Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee

“Competition, Patents and Innovation”

June 11, 2009

I. The Relationship Between Competition Law and Intellectual Property Rights

1. BIAC appreciates the opportunity to provide its views on the appropriate application of competition laws to issues concerning intellectual property rights, particularly patents. This submission builds on the statements in BIAC’s October 18, 2006 position paper on Competition, Patents and Innovation.

2. Competition authorities almost uniformly recognize that antitrust and intellectual property are complementary areas of law and that each play an essential role in encouraging innovation and dynamic competition. Dynamic competition is driven by the introduction of new products and technologies that strike at the foundations of existing markets.¹ The antitrust laws drive innovation and dynamic competition by encouraging firms to compete with rivals and succeed in the marketplace through the development of new and improved products and production methods.² The intellectual property laws create incentives for innovation by enabling firms to appropriate the returns from investments in research and development.³

¹ See e.g. Gregory Werden, “Network Effects and Conditions of Entry: Lessons from the Microsoft Case,” 69 Antitrust L.J. 87, 91 (2001), quoting Joseph Schumpeter, Capitalism, Socialism and Democracy ch. 7 (3d ed. 1950). Schumpeter called this form of competition “the process of creative destruction.”


3. As stated by the United States Department of Justice and Federal Trade Commission:

Over the past several decades, antitrust enforcers and courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation. This recognition signalled a significant shift from the view that prevailed earlier in the twentieth century, when the goals of antitrust and intellectual property were viewed as incompatible: intellectual property laws grant of exclusivity was seen as creating monopolies that were in tension with the antitrust law's attack on monopoly power. Such generalizations are relegated to the past.4

4. Both the European Commission and Canadian Competition Bureau also recognize that the antitrust and intellectual property laws share the common goal of encouraging competition.5

5. Competition policy should not create incremental uncertainty with respect to the scope or enforceability of intellectual property rights. Uncertainty will deter firms from making efficient investments in the development of new technologies and will ultimately depress both the development and dissemination of intellectual property.6

6. As with other forms of property, market power does not necessarily arise from the mere ownership of intellectual property. In its discussion paper on Article 82, the European Commission concludes that intellectual property rights “do not as such confer dominance on the holder. The impact of intellectual property rights on expansion and entry depends on the nature and actual strength of the intellectual property held by the allegedly dominant undertaking.”7 Similarly, the Canadian Competition Bureau explains, “the right to exclude others from using the [patented] product or process does not necessarily grant the owner market power. It is only after it has defined the relevant market and examined factors such as concentration, entry barriers and technological change that the Bureau can conclude whether an owner of a valid IP

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5 EC Technology Transfer Guidelines, para. 7 (“Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources.”); see also Canadian IPEGs, p. 1, (“IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy.”).
6 Canadian IPEGs, p. 5, para. 3.1.
right possesses market power.”

The United States Supreme Court has expressly held that “a patent does not necessarily confer market power upon the patentee.”

7. Competition policy should treat intellectual property the same as any other form of tangible or intangible property. The U.S. Department of Justice and Federal Trade Commission have stated “[t]he Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property.”

8. In some cases, a patentee may possess dominance within a market, but that fact alone should not create concerns under competition law. “As with any other tangible or intangible asset that enables its owner to obtain significant supra-competitive profits, market power (or even a monopoly) that is solely ‘a consequence of a superior product, business acumen, or historic accident’ does not violate the antitrust laws.” To the contrary, the acquisition of market power through the introduction of new products or production methods is the essence of dynamic competition. Even a dominant firm should not violate the antitrust laws absent “anti-competitive conduct that creates, enhances or maintains market power.”

9. Patents play a particularly important role in driving innovation in certain markets, such as the pharmaceutical sector, where research and development is costly, regulatory hurdles are extremely high, and market success is highly uncertain. Pharmaceutical companies typically suffer many failures relative to each market success. At the same time, the infrequent successes often generate extraordinary consumer benefits that often extend well beyond the life of the patent period. Absent the extraordinary profits that attach to these rare successes, the incentives to take extraordinary risks would be substantially diminished. Competition agencies too often, however, focus on the supra-competitive profits – which are relatively easy to quantify – without due analysis and measurement of the related consumer benefits. Thus, it is very important that competition policy not discourage pharmaceutical firms from investing in new product development by undermining patent protections or inhibiting them from taking action against unlawful infringement.

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8 Canadian IPEGs, p. 6, para. 4.1.


10 U.S. Licensing Guidelines, p. 3, para. 2.1.


12 Canadian IPEGs, p. 6, para. 4.1.
10. In this regard, BIAC is concerned by the European Commission’s characterizations and predisposition with respect to a number of legitimate patent-related activities in its November 2008 Pharmaceutical Sector Inquiry. In particular, the Commission adopts a critical tone with respect to pharma companies filing patent applications, pursuing infringement actions, and entering into settlement agreements that in some cases may delay generic entry without apparently giving sufficient consideration to the fact that no significant patent portfolio can be achieved without very significant R&D investment in this field. The report provides no evidence to suggest that in the aggregate these procedures amount to anything more than the legitimate efforts of originator companies to protect their valuable intellectual property against appropriation by imitators. Moreover, the Commission assumes net competitive harm and fails to address, let alone measure the potentially significant impact on future investments, particularly in add-on development that can often result in significant improvements and the reduction of side-effects. BIAC thus urges the European Commission against adopting competition policies that restrict these legitimate practices.

II. Competition Policy Towards Unconditional Unilateral Refusals to Deal

11. Competition policy with respect to unconditional unilateral refusals to deal must recognize that the economic incentives for firms to make efficient investments in research and development _ex ante_ depend critically on the expectation that the rewards from those investments will be appropriable _ex post_.

12. As the European Commission states:

    The existence of [an obligation to supply on dominant undertakings]… even for fair remuneration—may undermine undertakings' incentives to invest and innovate, and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings—or undertakings who anticipate that they may become dominant—not to invest, or to invest less, in the activity in question…competitors may be tempted to free ride on investments by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interests of consumers.  

13. Similarly, the Canadian Competition Bureau explains:

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Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system, this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate or bargain in the marketplace for it, thereby rewarding the owner. This creates incentives to invest in developing, and leads to the exchange of private property, thus contributing to the efficient operation of markets.¹⁶

14. Considering the benefits that flow from innovation and the inextricable relationship between ex ante innovative incentives and the right to exclude others from appropriating innovative rewards ex post, competition policy should not generally require even dominant firms to share their intellectual property with others. Exceptions to this policy based on “exceptional circumstances” should be rare and predictable. Competition authorities should provide clear standards for identifying exceptional circumstances, and in developing those standards, should not emphasize static competition and follow-on or incremental innovation at the expense of dynamic competition and breakthrough innovation.¹⁷

15. Some commentators have raised concerns with respect to the Commission decision, and the judgment of the Court of First Instance (“CFI”) in Microsoft,¹⁸ worried that the decision unwisely expands the traditional definition of “exceptional circumstances” beyond prior European Court of Justice decisions, and by doing so, risks deterring innovation and dynamic competition.

The CFI’s interpretation of the “new product” prong of the Magill/IMS test lowered the threshold noticeably compared to Magill/IMS. It shifted the delicate balance, which competition policymakers have long recognized, between dynamic competition, which relies on the prospect of future profits from the exercise of market power to stimulate investment and innovation, and static competition, which limits the exercise of market power in favor of the static competition. There was no obvious reason for such a shift at this point in time.¹⁹

¹⁶ Canadian Licensing Guidelines, p. 5, para. 3.1.

¹⁷ The United States Antitrust Division and Federal Trade Commission have stated that “Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections.” U.S. IP Report, p. 6. The United States Supreme Court has also stated that a Section 2 violation based on a unilateral refusal to deal lies “at or near the outer boundary of Section 2 liability.” Verizon Communications v. Trinko, 540 U.S. 398, 409 (2004). Similarly, the Canadian Competition Bureau has stated that “Since the right to exclude, which is the basis of private property rights, is necessary for efficient, competitive markets, the enforcement of the Competition Act rarely interferes with the exercise of this basic right. Canadian Licensing Guidelines, p. 5, para. 3.3.


¹⁹ Christian Ahlborn and David S. Evans, “The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe,” 75 Antitrust L.J. 887, 915 (2009); see also Robert
16. BIAC is concerned that the European Commission’s formulation of the “exceptional circumstances” test in its Article 82 Enforcement Guidance creates the same risk by expanding the exception beyond is traditional limits. The current formulation is likely to generate uncertainty regarding the appropriability of the rewards from innovative investments. Particularly, given the relatively low market share thresholds for establishing potential dominance in the EU, this uncertainty poses meaningful risks to dynamic competition and long-run consumer welfare.

17. Moreover, competition policy has too often proposed mandatory licensing as a means to remedy perceived flaws in the patent system. “From an economic perspective, imposing mandatory licensing on a patent holder who obtains a monopoly would undermine the rights of inventors whose innovations are the most valuable…[b]oth patent and antitrust law and policy are far better served by reforming the patent system than by distorting antitrust law to curtail the rights of patent holders.”

III. Standard Setting Organizations

18. The development of private industry standards by standard setting organizations (“SSOs”) has the potential to create both competitive benefits and competitive harm. Private industry standards have the potential to foster competition and increase output, efficiency and consumer welfare.


20 Article 82 Enforcement Guidance, para. 14. (“The Commission’s experience suggests that dominance is not likely if the undertaking’s market share is below 40% in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example, where they face serious capacity constraints. Such cases may also deserve attention on the part of the Commission.”)

21 Similarly, in a recent speech, the US Antitrust Division regretably emphasized that a monopolist’s right to refuse to deal with competitors was not unqualified, without providing clear standards as to when a refusal raises antitrust concerns. Though the discussion does not deal specifically with intellectual property, and the U.S. Supreme Court has already provided clear limits in its Trinko decision, vague statements from competition authorities regarding the duty to deal generate uncertainty that risks harming innovative incentives. Christine A. Varney, Asst. Atty. Gen., Antitrust Division, “Vigorous Antitrust Enforcement in this Challenging Era,” Remarks as Prepared for the US Chamber of Commerce (May, 12, 2009), pp. 11-13, available at http://www.usdoj.gov/atr/public/speeches/245777.pdf.


23 U.S. IP Report, pp. 33-35. See also European Commission, Communication from the Commission on Intellectual Property Rights and Standardization, at paragraph 2.1.11. (“The underlying objective of formal standardization is to generate the economic benefits for society that will result from a more rational organization of supply and demand and greater competition in the market place. Standardization tends to reduce costs for the supplier and purchaser of goods and services and to increase transparency of the market.”)
19. However, because SSO members typically compete as sellers in downstream product markets, and both buyers and sellers in upstream technology markets, standard setting also creates the risk that SSO members will use the organization as a vehicle for anti-competitive activities.24

20. Competition policy should encourage the competitive benefits of standard setting while discouraging the risks associated with collective action by competitors.25

21. Standards in many high technology industries, including telecommunications and semiconductors, often incorporate patented technologies, which may then become essential to practicing the standard. Competition policy towards the development of industry standards that incorporate intellectual property should reflect the same antitrust principles that apply to standard setting more generally.

22. Over the past few years, antitrust authorities have begun to debate appropriate competition policy responses to the potential for essential patent holders to engage in “patent hold-up.”26 Responses to the perceived risk of “patent hold-up” include a variety of potential SSO policies, including requiring SSO members to disclose unpatented research efforts, and permitting SSO members to jointly discuss or negotiation royalty rates for essential patents as part of the standard setting process. These policies should be more carefully considered, however, as they may have the perverse result of elevating the risks of collective action already inherent in the standard setting process. Moreover, they may discourage marketplace innovation by exacerbating the risk that innovation will not be appropriated before patent protection can be obtained.

23. Antitrust law should not create an affirmative duty on SSOs to adopt particular forms of ex ante patent policies in response to a perceived risk of patent-holding. Forcing SSOs to adopt particular patent policies could discourage participation in SSOs and undermine the standard setting process in the long run. Competition authorities should instead permit SSOs to balance the various costs, benefits and uncertainties associated with competing policies, and focus on prohibiting collective action that imposes an unreasonable restraint on trade. “A rational [SSO] could recognize benefits in a policy... yet conclude that those benefits are not enough to compensate for the additional personnel, costs and delays that such a policy may require.

24 Id.
26 Patent hold up occurs where (1) a patent holder attempts to impose licensing terms for essential patents after a standard is adopted that “SDO members could not reasonably have anticipated,” (2) it is not commercially reasonable to replace or modify the standard to avoid the patent(s) at issue, and (3) if the SDO members had anticipated the patent owners demands, the SDO members would not have incorporated the patented technology in the standard. Hill B. Wellford, Counsel to the Asst. Attorney General, Antitrust Division, “Antitrust Issues in Standard Setting,” (Mar. 29, 2007), p. 11, available at http://www.usdoj.gov/atr/public/speeches/222236.pdf; see also U.S. IP Report, p. 35, n. 11.
Antitrust should not second-guess that type of business decision.‖27 This approach has traditionally been shared by the European Commission: "To the extent that standards-making bodies are private and voluntary organizations, they are free, within the limits imposed by Articles 85 and 86 of the Treaty, to organize their activities in the way which seems to them to be most appropriate."28

24. Equally, competition policy should not discourage SSOs from adopting standards that incorporate patented technologies, which may reflect the optimal competitive outcome. Consumers benefit from standards based on optimal technical solutions, which may include patented technologies. Patented technologies could offer superior performance and features, and/or lower costs or implementation and greater lifespan, resulting in higher value or lower costs for standards compliant products and services, even inclusive of any costs that might be associated with licensing the patented technologies. Though a patented alternative might not always be the preferred course, competition authorities should not suggest that SSOs that adopt standards incorporating patented technologies necessarily face heightened antitrust risks.29

27 Wellford, p. 17-18; and see also U.S. IP Report, p. 55 ("[t]he Agencies do not suggest that SSOs are required to sponsor such discussions during the standard-setting process. Concerns about legitimate licensing discussions spilling over into dangerous antitrust territory may dissuade some groups from conducting them in the first place. Moreover, it is fully within the legitimate purview of each SSO and its members to conclude that ex ante licensing discussions are unproductive or too time consuming or costly. An SSO may also fear that requiring ex ante commitments to licensing terms would deter some IP holders from participating in the standard-setting process…").

28 European Commission, Communication from the Commission on Intellectual Property Rights and Standardization, (Oct. 27, 1992) at para. 6.1.8, available generally at http://ec.europa.eu/enterprise/standards_policy/reference_documents/index.htm. See also Grazyna Piesiewicz and Ruben Schellingerhout, “Intellectual Property Rights In Standard Setting From A Competition Law Perspective”, Competition Policy Newsletter 2007, n. 3, at p. 36, available at http://ec.europa.eu/competition/publications/cpn/cpn2007_3.pdf ("When developing IPR policies standard setting organizations should therefore address the question to what extent, if any, ex ante term disclosure is required. The role of the competition authorities in these is not to impose a specific IPR policy on standards bodies, but to indicate which elements may or may not be problematic. It is then up to industry itself to choose which scheme best suits its needs within these parameters.").