Competition Policy and Intellectual Property in the WTO: More Guidance Needed?

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I. INTRODUCTION

Recognition of the legitimate role of competition policy vis-à-vis intellectual property rights (IPRs) and licensing practices is an important element of the overall balance embodied in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). The relevant provisions acknowledge that "licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology" and stipulate that WTO Members "may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control" practices constituting "abuse[s] of intellectual property rights having an adverse effect on competition in the relevant market." As examples of such practices, the Agreement refers to exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing. These provisions reflect concerns regarding the potential anti-competitive effects of intellectual property rights protected under the Agreement that were expressed particularly by developing countries during the negotiation of the Agreement in the course of the Uruguay Round of multilateral trade negotiations.  

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1 See the Agreement on Trade-Related Intellectual Property Rights, Article 40.2. In addition, Article 8.2 of the Agreement provides that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." The scope and content of these provisions are discussed further, below.

2 Id., Article 40.2. There is no suggestion that this list is exhaustive; on the contrary, Article 40.2 is explicitly couched in non-exhaustive terms (i.e. the Agreement states only that such practices "may include" the practices mentioned).

The competition-related provisions of the TRIPS Agreement, while representing an essential element of balance in the Agreement, also leave important questions unanswered. For example, they do not define the basis on which practices may be deemed to be anti-competitive – i.e. the evaluative standards to be employed. The full set of practices that may be deemed anti-competitive (beyond the three examples mentioned) is left undefined. The Agreement also provides little in the way of guidance regarding the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other provisions of the Agreement.4

Whether the lack of guidance provided by the TRIPS Agreement regarding these questions is a problem can be debated. Frederick Abbott, for one, argues that the broad discretion for governments in the design and implementation of competition policies vis-à-vis intellectual property that results from the wording of the current provisions serves the best interests of developed and developing countries alike and, therefore, that no amendment to the Agreement or development of parallel rules on anti-competitive practices in relation to IP is warranted.5

However, even if no amendment to the TRIPS Agreement as such or development of parallel binding rules is deemed to be desirable or feasible in the current circumstances, there could be merit in a policy analysis and development exercise at the multilateral level to consider the relationship between competition policy and intellectual property rights. The question of possible guidelines – whether of a binding or non-binding nature – could be addressed in that context. Certainly, there are reasons for believing that there are costs associated with the dearth of guidance for WTO Member countries regarding the optimal application of competition policy in this area (see detailed discussion in Part III, below). In

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brief, the application of competition policy vis-à-vis intellectual property is one of the more complex and technically challenging sub-fields of such policy. In the absence of appropriate guidance, WTO Members lacking experience, particularly developing countries, may well find it difficult to implement appropriate enforcement policies in this area. In addition, as will be elaborated below, there are potential negative externalities or spillovers associated with differing national standards in this area. For example, remedies imposed in one jurisdiction may impinge on behaviour (and potentially on economic welfare) in other jurisdictions. A particularly acute example of this concern relates to situations in which remedies imposed in one jurisdiction require the sharing of proprietary information. In such cases, it may be difficult to prevent the information disclosed (or products manufactured using such information) from "leaking" across borders.6

To be sure, even if it is deemed desirable to provide additional guidance for WTO Members regarding these questions, it may not be possible to agree on appropriate standards to govern all practices in all situations. Although approaches to the competition policy-intellectual property interface in major developed jurisdictions have undergone a degree of convergence in recent years and a number of useful guidelines on national enforcement policies are available for reference,7 there remain important residual differences even as between the US and the European Community.8 In the past, even greater divergences have been evident between developed and developing countries regarding issues in this area.9 It is important, however, not to be defeatist regarding these differences and the consequent scope for development of policies that would enhance global welfare. Even if it is not possible to agree on standards to govern all anti-competitive practices relating to IP in all cases, there

6 See the discussion of remedies imposed in recent cases relating to practices of the Microsoft Corporation, below.


8 See the discussion in Part III, below.

could well be gains from an exchange of views on issues in this area in the context of the multilateral trading system.

In addition to pertinent developments at the national level, any discussion of issues concerning the interface of intellectual property and competition policy in the WTO could build effectively on developments and discussions that have already taken place in various intergovernmental fora. The interface of competition policy and intellectual property rights has been an important topic of discussion, inter alia, in the OECD Committee on Competition Law Policy and the UNCTAD Intergovernmental Group of Experts on Competition Law Policy.  

Experience in the WTO Working Group on the Interaction between Trade and Competition Policy - which was established at the Singapore Ministerial Conference in December 1996 and met regularly in the years from 1997 through 2004 but is currently "inactive" – is also, very much, of interest in this regard. The application of competition policy vis-à-vis intellectual property rights was an important focus of the Group in the initial years of its work.  As discussed in this chapter, the record of those discussions suggests that the state of international thinking has progressed since the more extreme divergences of the past and that there may be more scope than is commonly realized for further work on fostering common approaches among WTO Member countries in this area, centred around sound economic principles.

This chapter reflects on these questions and possibilities. The intention is not to provide a definitive answer to the question of what kind of guidance is needed or to take particular positions on current enforcement issues, but to illuminate the need for guidance and some of the issues that would need to be addressed. The overall perspective of the chapter is

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that, in the long run, there will clearly be a need for greater international coordination in this area. This reflects both the technical challenges for enforcement policy and the potential negative spillovers from a lack of international coordination that are noted above. However, agreement on common standards will not be easy. In the short run, there is a need for renewed international dialogue and reflection on issues concerning the interface of competition policy and intellectual property. Such dialogue should include but not be limited to competition specialists and should take account of recent economic learning and lessons from national enforcement experience in addition to past discussions at the international level, including in the WTO. The scope for resulting guidance and whether such guidance would be of a voluntary nature or otherwise are questions that could be assessed in the scope of such discussions.

The remainder of the chapter is organized as follows. Part II outlines the existing competition policy-related provisions of the TRIPS Agreement, noting in particular the questions that these provisions leave unanswered and the significance of these questions. Part III develops the need for a further learning/policy development exercise in this area at the multilateral level, fleshing out the points noted above. Part IV sets out a number of particular issues on which an exchange of views/further international convergence would be desirable, noting the problems that can flow from differing national standards and approaches in this area. Part V reviews the discussions that took place on this topic in the early work of the WTO Working Group on the Interaction between Trade and Competition Policy, noting the main points of agreement between the participating Members. Part VI provides concluding remarks.

II. THE COMPETITION POLICY PROVISIONS OF THE TRIPS AGREEMENT: FLEXIBILITY PROVIDED AND QUESTIONS UNANSWERED

The area of intellectual property rights is an important example of a sphere in which the role of competition policy is already directly reflected in an existing WTO Agreement,

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12 See also Anderson, note 3 and Anderson and Wager, note 4.
the Agreement on Trade-Related Intellectual Property Rights (TRIPS). At a broad level, Article 8.2 of the Agreement stipulates that:

"Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

In the same spirit but focusing on the specific issue of licensing practices, Article 40.1 of the Agreement notes that:

"Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede that transfer and dissemination of new technology."

To address this concern, Article 40.2 recognizes the right of Member governments to take measures to prevent anti-competitive abuses of intellectual property rights, provided that such measures are consistent with relevant provisions of the Agreement. Article 40.2 also contains a short illustrative list of practices which may be treated as abuses. It should be noted that neither Article 8.2 nor Article 40.2 indicates that specific practices shall be treated as abuses or specifies remedial measures that must be taken. In this sense, the competition provisions of the Agreement are permissive rather than mandatory.

Article 40.3 of the Agreement provides that a Member considering action against an intellectual property owner that is a national or domiciliary of another Member can seek consultations with that Member. The latter Member is required to cooperate through the supply of publicly available non-confidential information of relevance, and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality.

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14 These are exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing.
15 See also Anderson, above note 3.
Competition policy considerations are also embodied in the TRIPS Agreement provisions relating to compulsory licensing in respect of patents. Article 31 of the Agreement sets out detailed conditions that must be respected in the granting by Member states of any compulsory licences. However, subparagraph (k) of Article 31 stipulates that Members are not obliged to apply certain of these conditions\(^\text{16}\) in circumstances where the compulsory licence is granted "to remedy a practice determined after judicial or administrative process to be anti-competitive." In particular, requirements to show that a proposed user has made efforts to obtain voluntary authorization from the right holder on reasonable terms and conditions and that such efforts have not been successful within a reasonable period of time are not applicable in these circumstances. In addition, the requirement (in Article 31 (f)) that authorization for use of a patent under a compulsory licence be predominantly for the supply of the domestic market of the Member authorizing such use can also be rendered inapplicable by such a finding.

The existence of the foregoing provisions reflects a concern articulated by some countries, especially developing countries, during the negotiation of the Agreement that the various commitments regarding standards of protection for intellectual property that are embodied therein be balanced by a recognition of the right of Members to take appropriate measures to address resulting abuses.\(^\text{17}\) They provide broad discretion to WTO Member governments to implement competition policy remedies in regard to anti-competitive licensing and other practices. As such, they represent an important aspect of the flexibility that is built into the Agreement.

As pointed out in the Introduction to this chapter, however, the foregoing provisions leave unanswered a number of important questions. For example, they do not define the basis on which practices may be deemed to be anti-competitive – i.e. the evaluative standards to be employed. In addition, the full set of practices that may be deemed anti-competitive (beyond the three examples mentioned) is left undefined.\(^\text{18}\) The Agreement also provides little in the way of guidance regarding the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other provisions of

\(^\text{16}\) Specifically, those contained in paragraphs (b) and (f) of Article 31.

\(^\text{17}\) See discussion in World Trade Organization 1997, above note 3, at pp. 72-74.

\(^\text{18}\) The latter might not be a problem if the evaluative criteria were specified. It is not uncommon, in domestic statutes, to provide an open-ended illustrative list of acts that are covered by a particular provision.
the Agreement. Presumably, one implication of the latter limitation is that the remedy of compulsory licensing cannot be imposed other than in a manner consistent with the provisions of Article 31.

III. THE NEED FOR FURTHER GUIDANCE FOR WTO MEMBERS IN THIS AREA: TECHNICAL CHALLENGES, POLICY LEGITIMACY, AVOIDING OVERLY SWEEPING APPROACHES AND INTERNATIONAL COORDINATION ISSUES

As noted in the Introduction to this chapter, there may be advantages as well as disadvantages to the lack of guidance provided by the TRIPS Agreement on the matters identified in the preceding section. Abbott, in particular, argues that the broad discretion for governments in the design and implementation of competition policies vis-à-vis intellectual property that results from the wording of the current provisions serves the best interests of developed and developing countries alike. However, even if no amendment to the TRIPS Agreement as such or development of parallel binding rules is deemed to be desirable or feasible in the current circumstances, there are reasons for believing that the current situation is not optimal, and that ways need to be found to provide additional guidance for WTO Members in this area. This part of the chapter considers these reasons. The form that further guidance would take – i.e. whether it might be of a binding or non-binding nature – is a question that could be addressed at a later stage.

(1) Facilitating desirable competition policy interventions vis-à-vis intellectual property licensing and other abuses

The application of competition policy vis-à-vis intellectual property is undeniably one of the more complex and technically challenging sub-fields of such policy. It has taken decades for the major jurisdictions applying competition policy in this area (principally the US, the EC, Japan and Canada) to develop the relevant analytical tools and approaches. Therefore, while respecting the right and possible interest of developing countries to follow different approaches, it is important to recognize the practical difficulties that they face in developing and putting into place any approach at all. This is particularly so in regard to anti-

However, in view of the lack of evaluative criteria/defining principles, the open-ended nature of the set of anti-competitive practices could result in arbitrary application of the authority provided in Article 40.2.
competitive practices that are transnational in nature (e.g. anti-competitive clauses in international licensing agreements). An obvious way forward is to examine the approaches that have been adopted in regimes with active policies in this area, in conjunction with relevant legal and economic literature, and to consider the adoption of policy approaches. A policy that simply preserves all options in this area may well be synonymous with a policy of non-intervention in regard to IP licensing and other abuses.

For greater precision, the competition authorities of the US, the EC, Canada and Japan have all adopted more or less comprehensive guidelines or other policy statements setting out the analytical and other approaches that they take toward licensing and other IP abuses.\textsuperscript{20} Of course, each of these instruments has its own particularities reflecting its institutional and policy context. Of course, none of them purports to represent "the final word" on the optimal application of competition policy vis-à-vis intellectual property. In fact, these instruments are all subject to occasional updates/revision to take account of new learning and policy developments. They nonetheless represent highly useful syntheses of enforcement approaches that both provide guidance to firms and facilitate policy application by responsible officials. As such, they are an essential point of reference for international reflection and for jurisdictions with less experience in this area.

(2) Ensuring policy legitimacy

Guidelines and similar policy statements serve purposes that go beyond the pedagogical. Apart from the technical challenges involved in effective competition policy interventions vis-à-vis licensing and other IP abuses, developing countries may hesitate to apply their competition policies in this area out of fear of some kind of retaliation or other pressure.\textsuperscript{21} A key benefit of international deliberations/a possible resulting guideline on enforcement issues in this area could be to confer legitimacy on (well-founded) interventions by developing country competition authorities with respect to anti-competitive abuses of IPRs.

(3) Avoiding overly sweeping or rigid enforcement approaches

\textsuperscript{19} Abbott, above note 3.
\textsuperscript{20} See US, Department of Justice and Federal Trade Commission, above note 7; European Commission, above note 7; Canada, Competition Bureau, above note 7; and Japan, Fair Trade Commission, above note 7.
Competition law and enforcement officials recognize that, in addition to under-enforcement of national competition policies vis-à-vis intellectual property rights, national economic welfare can be reduced by over-enforcement of such policies (i.e. excessively sweeping or *per se* condemnation of practices that can, in appropriate circumstances, be welfare-enhancing). In this regard, the position articulated in the Antitrust Guidelines for Intellectual Property Licensing promulgated by the US Department of Justice and Federal Trade Commission in 1995 is à propos:

Field-of-use, territorial, and other limitations on intellectual property licenses may serve pro-competitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself.22

Recognition of the potential pro-competitive benefits of licensing and other vertical practices is not an invention of contemporary competition agencies; it is a basic tenet of modern industrial organization economics.23

The fact that licensing and other vertical practices can serve legitimate pro-competitive purposes cautions against excessive reliance on *per se* rules in regard to such practices. Recognizing this, for the past two decades or more competition agencies have progressively eschewed such rules in favour of case-by-case or "rule of reason" treatment of such practices. Helping countries to avoid the self-inflicted harm caused by excessively rigid or sweeping rules is another possible benefit of a comparative assessment or policy development exercise encompassing these issues at the multilateral level.

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21 This possibility is recognized by Abbott, above note 3.
Possible negative spillovers resulting from conflicting national competition policies vis-à-vis intellectual property

Independent of the concerns noted above which relate to the costs of under or over-enforcement of competition policy vis-à-vis IPRs at the national level, there are potential externalities or spillovers associated with differing national standards in this area. In some cases, the spillovers will be positive in the sense that measures taken to protect competition in one market will also benefit consumers in other markets and will have no adverse effects. However, negative spillovers can also arise. For example, remedies imposed in one jurisdiction may impinge on behaviour (and potentially on economic welfare) in other jurisdictions. A particularly acute example of this concern relates to situations in which remedies imposed in one jurisdiction require the sharing of proprietary information. In such cases, it may be difficult to prevent the information disclosed (or products manufactured using such information from "leaking" across borders.

The recent example of remedies implemented by various jurisdictions in respect of practices of the Microsoft corporation illustrates this concern. As is well known, in the course of a number of related cases the competition authorities of the United States and the European Communities have taken different positions - in some respects, only subtly different - regarding aspects of Microsoft's conduct. Although these cases have typically been framed in terms of abuse of dominant position or monopolization rather than abusive licensing practices as such, the two areas are intimately connected. In reviewing one recent EC decision, the Antitrust Division of the US Department of Justice issued a press release stating as follows:

"The U.S. experience tells us that the best antitrust remedies eliminate impediments to the healthy functioning of competitive markets without hindering successful competitors or imposing burdens on third parties, which may result from the EC's remedy. [...] Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is

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24 This section of the chapter draws on material in Robert D. Anderson and Alberto Heimler, *Abuse of Dominant Position: Enforcement Issues and Approaches for Developing Countries*, 2006, mimeo

significant that the U.S. district court considered and rejected a remedy [similar to that imposed by the EC] in the U.S. litigation. 26

As a further (perhaps even more stark) illustration, in early December 2005, the Fair Trade Commission of Korea made public an order requiring Microsoft to sell in Korea a version of its Windows operating system that includes neither Windows Media Player nor Windows Messenger functionality, requiring Microsoft to facilitate consumer downloads of third party media player and messenger products selected by the Commission, and prohibiting Microsoft from selling in Korea a version of its server software that includes Windows Media Services. In response, the Antitrust Division of the US Department of Justice issued a press release stating as follows:

"The Antitrust Division believes that Korea's remedy goes beyond what is necessary or appropriate to protect consumers, as it requires the removal of products that consumers may prefer. The Division continues to believe that imposing 'code removal' remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it. We had previously consulted with the Commission on its Microsoft case and encouraged the Commission to develop a balanced resolution that addressed its concerns without imposing unnecessary restrictions. Sound antitrust policy should protect competition, not competitors, and must avoid chilling innovation and competition even by 'dominant' companies." 27

Without taking any position on the substantive merits of the approaches taken in the three jurisdictions (the US, the EC and Korea), the foregoing exchanges illustrate clearly the potential for conflicts where different jurisdictions take different approaches in addressing transnational abuses of a dominant position (or abuses of intellectual property rights). A minimum requirement to avoid conflicts in such cases is adherence to the well-known principle of national treatment (one of the founding principles of the WTO), which broadly requires that countries not impose burdens on foreign producers or products that they do not impose on their own firms/products. 28 However, it is not clear that this, by itself, will answer all possible concerns, particularly where differences in the remedies imposed by particular jurisdictions result not from discrimination as such but from substantive differences in problems.

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enforcement philosophies and approaches. There may, indeed, be no simple solution. Possibly, the answers can be found in further international discussions aimed at fostering intellectual consensus on the substantive issues involved. However, the potential for conflict in cases of abuses of intellectual property rights (or abuses of a dominant position involving intellectual property rights, particularly as a remedy) at least raises the possibility that something more than this - i.e. a system of international coordination, whether voluntary or otherwise - will eventually be needed.

IV. ISSUES THAT MIGHT BE ADDRESSED IN A POSSIBLE INTERNATIONAL GUIDELINE/POLICY-MAKING EXERCISE

This section of the chapter sets out some specific issues on which international reflection and (possibly) coordination may be desirable. The list of issues derives from the guidelines that have been issued by the competition authorities of the major jurisdictions having experience in this area, and related enforcement experience and jurisprudence. Some of the issues noted concern the basic approach and coverage of competition law vis-à-vis intellectual property; others involve particular practices of current interest. Where possible, an effort is made to identify international coordination problems that may arise in relation to the issues and categories of conduct discussed in addition to the basic questions of enforcement policy. The potential international coordination problems identified (particularly in regard to the treatment of licensing issues, pooling, anti-competitive patent settlements and refusals to licence) reinforce the case for further discussion of these issues in appropriate international fora.

A. THE BASIC ROLE OF COMPETITION POLICY VIS-À-VIS INTELLECTUAL PROPERTY RIGHTS

A premise common to the guidelines of major jurisdictions with experience in this area is that, at least at a broad level, the protection of IPRs per se is not inconsistent with the goals of competition policy. Rather, if properly designed and administered, IPRs strengthen competition in the long run by providing incentives for the development and production of new products and production processes and by facilitating technology transfer.29

29 The Antitrust Guidelines on Intellectual Property Licensing of the US Department of Justice and Federal Trade Commission describe the basic relationship between intellectual property and competition law as follows: “The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new
Furthermore, in most (not all) cases, substitutes are available for products that are protected by intellectual property rights. This implies that the mere existence of intellectual property rights, by itself, should not be seen as proof of the existence of market power. The latter view has now been adopted in US Supreme Court jurisprudence (see Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006)) in addition to relevant enforcement guidelines.

Notwithstanding this overall relationship of complementarity, experience has made clear that IPRs can indeed give rise to significant market power in particular cases and that the exercise of such rights can conflict with the content and/or the objectives of competition law in a variety of ways. Four basic categories of practices which can and do give rise to conflicts with competition law in particular cases are the following: (i) the acquisition of IPRs, for example through mergers or simply the assignment of IPRs; (ii) technology licensing arrangements (whether domestic or international); (iii) cooperative arrangements among innovating firms, including patent pools; and (iv) anti-competitive settlements in patent infringement cases that deter entry by generic competitors. These specific aspects of competition law enforcement would constitute important elements of any international policy development exercise/guideline in this area and are discussed further below. Consideration is also given to an issue on which there is no international consensus – namely the treatment of refusals to licence – and to the transcending importance of competition advocacy.

and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.” US Department of Justice and Federal Trade Commission, Antitrust Guidelines on Intellectual Property Licensing, above note 7, section 1.0.

In the past, competition law in the US was guided by a presumption that the mere existence of patents or copyrights gives rise to the existence of market power, which in turn was an important threshold condition for the application of ‘per se rules’ (i.e. rules embodying a blanket prohibition of relevant practices) in regard to practices such as tying arrangements. See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (U.S. Supreme Court), and past precedents cited therein. However, economic analysis and Guidelines adopted by the US Department of Justice and Federal Trade Commission in 1995 called this view into question, pointing out the availability of substitutes for many protected works or technologies. Acceding to this approach, the US Supreme Court, in its decision in Illinois Tool Works, Inc. v. Independent Ink, Inc., struck down the old presumption, accepting the conclusion that patents do not necessarily confer market power.
B. COMPETITION ISSUES REGARDING THE ACQUISITION OF INTELLECTUAL PROPERTY RIGHTS

An important "threshold" issue that could be addressed in an international guideline or policy-making exercise concerns the basic applicability of competition law to acquisitions of intellectual property rights. Intellectual property rights may be acquired either by themselves or as a consequence of a merger of corporate entities owning such rights. It is of critical importance that acquisitions of intellectual property rights, like other forms of property, be subject to the constraints of competition law. This principle is recognized in the guidelines of major jurisdictions with active enforcement programs in this area; yet it has sometimes been resisted by intellectual property authorities and the courts.32

C. THE TREATMENT OF LICENSING AND RELATED PRACTICES

The treatment of licensing practices is a central issue at the interface of competition law and intellectual property rights. Licensing practices that may, in particular cases, have anti-competitive effects include grant-backs, exclusive dealing requirements, tie-ins, territorial market limitations, field-of-use restrictions and price maintenance clauses. The overall trend in competition law jurisprudence internationally is to treat such practices on a case-by-case or 'rule of reason' basis.33 As noted above, economic learning is supportive of such an approach in that it makes clear that these practices can, at least in some circumstances, serve legitimate pro-competitive functions.34

Under this approach, licensing arrangements are assessed on the basis of factors such as the following:

32 Recently, the Canadian Competition Bureau found it necessary to make an intervention in a case before the Federal Court of Appeal, Apotex Inc. v. Eli Lilly and Company, A-579-04, 2005 CAF 361, on the question of whether the assignment of a patent could constitute an agreement or arrangement to lessen competition unduly, contrary to the conspiracy provision of the Canadian Competition Act. In its decision, the Court adopted the Bureau's position, holding that Canada's patent legislation "does not immunize an agreement to assign a patent from section 45 of the Competition Act when the assignment increases the assignee's market power in excess of that inherent in the patent rights assigned." See, for details and further background, Sheridan Scott (Commission of Competition, Canada), Competition Law and Intellectual Property Law: Getting the Balance 'Just Right' (Notes for an Address to the University of Victoria Faculty of Law International Intellectual Property Law Symposium, July 15, 2006).

33 There are, nonetheless, important residual differences in the treatment of licensing practices among jurisdictions, perhaps particularly between the US and the European Community.

• The extent and availability of substitutes for the products and (existing or future) technologies in question (a basic determinant of market power).
• Implications of the arrangements in question for market power, coordination of pricing or output, and foreclosure of access to inputs.
• The extent to which they impose exclusivity.
• The extent of rivalry and the pace of innovation in the markets affected.
• Possible efficiencies resulting from the arrangement.  

A case-by-case approach to the treatment of licensing practices may strike some as unduly permissive or lenient. In the past, some developing countries have advocated a stricter approach. An unduly strict or per se approach is likely, however, to be self-defeating. Sweeping prohibition of restrictive practices in international licensing agreements would raise the costs and/or reduce the incentives for technology owners to enter into voluntary arrangements that are generally pro-competitive and are an important vehicle for international technology transfer. This does not, however, imply that restrictive licensing arrangements should be immune from scrutiny; rather, the suggestion is simply that such scrutiny should be carried out using the market power and other screens and tests that are suggested by relevant economic literature and case experience.

Where licensing arrangements are international in scope, the application of competition law in this area can clearly give rise to international coordination problems. In the absence of "comity" or similar considerations, where a particular licensing arrangement is subject to the competition laws of two or more jurisdictions, the arrangement could be deemed illegal under laws of the jurisdiction taking the "strictest" approach notwithstanding that it would be tolerated or even deemed desirable under the approach of the other jurisdiction.

35 See also Anderson and Heimler, above note 24.
36 Abbott, in particular, emphasizes that, in his view, section 40 of the TRIPS Agreement permits per se prohibition of licensing practices. Abbott, above note 3.
37 See, for further discussion, US Department of Justice and Federal Trade Commission, above note 7; and the various essays in Robert D. Anderson and Nancy T. Gallini, Competition Policy and Intellectual Property Rights in the Knowledge-based Economy, above note 30.
D. ISSUES CONCERNING PATENT THICKETS AND POOLING

Another important issue meriting attention in any international policy development exercise or guideline is that of patent thickets and pooling. Patent thickets are situations in which an overlapping set of patent rights requires firms seeking to commercialize new technology to obtain licenses from multiple patentees. For example, a single semi-conductor product can be potentially subject to hundreds or thousands of patents. The impact of patent thickets is heightened by the risk of "hold-ups" – that is, the danger that new products will inadvertently infringe on patents issued after the products were designed.38

Patent pools and/or cross-licensing can be an efficient response to these phenomena in many cases, although they can also raise antitrust concerns. A key insight, in this regard, is that pools combining complementary patents are generally efficiency-enhancing; whereas pools comprised of substitute patents can indeed create market power and are a legitimate focus of antitrust concern.39 Why might it eventually prove necessary to treat the issue of patent thickets and pooling in an international guideline or policy development exercise, as opposed to merely addressing it at the national level? The answer is that pools raise, potentially in acute form, the international coordination issues flagged above. If particular pools or cross-licensing arrangements are permitted in one jurisdiction but not in another, spillovers are likely to arise.

E. THE Treatment OF Patent SETTLEMENTS

Another important issue that is highlighted by recent enforcement experience in developed jurisdictions concerns anti-competitive "settlements" in patent infringement cases that thwart entry by generic competitors. This possibility is likely to be of particular concern in situations where public policy seeks to facilitate entry by generic competitors. As Majoras explains, under the relevant US legislation:

"In nearly any case in which generic entry is contemplated, the profit that the generic anticipates will be much less than the profit the brand-name drug

38 Majoras, above note 22.
company would make from the same sales. Consequently, it will often be more profitable for the branded manufacturer to buy off generics.\textsuperscript{40}

Of course, "buying off" potential generic competitors is likely to be strongly contrary to the interests of consumers.

As part of the global response to current public health emergencies, recently the TRIPS Agreement has been amended to facilitate generic production of pharmaceutical medicines for countries affected by such crises.\textsuperscript{41} It is important that this policy not be undercut by anti-competitive settlements between brand-name and generic drug companies. Accordingly, this issue could be an important focus of international deliberations regarding the interface of competition policy and intellectual property.

\textbf{F. REFUSALS TO LICENSE}

An additional issue on which it may be difficult to achieve full convergence is that of refusals to license intellectual property rights. In the European Community, the \textit{Magill TV}\textsuperscript{42} and \textit{IMS Health}\textsuperscript{43} cases have made clear that such refusals can indeed violate relevant competition law provisions, depending on the circumstances and, in particular, on whether they impede the development of new products. On the other hand, in the US, there is a strong or, in the view of many commentators, absolute presumption that patent holders are entitled to refuse to license their patented inventions (the situation is less clear with respect to copyright).\textsuperscript{44} Independent of views concerning which side in this debate is "right", the treatment of refusals clearly poses stark problems of international policy coordination: where technology is made available by compulsory licence in one jurisdiction (despite possible opposing views in another jurisdiction), it will be difficult to prevent it from "leaking" across borders.\textsuperscript{45}

\textsuperscript{40} Majoras, above note 22.
\textsuperscript{41} See, for details, Anderson and Wager, above note 4.
\textsuperscript{42} \textit{Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)} [1995] ECR 743, joined cases C-241/91P and C-242/91P.
\textsuperscript{43} \textit{IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG}, [2004] ECR I-5039, case C-481/01P.
\textsuperscript{45} Such concerns would appear to underlie the concerns voiced by the US Department of Justice in regard to the remedy imposed by the Korea Fair Trade Commission in its recent Microsoft decision, referred to in note 27 above and accompanying text.
G. COMPETITION ADVOCACY IN RELATION TO INTELLECTUAL PROPERTY RIGHTS

Recent experience also underlines the importance of advocacy activities by competition agencies aimed at ensuring that patents and other forms of intellectual property rights are not awarded unnecessarily or cast in overly broad terms.\textsuperscript{46} Such activities can include public education activities, studies and research undertaken to document the need for market-opening measures, formal appearances before legislative committees or other government bodies in public proceedings, or behind-the-scenes lobbying within government.\textsuperscript{47} An important and highly pertinent example of a competition policy advocacy activity in the specific area of intellectual property is the 2003 report of the US Federal Trade Commission entitled \textit{To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy}.\textsuperscript{48} This report provides a penetrating discussion of the harmful effects on competition that can flow from the awarding of unjustified patents (or patents that are cast in overly broad terms), and puts forward a range of proposals to address these problems. Affirming the importance of such activities in relation to intellectual property could be another valuable contribution of a international guideline or policy development exercise relating to competition policy and intellectual property at the multilateral level.\textsuperscript{49}

V. PAST DISCUSSIONS IN THE WTO WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY AS A POINT OF REFERENCE FOR FURTHER POLICY DEVELOPMENT WORK AT THE INTERNATIONAL LEVEL\textsuperscript{50}

At the 1996 Singapore Ministerial Conference, WTO Ministers established a Working Group on the Interaction between Trade and Competition Policy (WG TCP). The mandate given to the Working Group at that time was to consider issues raised by Members relating to

\textsuperscript{49} The importance of competition advocacy activities vis-à-vis intellectual property policy is also emphasized in Canada's \textit{Intellectual Property Enforcement Guidelines}, cited at above note 7.
\textsuperscript{50} This section of the paper draws on material in Anderson, above note 3. A complementery discussion is provided in Heinemann, above note 10.
the interaction of the two policy fields, including anti-competitive practices, and to identify any areas that might merit further consideration in the WTO framework. Between 1997 and 2003, a wide-ranging examination of the relationships between trade and competition policy, and between competition policy and economic development, was carried out in the WTO Working Group. As is well known, the exploratory work of the Working Group led eventually to a protracted debate, in the Group and outside, of the merits and demerits of a possible "multilateral framework on competition policy." At the WTO Ministerial Conference in Cancun, Mexico, in September 2003, it was not possible to reach a consensus on the launching of negotiations on a multilateral framework on competition policy as had been proposed by the European Union and various other countries in the run-up to the conference. Subsequently, the General Council of the WTO decided, as part of the so-called "July package" of 2004, that no further work would be undertaken toward negotiations on competition policy (or on the separate issues of investment and transparency in government procurement) for the duration of the Doha Round.

Notwithstanding the failure thus far to reach agreement on the launching of negotiations, the work of the Working Group on the Interaction between Trade and Competition Policy remains an important point of reference for discussions on international competition policy. For most WTO Members, the opposition to negotiations did not reflect a view that the issue of competition policy had no relevance to the goals of the multilateral trading system. Indeed, without yielding a consensus on negotiations, preparatory work in the WTO Working Group catalogued a variety of ways in which anti-competitive practices can adversely impinge on the objectives of the system, and a number of possible synergies between the system and the work of national competition authorities. Even participants who have been openly sceptical of the desirability of negotiations on competition policy in the WTO have noted the usefulness of the work done in the Working Group in promoting

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positive interest in the subject and wider understanding of competition policy concepts and tools.\footnote{For example, William Kolasky, then US Deputy Assistant Attorney-General for Antitrust and by no means an advocate of WTO competition rules, has stated as follows: "Over the years, we have been told that our WTO papers - dealing with issues like technical assistance, building a culture of competition, and establishing antitrust priorities - have been of enormous help to countries that are in the process of establishing an antitrust regime." William J. Kolasky, Global Competition Convergence and Co-operation: Looking Back and Looking Ahead, Remarks to the American Bar Association Fall Forum, Washington, D.C., 7 November 2002.}

The subject of the relationship between intellectual property rights and competition policy was an important focus of the WTO Working Group in the early years of its work. The debates on this issue contain many elements relevant to possible further work in this subject-area at the multilateral level. For example, the discussion took as a point of departure the recognition that competition policy can be an important factor in balancing the rights of producers under intellectual property legislation, and in counteracting particular abuses thereof. The debate recognized both the costs entailed by overly strict enforcement policies and regulations in the area of technology licensing and the dangers of an overly lax approach. The Working Group also took note of the evolution that has taken place in the enforcement policies of WTO Members with experience in this area, and attached importance to this as a basis for further analysis.\footnote{See, for a more comprehensive discussion, Anderson, above note 3.}

Some additional highlights of the Working Group's deliberations on this subject are as follows:

- There was wide acknowledgement that competition laws are necessary to prevent abusive practices and ensure that interfirm rivalry is not restricted to an extent beyond that intended by the intellectual property laws, and thereby that the market assigns a fair and efficient value to such property.\footnote{Report (1998) of the WTO Working Group on the Interaction between Trade and Competition Policy, above note 11, paragraph 113.}

- The discussion in the Working Group recognized that the availability of substitutes for goods and technologies covered by IPRs is an empirical question to be determined on a case-by-case basis.\footnote{Report (1998) of the WTO Working Group on the Interaction between Trade and Competition Policy, above note 11, paragraph 115.} As noted above, this is a base-line assumption of
economics-based approaches to antitrust analysis in this area.\textsuperscript{58} Further, even if the intellectual property right concerned generates market power, the right holder's behaviour might not necessarily constitute an abuse of a dominance.

- There was a general recognition that licensing arrangements are normally pro-competitive and are an important vehicle for technology transfer. Where an individual licensing practice needs to be examined, this should normally be done on a case-by-case or "rule of reason" basis by which the pro-competitive benefits are weighed against anti-competitive effects.\textsuperscript{59}

- Consistent with the above, the point was made that the proper application of competition law should avoid both excessively stringent enforcement approaches, which can lessen innovation, and the weak or ineffective application of such law, leading to the abuse of market power. Either approach can have an adverse effect on output as well as an inhibiting effect on trade.\textsuperscript{60}

- The view was also expressed that more attention should be paid to ensuring that the intellectual property rights themselves are underpinned by sound competition principles and that they promote global welfare. Over-protection of intellectual property rights can contribute to the entrenchment of horizontal and vertical restraints, for example through patent pooling among competitors and the restriction of parallel imports. Some Members suggested, further, that future negotiations in the area of intellectual property rights should give equal weight to recognizing the risks of both under- and over-protection of intellectual property rights. Under this approach, advocates of higher levels of protection would be required to demonstrate empirically that the changes they proposed are likely to increase global welfare.\textsuperscript{61}

- The point was made that the TRIPS Agreement itself reflects the view that regimes for the protection of intellectual property rights should be balanced by safeguards

\textsuperscript{58} See text accompanying notes 30 and 31, above.
intended to restrain anti-competitive practices involving the use of intellectual property rights. Some Members stated explicitly that the relevant provisions of TRIPS provide insufficient guidance on the practices that should be treated as abuses and the remedies that would be appropriate, and that more guidance in this area would be useful.\textsuperscript{62}

In sum, the discussion of the interface between competition policy and intellectual property rights in the WTO Working Group on the Interaction between Trade and Competition Policy was both wide-ranging and penetrating. The discussion delved into matters such as the objectives of intellectual property laws and their relation to those of competition policy; the potential efficiency benefits of "restrictive" licensing arrangements; the evolution of Member states' competition enforcement policies in this area and the reasons for such evolution; and the implications for economic welfare of the practice of international market segmentation through intellectual property rights. In key respects, the discussion in the Working Group paralleled the evolution of scholarly thinking in this area. As such, it may provide more of a basis for further work in this area than has hitherto been recognized.\textsuperscript{63}

\section*{VI. CONCLUDING REMARKS}

Recognition of the legitimate role of competition policy vis-à-vis intellectual property rights (IPRs) and licensing practices is an important element of the overall balance embodied in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). The relevant provisions reflect concerns regarding the potential anti-competitive effects of intellectual property rights protected under the Agreement that were expressed particularly by developing countries during the negotiation of the Agreement in the course of the Uruguay Round of multilateral trade negotiations.

The competition-related provisions of the TRIPS Agreement, while representing an essential element of balance in the Agreement, also leave important questions unanswered. For example, they do not define the basis on which practices may be deemed to be anti-competitive – i.e. the evaluative standards to be employed. Consequently, the full set of practices that may be deemed anti-competitive (beyond the three examples mentioned) is left

undefined. The Agreement also provides little in the way of guidance regarding the remedies that may be adopted in particular cases, beyond making clear that any measures adopted must be consistent with other provisions of the Agreement. These gaps heighten the technical challenges for WTO Members in putting the provisions to good use and also raise potential international coordination problems. For example, remedies imposed in one jurisdiction may impinge or be felt to impinge on behaviour and on economic welfare in other jurisdictions. The potential for such problems has already been seen in international tensions relating to remedies imposed in the various Microsoft cases. Even if no amendment to the TRIPS Agreement as such or development of parallel binding rules is deemed to be called for to address these issues, there could be merit in a policy analysis and development exercise at the multilateral level to consider the relationship between competition policy and intellectual property rights.

Of course, even if it is deemed desirable to provide additional guidance for WTO Members regarding these questions, it may not be possible to agree on appropriate standards to govern all practices in all situations. Although approaches to the competition policy-intellectual property interface in major developed jurisdictions have undergone a degree of convergence in recent years, there remain important residual differences particularly as between the US and the European Community. It is important, however, not to be defeatist regarding these differences and the consequent scope for development of policies that would enhance global welfare. Even if it is not possible to agree on standards to govern all anti-competitive practices relating to IP in all cases, there could well be gains from a further exchange of views on issues in this area, in an appropriate international forum.

Experience in the WTO Working Group on the Interaction between Trade and Competition Policy is of interest in this regard. The application of competition policy vis-à-vis intellectual property rights was an important focus of the Group in the initial years of its work. As discussed in this chapter, the record of those discussions suggests that the state of international thinking has progressed since the more extreme divergences of the past and that there may be more scope than is commonly realized for further work on fostering common approaches among WTO Member countries in this area, centred around sound economic principles.

63 See, for a more comprehensive discussion, Anderson, above note 3.
In any event, for all the reasons discussed in this paper, it seems likely that issues at the interface of intellectual property rights and competition policy will be a growing source of interest and possible international tensions in the years to come. Consequently, what today may seem impossible (i.e. a renewed discussion of these issues in the WTO) might yet come to pass.