3.3.2. What if technologies remain unpatented?	113
3.4. Conclusion	114

Chapter 4

Frequently Encountered Patents Related Instances of the Suppression of Innovation in the Context of EU Competition Law

4.1. Introduction	117
-------------------------	-----

4.2. The non-use of patent rights	117
4.2.1. The theoretical basis of granting IP rights	118
4.2.2. The non-use of patents under the utilitarian theory.....	119
4.2.3. Common reasons not to practice patent rights	120
4.2.4. Patent Trolls: Is it just an American phenomenon?	122
4.2.5. Does EU suffer from patent trolls as much as the US?	124
4.2.6. The procedure and remedies offered by the EU patent system.....	126
4.2.7. Evaluation of the non-use of patents as an abuse of dominance.....	129
4.2.8. Conclusion.....	131
4.3. Pay-for-delay agreements.....	132
4.4. Standardisation.....	136
4.4.1. Standardisation and its pro-innovation features	140
4.4.2. Does standardisations provide an adequate remedy for the suppression of innovation under Article 102 TFEU?	143
4.5. Spare part designs protection: Suppression of innovation by locking-in consumers and knocking-out competitors	147
4.5.1. Historical development of spare part designs protection	148
4.5.2. Market analysis for spare parts	150
4.5.3. The Uncertainties Regarding the Application of the Repair Clause	151
4.5.4. Proposed Solution in the context of Article 102 TFEU	152
4.5.5. Conclusion.....	154
4.6. Evergreening patents as blockers of innovation.....	155
4.6.1. Introduction	156
4.6.1.1. The legal context of the evergreening issue	157
4.6.1.2. Theoretical Examination of Evergreening Patents.....	160
4.6.2. An application of TFEU provisions in evergreening issues...	163
4.6.2.1. Case law regarding evergreening issues.....	165
4.6.2.2. Evergreening in the context of Article 102 TFEU	167

4.6.3. Conclusion.....	170
4.7. Overall Conclusion of the Chapter	171

Chapter 5
Suppression of Innovation via Predatory
Innovation and Exclusionary Product Design:
The Case of Planned Obsolescence

5.1. Introduction	175
5.2. The concept of planned obsolescence	177
5.2.1. The terminological classification for the planned obsolescence	178
5.2.1.1. Built-in obsolescence.....	178
5.2.1.2. Post-planned obsolescence	180
5.2.2. Consumer perceptions on planned obsolescence	182
5.2.3. The emergence of planned obsolescence in the literature....	185
5.2.4. Which fields are currently covering planned obsolescence? .	187
5.2.5. Different Aspects of Planned Obsolescence.....	190
5.2.5.1. Psychological and Sociological Aspects of Planned Obsolescence	190
5.2.5.2. Environmental Aspect of Planned Obsolescence	192
5.2.5.3. Consumerism and Planned Obsolescence	196
5.2.6. An endeavour to set a legal frame for planned obsolescence .	197
5.3. Does planned obsolescence underrated or unnoticed issue?	199
5.4. What steps have been taken concerning planned obsolescence in the EU?.....	204
5.4.1. The pioneer definition and application against planned obsolescence in France	207
5.4.2. Milestone Cases of Planned Obsolescence in national laws..	209
5.4.2.1. The Apple Case in France.....	210
5.4.2.2. The Apple and Samsung Cases in Italy	211

5.4.3. The contractual dimension of planned obsolescence.....	212
5.4.4. Discussion on planned obsolescence as an unfair commercial practice.....	214
5.4.5. The applicability of competition law in planned obsolescence	218
5.5. How much freedom do manufacturers have in the product design?.....	221
5.6. Planned obsolescence as an exclusionary product design practice	226
5.7. A legal treatment of planned obsolescence in the context of the EU competition law	229
5.7.1. Average consumer principle and information asymmetry.....	229
5.7.1.1. Is planned obsolescence a form of deception?.....	229
5.7.1.2. Is it possible to benefit from the Lemon problem to conceptualise planned obsolescence?	230
5.7.2. How does planned obsolescence suppress innovation?.....	232
5.7.3. Testing Article 101 TFEU in the context of planned obsolescence	238
5.7.4. Testing Article 102 TFEU in the context of planned obsolescence	238
5.8. Conclusion.....	244

Chapter 6 **Final Conclusion**

6.1. Summary of the Research	247
6.2. Contribution and Recommendations of the Research.....	252
6.3. Areas of Future Research	257
Bibliography.....	261