



# United Nations Conference on Trade and Development

Distr.: General  
15 May 2008

Original: English

---

## Trade and Development Board

### Commission on Investment, Technology and Related Financial Issues

Intergovernmental Group of Experts on Competition Law and Policy

Ninth session

Geneva, 15–18 July 2008

Item 3 (a) of the provisional agenda

## Competition policy and the exercise of intellectual property rights

Report by the UNCTAD secretariat\*

### *Executive summary*

The interplay of competition policy and intellectual property rights (IPRs) is crucial for the economic dynamics of developing as well as of industrialized countries seeking to promote innovation, technology transfer, a fair chance for competitive firms on the markets and affordable good quality products for consumers. With regard to licensing agreements, major challenges are the imposition of abusive terms and the refusal to license or deal. In the field of mergers and acquisitions, competition policy should carefully address the effects of such transactions on the markets for innovation and its impact on economic dynamics. The issue of whether or not a specific constellation of IPRs may raise anti-competitive concerns should thus be carefully analyzed on its own merit.

---

\* This document was submitted on the above-mentioned date as a result of processing delays.

## Contents

	<i>Page</i>
I. Background .....	3
II. Introduction .....	3
A. Theoretical framework .....	3
B. The international framework .....	5
C. The development dimension .....	6
III. Specific constellations .....	7
A. Competition and patents .....	8
B. Competition and IP licensing .....	9
C. Competition policy, parallel imports and the exhaustion of IPRs .....	11
D. Competition and copyrights .....	12
E. Competition and trademarks .....	13
F. Competition, IP and standards setting .....	13
G. Competition and pharmaceutical test data rights .....	14
H. Competition and innovation in merger cases .....	14
IV. Outlook: the interplay of competition policy and IPR protection, and the role of UNCTAD .....	15

## I. Background

1. The interface between IPRs and competition law and policy raises important economic and legal issues. For many years, UNCTAD has regularly addressed this matter. The agreed conclusions of the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy underlined the key role of competition policy and intellectual property rights in attaining development objectives. UNCTAD was asked to prepare a report on this topic.<sup>1</sup> The present paper has three main objectives: (a) to recapitulate the theoretical debate; (b) to highlight specific points of interest; and (c) to raise issues concerning future challenges of the interface of competition policy and IPRs on which delegates may wish to deliberate. Neither the list of specific legal constellations discussed in this report nor the additional questions raised are thereby meant to be exhaustive.

## II. Introduction

### A. Theoretical framework

2. Intellectual property (IP) relates to information or knowledge which can be incorporated into tangible objects in an unlimited number of copies at different locations anywhere in the world.<sup>2</sup> IPRs are exclusive, temporary rights created in law. They are designed to provide incentives for investments in innovation and its application.

3. Many national jurisdictions treat IP like any other form of legal property.<sup>3</sup> In contrast to much other property, IP is non-rivalrous; that is, there is no additional cost for an additional person to benefit from the IP. But if no one paid for IP, only costless IP would be generated. According to the European Commission Directorate General for Competition, “IPRs differ from and are usually less absolute than ‘normal’ property rights: they are often limited in duration (patents, copyright), not protected against parallel creation by others (copyright, know-how) or lose their value once they become public (know-how).”<sup>4</sup>

4. Some of the dispute over IPRs originates in the question, “Who pays to encourage potentially innovative activity when duplicating intellectual property which, once generated, is costless or almost costless?” The law creates IPRs in order to allow innovators to exclude others and profit from their own innovations. With patents, for example, the law balances the losses from under-utilization of the patent for its duration against the gains from incentivizing additional innovative activity. (Both duration and breadth are important dimensions.) It is not known which duration or breadth provides the “best” balance, even though laws must – and do – make choices. This balance varies depending on countries’ development levels. Developing countries need to have flexibility to determine what they consider the proper balance. In the developed world, for example, with some knowledge – e.g. basic research – exclusion is sometimes deemed unworkable or undesirable.

<sup>1</sup> UNCTAD (2007). Agreed Conclusions Adopted by the Intergovernmental Group of Experts at its eighth session. TD/B/COM.2/CLP/L.12. 24 July.

<sup>2</sup> World Intellectual Property Organization (undated). *Understanding Copyright and Related Rights*. WIPO publication No. 909(E) available at [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.pdf](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf).

<sup>3</sup> United States Department of Justice and Federal Trade Commission (1995). *Antitrust Guidelines for the Licensing of Intellectual Property*. Singapore, Competition Commission of (2006). *Guidelines on the Treatment of Intellectual Property Rights*.

<sup>4</sup> European Commission Directorate General for Competition (2007). *Competition policy and the exercise of intellectual property rights*, submission to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy.

5. IPR regimes play a key role in the way private firms and research institutions acquire and manage their knowledge assets. Through their influence on the pace, patterns and diffusion of technological progress, as well as on competition, IPRs have an impact on innovation capacity and economic performance of both developed and developing countries. Stronger patent regimes, however, do not necessarily induce more investment in research and development, but more likely alter the speed of the domestic deployment of advanced technology. The transition to a knowledge-based economy characterized by the increasing importance of technology-intensive sectors and the efficient management of intellectual assets has given rise to changes in Governments' IPR policies and firms' strategies concerning IPR management.

#### **Basic definitions**

Intellectual property (IP) is information or knowledge. Intellectual property rights (IPRs) are rights, provided in law, that exclude non-owners for a specified duration and over a specified breadth from commercially exploiting the IP without the owner's permission. IPRs are divided into industrial property and copyright. Industrial property includes patents (which protect inventions), industrial designs (which protect the appearance of industrial products), "trademarks, service marks, layout designs of integrated circuits, commercial names and designations, [and] geographical indications". Patents are the most widespread means of protecting invention. A trademark is a sign, or a combination of signs, which distinguishes the goods or services of one enterprise from those of another. Copyright law is used to "[protect] the form of expression of ideas, not the ideas themselves" in artistic or literary work. Computer programmes fall into this category.

*Source:* World Intellectual Property Organization (undated). Understanding Copyright and Related Rights. WIPO publication No. 909(E) available at [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.pdf](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf).

6. Competition law and policy and IP law and policy are often generally regarded as complements because both seek to promote innovation and the development of new technologies and products for the benefit of consumers.<sup>5</sup> Determining the relationship between the two regimes is not always easy and some scholars even doubt that competition law is well suited to contain the abuse of IPRs.<sup>6</sup>

7. The relationship between competition and innovation (and thus dynamic efficiency) is not obvious to economic theory. Those who espouse a Schumpeterian view argue that monopolies can better generate funds for innovation and can better capture the returns from innovation, so are the main drivers of technological and innovative progress in society.<sup>7</sup> They tend to see firms competing for successive

<sup>5</sup> United States (1995). "Over the past several decades, antitrust enforcers and the courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation."; Contributions of Barbados, the Bolivarian Republic of Venezuela, Bulgaria, Burkina Faso, the Czech Republic, Denmark, the European Union, France, Indonesia, Italy, Japan, Peru, Singapore, Turkey, Viet Nam and Zimbabwe; Drexl J (2005). *The critical role of competition law in preserving public goods in conflict with intellectual property rights*. In *Intellectual Public Goods and Transfer of Technology*. Cambridge; but see Pakistan (2007). Contribution to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy: "[B]oth [competition and intellectual property] laws spur innovation and efficiency but... are conflicting in nature as they approach the same issue differently."

<sup>6</sup> Fox E (2005). Can antitrust policy protect the global commons from the excess of IPRs? In Carsten F (2005). *Intellectual Public Goods and Transfer of Technology*. Cambridge; Competition law as a means of containing intellectual property. In *Intellectual Public Goods and Transfer of Technology*. Cambridge.

<sup>7</sup> Peter M and Schumpeter JA (1942). *Capitalism, Socialism and Democracy*. See also Curley D (2006). Innovation, intellectual property and competition - a legal and policy perspective. In *The Stockholm Network Experts' Series on Intellectual Property and Competition*. Stockholm; European Commission, Directorate General on Competition (2007); Kenya (2007). Competition

monopolies. Other economists, such as Arrow, who espouse the opposite view, argue that competition provides more incentives to innovate. In a competitive environment, enterprises are constantly incentivized to invest in research and development in order to gain or maintain an advantage over their rivals.<sup>8</sup> Incumbent monopolists may squelch innovative competitors, thereby discouraging innovation.<sup>9</sup> The empirical work on how market structure affects innovation is also unclear, with some arguing that the data support the Arrowian view while others state that the most innovative markets are neither too competitive nor too monopolized. In the real world, technologies differ, thus markets differ, thus the way competition plays out differs. Evans and Schmalensee, for example, identify industries such as computer software, Internet-based businesses, communications networks, mobile telephony, biotechnology and, to a lesser extent, pharmaceuticals as experiencing Schumpeterian competition in our times.<sup>10</sup>

## B. The international framework

8. Due to the diversity of national competition standards, a global harmonization of the interface between competition policy and IPR seems unlikely in the near term.<sup>11</sup> For example, in 2004 the World Trade Organization (WTO) dropped negotiations on the issue of competition policy.<sup>12</sup> Thus, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices<sup>13</sup> adopted in 1980 by the United Nations General Assembly remains the only official multilateral code addressing competition policy as such. The Set is a multilateral agreement that provides equitable rules for the control of anticompetitive practices, recognizes the development dimension of competition law and policy, and provides a framework for cooperation at the international level. One of the objectives of the Set is to attain greater efficiency in international trade and development through, among others, the encouragement of innovation. The Set provides that enterprises should refrain from imposing restrictions on the importation of goods legitimately marked abroad with a trademark identical or similar to the protected trademark protected on identical or similar goods in the importing country, where the trademarks in question are of the same origin, and when the restrictions limit access to markets or otherwise unduly restrain competition. The Set thereby addresses the issue of parallel imports, which has gained increasing interest over the years and will be discussed in greater detail in chapter III.

9. IPR protection is addressed by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS agreement sets out the minimum standards of protection to be provided in the principal areas of IPRs and rules regarding their enforcement.<sup>14</sup> But it also grants certain flexibilities for

---

policy and the exercise of intellectual property rights. Contribution to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy. Authored by Njoroge.

<sup>8</sup> European Commission Directorate General on Competition (2007).

<sup>9</sup> Stiglitz J (2005). Intellectual property rights and wrongs. *Daily Times*:

[http://www.dailytimes.com.pk/default.asp?page=story\\_16-8-2005\\_pg5\\_12](http://www.dailytimes.com.pk/default.asp?page=story_16-8-2005_pg5_12).

<sup>10</sup> Cited in European Commission, Directorate General on Competition (2007)

<sup>11</sup> Heimler A (2007). Competition law enforcement and intellectual property rights; Rill J (2003). International antitrust and intellectual property harmonization of the interface. In *Law and Policy in International Business*. Summer, available at: [http://findarticles.com/p/articles/mi\\_qa3791/is\\_200307/ai\\_n9259838/pg\\_14](http://findarticles.com/p/articles/mi_qa3791/is_200307/ai_n9259838/pg_14).

<sup>12</sup> WTO General Council decision, available at:

[http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm#invest\\_comp\\_gpa](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa).

<sup>13</sup> UNCTAD (2000). The United Nations set of principles and rules on competition. UNCTAD/RBP/CONF/10/Rev.2, available at: <http://www.unctad.org/Templates/Page.asp?intItemID=4106&lang=1>.

<sup>14</sup> UNCTAD (2004). Manual on the formulation and application of competition law. New York and Geneva.

developing countries.<sup>15</sup> Some provisions explicitly address competition-related questions, namely article 40 (1), where it is agreed that “some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology” and can therefore be defined as illegal. TRIPS recognizes compulsory licensing (government or government-authorized third party use – against adequate remuneration – of the subject matter of a patent) under national law, and provides for a procedure to precede compulsory licensing as well as exceptions. Specific mention is made, in a separate article, to public health and nutrition and public interest in sectors of vital socio-economic sectors of the member countries.<sup>16</sup> Actions to prevent restrictive licensing arrangements from adversely affecting competition in a domestic market are a matter left to individual member countries, although consultation and cooperation between members is encouraged.<sup>17</sup> Furthermore, the declaration TRIPS Agreement and Public Health clarified that the agreement is not to prevent members from taking measures to protect public health, specifically mentioning epidemics, and pushing back the termination of transitional arrangements that would have restricted trade in pharmaceuticals.<sup>18</sup>

### C. The development dimension

10. The TRIPS agreement will undoubtedly continue to pose serious challenges to developing countries’ IPR regimes. But it also allows certain flexibilities that developing countries can use in order to address country-specific development concerns. Major concerns of developing countries in the context of implementing TRIPS focus, among other things, on three issues: (a) access to medicines; (b) biotechnology and traditional knowledge; and (c) ensuring the transfer of technology which is sensitive to the climate for foreign investment.<sup>19</sup> Developing countries have recently focused on the availability of exceptions under TRIPS from intellectual property protection,<sup>20</sup> especially for pharmaceuticals, for example in the cases of South Africa,<sup>21</sup> Thailand,<sup>22</sup> Brazil<sup>23</sup> and Rwanda.<sup>24</sup> Yet the design of IPR policy in developing countries is a cross-cutting issue and must balance the needs to protect IPRs, to promote technological diffusion and to develop the domestic industry and innovation capacity, taking into account the flexibilities granted by TRIPS. Further, developing countries, with a less developed system of competition control, have little experience in handling IP-related competition cases.<sup>25</sup>

<sup>15</sup> For more details about the TRIPS flexibilities, see UNCTAD-ICTSD: Resource Book on TRIPS and Development.

<sup>16</sup> Article 8.(1) and article 31.(b) TRIPS, 15. April 1994.

<sup>17</sup> UNCTAD (2004).

<sup>18</sup> Fourth session of the WTO Ministerial Conference, Doha, 14 November 2001, available at

[http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/trips\\_04\\_e.htm#declaration](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_04_e.htm#declaration).

<sup>19</sup> Janis M (2005). “Minimal” standards for patent-related antitrust law under TRIPS. In *Intellectual Public Goods and Transfer of Technology*. Cambridge.

<sup>20</sup> As to the implementation of the TRIPS flexibilities not only in developing countries, see the contributions by the Bolivarian Republic of Venezuela, Colombia, the Czech Republic, Denmark, France, India, Jamaica, Japan, Pakistan, Panama, Singapore, Switzerland, Tunisia and Turkey. See in particular the example of the Bolivarian Republic of Venezuela, where the Competition Agency has applied article 8 of the TRIPS agreement in specific cases: Contribution of the Bolivarian Republic of Venezuela (2008). Contribution to the Ninth Intergovernmental Group of Experts on Competition Law and Policy.

<sup>21</sup> Decision available at:

[http://www.compcom.co.za/resources/Media%](http://www.compcom.co.za/resources/Media%20Releases/MediaReleases%202003/Jul/Med%20Re%2034%200f16%20Dec%202003.asp)

[20Releases/MediaReleases%202003/Jul/Med%20Re%2034%200f16%20Dec%202003.asp](http://www.compcom.co.za/resources/MediaReleases/MediaReleases%202003/Jul/Med%20Re%2034%200f16%20Dec%202003.asp).

<sup>22</sup> Flynn S (2007). Thailand’s lawful compulsory licensing and Abbott’s anticompetitive response. Program on Information Justice and Intellectual Property. American University. Washington, D.C.

<sup>23</sup> Jack A and Lapper R (2007). Brazil spurns patent on HIV drug. *Financial Times* (online issue).

<sup>24</sup> Rwanda (2007). IP/N/9/RWA/1, 19 July.

<sup>25</sup> As to the little precedence in IPR competition cases, not only in developing countries, see the contributions of Albania, Barbados, Bhutan, the Bolivarian Republic of Venezuela, Bosnia and Herzegovina, Burkina Faso, Colombia, Costa Rica, the

11. IPR regimes differ among countries. They are but one component of a broader policy mix, including science and technology, competition and trade that directly or indirectly influences their design, implementation and enforcement. From a development perspective, the challenges are to identify the core policy components that are required to form a modern IPR system, to improve the coherence of IPR policies and other relevant policies, and to ameliorate the institutional design to enhance the functioning of an IPR regime, while ensuring that abusive use of IPRs does not stifle innovation and economic growth.<sup>26</sup> Experiences of some developed and developing countries in adjusting their policies and institutions to enhance IPR protection in the process of their transition to knowledge-intensive and globalized economies should be explored by developing countries.<sup>27</sup>

12. An interesting way for smaller or developing countries to piggy-back on the analyses and power of larger jurisdictions is provided by Croatia. At the request of the Croatian Competition Agency, Microsoft committed itself to respect, in Croatia, the conditions and obligations imposed by the European Commission in decision 2007/53 EC of 24 March 2004, upheld by the Court of First Instance on 17 September 2007.<sup>28</sup>

13. World Bank research provides more nuanced data on the relationship among development, competition and technological progress. Put simply, technological progress in developing countries comes from absorbing or adapting foreign technologies. The ability of developing countries to do this depends on exposure to the foreign technologies, typically through foreign direct investment (FDI), the willingness of domestic entrepreneurs to take risks on the technologies, and the skills of the population. It finds a tendency that in some sectors stronger IPRs are associated with increased knowledge flows and FDI towards middle-income and large developing countries, but not towards poor countries.<sup>29</sup>

14. Not everyone is convinced that IPRs or competition law are beneficial. The Indonesian submission to the eighth session Intergovernmental Group of Experts on Competition Law and Policy meeting describes the popular view in that country: (a) IP rights are the rights of advanced countries; (b) competition law also belongs only to developed countries; and (c) people buy pirated products since they are much cheaper than licensed products. The Kenyan submission to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy expresses the view that “exclusive rights may... tend to gravitate to large or dominant concerns, regardless of the legal status of their claims”, because “[patent] litigation is costly, and the outcome is likely to favour the party with the larger purse”.

### III. Specific constellations

15. This report is limited to selected aspects of the interface between IPRs and competition policy. IPR-related anticompetitive practices may involve collusion, suppression of incentives to innovate or exclusion of competitors. Some specific restrictions in licensing agreements may involve territorial restrictions or exclusivity, in violation of some jurisdictions' competition laws.

---

Czech Republic, Denmark, Jamaica, Latvia, Indonesia, India, Peru, Singapore, Slovakia, Tunisia, Turkey, Uruguay, Viet Nam and Zimbabwe.

<sup>26</sup> Commission on Intellectual Property Rights (2002). Integrating Intellectual Property Rights and Development Policy. CIPR. London.

<sup>27</sup> For lessons of the United States' legal history in that context, see Janis (2005).

<sup>28</sup> Croatia (2008). Contribution to the ninth session of the Intergovernmental Group of Experts on Competition Law and Policy.

<sup>29</sup> World Bank (2008). Global Economic Prospects 2008: Technology Diffusion in the Developing World. Available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDECPROSPECTS/GEPEXT/EXTGEP2008/0,,contentMDK:21603882~menuPK:4503397~pagePK:64167689~piPK:64167673~theSitePK:4503324,00.html>.

## A. Competition and patents

### 1. The interplay of existing patents

16. A specific challenge is the situation where several patents are combined. Such combinations are increasingly used by companies and have the potential to cause anticompetitive effects. Cases of IPRs involving combined patents have hardly any precedence in developing countries or countries in transition.<sup>30</sup> It may therefore be useful for the experts to consider the possible anticompetitive effects of such practices and to prepare to react when the first cases show up in their countries.<sup>31</sup>

17. Patent thickets are an overlapping set of patent rights forcing those seeking to commercialize new technologies to obtain licenses to use multiple patents, thus potentially considerably raising costs.<sup>32</sup> Cross-licensing generally has the positive effect of enabling firms operating in a patent thicket of overlapping patents to combine use of different patents to develop technologies. But they could help (anticompetitive) price coordination and could raise barriers to market access of other competitors, since they could be forced to negotiate with all firms involved or impose terms that are abusive to non-members.<sup>33</sup> Patent pools refer to multiple patent holders pooling their patents and, through a joint entity, granting licenses to third parties.<sup>34</sup> Patent pools can reduce transaction costs by allowing a party to negotiate simultaneously for multiple licenses to use multiple patents.

18. How might competition law and policy deal with such business practices? The accumulation of patents into packages generally lowers transaction costs and reduces uncertainties, and may thereby increase efficiency.<sup>35</sup> It may nevertheless have anticompetitive effects if used, for instance, to coordinate or fix prices, or to discourage innovation.<sup>36</sup> Patent pools composed of pure substitute patents (those that cover competing technologies) are generally more problematic than those composed of complements (those covering different parts of the same technology).<sup>37</sup> The combination of several IPRs may raise the question of whether cumulated royalties result in “abusively high” royalties that are anticompetitive.<sup>38</sup>

19. These issues are also reflected by the fact that the European Commission opened a sector inquiry into the pharmaceutical industry in early 2008 with regard to competition concerns in patent networks. The inquiry responds to indications that competition in pharmaceutical markets in Europe may not be working well, with fewer new pharmaceuticals being brought to market, and seemingly delayed entry

---

<sup>30</sup> As to the little precedence of IPR cases involving combined patents cases not only in developing countries or countries in transition, see the contributions of Albania, Barbados, Bhutan, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Colombia, Croatia, the Czech Republic, Denmark, France, India, Indonesia, Italy, Jamaica, Panama, Pakistan, Peru, the Russian Federation, Singapore, Slovakia, Switzerland, Tunisia, Turkey, Uruguay, Viet Nam and Zimbabwe.

<sup>31</sup> For an illustration of anticompetitive concerns arising from package patents, consider the reasoning and the criteria applied by the United States Court of Appeals for the Federal Circuit in the recent case *U.S. Philips Corp. v. International Trade Commission*, United States Court of Appeals for the Federal Circuit, 04-1361 discussed in Bhattacharyya S (2007). *U.S. Philips Corp. v. International Trade Commission: Seeking a Better Tie Between Antitrust Law and Package Licensing*. In *Columbia Journal of Law and Social Problems*. New York.

<sup>32</sup> United States Federal Trade Commission (2003). To promote innovation: the proper balance of competition and patent law and policy. Report.

<sup>33</sup> Jaffe A and Lerner J (2004). Innovation and its discontents: how our broken patent system is endangering innovation and progress, and what to do about it. Princeton University Press.

<sup>34</sup> Ullrich H (2005). Patent pools: approaching a patent law problem via competition policy. In *European Competition Law Annual*.

<sup>35</sup> United States (1995).

<sup>36</sup> United States Department of Justice and Federal Trade Commission (2007). Antitrust enforcement and intellectual property rights: promoting innovation and competition. Available at: [www.ftc.gov/reports/index.shtm](http://www.ftc.gov/reports/index.shtm).

<sup>37</sup> United States (2007).

<sup>38</sup> Correa C (2007). Intellectual property and competition law: exploration of some issues of relevance to developing countries. University of Buenos Aires. July.



of generics. The inquiry is examining agreements between pharmaceutical companies, such as settlements in patent disputes, and the possible erection of artificial barriers to entry through, among others, the misuse of patent rights or vexatious litigation.<sup>39</sup>

## 2. The granting of new patents

20. The process of granting new patents can give rise to competition problems. A patent that is likely invalid or overly broad (“poor quality”) can deter innovation by making rivals take actions to avoid infringing the poor quality patent. Competing innovators are deterred by the fear of expensive and time-consuming litigation or having to pay unjustified royalties. Rivals may abandon lines of research, for example. How can competition policy improve the situation? Since the process of patent granting is usually left for IPR authorities alone, one might wish to deliberate on how possible anticompetitive effects from poor quality patents could be anticipated and possibly avoided.

21. Some examples of strategies relating to patent granting that are susceptible to creating anticompetitive effects are listed below. The evergreening of patents consists of acquiring patents on minor or trivial follow-on developments with the aim of extending the length of the exclusive rights beyond the original patent term. An example of evergreening is the European case involving Astra/Zeneca,<sup>40</sup> in which the company was found to be abusing its dominance by misusing public procedures to exclude generic rivals.<sup>41</sup> Blanketing (or flooding or mining) means turning an area into a patent thicket, that is, a “dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology”.<sup>42</sup> Commentators argue that the risk of strategic abuses and anticompetitive patent practices has increased as the United States in particular has made it easier to get and enforce patents, and harder to challenge a patent’s validity.<sup>43</sup>

## B. Competition and IP licensing

### 1. Licensing agreements

22. Some common terms in licensing agreements could raise competition concerns, but would be evaluated on a fact-intensive, case-by-case basis. Non-assertion clauses “typically provide that a contracting party will not assert patents or other IP rights against the other contracting party, even if that party were to engage in an infringing use”.<sup>44</sup> These clauses allow firms to avoid litigation, which reduces transaction costs, but they may discourage innovation by limiting the ability of licensees to collect rents on their own IP.<sup>45</sup> A grantback is “an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee’s improvements of the licensed technology”.<sup>46</sup> The terms of grantbacks vary. They can facilitate downstream licensing because they let both parties share the risk regarding the true value of the initial and the additional IP. But they can raise anticompetitive concerns, as explicitly stated in

<sup>39</sup> European Commission (2008). Press release IP/08/49 of 16 January 2008 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/49&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>40</sup> Commission Decision Case COMP/A. 37.507/F3 Astra/Zeneca, under appeal.

<sup>41</sup> European Commission Directorate General on Competition (2007).

<sup>42</sup> Shapiro C (2001). Navigating the patent thicket: cross licenses, patent pools, and standard-setting. In *Innovation Policy and the Economy*. Adam Jaffe et al., eds.

<sup>43</sup> Jaffe A and Lerner J (2004 and 2006). Innovation and its discontents. In *The Wall Street Journal*.

<sup>44</sup> United States (2007).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

article 40.(2) of the TRIPS agreement, since they can be written so that the original licensor reaps all the rewards of any follow-on invention (thus discouraging that invention) and they can extend improperly a patentee's market power. Reach-through royalty agreements "grant the owner of a patent on an upstream research tool the right to receive consideration based on sales or usage of a subsequent downstream product created with that tool". They can be efficient in allowing follow-on researchers to share innovation risks, but can also discourage follow-on innovation.<sup>47</sup>

23. Some major jurisdictions define a certain safety zone wherein licensing agreements are not legally challenged. The United States competition authorities expect that these terms would not, on balance, harm competition. Factors they would consider to make that assessment in specific cases include (a) whether the patent holder has market power; (b) whether the practice encourages illegal coordination; (c) whether the practice raises barriers to entry; and (d) whether the practice discourages future innovation.<sup>48</sup> The European Commission's Technology Transfer Block Exemption Regulation (2004) (Commission Regulation No. 772/2004 of 27 April 2004 on the application of article 81(3) of the treaty to categories of technology transfer agreements) describes a safe harbour for IP licensing agreements. Where an agreement contains no severely anticompetitive restraints, and the licensor and licensee are competitors, their combined market share must be under 20 per cent to qualify for the safe harbour, but if they are not competitors, then each must have a market share under 30 per cent in order to qualify. Regarding the contract terms discussed above, neither exclusive grantback obligations nor non-assertion clauses qualify.

24. A case from Indonesia involved exclusive licenses. A supplier of paid television programmes, ESPN Star Sport, planned to terminate its agreement with six broadcasters in Indonesia and offer an exclusive transmission agreement to a single broadcaster. The Indonesian Competition Authority was of the opinion that this would violate the competition act. ESPN Star Sport agreed to cancel the exclusive license plan.<sup>49</sup>

## 2. Refusal to license and compulsory licenses

25. Although the legal conditions for compulsory licensing (Government using or authorizing a person to use protected subject matter without the consent of the IPR holder) vary widely among countries, it seems to be generally acknowledged that some refusals to license could cause competitive harm and could be treated as a competition violation under appropriate circumstances.<sup>50</sup>

26. When a single IPR holder refuses to license, the first question is whether the IPR confers market power. If not, then a refusal will probably not harm competition. Even if the IPR does confer market power, a refusal to license may not be a violation of competition law. Jurisdictions differ in their assessments. After recent public hearings, as well as the Supreme Court's *Trinko* decision,<sup>51</sup> the general consensus in the United States was that unconditional refusals to license did

---

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Indonesia (2008). Contribution to the ninth session of the Intergovernmental Group of Experts on Competition Law and Policy.

<sup>50</sup> Contributions of Barbados, Croatia, the Czech Republic, Denmark, the European Union, France, Japan, Peru, Singapore, Tunisia and Zimbabwe; United States (2007).

<sup>51</sup> 540 U.S. 398 (2004).

not violate the competition laws. However, conditional refusals to license could harm competition and could violate the competition laws.<sup>52</sup>

27. By contrast, the European Court of First Instance, in its 2007 *Microsoft* judgement,<sup>53</sup> ordered the company to make available interoperability information. The court noted:

“[A] simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case law that such a refusal can be characterized as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market.” (Para. 691.)

28. The European Commission’s discussion paper on the application of article 82 EC addresses among other things compulsory licensing. A refusal to supply an input is evaluated as to whether it meets all five of the following conditions: (a) the behaviour can be characterized as refusal to supply; (b) the company is dominant; (c) the input is indispensable; (d) the refusal is likely to have a negative effect on competition; and (e) there is an absence of an objective justification. In the case of a refusal to license an IPR, an additional condition has to be fulfilled, that the license is an indispensable input to produce new products for which there is potential consumer demand.<sup>54</sup>

29. In some instances, developing countries have either made use of compulsory licensing based on the TRIPS flexibilities, notably to grant access to pharmaceuticals,<sup>55</sup> or strongly encouraged licensing of pharmaceuticals.<sup>56</sup> This is despite the caution expressed by many that the application of compulsory licenses should rather be handled restrictively.<sup>57</sup>

### C. Competition policy, parallel imports and the exhaustion of IPRs

30. International price discrimination may increase overall economic welfare, even if it may offend against equity, in that some consumers pay more than others for the same product. The positive aspect of price discrimination is that some consumers who are offered a low price under a discriminatory strategy may be unable to afford the product if it must be offered at a single, uniform price. In addition, price discrimination is generally more profitable than uniform pricing. This implies increased incentives for, among others, innovative activities. On the other hand, price discrimination is likely to raise anticompetitive concerns if the basis for the discriminatory pricing is not objectively justified.

<sup>52</sup> United States (2007).

<sup>53</sup> Judgment of the CFI of 17.09.2007 in case T-201/04, *Microsoft v. Commission*.

<sup>54</sup> European Commission Directorate General on Competition (2007).

<sup>55</sup> Flynn (2007). Rwanda, see IP/N/9/RWA/1 of 19 July 2007; Brazil, see Jack A and Lapper R (2007). Brazil spurns patent on HIV drug. *Financial Times* (online issue). For a case from a developed country see Coco R and Nebbia P (2007). Compulsory licensing and interim measures. In Merck: a case for Italy or for antitrust law? *Journal of Intellectual Property Law and Practice*. Oxford.

<sup>56</sup> In South Africa, GlaxoSmithKline and the Competition Commission reached an agreement that GSK would license antiretroviral drugs to some generics manufacturers for sale in South Africa and sub-Saharan African countries, in return for the commission not referring a complaint regarding abusively high prices to the Competition Tribunal. Available at <http://www.compcom.co.za/resources/Media%20Releases/MediaReleases%202003/Jul/Med%20Rel%2034%200f16%20Dec%202003.asp>

<sup>57</sup> Among others: Fox (2005); Ullrich H (2005). Expansionist intellectual property protection and reductionist competition rules: a TRIPS perspective. In *Intellectual Public Goods and Transfer of Technology*. Cambridge.

31. International price discrimination may be supported by IPRs. The sale and resale of goods and services embodying IPRs may be territorially restricted by the IPR holder. Enforcement against parallel imports (imports not authorized by the producer) can take the form of enforcing IPRs. But if the IPRs are “exhausted”, meaning the owner of the patent has no more rights, they cannot form a basis for blocking parallel imports. (Piracy, when the IPR owner did not authorize commercial use and did not get paid, is entirely different.) Often, goods and services embodying IPRs cannot be traded across national borders (the IPRs are not “exhausted”). However, the European Union applies a system where patents exhaust regionally.

32. A report by a World Health Organization (WHO) commission states, “As regards parallel trade between developed countries, taken as a group, and developing countries, taken as a group, there is little doubt that restrictions on parallel imports, which exist in the laws of most developed countries, are beneficial as they help to preserve price differentials through market segmentation that potentially benefit developing countries, and help maintain lower prices in those countries”.<sup>58</sup> On the other hand, in markets without price controls, parallel imports may be pro-competitive, as they can help reduce barriers to entry and disrupt collusion among manufacturers.<sup>59</sup> Discussion about the appropriate exhaustion regime is highly contentious.<sup>60</sup>

#### **D. Competition and copyrights**

33. The possible anticompetitive effects of copyright protection, including that of software, have been central in some major cases. It has been noted in particular that copyrights on interfaces might block secondary markets, thereby denying access to what could be considered an essential facility necessary for undistorted competition. It should furthermore be noted that, especially in the field of software, the impact of economic network effects and their increasing returns to scale are important features.<sup>61</sup> Thus, there is a tendency towards monopolistic structures compared to other markets,<sup>62</sup> be it in the case of operating systems, auction platforms, social network websites or search engines. The European Court of First Instance’s 2007 *Microsoft* decision has already been mentioned above under compulsory licensing. Two other notable and controversial European decisions were *Magill* (involving television programme listings; unusually, copyrightable in Ireland, the country where the dispute originated) and *IMS Health* (involving a copyrighted method for organizing data about pharmaceutical sales in Germany,

---

<sup>58</sup> World Health Organization, Commission on Intellectual Property Rights, Innovation and Public Health (2006). Public health, innovation and intellectual property rights: report of the Commission on Intellectual Property Rights, Innovation and Public Health.

<sup>59</sup> Heimler A (2007).

<sup>60</sup> Ganslandt M and Maskus K (2007). Intellectual property rights, parallel imports and strategic behaviour. IFN Working Paper No.704. Research Institute of Industrial Economics. Stockholm; Fink (2005); Arfwedson J (2003). Parallel trade in pharmaceuticals. In *International Policy Network*. United Kingdom Commons Select Committee on Trade and Industry (1999). Eighth report on trade marks fakes and consumers. London. Quoted in Kenny P and McNutt P (1999). Competition, parallel imports and trademark exhaustion: two wrongs form trademark right. Competition Authority Discussion Paper. Dublin; See for the case of pharmaceuticals: Dubois P-A and Fernandez-Garnelo F (2007). Parallel trading and European competition law. In *Intellectual Asset Magazine*. London; Heimler A (2007); Drexl J (2005); Kobak J (2005). Exhaustion of intellectual property rights and international trade. In *Global Economy Journal*. Berkeley.

<sup>61</sup> Schmalensee R and Evans D (2001). Some economic aspects of antitrust analysis in dynamically competitive industries. NBER Working Paper, quoted from: European Commission (2007). Competition policy and the exercise of intellectual property rights. Contribution to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy.

<sup>62</sup> Anderman S (2007). The competition law/IP “interface”: an introductory note. In *The interface between Intellectual Property Rights and Competition Policy*. Cambridge University Press.

which had become the de facto standard).<sup>63</sup> For some cases, including *Microsoft* and *IMS Health*, the network effects of product standards were important, and the copyrighted material embodied the standards.

## E. Competition and trademarks

34. Trademarks generally promote competition as they are crucial for customers to differentiate one company's products from another's. Misuse of another's trademark typically constitutes unfair competition. Trademark-related unfair competition cases may constitute a large part of the caseload of competition authorities that are willing to devote resources to unfair competition cases. For example, a study found that, of 49 cases on which the Chilean Central Preventative Commission ruled in 2001, 14 were unfair competition cases involving trademarks.<sup>64</sup> Competition authorities may consider whether leaving trademark disputes to the ordinary commercial courts would, by conserving the authorities' resources, be in the public interest.

35. The enforcement of trademarks may also be used to block parallel imports. Bearing in mind the specific goal of market integration within the European Union, the European Court of Justice found that the protection of the owner of trademarks did not extend to preventing the import of goods bearing the mark which had been legitimately marketed in a member State. In a series of cases, the court set out conditions under which repackaged trademarked products could be resold in another member State.<sup>65</sup> Thus, trademarks may also be involved in parallel trade discussions, though patents appear to be the main focus.

## F. Competition, IP and standards setting

36. Industry standards are ubiquitous in a modern economy. They can be established either by competition among standards, as in the Blu-Ray versus HD high-definition optical disk format war, or by collaboration, as in the GSM mobile telephone standard. Not all markets reach a single standard: e.g. the games console market has not. But whether established by competition or collaboration, standards can involve multiple patents with multiple owners. For example, the Blu-Ray format, championed by the Blu-Ray Disk Association, incorporated several different patents with different owners.

37. Competition problems may arise in standard-setting organizations (SSOs). It may be efficient to choose a standard collaboratively, since this reduces the delay and uncertainty of a standards war. But SSOs can be manipulated by participants and the resulting standard can be used to exclude or hamper rivals. A fundamental problem is that participants in SSOs do not know all the patents that may be relevant. One participant may "hide" its ownership of a patent that is necessary to a standard until after an agreement has been reached. Then, after it has become costly to switch to another standard, inform the other members about the existence of the patent and demand a high royalty. To reduce the threat of hold-up, SSOs may require members to disclose all IPRs that might be needed to use proposed standards, or require them to license any IPRs on "reasonable and non-

<sup>63</sup> European Court of Justice joined cases C-241/91 P and C-242/91 *Magill* [1995] ECR 743; Case C-418/01, *IMS Health* [2004] ECR I-5039.

<sup>64</sup> Organization for Economic Cooperation and Development (OECD) (2004). *Competition Law and Policy in Chile*.

<sup>65</sup> *Centrafarm v. Winthrop*. BV Case 16/74 [1974] ECR 1183 and *Hoffmann-La Roche v. Centrafarm*. Case 102/77 [1987] ECR 1139. Essentially, there must be a strong objective reason for the repackaging; the repackaging cannot adversely affect the product, mislead the purchaser or damage the reputation of the trademark holder, and the manufacturer must be given reasonable notice and samples of the repackaging; Goyder DG (2003). *European Commission Competition Law*. 4th ed. Oxford University Press.

discriminatory” terms (what these terms actually mean is unclear).<sup>66</sup> In the *Rambus* case involving DRAM memory chips, the United States Federal Trade Commission (FTC) found that the company had deceived an industry-wide standard-setting process in order to unlawfully monopolize a market.<sup>67</sup> Rambus’ appeal is pending. Regarding the collaboration in SSOs, the United States competition authorities have said they would apply a rule-of-reason.<sup>68</sup>

## G. Competition and pharmaceutical test data rights

38. Access to the pharmaceutical test data used to obtain marketing authorization from national drug regulators is a contentious issue that relates to competition from generic pharmaceutical manufacturers. The data regarding the reference, or innovative, pharmaceutical is protected for a period defined in national law. After that period has elapsed, competing generic manufacturers may apply to the drug regulator for approval. Thus, the market entry of competitors is linked to the chosen approach of data accessibility, i.e. whether the data is exclusively available to the first user,<sup>69</sup> whether some sort of cost sharing and compensatory liability is possible<sup>70</sup> or whether the so-called misappropriation approach is applied. The last refers to an interpretation of article 39.3 of the TRIPS agreement arguing that only test data obtained through unfair commercial means should be prevented from economic use.<sup>71</sup> In most free trade agreements, the data exclusivity approach prevails, although some recent ones contain the possibility of some cost sharing.<sup>72</sup> For developing countries, it is important to note that a data exclusivity approach can add years to the marketing of new drugs. Every country should examine carefully if this is desirable in its national context.

## H. Competition and innovation in merger cases

39. Merger review, especially in markets undergoing rapid innovation, requires consideration of how the merger affects innovation, in addition to elements such as prices and quality. It may well be the case that, in some circumstances, even substantial concentration will not harm competition in innovation and indeed a merger may allow research and development to proceed more successfully. The FTC’s 2004 closure of its investigation of the acquisition of Novazyme Pharmaceuticals by Genzyme was motivated by just such a finding.<sup>73</sup> Recent surveys indicate that a high percentage of merging companies state that their

---

<sup>66</sup> United States (2007).

<sup>67</sup> Opinion of the Commission, *Rambus Inc. (Rambus II)*, F.T.C. Docket No. 9302, at 35 (2 August 2006) available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

<sup>68</sup> United States (2007).

<sup>69</sup> This approach accommodates, to the greatest possible extent, the interest of the product/data originators, making market entry of generic competitors effectively impossible until the period of exclusivity has elapsed. See: International Federation of Pharmaceutical Manufacturers Associations (2004). *The pharmaceutical innovation platform - sustaining better health for patients worldwide*. Geneva.

<sup>70</sup> This approach seeks to ensure higher acceptance on the part of the OECD Governments by offering fair compensation of data originator’s efforts. See: Weissman R (2006). *Data protection: options for implementation*. In *Negotiating Health. Intellectual Property and Access to Medicines* (eds. Roffe, Tansey, Vivas-Eugui). Earthscan. London.

<sup>71</sup> Correa C (2006). *Protecting test data for pharmaceutical and agrochemical products under free trade agreements*. In *Negotiating Health. Intellectual Property and Access to Medicines* (eds. Roffe, Tansey, Vivas-Eugui). Earthscan. London.

<sup>72</sup> See, for example, annex XIII (article 3) to the EFTA-Korea FTA

([http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/KR/KR\\_RUAP/annexes/KR\\_Annex\\_XIII\\_-\\_IPR.pdf](http://secretariat.efta.int/Web/ExternalRelations/PartnerCountries/KR/KR_RUAP/annexes/KR_Annex_XIII_-_IPR.pdf)): “Any party may instead allow in their national legislation applicants to rely on such [test] data if the first applicant is adequately compensated.”

<sup>73</sup> Heimler A (2007) citing Muris. Statement of Chair Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc, available at <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf>.

primary objective is to boost their research and technical development.<sup>74</sup> Notwithstanding the potential positive effects, mergers may also limit or slow innovation. Another negative aspect is that by identifying ongoing research and development, companies might be able to identify future competitors and take them over in order to avoid competition.

#### **IV. Outlook: the interplay of competition policy and IPR protection, and the role of UNCTAD**

40. The present report briefly introduced the debate on competition policy and IPR protection, its international framework and its development dimension. Furthermore, it highlighted some specific constellations of the interplay of competition law and IPR protection. With regard to the specific characteristics of developing countries' economies, the role of UNCTAD and challenges for the future of the interface, further discussion is required. The following points might merit further consideration:

- (a) How to cope with the diversity of national approaches towards competition policy given the international framework on IPR protection and how to account for the efforts that member States have already made with regard to these issues;
- (b) The appropriate design of free trade agreements with regard to IPR protection, the access to test data rights, the doctrine of exhaustion and general issues concerning the cooperation between developing countries and the home countries of most IPR holders;<sup>75</sup>
- (c) Assessing the factors that lead to a limited intervention in situations involving IPRs by some developing country competition authorities because of concerns about respecting IPRs or their limited relevance, given the size of the informal economy or the tendency for consumers to prefer pirated products;<sup>76</sup>
- (d) How innovators could be compensated other than through IPRs, considering the effect of first mover advantages or adequate research and development subsidies, which might have less harmful effects on market structures;
- (e) The question of how a competition policy for developing countries should be designed with regard to an adequate system of checks and balances in the field of IPRs, the appropriate implementation of the TRIPS flexibilities and, in this context, the protection of global public goods;<sup>77</sup>
- (f) How to support regional solutions regulating the interplay of competition law and IPRs among developing countries, since cooperation among competition authorities is still underdeveloped in many regions;<sup>78</sup>
- (g) If and how to avoid poor quality patents and the negative effects of various forms of package patents by stronger inter-agency collaboration, since

<sup>74</sup> OECD (2007). Annex to the summary record of the 100th meeting of the competition committee, Directorate for financial and enterprise affairs, DAF/COMP/M(2007)2/ANN2, Paris.

<sup>75</sup> Drexel J (2007). Responding to the challenges for development with a competition-oriented approach. In Barton J, Abbott F, Correa C, Drexel J, Foray D and Marchant R. *Views on the Future of the Intellectual Property System*. ICTSD. Geneva.

<sup>76</sup> Indonesia (2007). Contribution to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy.

<sup>77</sup> Drexel J (2005). The critical role of competition law in preserving public goods in conflict with intellectual property rights. In *Intellectual Public Goods and Transfer of Technology*. Cambridge.

<sup>78</sup> Contributions of Albania, Bhutan, Bulgaria, Burkina Faso, Bosnia and Herzegovina, Colombia, Denmark, France, India, Japan, Pakistan, Peru, the Russian Federation, Slovakia, Tunisia, Uruguay and Viet Nam.

competition authorities are usually not integrated into the patent-granting process;<sup>79</sup>

- (h) The possible publishing of guidelines on the competition treatment of IPRs by competition authorities and the creation of “safe harbours” and “blacklists” to enhance the predictability and to satisfy business needs for legal security, as has already been done or at least considered by several countries;<sup>80</sup>
- (i) The role of UNCTAD in the field of competition policy, especially supplying technical assistance to overcome the asymmetry of information and the lack of human resources, to foster capacity-building and to help establish an appropriate institutional and legal framework in developing countries; and
- (j) UNCTAD’s role as a forum for international cooperation by supporting additional discussion material and holding further meetings on the issue.

---

---

<sup>79</sup> Contributions of Barbados, Bulgaria, Burkina Faso, Colombia, Costa Rica, Croatia, the Czech Republic, Denmark, France, India, Indonesia, Italy, Jamaica, Japan, Latvia, Pakistan, Peru, the Russian Federation, Singapore, Slovakia, Switzerland, Tunisia, Turkey, Uruguay, Viet Nam and Zimbabwe; Morocco (2007). *La politique de la concurrence et l’exercice du droit de la propriété intellectuelle*. Contribution to the eighth session of the Intergovernmental Group of Experts on Competition Law and Policy.

<sup>80</sup> Contributions of Bulgaria, France, Indonesia, India, Japan, Singapore, Switzerland and Turkey; European Commission (2004). Regulation (EC) No. 772/2004 on the application of article 81 (3) to categories of *Technology Transfer Agreements*. OJ 2004 L 123/11. United States (1995). Korean Guidelines quoted in OECD (2005). *Intellectual property rights*, DAF/COMP(2004)24; Canada: Competition Bureau (2000): *Intellectual Property Enforcement Guidelines*.