
THE INTERSECTION BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

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Overview

Apparent conflict

- IP law creates exclusive / monopoly rights
- Competition law seeks to control monopolies and abuse of market power

Apparent harmony

- Both seek to maximize economic efficiency and promote consumer welfare

Tension

- IP & Competition use different mechanisms to achieve the same goal - need to find balance
- Bureau's enforcement approach is described in the Intellectual Property Enforcement Guidelines ("IPEGs")
- IPEGs clarify that Competition Act applies to conduct associated with IP only to the extent necessary to prevent anti-competitive conduct

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Key Concepts in Competition Law

a. Competition law in Canada generally governs three categories of conduct

- Horizontal agreements
 - Cartels and other types of collusive behaviour
- Unilateral abusive conduct
 - Monopolies/abuse of dominance
 - Exclusive dealing, tied selling, refusal to deal
- Mergers

b. Competition Bureau and Competition Tribunal are the main players involved in finding the balance within the Competition Act

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Key Concepts in Competition Law

"Lessening or prevention of competition" is the essence of (almost) any Canadian competition law offence

- Horizontal Agreements (section 45) – agreement or arrangement to "prevent or lessen, unduly, competition"
- Abuse of Dominance (section 79) – must have "the effect of preventing or lessening competition substantially in a market"
- Exclusive Dealing/Tied Selling (section 77) – must have exclusionary effect "with the result that competition is ... lessened substantially"
- Mergers (section 92) – merger or proposed merger must be likely to "prevent or lessens competition substantially"
- Use of IPRs (section 32) – use of IPRs so as to "prevent or lessen, unduly, competition"
- Refusal to Deal (section 75) – must have "an adverse effect on competition in a market"

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Key Concepts in Competition Law

Substantial/undue lessening of competition requires some degree of "market power"

- "Excessive market power runs against the objectives of the Act" (*R. v. PANS*, SCC)
- A substantial lessening of competition is established where the "anti-competitive acts engaged in ... preserve or add to [a firm's] market power." (*NutraSweet*)
- "A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity ... to exercise market power." (Comp. Bureau *Merger Enforcement Guidelines*)

What is meant by "market power"?

- The ability to behave independently of the market (*R. v. PANS*, SCC) or the ability to profitably set prices above competitive levels for a considerable period of time (*NutraSweet*, *Laidlaw*, *Nielsen*)
- Requires defining a "relevant market"
- Demonstrated principally by: 1) high market shares; 2) high barriers to entry or expansion in the market

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Key Concepts in Competition Law

Significance of a firm possessing "market power"

- Conduct that is acceptable when engaged in by one firm may not be permissible if engaged in by another firm
- The legality of a firm's conduct depends on its relative economic position in the marketplace

In fact...

- Where a firm has a high degree of market power, even a small impact will be considered substantial (*Tele-direct*)

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Competition Bureau's Analysis of Conduct Involving IPRs

- **Bureau follows 5 steps to determine if conduct involving IP harms competition:**
 1. Identifying the transaction or conduct
 2. Defining the relevant market(s)
 3. Determining if the firm(s) under scrutiny possess market power
 4. Determining if the transaction or conduct would unduly or substantially lessen or prevent competition in the relevant markets
 5. Considering efficiency rationales, if any.



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Bureau's Analysis – Identifying the transaction

1. Identifying the transaction

- a. conduct involving "something more than the mere exercise" of the IP right –
 - Assessed under the general provisions of CA – mainly:
 - abuse of dominant position (sec. 79)
 - refusal to deal (sec. 75)
 - market restrictions (sec. 77)
- b. conduct involving the "mere exercise" of the IP right and nothing else
 - Assessed under IPR specific remedies – (sec. 32)



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Bureau's Analysis – Defining the relevant market

2. Defining the relevant market

- Not defined by scope of the IPR; rather defined by economic behaviour (see *Illinois Tool*).
- Product market
- Geographic market

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Bureau's Analysis – Market power

3. Market power

- Direct indicators
 - e.g. high profit margins, excessive prices, high market shares
 - may not less relevant in technology products context
- Indirect indicators
 - IPEGs suggest these may be more relevant
 - e.g. conditions of entry into market, pace of technological change, views of market participants and industry experts

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Bureau's Analysis – Lessening or preventing competition substantially

4. Lessening or preventing competition

- Focus on whether conduct serves to create or entrench a firm's market power
- e.g. in context of abuse of dominant position -whether conduct is "exclusionary, predatory or disciplinary"
- Mere superior performance is not anti-competitive

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Bureau's Analysis – Efficiency rationales

5. Efficiency rationales

- Whether transaction or conduct was adopted for efficiency reasons
- Efficiencies are an explicit defence only in merger transactions (sec. 96(1), CA)
- IPEGs state that Bureau will consider efficiencies under abuse of dominant position (sec. 79) and market restrictions (sec. 77) cases also
- In the case of IP, rather than allocative efficiencies, dynamic efficiencies may be more relevant (but harder to quantify)

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Application to IPR Licensing Agreements

- **Bureau considers “vast majority” of licensing agreements to be “pro-competitive” & will not challenge**
- **Competition Act scrutiny attracted particularly where**
 - firm exercises market power;
 - firm indulges in practice of anti-competitive behaviour;
 - conduct results in preventing or lessening of competition substantially;

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Application to IPR Licensing Agreements

- Sec. 45 - Agreements that unduly lessen or prevent competition

Eli Lilly v. Apotex (FCA, Nov. 2005)

- FCTD stated that although there was an agreement between Eli Lilly and Shinogi that had the effect of lessening competition, that lessening was not “undue” as required by Subsection 45(1) because it had been authorized by an Act of Parliament, specifically, s.50 of the *Patent Act*.
- On appeal, FCA explained that s.50, *Patent Act* does not immunize the assignment of a patent from s.45, *Competition Act* “ when the assignment increases the assignee’s market power in excess of that inherent in the patent rights assigned.”

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Application to IPR Licensing Agreements

- **Other licensing agreement terms that may be considered anti-competitive behaviour:**
 - contractual exclusivity clauses
 - tying or bundling
 - restrictions on right to challenge validity of the IP
 - restrictive covenants such as non-compete
 - threatening or conducting spurious litigation
 - encouraging adoption of standards that only licensor supplies
 - locking up key suppliers through exclusive purchase agreements
 - refusing to license or supply a product

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Conclusion

Key concepts of "lessening of competition"; "market power"; and "market definition" are important to understand when IPRs raise competition law issues and the "interface" needs to be engaged.

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