Exclusion versus Control: The Competition Dimensions of Intellectual Property Rights

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Introduction

Economic theory has had a profound impact on pol icymaking and judicial thinking over the last sixty years. Law and economics has developed into a key theoretical perspective informing legal curricula, judicial thinking, and legislative design. In the political sphere, the economic approach to law has influenced the development of rules and regulations that encourage individuals and organizations to adjust their behaviour in socially optimal ways. Historically, the law and economics approach was tied to antitrust or competition law, where the central tenets of neoclassical theory provided the backdrop to the legislative reaction against trusts, combines, and other collusions that threatened the vitality of free markets. In this context, the theories of competitive equilibrium, monopoly, and oligopoly provided both economic and moral justifications for restricting collusion in the marketplace. Judge Posner remarks that the theoretical and empirical tools of economics have expanded into "the central institutions of the legal system, including the common law doctrines of negligence, contract, and property; the theory and practice of punishment, civil, criminal and administrative procedure, the theory of legislation and rulemaking, and law enforcement and judicial administration."[1]

Academic study of these subjects abounds, with many scholars and judges advocating the synthesis of economic principles with legal rules. The expansion of law and economics has not, however, overshadowed its influence in two fields where legal rules (at least in theory) are derived directly from economic principles relating to the operations of markets, innovation, competition, and economic growth. These two areas are competition law and intellectual

[1] Richard A. Posner, "The Economic Approach to Law" (1975) 53 Tex L Rev 757 at 759.

property. Competition and antitrust laws are premised on the view that free markets ensure an efficient allocation of resources, lower prices, and higher quality products.[2] The protection of competition is thus seen as essential to preserving consumer welfare and maintaining economic well-being. Intellectual property shares this goal of social welfare improvement, but its *modus operandi* differs substantially. Rather than promoting free competition, it induces artificial scarcity (and thus monopoly profits) in order to encourage the dissemination of goods that would otherwise be withheld from public access.

A common objective of competition law and intellectual property is the optimization of economic resources. Intellectual property laws aim at coaxing valuable works and inventions into the public domain while competition laws protect the price mechanisms underlying the efficient distribution of resources. Indeed the TRIPS agreement negotiated at the Uruguay Round is testament to the importance of intellectual property rights (IPRs) for economically advanced countries, and, in particular, their eagerness to impose very strong protections against the infringement of patents in lesser developed countries.[3] The antitrust lawsuits against Microsoft in the United States and the EU provide further evidence of economic concerns that arise when products with proprietary technology (and usually intellectual property components) are marketed in anti-competitive ways.[4] The Microsoft prosecutions and the TRIPS agreement illustrate the economic importance of IPRs and competition law, in the context of pivotal trade negotiations and multi-jurisdictional civil prosecutions. The legislative regimes supporting competition and intellectual property are theoretically designed to foster efficiencies either in the

[2] See OECD, *Interim Report on Convergence of Competition Policies*, OECD/GD (94) 64, Areas of Convergence in Competition Policy and Law, Annex at 4.
[3] Bita Amani, *State Agency and the Patenting of Life in International Law: Merchants and Missionaries in a Global Society* (Burlington: Ashgate, 2009) at 163-182.
[4] *U.S. v. Microsoft Corp.* 253 F.3d 34 (2001) [*Microsoft*], European Commission Case No. COMP/C-3/37.792.

market structure as a whole or in the intellectual innovations that currently account for a large

proportion of the value added by public corporations.[5]

Regulatory agencies in Canada and the U.S. have more or less acceded to the view that IPRs and competition laws operate symbiotically—"work[ing] in tandem to bring new and better technologies, products, and services to consumers at low prices".[6] The reality, however, is that the distinct modes by which these regimes seek to enhance social welfare can (and often do) result in serious tensions, if not outright clashes. This paper will examine some of the legal and policy related problems that arise when IPRs are exercised in abusive or anti-competitive ways. The analysis will focus on the related economic aims of the two regimes, their theoretical underpinnings, and how legally sanctioned monopolies can concentrate market power and produce anticompetitive consequences. In particular, the study will focus on the dangers of overlapping and overreaching IPRs, the asymmetries of patent litigation, the problems of tied selling, and technological protection measures. The paper will conclude with suggestions for a more competitive and efficient IPR system given the threat of collusive behaviour and monopoly influence. The central thesis is that a fair and efficient intellectual property system must be based on an exclusionary model of property rights that does not give rights holders free reign to control products, processes, or markets through the manipulation of IPRs.

[5] The Economist, "A Market for Ideas" 22 Oct. 2005 at 3.
[6] See, for example, U.S. Dep"t of Justice & Fed. Trade Comm"n , "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" (2007), Competition Bureau, "Intellectual Property Enforcement Guidelines" (April, 2000) online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/$FI LE/i pege.pdf

1. The Economic Theory of Competition Law and Intellectual Property

Competition law and intellectual property have long been recognized as essential

components of a healthy economy. In Canada the drafters of the *British North America Act* of 1867 specifically enumerated patents and copyrights in section 91 as exclusive domains of federal economic jurisdiction.[7] Anti-combines legislation quickly followed suit, with the first Act coming into force in 1889.[8] In subsequent judicial interpretations, combines legislation was justified under the criminal law power and later under the federal government‟s general power over trade and commerce.[9] Trade-mark laws were also justified under trade and commerce in *Kirkbi AG v. Ritvik Holdings Inc.*[10] In the United States, the Constitution vests in Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".[11] The Sherman Antitrust Act, enacted in 1890 and justified under Congress‟ power to regulate inter-state commerce, is another example of the importance of competition law for the protection of vital economic interests.[12]

In short, the Canadian and American experience with competition and intellectual property illustrates the importance of these laws with respect to development and social welfare. This is underscored by judicial enunciations on the purposes of competition law and IPRs. In *R. v. Nova Scotia Pharmaceutical Society*, Gonthier J. described the *Combines Investigation Act,*

[7] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91(22), 91(23).
[8] *An Act for the Prevention and Suppression of Combines Formed in Restraint of Trade* S.C. 1889, c. 41.
[9] *Reference Re Combines Investigation Act*, [1929] S.C.R. 409; *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641; For a thorough review of the history of competition legislation in Canada see: Bruce C. McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47 Can. Bar Rev. 161.
[10] 2005 SCC 65, [2005] 3 S.C.R. 302 [*Kirkbi*].
[11] US Const art I, § 8, cl 8.
[12] Richard A. Posner *Antitrust Law* 2d ed. (Chicago: University of Chicago Press, 2001).

and particularly the conspiracy provisions in s. 32 (now s. 45) as "central to Canadian public policy in the economic sector."[13] Patent legislation has been described in similar economic terms. In *Apotex Inc. v. Wellcome Foundation Ltd.*, Justice Binnie described the raison d‟être for patent protection:

> A patent, as has been said many times, is not intended as an accolade or civic award for ingenuity. It is a method by which inventive solutions to practical problems are coaxed into the public domain by the promise of a limited monopoly for a limited time. Disclosure is the quid pro quo for valuable proprietary rights to exclusivity which are entirely the statutory creature of the Patent Act... .The patent monopoly should be purchased with the hard coinage of new, ingenious, useful and unobvious disclosures.[14]

In *Euro Excellence Inc. v. Kraft Canada Inc.* Bastarache J. stressed that "copyright protects the economic gains resulting from an exercise of skill and judgment" and accordingly, "the [Copyright] Act protects only the legitimate economic interests of copyright holders."[15]

These judicial declarations illustrate the centrality of economic factors in competition and IPR regimes. Patents and copyrights provide inventors and authors with the incentive to disseminate their works to the public, thus contributing to scientific innovation, knowledge acquisition, and economic growth. Similarly, competition law protects the market system by preventing large, less efficient firms from squeezing out smaller rivals through the exercise of market power. Thus, competition and IP are ultimately aimed at regulating the exercise of certain property rights within the market system. Competition law prevents firms from using their resources strategically to protect their dominance. Intellectual property laws are premised on a cost/benefit model designed to protect the legitimate economic interests of authors and inventors

[13] [1992] 2 S.C.R. 606 at para 83.
[14] 2002 SCC 77, [2002] 4 S.C.R. 153 at para 37 [*Apotex*].
[15] *Euro Excellence Inc. v. Kraft Canada Inc*. 2007 SCC 37, [2007] 3 S.C.R. 20 at paras 83-85.

without overcompensating them for their efforts. In short, the two regimes are equally committed to i ncentivizi ng innovation and competition while at the same time limiting the undue exploitation (or intentional non-exploitation) of property interests.

The Competition Bureau has recognized the importance of IPRs to efficient, competitive

markets. In the "Intellectual Property Enforcement Guidelines" (IPEGs) the Bureau discusses the interface between competition and IPRs:

> IP and competition laws are both necessary for the efficient operation of the marketplace. IP laws provide property rights comparable to those for other kinds of private property, thereby providing incentives for owners to invest in creating and developing intellectual property and encouraging the efficient use and dissemination of the property within the marketplace. [16]

Given the overlap between the economic objectives of IPRs and competition law, it is important to ensure that these two regimes do not clash based on their methodological differences. Although they may share identical aims, the two regimes undoubtedly seek radically different means by which to achieve their objectives. This methodological divide was noted by Rudolph Peritz in his chapter on antitrust and intellectual property in the United States:

> [I]t has long been recognized that antitrust and intellectual property rights encourage innovation but by different means which can conflict. In simplest terms, they can conflict because copyright and patent protection grant monopolies and antitrust promotes competition. Moreover, their methodologies proceed from sharply different assumptions about market forces: to the extent that antitrust is concerned with price and output, its policy focuses on short term effects of strategic conduct. Copyright and patent, in contrast, are intended to encourage innovation over the longer term. [17]

[16] Competition Bureau, "Intellectual Property Enforcement Guidelines" (April, 2000) online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ipege.pdf/$FILE/ipege.pdf > [IPEGS].
[17] Rudolph J.R. Peritz "Competition Policy and its Implications for Intellectual Property Rights in the United States" in Steven D. Anderman, ed, *The Interface between Intellectual Property Rights and Competition Policy* (Cambridge: Cambridge University Press, 2007) at 188.

Peritz highlights a key distinction between short and long run theories of economic growth. Whereas competition laws protect against the short term welfare losses created by monopolies, IP laws tend to promote the long term benefits that arise when the allure of an intellectual monopoly creates the incentive for more innovation and spurs technological development. The tradeoff between the short and long run has been a dominant theme in macroeconomic policy

debates.[18]

2. The Empirical Dimension to Economic Theories of Intellectual Property

The focus of IPRs, particularly patents and copyrights, is on the long term benefits that arise when new innovations are coaxed into the public domain through a temporary monopoly. This maxim has become so ingrained in Anglo-Canadian law that courts often seem to be taking judicial notice of it.[19] However much this view has prevailed in the jurisprudence, it must not be forgotten that it is neither a truth of law nor a necessary maxim of logic. It is an empirical claim which is only verifiable with empirical evidence.

The evidence on the impact of patents and copyrights on innovation in the arts and science is difficult to measure. Defining "innovation" and its relationship to economic growth is an exercise in ambiguity. A number of researchers have nevertheless addressed this question in

[18] See, generally, Jacob Viner, "The Short View and the Long in Economic Policy" (1940) 30 The American Economic Review 1.

[19] In *Free World Trust v. Électro Santé,* [2000] 2 S.C.R. 1024 at para 13 Binnie J. noted that "Patent protection rests on the concept of a bargain between the inventor and the public. In return for disclosure of the invention to the public, the inventor acquires for a limited time the exclusive right to exploit it. It was ever thus. Even before the Statute of Monopolies (1623), the Crown rewarded an inventor with a limited monopoly in exchange for public disclosure of "a new invention and a new trade within the kingdom ... or if a man hath made a new discovery of anything"

two historical contexts: the Industrial Revolution of the mid-19th century[20], and the system of international trade that emerged in the wake of the Bretton Woods Agreement.[21] The findings of the studies on patenting and innovation in the 19th century were summarized by economists Boldrin & Levine:

> Careful statistical analyses of the nineteenth century‟s available data, carried out by distinguished economic historians, uniformly shows two things. Patents neither increase the rate of innovation nor are the best instrument to maximize inventors‟ revenue. Patents create a market in patents and in the legal and technical services required to trade and enforce them. [22]

The scant evidence on 19th century intellectual property regimes contributing to innovation is reinforced by two further observations made by Boldrin & Levine. First, relying on a study conducted by Scherer[23], they note that there is little to no evidence establishing that copyright laws affected the amount of musical pieces that were being composed in the 18th century. Indeed, in their view, "whatever the mechanism affecting composers‟ incentives, copyright protection was not an important part of it."[24] Second, Boldrin & Levine review twenty three economic studies that considered the impact of patents on innovation in the postwar era.[25] For the most part the studies confirmed the hypothesis advanced by the 19th century data—that patents are not associated with significant technical or scientific innovation. Rather, "these studies find weak or

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[20] See, e.g. F.M. Scherer., *Quarter Notes and Bank Notes: The Economics of Music Composition in the Eighteenth and Nineteenth Centuries* (Princeton, NJ: Princeton University Press, 2004) [Scherer], N.R. Lamoureux and K.L. Sokoloff ,"Intermediaries in the U.S. Market for Technology, 1870-1920" (2002) NBER Working Paper No. 9016, Moser, P. "How do Patent Laws Influence Innovation? Evidence from the Economic Geography of Innovations in 1851" (2005) , National Bureau of Economic Research and MIT, online: < http://web.mit.edu/moser/www/loc507nber.pdf. >, Moser P. "How do Patent Laws Influence Innovation? Evidence from Nineteenth Century World Fairs", NBER Working Paper No. 9909.

[21] See R. Mann "Do Patents Facilitate Financing in the Software Industry?" (2005) 83:4 Tex L Rev 961, J. Lerner "Patenting in the Shadow of Competitors" (1995) 38 *Journal of Law and Economics* 563, A.B. Jaffe "The U.S. Patent System in Transition: Policy Innovation and the Innovation Process" (2000) 29 Research Policy 531.

[22] Michael Boldrin and David K. Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008) at 192 [Boldrin & Levine].

[23] Scherer, *supra* note 20.

[24] Boldrin & Levine *supra* note 22.

[25] *Ibid* at 193.

no evidence that strengthening patent regimes increases innovation; they find evidence that strengthening the patent regimes increases patenting!"[26] In other words, the evidence reviewed by Boldri n & Levine suggests that a stronger I PR regime creates the incentive to copyright and patent more prolifically. It does not, however, produce significant leaps in innovation or artistry.

Econometric studies invariably suffer from definitional impasses. The difficulty of pinpointing an appropriate metric for "innovation" on a macroeconomic scale is compounded by the problem of finding reliable data for early epochs. Nevertheless, the studies reviewed by Boldrin & Levine force us to at least rethink some of the theoretical justifications for intellectual monopolies. If innovation can be spurred with equal or greater success in a competitive market system, the case for having any IPRs (except perhaps trademarks which are monopolies of a different quality) is severely diminished. Accordingly, judicial doctrines that have been constructed around a theory that emphasizes the utility of IPRs for stimulating innovation should be viewed with some skepticism.

3. Deontological Theories

IPRs are not always justified in strictly utilitarian or economic terms. Alternate justifications include a commitment to protecting the moral rights of authors or inventors in the works they have created. This justification tends to flow from the premise that the non-exclusivity of intellectual property allows people to appropriate the creative or scientific fruits of others without having paid a corresponding price.[27] In other words, the marginal cost of copying another"s invention is much lower than the cost of independently inventing or creating the same

[26] *Ibid* at 192.
[27] Edwin C. Hettinger "Justifying Intellectual Property" (1989) 18:1 Philosophy & Public Affairs 31 at 36.

work.[28] Therefore, the theory supports intellectual property on the basis that it prevents people from reaping where they have not sown. Such a deontological justification for IPRs protects individuals—the "*droit d'auteur'*—from misappropriations of their works.[29] In this way, the scope of IPRs is limited to protecting the individual and his or her creation. It does not protect the rights of corporations or other entities who may own a patented invention or copyrighted work but have no moral claim to it because they have not expended any effort in creating it.

4 The Competition Challenges for IPRs

The deontological justification for IPRs is narrower in scope than the utilitarian justification and is consistent with competition policy, which seeks to protect the right of private property owners "to profit from the creation and use of their property by claiming the rewards flowing from it."[30] This justification has become less important, however, in recent times, especially since the World Intellectual Property Office and the internationally negotiated TRIPS agreement place greater emphasis on the purported social welfare gains flowing from IPRs.[31] Accordingly, the modern approach to IPRs is premised on their utility for disseminating new ideas, technologies, and artistic works. As discussed above, the empirical evidence supporting the link between IPRs, innovation, and technological development is tenuous at best. Thus, intellectual property laws, at least on one theoretical level, may not be as harmonious with competition law as the regulatory authorities would have us believe.

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[28] William M. Landes and Richard A. Posner "An Economic Analysis of Copyright Law" (1989) 18:2 J Legal Stud 325.

[29] See discussion on the distinction between "droit d"auteur" and "copyrights" in *Théberge v. Galerie d'Art du Petit Champlain Inc*., 2002 SCC 34, [2002] 2 S.C.R. 336 at para 62.

[30] IPEGs, *supra* note 17 at 5.

[31] See WIPO, *World Intellectual Property Handbook: Policy, Law, and Use* 2d Ed (Geneva, WIPO Publication, 2004) at 166-167, Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 14 April 1994, <http://www.wto.org/engli sh/tratop_e/trips_e/t_agm0_e.htm >1869 U. N .T.S. 299; 33 I.L .M. 1197.

The problem is essentially one of overreaching rights. Whereas the deontological theory limits the intellectual monopoly for the benefit of the individual inventor/artist, the economic-utilitarian justification is flexible enough to justify IPRs for the public good more generally. This creates rule of law concerns. How do we place limits on intellectual monopolies when they claim to protect such an ambiguous concept as public welfare? Where do we draw the line between legitimate and illegitimate economic interests in IPRs when large multinational corporations can own and accumulate patents, copyrights, and trademarks; trading them in virtually unfettered national and international markets? In the following section I will address these concerns in specific contexts where they arise. In particular, I will argue that the anti-competitive exercise of IPRs is the result of a paradigm shift in the theory of intellectual property. This shift has at its core the desire of IPR holders to tighten control over their products, processes, marketing rights, and other privileges. Such a tightening of control has resulted in property being used in strategic ways that expands its influence beyond the basic right of exclusion. In this regard, property generally, and intellectual property in particular, has the potential to *increase* rather than *decrease* transaction costs in the economy.[32]

5. Overlapping and Overreaching IPRs

"Monopoly", David Vaver argues, "once tasted, is addictive".[33] If ever a universal truth was spoken in intellectual property law, Vaver"s adage comes closest to embodying it. A critical problem occupying the jurisprudence and literature on patents, copyrights, and trade-marks is the

[32] For a more in depth discussion of the economic theory of property and its role in reducing transaction costs see William M. Landes and Richard A. Posner *The Economic Structure of Intellectual Property Law* (Cambridge: Harvard University Press) at 12-13.
[33] David Vaver, "Publishers and copyright: rights without duties?" (2006) 40:6 Bibliotheksdienst 743 at 746.

scope of the monopoly protection provided by each respective regime. The four pillars of the patent system are designed to limit the kinds of inventions that can benefit from protection.[34] Likewise, the definition of "original literary dramatic, musical and artistic work" in the *Copyright Act* circumscribes the classes of copyrightable works.[35] In trademarks law, the doctrine of functionality seeks to limit protection to the distinctiveness of the underlying product rather than the product itself.[36]

Despite the theoretical limitations built into intellectual property rights, the regimes are not mutually exclusive. Copyrights are frequently sought over subject matter that falls more appropriately within the domain of patents.[37] The perpetual nature of trademarks protection encourages companies to extend their exhausted patent portfolios by registering additional marks.[38] The allure of extensive monopoly rights and the possibility to choose among a catalogue of protections with different longevities incentivizes intellectual property overlapping. It is a trite reality of economic life that individuals and firms who extract sizeable rents from a legal title to property (be it physical or intellectual) will focus their energies on perpetuating these gains for as long as possible. This problem was discussed by Mr. Justice LeBel in *Kirkbi, supra* where he warned of the strategic litigiousness of rights holders:

> The economic value of intellectual property rights arouses the imagination and litigiousness of rights holders in their search for continuing protection of what they view as their rightful property. Such a search carries with it the risk of discarding basic and necessary distinctions between different forms of intellectual property and their legal and economic functions.[39]

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[34] See Gordon F. Henderson, Q.C.ed., *Patent Law of Canada* (Toronto: Thomson Carswell, 1994).
[35] *Copyright Act*, R.S.C. 1985 c. C-42, s. 2 [*Copyright Act*].
[36] *Trade-marks Act*, R.S.C. 1985, c. T-13, s. 13(2), *Kirkbi, supra* note 10 at para 42.
[37] See *Baker v. Selden*, (1879), 101 U.S. 99, *Hollinrake v. Trustwell*, [1894] 3 Ch. 420,
[38] See *Kirkbi, supra* note 10.
[39] *Ibid* at para 37.

In *Kirkbi*, the appellant was the manufacturer of the famous LEGO® blocks. Its unique snap bricks were protected under various patents, the last of which expired in 1988.[40] Several new competitors entered the market at this stage, offering block sets that were interchangeable with LEGO® bricks. "Facing new competition and now deprived of patent protection, Kirkbi attempted to protect its market position, employing a highly creative and aggressive use of the law of intellectual property and unfair competition, in several different legal systems throughout the world."[41] All three levels of court in *Kirkbi* dismissed the appellant‟s action for trademark infringement. LeBel J., at the Supreme Court, held that granting Kirkbi‟s claim "would amount to recreating a monopoly contrary to basic policies of the laws and legal principles which inform the various forms of intellectual property in our legal system."[42]

Those who assert the compatibility of IPRs with competition policy often fail to recognize that strategic exercise of these rights can restrain trade beyond the scope of the intellectual property monopoly. The idea that IPRs are limited monopolies is illusory when the system of property law allows these rights to be assigned, licensed, sold, bequeathed, transferred, contracted and manipulated in ways that are detrimental to free competition. For example, in *Euro-Excellence Inc. v. Kraft Canada Inc.* the Supreme Court dealt with a situation where a copyright monopoly was used strategically to prevent the parallel importation of goods.[43] In that case, Kraft Canada was the exclusive Canadian distributor of brand name chocolate bars. Kraft had exclusivity agreements with the parent corporation‟s European affiliates who manufactured Toblerone and Côte d‟Or chocolate bars. Despite these exclusivity arrangements, Euro-

[40] *Ibid* at para 4.
[41] *Ibid* at para 6.
[42] *Ibid* at para 69.
[43] 2007 SCC 37, [2007] 3 S.C.R. 20 [*Euro-Excellence*].

Excellence imported Toblerone and Côte d"Or bars, which it acquired legally in Europe, to Canada. The Kraft European affiliates subsequently registered their respective logos in Canada as copyrighted works and granted exclusive licences to Kraft Canada. When Euro-Excellence refused to cease and desist from importing the chocolate bars, Kraft Canada sued for secondary copyright infringement pursuant to s. 27(1) of the *Copyright Act*.[44] The Federal Court ordered an injunction restraining Euro-Excellence from selling or distributing the chocolate bars with the copyrighted logos. This decision was upheld by the Federal Court of Appeal. At the Supreme Court, there was a split in reasons among the majority. In his judgment, Justice Bastarache acknowledged that s. 64(3)(b) of the *Copyright Act* permits a single work to be the subject of both copyright and trademark protection.[45] However, he relied on the reasoning in *Kirkbi* for the proposition that "basic and necessary distinctions" exist between "different forms of intellectual property."[46] Justice Bastarache emphasized the importance of these distinctions at paragraph 83 where he held:

> Trademark law protects market share in commercial goods; copyright protects the economic gains resulting from an exercise of skill and judgment. If trade-mark law does not protect market share in a particular situation, the law of copyright should not be used to provide that protection, if it requires contorting copyright outside its normal sphere of operation. The protection offered by copyright cannot be leveraged to include the protection of economic interests that are only tangentially related to the copyrighted work.[47]

The majority allowed the appeal on the grounds that Kraft Canada could not prove "hypothetical infringement" which was a requirement under s. 27(2)(e) of the Act.[48] *Euro-Excellence*, like *Kirkbi* before it, establishes the danger of overreaching IPRs. In *Consumers Distributing*

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[44] *Copyright Act, supra* note 35, s. 27(1).
[45] *Euro-Excellence, supra* note 43 at para 87.
[46] *Kirkbi, supra* note 10 at para 37.
[47] *Euro-Excellence, supra* note 43 at para 83.
[48] *Ibid* at para 14.

Company v. Seiko Time Canada ("*Seiko*") the Supreme Court held that the law of passing off could not be used to prevent the parallel importation of goods.[49] In *Euro-Excellence,* Kraft Canada sought to avoid this restriction by using copyright protection over its chocolate bar logos to sue for secondary infringement. This was undoubtedly a strategic move to test the limits of copyright protection as a way of restraining parallel importation, which the Supreme Court ruled in *Seiko* was not inherently illegal and in fact benefited the public through lower prices and greater product choice.[50]

The fact that both levels of the Federal Court granted Kraft Canada"s injunction shows how a copyright holder (in this case an exclusive licensee) can use its intellectual property rights to strategically restrain trade. Moreover, in the course of litigation, an injunction, even if it lasts only a few months, can cause substantial financial harm to the interests of the defendant. *Euro-Excellence* is recognized by commentators as a decision that pits IPRs against competition policy.[51] Thomas Hays described the nature of the anti-competitive conduct involved in the blocking of parallel imports:

> There are two parts to the restrictive practice of blocking parallel importation within the market. The first part is the agreement between undertakings evidencing an intention to distort competition. The second is the anti-competitive act itself: the use of intellectual property rights to enforce what may be an otherwise legally-permissible agreement. [52]

As Professor Scassa explains, the elements described by Hays are present in *Euro-Excellence* which "combines an exclusive distribution agreement with an exercise of intellectual property

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[49] *Consumers Distributing Co. v. Seiko Time Canada Ltd.* [1984] S.C.J. No. 27, 10 D.L.R. (4th) 161.
[50] Teresa Scassa, "Using Copyright Law to Prevent Parallel Importation: A Comment on Kraft Canada, Inc. v. Euro-Excellence, Inc." (2006) 85 Can. Bar Rev. 409 at 410 [Scassa].
[51] *Ibid.*
[52] Thomas Hays, "Anti-competitive Agreements and Extra-market Parallel Importation" (2001) 26 Eur. L. Rev. 468 at 470.

rights designed to bolster the exclusivity of that contract. It is thus possible to characterize Kraft Canada as a competition law problem."[53] In other words, *Euro-Excellence* is an example of anti-competitive conduct being perpetuated by the strategic exercise of an intellectual property right. The fact that Kraft Canada framed its action in copyright rather than trademark infringement demonstrates its intention to use an exclusive licensing arrangement to launch a lawsuit that might not otherwise have survived summary judgment.

6. The Information Asymmetries of Patent Litigation

Economists recognize a wide range of situations where informational asymmetries can produce inefficiencies in otherwise competitive markets.[54] The world of IPR litigation is rife with such asymmetries. In part, these imbalances stem from the fact that plaintiffs who have gone to the trouble of securing a patent have a much better idea of its validity and prospect for enforceability than any potential infringer. As Michael Meurer argues, "a plaintiff with a weak lawsuit can successfully bluff a defendant because in the early stages of IP litigation the plaintiff is likely to have better information about the scope and validity of the IP rights."[55] This was illustrated in the U.S. case *Walker Process Equipment Inc. v. Food, Machinery & Chemical Corp.*[56] In that case, Food Machinery secured a patent over a sewage treatment process by fraudulently concealing information that the process had been available to the public more than a year before the filing of its patent application. Food Machinery then sued Walker, a new entrant into the market, for patent infringement. Walker called Food Machinery"s bluff and the claim for

[53] Scassa, *supra* note 50 at 425.
[54] See, for example, George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" Quarterly Journal of Economics 84:3 (1970) 488, Hal R. Varian, *Intermediate Microeconomics: A Modern Approach* 7th ed. (New York: W.W. Norton & Co, 2006) at 695.
[55] Meurer, Michael J., "Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation" (2002) 44 B.C.L. Rev. 509.
[56] 382 U.S. 172 (1965).

infringement was dismissed at trial. However, as Meurer suggests, similar attempts at restricting market entry may be successful, especially given the high costs of defending an action for patent infringement.[57]

Defending a frivolous I P claim is both costly and difficult. Section 43(2) of the Canadian *Patent Act* establishes the presumptive validity of issued patents, making it more difficult for defendants to strike pleadings at the pre-trial stage.[58] As Meurer argues, the resulting costs of frivolous patent litigation are substantial:

> Opportunistic IP suits impose direct and indirect costs on defendants and society. Besides settlement payments, there are sizeable direct legal costs and indirect costs borne by potential defendants who work to minimize their exposure to opportunistic litigation.[59]

The desire of potential defendants to avoid costly patent litigation creates its own set of competition law issues. The rise of reverse payment settlements in the pharmaceutical industry is one example of large firms perpetuating their market dominance through the strategic exercise of IPRs. Reverse payment settlements typically arise when brand name and generic pharmaceutical companies clash in the market for a new drug.[60] These settlements, which tend to occur in an oligopol istic market structure, essentially result in the patent holder paying the defendant a sum of money to stay out of the market.[61] A situation of this kind arose in an American case reviewed by the Federal Trade Commission ("FTC") on allegations that the settlement entered into by the parties violated the Sherman Act.[62] In that case the petitioner, Schering-Plough, had

[57] Meurer, *supra* note 55 at 515.
[58] *Patent Act*, R.S.C. 1985, c. P-4, s. 43(2) [*Patent Act*].
[59] Meurer, *supra* note 55 at 519.
[60] Teresa Scassa, "Extension of Intellectual Property Rights" in M. Boyer, M. Trebilcock, D. Vaver, eds, *Competition Policy and Intellectual Property* (Toronto: Irwin Law Inc., 2009) at 97 [Boyer et al].
[61] See *Schering-Plough Corp. v. Federal trade Commission*, 402 F.3d 1056 [*Schering*].
[62] *Ibid*.

sued a generic drug manufacturer, Upsher-Smith Laboratories, for infringing one of its patents on a potassium supplement, K-Dur 20.[63] The parties settled the case before trial with Schering agreeing to pay $ 60 million to Upsher in exchange for a guarantee that it would keep its generic drug equivalent out of the market. A few years later, Schering entered into an identical settlement agreement with ESI, another generic manufacturer, in which it agreed to pay $ 10 million to keep the competing drug out of the market. In early 2001 the FTC filed a complaint against Schering, Upsher, and ESI's parent, American Home Products Corporation. The complaint alleged that Schering's settlements were illegal agreements in restraint of trade. The FTC made an order against Schering-Plough, but this was ultimately overturned on judicial review.[64]

The Schering-Plough case was followed by a successful FTC challenge to a settlement agreement in *Re Cardizem CD Antitrust Litigation.*[65] That case involved the manufacturer of a prescription drug, Cardizem CD, and a producer of a generic version of that drug. Justice Oberdorfer of the U.S. Sixth Circuit Court of Appeal found that the settlement agreement which resulted in the plaintiff paying $ 40 million a year to keep the defendant from marketing its generic version was inherently anti-competitive.[66]

The Schering-Plough and Cardizem cases illustrate two anti-competitive effects of reverse payment settlements. First, in an already oligopolistic market structure, the agreement not to compete is harmful per se since it undercuts price competition in pharmaceutical products. Second, firms are able to prevent challenges to potentially illegitimate IPRs, thus perpetuating

[63] *Ibid.*
[64] *Ibid*.
[65] 332 F.3d 896 (6th Circ. 2003).
[66] *Ibid* at 908.

monopolies that, in the words of Justice Binnie, were not earned with the "hard coinage of new, ingenious, useful and unobvious disclosures."[67] In short, reverse payment settlements may perpetuate the existence of bad patents which impose "unwarranted costs on the general public".[68]

The information asymmetry involved in patent litigation is another example of IPRs being used as systems of control rather than exclusion. Furthermore, it illustrates the substantial divide between the theory and practice of IP litigation in a supposedly pro-competition environment. As Meurer explains, "[i]n an ideal IP system, it would be impossible to mount an anti-competitive IP lawsuit because such suits would not be credible. In reality, anti-competitive lawsuits are possible because undeserving claimants receive presumptively valid or at least colourable rights to intellectual property."[69]

7. Intellectual Property and Tied Selling

There are certain anti-competitive practices which are especially conducive to exploitation by IPR holders. Two of these practices are known as "tied selling" and "exclusive dealing". Tied selling, also known as "bundling", is a practice whereby a supplier of a product requires, as a condition of sale, that its customers purchase separate products "tied" to the original good. It can also include any condition on the sale that requires a customer to refrain from using goods in conjunction with the product that are not of the same brand or manufacture designated by the supplier.[70] Exclusive dealing is a related practice whereby the supplier, as a

[67] *Ibid.*
[68] *Apotex, supra* note 14 at para 37.
[69] *Meurer, supra* note 55.
[70] See *Competition Act*, R.S.C. 1985, c. C-34, s. 77(1) [*Competition Act*], Edward M. Iacobucci and Ralph A. Winter "Tying and Intellectual Property" in Boyer et al, *supra* note 60 at 165.

condition of sale, limits the customer"s ability to deal with other suppliers.[71] The practices of tied selling and exclusive dealing are prohibited under s. 77 of the Canadian *Competition Act*.[72]

Tied selling is another way that IPR holders are able to assert control over products, processes, and markets. Although the mere existence of I PRs does not typically result in tied selling or exclusive dealing, the ways in which these rights are exercised can facilitate such anti-competitive conduct. One of the largest antitrust prosecutions of the 1990s involved allegations that Microsoft Corp. entered into exclusionary contracts with computer manufacturers and internet providers. Microsoft sold its Windows operating system on the condition that purchasers give preferential treatment to its browser, Internet Explorer ("IE"), which was included in the software package.[73]The District Court made four findings against Microsoft in relation to the charges of tied selling. The U.S. Department of Justice eventually settled the charges against Microsoft in late 2001 after it agreed to share its application programming interfaces with third-party companies.[74] In a parallel proceeding prosecuted by the European Commission, Microsoft was fined € 497 million for bundling its Windows media player with its operating system.[75]

The Microsoft cases are important for two reasons. First, they demonstrate how IP rights can be used as springboards towards product control and market dominance. By the mid-1990s Microsoft had a near absolute monopoly in the market for operating systems.[76] Its software was protected by a thicket of copyrights, patents, and trademarks that excluded competitors from

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[71] *Competition Act*, *supra* note 70, s. 77(1)
[72] *Ibid.*
[73] *Microsoft, supra* note 4.
[74] *United States of America v. Microsoft* Civil Action No. 98-1232 (CKK).
[75] "EU Fines Microsoft a Record $1.3 billion", online: <http://www.msnbc.msn.com/id/23366103/ns/business-world_business/> .
[76] *Microsoft*, *supra* note 4 at para 35

developing programs with even remotely similar features. This accumulation of IPRs continued well into the 2000s, with Microsoft celebrating its 10,000th patent in 2009.[77] These IPRs allowed Microsoft to consolidate its early successes with the Windows operating system through protective measures aimed at ensuring continued dominance. The practice of tied selling was thus one way in which Microsoft could exploit its copyrighted software. The Windows operating system, shielded by copyright protections, was used to accelerate the proliferation of the Internet Explorer browser. This resulted in rival browsers such as Netscape effectively being squeezed out of the market. These competitors were unable to match a browser that was bundled with a near universally accepted operating system. One of the reasons Microsoft was able to crush competitors in this way was because its extensively protected software could not easily be emulated without the risk of a copyright or patent infringement suit.

The second reason why the Microsoft cases are important is that they further dispel the myth that copyright protection is a necessary precursor to innovation. Internet Explorer was developed much later than the initial browsers in the market such as Netscape Navigator, Cello, Arena, Lynx, and Mosaic. Since Microsoft had copyright protection over its operating system, however, it was able to market Internet Explorer under the guise of a protected invention. As Boldrin & Levine discuss, IP protection had little to do with any of the innovations made by Microsoft in the software industry, and particularly, its development of Internet Explorer.[78] In short, Microsoft did not innovate in the market for web browsers. It acquired the idea from others and used its dominance in the operating systems market to squeeze out its rivals. If Microsoft‟s

[77] Microsoft Corp, "10,000 "Eureka Moments," and Counting" <http://www.microsoft.com/presspass/features/2009/feb09/02- 1 0PatentMil estone.mspx>. .
[78] Boldrin & Levine, *supra* note 22 at 17.

IPRs were not used directly to tie and bundle its products, they certainly were complicit in its anti-competitive practices.

8 Copyrights and Technological Protection Measures

The use of technological protection measures ("TPMs") in copyrighted works is another area where competition law intersects with intellectual property. TPMs are used in digital media to limit a consumer"s ability to access and use the underlying works. They are often part of a complex technological web known as "digital rights management" or DRMs.[79] Such protective measures include encryption codes, registration keys, phone activation codes, and code morphing.[80] The main issue with DRM strategies is that their method of protection interferes with contractual interests and thus creates the danger of extending copyright owners" rights beyond those conferred under the *Copyright Act*.[81] Cameron and Tomkowicz discuss the potential legal difficulties that arise with DRM:

> Copyright law itself contains no limit on the ability to contract and certainly no limit on the ability to perfect contracts through technological controls. By virtue of the fact that DRM operates to create, manage, perform, and enforce contracts with each user, copyright owners that use DRM are no longer bound by the limits of copyright law—they can efficiently contract around it. Indeed, information protected by DRM need not be copyrightable at all and, unlike a work subject to copyright for a limited term, DRM-protected works can be protected indefinitely.[82]

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[79] See Alex Cameron and Robert Tomkowicz, "Competition Policy and Canada's New Breed of "Copyright" Law" (2007) 52 McGill L.J. 291 [Cameron and Tomkowicz].
[80] WIPO "How do Technological Protection Measures Work?", online: < http://www.wi po.int/enforcement/en/faq/technological/faq03.html >
[81] Cameron and Tomkowicz, *supra* note 79
[82] *Ibid* at para 36.

As Cameron and Tomkowicz point out, DRM technologies not only have the potential to extend existing copyrights beyond their statutory limits, they can also be used to protect information that is not copyrighted at all. Thus, DRM technology interferes with free competition since it prevents users of digital information from freely using the property they purchased under contract. In other words, not only do TPMs interfere with the contractual rights of parties purchasing digitally stored information, they restrain further dealing and trade in such information after it has become the exclusive property of the purchaser. This is *prima facie* anti-competitive since it acts as a restriction on the alienability of private property. The Bureau has emphasized that in competitive markets "[p]roperty owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it."[83] The rise of DRM technologies threatens a user"s ability to profit from the use of their property. For example, users may be able to read information stored digitally, but when they try to copy or cite portions of the work, the DRM system is programmed to automatically destroy it.[84] In this way copyright holders are able to exercise control over works even after ownership in them has transferred. Thus, rather than protecting their interests through exclusion, copyright holders rely on DRM systems to control the use, accessibility, and dissemination of digital information. This is especially troubling since TPMs are contractual in nature and do not trigger the same statutory limitations available under the copyright and patent regimes.

In fact, Bill C-32, a proposed amendment to the Copyright Act, threatens to expand rather than limit DRM technology for digital media.[85] The Bill includes a proposed section prohibiting

[83] IPEGS, *supra* note 16 at 5.
[84] Cameron and Tomkowicz, *supra* note 79 at para 21.
[85] Bill C-32, *An Act to amend the Copyright Act,* 3rd Session, 40th Parl, 2010.

the circumvention of TPMs by users of digital media products.[86] Clause 41 .1 (2) provides copyright holders with a full panoply of remedies injunction, damages, accounting of profits, delivery up against anyone who avoids, bypasses, removes, deactivates or impairs a technological protection measure.[87] It also prohibits the selling of services or manufacturing of technologies designed to circumvent TPMs.[88] In short, Bill C-32 proposes to legally sanction DRM technologies by making circumvention illegal. If passed, the Bill would provide copyright holders with much broader protections that could allow them to control digital media in perpetuity. This would be facilitated by the remedies available in the proposed section 41.1(2) which provides for the same damages that would normally be available if copyright was infringed.

In addition to the limits they impose on the use and transfer of digital media, TPMs may also produce overlapping IPRs, a problem that was discussed in section five above. DRM technologies can act as patent substitutes by protecting technology that would otherwise not meet the criteria for patentability. In this way, copyrighted software programs can be protected with more extensive patent-like limits on use and dissemination. Tomkowicz and Judge make this argument in their article on the misuse of copyright through DRM:

> [T]hrough controlling access to an invention, DRM can act as a patent substitute, either offering protection for inventions that cannot meet the requirements of patentability or expanding protection for inventions when their patents already expired. It can be done by imbedding copyright software in a device and claiming the right of access to the combination of those two. [89]

[86] *Ibid* cl. 41.1(1).
[87] *Ibid* cl. 41.1(2).
[88] *Ibid* cl. 41.1(1)(c)
[89] Robert J. Tomkowicz and Elizabeth F. Judge, "The Right of Exclusive Access: Misusing Copyright to Expand the Patent Monopoly" (2006) 19:2 IPJ 351 at para 31 [Tomkowicz & Judge].

Although Bill C-32 has not yet become Canadian law, the United States has integrated similar anti-circumvention provisions into its law since the enactment of the *Digital Millennium Copyright Act* ("DMCA").[90] This act prohibits the circumvention of DRM as well as the trafficking in devices that circumvent DRM controls.[91] The jurisprudence that has developed under the DMCA illustrates the potential anti-competitive consequences of DRM litigation. For example, in *Lexmark v. Static Control Components*, the plaintiff, Lexmark, one of the largest printer vendors in the U.S., sued a chip manufacturer alleging that it had violated the DMCA by circumventing technology contained in its printer cartridge toners.[92] In that case, the DRM technology employed by Lexmark was an encryption algorithm which ensured that only Lexmark brand toner cartridges could be used in Lexmark printers. The defendant, Static Control, was in the business of manufacturing microchips that mimicked Lexmark‟s authentication sequence. These microchips allowed competitors in the toner-cartridge market to make products that would be compatible with Lexmark printers. Lexmark‟s action for a preliminary injunction against Static Control was granted by the U.S. District Court. The decision shows how easily DRM technologies can be used in a way that is fundamentally inconsistent with copyright protection. Tomkowicz and Judge emphasize this point:

> Lexmark‟s practice was clearly contrary to the purpose of anticircumvention provisions. Instead of protecting its copyright, Lexmark, in reality was trying to protect a business model which involves collecting high profits on the sale of the toner cartridges, while forfeiting profits on sale of the printers.[93]

[90] *Digital Millennium Copyright Act*, 17 U.S.C. §§ 1201-1205.
[91] *Ibid* § 1201.
[92] 253 F. Supp. 2d 943 (E.D. Ky. 2003), 387 F.3d 522 (6th Cir. 2004).
[93] Tomkowicz & Judge, *supra* note 89 at para 33.

Lexmark‟s practice was remarkably similar to a well-known case of aftermarket tying

investigated by the Director of Investigation and Research in *Canada v. Xerox Canada Inc.*[94] In that case, the Director of the Competition Bureau alleged that Xerox was refusing to supply a market participant in contravention of s. 75 of the *Competition Act*.[95] The Competition Tribunal found that Exdos Corp., which was in the business of refurbishing, selling and servicing used Xerox copiers relied critically on a supply of Xerox parts in order to carry on with its work. It further found that Xerox had unjustifiably retracted its parts supply arrangement with Exdos in August 1988 as part of a policy designed to protect its service revenues.[96]

Although the Xerox case did not involve TPMs, the refusal to deal was essentially of a similar character. Here Xerox sought to extend its control over copier parts by limiting their use and dissemination in the resale market. Similarly, in Lexmark, the printer company relied on anti-circumvention laws to control the aftermarket for toner cartridges. This comparison illustrates the salient overlaps between different forms of anti-competitive behaviour and the exercise of I PRs. In both the Lexmark and Xerox cases, the anti-competitive conduct stemmed from the vendor"s desire to increase control over technical components and thus capture greater rents in its product market. In both circumstances, the existence of IPRs either added to the thicket of controls available to the vendor, or triggered a new cause of action for the breach of anti-circumvention measures. In any event, whatever the business strategy employed it is clear that both Lexmark and Xerox were using their IPRs to protect their position in the market and not to guard against misappropriation of their intellectual efforts.

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[94] *Canada (Director of Investigation & Research) v. Xerox Canada Inc*. (1990), 33 C.P.R. (3d) 83.
[95] *Competition Act, supra* note 70, s. 75(1).
[96] *Xerox, supra* note 94 at para 2.

9. Towards a Fair and Efficient System of Intellectual Property Rights

The foregoing survey illustrates the myriad ways that IPRs can be used to stifle competition and increase market concentration. For regulators and policymakers, the challenge lies in confronting and preventing such market abuses so that a fair and efficient balance can be achieved between intellectual property and competition law. There are two strategies for achieving such a fair and efficient balance. First, judicial interpretation can be used to interpret intellectual property legislation in a manner that recognizes the limited nature of the rights conferred under the Patent, Copyright, and Trademark Acts respectively. This was illustrated in *Eli Lilly & Co. v. Apotex Inc.* where the appellant sought to defend an action for patent infringement by arguing that the respondent had entered into assignment agreements which unduly lessened trade contrary to s. 45 of the *Competition Act*.[97] The Court of Appeal found that where the effect of a patent assignment is to increase the assignee's market power by more than that inherent in the rights assigned, the right of assignment under section 50 does not preclude the application of section 45 of the *Competition Act*. In other words, the Court held that prohibitions on the undue restraint of trade apply to assignments of patents even where such assignments are expressly authorized under the *Patent Act*.[98]

Judicial interpretation that harmonizes competition and intellectual property legislation is one way of guarding against the abusive exercise of IPRs. The interpretive approach only goes so far, however, since it only polices the exercise of existing rights under intellectual property legislation. A second approach based on proactive enforcement guidelines is required if a fair and efficient system of intellectual property rights is to be achieved. The Bureau‟s "Intellectual

[97] 2005 FCA 361, [2006] 2 F.C.R. 477.
[98] See *Patent Act*, R.S.C. 1985, c. P-4, s. 50.

Property Enforcement Guidelines" is a step in the right direction, but this initiative needs to be reinforced with a serious commitment to prosecute abuses of IPRs. The *Competition Act* provides for a special set of remedies where the mere exercise of an IPR is unduly restraining trade.[99] The Bureau should rely on s. 32 in cases where a firm uses its I PRs to control a product or process rather than to exclude others from unfairly pirating its innovations. A comprehensive enforcement guideline built around s. 32 of the Act will give credence to the Bureau"s mandate with respect to intellectual property and will breathe new life into this rarely used section of the Act.

In sum, there are two principal ways in which competition law and policy can assist in preventing the many abuses of IPRs that are made possible through strategic conduct. Courts can help ensure that intellectual property regimes are not immunized from competition laws by interpreting the rights granted under these regimes in a way that is consistent with competition rules. Second, the Competition Bureau must take the initiative and set up enforcement mechanisms which recognize the myriad ways that IPRs can restrain trade and injure competition.

10. Conclusion

Intellectual property rights create monopolies. As Justice Binnie noted, "[m]onopolies are associated in the public mind with higher prices". Thus, monopolies should only be legally sanctioned where the public benefits from their existence with the disclosure of "new, ingenious, useful and unobvious" inventions or works.[100] Intellectual property casts a protective net over

[99] See *Competition Act, supra* note 70, s. 32(1).
[100] *Apotex, supra* note 14 at para 37.

information. Because information is non-rivalrous in consumption, the public has a strong interest in having unencumbered access to it. Information is crucial to the proper functioning of markets. People rely on price signals and knowledge of substitutes in order to make rational choices. Competition law seeks to protect the free flow of information and goods in order to ensure that the gains from trade are fully realized. Although IPR and competition law share similar ends (i.e. promoting economic growth, technological and scientific innovation) their methods for achieving these ends differ completely and, in many circumstances, have the potential to conflict. It is when IPRs are exercised strategically as a way of controlling products, processes and, correlatively, markets, that competition law becomes an important bulwark against abusive monopolization. Particular areas of concern include overlapping and overreaching IPRs, strategic litigation, tied selling, and DRM technologies. In order to combat the anti-competitive threats of these practices, the Competition Bureau ought to take a stronger stance against IPRs that are being used to restrain trade. Section 32 of the *Competition Act* provides a unique set of remedies that could be used more frequently in cases of IPR abuse. Accordingly, the Bureau should update its enforcement guidelines in order to meet the new regulatory challenges arising from the proliferation of IPRs in the 21st century.

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