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Enforcement Guidelines

Intellectual Property

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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PREFACE

The Competition Bureau (the “Bureau”), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the “Act”), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the laws under its jurisdiction. One of the ways it does so is by issuing enforcement guidelines, which describe the Bureau’s general approach to enforcing specific provisions in the Act.

Intellectual property (“IP”) and intellectual property rights are increasingly important in today’s knowledge-based economy. In such an environment, there has been interest in how the Bureau will deal with competition issues involving IP. Accordingly, the Bureau has made it a priority to provide increased clarity on this subject.

These Guidelines articulate how the Bureau approaches the interface between competition policy and IP rights. They describe how the Bureau will determine whether conduct involving IP raises an issue under the Act. They also explain how the Bureau distinguishes between those circumstances that warrant a referral to the Attorney General under section 32 of the Act, and those that will be examined under the general provisions.

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of each case. Final determination of the law is the responsibility of the Competition Tribunal (the “Tribunal’) and the courts.

The Bureau may revisit certain aspects of these Guidelines in the future in light of experience, changing circumstances and decisions of the Tribunal and the courts.

John Pecman
Commissioner of Competition

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1. INTRODUCTION

Today's economy is increasingly based on knowledge and innovation and driven by rapid advancements in information and communications technologies. New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create employment and wealth. Adequate protection of IP plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy.[1] In this context, IP becomes a valuable asset for firms' profitability and growth. However, given the importance of IP, there is a risk that it may be used strategically to lessen or prevent competition.

Owners of IP, like owners of any other type of private property, profit from property laws that define and protect owners' rights to exclude others from using their private property. The special characteristics of IP have made it necessary in many instances for governments to develop laws that confer property rights to IP comparable to those for other kinds of private property.

IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy. IP laws provide incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression. Competition laws may be invoked to protect these same incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms vigorous rivalry among firms. Given that competition law may result in limitations on the terms and conditions under which the owners of IP rights may transfer or license the use of such rights to others, and on the identity of those to whom the IP is transferred or licensed, these Guidelines seek to clarify the circumstances under which the Bureau would consider such intervention to be appropriate and also illustrate situations that would not call for intervention under the Act.

In the interest of transparency, the Bureau recognizes the importance of providing information on its treatment of IP under the Act. This document, the Intellectual Property Enforcement Guidelines, sets out how the Bureau views the interface between IP law and competition law. It also explains the analytical framework that the Bureau uses to assess conduct involving IP.

The Guidelines discuss the circumstances in which the Bureau, under the Act, would seek to restrain anti-competitive conduct associated with the exercise of IP rights to maintain competitive markets. The approach elaborated in this document is based on the premise that the Act generally applies to conduct involving IP as it applies to conduct involving other forms of property.

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1 The Canadian Intellectual Property Office (CIPO) defines intellectual property and summarizes the role of IP rights as follows: "Intellectual Property (IP) refers to the creations of the mind, such as inventions, literacy and artistic works, as well as symbols, names, pictures, designs and models used in business. Patents, trade-marks, copyright, industrial designs, integrated circuit topographies and plant breeders' rights are referred to as "IP rights." Just as rights are acquired when a building or land is purchased, IP rights are "property" in the sense that they are based on the legal right to exclude others from using the property. Ownership of the rights can also be transferred." For more information, see the CIPO website: http://www.cipo.ic.gc.ca/.

The Bureau's overall approach to the application of the Act to IP is as follows:

- The circumstances in which the Bureau may apply the *Act* to conduct involving IP or IP rights fall into two broad categories: those involving something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The Bureau will use the general provisions of the *Act* to address the former circumstances and section 32 (special remedies) to address the latter.
- In either case, the Bureau does not presume the conduct violates the general provisions of the *Act* or should be remedied under section 32.
- The analytical framework that the Bureau uses to determine the presence of anti-competitive effects stemming from the exercise of rights to non-IP forms of property is sufficiently flexible to apply to conduct involving IP, even though IP has important characteristics that distinguish it from other forms of property.
- When conduct involving an IP right warrants a special remedy under section 32, the Bureau will act only in the very rare circumstances described in this document and when the conduct cannot be remedied by the relevant IP statute.

Circumstances will determine how the Bureau uses its enforcement discretion to respond to any alleged contravention of the *Act*. Therefore, individuals contemplating a business arrangement involving IP should either consult qualified legal counsel or contact the Bureau when evaluating the risk of the arrangement contravening the *Act*. The final interpretation of the law rests with the Tribunal and the courts.

When developing these Guidelines, the Bureau considered the current global economic and technological environment and, in particular, the rapid rate of technological changes occurring in many industries. The Bureau also took into account its past enforcement experience, Canadian case law, and the approaches taken in the Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice and the Federal Trade Commission in 1995, and in other jurisdictions, including the European Union. The Bureau recognizes that the interface between competition and IP policy is a constantly evolving area. Accordingly, to ensure appropriate coordination between IP and competition policy, the Bureau has entered into a Memorandum of Understanding with CIPO that will serve to identify areas of mutual interest and facilitate discussions between the two agencies.

The remainder of this document is organized into six parts:

- Part 2 discusses the purpose of IP laws, lists the various statutes that deal with IP, reviews the purpose of competition law and lists the principal provisions of the *Act* that relate to IP;
- Part 3 discusses the interface between IP law and competition law;
- Part 4 outlines the principles underlying the application of the general provisions and section 32 of the *Act* to business conduct involving IP;
- Part 5 describes the Bureau's analytical framework, which is sensitive to the particular characteristics of IP;

- Part 6 discusses the Bureau's mandate to promote competition, which may include intervening in proceedings in which IP rights are being defined, strengthened or extended inappropriately; and
- Part 7 presents a series of hypothetical scenarios to illustrate how the Bureau would apply the *Act* to a wide variety of business conduct involving IP.

2. OVERVIEW OF IP LAW AND COMPETITION LAW

2.1 IP Law

IP laws create legally enforceable private rights that protect to varying degrees the form and/or content of information, expression and ideas. The primary purpose of these laws is to define the scope of these rights and determine under what circumstances they have been infringed upon or violated. While the nature and scope of protection provided by each respective IP Act are different, by protecting exclusive rights, the IP laws provide an incentive to pursue scientific, artistic and business endeavours, which might not otherwise be pursued.

In the Guidelines, IP rights include rights granted under the *Copyright Act*, the *Patent Act*, the *Trade-marks Act*,[2] the *Industrial Design Act*, the *Integrated Circuit Topography Act* and the *Plant Breeders' Rights Act*.

- The *Copyright Act* confers upon the creator of an original work, for a limited term, exclusive rights to reproduce or communicate that work.
- The *Patent Act* protects an inventor by granting, for a fixed term, the exclusive right to prevent others from making, selling or using an invention.
- The *Trade-marks Act* allows the registration of distinctive marks and confers upon the owner the exclusive right to use that mark.
- Upon registration of a design, the *Industrial Design Act* confers on the owner the right to limit the production and sale of articles that incorporate the design.
- The *Integrated Circuit Topography Act* confers similar rights for a topography, which is a design for the disposition of an integrated circuit product.
- The *Plant Breeders' Rights Act* grants the owner of a new plant variety the exclusive rights to produce, for sale and to sell, reproductive material of the variety.

The term IP rights also encompasses the protection afforded IP under common law and the Civil Code of Quebec, including that given to trade secrets and unregistered trademarks.

There are also remedies available under the IP statutes to protect against abuses. For example, as stipulated in section 65 of the *Patent Act*, three years after the grant of a patent, a party may apply to the Commissioner of Patents alleging abuse of the patent, such as unduly restrictive licensing conditions. If the Commissioner of Patents is satisfied that there has been abuse of conduct, there are a number of actions he/she may take, including ordering the grant to the applicant of a license on such terms as the Commissioner of Patents may think expedient, or ordering the patent to be revoked.

2 Although the same general competition law principles apply to trademarks as to other forms of IP, the Guidelines are generally concerned with technology transfer and innovation related issues. Consequently, when applying its enforcement approach to trademarks, the Bureau will additionally consider in its analysis the source and quality differentiation issues that arise in respect of trademarks.

2.2 Competition Law

The principle underlying competition law is that the public interest is best served by competitive markets, which are socially desirable because they lead to an efficient allocation of resources. Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering offsetting economic benefits. Market power refers to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time.[3] However, a firm would not contravene the Act if it attains its market power solely by possessing a superior product or process, by introducing an innovative business practice or by other reasons of exceptional performance.[4]

The provisions of the Act that set out when it may be necessary for the Bureau to intervene in business conduct, including conduct involving IP, fall into two categories: those that cover criminal offences and those that cover reviewable (civil) matters. Several civil provisions state that the Bureau must, before it intervenes, show that the conduct substantially lessens or prevents competition.[5]

Criminal offences include conspiracy (section 45), bid-rigging (section 47), and some forms of misleading advertising and related deceptive marketing practices (sections 52 to 55).[6]

The provisions on reviewable (civil) matters deal with conduct that is generally pro-competitive but that may, in certain economic circumstances, significantly constrain competition. Reviewable matters include abuse of dominant position (section 79), exclusive dealing, tied selling and market restriction (section 77), price maintenance (section 76), refusal to deal (section 75), agreements or arrangements between competitors (section 90.1), mergers (section 92), and misleading advertising and related deceptive marketing practices (sections 74.01 through 74.06).[7] In general, the Tribunal may order remedies under these provisions if the conduct is likely to substantially lessen or prevent competition.

When a court determines that a firm has contravened the criminal provisions of the Act, it can impose fines, imprisonment and prohibition orders.[8] In addition, parties may bring private

3 *R. v. Nova Scotia Pharmaceutical Society et al., (1992) 2 S.C.R. (606)*, defines market power as "…the ability to behave relatively independently of the market." *DIR v. The NutraSweet Co., (1990) 32 C.P.R. (3d) 1(Comp. Trib.)*, defines it as the ability to maintain prices above competitive levels for a considerable period.

4 In the abuse of dominance provision of the Act, subsection 79(4) provides that superior competitive performance is a consideration in determining whether a practice has an anti-competitive effect in a market.

5 The refusal to deal provision (section 75) and the price maintenance provision (section 76) require proof that the refusal is having or is likely to have an adverse effect on competition in a market. Section 75 also requires that the person's inability to obtain adequate supply is the result of insufficient competition among suppliers. The deceptive marketing practices provisions (sections 74.01 through 74.06) do not require a competition effects test.

6 These provisions do not require proof of market power or anti-competitive effects.

7 Section 103.1 of the Act allows parties to apply to the Tribunal for leave to make an application under section 75, 76 or 77.

8 See the Bureau's *Conformity Continuum Bulletin*, June 18, 2000, for a detailed discussion of case resolution alternatives.

actions seeking damages.[9] With respect to reviewable (civil) matters, the Tribunal may issue a variety of remedial orders, some of which restrict private property rights. For example, the Tribunal has, in the past, ordered merging firms to divest themselves of assets, including IP, when it concluded that the proposed merger was likely to substantially lessen or prevent competition, thereby overriding the rights of property owners to acquire or dispose of their private property.[10] Similarly, remedies under the abuse of dominant position provision have involved orders affecting IP.[11]

Section 32, which is in the special remedies part of the Act, gives the Federal Court the power, when asked by the Attorney General, to make remedial orders if it finds that a company has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit topography to unduly restrain trade or lessen competition (see section 4.2 of this document for circumstances in which the Bureau may seek to have the Attorney General bring an application under section 32).

When the Federal Court determines that a special remedy is warranted under section 32, it may issue a remedial order declaring any agreement or licence relating to the anti-competitive use void, ordering licensing of the IP right (except in the case of trademarks), revoking the right or directing that other things be done to prevent anti-competitive use. This provision provides the Attorney General with the statutory authority to intervene in a broad range of circumstances to remedy an undue lessening or prevention of competition involving the exercise of statutory IP rights. In practice, the Attorney General likely would seek a remedial order under the Act only on the recommendation of the Commissioner.

9 See section 36 of the Act.

10 See DIR v. Southam Inc. (1997), 71 C.P.R. (3d) 417 (S.C.C.), and (1995), 63 C.P.R. (3d) 67 (F.C.A.), aff'd (1992), 47 C.P.R. (3d) 240 (Comp. Trib.).

11 See DIR v. D&B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) (hereafter referred to as *Nielsen*).

3. INTERFACE BETWEEN IP AND COMPETITION LAW

3.1 Property Rights

Private property rights are the foundation of a market economy. Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system, this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate or bargain in the marketplace for it, thereby rewarding the owner. This creates incentives to invest in developing, and leads to the exchange of, private property, thus contributing to the efficient operation of markets.

3.2 IP Law

IP has unique characteristics that make it difficult for owners to physically restrict access to it and, therefore, exercise their rights over it. The owner of physical property can protect against its unauthorized use by taking appropriate security measures, such as locking it away, but it is difficult, if not impossible, for the creator of a work of art to prevent his or her property from being copied once it has been shown or distributed. This is exacerbated because IP, while often expensive to develop, is often easy and inexpensive to copy. IP is also typically non-rivalrous — that is, two or more people can simultaneously use IP. The fact that a firm is using a novel production process does not prevent another firm from simultaneously using the same process. In contrast, the use of a physical property by one firm prevents concurrent use by another.[12]

Accordingly, IP laws confer on an IP owner the right to unilaterally exclude others from using that property. While each IP statute grants this right to varying degrees and the right may be subject to limitations that vary across statutes, it allows the owners of the IP to maximize its value through trade and exchange in the marketplace. This claim on the rewards flowing from IP enhances the incentive for investment and future innovation in IP as it does for other forms of private property. With the exception of the protections afforded unregistered trademarks and other common law rights, the legal protection of IP is a function of and does not exist outside the scope of IP statutory regimes.

3.3 Competition Law

Since the right to exclude, which is the basis of private property rights, is necessary for efficient, competitive markets, the enforcement of the Act rarely interferes with the exercise of this basic right. Enforcement action under the Act may be warranted when there are conspiracies, agreements or arrangements among competitors or potential competitors;

12 To enforce common law property rights, it must be possible to identify the property's owner and to clearly delineate the boundaries of the property. Both tasks can prove problematic in the case of IP. For other kinds of private property, possession can generally be seen as an indication of ownership. However, since many individuals can possess IP simultaneously, it may be difficult to establish the identity of the original creator and true owner of the IP. Furthermore, since IP is generally intangible, it is often difficult to clearly delineate the boundaries of the property. Without a legal delineation of these boundaries, IP owners may have difficulty showing that others have infringed on their property.

when anti-competitive conduct creates, enhances or maintains market power;[13] or when firms use deceptive marketing practices.

3.4 Interface

IP and competition laws are both necessary for the efficient operation of the marketplace. IP laws provide property rights comparable to those for other kinds of private property, thereby providing incentives for owners to invest in creating and developing IP and encouraging the efficient use and dissemination of the property within the marketplace. Applying the Act to conduct associated with IP may prevent anti-competitive conduct that impedes the efficient production and diffusion of goods and technologies and the creation of new products. The promotion of a competitive marketplace through the application of competition laws is consistent with the objectives underlying IP laws.

13 An example of conduct involving IP that could create market power is the assignment of patents. See *Apotex Inc. v. Eli Lilly and Co.* [2005] F.C.J. No. 1818 (Fed. C.A.).

4. APPLYING THE *ACT* TO CONDUCT INVOLVING IP

4.1 Overview

In general, the Bureau's analysis for determining whether competitive harm would result[14] from a particular type of business conduct comprises five steps:

- identifying the conduct;[15]
- defining the relevant market(s);
- determining if the firm(s) under scrutiny possess market power[16] by examining the level of concentration and entry conditions in the relevant market(s), as well as other factors;
- determining if the conduct would substantially lessen or prevent competition in the relevant market(s); and
- considering, when appropriate, any relevant efficiency rationales.

This analysis applies to all industries and all types of business conduct, and is sufficiently flexible to accommodate differences among the many forms of IP protection, as well as between IP and other types of property. For example, the Bureau takes differences among the various forms of IP protection into account when defining the relevant market and determining whether a firm has market power. In addition, although IP rights to a particular product or process are often created and protected by statute and are thus different from other forms of property rights, the right to exclude others from using the product or process does not necessarily grant the owner market power. It is only after it has defined the relevant market and examined factors, such as concentration, entry barriers and technological change, that the Bureau can conclude whether an owner of a valid IP right possesses market power. The existence of a variety of effective substitutes for the IP and/or a high probability of entry by other players into the market (by "innovating around" or "leap-frogging over" any apparently entrenched position) would likely cause the Bureau to conclude that the IP has not conferred market power on its owner.

While the criminal offence provisions of the Act do not require a finding of market power, under many civil provisions, an order can only be made if a firm has engaged in anti-competitive conduct that creates, enhances or maintains market power. Again, consistent with its approach with respect to all forms of property, the Bureau does not consider an owner of IP to have contravened the Act if it attained market power solely by possessing

14 For ease of discussion, and unless otherwise indicated, competitive harm is prospective. Note, however, that in many cases, competitive harm may be occurring at the time the Bureau is conducting an investigation or may have occurred sometime in the past.

15 Some examples of conduct that could involve IP include mergers, pooling of licences, setting standards for products, tied selling and exclusive dealing.

16 Matters pursued under the criminal provisions or the provisions concerning deceptive marketing practices do not require a finding of market power or an identification of competitive effects.

a superior quality product or process, introducing an innovative business practice or other reasons for exceptional performance.

Licensing is the usual method by which the owner of IP authorizes others to use it. In the vast majority of cases, licensing is pro-competitive because it facilitates the broader use of a valuable IP right by additional parties.[17] In assessing whether a particular licensing arrangement raises a competition issue, the Bureau examines whether the terms of the licence serve to create, enhance or maintain the market power of either the licensor or the licensee. The Bureau will not consider licensing agreements involving IP to be anti-competitive unless they reduce competition substantially relative to that which would have likely existed in the absence of the licence's potentially anti-competitive terms.

4.2 Enforcement Principles

Specific reference is made to IP rights in a number of provisions of the Act.[18] The circumstances in which the Bureau may apply the Act to anti-competitive conduct involving IP or IP rights fall into two broad categories: those involving anti-competitive conduct that is something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The general provisions of the Act address the former, while section 32 (special remedies) addresses the latter. The Bureau's approach is consistent with subsection 79(5), which acknowledges that the mere exercise of an IP right is not an anti-competitive act,[19] while acknowledging the possibility that under the very rare circumstances set out in section 32, the mere exercise of an IP right might raise a competition issue.[20]

4.2.1 General Provisions

The mere exercise of an IP right is not cause for concern under the general provisions of the Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use of the IP also as being the mere exercise of an IP right.

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

17 Licensing is a means by which owners trade IP, and it signals the willingness of IP holders to participate in the marketplace. This ability of owners to exchange and transfer IP can enhance the IP's value and increase the incentive for its creation and use. Licensing arrangements also promote the efficient use of IP by facilitating its integration with other components of production, such as manufacturing and distribution.

18 Refer to sections 32, 76, 77, 79 and 86.

19 Subsection 79(5) reads: "For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

20 The remedies in section 32 are more extensive than those under the general provisions.

The Bureau applies the general provisions of the Act when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the Act in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Act.[21] Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the Act.

This approach is consistent with the Tribunal's decisions in both Tele-Direct[22] and Warner[23] in which the Tribunal held that the mere exercise of the IP right to refuse to license a complainant was not an anti-competitive act. In its decision in Tele-Direct, the Tribunal indicated that competitive harm must stem from something more than just the mere refusal to license.[24]

Underlying this enforcement approach is the view that market conditions and the differential advantages IP provides should largely determine commercial rewards flowing from the exploitation of an IP right in the market to which it relates. If a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the Act, then the Bureau may intervene.

When joint conduct of two or more firms lessens or prevents competition, the competitive harm clearly flows from something more than the mere exercise of the IP right to refuse. To the extent that conduct, such as joint abuse of dominance, market allocation agreements and mergers, restricts competition among firms actually or potentially producing substitute products or services, the presence of IP should not be a mitigating factor. Similarly, IP should not be an exception or immunity mitigating factor in matters involving criminal conduct, such as conspiracy[25] or bid-rigging. All these types of conduct would be subject to review under the appropriate general provision of the Act.

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21 This analysis would use the concept of a relevant market as discussed in section 5.1. For an example where an assignment of patent rights may create market power see *Apotex Inc. v. Eli Lilly and Co.*, *supra* note 13.

22 DIR v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (1997), 73 C.P.R. (3d) (hereafter *Tele-Direct*).

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

24 In *Tele-Direct* the Competition Tribunal stated that, "The Tribunal is in agreement with the Director that there may be instances where a trademark may be misused. However in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trademark."

25 The *Copyright Act* provides that section 45 of the Act does not apply to any royalties or related terms and conditions arising under certain collective society agreements filed with the Copyright Board.

A transfer of IP rights that lessens or prevents competition is a further example of a situation in which competitive harm results from something more than the mere exercise of the IP right to refuse. Two examples of this are when a licensor ties a non-proprietary product to a product covered by its IP right, and when a firm effectively extends its market power beyond the term of its patent through an exclusive contract. In either case, if the conduct leads to the creation, enhancement or maintenance of market power so as to substantially lessen or prevent competition, the Bureau may intervene.

Sometimes upon examination, what appears to be just a refusal to license or to grant others access to a firm's IP rights turns out to have included conduct that goes beyond such a refusal. The conduct that goes beyond the unilateral refusal to grant access to the IP could warrant enforcement action under the general provisions of the Act. For instance, if a firm acquires market power by systematically purchasing a controlling collection of IP rights and then refuses to license the rights to others, thereby substantially lessening or preventing competition in markets associated with the IP rights, the Bureau could view the acquisition of such rights as anti-competitive. If the conduct met the definition of a merger as specified in section 91 of the Act, the Bureau would review the acquisitions under the merger provisions. If the conduct did not meet the definition of a merger, the Bureau would review the matter under either section 79 (abuse of dominance) or section 90.1 (civil agreements between competitors) of the Act.[26] Without the acquisitions, the owner's mere refusal to license the IP rights would have been unlikely to cause concern (see example 7).

4.2.2 Matters Outside the General Provisions – Section 32[27]

Only section 32, in the special remedies part of the Act, contemplates the possibility that the mere exercise of an IP right may cause concern and result in the Bureau seeking to have the Attorney General bring an application for a special remedy to the Federal Court.

The Bureau will seek a remedy for the unilateral exercise of the IP right to exclude under section 32 only if the circumstances specified in that section are met and the alleged competitive harm stems directly from the refusal and nothing else. Such circumstances require the Federal Court to balance the interests of the system of protection for IP (and the incentives created by it) against the public interest in greater competition in the particular market under consideration. Generally, the Bureau would recommend to the Attorney General that an application be made to the Federal Court under section 32 when, in the Bureau's view, no appropriate remedy is available under the relevant IP statute.

Enforcement under section 32 requires proof of undue restraint of trade or lessened competition. The Bureau expects such enforcement action would be required only in certain

26 The Competition Tribunal in DIR. v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) (hereafter *Laidlaw*), recognized that the abuse of dominance provision could apply to situations involving a series of acquisitions.

27 The special remedies provided for under section 32 include declaring any agreement or licence relating to the challenged right void, ordering licensing of the right (except in the case of trademarks), revoking a patent, expunging or amending a trademark, or directing that other such acts be done or omitted as deemed necessary to prevent the challenged use.

narrowly defined circumstances. The Bureau determines whether the exercise of an IP right meets this threshold by analyzing the situation in two steps.

In the first step, the Bureau establishes that the mere refusal (typically the refusal to license IP) has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services that result directly from the exercise of the IP. This step is satisfied only by the combination of the following factors:

i) the holder of the IP is dominant in the relevant market; and

ii) the IP is an essential input or resource for firms participating in the relevant market — that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market.

In the second step, the Bureau establishes that invoking a special remedy against the IP right holder would not adversely alter the incentives to invest in research and development in the economy. This step is satisfied if the refusal to license the IP is stifling further innovation.

If factors i) and ii) are present and if the refusal is stifling further innovation, then the Bureau would conclude that incentives to invest in research and development have been harmed by the refusal and a special remedy would help realign these incentives with the public interest in greater competition.

The Bureau recognizes that only in very rare circumstances would all three factors be satisfied. A case in which they could arise is in a network industry,[28] when the combination of IP protection and substantial positive effects associated with the size of the network could create or entrench substantial market dominance. In such a situation, IP rights and network externalities can interact to create de facto industry standards. Standardization means that the protected technology is necessary for a competitor's products to be viable alternatives. IP protection can effectively exclude others from entering and producing in the market.[29] However, the Bureau still would have to be satisfied that a refusal is stifling further innovation and not simply preventing the replication of existing products before seeking to recommend that the Attorney General bring an application for a special remedy to the Federal Court (see example 8).

28 A network industry is an industry that exhibits network effects. These effects exist when the value or benefit derived from using a product increases with the number of other users. For example, particular types of software can exhibit network effects because the value of exchanging computer files with other individuals clearly depends on whether these individuals use compatible software.

29 This does not suggest that markets subject to network effects will inevitably be monopolized. Often, firms form alliances and make a new technology "open" to gain acceptance and build an installed base. These activities tend to be pro-competitive if firms that participate in the standard-setting process freely compete with each other in the market.

4.2.3 Matters Possibly Resolved Outside the Act

An illegitimate extension of an IP right could include anti-competitive behaviour. This might involve a patent holder asserting its patent over products that are not within the scope of its patent or a distributor making false claims that it is an official licensee of a trademarked good. Alternatively, the Bureau may receive complaints that infringement of a legitimate IP right should be justified on competition grounds. In such disputes, the Bureau will use its enforcement discretion and may choose to leave the matter to be resolved by the appropriate IP authority under the appropriate IP statute (see example 1).

As outlined in section 4.1 above, the Bureau's analytical approach is sufficiently flexible to accommodate the specific characteristics of IP and the differences in the scope and length of protection extended to different IP rights. The following information highlights how the Bureau takes these factors into account when analyzing business conduct involving IP.

5. THE ANALYTICAL FRAMEWORK IN THE CONTEXT OF IP

5.1 Relevant Markets

Relevant markets provide a practical tool for assessing market power.[30] When the anti-competitive concern is prospective (that is, the conduct is likely to have a future anti-competitive effect),[31] relevant markets are normally defined using the hypothetical monopolist test.[32]

When the anti-competitive concern is retrospective[33] (that is, the conduct has already had an anti-competitive effect), applying the hypothetical monopolist test could lead to erroneous conclusions about the availability of substitutes and the presence of market power. Accordingly, the Bureau takes into account the impact of any alleged anti-competitive conduct that may have preceded the investigation when determining the relevant market. In this context, the Bureau analyzes market definition and competitive effects concurrently.

For conduct involving IP, the Bureau is likely to define the relevant market based on one of the following: the intangible knowledge or know-how that constitutes the IP, processes that are based on the IP rights, or the final or intermediate goods resulting from, or incorporating, the IP.

Defining a market around intangible knowledge or know-how is likely to be important when IP rights are separate from any technology or product in which the knowledge or know-how is used. For example, consider a merger between two firms that individually license similar patents to various independent firms that, in turn, use them to develop their own process technologies. Such a merger may reduce competition in the relevant market for the patented know-how: if the two versions of that know-how are close substitutes for each other: if there are no (or very few) alternatives that are close substitutes for the know-how: and if there are barriers that would effectively deter the development of conceptual approaches that could replace the know-how of the merging firms. This last condition may hold if the scope of the patents protecting the merging firms' know-how is sufficiently broad to prevent others from "innovating around" the patented technologies, or if the development of such know-how requires specialized knowledge or assets that potential competitors would be unlikely to develop or obtain in a timely manner sufficient to constrain a material price increase in the relevant market.

In cases involving the licensing of IP, the Bureau generally treats the licence as the terms of trade under which the licensee is entitled to use the IP. The Bureau does not define a relevant market around a licence, but rather focuses on what the legal rights granted to the licensee actually protect (i.e., intangible knowledge or know-how, processes, or final or intermediate goods).

30 The market definition exercise focuses on demand substitution factors (i.e., possible consumer responses). The Bureau considers the potential constraining influence of firms that can participate in the market through a supply response (i.e., a possible production response) after it has defined the relevant market.

31 This is generally the case with mergers.

32 See paragraphs 4.3, 4.4 and 4.5 of the Competition Bureau's *Merger Enforcement Guidelines*.

33 This is generally the case with alleged abuse of dominant position.

The Bureau does not define markets based on research and development activity or innovation efforts alone. The Bureau usually concentrates on price or output effects. Conduct that directly reduces the innovation effort of the firms under scrutiny or restricts or prevents the innovation efforts of others may be anti-competitive. The appropriate relevant market definition or definitions will depend specifically on the knowledge or know-how, process, or final or intermediate good toward which the innovation effort is directed.

5.2 Market Power

Whether conduct involving IP results in an increase in market power in the relevant market depends on a number of factors, including the level of concentration, entry conditions, the rate of technological change, the ability of firms to "leap-frog over" seemingly entrenched positions and the horizontal effects, if any, on the market.[34] The order in which the Bureau assesses these factors may vary depending on the section of the Act under which the Bureau is examining the conduct and on the circumstances of the relevant market.

5.2.1 Market Concentration

The Bureau examines the degree of market concentration to get a preliminary indication of the competitiveness of the relevant market. In general, the more firms there are in the relevant market, the less likely it is that any one firm acting unilaterally, or any group of firms acting cooperatively, could enhance or maintain market power through the conduct being examined. However, a high degree of concentration is not enough to justify the conclusion that the conduct will create, enhance or maintain market power. This is particularly true of industries with low barriers to entry, a high rate of technological change and a pattern of firms "innovating around" or "leap-frogging over" technologies that had previously controlled a dominant share of a market.

To measure concentration in markets for intermediate or final goods, the Bureau typically calculates the market shares of the firms identified as actual participants in the relevant market. These include the firms identified as currently offering products that are demand substitutes as well as those that represent potential supply sources of these products (i.e., firms that are likely to respond to a price increase in the relevant market with minimal investment).[35] Firms that are unable to respond quickly to a price increase or whose entry requires significant investment are not considered to be participants within the relevant market for purposes of assessing market concentration. That said, the potential competitive influence of such firms will be considered as part of the assessment of whether the conduct in question is likely to lessen or prevent competition substantially.

34 The *Merger Enforcement Guidelines* discuss other factors the Bureau considers when it assesses market power. These include foreign competition, business failure and exit, the availability of acceptable substitutes, effective remaining competition, removal of a vigorous and effective competitor, and change and innovation.

35 The following factors are relevant to determining when a firm will rapidly divert sales in response to a price increase: the cost of substituting production in the relevant market for current production (i.e., switching costs), the extent to which the firm is committed to producing other products or services, and the profitability of switching from current production.

The Bureau generally does not challenge the conduct of a firm that possesses less than a 35 percent market share.[36] (Market shares of more than 35 percent indicate circumstances that may warrant further review.) Market share may be calculated based on the firms' entire actual output, total sales (dollars or units) or total capacity (used and unused).[37, 38] However, some of these factors may be difficult to assess in cases involving IP. Accordingly, the Bureau's assessment of market power is likely to focus on qualitative factors such as conditions of entry into the relevant market, whether IP development is resulting in a rapid pace of technological change, the views of buyers and market participants, and industry and technology experts.

5.2.2 Ease of Entry

The Bureau also examines how easily firms can enter the relevant market to determine whether new entrants have the ability to restrain any creation, enhancement or maintenance of market power that may result from conduct involving IP. When assessing effects in markets involving IP, conditions of entry are often more important than market concentration. For instance, evidence of a rapid pace of technological change and of the prospect of firms being able to "innovate around" or "leap-frog over" an apparently entrenched position is an important consideration that may, in many cases, fully address potential competition law concerns.

The Bureau also considers the extent to which the conduct itself erects or has erected barriers to entry or, alternatively, induces or has induced competitors to exit the market (see examples 3.2 and 4).[39] Entry into markets in which IP is important may be difficult because of the sunk costs associated with developing assets that comprise specialized knowledge. Additionally, IP rights can serve to increase barriers to entry independent of any conduct.[40]

5.2.3 Horizontal Effects

In evaluating the competitive effects of conduct that involves an IP right, whether it is a merger transaction, licensing arrangement or other form of contractual arrangement, the Bureau focuses on whether the conduct will result in horizontal anti-competitive effects — consequences for firms producing substitutes or firms potentially producing substitutes (see examples 3.1 and 3.2).

Even though an arrangement may be vertical, such as the acquisition of a retail shoe outlet by a shoe manufacturer or the licensing of the right to use a particular food additive to a food producer, it can still have horizontal effects in a relevant market (see example 4). If an

36 The Bureau generally does not challenge the conduct of a group of firms alleged to be jointly dominant that possess a combined market share of less than 65 percent.

37 If the actual participants in the market include firms that represent potential sources of supply for the market, then market shares, even in terms of production capacities, may be difficult to accurately estimate. Accordingly, it must be recognized that the market shares attributed to firms whose products are actually sold within the relevant market will overstate the relative market position of these firms in such circumstances.

38 The Competition Tribunal stated in *Laidlaw*, that market share calculations based on sales may overstate market power when the market is characterized by excess capacity.

39 The fact that anti-competitive conduct can create barriers to entry was recognized by the Tribunal in *Laidlaw*.

40 Of course, the purpose of providing innovators with IP rights is to foster the development of new products. In this sense, IP rights may encourage firms to participate in environments in which technology changes very rapidly.

arrangement is vertical, the Bureau considers whether it is likely to result in horizontal effects among either sellers or buyers.

5.3 Anti-competitive Effects

Conduct must create horizontal effects for the Bureau to conclude that it is anti-competitive. In this regard, the Bureau analyzes whether conduct facilitates a firm's ability to exercise market power, either unilaterally or in a coordinated manner, in areas such as pricing and output.[41]

Anti-competitive horizontal effects may arise if the conduct increases competitors' costs. For example, a transaction can prevent, or raise the cost of, competitors' access to important inputs. IP licensing arrangements that involve one firm selling the right to use IP to another are inherently vertical, but can have horizontal effects, particularly if the licensor and licensee would have been actual competitors in the absence of the licensing arrangement. In addition, conduct that reduces innovation activity could be anti-competitive if it prevents future competition in a prospective product or process market.

5.4 Efficiency Considerations

A fundamental objective of competition law is to ensure the efficient use of resources through vigorous competition. However, there may be instances in which restrictions on competition can lead to a more efficient use of resources. This may be particularly true of agreements, arrangements and transactions involving IP that are inherently vertical and combine complementary factors. Moreover, there may be instances when creating or increasing market power is justified because of the efficiencies created. Indeed, this principle is consistent with the protection afforded by IP laws, which foster dynamic efficiency and competition by facilitating the creation of valuable works or processes that result in long-term increases in product selection, quality, output and productivity. In providing incentives for investment, IP laws grant exclusivity to the protected works that may result in temporary market power. Consequently, the Bureau considers both the short-term and long-term efficiency implications of conduct when analyzing efficiencies in cases involving IP. Efficiencies are explicitly recognized in sections 90.1 and 96 of the Act in the context of agreements or arrangements among competitors[42] and mergers.[43] In addition, under the abuse of dominant position provision (sections 78 and 79), business justifications may be relevant to determining whether conduct is, on balance, anti-competitive.[44]

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41 The term 'pricing' refers to all aspects of firms' actions that affect the interest of buyers. These include a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

42 Section 90.1 also applies to agreements between parties that are potential competitors.

43 Section 95 provides a specific exemption under the merger provision to research and development joint ventures that satisfy certain criteria outlined in the provision.

44 In *Tele-Direct*, the Competition Tribunal stated that, "(w)hat the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, 'exclusionary, predatory or disciplinary'. Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A 'business justification' must be a 'credible efficiency or pro-competitive' business justification for the act in issue. Further, the business justification must be weighed 'in light of any anti-competitive effects to establish the overriding purpose' of the challenged act..."

If the Bureau concludes that conduct is likely to substantially lessen or prevent competition in a relevant market, it will, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, make an assessment of whether the efficiency gains brought about or likely to be brought about by the conduct are greater than and offset the anti-competitive effects arising from the conduct. Part 12 of the *Merger Enforcement Guidelines* more fully describes the Bureau's approach to the analysis of efficiencies.

In assessing whether conduct involving IP is for an anti-competitive purpose under the abuse of dominant position provisions, the Bureau considers any pro-competitive effects (business justifications) generated by or associated with the conduct. For example, a licensing arrangement between an IP owner and a distributor may restrict intra-brand competition, but at the same time further inter-brand competition. A licensing arrangement between two potential competitors may result in a new product being developed that would not otherwise have been developed. In each case, the level of competition in the market may be enhanced.[45]

The Bureau also considers whether the firms could have used commercially reasonable means to achieve efficiencies that are or were less harmful to competition. If such alternatives exist, the Bureau would compare the anti-competitive effect of the conduct to such alternatives. In making this comparison, the Bureau does not attempt to uncover all of the theoretically possible alternatives for achieving the efficiencies. It considers only those means that are commercially reasonable and consistent with the firm's IP rights. The Bureau also considers the impact that using an alternative would have on the firm's ability to exercise its IP rights.

45 In *Nielsen*, the Competition Tribunal held that even if there is some justification for the alleged anti-competitive conduct, this must be weighed against any anti-competitive effects.

6. COMPETITION POLICY ADVOCACY

The Bureau may use its mandate to promote competition and the efficient allocation of resources to intervene in policy discussions and debates regarding the appropriate scope, definition, breadth and length of IP rights.[46] The Bureau may also seek leave to intervene in Federal Court and Superior Court cases when it believes it is important to bring a competition perspective to proceedings that will not be brought by the parties. In other proceedings, when the Bureau believes that IP rights could potentially be defined, strengthened or extended inappropriately, the Bureau may seek leave to intervene to make representations concerning the scope of the protection that should be accorded IP rights.

An example of Bureau advocacy occurred when it applied for and was granted leave to intervene by the Federal Court of Appeal (FCA) in *Apotex Inc. v. Eli Lilly and Co*.[47] In this case, the Bureau argued that the assignment of a patent could constitute an agreement or arrangement to lessen competition contrary to section 45 of the Act. This position meant that section 50 of the *Patent Act*, which gives patentees the right to assign their patents, does not preclude application of the Act to patent assignments. The Bureau's intervention served the purpose of protecting its ability to administer the Act in respect of patent rights. The FCA agreed with the Bureau's position and noted that, "…this interpretation is consistent with the Competition Bureau's *Intellectual Property Enforcement Guidelines*. [citation omitted]"

Part 7 of this document sets out hypothetical situations to illustrate the Bureau's enforcement approach.

46 Section 125 of the Act provides that the Commissioner may make representations to and call evidence before any federal board, commission or other tribunal in respect of competition. Section 126 of the Act provides that the Commissioner may do the same for any provincial board, commission or other tribunal as long as the board, commission or tribunal consents.

47 *Supra* note 13.

7. APPLICATION OF COMPETITION LAW TO IP: HYPOTHETICAL EXAMPLES

Example 1: Alleged Infringement of an IP Right

TAX is a software company that produces and distributes a sophisticated and complex tax management program to help households with their tax planning. As is customary in the software industry, TAX assigns a serial number to each copy of the program that it distributes. A customer may register with TAX by providing the serial number listed on the packaging along with certain personal information. TAX offers upgrades to its software from time to time to respond to changes in the tax code and technological advances, and users need to be registered to receive these upgrades at low prices. If TAX finds that a serial number has been used more than once, it knows that its software has been illegally reproduced. TAX realizes that serial numbers do not prevent duplication but do provide a mechanism for detection, thus weakening incentives to copy. TAX has been selling its product for a number of years and is now widely recognized as a leading producer of tax management software.

More than two years ago, a key member of TAX's software engineering team left the company to start her own software business, called UPSTART. Recently, UPSTART began to market its own tax management program to be used in conjunction with TAX's product. UPSTART designed its program to operate as a graphical user interface to TAX's software. Furthermore, relatively minor changes in the tax code can be incorporated into UPSTART's product. As a consequence, for users who already own TAX's product, there is no longer a need to get upgrades from TAX. Instead, they can purchase UPSTART's product for a much lower price and can continue to buy upgrades from UPSTART.

TAX has publicly alleged that UPSTART must have infringed TAX's copyright because it would have been impossible for UPSTART to have created its program without having copied TAX's source code. Despite its claims, TAX has not filed a suit against UPSTART. Instead, TAX has made a formal complaint to the Bureau that UPSTART's conduct is predatory since it has undermined TAX's serial number policy by making it less valuable for users to become registered with TAX. TAX claims that since UPSTART's product came on the market, there has been widespread piracy of TAX's program and, consequently, the market for its product has evaporated.

Analysis

The Bureau would likely conclude that the underlying issue in this case is the possibility that UPSTART infringed TAX's copyright. Therefore, the Bureau would inform TAX that it does not view the matter as raising any issues under the Act and would suggest that TAX seek legal advice on other remedies, if any, that might be available.

Example 2: Price-fixing

Three firms, each of which have developed and own a patented technique, offer competing cosmetic surgical procedures to treat a particular condition. All three procedures involve several visits to a private clinic over six months, produce no side effects and have approximately equal success rates. The only existing alternative to the three procedures is an expensive medication that causes undesirable side effects in some patients. Each of the three firms has developed a business plan to market its procedure and industry analysts widely agree that competition among the procedures will be the most important factor limiting shareholder returns. Rather than proceed with their business plans in anticipated competition with one another, the three firms agree on a minimum price at which each will perform the procedure as well as a minimum fee to license each procedure to third parties.

Analysis

The Bureau would likely examine this agreement under the conspiracy provision in section 45 of the Act given that it involves fixing prices for the supply of a product. The Bureau would likely take the view that the three participants in the agreement are competitors based on the views of industry analysts and given the fact that each of them supplies treatments that are functionally interchangeable and comparable to one another. For example, the duration, the success rate and the risk of side effects are approximately the same for each procedure. Moreover, section 45 applies to agreements between parties that are potential competitors. Accordingly, even if the parties had not been in competition when the agreement was concluded or during the term of the agreement, the parties would still be deemed to be competitors for purposes of section 45.

Given that the price-fixing agreement is not ancillary to a broader or separate agreement or arrangement, which itself does not offend section 45, the Bureau would refer the matter to the Public Prosecution Service of Canada (the “PPSC”) for criminal prosecution.

Example 3.1: Exclusive Licensing

SHIFT recently developed a new gear system for mountain bikes. Two other firms manufacture systems that compete with SHIFT’s. All three of these firms manufacture several varieties of bicycle gear systems and are engaged in research and development to improve gear system technology. SHIFT grants licences for the use of its patented gear system technology to manufacturers of mountain bikes as it does not have the ability to manufacture mountain bikes itself. Three large firms account for 80 percent of the sales of mountain bikes with the balance being supplied by six smaller firms. SHIFT has just granted ADVENTURE, the largest mountain bike manufacturer (accounting for 30 percent of sales), an exclusive licence to use its new patented gear system technology on its mountain bikes. ADVENTURE does not own or have the ability to develop gear system technology. Although SHIFT’s new gear system offers a number of features not available on other current products, the demand for mountain bikes with these new features is uncertain. In addition, ADVENTURE expects to incur significant expense developing and promoting mountain bikes that use SHIFT’s new gear system technology. SHIFT has refused requests from other mountain bike manufacturers for a licence for this technology. As a result of ongoing research and development, alternative gear system technologies are likely to become available in the future.

Analysis

The Bureau is likely to examine the conduct of both firms under the abuse of dominant position provision (section 79) of the Act.

SHIFT and ADVENTURE relate as supplier and customer, and are neither actual nor potential competitors in the markets for gear systems or mountain bikes. Since the firms do not compete, the exclusive licence would likely not lessen competition between the two firms. The Bureau would nonetheless examine the markets for gear systems and mountain bikes to determine if the exclusive licence lessened or prevented competition substantially in either or both of those markets.

Even though SHIFT's technology is not available to ADVENTURE's two principal rivals and the markets for gear systems and mountain bikes are concentrated, SHIFT's rivals in the gear system market may still sell to ADVENTURE. Furthermore, the other mountain bike manufacturers have access to other gear systems from SHIFT and to gear systems from other suppliers. The exclusive licence may have been granted in consideration for ADVENTURE's agreement to incur significant expense in the development and promotion of mountain bikes that use SHIFT's technology.

In the course of its assessment, the Bureau would consider the competitiveness of the mountain bike market before and after the exclusive licence. Since SHIFT is not a mountain bike manufacturer and has no obligation to license its gear system to a mountain bike manufacturer, a licence agreement in this case would enhance competition. The technology licence mandated the development and promotion of mountain bikes using the technology, thereby enhancing competition without in any way limiting the ability of other mountain bike manufacturers to access or use competing technologies. Consequently, the Bureau would conclude, given the facts of this case, that the exclusive licence arrangement did not raise any competition issues.

Example 3.2: Foreclosure by Purchaser

Consider a variation on the situation described in example 3.1, in which ADVENTURE's business has grown to represent approximately 70 percent of mountain bike sales. ADVENTURE has taken advantage of its increasing sales share to independently negotiate long-term exclusive licences and supply arrangements with the three competing suppliers of mountain bike gear systems. The inability of the competing manufacturers to obtain suitable gear system technology has put a number of them out of business and has substantially cut into the sales of the remaining firms. ADVENTURE has raised the prices of its mountain bikes by 25 percent. Although alternative gear system technologies are under development, it appears unlikely that a viable technology will be tested and in production in less than 36 months.

Analysis

The Bureau is likely to examine ADVENTURE's conduct under the abuse of dominant position provision (section 79) of the Act.

The Bureau would initially determine whether mountain bikes comprised a relevant market and assess whether ADVENTURE substantially or completely controlled the supply of product within that relevant market. The Bureau would likely view the apparent lack of good substitutes and ADVENTURE's high sales share and ability to successfully impose a 25 percent price increase as evidence that ADVENTURE substantially controlled the mountain bike business and that mountain bikes comprise a relevant market.

The Bureau would then consider whether ADVENTURE's exclusive licence agreements, through which it precluded its competitors from obtaining an adequate supply of gear systems, constituted anti-competitive conduct. While an exclusive licence arrangement may enhance competition, as was apparent in Example 3.1, the use of an exclusive licence arrangement to effectively control the supply of a competitively essential input may be anti-competitive. In the absence of a compelling business justification, the Bureau would likely view the systematic manner in which ADVENTURE prevented its competitors from obtaining access to this vital input (gear systems) through the execution of long-term exclusive licences with each supplier as a practice of anti-competitive acts.

The Bureau would then assess the impact of the exclusive licences on competition. It would likely conclude that the adverse impact on the ability of other mountain bike manufacturers to compete that resulted from ADVENTURE preventing them from gaining access to proven gear system technology and the manner in which ADVENTURE successfully imposed substantial price increases constituted evidence that ADVENTURE substantially lessened or prevented competition. Accordingly, the Bureau would likely seek to have the exclusive licences voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms of the licences.

Example 4: Exclusive Contracts

SPICE, by virtue of its international patents, is the sole supplier of Megasalt, a unique food additive that has effectively replaced salt in certain prepared foods in most countries. SPICE's Canadian patent recently expired; however, SPICE still has valid patent protection throughout much of the rest of the world. Shortly before its Canadian patent expired, SPICE signed five-year contracts, which included exclusive supply rights, with its two principal Canadian buyers. These contracts prevent the two buyers, which use Megasalt in specially prepared foods for hospitals and other health care institutions, from combining Megasalt with any other salt substitute on the same product line. SPICE does not have long-term exclusive supply contracts with other buyers of Megasalt in Canada or elsewhere. Recently, NUsalt, a firm that has developed a potential alternative to Megasalt, filed a complaint with the Bureau alleging that SPICE's contracts are preventing NUsalt from manufacturing and marketing its product in Canada. NUsalt claims that SPICE's contracts have "locked up" a substantial part of the market, thereby precluding NUsalt from profitably entering Canada.

Analysis

The NUsalt allegations suggest that SPICE, as a result of its contracts with its two largest buyers, is currently exploiting market power within the market for salt substitutes. The Bureau would likely investigate these allegations under the abuse of dominance provision (section 79) of the Act.[48]

The Bureau would initially determine whether salt substitutes comprise a relevant market. This would entail determining whether salt substitutes are subject to effective competition from other substances (for example, salt) or whether salt substitutes have specific properties

48 The Bureau may also choose to review the conduct under the exclusive dealing, tied selling and market restriction (section 77) of the Act.

and functional characteristics that make salt ineffective as a substitute. The Bureau would then seek to determine whether SPICE substantially controlled the market in which its salt substitute competed, and then assess SPICE's share of sales and barriers to entry to this market. Among others, the Bureau would consider all of the factors currently preventing alternative suppliers from offering their products to customers in Canada, including the effect of the exclusive supply contracts on the ability of alternative suppliers to obtain sales from a critical mass of customers. Assuming that the Bureau had determined that salt substitutes constitute a relevant market, it would likely conclude that SPICE substantially controlled that market.

The Bureau would then consider whether the exclusive supply contracts, through which SPICE had precluded its principal customers from obtaining salt substitutes from alternative suppliers, constituted a practice of anti-competitive acts. To make this assessment, the Bureau would examine the circumstances surrounding their negotiation and settlement, and the extent to which they were exclusionary and intended to erect barriers to effective competition in the relevant market. As part of this analysis, the Bureau would consider whether there are compelling business justifications for SPICE's exclusive contracts. For example, SPICE may have signed these contracts to ensure that it would have sufficient sales to justify investing in enough productive capacity to realize economies of scale. Also, the restriction preventing buyers from combining Megasalt with other salt substitutes could have a safety or quality rationale. If the Bureau found that the contracts in this case were intended to hold back a sufficient amount of market demand from potential entrants so that the remaining demand would provide an insufficient volume of sales to cover the cost of effective entry and future operating costs in Canada, then the Bureau would likely view the execution of the long-term exclusive licences as anti-competitive.

The Bureau would then assess the impact of the exclusive contracts on competition. In this regard, the adverse impact on the ability of other suppliers of salt substitutes to compete in Canada would be assessed to determine whether the contracts had substantially lessened or prevented competition. If the relevant market is narrowly defined as salt substitutes and SPICE's contracts are preventing the entry of potential salt substitute producers, the Bureau may conclude that the exclusive contracts have substantially lessened or prevented competition. By deterring firms from attempting to supply alternative salt substitutes in Canada, the exclusive contracts may cause other buyers in Canada not under contract with SPICE to pay higher prices than they would if SPICE faced effective competition.

The magnitude of the decrease in competition would depend on the extent to which the contracts prevent entry and the expected degree of substitution that would exist between Megasalt and alternative salt substitutes, such as NUsalt, in the absence of the exclusive terms in the contracts. In general, if the contracts are determined to be the principal barrier to new entry and the new entrants' products are likely to be close substitutes for Megasalt, then the Bureau is likely to conclude that the contracts have substantially lessened or prevented competition and would likely seek to have SPICE's exclusive contracts voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms in the contracts.

However, if the Bureau determines that, notwithstanding the contracts, there is still sufficient demand in Canada or the rest of the world to support effective competitive entry in Canada, then SPICE's exclusive contracts would not be considered to have substantially lessened or prevented competition. In this case the Bureau would close its inquiry without seeking remedial measures. Throughout its investigation the Bureau would work collaboratively with competition agencies in other jurisdictions as necessary to determine facts and their analytical approach relevant to the resolution of the matter.

Example 5: Output Royalties

MEMEX currently holds a patent for the design of a memory component it manufactures for use in personal home computers. MEMEX does not manufacture personal computers, but instead sells its memory components and licenses the use of its technology to computer manufacturers. Historically, MEMEX's licensing contracts required that the licensee pay a fee for each MEMEX memory component it installed in a computer. Because of its patent, MEMEX currently faces no competition from other memory component producers wishing to use a similar design; however, MEMEX's patent is to expire within a year and there is speculation that once it expires, other firms will begin manufacturing and selling memory components based on MEMEX's design. MEMEX has recently introduced a new licence agreement. Under the new agreement, MEMEX grants non-exclusive licences for the use of its technology and memory components to all personal computer manufacturers for a royalty on every computer shipped, regardless if any MEMEX memory components are installed. MEMEX claims that the previous licensing policy had the unintentional effect of encouraging computer manufacturers to install too few MEMEX memory components, which detracted from computer performance. MEMEX claims that the new licensing practice provides manufacturers an incentive to install a more appropriate quantity of memory in computers.

Analysis

The Bureau would likely investigate this case under the abuse of dominance provision (section 79) of the Act.

The Bureau would first determine whether memory components that employ MEMEX's technology comprise a relevant market and then assess whether MEMEX substantially or completely controls the supply of product within that market. In view of the rapid rate of technological development and intense competition in the production of integrated circuit devices, the Bureau may conclude that the MEMEX technology competes with other memory technologies, that barriers to entry are sufficiently low that the scope of the relevant market extends beyond the MEMEX technology, or that MEMEX is unable to substantially control the supply of products within the specified relevant market. If the Bureau determines that MEMEX faces substantial, effective competition from other suppliers of memory components then it would likely conclude that further investigation is not warranted. If, on the other hand, the Bureau concluded that the memory components supplied by the alternative suppliers are not considered good substitutes and would not allow computer manufacturers to build computers that could compete with those using MEMEX's memory component, the Bureau might determine that further inquiry was warranted.

Assuming that the Bureau determined that the MEMEX technology defines the relevant market and MEMEX substantially controls that market, the Bureau would then consider whether MEMEX's use of its new licensing arrangements constituted a practice of anti-competitive acts. This determination would depend on the specific terms of the contracts and the likely effect they would have on competition in the relevant market. While MEMEX's licensing contracts do not expressly prohibit computer manufacturers from using memory components based on technology other than MEMEX's, they effectively impose a tax on computer manufacturers who use memory components from another supplier.[49] The imposition by a dominant supplier of long-term licensing contracts containing such provisions could preclude competition and maintain the supplier's market power. Accordingly, the Bureau would determine whether these contracts are in widespread use and their duration, and consider MEMEX's business justification for charging the per computer royalty. It would also consider whether the per computer royalty is sufficient to deter computer manufacturers from buying memory components from alternative suppliers.

If the Bureau determined the relevant market to be memory components based on the MEMEX technology, MEMEX had market power, and the licensing contracts were a practice of anti-competitive acts, the Bureau would then assess the likely impact of MEMEX's new licensing practice on competition and the price of memory components. If the Bureau determines that this practice would permit MEMEX to exercise a significantly greater measure of market power than would otherwise have been the case, the Bureau would likely seek to have the new licensing practice voluntarily terminated. Failing that, it would likely bring an application before the Tribunal seeking to terminate this practice.

Example 6: A Patent Pooling Arrangement

Five firms hold patents on technologies required by producers to develop widgets that conform to an international standard. To facilitate the licensing of their patents, the five firms hire an independent expert to review the patents of each firm and determine those that are essential for implementing the standard based on the underlying technical characteristics of the technologies. Upon completion of the review, the five firms create a patent pool and each of them licenses its essential patents on a non-exclusive basis to the pool. The pool is organized as a separate corporate entity whose role is to grant a non-exclusive sub-licence to all the patents in the pool on a non-discriminatory basis to any party requesting one. The patent pool administrator collects royalties from licensees and re-distributes the revenue to pool members according to a formula that is partly based on the number of patents that each member has contributed to the pool. Each of the five members of the pool retains its right to license its own essential patents outside the pool to third parties to make widgets that conform to the standard or widgets that may compete with those that conform to the standard.

The patent pool agreement specifies that if a final court judgment declares a patent in the pool to be invalid, that patent will immediately be excluded from the pool. In addition, the agreement requires that an independent expert re-assesses the patents in the pool every four years to ensure that they are essential to developing widgets conforming to the international

49 A manufacturer who wishes to use alternative memory products must pay twice, once for the alternative component and a second time for the per computer royalty payable to MEMEX.

standard. Licensees also have the ability to hire an independent expert to review any patent that they feel is not essential for developing widgets conforming to the standard. If, in either case, the expert concludes that one or more patents are not essential to developing widgets that conform to the standard, those patents are excluded from the pool. The decisions of experts are final and are binding upon the pool members.

The patent pool agreement also includes provisions allowing each pool member to audit the books of the pool administrator, and provisions allowing the pool administrator to audit the books of each licensee to verify royalty amounts. In each case, provisions are put in place to guard against confidential business information being divulged to either pool members or licensees.

Analysis

The Bureau recognizes that patent pools can often serve a pro-competitive purpose by, among other things, integrating complementary technologies, reducing transaction costs and clearing blocking patents. Where patent pools may represent an agreement between competitors or potential competitors, the Bureau is likely to review them under section 90.1 of the Act rather than section 45 unless the Bureau has evidence that the patent pool was simply a sham used as a means to facilitate an agreement prohibited under subsection 45(1).

Despite their potential benefits, patent pools may also raise competition concerns. If the patented technologies inside the pool are substitutes then the pool can be a mechanism for the pool members to restrict competition between themselves and increase royalty rates above levels that would have existed in a competitive market. Alternatively, if a patented technology inside the pool is a substitute for a technology outside the pool, the pool could be used as a bundling mechanism to effectively foreclose the outside technology. Other potential competition concerns are that a pool's members may discriminate among licensees or use the pool to share confidential business information so as to reduce competition in a downstream market.

To evaluate whether a patent pool would likely cause a competition issue, the Bureau would first seek to determine whether each patent placed inside the pool is essential for developing the product or service that is the basis behind the formation of the pool. In the case at hand, if each patent inside the pool is required to implement the widget standard, then the members of the pool cannot be viewed as horizontal competitors; a firm looking to buy technologies to develop widgets conforming to the standard would need permission to use each patented technology in the pool. A pool comprised of only essential patents would not have the potential to harm competition among suppliers of technology either inside or outside the pool.

In this example, the Bureau would look positively on the fact that pool members engaged an independent expert to determine which of their patents are essential to the widget standard. However, the Bureau would evaluate whether the expert is qualified to provide such an opinion, and whether he/she was provided with incentive to work independently, without influence from pool members. The Bureau would take additional assurance from the fact that an expert would continue to periodically review the patents to ensure they are essential, as well as from the ability of licensees to challenge patents by requiring a separate independent review. The fact that any patents found to be invalid would also be removed from the pool would also contribute to the Bureau's assurance that the pool has taken adequate measures to only include essential patents.

Given that the pool administrator issues licences on a non-discriminatory basis to all interested parties, the Bureau would likely conclude that the technologies inside the pool were not being used to distort competition in a downstream widget market. The fact that pool members remain free to license their patents independently to other widget producers provides more evidence that competition in the downstream widget market would not be distorted by the pool.

As a final step, the Bureau would review the pool agreement's provisions relating to the sharing of confidential information and ensure that such provisions provide adequate safeguards against the pool being used to facilitate coordination among pool members or licensees.

Absent any evidence that the patent pool is used as a sham to facilitate an agreement to restrict competition, based on the analysis above, the Bureau would likely conclude that the patent pool does not raise any issues under the Act.

Example 7: Agreement to Foreclose Complementary Products

There are five major record labels. The largest two, ROCKCO and POPCO, which together account for more than 65 percent of total sales and 70 percent of all major label artists, have formed a joint venture (DISCO) to develop, produce and market a new generation of digital playback devices. The DISCO technology provides a level of sound quality and other features far superior to those offered by existing technologies. DATCO has also developed a digital sound technology with similar high-fidelity qualities, but which is also portable and allows users to record. The costs of the two technologies are similar, but the technologies themselves are incompatible: music digitally encoded in DISCO format must be re-encoded for playback on DATCO's player. Under the terms of their joint venture agreement, ROCKCO and POPCO agree to not release, or license any other person to release, their copyrighted recordings in a digital format other than the DISCO format. Consistent with that agreement, ROCKCO and POPCO have declined DATCO's request for a licence to convert and release ROCKCO and POPCO recordings in the DATCO format. The other three record labels predict — correctly — that consumers will be reluctant to purchase the DATCO technology if they are unable to obtain music from either ROCKCO or POPCO in that format. The other record companies are willing to release their recordings in the DATCO format, but find that there is no market for it and are compelled by popular demand to license the DISCO technology to release their recordings in the DISCO format. As a result of the foregoing, DATCO's digital sound technology, which reviewers have generally viewed as superior to the DISCO technology, is being withdrawn and DISCO is substantially increasing both the price of the playback equipment that it sells and the royalties charged to the other record companies for the use of the DISCO technology to release recordings in the DISCO format. The Bureau has concluded that the joint venture would not meet the definition of a merger as specified in section 91 of the Act.

Analysis

The Bureau would examine this case under the agreements and arrangements provision (section 90.1) and/or the abuse of dominance provision (section 79) of the Act.

The matter would not be considered under section 45 because it is not an agreement between competitors to fix prices, allocate markets or customers nor is it an agreement to restrict output. Even if the refusal to release recordings in another format or grant a licence are considered output restrictions, the ancillary restraints defence would likely apply because they are ancillary and directly related to the broader joint venture agreement to develop the DISCO technology. As well, these restraints appear reasonably necessary to attract a sufficient number of customers to the DISCO technology to make the joint venture viable.

As a first step, the Bureau would consider whether the alleged anti-competitive conduct, namely the refusal of ROCKCO and POPCO to license the reproduction of their copyrighted recordings in the DATCO format, was a mere exercise of their IP rights or involved something more. In this case, the Bureau would likely determine that the terms of the DISCO joint venture agreement and the refusal to license constituted joint conduct and hence would be considered conduct that was beyond the mere exercise of an IP right.

The Bureau may elect to review the agreement under section 90.1 of the Act if ROCKCO and POPCO could be considered competitors in a relevant market. In this example, the important consideration in determining if the firms are competitors is determining if ROCKCO and POPCO would have likely developed the DISCO, or similar technology, independently in the absence of the agreement. If the Bureau were to determine that this would be the case, then ROCKCO and POPCO could have been expected to compete in the market for digital playback devices in the absence of their joint venture and the agreement would be reviewed under section 90.1.

If, on the other hand, ROCKCO and POPCO were determined not to be competitors, the Bureau would elect to review the joint venture agreement under the abuse of dominance provision, on the basis that the joint venture agreement established and provided for the joint abuse of a dominant position. The review would be carried out in accordance with the framework and criteria for abuse of dominance outlined in the previous examples. Whichever provision of the Act would apply, the Bureau would have to establish the affected relevant market or markets, consider barriers to entry and evidence of market power or dominance, demonstrate a substantial lessening or prevention of competition and assess any business justifications.

If the Bureau were to proceed under sections 79 or 90.1, it would have to establish that the DISCO joint venture has substantial market power in either the market for digital sound technology or digital playback equipment. In addition, it would have to find that the DISCO joint venture had engaged in anti-competitive conduct that substantially lessens or prevents competition. The anti-competitive acts in this case would relate to the acquisition and foreclosure by the DISCO joint venture of access by its competitors to the music in the ROCKCO and POPCO music libraries. Foreclosure of access to these materials is apparently preventing alternative sound recording technologies from acquiring the critical mass of desirable music content required for them to achieve viability. It appears that this conduct may be substantially preventing or lessening competition and leading to the monopolization or the creation of dominance in the markets for digital sound technology and/or digital playback equipment sound reproduction. The foreclosure of other technologies creates market power for DISCO in these markets and is inefficient, as it reduces consumer choice, leads to increases in the royalties paid by the record companies to use this type of technology and increases the price of playback devices. The Bureau would likely seek an order requiring that ROCKCO and POPCO divest themselves of DISCO or that ROCKCO and POPCO license their works for release in alternative formats.

Example 8: Refusal to License a Standard

ABACUS and two other firms were the first to market a spreadsheet for personal computers. Electronic spreadsheet software was one of the applications that established personal computers as an essential tool for business. In the first five years, ABACUS out-sold its nearest competitor nearly two to one and its installed base (cumulative sales) grew to 50 percent. In the next two years, its annual market share grew to more than 75 percent and one of the other original firms left the market. At about the same time and after three years of programming, CALCULATOR introduced spreadsheet software that had a number of innovative features not found in ABACUS. However, CALCULATOR soon ran into financial difficulties despite the innovative features and a lower price. CALCULATOR approached ABACUS and requested a licence to copy the words and layout of its menu command hierarchy (for the purpose of this example, assume that permission was required since ABACUS had valid IP rights in these works). With permission, CALCULATOR could have relaunched its product with minor changes, which would have given CALCULATOR the ability to read ABACUS files and ensured compatibility between the two products. ABACUS refused to grant a licence and publicly announced that it would enforce its IP rights against CALCULATOR if it copied the ABACUS hierarchy. In light of this, several other prominent software makers announced that they were discontinuing their spreadsheet development programs.

An important characteristic of spreadsheets that determines their benefits to a purchaser is network effects. Network effects exist if the value of a product increases with the number of others who purchase compatible spreadsheets. Network effects for spreadsheets arise since the greater the size of the network (the installed base of compatible spreadsheets), the greater the number of individuals with whom files can be shared, the greater the variety of complementary products (utilities, software enhancements and macros), the more prevalent consulting and training services, and the greater the number of compatible data files.

Analysis

Given the circumstances surrounding this case, ABACUS's refusal to license its IP would constitute a "mere exercise" of its IP rights and would, therefore, be subject to review only under section 32 of the Act.

To establish whether ABACUS's refusal created an undue restraint of trade or unduly lessened competition, the Bureau would determine whether the refusal adversely affected competition in a relevant market that was different or significantly larger than the subject matter of ABACUS's IP rights or the products or services that result directly from the exercise of such IP rights. In this case, competitive harm is alleged in the market for ABACUS-compatible spreadsheets.

Whether the relevant market is determined to be ABACUS-compatible spreadsheets depends on the extent and importance of network effects and switching costs. If network effects are important, consumers that have never purchased a spreadsheet may still purchase the more expensive ABACUS product. Consumers who are already on the ABACUS network may be locked in by the switching costs of joining a new spreadsheet network (for example, their sunk investments in training, files and complementary products) and the loss in network benefits. If network effects and switching costs are material, then existing consumers are likely to stay and new consumers to choose ABACUS even if it is priced above competitive levels.

If the relevant market is determined to be ABACUS-compatible spreadsheets, then ABACUS would be the only producer and thus have 100 percent control of this market. If, in addition, entry barriers were found to be high, which is likely in an industry experiencing network effects, the Bureau would conclude that ABACUS is dominant. In determining whether the installed base of ABACUS contributes materially to entry barriers, the Bureau would consider the pace of innovation and the potential for a new technology to "leap-frog over" ABACUS despite its advantages (that is, its installed base and the switching costs). The Bureau would also endeavour to determine whether there are other efficient avenues for creating compatibility that would not infringe on the IP rights of ABACUS.

If the relevant market is determined to be ABACUS-compatible spreadsheets and the Bureau concluded that the relevant market was significantly larger than the subject matter of ABACUS's IP, and the products that result directly from the exercise of such IP rights, then the Bureau would likely conclude that ABACUS is dominant in the relevant market and that the IP is an essential input for firms participating in the relevant market. On this basis, ABACUS's refusal satisfies the first step of the Bureau's two-step analysis to determine whether it would seek to have an application brought under section 32.

In the second step, the Bureau determines whether ABACUS's refusal to license its IP would adversely alter firms' incentives to invest in research and development in the economy. In this case, the facts suggest that it is possible that ABACUS's ability to impose incompatibility may have a chilling effect on the development of more advanced spreadsheets. In addition, the choice by ABACUS of the words and layout of its menu hierarchy was likely arbitrary and likely involved little innovative effort and had little value relative to other substitutes. In the absence of an installed base and switching costs, ABACUS's terms and menu hierarchy would be no better or worse than CALCULATOR's (or any other). It is only after consumers make sunk investments and adoption creates an installed base that ABACUS spreadsheets become the market or standard and that its choice of words and menu interface required for compatibility with the ABACUS network creates unintended and unwarranted market power, a situation that can be corrected through enforcement action under section 32. On this basis, the Bureau would likely conclude that a special remedy invoked under section 32 would restore incentives for other firms to engage in research and the development of competing compatible spreadsheet programs.

If the facts of the case suggest potential enforcement under section 32, the Bureau would seek a special remedy that would allow other spreadsheet firms to gain access to the words and layout of ABACUS's menu hierarchy.

Example 9: Product Switching

BRAND sells innovative pharmaceutical drugs. One of its top sellers in terms of revenue, Product A, has been sold in Canada for many years, and continues to be sold, but will lose patent protection in six months. Two years ago BRAND introduced another product, Product B, which has a different chemical composition but alleviates the same affliction as that treated by Product A. The number of prescriptions for Product B remains low. Product B will remain under patent protection for the next 10 years.

GENERIC is set to launch a generic version of Product A ("Generic A") as soon as Product A's patent protection expires. Before its patent expires, BRAND withdraws Product A from the market by ceasing to manufacture it and by buying back inventories from wholesalers and pharmacies. BRAND notifies health care professionals that Product A is no longer available. In response to this development, physicians prescribe Product B to patients in place of Product A and a large number of prescriptions for Product A are replaced by prescriptions for Product B. Because Product A is the reference product for (or bioequivalent to) Generic A, pharmacies are prohibited from automatically substituting Generic A for the prescribed Product B. As a result, the success of GENERIC's entry becomes uncertain and drug payers (both patients and drug plan providers) must continue to buy Product B at high prices rather than have the option of buying Generic A at low prices.

Analysis

Because BRAND's conduct could be for the purpose of excluding entry by GENERIC and Generic A, the Bureau would not view the withdrawal of Product A by BRAND as a mere exercise of its patent right and thereby conduct exempt under section 79(5). Accordingly, the Bureau is likely to examine the conduct of BRAND under the abuse of dominant position provision (section 79) of the Act.

The Bureau would first seek to define a relevant market around Product A. Given that Generic A is bioequivalent to Product A and that empirical evidence from past generic entry events show that a generic drug largely supplants the brand when it becomes available; the Bureau would likely conclude that both drugs are in the same relevant market. The Bureau would also consider whether other drugs are sufficiently close substitutes to Product A to be considered in the relevant market. Important evidence as to what drugs may be in the relevant market would come from the evidence of physician/patient switching behaviour when BRAND withdrew Product A from the marketplace.

If the Bureau determined that BRAND was dominant in a relevant market that included Generic A, it would then proceed to determine whether BRAND's conduct, including that of withdrawing Product A from the marketplace, constituted a practice of anti-competitive acts. In making this determination, the Bureau would examine the likely effect of BRAND's conduct on the ability of GENERIC to enter and compete in the relevant market. For example, the Bureau would examine the possibility of GENERIC marketing Generic A directly to physicians. Ultimately, the Bureau would seek to determine whether BRAND's conduct would either foreclose the entry of GENERIC or delay that entry for a significant period.

The Bureau would also examine whether the purpose of BRAND's conduct was to delay or foreclose the supply of Generic A by GENERIC, or whether there was some other compelling business justification. In assessing any business justification, the Bureau would examine the evidence of physician prescribing behaviour for Product B when Product A was available as an alternative (i.e., before Product A's withdrawal). The Bureau would also consult with persons with relevant expert medical knowledge concerning the products at issue. If the Bureau determined that physicians viewed Product B as providing no substantive medical benefit over Product A, it would doubt any argument advanced that Product B is superior to Product A and the purpose of the withdrawal of Product A was to transition patients to a higher quality treatment.

If the Bureau concluded that BRAND was dominant in a relevant market and that it had engaged in a practice of anti-competitive acts, it would also assess whether BRAND's conduct had caused a substantial lessening or prevention of competition. As part of this analysis, the Bureau would likely examine the difference between the price of Product B and the price at which Generic A would have been expected to be sold if it had not been delayed or foreclosed by BRAND's conduct. As other evidence of harm resulting from BRAND's conduct, the Bureau would likely cite the negative effect of Product A's withdrawal on limiting physician/patient choice for prescription drugs.

If the Bureau concluded that the constituent elements of 79(1) were met, it would likely seek to negotiate a remedy with BRAND and failing that, bring an application before the Tribunal.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

www.competitionbureau.gc.ca

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