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Article 3

Introduction: Intellectual Property Licensing by the Dominant Firm: Issues and Problems

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INTRODUCTION

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The following three Articles in this issue of the *DePaul Law Review* all deal with issues arising from the refusal by a dominant firm to license all or some of its intellectual property (IP) to a smaller rival that claims to need access to that property in order to provide effective competition in a relevant market. Each Article discusses those issues from a North American perspective; the first two focus on the United States, while the third describes the Canadian approach. But to place these Articles in a broader context, one must realize that the North American perspective on these issues is not the only one, and that European law takes a very different view of these matters.

In particular, one must acknowledge that antitrust law as applied in North America grants a great deal more leeway to the dominant firm than does its European counterpart. For reasons both historical and cultural, courts in North America are much less suspicious of dominance and much more willing to accommodate and encourage it than are courts in Europe, a predilection made explicit in the recent *Trinko* case.[1] At the same time, U.S. law tightly embraces the proposition that, with the possibility of a rare exception discussed below, the incentives to produce intellectual property must not be encumbered or diluted by any sharing obligations that antitrust law might otherwise impose. This twin bias, if you will, is clearly visible with respect to cases involving refusals by the dominant firm to license IP, in which the issue of interest has been narrowed over the years so dramatically that it has practically ceased to matter.

Thus, it has been solid and unchallenged law in the United States since the *SCM Corp. v. Xerox Corp.* (*SCM/Xerox*)[2] case in 1981 that a dominant firm that has never licensed its intellectual property to a rival has absolutely no duty to do so, regardless of the short-term economic consequences of its refusal. Consequently, for the past twenty-five years the only questions in this area have involved dominant firms that decided initially to license IP to their rivals and then decided later to revoke that license or refuse to extend it. Here, too, the case law

1. Verizon Commc'ns v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398 (2004).
2. SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981).

has been extremely accommodating to the dominant firm. Thus, on the broader reading of the applicable case law, the dominant firm's refusal to continue licensing its IP is shielded from antitrust liability as long as the reasons for its refusal are not "pretextual"; on the narrower reading, the dominant firm's refusal is irrebuttably presumed to be lawful. I suggest below that as a practical matter, the narrower reading will eclipse the broader one, creating a de facto rule of legality for all refusals to license by the dominant firm.

In Europe, however, the law is quite different. Courts and competition regulators are more suspicious of dominant firms, more attuned to possibilities of short-term economic harm from certain of their activities, and less disposed to exalt the incentives to create intellectual property to a position of absolute, or near-absolute, preeminence. As a consequence, despite some superficial similarities (*Volvo*[3]), the European case law in this area differs substantially from that of the United States. In the famous *Magill*[4] case, the Court of First Instance (CFI) adjudged that certain television broadcasters (who were also owners of the copyrights to their program listings and each of whom prepared its own weekly single-channel program listings) had abused their dominant positions (i.e., wrongfully monopolized) in the market for those program listings by invoking their copyrights over the listings to deny third parties the opportunity to publish complete weekly guides to the programs of all the broadcasters.

On appeal, the European Court of Justice (ECJ) upheld the decision of the CFI, announcing that although a refusal to grant a license in respect of an intellectual property right cannot "in itself"[5] constitute a general abuse of a dominant position, it might "in exceptional circumstances"[6] constitute abusive conduct within the meaning of Article 82 (the European equivalent to Section 2 of the Sherman Act). In particular, the circumstances in *Magill* that warranted a determination of abuse were three: first, the defendants owned the IP rights to the raw material indispensable to a comprehensive weekly guide, but had chosen to use it so as to deprive consumers of a comparative basis for choosing programs; second, no acceptable justification for that refusal existed, which is to say that attempting to justify the refusal by reference only to one's IP rights was legally inadequate; and third, the defendants had effectively prevented the development of a new mar-

3. Case 238/87, Volvo (AB) v Erik Veng (UK) Ltd, 1988 E.C.R. 6211.

4. Radio Telefis Eireann (RTE) & Indep. Television Publ'ns, Ltd. (ITP) v. Comm'n (*Magill*) 1995 E.C.R. I747.

5. *Id.* ¶ 2.

6. *Id.*

ket, in publications containing complete weekly program listings, by withholding access to their IP. In another recent case involving very similar issues, *IMS Health v. NDC*, the Advocate General to the ECJ found that different "exceptional circumstances" justified an order compelling a dominant firm to license its copyrighted marketing format to a smaller rival, over the objection and against the wishes of the dominant firm.[7]

These cases are remarkable in four respects at least. In the first place, they demonstrate that European courts are willing, in certain circumstances, to compel dominant firms to license their IP even to rivals with which they have never before had a licensing agreement. There is no *SCM/Xerox* immunity for steadfast refusals to deal. In the second place, European courts are willing to do so in spite of the incentive effects that such a requirement might have on the production of IP. In the third place, the administrative costs of determining a proper price for the license and of resolving disputes about such pricing and other relevant matters seem to matter little to the courts. And in the fourth place, the obligation to license has been imposed in cases where there had never before been a license grant, which suggests that in those cases currently of interest in the United States—refusals to license that follow an earlier grant—European courts would be much more likely to impose liability on the dominant firm.

Of course, the cases in Europe caution that these requirements can be imposed only under "exceptional circumstances"—when the owner of the IP can provide no "objective justification"[8] for its refusal and where access to the IP is essential for "operating on a secondary market"[9] (that is, a separate and distinct market from the one in which the IP owner is currently doing business). But the requirement exists nevertheless, and because the criteria for its imposition are ambiguous at best, it must necessarily serve as at least a small brake on innovative efforts and a clear restriction on the freedom of the dominant firm. U.S. law has no such requirements.

The three related articles in this issue focus, as mentioned above, on U.S. and Canadian law. One offers a survey of U.S. law on refusals by the dominant firm to license IP and a prediction about the effect of the recent *Trinko* case on that area of law. One confines itself somewhat more narrowly to the analysis and comparison of two recent and controversial opinions in this area by the Ninth and the Federal Cir-

7. Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039, *available at* 2004 ECJ CELEX LEXIS 166.

8. *Id.* ¶ 66.

9. *Id.*

cuit Courts of Appeal and offers a theory for choosing between them. And the third surveys Canadian law in this area, which resembles U.S. law in certain ways, but also contains as well some significant and interesting differences. Each of the Articles offers an important perspective.

In his Article, *Refusals to License Intellectual Property After* Trinko,[10] Professor Michael A. Carrier first discusses five approaches adopted by United States federal courts in recent years to the problem of a dominant firm's refusal to license its intellectual property to rivals and then reconsiders the vitality of these approaches in light of the United States Supreme Court's 2004 *Trinko* opinion. Professor Carrier persuasively argues that although not involving a refusal to license IP by a dominant firm, *Trinko*'s tone and content seem to mark out a new path in the Supreme Court's general treatment of a dominant firm's obligations to assist its rivals, a path that "will certainly not make it any easier for plaintiffs challenging IP refusals to license."[11]

The five pre-*Trinko* approaches to the IP licensing issue canvassed by Professor Carrier are well-known to practitioners and academics alike. The first, called "absolute immunity" by Professor Carrier, was announced in 1981 in the case of *SCM Corp. v. Xerox Corp.*[12] The facts of the case were pleasantly simple: after the commercial prospects for Xerox's plain paper copier became obvious to all, SCM sought a license from Xerox to use its patents, a license that would place SCM in direct competition with Xerox in the copier market, leading Xerox—understandably enough—to refuse the licensing request. SCM claimed, accurately, that Xerox's refusal enabled it to maintain its monopoly in the market for plain paper copiers, but the Second Circuit rejected the claim because it concluded that in refusing to share its technology with a would-be rival, Xerox did no more than stand by patent rights lawfully acquired, insisting on the statutory grant of exclusivity.

Though the Second Circuit had no need to make mention of it, Xerox, unlike future defendants in similar cases in the United States, had never licensed its IP to SCM or anyone else. Because of that critical fact, *Xerox* has come to stand for a seemingly unalterable rule of U.S. law: a dominant firm that has never licensed its IP to rivals may lawfully refuse any request for a license, regardless of the motive for its refusal and regardless of the effect of its refusal on competition.

10. Michael Carrier, *Refusals to License Intellectual Property After* Trinko, 55 DEPAUL L. REV. 1191 (2006).

11. *Id.* at 1209.

12. 645 F.2d 1195 (2d Cir. 1981).

All of the other cases discussed by Professor Carrier involve qualitatively different behavior that has proven more problematic for courts to resolve: dominant firm refusals to continue licensing their IP to rivals with whom they had previously cooperated. Consequently, the message of *Xerox*, slightly restating Professor Carrier's characterization, might be: "absolute refusal, absolute immunity"; it is a message that has remained unchanged and unchallenged in the United States for the past twenty-five years.

The second, third, and fourth approaches analyzed by Professor Carrier are variations on a theme. In each of the relevant cases, a dominant firm that had formerly made its IP available to smaller rivals, changed its policy, and refused to continue licensing the relevant IP. In each case, the smaller rival then sued, alleging that the refusal to deal was undertaken in pursuance of improper monopoly maintenance, and thus in violation of § 2 of the Sherman Act. In the *Xerox* case, *CSU, L.L.C. v. Xerox Corp.*,[13] the Federal Circuit adopted what Professor Carrier calls a rule of "near-absolute immunity" for such refusals to deal. A dominant firm's refusal to continue licensing its IP to smaller rivals, the Court held, is central to the patent system's right to exclude and is thus per se lawful, save for three specific exceptions: (1) licensing through an arrangement that ties patented and unpatented products (arrangements that are now likely to be viewed more kindly in light of the Supreme Court's ruling this term in *Independent Ink v. Illinois Tool Works*[14]); (2) refusing to license a patent obtained through a fraud on the Patent Office; and (3) using the patent in a scheme of sham litigation. Under this approach, in the absence of one of the exceptions, a dominant firm's refusal to continue licensing cannot violate the antitrust laws, regardless of the effect of that refusal or the motives behind it.

The *Data General*[15] case provides a variation on *Xerox*, the "presumptive legality" approach in Professor Carrier's terms. Like Xerox in the case just discussed, Data General had terminated a course of cooperative conduct with its rivals, conduct that included licensing some of its IP to those rivals. Data General's decision to stop licensing provoked the usual challenge (an antitrust suit) for the usual reasons (alleged § 2 violation). After examining the purposes of the IP laws and focusing particularly on their presumed incentive effects, the Court concluded that an IP owner's "desire to exclude others from use

13. 203 F.3d 1322 (Fed. Cir. 2000).

14. 126 S. Ct. 1281 (2006).

15. Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994).

of its . . . work is a presumptively valid business justification . . . ."[16] Perhaps because it did not need to do so, the Court failed to describe or otherwise indicate the kind of evidence capable of rebutting that presumption: it was enough for purposes of its decision that the plaintiff had not offered any such evidence.

In *Kodak II*, the Ninth Circuit attempted to fill in the blank left incomplete by the *Data General* opinion. In factual circumstances functionally identical to those of the other cases, Kodak had ceased licensing its IP to smaller rivals with whom it had previously cooperated. Without access to the protected products, the rivals alleged, they were unable to compete effectively with Kodak, and several were forced out of business. The Ninth Circuit, affirming a jury verdict for plaintiffs, adopted the *Data General* presumption ("the desire to exclude is a presumptively valid business justification"), but held that the presumption of legality could be rebutted by proof that the particular justification offered by defendants was "pretextual."[17]

Under the facts of the *Kodak* case, the Court's holding mattered, because at trial (before this rule of presumptive legality had been announced) Kodak had offered several far-fetched excuses for its behavior that could have seemed "pretextual" to a reasonable jury. Aside from its effect on the parties, however, the holding in *Kodak* is almost certain to be irrelevant in the business world. From now on, any dominant firm that ceases to share important IP with smaller rivals will be effectively immune from liability (subject of course to the *Xerox* exceptions) as long as it simply says either "I stopped cooperating because I decided to exclude my rival from access to my IP," or "I stopped cooperating because I decided that I could make more money by doing so." Because these explanations are always plausible and thus unassailable, even under the apparently stricter standards of *Kodak II*, they are almost certain to be raised in all similar cases in the future and to absolve the dominant firms raising them from liability.

The most significant practical effect of *Kodak II* therefore is to complete the convergence of the three seemingly different tests (*Xerox/CSU*; *Data General*; and *Kodak II*) described and discussed by Professor Carrier. Because dominant firms with powerful IP benefit under each test from a powerful presumption of legality when they refuse to continue licensing IP to their smaller rivals; and because a perfectly simple and plausible justification is available to all dominant firms whose refusals might be challenged (the wish to exclude one's rivals,

16. *Id.* at 1187.

17. Image Technical Servs., Inc. v. Eastman Kodak Co. (*Kodak II*), 125 F.3d 1195, 1212 (9th Cir. 1997).

or the wish to make more money), in the future dominant firms in the position of Kodak are highly unlikely to fall afoul of the antitrust laws.

This leaves the fifth approach examined by Professor Carrier, the essential facilities doctrine, whose pedigree in this area of the law comes from a district court opinion overruled on appeal and predicated on the three-part notion that IP might be both a "facility" and "essential" within the meaning of that doctrine, that even if so there are no countervailing reasons to deny rivals access to it, and that the Supreme Court would endorse such an approach. To describe this approach is essentially to reject it. Moreover, Justice Scalia's statement in *Trinko* that the Supreme Court has "never recognized [the essential facilities] doctrine"[18] and that it could see "no need either to recognize it or to repudiate it here"[19] is bound to cast very serious doubt on the vitality of that doctrine.

As Professor Carrier observes, *Trinko* also seems fundamentally and in several ways to dampen if not eliminate the prospects for the adoption of a doctrine of judicially-enforced IP sharing. In the first place, *Trinko* specifically places *Aspen Skiing*[20]—the linchpin of the rule requiring a dominant firm to share its assets (albeit non-IP) with its smaller rival—"at or near the outer boundary"[21] of § 2 liability, confining its applicability to its own particular and peculiar facts. In the second place, *Trinko* expresses a clear preference for allowing dominant firms wide latitude in their behavior towards their smaller rivals and a clear distaste for saddling them with court-enforced sharing obligations. According to the Court in *Trinko*, sharing requirements have little, if anything, to recommend them: they discourage investment, require ongoing and costly judicial oversight, facilitate collusion, and intrude unduly upon the freedom historically accorded to dominant firms by the Supreme Court to make unfettered choices about those firms with which they will deal.

For these reasons and more, Professor Carrier concludes, *Trinko* suggests quite powerfully that, if faced squarely with the issue, the Supreme Court would be highly unlikely to require dominant firms to continue licensing their IP to smaller rivals. Moreover, he argues, *Trinko* also suggests that, if the issue presented itself, the Court would be apt to endorse one of the more absolute lower court approaches, along the lines of either *SCM* or *Xerox/CSU*, and would reject those

18. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 411 (2004).

19. *Id.*

20. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

21. *Trinko,* 540 U.S. at 409.

that are more flexible in their requirements. Though Professor Carrier says, after canvassing all these developments, that "the law on IP refusals to license is . . . unclear,"[22] in fact it seems quite clear: dominant firm refusals to license—both initially and following a period of licensing—are virtually and practically immune from antitrust challenge. *Trinko* might make this state of affairs more obvious than it would otherwise have been, and might also provide an extended rationale for why it should be so, but it hardly can be said to have created it.

Professor Joseph Bauer also focuses his attention on recent U.S. case law in an effort to harmonize what he calls the "potentially conflicting principles" of intellectual property law and antitrust law, respectively.[23] The conflict, in Professor Bauer's view, arises from the grant of exclusivity given to the owner of intellectual property, on the one hand, and the proposition that "under the antitrust laws, a unilateral refusal to deal may constitute an element of a violation of § 2 of the Sherman Act,"[24] on the other. The "central question" thus addressed by Professor Bauer's article is "[u]nder what circumstances should the antitrust laws impose a duty to deal on the owner of intellectual property?"[25]

Professor Bauer purports to answer this question by comparing and contrasting the approach taken by the Court of Appeals for the Ninth Circuit in *Image Technical Services v. Eastman Kodak*[26] (*Kodak II*) with that taken by the Court of Appeals for the Federal Circuit in *In re Independent Service Organizations Antitrust Litigation*[27] *(Xerox/CSU)*. After discussing these cases and other related opinions, as well as "the policies underlying the antitrust and intellectual property regimes," Professor Bauer then proposes "a harmonization"[28] of those "supposedly conflicting"[29] regimes. On his view, since patents and copyrights confer limited grants of "defined rights,"[30] attempts by the owners of those rights to extend them "beyond [their] statutory scope"[31] are unlawful. This principle, he claims, supports his conclusion that the proper approach to refusals to license is the one adopted by the Ninth Circuit in *Image Technical* (*Kodak*), an approach whose

22. Carrier, *supra* note 10, at 1209.
23. Joseph P. Bauer, *Refusals to Deal With Competitors by Owners of Patents and Copyrights: Reflections on the* Image Technical *and* Xerox *Decisons*, 55 DePaul L. Rev. 1211, 1212 (2006).
24. *Id.*
25. *Id.*
26. 125 F.3d 1195 (9th Cir. 1997)
27. 203 F.3d 1322 (Fed. Cir. 2000).
28. Bauer, *supra* note 23, at 1213.
29. *Id.*
30. *Id.*
31. *Id.*

vitality he claims remains largely unaffected by the Supreme Court's opinion in *Trinko*.

In several ways, Professor Bauer's ambitious thesis is problematic. The supposed conflicts between the intellectual property and antitrust laws—"conflicts" that seemed important to academics and antitrust regulators in the 1960s and 70s—have over the past twenty years been recognized by most courts and scholars to be complementary means of achieving the same beneficial end, consumer welfare. Maximizing consumer welfare, which for antitrust purposes is broadly defined as a state of economic affairs characterized by low (quality adjusted) prices, high output, and high levels of innovation, is widely acknowledged to be the main goal of both antitrust law and intellectual property law. Antitrust law seeks to accomplish this end largely with a stick: preventing collusion by rivals, prohibiting mergers that threaten to raise price, and punishing dominant firms that abuse their power. By contrast, intellectual property law uses a carrot: successful innovators receive large and long-lasting rewards, rewards that will encourage even more efforts at innovation and thus contribute significantly to consumer welfare.

Questions arise periodically, of course, about whether the rewards conferred by the intellectual property regime are properly calibrated. Some claim that the reward structure is more generous than it need be to encourage the "proper" level of innovation and that this excessive generosity leads to rent-seeking and improperly diverts resources from higher and better uses. And indeed, the specifics of the proper term of patent and copyright protection have been the subject of heated debate in recent years (see the Copyright Extension Act and the related debate). But even the most heated of those debates accept the general principle that consumers benefit from some level of increased innovation, a proposition that is perfectly consistent with the goals of antitrust law. "Harmonizing" these areas of law thus seems to be largely unnecessary.

Secondly, there is a certain tautological quality to Professor Bauer's main argument. Dominant firms, he contends, should be prohibited by antitrust law from "seeking to exercise rights beyond the statutory scope"[32] of their powerful copyrights or patents. This test originated in early patent tying cases, where it was feared that by tying unpatented products to patented ones, dominant patent holders might improperly extend their market power into second markets that would otherwise be competitive. Courts have expressed the test in a variety

32. *Id.*

of ways and continue to use it today, but the test has serious difficulties. First and foremost, its meaning is unclear: the "lawful grant" of exclusivity does not confer market power by its own terms; nor does it mention economic markets. It covers inventions, in the case of patents, not the markets in which those inventions might be sold. Thus, it might be the case that an invention's utility (and thus its market power) would naturally extend to two or more economic markets. Think of a small variation on the *Kodak* and *Xerox* cases: assume that certain patented parts enable the manufacturer to produce a machine that accounts for a dominant share of the original equipment market; and then assume that the same patented parts (or copyrighted instructions), which are necessary to maintain and service that equipment, have never been licensed for sale by another firm. The same patents, on these not unusual facts, have given rise to power in two separate markets. Has the "statutory scope" of the patents been exceeded? It seems not. Should the inventor be prohibited from taking monopoly rewards in two markets, simply because its patents were particularly useful? Again, it would seem not.

The point is that "the statutory scope" of a patent or copyright grant is described without reference to economic markets and therefore cannot serve as a useful limit on the behavior of the dominant firm. It is possible, of course, to read antitrust limitations into those grants, but that would be an act of imagination and declaration, not an act of logic or of economic reasoning. Consequently, it seems unhelpful to propose a test based on "the statutory scope" of the intellectual property right in question: in theory, the "scope" is either indeterminable or irrelevant to the inquiry of interest; in practice, "the scope" in any particular case would be whatever the trial judge might determine it to be, which in turn would necessarily be a determination unmoored from definitional or economic reality.

In the second place, because Professor Bauer's test arose in the patent tying context, it fails to address—let alone answer—the most important question raised in the refusal to license cases. That is, if one accepts—as Professor Bauer seems to—the legitimacy of the holding in *Xerox/SCM* that a firm that has never licensed its IP to rivals need not ever do so, then on what basis is one to distinguish between that scenario and those in the *CSU* and *Kodak II* cases, where an initial license grant was withdrawn? In particular, *Xerox/SCM* would seemingly permit the dominant firm to use its IP to dominate as many markets as the IP could legitimately control. But under Professor Bauer's test, the dominant firm's decision to grant an IP license to its smaller rival might result in its having much less leeway in this regard. But why? The use of the IP in both instances is identical, save for the license grant and refusal in the second example. It is the revocation of the license that distinguishes the cases, nothing more. Thus, unless the revocation might somehow undermine contractual reliance interests—a possibility that seems highly implausible—the smaller rival could have no basis for complaint; and would have no basis whatever for an antitrust claim.

D. Jeffrey Brown and Patrizia Martino, lawyers with the Canadian firm of Stikeman Elliott, provide a Canadian perspective on the issues and problems of IP licensing by the dominant firm.[33] They write that for the most part the Canadian approach to these issues has been similar to that of the United States, with Canadian law and antitrust enforcers viewing the unilateral refusal to license IP as "beyond the scope of the provisions of the Canadian Competition Act."[34] They note, however, that there are differences between the two regimes, in particular the provisions within the Canadian Competition Act and Patent Act for "special remedies" to address certain specified abuses of IP rights.

After first discussing U.S. law on refusals to deal by the dominant firm, *Aspen* and *Trinko* in particular, Brown and Martino provide a brief overview of the Canadian Competition Act, Canada's federal antitrust law. Section 75 of the Competition Act covers "refusals to deal," which are "civilly reviewable" under the Act: remedies for violations are limited to injunctive relief and administrative monetary penalties. Section 75 sets forth six explicit conditions necessary to make out a violation. First, the refusal must substantially affect a person in his or her business or preclude him or her from carrying on that business. Second, the adverse effect must arise from his or her inability to obtain adequate supplies of the relevant product on usual trade terms. Third, that inability must stem from insufficient competition among suppliers of the product. Fourth, the person adversely affected must be willing to meet the supplier's usual trade terms. Fifth, the product must be in ample supply. And sixth, the refusal to deal must have, or be likely to have, an adverse effect on competition in a market, a criterion added to the law in June 2002. Brown and Martino then review three cases brought under § 75, which stand collectively for the proposition that § 75 does not apply to refusals by the dominant firm to license its IP.

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33. D. Jeffrey Brown & Patrizia Martino, *Intellectual Property Licensing by the Dominant Firm: Issues and Problems—A Canadian Perspective*, 55 DePaul L. Rev. 1247 (2006).

34. *Id.*

Section 79 of the Competition Act proscribes the abuse of a dominant position and is thus analogous to § 2 of the Sherman Act. Brown and Martino observe that because Canadian case law has recognized the proposition that a "refusal to deal" might violate § 79, in theory that section might provide a basis for regulating a dominant firm's refusal to license its IP. They note, however, that subsection 79(5) significantly limits the applicability of § 79 to those kinds of refusals, exempting from the law's coverage conduct undertaken "pursuant only to" the exercise of any right or interest derived from specified IP statutes. Moreover, Brown and Martino note, as interpreted by the Competition Tribunal in *Tele-Direct*,[35] the exemption applies regardless of the IP owner's motivation for refusing a license.

Brown and Martino next describe and analyze § 32 of the Competition Act and § 65 of the Patent Act, which provide special remedies for "abuse" of IP rights. Each statute provides that if a court is satisfied that the conduct in question prevents or lessens competition unduly, then it may grant an order directing, among other things, compulsory licensing. Although these statutes would seem to permit a relatively high degree of judicial intervention into decisions to refuse to license IP, Brown and Martino report that § 32 is "essentially moribund,"[36] that "there is no jurisprudence considering its application,"[37] and that section is "rarely used."[38] They observe as well that the best guidance as to the meaning and effect of these laws comes from the Intellectual Property Enforcement Guidelines released in 2000 by the Competition Bureau, Canada's antitrust regulator. The Guidelines in turn reaffirm the general proposition that unilateral refusals to license IP—whatever their motivation—cannot be challenged under the general provisions of the Competition Act (§ 75 and § 79) and are susceptible to challenge only rarely under § 32. Nevertheless, Brown and Martino caution that both sections remain good law, providing a basis for remedies for refusals to license, serving to distinguish Canadian law from its U.S. counterpart, and requiring the attention and consideration of Canadian practitioners and businesses.

In conclusion, Brown and Martino view the U.S. approach as one in which "the balance appears to have shifted strongly in favor of IP laws"[39] through what they regard as the rule of per se legality adopted

35. Canada (Dir. Investigation & Res.) v. Tele-Direct (Pub'ns) Inc., [1997] 73 C.P.R.3d. 1, 32 (Comp. Trib.), *available at* 1997 C.P.R. LEXIS 1114.

36. Brown & Martino, *supra* note 33, at 1258.

37. *Id.*

38. *Id.* at 1247.

39. *Id.* at 1270.

in *Xerox*. They regard Canada's statutory approach as more multi-faceted than U.S. law. And they see in § 32 of the Competition Act and § 65 of the Patent Act a source of potentially useful stopgap measures against anticompetitive refusals to license that is lacking in the U.S. system.

Taken together, the Articles in this issue provide us with a comprehensive view of the U.S. and Canadian law in this interesting and problematic area. They offer different approaches, different perspectives, plausible predictions and new proposals. We are fortunate to be able to publish them and thank the authors for their time, thought, and energy.