Intellectual Property Licensing by the Dominant Firm: Issues and Problems - A Canadian Perspective

D. Jeffrey Brown

Patrizia Martino

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Introduction

One of the most debated issues in antitrust law today is defining the limits that antitrust may (or should) impose on a dominant firm. While this issue cuts across all areas of the field, it has attracted particular attention in relation to the interface between intellectual property (IP) rights and antitrust law. The Canadian approach to the IP-antitrust interface has been, for the most part, similar to that in the United States. Nevertheless, there are differences, with the principal distinguishing feature of the Canadian regime being the existence of rarely used “special remedies,” namely the Competition Act\(^1\) and the Patent Act, to address certain specified “abuses” of IP rights in two Canadian laws.\(^2\) Otherwise, Canadian law and enforcement policy have generally viewed the mere exercise of IP rights, defined generally as unilateral conduct respecting IP, including refusals to license IP, as beyond the scope of the provisions of the Competition Act.

In light of the above issue, this Article outlines the manner in which Canadian competition law deals with the IP-antitrust interface from the perspective of the relevant provisions of the Competition Act, jurisprudence, and enforcement policies of the Canadian Competition Bureau.\(^3\)

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* D. Jeffrey Brown is a partner and Patrizia Martino is an associate in the Competition Group of Stikeman Elliott L.L.P., http://www.stikeman.com. The views in this Article represent the views of the authors alone and were presented at the DePaul University Center for Intellectual Property Law & Information Technology’s (CIPLIT) 6th Annual Symposium, Intellectual Property Licensing by the Dominant Firm: Issues and Problems.

3. The Competition Bureau, which is headed by the Commissioner of Competition, is Canada’s principal competition law enforcement body.
II. THE U.S. POSITION RESPECTING REFUSALS TO DEAL

A. Generally

The intensity of the debate concerning what limits antitrust law may (or should) impose on a dominant firm ratcheted up following the U.S. Supreme Court's decision in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P. (Trinko).4 Particular highlights of Trinko included the Court's characterization of its prior decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen)5 as "at or near the outer boundary of § 2 [Sherman Act] liability,"6 and doubts raised by the Court about the existence or scope of an essential facilities doctrine under U.S. antitrust law.7 Neither Trinko nor Aspen dealt with the IP-antitrust interface. Nevertheless, the controversy incited by Trinko is interesting because the approach to non-IP refusals to deal espoused in that case is similar to that established for refusals to license IP in In re Independent Service Organizations Antitrust Litigation, which affirmed the case of CSU, L.L.C. v. Xerox Corp. (CSU).8

A detailed discussion of these cases is beyond the scope of this Article. A brief summary of the facts and findings in these cases, however, provides useful background to understanding the treatment of refusals to license IP under Canadian antitrust law. The Aspen case is best discussed in conjunction with a second case, Eastman Kodak Co. v. Image Technical Services, Inc. (Kodak),9 as the two cases have been cited together for the proposition that proof of anticompetitive effect is unnecessary in certain § 2 monopolization cases.

Aspen is well known for its expansive view of liability under § 2 of the Sherman Act.10 Together with Kodak, Aspen has been interpreted

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7. Id. at 409–11.
9. 504 U.S. 451 (1992). Kodak involved an action by eighteen independent service organizations (ISOs) for violations of sections 1 and 2 of the Sherman Act based on Kodak's refusal to supply them with replacement parts for Kodak copiers. Id. at 455–56. Prior to the refusal, the ISOs had purchased replacement parts for use in the servicing of Kodak copiers, putting them in competition with Kodak. Id. at 457. The Supreme Court stated that "[i]f Kodak adopted its parts and services policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2" and concluded that "[l]iability turn[ed] . . . on whether 'valid business reasons' can explain Kodak's actions." Id. at 483 (citing Aspen, 472 U.S. at 600–05).
10. Aspen involved a § 2 suit brought by Aspen Highlands Skiing Corp. (Highlands), the owner of a ski facility in Aspen, Colorado, after its larger competitor, Aspen Skiing Co. (Ski Co.), refused to continue providing an interchangeable, six-day ticket that allowed access to all
by some as establishing a rule that proof of anticompetitive effect is unnecessary in certain § 2 monopolization cases.\textsuperscript{11} According to the so-called \textit{Aspen/Kodak} rule, § 2 liability may be established using a truncated analysis that focuses not on the competitive effects of conduct but whether conduct is supported by a "legitimate business justification."\textsuperscript{12} The appropriateness of such a rule, which may attribute liability even in the absence of proof of a causal connection between the existence of exclusionary conduct and the creation, enhancement, or maintenance of a monopoly, has been controversial.\textsuperscript{13} Critics of the \textit{Aspen/Kodak} rule received an enormous boost after \textit{Trinko}, which rekindled debate about U.S. antitrust law's treatment of refusals to deal. \textit{Trinko} involved a refusal by Verizon, an incumbent monopoly local service provider, to provide AT&T with access to its systems and support operations, thereby allegedly impairing AT&T's ability to provide competitive service. The plaintiffs alleged that such refusal violated Verizon's obligations under the Telecommunications Act of...
1996,\textsuperscript{14} and that this violation also amounted to anticompetitive and exclusionary conduct contrary to § 2 of the Sherman Act. In its analysis, the Court described \textit{Aspen} as "at or near the outer boundary of § 2 liability,"\textsuperscript{15} and held that application of traditional antitrust principles did not justify creating a new exception to the proposition that there is no duty to aid competitors.\textsuperscript{16} With respect to the "essential facilities doctrine," the Court said that it had "never recognized such a doctrine," and added that it saw "no need either to recognize it or to repudiate it here."\textsuperscript{17} On the facts before it, however, the Court held that the prerequisite for the doctrine, the unavailability of access to the essential facilities, was absent in light of the provisions of the Telecommunications Act of 1996, which created an access mechanism available to AT&T and other competitive local exchange carriers.\textsuperscript{18}

\textit{Trinko}, therefore, represents a significant departure from the law as it previously existed. Prior to \textit{Trinko}, the \textit{Aspen/Kodak} rule’s approach to § 2 liability could be characterized as expansive insofar as its truncated analysis, focusing on the question of legitimate business justification rather than competitive effects, facilitated § 2 enforcement in respect of refusals to deal. Post-\textit{Trinko}, the bar would appear to be much higher in this regard, the Court signalling a far more restrictive approach to analyzing refusals to deal going forward.

\textbf{B. Refusals to License IP}

To say that \textit{Trinko} represented a significant departure from prior law is true to the extent that \textit{Aspen/Kodak} applied to refusals to deal generally—outside the sphere of IP. Viewed within the sphere of IP, however, \textit{Trinko} does not represent such a significant departure. Rather, \textit{Trinko} can be viewed as extending U.S. antitrust law respecting refusals to deal to a point where such law already existed. \textit{Trinko} can be compared in this regard to the decision in \textit{CSU},\textsuperscript{19} which established that a refusal to license IP is not anticompetitive. In this case, Xerox had established a policy of not selling parts unique to a particular series of its photocopiers to independent service organizations (ISOs), including CSU, unless they were also end-users of the copiers. Xerox subsequently tightened the policy, cutting CSU’s di-

\begin{itemize}
\item \textsuperscript{16} \textit{Id.} at 399.
\item \textsuperscript{17} \textit{Id.} at 411.
\item \textsuperscript{18} \textit{Id.} at 399.
\item \textsuperscript{19} 203 F.3d 1322 (Fed. Cir. 2000).
\end{itemize}
rect purchase of restricted parts. In order to maintain its business of servicing Xerox equipment, CSU used parts from used Xerox equipment, other ISOs, and parts purchased through a number of its customers. CSU also obtained parts from Rank Xerox, a European affiliate of Xerox, until Xerox forced Rank Xerox to stop selling parts to CSU. CSU filed suit against Xerox alleging that Xerox violated the Sherman Act by setting the prices on its patented parts higher for ISOs than for end-users to force ISOs to raise their prices. Xerox counterclaimed for patent and copyright infringement.

The district court found that Xerox’s refusal to license was not an unlawful attempt to leverage a “parts monopoly” into a “service monopoly” as argued by CSU.20 It also rejected CSU’s argument that the subjective intent underlying Xerox’s refusal to deal was relevant in determining the legality of Xerox’s conduct. Rather, the District Court adopted a rule of per se legality for unilateral refusals to license.21 The Federal Circuit affirmed the decision, finding that “Xerox was under no obligation to sell or license its patented parts and did not violate the antitrust laws by refusing to do so.”22 The Federal Circuit did not exempt refusals to license IP entirely from antitrust laws, recognizing that “illegal tying, fraud in the Patent and Trademark Office, or sham litigation” could constitute antitrust violations.23 Absent such conduct, however, “the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.”24

Post-Trinko, the debate in the United States continues regarding whether the narrow reading of the Aspen decision in Trinko is indicative that U.S. courts have retreated from the expansive approach of using antitrust to deal with the activities of monopolists. Typically, refusals to license IP were dealt with as a discrete issue. The question in light of Trinko becomes whether the refusals of “traditional” property are now on equal footing with refusals to license IP as not being anticompetitive (as per the decision in CSU).

20. Id. at 1329.
21. Id.
22. Id. at 1328.
23. Id. at 1327.
24. Id.
III. IP Licensing by Dominant Firms in Canada

A. The Competition Act—Overview

In Canada, competition law is found exclusively in the provisions of the Competition Act, which is federal legislation of general application.\(^\text{25}\) Structurally, the Competition Act’s provisions are divided into two principal categories: criminal offenses and civilly reviewable matters. A third category, “special remedies,” also exists and includes § 32 of the Competition Act, which deals with specified “abuses” of IP rights.\(^\text{26}\) A separate remedy respecting abuses of patent rights is also found in the Patent Act and is discussed separately below.\(^\text{27}\)

The criminal provisions of the Competition Act include offenses respecting conspiracy,\(^\text{28}\) price maintenance,\(^\text{29}\) bid-rigging,\(^\text{30}\) and misleading advertising and related deceptive marketing practices.\(^\text{31}\) The Commissioner of Competition (Commissioner) investigates complaints through the Competition Bureau (Bureau) and refers matters to the Attorney General of Canada (Attorney General) for prosecution before the courts. Penalties for violation of the Competition Act’s criminal provisions include fines and jail terms. There is also a limited right of private action under § 36 of the Competition Act—available in respect of violations of the Competition Act’s criminal provisions or orders made under the Competition Act. Damages under § 36, however, are limited to special damages (i.e., damages for losses actually suffered); treble damages are not available.

The Competition Act’s civilly reviewable provisions deal with such conduct as abuse of dominance;\(^\text{32}\) refusal to deal;\(^\text{33}\) exclusive dealing, tied selling, and market restriction;\(^\text{34}\) and misleading advertising.\(^\text{35}\) In addition to investigating, the Commissioner “prosecutes” civilly reviewable matters before the Competition Tribunal (Tribunal) or before the courts in certain cases (e.g., misleading advertising). Remedies for civilly reviewable matters are limited to orders prohibiting

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\(^{26}\) Id. § 32.


\(^{29}\) Id. § 61.

\(^{30}\) Id. § 47.

\(^{31}\) Id. §§ 52-55.

\(^{32}\) Id. § 79.

\(^{33}\) Id. § 75.

\(^{34}\) R.S.C., ch. C-34, § 77.

\(^{35}\) Id. § 74.01.
the continuation of conduct and administrative monetary penalties (AMPs) for certain civilly reviewable conduct (e.g., misleading advertising and deceptive marketing practices). There is also a limited right of private action, with leave of the Tribunal, for refusals to deal, exclusive dealing, tied selling, and market restriction.36

With regard to the specific issue of refusals to license IP, sections 75 (refusal to deal), 79 (abuse of dominance), and 32 (abuse of IP rights) are the Competition Act's most relevant provisions. Each of these provisions is discussed below, including pertinent jurisprudence and the Bureau's enforcement policy applicable to the IP-antitrust interface.

B. Relevant Provisions

1. Section 75: Refusal to Deal

Section 75 of the Competition Act is the Act's "refusal to deal" provision.37 Refusal to deal is civilly reviewable where, in respect of such a refusal (i) a person is substantially affected in his or her business or is precluded from carrying on business (ii) due to his or her inability to obtain adequate supplies of a product anywhere in a market on usual trade terms (iii) because of insufficient competition among suppliers of the product in the market, provided that (iv) the person is willing to meet usual trade terms of the suppliers, (v) the product is in ample supply, and (vi) the refusal to deal is having or is likely to have an adverse effect on competition in a market.38

36. Remedies available in respect of civilly reviewable practices are likely to expand. Bill C-19 was introduced in Parliament in November, 2004. Bill C-19, An Act to Amend the Competition Act and to Make Consequential Amendments to Other Acts, available at http://www.parl.gc.ca/common/Bills_Is.asp?lang=E&Parl=38&ses=1&ls=C19&source=Bills_House_Government. While Bill C-19 died on the order paper with the dissolution of Parliament in the fall of 2005, followed by a federal election and change of government in January 2006, the essential components of Bill C-19 will likely be reintroduced in some form again. If enacted, such changes would include, among other things, very substantial AMPs for abuses of dominant position, substantial increases in AMPs for the Competition Act's deceptive marketing practices provisions, and a provision for restitution orders against companies found to have engaged in misleading advertising. Another potential future amendment to the Competition Act that has been discussed but not yet reflected in proposed legislative amendments involves expanding the right of private action in § 36 of the Competition Act to persons who suffer losses or damages as a result of civilly reviewable conduct that is the subject of an order of the Tribunal. See Competition Bureau, Gov't of Canada, Options for Amending the Competition Act: Fostering a Competitive Marketplace (Discussion Paper, June 2003), available at http://strategis.ic.gc.ca/pics/ct/ct02584e.pdf.


38. Id.
The two leading cases under § 75 are Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (Chrysler)\(^{39}\) and Canada (Director of Investigation and Research) v. Xerox Canada Inc. (Xerox).\(^{40}\) Neither of these cases had an IP element, although they arguably could have given the facts—both dealt with refusals to deal respecting proprietary parts. A third case, Canada (Director of Investigation and Research) v. Warner Music Canada Ltd. (Warner),\(^{41}\) dealt with § 75's application to a refusal to license a copyright. Each of these cases is discussed below.

**Chrysler** dealt with a refusal by Chrysler Corporation's Canadian subsidiary, Chrysler Canada, to supply automotive parts to Richard Brunet. Brunet had opened a business in Montreal exporting automotive parts, including Chrysler, Ford, and GM parts. Although Chrysler Canada had previously encouraged Brunet to expand the sale of Chrysler auto parts in the export market, Chrysler Canada notified Brunet that it would not accept new orders from him, thereby forcing Brunet to find alternative sources of supply. Brunet approached several Montreal area dealers to secure parts, but Chrysler Canada learned of this and instructed the dealers not to sell Chrysler automotive parts for export.

In considering whether to use § 75 to order Chrysler Canada to supply Brunet, the Tribunal defined the relevant products as proprietary Chrysler parts and concluded that Brunet had been substantially affected in his business by virtue of his inability to obtain Chrysler parts because of "insufficient competition among suppliers."\(^{42}\) The Tribunal appeared open to accepting an efficiency argument, in particular the consolidation of Chrysler's export business in the United States, as a defense for the refusal to supply, but it ultimately declined to accept this explanation because Chrysler Canada did not provide a "cohesive explanation" of its distribution system.\(^{43}\) Therefore, having found that all of the elements of a refusal to deal under § 75 of the Competition Act were present, the Tribunal exercised its discretion to order Chrysler Canada to accept Brunet as a customer.\(^{44}\)

**Xerox** arose out of a decision by Xerox Canada to discontinue its supply of ISOs, including Exdos, as part of a new policy of selling only to end-users. As in Chrysler, the Tribunal found that the words "in-
sufficient competition among suppliers of the product in the market" included "a situation in which the product is proprietary and derives largely from a single source." Also as in Chrysler, the Tribunal considered whether a legitimate business justification existed for Xerox's refusal. In the Tribunal's view, however, "it [was] abundantly clear that the decision [to cease supplying] was taken for the very purpose of curtailing competition in the after-sale market." As a result, the Tribunal concluded that Xerox, like Chrysler Canada before it, was unable to rely on the legitimate business justification defense for its refusal.

Both the Chrysler and Xerox decisions share common features with the U.S. decisions in Aspen and Kodak. Such features derive in part from the language set out in § 75 of the Competition Act at the time of the decisions, which did not require proof of an anticompetitive effect. Thus, in both Chrysler and Xerox, the existence of a legitimate business justification and the discontinuance of a pre-existing relationship were prominent in the Tribunal's analysis, which the Tribunal regarded as significant to whether, having found a refusal to deal within the meaning of § 75 of the Competition Act, the Tribunal should exercise its discretion to order the supply of the products under the provision.

As noted previously, IP did not frame the arguments presented to the Tribunal in either the Xerox or Chrysler decisions, although an argument could have been made on those grounds, as both cases involved refusals regarding proprietary parts. The potential application of § 75 to a refusal to license IP was subsequently addressed in Warner. Warner involved a refusal by certain respondents, referred to collectively as "Warner," to grant BMG Canada copyright licenses to make sound recordings. BMG Canada sought such licenses to compete in the mail order record club business in Canada. In a summary judgment application, the Tribunal held that a refusal to license a copyright is beyond the scope of § 75.

In reaching its decision, the Tribunal was satisfied that, under the Copyright Act, Warner had the exclusive right to reproduce musical works and to make the contrivance for the performance of musical

45. Xerox, 33 C.P.R.3d at 101.
46. Id. at 119.
47. Id.
48. Prior to June 2002, § 75 of the Competition Act did not include the requirement that refusals to deal have, or likely have, "an adverse effect on competition in a market."
50. Id. at 335.
works. Under copyright law, Warner also had the right to refuse to license its master recordings to BMG Canada. In his arguments to the Tribunal against the summary judgment application, the Director (as the Commissioner was then called) argued that "if a refusal to grant a license is not caught by § 75, the effect will be that intellectual property rights will be seen to 'trump' competition law." Nevertheless, observing that a copyright license could not be in "ample supply," the Tribunal concluded that a "license" is not a product for the purposes of § 75 of the Competition Act:

The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product"—there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the [Competition] Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.52

As a result, the Tribunal held that § 75 of the Competition Act does not apply to refusals to license IP.53

Two amendments to the Competition Act in June 2002 significantly changed the application of § 75. First, a right of private action, with leave of the Tribunal, was created in § 103.1 of the Competition Act where the "applicant is directly and substantially affected in the applicants' business by [a refusal to supply] . . . that could be subject to an order under," inter alia, § 75.54 Second, paragraph 75(1)(e) was added to § 75 to require that the "refusal to deal is having or is likely to have an adverse effect on competition in a market."55 Nevertheless, barring the overturning of Warner, § 75 is not available for addressing refusals respecting IP licenses in any event. As Warner addressed only the application of § 75 of the Competition Act to such refusals, however, the possibility remained that refusals to license IP rights could be attacked under § 79 as an abuse of dominance. Section 79 of the Competition Act, as applied to such refusals to deal, is discussed below.

51. Id. at 330.
52. Id. at 333.
53. Id. at 335.
54. Competition Act, 2002 S.C., ch. 16 (Can).
55. Id.
2. **Section 79: Abuse of Dominance**

Pursuant to § 79 of the Competition Act, a firm abuses a dominant position where it: (i) is dominant in a relevant (product and geographic) market, (ii) has engaged in a practice of anticompetitive acts, and (iii) competition is thereby substantially lessened or prevented.\(^{56}\) A nonexhaustive list of anticompetitive acts is set out in § 78 of the Competition Act.\(^{57}\) Of the enumerated acts, one deals with what could be construed, at least in some circumstances, as a variation of refusal to deal, in particular "pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market."\(^{58}\)

More generally, a refusal to deal has been recognized as an anticompetitive act for purposes of § 79, creating the potential for a Canadian version of the essential facilities doctrine under the heading of abuse of dominance.\(^{59}\)

As applied to refusals to license IP, the scope of § 79's application is limited by subsection 79(5). Subsection 79(5) of the Competition Act exempts from application of § 79 conduct engaged in "pursuant only to" the exercise of any right or the enjoyment of any interest derived from specified IP statutes.\(^{60}\) The principle underlying this provision was recognized by the Tribunal in *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. (Tele-Direct)*, which was principally a tied selling case but also dealt with the issue of refusal to license trademarks:

> The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a license; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. . . . The decision to license a trade-mark . . . is a right which rests entirely with the owner of the mark.\(^{61}\)

The Tribunal also confirmed that a trademark owner's motivation for refusing a license is irrelevant:

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57. Id. § 78.
58. Id. § 78(1)(e).
Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the Trade-marks Act, accorded the right to refuse to license their trade-marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the [Competition] Act.62

With this in mind, the Tribunal recognized that the exemption contained in subsection 79(5) is not unlimited. Subsection 79(5) applies only insofar as conduct is "pursuant only to" the exercise of an IP right.63 Thus, the Tribunal distinguished between a refusal to license a trademark and a situation where anticompetitive provisions are attached to a trademark license:

The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark.64 Implicit in the Tribunal's view is that a refusal to license constitutes the "mere exercise" of an IP right, and therefore cannot be anticompetitive. Conduct going beyond this, however, including terms of a license, may be anticompetitive and thus is susceptible to analysis under the Competition Act's abuse of dominance provision.65

3. Section 32: Special "Abuse of IP" Remedy

Section 32 provides a special remedy for abuse of IP rights. It provides broad remedial powers on application by the Attorney General to the Federal Court of Canada. Remedies include orders directing compulsory licensing of a patent, copyright, or integrated circuit topography (but not trademarks) or, if compulsory licensing is deemed insufficient, revocation of a patent.66 The court may grant an order under § 32 if it is satisfied that the conduct in question unduly prevents or lessens competition, or is likely to do so.

Notwithstanding its lengthy history as part of Canadian competition law, having been added to the Competition Act (then the Combines Investigation Act) in 1946,67 § 32 has been essentially moribund. Indeed, there is no jurisprudence considering its application. Two pro-

62. Id. at 33.
63. Id. at 32.
64. Id.
65. Id. This type of conduct may also be susceptible to other "general" provisions, such as the Act's substantive merger provision, § 92.
67. A predecessor to § 32 was first enacted in 1910, repealed in 1937, and re-enacted in 1946.
ceedings were commenced in the late 1960s against Union Carbide of Canada respecting restrictive provisions in licensing agreements involving the use of patented processes and machines for the extraction of polyethylene film from resin and treatment of such film for printing. Both cases settled without trials on the merits, with the result that no court decisions were issued. The most substantive discussion of § 32 of the Competition Act, therefore, is found in the Bureau’s *Intellectual Property Enforcement Guidelines*, which are discussed below.

C. Competition Bureau’s Enforcement Framework

In light of the rising importance of the IP-antitrust interface and the paucity of Canadian jurisprudence on the subject, the Bureau sought to clarify the relationship between Canadian IP and competition laws with the release of the *Intellectual Property Enforcement Guidelines* (IPEGs) in 2000.68 The IPEGs confirm the basic principles enunciated by the Tribunal in *Tele-Direct*, and also set out the Bureau’s views on the application of § 32 of the Competition Act.

At the time of their release, there was concern among many Canadian IP owners and legal practitioners that release of the IPEGs signalled a greater enforcement focus by the Bureau on IP going forward. The Bureau, for its part, indicated that the IPEGs were intended only to set out the Bureau’s existing enforcement policy and that their release should not fuel concerns about a shift toward a more aggressive enforcement approach in respect of IP.69 Indeed, the Bureau sought to reassure IP owners in the IPEGs by acknowledging the economic benefits of IP and the exclusive statutory rights on which it is founded, stating that IP and competition laws are complementary (rather than conflicting, as they are often said to be) instruments of economic policy, each seeking to promote efficiency, innovation, and technological diffusion.70

Consistent with this modern approach to the IP-antitrust interface, the IPEGs state a number of propositions about the relationship between IP and competition law. For example, the IPEGs state that “there is no presumption that an IP right confers market power or that conduct in relation to IP is anti-competitive,” and “licensing, which serves as a mechanism for the diffusion of technology, is generally pro-competitive.”71 With this in mind, it does not follow that the

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69. See id. at 1.
70. Id.
71. Id. § 4.1, at 6.
Competition Act does not apply to IP. While cognizant of its unique characteristics, the Bureau states that the Competition Act applies to IP just as it applies to other forms of property.\textsuperscript{72}

With respect to the manner in which the Bureau regards the Competition Act as applying to IP, it is generally consistent with the approach taken by the Tribunal in \textit{Tele-Direct}. The IPEGs briefly summarize the Bureau's approach as follows:

- The circumstances in which the Bureau may apply the \textit{Competition Act} to conduct involving IP or IP rights fall into two broad categories: those involving something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The Bureau will use the general provisions of the \textit{Competition Act} to address the former circumstances and section 32 (special remedies) to address the latter.
- In either case, the Bureau does not presume that the conduct is anti-competitive, violates the general provisions of the \textit{Competition Act} or should be remedied under section 32.
- The analytical framework that the Bureau uses to determine the presence of anti-competitive effects stemming from the exercise of rights to other forms of property is sufficiently flexible to apply to conduct involving IP, even though IP has important characteristics that distinguish it from other forms of property.
- When conduct involving an IP right warrants a special remedy under section 32, the Bureau will act only in the very rare circumstances described in this document and when the conduct cannot be remedied by the relevant IP statute.\textsuperscript{73}

A threshold question, therefore, is whether conduct in respect of IP should be analyzed using the Competition Act's general provisions or the special remedy contained in § 32 of the Competition Act. The answer to this question, under the Bureau's approach, depends on what constitutes the "mere exercise" of an IP right, such conduct being beyond the scope of the Competition Act's "general provisions" but susceptible to the application of § 32. According to the IPEGs, the "mere exercise of an IP right" means the "exercise of the owner's right to unilaterally exclude others from using the IP . . . . [This includes the owner's] use or non-use of the IP . . . ."\textsuperscript{74} Pursuant to this approach, unilateral refusals to license IP cannot be challenged under the general provisions of the Competition Act "no matter to what degree competition is affected" by the refusal; they can be challenged only pursuant to § 32.\textsuperscript{75}

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 1–2.
\textsuperscript{74} IPEGs, supra note 68, § 4.2.1.
\textsuperscript{75} Id.
As noted previously, this approach would appear to be consistent with that taken by the Tribunal in Tele-Direct. A judge of the Federal Court of Canada, however, recently expressed a different view. In *Eli Lilly and Co. v. Apotex Inc.*, Eli Lilly claimed that Apotex infringed eight patents of the antibiotic cefaclor, four of which had been assigned to Eli Lilly by Shinogi & Co. Apotex counterclaimed that the assignments to Eli Lilly constituted an agreement that resulted in an undue lessening of competition contrary to the Competition Act's conspiracy provision, § 45. In the context of a summary judgment application, Judge Hugessen held that patent assignments fall within the scope of a patent right, thereby exempting them from the Competition Act. Judge Hugessen's decision was appealed to the Federal Court of Appeal, which raised questions about his interpretation and application of *Molnlycke AB v. Kimberly-Clark of Canada* and sent the matter back to Judge Hugessen for reconsideration. Judge Hugessen's second decision upheld his first, maintaining that his interpretation of *Molnlycke* is correct and, moreover, consistent with the analytical approach set out in the Bureau's IPEGs. Apotex appealed Judge Hugessen’s second decision, and the Commissioner applied for and was granted intervenor status in the proceeding. The


77. As Judge Hugessen stated in *Eli Lilly II*, "where an agreement deals only with patent rights and is itself specifically authorized by the Patent Act, any lessening of competition resulting therefrom, being authorized by Parliament, is not ‘undue’ and is not an offence under section 45." *Eli Lilly II*, [2004] F.C. ¶ 9. In doing so, Judge Hugessen cited the proposition set out in *Molnlycke AB v. Kimberly-Clark*, [1991] 36 C.P.R.3d 493 that "an undue impairment of competition cannot be inferred from evidence of the exercise of patent rights alone." *Eli Lilly II*, [2004] F.C. ¶ 10. According to Judge Hugessen, the assignment agreement was authorized and only dealt with the permitted assignment of patents; therefore, its effects could not be found to be undue even though the assignment agreement would increase the assignee's market power. *Id.* ¶ 21.

78. The Federal Court of Appeal confirmed that *Molnlycke* stands for the proposition that competition cannot be unduly impaired by the exercise of patent rights alone: "Where . . . there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, *Molnlycke* does not purport to completely preclude application of the Act." *Apotex Inc. v. Eli Lilly & Co.*, [2004] F.C.A. 232, ¶15.


80. Setting aside the correctness of the first of these propositions, which will be addressed again by the Federal Court of Appeal as a result of a further appeal filed in respect of Judge Hugessen’s second decision, Judge Hugessen’s statement that his approach is consistent with the IPEGs is surprising. The IPEGs state that only the "mere exercise" of an IP right is beyond the scope of the Competition Act’s general provisions (including § 45) and define the mere exercise of an IP right as an owner's unilateral exclusion of others from using the IP or non-use of the IP; nonunilateral conduct, including “[a] transfer of IP rights,” in the Bureau's view, is "something more than the mere exercise of an IP right to refuse.” IPEGs, supra note 68, § 4.2.1, at 8.

Federal Court of Appeal allowed Apotex’s appeal, concluding that “the assignment of a patent may, as a matter of law, unduly lessen competition” and confirming the correctness of the IPEGs’ approach with regard to the interface between the two statutory provisions. In this regard, the Federal Court of Appeal distinguished \textit{Molnlycke} “on the basis that it was dealing with a situation where the only market power created by the assignment was that inherent in the patent assigned.”

With respect to § 32 of the Competition Act, it applies even to “mere exercises” of IP rights, including unilateral refusals to license. Consistent with its enforcement history, which, as noted previously, has yielded no jurisprudence, the IPEGs state that the Bureau expects that § 32 will be used in rare circumstances, for example, in the case of network industries where IP protection can combine with substantial positive effects from network size to “create or entrench substantial market dominance.”

According to the IPEGs, the Bureau will seek a remedy under § 32 “only if the circumstances specified in that section are met and the alleged competitive harm stems directly from the refusal and nothing else.” Such circumstances, the IPEGs say, “require the Federal Court to balance the interests of the system of protection for IP (and the incentives created by it) against the public interest in greater competition in the particular market under consideration.” To this end, the IPEGs identify a number of criteria to be met before the Commissioner will recommend enforcement under § 32, which may be summarized as follows:

1. there is no appropriate remedy under the relevant IP statute (e.g., § 65 of the Patent Act);
2. the impact on competition is in a market that is different or significantly larger than the subject matter of the IP (or the products that result directly from the exercise of the IP), e.g.,
   a. the IP holder “is dominant in the relevant market,” and
   b. “the IP is an essential input or resource for firms participating in the relevant market;”

\textit{tended to exempt conduct from a law of general competition, the Competition Act should continue to apply. Viewed from this perspective, the Commissioner submits that § 50 of the Patent Act will not result in the nonapplication of the Competition Act.}
3. the remedy would not adversely affect incentives to invest in R&D (e.g., the refusal is stifling further innovation).  

The Bureau's approach to § 32 is not dissimilar in form to the approach taken by the European Court of Justice (ECJ) in *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (IMS)*.  

IMS dealt with the rights to IMS's proprietary system for collecting and distributing drug sales data, which divided Germany into geographical areas and then tracked sales data on pharmaceutical products using the geographical divisions. IMS improved its data collecting system with the participation of users in working groups, then distributed its database structure to the relevant users free of charge. An IMS director subsequently left the company and established a competing business, which initially used a different structure than that of IMS. The business was unsuccessful, leading the former director to adopt a new database structure that resembled the one used by IMS. A German court prohibited the former director from using the IMS structure, as it was protected by copyright, but noted that IMS could not refuse to license the structure if such a refusal constituted an abuse of dominance under European law. Several issues were therefore referred to the ECJ regarding under which circumstances such behavior would be considered to be an abuse of a dominant position.

The ECJ recognized that the exclusive right of reproduction generally forms part of a copyright holder's rights, and that a refusal to grant a license, even in the case of a dominant firm, cannot "in itself" constitute an abuse of dominant position. The ECJ did note, however, that a refusal could constitute an abuse of dominance in "exceptional" circumstances. Such exceptional circumstances would arise, according to the ECJ, where a "refusal is preventing the emergence of a new product for which there is a potential consumer demand, . . . [the refusal] is unjustified [by objective considerations.] and [the refusal operates] such as to exclude any competition on a secondary market."

Thus, under Canadian law, the ECJ began from the premise that a mere refusal to license IP is not anticompetitive, but crafted a limited exception to this rule. Moreover, the ECJ's exception is not dissimilar to that contained in § 32 of the Competition Act, as interpreted by the

87. Id.
89. Id. ¶¶ 9–17.
90. Id. ¶ 34.
91. Id. ¶ 35.
92. Id. ¶ 38.
Bureau in the IPEGs. The two-part analysis that the Bureau undertakes in applying § 32 incorporates two of the three conditions that must be fulfilled in order for the ECJ to find a refusal to license to constitute an abuse of dominance. The third requirement, that there be no objective justification for the refusal, does not have an express counterpart in the Canadian approach, but it could be argued that the assessment conducted by the Bureau to determine whether imposing a remedy would alter the incentives to invest in research and development serves a similar function.

D. Remedies Under IP Legislation

In addition to the Competition Act, § 65 of the Patent Act contains a special remedy in respect of abuses of patent rights. The scope of the remedy is a significant issue not only as a matter of patent law, but also as a result of the Bureau's enforcement approach regarding § 32 of the Competition Act, an aspect that involves a requirement that there be no remedy available under the relevant IP statute. In this regard, there has been relatively little jurisprudence under § 65 of the Patent Act, but a recent decision demonstrates the potential impact that it could have if relied upon by aspiring, but rebuffed, patent licensees.

Section 65 of the Patent Act provides as follows:

(1) The Attorney General of Canada or any person interested may, at any time after the expiration of three years from the date of the grant of a patent, apply to the Commissioner [of Patents] alleging in the case of that patent that there has been an abuse of the exclusive rights thereunder and asking for relief under this Act.

(2) The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:

   (c) if the demand for the patented article in Canada is not being met to an adequate extent and on reasonable terms;

   (d) if, by reason of the refusal of the patentee to grant a license or licenses on reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a license or licenses should be granted;

   (e) if any trade or industry in Canada, or any person or class of persons engaged therein, is unfairly prejudiced by the conditions attached by the patentee, whether before or after the passing of this

Act, to the purchase, hire, license or use of the patented article or to the using or working of the patented process; or

(f) if it is shown that the existence of the patent, being a patent for an invention relating to a process involving the use of materials not protected by the patent or for an invention relating to a substance produced by such a process, has been utilized by the patentee so as unfairly to prejudice in Canada the manufacture, use or sale of any materials.

...  

(5) For the purposes of this section, the expression "patented article" includes articles made by a patented process.  

Stated briefly, § 65 sets out what constitutes an abuse of patent rights. Section 66 of the Patent Act, in turn, provides that the Commissioner of Patents may grant a compulsory license in cases of abuse under certain circumstances.

Although there have not been many cases dealing with these provisions, the most recent is Torpharm, Inc. v. Canada (Commissioner of Patents) (Torpharm), where the Federal Court allowed an appeal from a decision of the Commissioner of Patents. The Commissioner of Patents refused the application of Torpharm, Inc. (Torpharm) for relief based on the alleged abuse of exclusive rights under a patent pursuant to § 65 of the Patent Act. Torpharm sought a compulsory license that would enable it to acquire a bulk chemical, lisinopril, which at the time was subject to a patent owned by Merck and Co., Inc. (Merck), for the purpose of manufacturing tablets in Canada for export. After Torpharm requested a voluntary license from Merck, Merck advised that its existing licensees in Canada were satisfying demands for lisinopril-based tablets in Canada and that it did not understand how the trade or industry in Canada would be prejudiced if a further license was not granted. Therefore, Merck refused to grant Torpharm a license.

The Commissioner of Patents found that, at first glance, there was no case of abuse made under paragraph 65(2)(c) of the Patent Act, finding that there was no evidence that Torpharm ever requested that Merck supply it with bulk lisinopril, but had merely asked for a license. The Commissioner of Patents also found a lack of evidence that Merck had refused to supply the bulk lisinopril, nor was the Com-

96. Id. § 66(1)(a)-(c).
98. Id. ¶ 2.
99. Id. ¶ 9.
missioner satisfied that the demand for lisinopril was not being met to an adequate extent and on reasonable terms.100

The Commissioner of Patents also found that there was no refusal by Merck to grant a license on reasonable terms.101 Therefore, a case of abuse under paragraph 65(2)(d) of the Patent Act was not made. Finally, the Commissioner of Patents refused to consider the third ground of abuse, namely, the exercise of monopoly rights for no bona fide purpose, as it was not one of the classes of abuse set out under subsection 65(2).102

The Federal Court found that the Commissioner of Patents erred in concluding there was no demand for bulk lisinopril in Canada.103 The Federal Court observed that the Commissioner of Patents had not assessed whether the repeated request for a license could constitute a demand for the product in the circumstances of the case, where Torpharm required a license from the patentee to use the lisinopril in the manufacture of tablets. The Court also found, regarding paragraph 65(2)(c), that the Commissioner erred in concluding that serving foreign export markets by manufacturing tablets in Canada did not constitute a demand for bulk lisinopril in Canada as a raw product for use in manufacture.104 Regarding the “reasonableness” determinations made by the Commissioner under paragraphs (c) and (d) of 65(2), the Court found that no such determinations could be made without submissions from both the applicant and the patentee. Finally, the Federal Court found that the Commissioner of Patents erred in law by concluding that the only abuses included in the Patent Act are those described in the classes enumerated in subsection 65(2).105

Although the significance of Torpharm is limited by the fact that the Federal Court decided only that the evidence was sufficient to warrant a preliminary finding that a case for relief had been made, and not that Merck had indeed abused its rights, it might be interpreted as lowering the bar for granting compulsory licenses under 65(2)(c). The Federal Court held that Torpharm’s plans to manufacture tablets for export using the patented product was evidence of an unmet demand

100. Id.
101. Id. ¶ 10.
102. Id. ¶ 11.
104. Id.
105. The Court also held, however, that causing adverse effects upon the applicant and public interest may not in itself constitute an abuse of Merck’s exclusive rights (although such effects would have been considered under § 65(2)(d) if other abuse were found under that provision). Id. ¶ 10.
for the product,106 which implies that any applicant would have evidence that demand for a patented product is not being met due to a mere refusal to license. Any time an applicant offers reasonable terms and is refused, therefore, it would be entitled to obtain a compulsory license based on 65(2)(c). This is a significant change from earlier cases, where patentees' exclusive rights were much more vigorously protected.

On the other hand, the Court in Torpharm held that industry, competitor, and public interest concerns were insufficient, of themselves, as grounds to find an abuse of patent rights.107 Before such concerns can be raised under 65(2)(d), a preliminary abuse of rights must be established. This interpretation is more consistent with earlier cases.

One such earlier case is Puckhandler Inc. v. BADS Industries, Inc.,108 which involved an application by Puckhandler for a compulsory license under § 65 of the Patent Act with respect to a patent entitled "Hockey Stick Training Device.” The owner of the patent, BADS Industries, Inc. (BADS), objected to the granting of a license. As BADS acknowledged that there was demand for the patented device that it was unable to fulfill, the Commissioner of Patents concluded that the criteria in paragraph 65(2)(c) of the Patent Act were satisfied.109 But, the Commissioner of Patents also found that Puckhandler did not show that it was in the public interest for a license (or licenses) to be granted, as is required under paragraph 65(2)(d).110 Therefore, an abuse of patent rights under paragraph 65(2)(d) of the Patent Act was not demonstrated. Paragraph 65(2)(c), however, does not include a "public interest” requirement, and the Commissioner of Patents went on to find an abuse under that provision.111 As a result, the Commissioner of Patents granted Puckhandler a nonexclusive license to make, use, and sell the hockey training device at a royalty of $1.00 per device. The Commissioner proceeded to enumerate multiple terms and conditions for the nonexclusive license.

Finally, there is Sarco Co. Inc. v. Sarco Canada Ltd.,112 an older case that also dealt with the equivalent provisions to the current sections 65 and 66 of the Patent Act. The Commissioner of Patents refused to grant the appellant a license, under sections 67 and 68 of the

106. Id. ¶¶ 28–30.
107. Id. ¶ 33.
109. Id. at 264.
110. Id.
111. Id.
Patent Act, to use the patented invention (steam traps). The Canadian patent for the invention (TD-50) was granted to the respondent in 1958 based on an application made by the inventor, who assigned the patent to the appellant, who in turn assigned it back to the respondent. The appellant continued to own the U.S. patent for the invention and manufactured the traps. The appellant also began manufacturing and distributing an improved trap (TD-52) in the United States for which the appellant also held a patent. The appellant was able to receive a patent for the improved invention in Canada; however, as it was within the scope of the respondent's patent, this prevented the appellant from making or selling the improved traps in Canada.

According to the court, there was an arrangement between the respondent and the appellant that they would cooperate regarding certain aspects of their operations. The appellant provided the respondent with access to the technical literature, engineering assistance, and know-how for the products it manufactured, and the appellant would act as a source of supply to the respondent for products it did not manufacture. After the death of the owner of the Canadian company, however, relations between the appellant and the respondent deteriorated. The respondent began inquiring about manufacturing the traps in Canada, but the appellant made clear that it was opposed to the idea. Therefore, from the time the steam traps were first produced until late 1963, the Canadian market was supplied by traps manufactured by the appellant in the United States and imported into Canada by the respondent.

For the next few years, a very small percentage of the traps were manufactured by or for the respondent in Canada. When the appellant learned of the respondent's activities, the appellant launched its application for a compulsory license under the patent. The court found that there was no reason why the traps could not have been produced at a profit in Canada to supply the Canadian market. The court held that the invention was "not worked in Canada on a commercial scale" and that without a satisfactory reason, the failure to work the patent "on a commercial scale" in Canada constituted an abuse of the exclusive right under the patent within the meaning of paragraph 67(2)(a) of the Patent Act. Therefore, the issue to be determined in the case was whether the facts provided a "satisfactory
reason” for the nonworking of the patent in Canada.\textsuperscript{116} Judge Thurlow found that there was “no legal, technical or economic impediment to the working of the invention in Canada and the failure to manufacture on a commercial scale during this period had been the result of the respondent's decision or decisions to import rather than to manufacture.”\textsuperscript{117} Based on the evidence, Judge Thurlow found that the Commissioner of Patents erred in finding that there had been no abuse of the patent under paragraph 67(2)(a).\textsuperscript{118}

Clearly, the court’s interpretation of paragraph 67(2)(a) effectively diminished patentees’ exclusive rights. This provision, however, was repealed in 1993,\textsuperscript{119} which arguably reduced the extent to which competition concerns are protected in the Patent Act. In dealing with paragraph 67(2)(d) of the Patent Act, there were five separate incidents that the appellant attempted to rely on to demonstrate a refusal to grant a license on reasonable terms.\textsuperscript{120} Although the five incidents demonstrated reluctance on the respondent’s part to consider granting the appellant a license, Judge Thurlow found that there was no actual evidence that indicated the refusal of a license on reasonable terms in either the application or the affidavit.\textsuperscript{121}

Nevertheless, Judge Thurlow went on to consider the possibility that the conduct of the respondent was viewed as a refusal to license on reasonable terms. If that were the case, Judge Thurlow stated, the follow up issue to be determined was whether it had been proven that “the establishment in Canada by the (appellant) of a new trade or industry is prejudiced thereby.”\textsuperscript{122} Thurlow held that the TD-52 trap is a substitute for the TD-50 trap.\textsuperscript{123} Therefore, the manufacture of the TD-52 trap by the appellant in Canada would be the entry of a new trader into the existing trade of steam traps in Canada and not the “establishment of a new trade or industry in Canada” as required by the statute.\textsuperscript{124} Based on the above, Thurlow held that there was no abuse within the meaning of paragraph 67(2)(d).\textsuperscript{125}

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 202.
\textsuperscript{118} Sarco, [1969] 2 Ex. C.R. at 202–03.
\textsuperscript{119} North American Free Trade Agreement Implementation Act, 1993 S.C., ch. 44, § 196 (Can.).
\textsuperscript{120} Sarco, [1969] 2 Ex. C.R. at 203–08.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 208.
\textsuperscript{123} Id. at 212.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
Although Thurlow had found an abuse established under subsection 67(2)(a), the appeal was dismissed based on the further finding that the applicant (appellant) only applied for a license when it found out that the respondent was manufacturing in Canada despite its efforts to stop the respondent.\textsuperscript{126} Thurlow held that if a license was granted to a person who has been attempting to prevent the manufacture of the patented item in Canada, the result would be to encourage those who want to serve the Canadian market for a patented article with goods of foreign manufacture.\textsuperscript{127} Therefore, the granting of a license would amount to a reward for promoting the abuse of a patent and would encourage those who seek to avoid the manufacture of patented items in Canada.

These cases highlight the importance of considering possible remedies that exist under IP legislation when discussing the interface between IP rights and antitrust. They also emphasize the importance of not dealing with IP rights solely from the perspective of IP or antitrust but keeping in mind the interface between the two areas of law.

IV. Conclusion

The interface between IP rights and antitrust in Canada is an issue of particular interest in the broader debate in antitrust today—defining the limits that antitrust may (or should) impose on a dominant firm. Canadian law and enforcement policy have generally viewed the mere exercise of IP rights, defined generally as unilateral conduct respecting IP, including refusals to license IP, as beyond the scope of the general provisions of the Competition Act. While this position has been adopted by both the Tribunal and the Bureau, limited jurisprudence in this area means there is some risk that an alternative interpretation may arise.

In comparison to the United States, the debate regarding the interface between IP rights and competition law in Canada has changed due to the existence of § 32 of the Competition Act and § 65 of the Patent Act, which allow for "special remedies" to address specified "abuses" of IP rights. The Canadian approach differs in this regard from that in the United States, where the balance appears to have shifted strongly in favor of IP laws through the adoption of a rule of per se legality for refusals to license IP in the wake of the \textit{CSU} decision. Even if Canadian law and enforcement policy adopt an approach that is generally similar to that taken in \textit{CSU}, such an

\textsuperscript{126} Sarco, [1969] 2 Ex. C.R. at 214.
\textsuperscript{127} Id.
approach only applies to the extent that conduct could attract enforcement attention under the Competition Act's general provisions. Section 32 of the Competition Act could still apply (even if, as a practical matter, the scope of its application has been minimal), thereby providing a potential "stop-gap" measure in the event of anticompetitive uses of IP rights, the existence of which is lacking in U.S. antitrust law. The same is true of section 65 of the Patent Act, another rarely used provision that provides additional remedies in respect of certain abuses of patent rights and that has no counterpart in U.S. patent law.