

Canada

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Intellectual property law

- 1** Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed, or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Legislative intellectual property rights in Canada are granted by virtue of the following primary statutes: the Trade-Marks Act, the Copyright Act, the Patent Act, the Industrial Design Act, the Integrated Circuit Topography Act and the Plant Breeders' Rights Act. Additionally, the Canadian common law offers protection of trade secrets, confidential information, business names, common law trademarks and against unfair competition or passing off.

The contours of protection offered by the various statutes and the common law vary with the nature of the right claimed. For example, the Copyright Act will only protect the expression of an original idea from copying, not the underlying idea itself. The term of protection for copyright in Canada is, except as otherwise expressly provided in the Copyright Act, the life of the author, the remainder of the calendar year in which the author dies, and a period of 50 years following the end of that calendar year. In contrast, the Patent Act will, subject to novelty and utility requirements, protect any "new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter". The term of patent protection is from the day the patent is granted to a maximum of 20 years after the date on which the patent application was filed. Trademark protection is granted to a mark that is used by a person "for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others" and includes certification marks, distinguishing guises and proposed trademarks. Trademark protection is awarded for 15 years from the date of registration and may be renewed for further 15 year terms in accordance with the Trade-Marks Act.

Restrictions on how IP rights may be exercised, licensed or transferred also vary depending on the nature of the right being asserted. For example, the Copyright Act forbids the assignment or licensing of an author's moral rights, although they may be waived entirely by the author and such waiver need not explicitly be in writing. The Copyright Act, the Industrial Design Act and the Patent Act all require that an assignment be in writing, whereas an assignment of trademark rights can be oral. The Trade-Marks Act also imposes significant statutory restraints on the assignment and licensing of trademarks by requiring that for a trademark to remain valid, it must remain inherently distinctive such that the goods and services it is used in association with are

distinguished from those of others. Provisions of the Competition Act relevant to the exercise of IP rights are discussed in greater detail below.

Canada's IP rights are compliant with minimum standards required by TRIPs. Unlike the US and EU, Canada has not extended copyright protection beyond the minimum standard required by the agreement. In the context of trademarks, TRIPs requires only a seven year initial term of protection, while Canada's initial term is 15 years. Nevertheless, in both cases, the initial term is renewable indefinitely, as long as conditions for renewal are met.

- 2** What authorities are responsible for administering IP legislation?

The Canadian Intellectual Property Office (CIPO), a special operating agency associated with Industry Canada (a federal government department), is responsible for the administration and processing of the greater part of intellectual property in Canada. CIPO's areas of responsibility include patents, trademarks, copyrights, industrial designs and integrated circuit topographies. The Canadian Food Inspection Agency (CFIA) administers plant breeders' rights.

- 3** What types of legal or administrative proceedings are available for enforcing IP rights?

Depending on the nature of the right infringed, legal enforcement of statutory IP rights may occur before either the Federal Court of Canada or the provincial courts owing to concurrent jurisdiction. The Federal Court of Canada administers those federal statutes which confer jurisdiction upon it, including the Trade-Marks Act, the Copyright Act, the Patent Act, the Industrial Design Act, the Integrated Circuit Topography Act and the Plant Breeders' Rights Act. Additionally, each province has superior courts with concurrent jurisdiction over IP matters, and in some cases such as misappropriation of personality, passing off, trade secrets, and restrictive covenants, provincial jurisdiction is exclusive. The Trade-Marks Act also allows for any person to oppose the registration of a trademark before the Trade-Marks Opposition Board, an administrative tribunal charged with determining ownership or the proper applicant for a trademark in respect of a pending application.

- 4** What remedies are available to a party whose IP rights are found to have been infringed?

The remedies available to a party whose IP rights are found to have been infringed include injunctive relief (interim, interlocutory and

permanent) to prevent continued and future infringement, compensatory damages for losses suffered or (in the alternative in the case of trademarks, patents and industrial designs) an accounting of the defendant's profits proven to have been earned by the infringing activity as well as statutory damages for infringement of copyright and punitive and exemplary damages should circumstances warrant. *Anton Piller* orders, permitting the plaintiff and its counsel to attend the defendant's business or residence and (without prior notice) seize infringing products and documents evidencing the extent of the defendant's infringing behaviour, the delivery up and destruction of infringing goods, and the recovery of legal costs also may be available.

- 5 Does IP legislation make any specific mention of competition or contain provisions respecting the anti-competitive or similar abuse of IP rights?

Section 7 of the Trade-Marks Act sets out specific prohibitions against unfair competition and prohibited marks and includes prohibitions against false or misleading statements intended to discredit the business of a competitor, passing off, making use of any description that is false in a material respect and likely to mislead the public as to the character, quality, quantity, composition, geographical origin or mode of manufacture production or performances of wares or services, and also prohibits any other act or business practice contrary to honest industrial or commercial use in Canada.

Section 65 of the Patent Act allows any interested person, three years after the grant of the patent, to apply for a compulsory licence in respect of the patent on the grounds that there has been an abuse of the exclusive rights thereunder. The exclusive rights under a patent are deemed to have been abused if, among other things: the invention is not being worked on a commercial scale in Canada without satisfactory reason; the working of the invention on a commercial scale in Canada is being impeded by the importation of the patented article into Canada by the patentee; Canadian demand for the patented article is not being met to an adequate extent and on reasonable terms; and if the refusal by the patentee to grant licences on reasonable terms impedes the industry in Canada.

Additionally, sections 67 to 78 of the Copyright Act set out the legislative framework which permits the formation of collective societies to represent copyright owners and grants them the rights to file proposed tariffs with the Copyright Board or enter into agreements with users without risk of being accused of engaging in anti-competitive behaviour.

- 6 With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

The Competition Act contains a number of civil provisions prohibiting false or misleading representations to the public made to promote, directly or indirectly, the supply or use of a product or to promote, directly or indirectly, any business interest, by any means whatever. Criminal charges for such claims may also be brought under the general prohibitions against false or misleading representations contained in the Competition Act. Additionally, the Consumer Packaging and Labelling Act contains general prohibitions against false or misleading representations, and it is a criminal offence pursuant to the Criminal Code to forge a trademark with the intent to deceive or defraud the public.

Several Canadian provinces have enacted consumer protection statutes establishing a regulatory scheme designed to address

a number of specific practices considered to be 'unfair business practices' (including misleading advertising). In other provinces, separate Business Practices Acts have been enacted to deal with potential abuse of consumers through unfair business practices. All such provincial trade practices statutes prohibit false, misleading or deceptive acts that induce the consumer to believe that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities they do not have.

- 7 With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRMs) enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

There are currently no statutory provisions that grant legal protection to TPMs and DRMs in Canada, but anti-circumvention provisions were included in the proposed federal legislation denoted as Bill C-60 (which died on the order paper with the 2006 federal election). These provisions would have implemented Canada's WIPO obligations and allowed Canada to ratify both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The enactment of similar legislation including anti-circumvention provisions is anticipated again in the near future.

The combination of DRMs and anti-circumvention legislation has raised competition concerns with some public interest groups. Among the concerns raised by public interest groups is the challenge DRMs pose to interoperability, because content subject to DRMs is frequently linked to specific hardware, leaving consumers unable to transfer the content from device to device. Absent statutory protection, and given the right facts, it is conceivable that a DRM or TPM could be challenged under the Competition Act as an abuse of a dominant position.

Competition law – general

- 8 What legislation sets out competition law?

The legislation setting out competition law in Canada is the federal Competition Act. The Competition Act sets out criminal offences and civilly reviewable conduct. The former include conspiracy, bid rigging, predatory pricing, price discrimination, resale price maintenance and some types of misleading advertising. The latter includes abuse of dominance, deceptive marketing, refusal to deal, market restriction, exclusive dealing, tied selling and consignment selling. The Competition Act also sets out a merger control regime.

The Competition Act is primarily enforced by the commissioner of competition (the commissioner) who is the head of the Competition Bureau (the Bureau). The commissioner and the Bureau investigate both criminal offences and civilly reviewable matters. Regarding offences, when the commissioner believes there are sufficient grounds for a criminal prosecution the commissioner will recommend to the attorney general of Canada that charges be laid. The final decision to prosecute, however, lies with the attorney general. Criminal matters are tried before the provincial courts. With respect to the civilly reviewable conduct and mergers, the commissioner acts as prosecutor before the specialist Competition Tribunal (the Tribunal).

9 Does the competition legislation make specific mention of IP rights?

Intellectual property rights are referred to in several sections of the Competition Act. For example, the Competition Act specifies that acts engaged in pursuant only to the exercise of an IP right will not be subject to sanction under the abuse of dominance provision. The Competition Act also specifies that its resale price maintenance provision applies to holders of IP rights.

Significantly, the Competition Act also contains a specific provision (section 32) dedicated to IP rights and which contemplates that the mere exercise of such a right may, in certain circumstances, give the competition authorities grounds to seek a special remedy from the Federal Court. Section 32 is discussed throughout this chapter.

10 What authorities have the jurisdiction to review or investigate the competitive effect of the conduct related to IP rights?

As noted under question 8, the commissioner, supported by the Bureau, has the jurisdiction to investigate conduct that could offend the Competition Act. Where this conduct falls under the criminal provisions, the commissioner will investigate and the attorney general of Canada will lay charges and prosecute before the courts, if appropriate. Where this conduct is a civilly reviewable matter the commissioner will investigate and will bring a case before the Tribunal, if appropriate. As discussed in greater detail below, it is possible for conduct involving IP rights to fall afoul of various provisions of the Competition Act.

Under section 32, the IP-specific provision of the Competition Act, the Bureau has stated that it will recommend to the attorney general that an application be made to the Federal Court only when, in the Bureau's view, no appropriate remedy is available under the relevant IP statute. Remedies available under IP statutes are described above.

11 Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Under the Competition Act, private parties have a damages remedy where they have suffered loss or damage as a result of conduct contrary to the criminal provisions of the Competition Act or as a result of the failure of any person to comply with an order of the Tribunal or another court. The criminal provisions in respect of which damages may be claimed include section 45 (conspiracy/cartel) and section 61 (price maintenance). To the extent that conduct relating to IP rights violates one of these provisions, or violates an order of the Tribunal or another court, private parties could sue for the loss or damage they suffered.

Additionally, private parties may apply for leave to the Tribunal to make a claim under section 75 (refusal to deal) and section 77 (exclusive dealing, tied selling or market restriction) although damages are not available in respect of these sections. To the extent that conduct relating to IP rights violates one of these provisions, private parties could apply to the Tribunal to have the conduct stopped, although it is clear from the *Warner Music* case, discussed in 23 below, that the mere refusal to license IP rights does not violate section 75.

Private parties do not have access to section 32, the IP-specific remedy.

12 Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

In 2000, the Bureau released its Intellectual Property Enforcement Guidelines (the Guidelines). The Guidelines set out how the Bureau views the interface between IP law and competition law, explain the analytical framework that the Bureau uses to assess conduct involving IP and discuss the circumstances under which the Bureau may apply the Competition Act to restrain anti-competitive conduct associated with the exercise of IP rights.

The Guidelines provide that the circumstances in which the Bureau may apply the Competition 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. Although the Guidelines are not binding statements of law they do reveal the Bureau's approach to IP and competition law.

13 Are there aspects or uses of IP rights that are specifically exempt from the application of competition law (either by statute or pursuant to case law)?

The Guidelines state that the mere exercise of an IP right is not cause for concern under the general provisions of the Competition Act, no matter to what degree competition is affected. The mere exercise of an IP right is defined as the exercise of the owner's right to unilaterally exclude others from using the IP, and includes the owner's use or non-use of the IP. The approach of the Guidelines is consistent with the Tribunal's approach in several earlier decisions, where it was held that the mere exercise of the right to refuse a licence to a complainant was not an anti-competitive act under the general provisions of the Competition Act.

However, under section 32, the Bureau may seek a remedy for the unilateral exercise of an IP right where the Bureau establishes that the mere exercise (typically the refusal to license IP) has unduly restrained trade or lessened competition. In these circumstances, the Bureau will use a two-step approach.

First, the Bureau will consider whether the unilateral exercise of an IP right 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 which result directly from the exercise of the IP. This first step is satisfied only by the combination of the following factors:

- the holder of the IP is dominant in the relevant market; and
- 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 must establish that invoking a special remedy against the IP 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.

The Bureau recognises that only in very rare circumstances would this test be satisfied and will generally recommend to the attorney general that an application be made to the Federal Court under section 32 only when no appropriate remedy is available under the relevant IP statute. There have been no such applications to date.

14 Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

As noted in 13 above, the Bureau will only seek a remedy under section 32 of the Competition Act where no appropriate remedy is available under the relevant IP statute.

Significantly however, as discussed in 29 below, in the recent *Apotex* case, the Bureau successfully intervened at the Federal Court of Appeal where the court reversed an earlier decision that would have blocked the Bureau from investigating conduct (such as licensing) that, although permitted under an IP statute, could offend the Competition Act. It is clear therefore that with respect to non-unilateral conduct, the Bureau will not be impeded from enforcing the general provisions of the Competition Act simply because an IP statute permits the conduct.

Mergers

15 Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

The Bureau's powers in reviewing a merger are not reduced or enhanced by the presence of IP rights. However, as explained under questions 16 to 18, the Bureau's analysis of the competitive impact of a merger involving IP rights will differ from its analysis of one that does not. Furthermore, the merger remedies sought by the Bureau may also be different where IP rights are involved.

16 Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

In general, the Bureau can challenge a merger before the Competition Tribunal or negotiate remedies with the merging parties where it believes that a merger is likely to substantially prevent or lessen competition. This substantive test does not depend on whether IP rights are involved. However, the Bureau has stated in the Guidelines that its assessment of market power in the IP context will focus less on traditional measures of market share and more on qualitative factors such as barriers to entry and the pace of technological change. Among other things, the Guidelines also note that a high degree of concentration is less problematic in industries characterised by low barriers to entry, rapid technological change, and patterns of firms 'leap-frogging' or 'innovating around' previous technologies. The Guidelines also note that transactions involving IP often have pro-competitive benefits (such as combining complementary factors) and these would be considered as part of any efficiencies analysis conducted by the Bureau.

17 In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

As noted above, the Bureau can challenge a merger before the Competition Tribunal where it believes that a merger is likely to substantially prevent or lessen competition in a relevant market. In practice, with respect to mergers involving IP rights, the Bureau has negotiated remedies with merging parties rather than litigate at the Tribunal, with the result that case law is sparse. Some examples of negotiated remedies are:

In the *Bayer/Aventis CropScience* merger, Bayer agreed to divest three agricultural chemical products used by the pesticides industry and license a fourth chemical product. The Bureau had argued that the industry was characterised by significant barriers

to entry, lengthy and expensive product development processes and patent protection.

In the *Pfizer/Pharmacia* merger, Pfizer agreed to divest various developmental pharmaceutical compounds, even though the divested compounds all related to products in development which did not yet compete with existing products.

In the *GE/Instrumentarium* merger, the Bureau agreed not to challenge the merger on the condition that Instrumentarium's patient monitoring equipment business be divested and that GE ensure that third-party suppliers could effectively interconnect with their equipment.

18 What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

As a preliminary matter, the Bureau's preference is to negotiate remedies with the parties rather than litigate at the Tribunal. Where the Bureau opposes a merger at the Tribunal it is generally prepared to challenge only those portions of the merger that will likely lead to a substantial lessening or prevention of competition.

Negotiated remedies often include divestitures of assets. The Bureau views 'structural remedies' such as divestitures to be more effective than behavioural remedies. In the IP context, though the Bureau has sought and obtained divestitures, it has also noted that remedial action involving IP is often accomplished through licensing rather than outright divestiture. The Bureau has stated that licensing can enable one or more third parties to participate in markets and that, compared to divestitures, licensing can be efficiency enhancing because it is less likely to discourage future research and development. A licence that is part of a remedy may be exclusive to the licensee, co-exclusive or non-exclusive, depending on the facts of the case.

Specific conduct

19 Cartel or conspiracy

Under section 45 of the Competition Act, an agreement among competitors or between suppliers and customers that would lead or would likely lead to an undue lessening or prevention of competition is a criminal offence punishable by fine, imprisonment or both. Section 45 is comprehensive enough to apply to agreements between owners of competing IP rights and between licensors and licensees. The Guidelines recognise that most restrictions contained in licensing agreements will not lead to the requisite 'undue lessening or prevention of competition' because licensing IP is generally pro-competitive. However, it is still possible that the market power of the contracting parties, or the effect of the agreement on the relevant market could lead the competition authorities to allege that section 45 has been violated.

As noted, section 45 allows pro-competitive agreements and therefore permits cross-licensing arrangements and patent pools to the extent that they are pro-competitive. The Bureau has stated in its guidelines that pro-competitive benefits of such arrangements can include: the clearing of blocking patents, reducing transaction costs, integrating complementary technologies and avoiding costly infringement litigation. Protection for collective societies is provided for in the Copyright Act (see question 5).

20 (Resale) price maintenance

Resale price maintenance is prohibited under section 61 of the Competition Act and carries criminal sanctions. Section 61 was

designed to include IP rights such that attempts by licensors to influence prices upwards (or discouraging reductions in price) in a downstream market are prohibited. Although a licensor may suggest a resale price, it must make clear to the reseller that the reseller need not accept the suggested price and that the reseller's business relations with the licensor or any other person will not suffer if it chooses not to accept the suggested price.

21 Exclusive dealing, tying and leveraging

Both exclusive dealing and tied selling (which are forms of leveraging) fall under section 77 of the Competition Act, and are civilly reviewable by the Tribunal. Generally, a supplier engages in tied selling where, as a condition of supplying a product, it requires or induces a customer to purchase another product or refrain from using a particular brand of product; exclusive dealing occurs where a supplier uses incentives to require or induce a customer to deal exclusively or primarily with products supplied or chosen by the supplier.

In order to offend section 77, both tied selling and exclusive dealing must result or be likely to result in a substantial lessening of competition. Therefore, a holder of IP rights may not use its rights to prevent or compel the use of other products where this conduct leads or is likely to lead to the requisite anti-competitive effect. The Bureau has stated in its Guidelines that even where it concludes that exclusive dealing or tied selling will substantially lessen competition, it will not likely challenge conduct that has a strong efficiency rationale or business justification.

22 Abuse of dominance

Abuse of dominance is civilly reviewable by the Tribunal. The Competition Act's abuse of dominance provision specifically exempts conduct engaged in pursuant only to the exercise or enjoyment of any interest derived from specified IP statutes. In the *Tele-Direct* case, the Tribunal found that the respondents' refusal to license their trademarks fell within the exemption because it represented nothing more than the mere exercise of statutory rights. The Guidelines further emphasise that the mere exercise of a unilateral right (the owner's right to exclude, for example) cannot result in a finding of abuse of dominance.

However, both the case law and the Guidelines provide that non-unilateral conduct falls outside the scope of the exemption. In the *NutraSweet* case, the Tribunal found that conduct seeking to extend an IP right beyond its scope (in that case, inducing customers to enter long-term supply agreements just before patents expired) amounted to an abuse of dominance. Furthermore, in the *Interac* case, in which the director of investigation and research under the Competition Act (the former title of the commissioner) and the respondents entered into a consent order, the director alleged that respondents used their control over the Interac electronic banking network and enacted exclusionary by-laws to engage in joint abuse of dominance. Among other things, the consent order contained provisions requiring Interac to grant a commercially reasonable software licence enabling others to join the Interac network, without any licence fee or royalty charge.

23 Refusal to deal and essential facilities

See question 13 for a discussion of the circumstances in which a simple refusal to license IP could violate section 32 of the Competition Act, the section specifically dealing with the uni-

lateral exercise of IP rights. Please see 25 below for a discussion of the remedies available for violations of section 32 of the Competition Act.

Section 75 is the general provision of the Competition Act covering refusals to deal. Refusals to deal are civilly reviewable by the Tribunal. Under section 75, a refusal to deal occurs where a supplier refuses to supply a product to a customer and where the refusal has an adverse effect on competition (and the customer is willing and able to meet the usual trade terms, but is unable to obtain adequate supply because of insufficient competition among suppliers). In the *Warner Music* case, the Tribunal rejected an application made by the director of investigation and research under section 75 in which the director sought compulsory licensing of copyrights to enable a new, fledgling competitor to compete with an incumbent. Although the Tribunal disposed of the application on other grounds, it noted that as a matter of copyright law the respondents (ie, the IP holders) had the right to refuse to license their IP. The Tribunal seems therefore to be of the general view that section 75 does not apply to refusals to license IP.

Remedies

24 What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

Please see 25 below for a summary of the remedies available for violations of section 32, the section of the Competition Act specifically dealing with IP. In addition to these special IP-specific remedies, which include compulsory licensing and the voiding of licences, other remedies are available for violations of the general sections of the Competition Act for conduct that happens to involve IP. For example, if an IP-related agreement was found to violate section 45 of the Competition Act (the cartel or conspiracy provision), then the normal remedies available under section 45 (ie, fines up to C\$10 million, imprisonment for up to five years, or both) would be available. If the Bureau blocked a merger on the basis that the combination of the merging parties' IP would substantially lessen competition, then the Bureau may seek remedies available in mergers that do not involve IP (divestitures, for example) or IP-specific remedies such as mandatory licensing.

25 Do special remedies exist under your competition laws that are specific to IP-related matters?

As noted in 13 above, section 32 of the Competition Act provides for special remedies specific to IP-related matters. Where the factors outlined in 13 are met, and when it is the Bureau's view that no appropriate remedy is available under the relevant IP statute, the Bureau will recommend to the attorney general that an application be made to the Federal Court under section 32.

If it agrees with the attorney general, the Federal Court may make one or more of the following orders: (i) declaring void, in whole or in part, any agreement, arrangement or license relating to the impugned use of IP rights; (ii) restraining a person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence; (iii) directing the grant of licences to such person and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent the impugned use, revoking the patent; (iv) directing a registration of a trademark or an integrated circuit topography to be expunged or revoked; and (v) directing that such other acts be done or omitted as the court deems necessary to prevent the impugned use.

26 What competition remedies or sanctions have actually been imposed in the IP context?

Section 32 remedies have not yet been imposed by a court. Furthermore, it should be noted that the Bureau has adopted a cautious approach to section 32, as set out in the Guidelines, which is unlikely to produce a great number of cases.

Under the general provisions of the Competition Act, sanctions or remedies have been imposed in the IP context. For example, sanctions or remedies were imposed or agreed upon in the abuse of dominance context in the *Nutrasweet* and *Interac* cases, described under question 22. In merger cases, the Bureau has entered into consent agreements with the merging parties in which divestitures or licensing of IP, or both have been obtained.

27 How will a settlement agreement terminating an IP infringement litigation or dispute be scrutinised from a competition perspective?

Although there have been no cases to date, there is no reason why such an agreement could not offend section 45 of the Competition Act (the cartel or conspiracy provision), particularly if it arguably extends beyond the area of exclusivity granted by the IP rights. Please see question 19 for a brief discussion of section 45.

Practice

28 What role has economics played in the application of competition law to cases involving IP rights?

As there have been relatively few competition law cases involving IP rights, it is difficult to assess what role the courts and the Tribunal have assigned to economics in the IP context. However, the Guidelines are replete with economics-based reasoning and the Bureau's approach to IP rights as evidenced in the Guidelines, speeches of the Commissioner and elsewhere suggest that the Bureau's understanding of the relationship between IP rights and competition policy is suitably informed by economic theory.

29 Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In November 2005, in the *Apotex* case, the Federal Court of Appeal found that there is no inherent conflict between section 45 of the Competition Act (the conspiracy provision) and the right of a patent holder to assign a patent under the Patent Act. The court therefore rejected the argument that because the assignment of patents is permitted under the Patent Act, all such assignments should be immunised from the conspiracy provision of the Competition Act. The court found that where the assignment of a patent increases the assignee's market power in excess of that inherent in the patent rights assigned, section 45 may apply. The court's finding was therefore supportive of the Bureau's Guidelines, which provide that the Bureau may challenge an arrangement where it creates, enhances or maintains market power.

30 Have changes occurred recently or are changes expected to occur in the near future (either through legislation or court decisions) that will have an impact on the application of competition law to IP rights?

As explained in 29 above, the *Apotex* case represents an important recent court decision on the application of competition law to IP rights.

Although specific legislative changes to the Competition Act are not currently anticipated, the Bureau, Industry Canada and the Canadian Intellectual Property Office (CIPO) are working together on the interface between intellectual property and competition policy. The Bureau has commissioned a review paper of the major issues, identified topics for further study and created an international editorial panel.

In 2007, a top level symposium will be held consisting of 40 to 50 selected participants including leading academics, practitioners, and government representatives. The topics to be studied in greater depth include: authorised generics, collective management of copyright, extension of IP rights, compulsory licensing, bundling or tying, and a comparison of Canada's patent regime in the international context.

In addition, statutory provisions granting legal protection to TPMs and DRMs may well be reintroduced (see question 7).

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