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INNOVATIVE TO ABUSE?

*Exploring the Interactions Between
Intellectual Property and Competition Law*

A Colloquium held at McGill University's Faculty of Law,
Montreal, Canada, on October 29th, 2008

In Collaboration with McMillan LLP

and the European Union Center for Excellence

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1. INTRODUCTION & BACKGROUND

On October 29th, 2009, McGill’s Centre for Intellectual Property Policy (CIPP) and McMillan LLP, under the leadership of Professor Pierre-Emmanuel Moysse and Patrick Goudreau, hosted in Montreal a Competition and Innovation colloquium on the theme: “Innovative to Abuse? Exploring the Interactions between Intellectual Property and Competition Law”.

The half-day colloquium inaugurated an annually-based conference cycle on competition law, innovation and intellectual property (IP). This initiative, launched in April 2008, is part of the CIPP’s “Intellectual Property, Innovation and Trade” research axis. The conference cycle aims to support Canadian research to inspire a deeper reflection on the contributions, functions and objectives of competition law vis-à-vis innovation.

The October 29th “Innovative to Abuse?” colloquium brought together over eighty faculty members, lawyers, policy-makers, economists, and students from Canada, the United States and Europe, to explore interactions between innovation and competition law in today’s rapidly-changing markets. As Professor Wendy Adams, Director of the CIPP, noted in her introduction to the colloquium, the event represented an important opportunity to bridge the gap between scholars and practitioners, as well as to foster dialogue between two often self-contained areas of the law.

The colloquium aimed to explore the intersection between abuses of IP rights (IPRs) and competition policy by adopting a comparative approach with European Law. Professor Armand De Mestral, Director of the European Union Centre of Excellence,

noted in his introduction the particular relevance of the relationship between competition and intellectual property to the European model of legal harmonization.

Colloquium discussion focused, in particular, on the potential for abuse of IP rights in wake of a recent decision of the European Commission in the *Microsoft*¹ case. In an economy where the capacity to innovate is conceived of as the driving force of today's economy, IPRs have generally been presented as being instrumental to such progress. In the last decade, however, critics started to see in IPRs a potential for abuse, causing prejudice to fair competition and consumer welfare. For example, Professor Moysé, principal investigator for the "Competition and Innovation" initiative, noted in his introduction that IP laws are today hosting what he calls "sub-legal creatures". These "creatures" (such as software, databases, and digital locks) are often protected by IP legislation without sound justification.

Microsoft reflects this growing concern that dominant players are using IPRs strategically to erect entry barriers and "lock out" competitors in a way that leaves "little scope for innovation."² According to the European Commission, an order "require[ing] Microsoft to refrain from fully enforcing any of its intellectual property rights ... would be justified by the need to put an end to the abuse."³

Professor Moysé emphasized the need for creative solutions to this problematic. He highlighted a recent initiative in France entitled the "Law on Innovation"--legislation that aims to facilitate technology transfers from the public to the private sector. In light of the involvement of a variety of actors in the debate, it may be necessary to re-evaluate the respective roles of IP and competition law. For example, "competition law must perhaps

¹ *Commission v. Microsoft*, COMP/C-3/37.792 (Commission Decision), 24 March 2004.

² *Ibid.* at 700.

³ *Ibid.* at 1004.

reinvent itself to move from downstream market to upstream market and ensure that the trade of rights – seen as property, seen as products – are also regulated.”

The Colloquium included six panellists: Canadian, American and European scholars, lawyers and policy-makers. After a brief introduction by the organizers and sponsors, each panellist gave a 20-minute presentation. Presentations were followed by a question and answer period. This report outlines the content of each panellist’s presentation. The colloquium agenda can be found in Appendix A, and biographical notes on each of the panellists can be found in Appendix B.

2. EUROPEAN PERSPECTIVE

Professor Larouche, Vice-Director of the Tilburg Law and Economics Centre of Tilburg University, Netherlands, situated the afternoon’s debates by drawing from the European Commission’s decision in *Microsoft*.⁴ Professor Larouche argued that it is necessary to place innovation in the centre of the discussion, in order to solve tensions between intellectual property law and competition law.

For Professor Larouche, the *Microsoft* decision ultimately concerned a debate about control over innovation. *Microsoft* reveals that the European Commission sees this control as belonging in the hands of consumers.

Professor Larouche further noted that it is clear from *Microsoft* that in the EU, competition law trumps intellectual property. He highlighted some lessons learned from the decision for both IP and competition law:

⁴ *Microsoft*, *supra* note 1.

- *Microsoft* highlights deficiencies in IP law: IP protection is going beyond what is socially desirable for innovation policy. As a result, we need alternative, more effective means to address market failures.
- The outcome of competition cases depends on underlying assumptions about innovation policy, which should be made more explicit.
- *Microsoft* opens the door to the idea that there could be different innovation models in the US and the EU, with the US favouring a “breakthrough innovation” model, and the EU favouring an “incremental innovation” model.
- IP law needs to evolve beyond the “garage inventor needing protection” in order to take modern realities into account.
- Competition law needs to establish more clearly what its long-term, dynamic efficiency objectives are, while being wary of overly-simplistic models.

In Professor Larouche’s opinion, the *Microsoft* decision reveals a deeper challenge for the law in general. Innovation is an inherently uncertain phenomenon, and innovation policy requires managing that uncertainty. Since the law usually aims to improve certainty, this is likely to prove challenging: innovation policy requires that the law to purposefully create uncertainty to foster a climate conducive to innovation. *Microsoft* demonstrates, however, that the state is firmly committed to deciding how this competition and innovation will evolve.

3. AMERICAN PERSPECTIVE

3.1 Commissioner Thomas Rosch, US Federal Trade Commission

Commissioner Rosch of the US Federal Trade Commission took issue with Professor Larouche’s critique of the European Commission’s *Microsoft* decision.

Commissioner Rosch argued that *Microsoft* is a unique decision due in large part to the particular facts surrounding the case. He highlighted, for example, Microsoft’s

position in the global economy, as well as the overwhelming evidence indicating Microsoft's intent to monopolize. Commissioner Rosch felt it was appropriate for the European Commission to have focused heavily on the facts in its decision. He noted first that a reliance on facts is regular practice in the United States, as this helps insulate a first instance decision from review on appeal. Secondly, Commissioner Rosch observed that any decision under article 82 of the EC Treaty⁵ or section 2 of the US *Sherman Act*⁶ is "bound to be fact specific because both ultimately depend on effects."

Commissioner Rosch did not believe that "in either jurisdiction those [Microsoft] cases were susceptible to a one-size-fits-all sweeping rule of legality or illegality." Commissioner Rosch's comments turned to the Microsoft's alleged refusal to supply interoperability information as an example. Commissioner Rosch agreed with Professor Larouche that innovation policy is at the core of the debate over the intersection between IP and competition law in both the United States and in Europe. This was clear in the United States Supreme Court's decision in *Trinko*⁷. However, Commissioner Rosch argued that any debate over innovation policy and the appropriate balance between competition and IP is more appropriately conducted and adjudicated in the legislatures, rather than before the courts. He made the point that the two forms of innovation identified by Professor Larouche – incremental and breakthrough innovation – are not necessarily binary but may interact in surprising ways. Because of these larger economic questions, it was appropriate for the European Commission to decide the interoperability question on a narrow ground. The Commission based its decision on the "exceptional

⁵ EC, *Treaty establishing the European Community (Nice consolidated version)*, [2003] O.J. C 325, 24/12/2002 at 65.

⁶ *Sherman Antitrust Act*, 15 U.S.C. §§ 1-7 (1890), s.2.

⁷ *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

circumstances test” for establishing liability in cases of refusals to license, laid down in *IMS*⁸. Commissioner Rosch approved of the practice of focusing on a narrow legal issue consistent with prior precedent, rather than making sweeping holdings. According to Commissioner Rosch, this is particularly necessary where a case is vulnerable to reversal on appeal.

The full text of Commissioner Rosch’s speech is available on line at: <http://www.ftc.gov/speeches/rosch/081029roschrviewsonneuro.pdf>

3.2 Michael Antalics, O’Melveny and Myers LLP

Michael Antalics, of O’Melveny and Myers LLP, expanded on the American experience of the IP-competition law interface with reference to two concrete scenarios drawn from his personal experience working at the Federal Trade Commission and in the private sector. Mr. Antalics argued that the cases of standard-setting organizations and generic pharmaceuticals are two areas where increased antitrust scrutiny of IP rights abuses is warranted.

Antitrust concerns in standard-setting organizations date to the early 1990s. Mr. Antalics used an example from this period, in which Dell failed to disclose its patents to a standard-setting organization, Vesa. Dell disclosed the patents after the standard was set and consumers were already “locked in” to the technology. Mr. Antalics identified the situation as an antitrust issue, and found the doctrine of equitable estoppel to be potentially applicable to the situation. Had Dell disclosed its patents early on, it was open to Vesa to adopt a different standard. In Mr. Antalics’ example, Dell settled out of court.

⁸ Judgment of 29 April 2004 in ECJ, Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co.* KG [2004] ECR I-5039.

The Federal Trade Commission has since addressed a number of similar situations. Mr. Antalics took issue, however, with the recent decision in *In re Rambus*⁹, in which the DC Circuit Court of Appeals overturned the Federal Trade Commission’s finding of an antitrust violation. Because it was unclear whether the standard-setting organization would have picked Rambus’ technology despite the existence of its patents, the Court of Appeals refused to find an antitrust violation. According to the court, this was a complaint about price regulation rather than monopolization. Mr. Antalics disagreed with this finding, noting that the court’s distinction between “free use of an alternative technology” and “monopoly” is overly simplistic. Rather, there exists a spectrum of options, including the possibility of negotiating better royalties for the patented technology. Mr. Antalics predicted that the Federal Trade Commission would continue bringing similar cases, in order to ultimately resolve this area of the law at the level of the US Supreme Court. Despite the existence of standard-setting antitrust concerns since the early 1990, the question remains unresolved.

Mr. Antalics also spoke about generic pharmaceuticals under the “Hatch Waxman Act”¹⁰ as a second line of cases involving unresolved IP and competition law issues.

4. CANADIAN PERSPECTIVE

4.1. Adam Fanaki, Special Counsel to the Commissioner of Competition

Adam Fanaki, Special Counsel to the Commissioner of Competition, began his presentation by explaining the Competition Bureau’s position on the IP-competition

⁹ *Rambus Inc. v. Federal Trade Commission*, (2008] US Court of Appeals for the District of Columbia Circuit No. 07-108

¹⁰ *The Drug Price Competition and Patent Term Restoration Act* [Public Law 98-417] (1984).

interface. The Bureau sees competition policy and IP law not as inherently contradictory, but rather as serving complementary goals. This vision of complementarity is reflected in the Bureau's IP Enforcement Guidelines (IPEGs).¹¹ The IPEGs distinguish between:

- the “mere exercise” of an IP right, which is insulated from the application of the *Competition Act*, except under limited circumstances under section 32,¹² and
- “something more than the mere exercise” of an IP right, which could expose conduct that substantially or unduly lessens or prevents competition in a market to sanctions under the *Competition Act*.

Mr. Fanaki highlighted *Eli Lilly and Co. v. Apotex Inc.*¹³ as an example of the role of the *Competition Act* and Competition Bureau in dealing with intellectual property issues.

The Competition Bureau aims to strike the appropriate balance between creating incentives for continual innovation and encouraging vigorous competition in the marketplace. In particular, Mr. Fanaki reasoned that:

- Consistency in approaches is needed across jurisdictions, since differing or conflicting standards between jurisdictions have the potential to chill pro-competitive innovative activity;
- Competition law should be invoked only to protect incentives for innovation; and,
- It remains to be determined whether preserving incentives for innovation would constitute an alternative and pro-competitive rationale for the purpose of the abuse of dominant position, under the test established in *Canada Pipe*¹⁴.

Fanaki noted that, for the Bureau, avoiding chilling innovative activity is particularly pressing since, according to Competition Policy Review Panel, Canada “rank[s] poorly across almost all aspects of innovation”.¹⁵

¹¹ Competition Bureau, *Intellectual Property Enforcement Guidelines* (Hull, QC: Industry Canada, 2000), Online: Competition Bureau <<http://strategis.ic.gc.ca/pics/ct/ipege.pdf>>.

¹² *Competition Act*, R.S.C., 1985, c. C-34, s.32.

¹³ *Eli Lilly and Co. v. Apotex Inc.*, 2004 FCA 232, (2004), [2005] 1 F.C.R. D-38.

¹⁴ *Canada (Commissioner of Competition) v. Canada Pipe Co.* (F.C.A.), 2006 FCA 233.

4.2 Martin Low, McMillan LLP

Martin Low, of McMillan LLP, elaborated on Mr. Fanaki's presentation, offering a practitioner's perspective on recent developments in Canadian competition law and the Competition Bureau's policies.

Mr. Low began by contrasting different approaches to the tension between Competition and Intellectual Property laws, in the United States, Europe and Canada. The United States' approach, in which IP rights are effectively insulated from the scope of antitrust law, was first announced in *E. Bennet & Sons v. National Harrow Co* in 1902.¹⁶ Since then, however, US Courts have developed a more calibrated balancing act to manage the interaction between IP rights and the public interest in competitive markets and consumer welfare, as demonstrated in cases like *Microsoft* and *Rambus*¹⁷. In contrast, Europe has taken an opposite approach, in which competition law has generally trumped IP, for example in cases like *Magill*,¹⁸ *IMS*¹⁹ and *Microsoft*.²⁰ In Canada, however, there has been little recourse by public agencies to competition law to smooth out tensions between the interests of IP holders and others—whether competitors, consumers or the competitive process. Low noted though, that outside the public enforcement context, the Courts generally recognize that measures to extend IPRs are not sheltered from

¹⁵ Competition Policy Review Panel, *Compete to Win: Final Report June 2008*, online: Competition Policy Review Panel < http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html>.

¹⁶ *E. Bennet & Sons v. National Harrow Co.*, 186 U.S. 70 (1902).

¹⁷ *Rambus*, *supra* note 9.

¹⁸ EC, *Commission Decision Magill TV Guide*, [1989] OJ L78/43.

¹⁹ *IMS*, *supra* note 8.

²⁰ *Microsoft*, *supra* note 1.

competitive forces--for example in *Kraft Canada v. Euro-Excellence*²¹ and *Kirkbi v. Ritvik Holdings*.²²

Mr. Low reiterated the formal position of the Competition Bureau on the IP-Competition interface, as explained by Adam Fanaki, but noted that, in practice, the situation is altogether different. There are few situations in which the general provisions of the *Competition Act* could be used to check IP abuses. The use of the abuse of dominance provision, section 79, was effectively ruled out in *DIR v. Tele-Direct*,²³ in which the court held that “something more than the mere exercise of statutory rights, even if exclusory in effect, must be present before there can be a finding of misuse of a trade-mark.” Similarly, it was held in *DIR v. Warner*²⁴ that the term ‘product’ in the refusal to deal provision, section 75, “cannot be read to include... copyright licenses...” Therefore, the Competition Act does not give the tribunal jurisdiction to make the order sought.

Low then went on to examine section 32, which provides for a “Special Remedy” under the *Competition Act* where the use of an IP rights has unduly prevented or lessened competition. He noted that no proceedings have ever been taken under this provision, and that it is institutionally outmoded:

- Carriage is with the Attorney General, not the Commissioner of Competition;
- Jurisdiction is with the Federal Court, not the Competition Tribunal.
- Focus is on intent, not effect, and only operates *post facto*;
- It uses old *Criminal Code* language and procedure.

²¹ *Kraft Canada v. Euro-Excellence*, 2007] 3 S.C.R. 20.

²² *Kirkbi A.G. v. Ritvik Holdings Inc.*, 2005] 3 S.C.R. 302.

²³ *DIR v. Tele-Direct (Publications) Inc. and Tele-Direct (Services)* [1997] 73 C.P.R. (3d) 1

²⁴ *DIR v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321.

According to Mr. Low, authorized generics, patent litigation settlements, patent ambush, as well as tying, bundling or extension of IP rights, all represent areas of hypothetical concern in Canada for anti-competitive abuses of IP rights. Despite the various opportunities for creative IP rights-holders to abuse their rights, there has been no recourse to the *Competition Act* to address IP concerns since the IPEGs were issued in 2000. Furthermore, section 32's language, institutional focal points and evidentiary burdens make it an unworkable provision for addressing IP abuses. According to Mr. Low, the mere existence of section 32 impedes reliance on other provisions of the *Competition Act*, as was demonstrated in *Warner*.²⁵ As a result, a broad review of section 32 should be undertaken, in order to:

- Confer authority on the Competition Bureau and Tribunal;
- Identify the circumstances that justify intervention;
- Clarify the intersection between section 32 and other civil remedies in the Competition Act and IP statutes;
- Establish a transparent and realistic evidentiary test to be met.

Such a review would benefit innovators as well as consumers.

5. INNOVATION POLICY PERSPECTIVE

Professor Richard Gold of McGill's Faculty of Law wrapped up the afternoon by offering a broad perspective on innovation policy. Professor Gold argued that the current approach to innovation is outdated, leaving substantial gaps between IP and competition policy, and causing an overly aggressive use of IP in certain fields.

²⁵ *Warner*, *supra* note 24.

According to Professor Gold, innovation is increasingly recognized as a complex, circular and iterative process. Innovation depends largely on networks of public and private sector actors. The notion of a single, identifiable market for investigation is increasingly being replaced by the recognition that intellectual assets protected by IP may have simultaneous effects in the innovation, product and knowledge markets. This complicates an assessment of market power, since market power may not exist in a primary market, but may in a secondary market. IP can thus block innovation directly, even in the absence of clear network effects. Furthermore, Professor Gold pointed out that changes in the innovation environment over the past three decades have diversified the types of participants in innovation. Partnerships now account for two thirds of innovative activity.

Due to the importance of partnerships, traditional models of innovation—which were based on the aggressive use of IP to block out competitors—are breaking down. Increasing recognition of the role of partnerships in innovation should be reflected in IP and competition policy. Non-exclusive licensing, knowledge sharing, donations to the public domain, and other collaborative arrangements should be encouraged. Pooling and other partnership methods should also be viewed as pro-competitive. In Gold’s opinion, the current reluctance to review *per se* the exercise of exclusive IP rights is misplaced.

Professor Gold then discussed the role of IP law more generally, noting a lack of evidence to support the conclusion that IP actually encourages investment in research. For Professor Gold, IP plays a larger role in bringing ideas to the market. Therefore, IP offices trained in technical aspects of invention are ill-placed to assess the impact of the IPR on innovation and access. While IP offices should be more careful about awarding

rights, they cannot be expected to assess the use of those rights. On the other hand, competition offices, which have expertise in the effects of market access on the movement of intellectual assets, are better suited to monitoring the use of IP rights, in order to ensure that the market operates fairly and transparently, without imposing unnecessary blockages.

Professor Gold concluded by noting the important role of public policy in ensuring that IPRs are exercised to increase knowledge flow and access, both in the public and private sectors. He added that IP and competition policy continue to be artificially divided. Policy-makers have given both patent and competition offices the instruments needed to ensure the flow of knowledge, and those offices need to exercise those powers.

6. CONCLUSION

The divergences in panellists' views and the differences in policy approaches adopted in the United States, Canada and Europe, demonstrate a lack of consensus over the appropriate balance between intellectual property rights and competition policy. One point of consensus in the afternoon's discussions, however, was the need to move innovation to the centre of the IP-competition debate.

It was clear from panellists' interventions that Canadian competition policy, in particular, must be adapted to the realities of today's innovation economy. Section 32 of the *Competition Act* was singled out as an area in need of reform, in order to give Canadian competition policy the tools to effectively regulate uses—and abuses—of intellectual assets.

Future research in this area should focus on specific problems for which a closer examination of the relationship between innovation and competition is needed. Panellists highlighted authorized generic pharmaceuticals and “patent ambush” in standard-setting organizations as two areas of the law requiring further examination and clarification.

The shift to next-generation networks (NGN) is another phenomenon that poses challenges for competition policy in Canada, the US and Europe, and which could be the focus of future research and discussion. NGN, by separating transport from services, offers significant possibilities for market entry, for the development of new business models and for the creation of diversified, innovative services. However, this potential depends largely on an appropriate regulatory framework for an open, competitive environment. NGN raises competition issues such as essential facilities and technology-neutral licensing schemes – both issues touched upon at the October 29th colloquium. The controversial 2008 decision of the Canadian Radio-Television and Telecommunications Commission (CRTC) regarding network management of Voice-over Internet Protocol (VoIP)²⁶ revealed, for example, the urgent need for collaboration between academics, practitioners and industry on this issue. Competition policy will affect the manner in which NGN is implemented, and in particular whether opportunities for increased participation are fostered in this sector.

As the colloquium discussion and the above examples demonstrate, IP, innovation, and competition policy are not self-contained fields. On the contrary, these disciplines overlap and so require increased cooperation for the efficient functioning of today’s knowledge economy. The October 29th colloquium, as the inaugural conference

²⁶ *Canadian Association of Internet Providers v. Bell Canada*, Telecom Decision CRTC 2008-108, online: CRTC < http://www.crtc.gc.ca/partvii/eng/2008/8622/c51_200805153.htm>.

in the CIPP's "Competition and Innovation" research initiative, is only a first step in an in-depth examination of these complex issues.