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William E. Kovacic* Andreas P. Reindl†

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Abstract

This Paper suggests that interdisciplinary cooperation and coordination should focus on IP policy issues as well. This Paper discusses whether greater emphasis on interdisciplinary cooperation and coordination could contribute to more effective international convergence. We address the topic as follows. Part 2 describes the interdependency between the CP and IP regimes and potential benefits of expanded cooperation between the two fields on a domestic level. Part 3 sketches the existing collection of domestic and international institutions that make up the CP and IP communities and examines the consequences of institutional multiplicity for efforts to achieve better harmony between the two regimes. Part 4 suggests approaches for improving coordination between the two fields.

AN INTERDISCIPLINARY APPROACH TO IMPROVING COMPETITION POLICY AND INTELLECTUAL PROPERTY POLICY

*William E. Kovacic & Andreas P. Reindl**

INTRODUCTION

The interdependency of the competition policy ("CP") and intellectual property ("IP") regimes is becoming more apparent, as the significance of high technology and other IP-intensive industries grows, and IP rights ("IPR" or "IPRs") play a major role in shaping competition in these industries.[1] There is broad agreement that the two systems are to a great extent complementary in their efforts to promote innovation and consumer welfare.[2] However, most observers also agree that the two systems use different methods to promote these goals, and are not always equally successful in doing so.[3] Better coordination could limit inconsistencies between the two systems and ensure that both can more effectively encourage innovation and competition.

Broadly speaking, IP regimes and competition law and policy intersect — and therefore require coordination — in two ar-

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* Mr. Kovacic is the E.K. Gubin Professor of Government Contract Law at the George Washington University Law School and is the former General Counsel of the U.S. Federal Trade Commission ("FTC"). Mr. Reindl is with the Organization for Economic Cooperation and Development ("OECD"). The Authors would like to thank Barry Hawk for his useful comments and suggestions. The views expressed here are those of the Authors alone.

1. These developments received extensive attention in a recent FTC report that studied the operation of the U.S. system for granting patent rights. *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf (last visited Mar. 19, 2005) [hereinafter TO PROMOTE INNOVATION].

2. *See* Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) (stating that even though "the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds . . . the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.") (citing Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 876-77 (Fed. Cir. 1985)).

3. *See, e.g.*, Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1049-53 (2003) (discussing the different approaches to innovation taken by patent and antitrust law); Timothy J. Muris, Remarks Before the American Bar Association Antitrust Section Fall Forum 2 (Nov. 15, 2001) (transcript available at http://www.ftc.gov/speeches/muris/intellectual.htm) (discussing limitations of the antitrust and intellectual property ("IP") regimes as policy tools).

eas. On the one hand, the definition of IPR and the circumstances in which IPRs are granted may affect competition. Poorly functioning IP regimes distort competition and may chill innovation.[4] On the other hand, competition enforcement affects how IPR holders can use their rights. Poorly functioning competition law and policy at the interface with IPRs can distort IP-based innovation.[5] Traditionally, CP agencies have, to a much greater extent, or even exclusively, considered the enforcement aspect at the interface between IP and competition regimes. This Paper suggests that interdisciplinary cooperation and coordination should focus on IP policy issues as well.

While international cooperation and convergence activities involving CP and IP policy have grown more intense in recent years,[6] to date, they have tended to be intra-disciplinary.[7] Few cooperation and convergence activities account for the interdependency of the CP and IP regimes. This Paper discusses whether greater emphasis on interdisciplinary cooperation and coordination could contribute to more effective international convergence.

We address the topic as follows. Part 2 describes the interdependency between the CP and IP regimes and potential benefits of expanded cooperation between the two fields on a domestic level. Part 3 sketches the existing collection of domestic and international institutions that make up the CP and IP communities and examines the consequences of institutional multiplicity for efforts to achieve better harmony between the two regimes.

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4. *See infra* note 12 and accompanying text.

5. These two areas are not separated by a bright line, but it appears helpful to look at the issues that can arise in each area separately.

6. For example, in revising its Technology Transfer Block Exemption ("TTBE"), the Directorate General for Competition of the European Commission ("DG Comp") consulted extensively with competition authorities from other jurisdictions, including the United States. *See, e.g.*, DEPARTMENT OF TRADE AND INDUSTRY, COMMISSION DRAFT REGULATION ON TECHNOLOGY TRANSFER BLOCK EXEMPTION: UK RESPONSE (2003), *available at* http://europa.eu.int/comm/competition/antitrust/technology_transfer_2/72_dti_en.pdf (last visited Mar. 19, 2005). Officials from DG Comp have observed that contributions from foreign authorities played an important role in shaping the revised guidelines. *See* Phillip Lowe, Address at the Intellectual Property and Antitrust Roundtable *in* FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY 301-02 (Barry Hawk ed., 2005).

7. As we point out below, discussions about improvements in competition policy or IP policy within individual jurisdictions also tend to be intra-disciplinary. *See* discussion *infra* Pt. III.B.3.

Part 4 suggests approaches for improving coordination between the two fields.

I. *CP AND IP INTERDEPENDENCY*

A. *Imperfections in Each Regime Can Frustrate Valuable Economic Objectives*

The need for a stronger interdisciplinary perspective stems from the links between the CP and IP fields. The operation of CP and IP regimes features substantial interdependencies. Imperfections in the design and implementation of policy in each regime can frustrate the attainment of valuable economic objectives that each regime is intended to achieve.[8] The following possibilities indicate the potential benefit of continuing efforts to improve the operation of each regime in ways that take account of the interdependencies between the two systems.

A central concern of CP is the improper creation or maintenance of substantial market power.[9] The question of whether the existence of an IPR establishes substantial market power often is an issue in antitrust analysis.[10] Inherent in the definition of property rights in most IP regimes is the power of the rights-holder to deny others the use of the property right in question unless the rights-holder consents to such use. In many instances, the capacity to deny others the ability to use a species of IP does not confer substantial market power upon the rights-holder.[11]

Other property rights not within the control of the rights-

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8. *See* TO PROMOTE INNOVATION, *supra* note 1, Executive Summary, at 1, 3 (noting that errors or biases in competition and patent law policies can harm their effectiveness).

9. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 22 (2002) (noting that the "primary economic aim of competition law is to prevent the acquisition or exercise of 'market power,' as that term is used in microeconomics.").

10. *See* Independent Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342, 1345-46 (9th Cir. 2005) (discussing whether presumption of market power attaches to the existence of patent or copyright in the context of analyzing allegations of illegal tying arrangements), *petition for cert. granted*, ___ S.Ct. ___ (2005).

11. *See* ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 21 (5th ed. 2001) ("Patent rights are not legal monopolies in the antitrust sense of the word. Not every patent is a monopoly, and not every patent confers market power."); *see also* DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.0 (1995) [hereinafter ANTITRUST GUIDELINES] (noting that the Department of Justice Antitrust Division and FTC "do not presume that intellectual property creates market power in the antitrust context").

holder may serve as good substitutes for the property in question. In other cases, however, there may be few close substitutes for the rights-holder's property. In such instances, the right to exclude conferred by the IP system can be a source of substantial market power. Improvidently granted property rights — improvident either because the dimensions of the right are defined by law in an unduly broad manner, or because the rights-granting authority did not exercise its review of a rights application in a sufficiently rigorous manner — can have the effect of suppressing competition and innovation unnecessarily.[12]

Poorly conceived CP rules can have correspondingly adverse effects on the operation of the IP regime. Unwise antitrust rules can diminish incentives to create certain forms of property and the capacity to use such property efficiently.[13] For example, an antitrust rule that imposed an unreasonably broad duty upon a rights-holder to license her property right to others might harm innovation and the competition to devise new ideas. Similarly, excessively harsh antitrust strictures on licensing, or the recognition of antitrust rules that create excessive uncertainty about the legality of various licensing approaches, can frustrate the adoption of practices that promote the efficient exploitation of the ideas.

Our hypothesis is that judicial tribunals observe and respond to mitigate the consequences of spillovers of imperfect policies from one regime to the other, either from IP to CP or from CP to IP. The adjudication of IP or CP issues at the inter-

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12. *See* TO PROMOTE INNOVATION, *supra* note 1, Executive Summary, at 5 (noting that questionable patents "can block competition . . . and harm innovation in several ways"); *see also* Joseph E. Stiglitz, Address at Fed. Trade Comm'n Hearings on Global and Innovation-Based Competition (Oct. 12, 1995) (transcript available at http://www.ftc.gov/opp/global/GC101295.htm) (last visited Mar. 12, 2005). The Nobel Prize-winning economist observed that an appreciation for the role of IP rights ("IPR" or "IPRs") in stimulating innovation does not warrant "the conclusion that the broader the patent rights are, the better it is for innovation." *Id.* at 11. Emphasizing the cumulative nature of many innovations, Stiglitz cautioned that "[i]f you get monopoly rights down at the bottom, you may stifle competition that uses those patents later on, and so . . . the breadth and utilization of patent rights can be used not only to stifle competition, but also have adverse effects in the long run on innovation." *Id.*

13. The modern history of CP provides memorable examples of how competition authorities have, at times, slighted the value of IPR in promoting industrial progress and encouraging expansive interpretations of antitrust doctrine in order to curtail the exercise of such rights. *See* GAVIL ET AL., *supra* note 9, at 1111-22 (recounting the announcement and subsequent abandonment by U.S. antitrust authorities of the "Nine No-nos").

section of the two fields offers an example of what one commentator has labeled "equilibrating tendencies."[14] This concept refers to the inclination of courts to adjust substantive, procedural, and remedial rules to correct apparent flaws in any single rule of law.[15]

Judicial equilibration could occur in two ways that illuminate the interdependency of the CP and IP regimes. The decisions of CP enforcers and courts in antitrust disputes may reflect their impressions of the efficacy of an IP system. When CP enforcers and courts perceive that IPRs ought not to have been recognized by the rights-granting authority, they may adjust CP doctrine to offset the excessive breadth of IPR. By the same token, when IP policy makers or courts perceive that CP doctrine is inattentive to the logic and legitimacy of IP principles, they may seek to interpret IPRs broadly to curtail overreaching by the CP system.[16]

Both forms of equilibration can generate unfortunate distortions in the legal rules governing CP and IP, respectively. The impulse to correct improvidently defined or granted IPRs by adjusting CP doctrine can tempt CP decision makers to adopt analytically questionable approaches that undermine the coherence and rationality of antitrust rules generally. By the same measure, using adjustments in IP doctrine to push back against expansive applications of antitrust rules can lead to interpretations of IPRs that do not promote the achievement of the IP system's innovation and consumer welfare goals.

Equilibration, as we have used the term above, is a relatively crude, second-best solution to curing imperfections in the CP and IP systems. We advocate a first-best approach that would

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14. This phrase originates in an article by Stephen Calkins. *See* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1066 (1986).

15. *See* ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 170-96 (5th ed. 2004) (describing how the U.S. Supreme Court has curbed the impact of the *per se* rule against minimum resale price maintenance by imposing more demanding standards for the proof of agreement in such cases); *see also* William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, *in* 2 COMPETITION LAW YEARBOOK 167, 175-77 (Mads Andenas et al. eds., 2004) (hypothesizing that U.S. courts sometimes curtail the reach of the doctrine concerning abuse of dominance in order to address indirectly perceived perfections in the operation of private rights of action under the U.S. antitrust laws).

16. *See In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000) (declaring broad antitrust immunity for refusals to license IPRs).

have the CP and IP policy communities correct the flaws in their own regimes that cause destructive inter-system distortions. On the IP side, this calls with respect to patents for enhancements in the rights-granting process to ensure that applications genuinely meet standards of recognition established in the relevant patent statute; for other areas of IP, it requires statutory or judicial definitions of IPRs that recognize the negative impact on competition inappropriately broad IPRs can have. On the CP side, competition authorities must take measures to correct doctrine and enforcement policy that discourage the efficient creation and exploitation of IPR.

As we explore in more detail below, progress toward a first-best solution requires expanded cooperation between the two fields of legal policy. Some degree of lasting tension between the CP and IP regimes is probably inevitable, but better cooperation would serve to reduce the level of tension and avoid particularly destructive distortions that result from a failure to understand interdependencies between the two systems. Better cooperation has the promise to improve policies affecting innovation, and could increase desirable innovation.

B. *Expanded Cooperation and Coordination*

1. Improvements Within Each Regime

The recent Federal Trade Commission ("FTC") Report recommends several areas in which modifications to the patent system could result in a better balance between competition and patent law and policy.[17] In very general terms, the Report suggests that an increase in the number of patents alone will not necessarily result in more innovation and competition.[18] Patent quality, as well as legal standards and procedures, are also important parameters to ensure that a patent system does not create unwarranted market power and unnecessary costs.[19] While the FTC Report is limited to patents, similar questions can, in principle, be raised with respect to other IPR systems.[20]

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17. *See* TO PROMOTE INNOVATION, *supra* note 1, Executive Summary, at 4-18; *see also* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, A PATENT SYSTEM FOR THE 21ST CENTURY 4-7, 81-129 (2004) (recommending improvements in the U.S. process for granting patent rights).

18. *See* TO PROMOTE INNOVATION, *supra* note 1, Chapter 2.

19. *See id.*, Ch. 3, at 20 (biotechnology) and 53 (software patents).

20. *See also infra* notes 49-53 and accompanying text (discussing European

Corresponding improvements in the CP system can manifest in policy reforms that account for the efficiency-enhancing properties of various licensing practices. For example, criticism of U.S. antitrust policies that treated a range of licensing practices in the 1970s skeptically prompted important adjustments in the 1980s and 1990s.[21] Although individual approaches vary, the trend in a number of jurisdictions over the past decade has been to give IPR-holders greater freedom in designing licensing terms.[22]

2. Continued Inter-disciplinary Cooperation

The FTC Report and its careful examination of how patent law and policy can affect competition suggest that CP agencies in general ought to pay closer attention to developments of IP regimes.[23] The definition of new IPRs, the rights-granting process, as well as modifications to the standards of patentability or copyright protection that IP agencies and courts develop potentially affect competition and innovation activities. CP agencies should be willing to contribute their understanding of competition issues and economic expertise in the debate about IPR and IP policies.

For example, as IP communities discuss challenges created by difficult and novel patent rights issues, such as the optimal scope of biotech patents, or patents for software and internet industries, CP agencies may have unique economic understanding of competitive processes and innovation in an industry. If so, they should thus be prepared to provide input in the debate, preferably before an increasing number of competition cases in-

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database directive and judicial efforts to limit the scope of the IPR granted to database holders).

21. *See, e.g.*, ANTITRUST GUIDELINES, *supra* note 11.

22. The recent reforms of the EC's TTBE can be said to move in this direction, at least to some extent. *See, e.g.*, Maurits Dolmans & Anu Pilola, *The New Technology Transfer Block Exemption: A Welcome Reform, After All*, 27 WORLD COMPETITION 351, 362 (2004) (concluding that the TTBE brings more flexibility to the analysis of license agreements). There is a question, however, whether the Commission has moved far enough. *See* Robert C. Lind & Paul Muysert, *The European Commission's Draft Technology Transfer Block Exemption Regulations and Guidelines: A Significant Departure from Accepted Competition Policy Principles*, 25 EUR. COMPETITION L. REV. 181, 187-88 (2004) (criticizing Commission's proposed analytical framework for vertical license agreements as overly interventionist).

23. *See* TO PROMOTE INNOVATION, *supra* note 1, Executive Summary, at 17-18.

dicate that IPRs might cause competitive harm.[24]

3. Greater Investment in Research Exploring CP/IP Links

Understanding the interrelationship between the CP and IP regimes involves wrestling with difficult conceptual issues and developing a sound understanding of industry circumstances in which many CP/IP issues arise. An important ingredient of cooperation between CP and IP regimes is a greater commitment of resources by CP and IP agencies to perform research concerning these issues. For example, competition agencies seeking to develop enforcement programs at the CP/IP interface must use research to build up expertise related to IPR and IP policy.[25] The FTC's recent study of entry by generic drugs is an example of the type of work that CP agencies must perform in order to have a reliable conceptual and empirical foundation for work in this area.[26]

II. *IMPACT OF MULTIPLICITY IN POLICY MAKING REGIMES — AN INTERNATIONAL PERSPECTIVE*

On an international level, intra-disciplinary difference and divergence increase the likelihood that implementation of one system can affect the attainment of economic objectives other regimes are intended to achieve. The goals and enforcement standards of CP systems differ with regard to innovation and development of new technologies. And even though more progress has been made in the process of convergence of IP systems than in the CP area, IP regimes continue to differ in key aspects, including their sensitivity to the impact they have on competition. As a result, one should expect that jurisdictions treat differently the interface between their CP systems and IP systems, and have different views as to how the two systems can be coordi-

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24. *See, e.g.*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTELLECTUAL PROPERTY RIGHTS 26-30 (2004), *available at* http://www.oecd.org/dataoecd/61/48/34306055.pdf (last visited May 30, 2005).

25. *See* William E. Kovacic, Remarks at the Intellectual Property and Antitrust Roundtable, *in* FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY 285, 314-15 (Barry Hawk ed., 2005) (making argument for investments by competition agencies in "competition policy research and development" relevant to competition issues involving IPR).

26. *See, e.g.*, FEDERAL TRADE COMMISSION, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf (last visited Apr. 4, 2005).

nated. The discussion below provides some examples of major differences between regimes and discusses how the institutional framework might contribute to this situation. We then explore major implications of the differences between jurisdictions.

A. *Possible Sources of International Tension*

1. Differences Between CP Systems Across Jurisdictions

Cooperation and convergence have become major topics in the international antitrust community.[27] In some areas (such as cartel enforcement and merger control) there has been more cooperation, and greater convergence has occurred towards what are recognized to be superior practices, policies, and enforcement standards. The antitrust/IP interface, on the other hand, belongs to the areas where convergence has been limited. Efforts to address antitrust/IP issues in international treaties, codes, or international best practices documents have highlighted differences, rather than a process toward greater convergence.[28] As a result, jurisdictions take different views in considering how CP and competition law enforcement can best contribute to innovation and efficient dissemination of technologies. This applies even to mainstream antitrust jurisdictions.

For example, in certain jurisdictions, competition rules applicable to technology transfers may prefer to protect interests of smaller firms and/or licensees. Such rules may be based on the belief that more competition and innovation, and more effective dissemination of technologies, will result from a more fragmented market structure. Others might believe in the benefits of competition among licensees of the same technology (intra-technology competition).[29] With this approach, competition law systems are likely to more strictly scrutinize the reasonableness of

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27. *See* William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 (2003) (discussing international initiatives to encourage cooperation among competition authorities and promote convergence of procedure and substantive standards).

28. *See, e.g.*, HERBERT HOVENKAMP ET AL., 2 IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 40.2 (2002 & 2003-2005 Supp.).

29. *See, e.g.*, Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. C 101/2 (2004), ¶ 26 [hereinafter TTBE Guidelines] (discussing benefits of intra-technology competition); Luc Peeperkorn, *IP Licences and Competition Rules: Striking the Right Balance*, 26 WORLD COMPETITION 527, 538 (2003).

restrictions which licensors seek to impose on licensees. They will develop enforcement standards that ensure greater freedom of licensees and their ability to compete with each other. The ability of the rights holder to design the most efficient exploitation of its technologies and to maximize returns from the exploitation of its IPR will play a lesser role.

Other jurisdictions might rely to a greater extent on an innovation process based on competition among technologies (inter-technology competition) and among different right holders.[30] Robust competition among rights holders will in most cases be sufficient to eliminate or substantially reduce concerns about restrictions right holders impose on licensees. As a general rule, restraints on license agreements that restrict competition no more than the licensed IPR itself will be subject to less scrutiny.[31] Restrictions that limit competition among licensees of the same technology therefore will escape antitrust scrutiny.

The consequences of different policy approaches to license arrangements were highlighted, for example, when the EU published its draft block exemption for technology transfer agreements and the related guidelines.[32] Several restrictions that the draft block exemption threatened to prohibit under its "objectively unreasonable" standard are standard licensing practices that U.S. antitrust law would consider lawful.[33] In particular,

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30. *See, e.g.*, RICHARD GILBERT, CONVERGING DOCTRINES? U.S. AND EU ANTITRUST POLICY FOR THE LICENSING OF INTELLECTUAL PROPERTY 9 (2004), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1045&context=iber/cpc.

31. *See* Lind & Muysert, *supra* note 22, at 184 (noting that in general competition authorities should not question restrictions in a license agreement that affect only the use of the license and are required for the full transfer of the exclusive right granted by IP laws); *see also* Robert C. Lind & Paul Muysert, *Innovation and Competition Policy: Challenges for the New Millenium*, 24 EUR. COMPETITION L. REV. 87, 91 (2003) ("The key question that competition authorities should seek to answer in a licensing case is whether a licence harms competition that would otherwise have occurred.").

32. For the final versions of the TTBE and the accompanying guidelines, see Commission Communication, O.J. C 235/10 (2003) (Communication pursuant to Article 5 of Council Regulation No. 19/65/EEC of 2 March 1965 on the application of Article 81(3) of the EC Treaty to certain categories of agreements and concerted practices, as last amended by Regulation (EC) No 1/2003); Commission Notice, O.J. C 101/02 (2004).

33. *See* Joint Comments on Draft Commission Regulation on the Application of Article 81(3) of the EC Treaty to Categories of Technology Transfer Agreements and Draft Commission Notice on Guidelines on the Application of Article 81 to Technology Transfer Agreements, A.B.A. SEC. ANTI-TRUST L., A.B.A. SEC. BUS. L., A.B.A. SEC. INT'L L. & PRAC., A.B.A. SEC. INTELL. PROP. L. 4 (2003), *available at* http://europa.eu.int/comm/competition/antitrust/technology_transfer_2/15_aba_part2_en.pdf (noting

concerns were expressed that significant differences in the treatment of certain horizontal arrangements would have interfered with global licensing practices and collaborative efforts to a much greater extent than differences in the treatment of vertical restraints.[34] Opposition to the draft text prompted the European Commission to amend the draft, and the final text of the block exemption eliminated the most obvious areas of concern.[35]

Nevertheless, differences continue to exist, especially in the treatment of vertical restraints.[36] Considerations that rights holders should be able to decide how their IPRs are exploited, and how to maximize their returns as an incentive for future investment, play a lesser role in European competition law.[37]

Along the same lines, some jurisdictions will be more concerned than others about the strategies used by firms with appreciable market power to exploit their IPR. They will be more likely to find, for example, that refusals by a right holder to share its IPR with competitors, or attempts to impose "discriminatory" licensing terms, could unreasonably limit competition.[38] Other jurisdictions more likely will consider restrictions imposed on licensees and refusals to license, even in the case of a firm with market power, a legitimate use of rights established by an IPR system with which competition laws should not interfere.[39]

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that the Commission focuses "exclusively on whether firms could have adopted a less restrictive agreement," whereas "U.S. enforcement authorities will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.").

34. *See, e.g., id.*

35. *See generally* Dolmans & Pilola, *supra* note 22, at 354-57 (discussing changes concerning license arrangements between competitors).

36. *See, e.g.*, GILBERT, *supra* note 30, at 3-5.

37. *See, e.g.*, Lind & Muysert, *supra* note 22, at 184-88 (criticizing the European Commission for adopting an analytical approach to license agreement that does not sufficiently respect the need to allow an IPR holder to appropriate the value of its IPR through restrictions in license agreements).

38. *See, e.g.*, John Temple Lang, The Application of the Essential Facility Doctrine to Intellectual Property Rights Under European Competition Law 6-7 (2004), *available at* http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueAntitrust2004/TempleLang.pdf (last visited Mar. 19, 2005).

39. *See* GILBERT, *supra* note 30, at 6-7. *See also* Damien Geradin, *Limiting the Scope of Article 82: What Can the EU Learn from the U.S. Supreme Court's Judgment in* Trinko *in the Wake of* Microsoft, IMS, *and* Deutsche Telekom?, 41 COMMON MARKET L. REV 1519, 1533-46 (2004) (contrasting European Commission's analysis in *Microsoft* of a refusal to deal with U.S. approach in *Trinko*).

For example, once a rights holder is found to hold a dominant position under EU competition law, and restrictions it imposes in licensees no longer benefit from the Technology Transfer Block Exemption ("TTBE"), EU competition law limits the rights holder's ability to develop a licensing strategy.[40] A conservative interpretation of Article 82 of the EC Treaty[41] suggests that several licensing practices that may be lawful under U.S. antitrust law could be considered a violation of EU competition law.[42]

2. Differences Among IP Systems Across Jurisdictions

IP systems have a long tradition of cooperation and convergence towards (at least) minimum standards. Convergence and cooperation by far exceed what has so far been achieved among CP systems. For many years, international treaties have been effective instruments for reducing differences among national IP systems.[43] As a result, both with respect to patents and copyrights, substantial similarities exist among IP systems in mainstream jurisdictions.

Yet, despite a long tradition of dialogue, cooperation, and convergence with respect to broad principles, differences continue to exist even among mainstream IP systems. And frequently these differences exist in areas that matter a great deal for the interaction between an IP system and competition. As regards patent rights, for example, the recent FTC Report highlighted features in the application and rights-granting process before the U.S. Patent and Trademark Office ("USPTO"), which

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40. *See* Temple Lang, *supra* note 38, at 6-7 (stating that there is a "duty under Article 82 to contract on strictly non-discriminatory terms" when certain conditions are met, including dominant market position).

41. *See* E.C. Treaty, art. 82, O.J. C 325/1 (2002), at 65.

42. In addition to refusals to license, the granting of an exclusive license, noncompetes, grant backs, and the use of discriminatory terms in license agreements could be practices subject to harsher treatment under EU competition law.

43. *See, e.g.*, Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *reprinted in* 31 LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND, Annex 1C, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as amended on* July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as amended on* July 24, 1971, 828 U.N.T.S. 221; North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289.

raise concerns about their potential effects on competition.[44] These include, for example, insufficient resources to thoroughly examine large numbers of complex and novel patent applications, and unreasonably strict standards for third parties to challenge USPTO-granted patents.[45] Interestingly, several recommendations in the FTC Report to make the USPTO system more sensitive to competition issues are similar to already existing features of the European Patent Office ("EPO") patent system.[46] One example is the proposed opposition procedure that would facilitate challenges to newly granted patents.[47]

Another example of differences with potential effects on competition is the IP protection for databases.[48] Here, the EU member countries agreed on an IPR-type system that confers strong rights on database owners.[49] In contrast, no IPR protection exists under U.S. law for databases, and efforts to introduce similar protection have not been successful.[50] The European system, which has meantime been exported to several other coun-

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44. *See generally* TO PROMOTE INNOVATION, *supra* note 1 (making recommendations for the patent system to maintain a proper balance with competition law and policy).

45. *See id.*, Executive Summary, at 8-9.

46. *See id.*, Executive Summary, at 23 (noting suggestions that the United States implement an opposition system challenging questionable patents drawing from the best features of the European system).

47. There is, however, apparently no conclusive evidence that the European opposition procedure results in significantly lower social costs than the current U.S. re-examination system. *See* STUART J.H. GRAHAM ET AL., PATENT QUALITY CONTROL: A COMPARISON OF U.S. PATENT RE-EXAMINATIONS AND EUROPEAN PATENT OPPOSITIONS, IN PATENTS IN THE KNOWLEDGE-BASED ECONOMY 74, 114 (Wendy M. Cohen & Stephen A. Merrill eds., 2003) (noting that any comprehensive assessment of the social costs and benefits of the U.S. and European challenge systems would require consideration of both post-grant challenges within the patent office processes and litigation).

48. Digital rights enforcement could become another area where jurisdictions adopt different approaches in their copyright laws, sometimes with perhaps unintended consequences for competition. This is an area that needs to be further explored, though.

49. *See* Council Directive No. 96/9, O.J. L 77/20 (1996) [hereinafter EU Database Directive]. For an overview and critical assessment of the Directive, see, e.g., J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 76-95 (1997); P. Bernt Hugenholtz, *Implementing the European Database Directive*, *in* INTELLECTUAL PROPERTY AND INFORMATION LAW, ESSAYS IN HONOUR OF HERMAN COHEN JEHORAM 183 (Jan J.C. Kabel & Gerard J.H.M. Mom eds., 1998), *available at* http://www.ivir.nl/files/database/index.html#toptop (last visited June 6, 2005).

50. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (holding that defendant's practice of copying names, addresses, and phone numbers from a competitor's phone directory for inclusion in defendant's phone directory did not violate copyright laws); Reichman & Samuelson, *supra* note 49, at 126.

tries,[51] has been criticized for its potentially anticompetitive effects. Critics have been concerned, in particular, that the database right can confer substantial market power on producers of single source data that can be exploited in downstream markets for derivative information products and services.[52] It appears that these were unintended consequences of a poorly designed law, which in turn led to several court judgments trying to limit the law's anticompetitive effects by adopting analytically questionable approaches to the competition/IP interface.[53] Importantly, recent European Court of Justice judgments on the EU Database Directive may have addressed some of these concerns related to single source databases.[54] The Court denied IP protection where the data would have been created irrespective of the existence of IPRs and therefore, consistent with the approach advocated above,[55] corrected a flaw in the IP regime applicable to databases which had caused distortions to competition. By aligning the scope of the database right more closely with the rationale that IPRs should be granted only where they are necessary to protect an incentive to invest and develop new products, the Court reduced the need to use questionable competition rules to achieve better policy outcomes.[56]

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51. *See* P. BERNT HUGENHOLTZ, ABUSE OF DATABASE RIGHTS 2 (Paper Presented at the Cerna Conf. on Antitrust, Patent and Copyright, Paris, Jan. 2004), *available at* http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueAntitrust2004/Hugenholtz.pdf (last visited Mar. 30, 2005).

52. *See* Hugenholtz, *supra* note 51, at 2. Even commentators who are generally in favor of strong database protection concede this problem, see also G. M. Hunsucker, *The European Database Directive: Regional Stepping Stone to an International Model?*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 750 (1997) (stating that "[the] power to control the dissemination of sole-source data enables the first database maker . . . to charge monopolistic fees for access to the database.").

53. *See, e.g.*, Hugenholtz, *supra* note 51, at 2 (noting that some national courts have applied competition law to cure abusive practices under the EU Database Directive). For further information, see generally the resources page provided by the Amsterdam University Institute for Information Law, *available at* http://www.ivir.nl/files/database/index.html (last visited June 7, 2005) (providing list of national court judgments involving Database Directive, including some that found antitrust liability to simple refusals to license).

54. Case C-338/02, Fixtures Marketing Ltd v. Svenska AB; Case C-444/02, Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou EG; Case C-46/02 Fixtures Marketing Ltd v. Oy Veikkaus Ab; Case C-203/02, British Horseracing Board Ltd v William Hill Organization Ltd., Judgments of November 9, 2004.

55. *See supra* notes 17-20 and accompanying text.

56. In essence, the Court denied protection under the Database Directive to data that have been drawn up in the course of a different principal business activity, as in

Different approaches of IP systems exist in other areas as well. For example, what is exempted under one jurisdiction's patent law research exemption may constitute an infringing act in another jurisdiction that interprets a research exemption more narrowly.[57] Effects on competition are possible, where research exempted in one jurisdiction leads to a broader range of new products. Along the same lines, one jurisdiction may institutionalize an early review of patents, thus facilitating the elimination of bad patents. This approach could favor a broader public domain, and thus also more vigorous competition. Other jurisdictions may lack a comparable review process and thus enable right holders to hold on to questionable patents.[58]

3. CP and IP Systems: Understanding Reasons for Institutional Insularity

Jurisdictions also may have different perspectives concerning the proper interaction between IP policy and CP, including the willingness of CP agencies to engage in a dialogue with IP stake holders to ensure greater coherence between the two systems. A greater reluctance by some CP agencies may be based on different policy approaches, as in some jurisdictions, CP makers may consider it outside their expertise and appropriate responsibilities to interfere with policies and the rights-granting process of IP systems.

Different institutional backgrounds also may affect the interaction between CP makers and IP law and policy. Resolution of IP cases under EC competition law, for example, tends to get

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this case the creation of the database did not involve substantial investment. The Court's approach contrasted with the approach suggested by the Advocate General who supported a broader definition of the database right, and suggested that distortions of competitions that could result from such a broader right should be remedied by ex-post antitrust intervention. As suggested above, this would have been at best a second best solution to curing an imperfection in an IP system. For a discussion of the cases, see Mark J. Davison & P. Bernt Hugenholtz, *Football Fixtures, Horse Races and Spin-offs: The ECJ Domesticates the Database Right*, 27 EUROP. INTEL. PROP. REV. 113 (2005).

57. *See, e.g.*, Dominique Guellec & Catalina Martinez, *Overview of Recent Changes And Comparison of Patent Regimes in the United States, Japan, and Europe* 154-55, *in* OECD, PATENTS, INNOVATION AND ECONOMIC PERFORMANCE (2004).

58. Differences in the scope and breadth of IPR include patentable subject matter, such as business methods, computer programs, and genes. Such differences are perhaps more likely in newly emerging areas of IPR. Biotechnology and software patents might be good examples of areas where some jurisdictions may be more reluctant than others to grant strong and broad IPRs.

less involved in CP and IP policy aspects than is the case in comparable U.S. cases. Some have opined that the difference exists because in Europe, IP policy making is a federal matter only to a limited extent — only with respect to areas in which harmonization has occurred. The definition of rights remains, to a large extent, a matter of Member State jurisdiction. This situation might make a coherent analysis of competition issues from both a CP and an IP perspective more difficult.

B. *The Institutional Framework: Self Contained Institutions*

To speak of the CP or IP communities is to refer to a large collection of institutions within any single jurisdiction and across jurisdictions. This part of the Paper outlines the relevant institutions through which policy in both areas is formed and executed. The brief summary demonstrates that the institutional framework has allowed for intra-disciplinary cooperation, but has contributed little to more interdisciplinary work.

1. The CP and Enforcement Community

Nearly 100 jurisdictions have adopted competition statutes and created mechanisms for their enforcement.[59] Despite a number of common features, competition systems feature important differences in substantive commands, procedure, institutional design, and the capability of enforcement authorities.[60] In addition to diversity across jurisdictions, significant degrees of decentralization of CP authority exist within selected jurisdictions.[61]

Recent years have featured increased efforts to coordinate CP-making within and across jurisdictions.[62] The EU has re-

59. The modern development of competition systems is analyzed in William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001).

60. U.S. and EU enforcement mechanisms illustrate possible differences. Private rights of action are integral, important means of enforcing the U.S. antitrust laws, but thus far have been relatively unimportant in the enforcement of the competition laws of the EU and its Member States.

61. *See generally* William E. Kovacic, *Toward a Domestic Competition Network*, *in* COMPETITION LAWS IN CONFLICT 316 (Michael S. Greve & Richard A. Epstein eds., 2004) (discussing decentralization of competition authority within the United States).

62. *See* William E. Kovacic, *Competition Policy Cooperation and the Pursuit of Better Practices*, *in* THE NEW TRANSATLANTIC AGENDA AND THE FUTURE OF TRANSATLANTIC ECONOMIC GOVERNANCE (Gregory C. Shaffer ed.) (forthcoming 2005) (discussing conver-

cently established a European Competition Network to coordinate enforcement activity and policy among the DG Comp and the EU Member States.[63] International coordination takes the form of bilateral cooperation programs, regional initiatives, and global networks such as the OECD.[64]

Non-government bodies also play a major role as instruments of domestic and international cooperation. Legal societies and trade associations are active participants in debates about CP within individual jurisdictions and in international fora. In their teaching and research activities, universities and academic societies provide important instruments for developing an international consensus concerning theory, empirical research, and analytical techniques.

2. The IP Policy and Enforcement Community

Most nations have adopted IP laws and established government bodies to issue patents and patent-like IPRs. As with CP, the design of the relevant institutions varies across jurisdictions. For example, the United States vests all responsibility for patents in the national government and has a unified patent system. By contrast, EU Member States play a much greater role in patent policy, although the EU has pursued a number of measures in recent years to establish a unified system. In a number of jurisdictions, a variety of public authorities share authority in determining how IPR may be issued and exploited.[65]

As with competition law, various institutions have a hand in promoting convergence across jurisdictions. As mentioned earlier, major government-to-government initiatives include the WTO (the venue for the TRIPS agreement),[66] WIPO,[67] and vari-

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gence activities involving the United States and the EU) [hereinafter Kovacic, *Competition Policy Cooperation*].

63. *See* Council Regulation No. 1/2003, art. 11, O.J. L 1/1 (2003); Commission Notice on Cooperation within the Network of Competition Authorities, O.J. C 101/43 (2004).

64. *See generally* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *About OECD, at* http://www.oecd.org/home/ (last visited Apr. 4, 2005).

65. For example, the U.S. Food and Drug Administration has significant responsibilities for overseeing the operation of the "Orange Book" mechanism that governs the entry of generic equivalents to branded pharmaceutical products. *See* Elizabeth Stotland Weiswasser & Scott D. Danzis, *The Hatch-Waxman Act: History, Structure, and Legacy*, 71 ANTITRUST L.J. 585, 593-94 (2003) (discussing role of the FDA in approvals of generic products).

66. TRIPS Agreement, *supra* note 43.

ous components of the OECD.[68] Here, also, NGOs, such as the American Intellectual Property Law Association, supply influential networks for policy discussion within and across jurisdictions.

3. Largely Self-Contained Communities

The frameworks described above for CP and IP are generally intra-disciplinary. With occasional overlap, the relevant institutions and networks tend to be either CP centric or IP centric. Even within institutions (e.g., OECD, WTO, and NGOs such as legal societies) that contain subunits addressing CP and IP, respectively, discussion across disciplinary groups tends to be limited. Truly interdisciplinary policy frameworks and networks that integrate CP and IP perspectives are rare. A major theme of this Paper is the need to add a stronger interdisciplinary dimension to existing institutions as a means for improving CP/IP coordination, nationally, and internationally.

C. *Consequences*

Differences between legal regimes may sometimes be without significant consequences for the way firms do business. Rights and enforcement standards that affect only local/national business activities will raise little concerns on an international level. Where markets are global and activities of right holders go beyond a single jurisdiction, however, differences between jurisdictions can affect the ability of right holders to efficiently exploit their IPR.

1. Firms Must Follow Standards of Most-restrictive Major Jurisdiction

The most severe result of different enforcement standards is forcing right holders to follow in the worldwide exploitation of their rights the standards of the most restrictive major jurisdiction. Right holders usually will be able to avoid such drastic results, given the territorial nature of IPR and the ability of firms to enter into local license arrangements. However, carving out re-

67. WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 36 I.L.M. 76; Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

68. *See supra* note 64.

strictive jurisdictions from worldwide license agreements or worldwide IP strategies might not always be feasible.

The risk of one jurisdiction imposing its more restrictive standards on licensing agreements worldwide became apparent in the above mentioned case of the European Commission's draft TTBE. Concerns were expressed that the TTBE could have affected numerous licensing agreements beyond the EU, particularly between firms considered actual or potential competitors.[69] The criticism on the first draft led the Commission to reconsider its approach and to adopt standards that were more in line with industry practices and U.S. antitrust law.[70]

A well known example of competition enforcement in one jurisdiction affecting a right holder's worldwide business practices is the Commission's *IBM* case.[71] Remedies imposed by the European Commission on *IBM* in connection with alleged violations of Article 86 of the Treaty of Rome [now Article 82][72] forced IBM to change its worldwide business strategy, even though outside Europe, its conduct was not found to be anticompetitive.[73] Several other instances are known where U.S.-based firms submit complaints in Europe, seeking help before the European Commission in their disputes with other U.S. firms. These complaints are based on the expectation that stricter standards in European competition law will impose stricter limits on business practices of market leaders than U.S. antitrust law. There is always a risk in these cases that these stricter standards (which may not always result in more competi-

69. *See* Commission Regulation 240/96, O.J. L 31/2 (1996).

70. *See supra* notes 32-36 and accompanying text.

71. *See* Int'l Bus. Mach. Corp. v. Comm'n, Case 60/81, [1981] E.C.R. 2639.

72. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. Article 86 became Article 82 following revisions pursuant to the Treaty of Amsterdam.

73. The worldwide effects of the Commission decision resulted primarily from the disclosure of know-how, rather than IPR. *See* David J. Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TUL. L. REV. 57, 97-98 (1987) (stating that "[t]he investigation did not lead to formal action by the Commission, because IBM consented to make [certain information publicly] available"). The Commission's recent Microsoft decision might become another example of an antitrust decision in one jurisdiction that prompts a right holder to adjust some of its business practices worldwide, even though certain conduct was not found to violate antitrust laws elsewhere. *See* Commission Decision No. COMP/C-3/37.792 (Eur. Comm'n Mar. 24, 2004), *available at* http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf [hereinafter Microsoft Decision].

tion and innovation in the long term) will in effect become worldwide standards.

The Commission's *Microsoft* Decision[74] illustrates these concerns, although it also demonstrates that firms may be able to limit the effects of remedies to the jurisdiction in which they were imposed. With respect to the most controversial portion of the decision addressing Microsoft's bundling strategies related to the Media Player, Microsoft decided to implement a remedy only in EU Member States and did not make any changes to its product integration strategy outside the EU, including the United States, where the Commission approach has been criticized. With respect to Microsoft's refusal to provide interface information to competitors in the business server market, Microsoft will implement a remedy worldwide,[75] and the Commission's enforcement standards therefore will effectively become worldwide standards. There is, however, much less practical divergence between the United States and the EU, and much greater overlap and complementarity, with respect to this portion of the case, even though the Commission's finding of antitrust liability was based on a potentially divisive refusal to license rationale.[76]

2. Compliance Costs Rise With Multiplicity

It is commonly assumed that differences between competition laws concerning the evaluation of vertical restraints are less likely to become the sources of international tensions because vertical arrangements are predominantly local in nature. Even if this assumption is true (and it may not always be), differences between antitrust systems raise firms' costs of doing business worldwide. Compliance with local laws becomes more burdensome and requires greater resources. Recently, two authors opined that a greater convergence of approaches could remove

74. *Id.*

75. The worldwide scope of this element of the European Commission's remedy is identified in Commission Press Release IP/05/673, June 6, 2005.

76. *See* Press Release, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on The EC's Decision in its Microsoft Investigation (Mar. 24, 2004) (remarking that "[w]ith respect to the EC's 'interoperability' remedy, which requires Microsoft to license technologies used by Microsoft server software to communicate with other Microsoft software on a network, there is considerably more overlap with the United States' approach"), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

some of the uncertainty as to permissible licensing restrictions, and limit potential sources of litigation that accompany uncertainty.[77] It is unclear whether much litigation involving antitrust and IP issues has been caused by differences between CP regimes. Experience shows that private antitrust litigation outside the United States continues to be a rather limited phenomenon. It does appear to be a reasonable assumption, however, that compliance costs increase where differences between jurisdictions are substantial.

Business models that can successfully be implemented in some jurisdictions may not be transferable elsewhere without changes, because antitrust laws may not permit right holders to impose the same kind of restrictions on licensees in all jurisdictions.[78]

III. *ACHIEVING A MORE COHERENT APPROACH*

We submitted earlier that within a single jurisdiction, progress toward improving CP and IP policy within each regime requires greater attentiveness by CP and IP authorities to the interdependency between the two policy fields.[79] Recognition of the interdependency can provide the foundation for specific measures to reduce friction between the two systems and promote the achievement of shared policy aims. We discuss in the final chapter how policies concerning the interface between CP and IP policy can converge across jurisdictions. Greater recognition of the interdependence of the two policy regimes could support such convergence. We shall first consider possible goals of greater convergence.

A. *Policy Objectives*

Greater coordination among competition policies, as well as among competition policies and IP policies, can serve two goals. First, it can lead to the acceptance of superior norms in a greater number of jurisdictions. Second, coordination can reduce costs to private firms. Both objectives have been successfully pursued

77. *See* James F. Rill & Mark Schechter, *International Antitrust and Intellectual Property Harmonization of the Interface*, 34 LAW & POL'Y INT'L BUS. 783, 787 (2003).

78. This could occur, for example, with certain business models for the online distribution of products that require some territorial or other restrictions on licensees.

79. *See supra* text accompanying notes 8-11.

in other areas of competition law, particularly with respect to cartel enforcement and merger control policy and practices.[80]

1. Promote Global Policy Evolution Toward Acceptance of Superior Norms

At least in some cases, it could be beneficial to overcome differences regarding IPR and CP by achieving greater acceptance of superior norms and policies. This would be the case where practices and policies differ between jurisdictions, and where analysis and empirical evidence suggest that certain practices and policies are more likely to encourage innovation and promote dissemination of technologies than others.[81]

More rigorous application of mainstream economic principles should eventually lead to greater convergence in areas where differences persist today. One author examined existing differences in the evaluation of IP licensing agreements and concluded that the prospects for gradual harmonization appeared to be strong, as more and more Nations recognized the efficiencies of licensing arrangements that were designed to implement cost minimizing arrangements.[82] He also suggested approaches to economic analysis that, in his view, should be acceptable across jurisdictions.[83]

The differences among jurisdictions in the assessment of single firm conduct involving IPR are even more significant than in the area of license arrangements.[84] Even within single jurisdictions, the standards applied to single firm conduct by courts and competition agencies, including refusals to license, are not always entirely consistent.[85] Both aspects of this inconsistency

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80. *See* The Work of the International Competition Network Related to Merger Review and Procedures, *available at* http://www.internationalcompetitionnetwork.org/notification.html; *see also* OECD, Recommendation of the Council on Merger Review, *available at* http://webdomino1.oecd.org/horizontal%5Coecdacts.nsf/Display/907BCFEA6DDFCA41C1257013005B86E1?OpenDocument (last visited June 1, 2005).

81. Convergence towards superior norms may be limited to countries that are at similar stages of economic development. Some countries may be in different economic positions, and may find IP and CP, as well as enforcement norms, that differ from the norms in other jurisdictions are preferable in order to maximize consumer welfare in their jurisdictions.

82. *See* Alden F. Abbott, *Intellectual Property Licensing and Antitrust Policy: A Comparative Perspective*, 34 LAW & POL'Y INT'L BUS. 801, 826 (2003).

83. *See* Abbott, *supra* note 82, at 826.

84. *See id.* at 809.

85. *Compare, e.g.*, Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d

suggest that convergence may be even more difficult in dominance or monopolization cases involving IPR. However, these aspects also suggest that the potential benefit from convergence could be substantial. As in the area of license agreements, various changes could lead to a wider use of better enforcement standards: (1) more rigorous application of mainstream economic principles; (2) greater recognition that competition enforcement should, in the first place, encourage innovation, even by firms with significant market power; and (3) better understanding of how firms with significant market power can strategically use IPR to create entry barriers beyond the scope of the rights they hold.

2. Reduce Avoidable Costs

Merger review laws and practices are also a good example for better coordination to reduce costs to firms and agencies.[86] This goal is justified also with respect to IPR and competition law. If licensing activities, for example, are considered desirable because they help diffuse technologies, then lowering the costs of these activities makes sense, as lowered costs will make it more likely that the activities occur. If the costs of seeking partners outside a firm's jurisdiction are manageable and the legal environment for licensing arrangements is based on familiar principles (if not identical principles), firms without extensive international activities and experience might be more likely to seek partners outside their own jurisdiction. Thus, lowering the risks of unexpected costs and consequences for business strategies could encourage more international activities, and therefore more competition.

B. *Cooperation Across Jurisdictions*

1. Within Disciplines

Continued cooperation among competition agencies and across jurisdictions can improve enforcement standards, especially as new issues develop in information based industries. Ultimately, such cooperation should eventually lead to greater convergence toward best practices in certain areas such as IP licens-

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1195 (9th Cir. 1997) *with In re* Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1077 (2001).

86. *See supra* note 80.

ing, and, ultimately, the development of internationally recognized superior norms. CP agencies have experience with this kind of cooperation, though mostly in areas other than IPR, and are sometimes able to reach substantial results. Cooperation among competition agencies with respect to IPR has not yet occurred in the same, systematic way as in other areas.[87] Commentators have therefore suggested that this process be strengthened and expanded within the framework of different international institutions.[88]

However, our hypothesis is that convergence is more likely to occur if cooperation among CP agencies focuses on the interdependency of CP and IP policy regimes. Focusing on interdependency also includes efforts to improve CP agencies' understanding how IP policy and IPR affect competition and innovation, and how to effectively promote their views with IP policy makers and IP agencies. In fact, examining regulatory regimes from a competition angle is not a novel idea for cooperation among CP agencies. With respect to areas other than IP, CP agencies traditionally have shown great willingness to cooperate and consider jointly the competitive impact of regulatory regimes, as well as to advise non-competition agencies on the benefits of pro-competitive regulatory regimes.[89] Competition agencies traditionally have not focused on IP and innovation policy "regulatory regimes" in their cooperation efforts. However, the interdependency of IP systems and CP systems and their effects on innovation suggest that CP agencies should exchange views and cooperate also in this aspect of the IPR/competition inter-

87. Examples include OECD roundtables, UNCTAD work, and the bilateral U.S. / EU working group for IPR. *See, e.g.*, OECD, *Intellectual Property Rights*, *supra* note 24; OECD, *Competition Policy and Intellectual Property Rights* (1998), *available at* http://www.oecd.org/dataoecd/34/57/1920398.pdf (last visited June 1, 2005).

88. *See* Rill & Schechter, *supra* note 77.

89. OECD cross-sector work provides numerous examples, including, e.g., concerning regulatory reform and structural separation in network industries. *See, e.g.*, OECD, RESTRUCTURING PUBLIC UTILITIES FOR COMPETITION (2001), *available at* http://www.oecd.org/dataoecd/6/60/19635977.pdf (last visited June 8, 2005); OECD Reviews of National Competition Frameworks (reviewing regulatory reforms in many OECD member countries), available at http://www.oecd.org/document/43/0,2340,en_2649_33759_2489707_1_1_1_1,00.html (last visited June 8, 2005). The International Competition Network ("ICN") also recently started a working group on regulation and competition. *See* http://www.internationalcompetitionnetwork.org/aers.html (last visited June 7, 2005).

face.[90]

2. Across Disciplines

While intra-disciplinary cooperation at international level has a long tradition within CP regimes as well as IP regimes,[91] there has been very little, if any, interdisciplinary international cooperation. Yet, it appears that innovation policies could sometimes benefit from more international, interdisciplinary cooperation.

For example, the IP community may develop unique insights in IP intensive industries that the more generalist CP agencies lack. One example is the OECD Committee for Science and Technological Policy's study on IPR, Innovation, and Economic Performance.[92] The project is designed to provide factual evidence and analysis that shed light on the policy debate about IPR, and the project sets out implications for the development of IPR regimes that contribute more efficiently to innovation and economic performance.[93] Studies on the technology licensing practices can provide important information for CP agencies when they discuss policies concerning licensing agreements in areas such as biotech patents.

There could be also a role to play for well-informed CP agencies on an international level. When cooperation occurs among IP agencies, IP policy makers, and IP stakeholders, there has been a tendency to focus exclusively on strengthening of

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90. So long as CP agencies have different views, or unclear views, about how a CP regime can best interact with IP policy regimes to attain common economic objectives, convergence of competition enforcement standards might be less likely to occur. Some observers have expressed doubts about the effectiveness of a convergence process based on informal cooperation and exchanges of views and experiences. *See, e.g.*, David J. Gerber, *The U.S. – European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123, 131-35 (1999). We believe, however, that informal cooperation processes among competition authorities across jurisdictions can successfully lead to greater convergence. In addition to the examples discussed earlier (including the European Commission's adjustment to the TTBE), we find ample evidence for our position in, for example, bilateral U.S./EU relations as well as the work of the ICN and OECD. *See, e.g.* Kovacic, *Competition Policy Cooperation*, *supra* note 62 (discussing convergence activities involving the United States and the EU). A more detailed discussion of international convergence mechanisms, however, cannot be undertaken here, and will be the subject of future work.

91. *See supra* notes 6-7 and accompanying text.

92. *See* OECD, COMPENDIUM OF OECD ACTIVITIES RELATED TO IPR 1 (2005), *available at* http://www.oecd.org/dataoecd/60/61/34305040.pdf (last visited Mar. 19, 2005).

93. *See id.*

rights. As IPR policy makers look across borders to consider IPR policies in other jurisdictions, convergence typically will occur at the highest level of protection. Concerns about finding the best balance between stronger IPR and competition appeared to play a much lesser role.[94] Rarely, if ever, will harmonization of IPR and setting of international minimum standards for the definition of IPR include considerations of the effects stronger IPR can have on innovation and competition. In fact, it sometimes appears that moving discussions about new rights to an international level can be a mechanism for IP stakeholders to escape a national debate concerning the proper balance between IPR and competition.[95]

Such a trend can be observed, for example, in the bilateral relationship between the United States and the EU. For example, efforts in the European Union to introduce legislation providing for the patentability of computer programs referred to a great extent on the U.S. experience where the U.S. Patent and Trademark Office ("USPTO") and courts have long held that computer programs are patentable subject matter.[96] The creation of a "level playing field" was one of the arguments used by the Commission in support of the new IPR legislation.[97] While the Commission attempted to distinguish the proposed system from the situation in the United States, arguing that stricter patentability standards in Europe would avoid negative effects of software patents that are frequently criticized in the United States,[98] not everyone would agree that the European case was really sufficiently distinguished.[99] Despite the Commission's re-

94. *See, e.g.*, J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation With the Developing Countries*, 32 CASE W. RES. J. INT'L L. 441, 442-43 (2000).

95. For a discussion IPR treaty making negotiations in which countries may push for the inclusion of IPRs in international treaties which may not have sufficient domestic support see, e.g., Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 418-428 (1997) (describing – unsuccessful - U.S. efforts to include database rights in new WIPO Treaty, even though similar rights did not exist under U.S. law, and there was not sufficient domestic support for the introduction of such an IPR).

96. *See* Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the Patentability of Computer-implemented Inventions, COM (2002) 92 Final (Feb. 2002), at 5, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2002/com2002_0092en01.pdf.

97. *See id.*

98. *See id.*

99. *See, e.g.*, P. BERNT HUGENHOLTZ, A BRIEF CASE AGAINST SOFTWARE PATENTING (Presentation at the Conf. Industrial Prop. — Quo Vadis?, Oct. 7, 2003), *available at* http://www.ischiaconference-ipr.org/ppt/HUGENHOTLZ.ppt.

peated efforts, the proposed legislation has not yet been adopted. Conversely, EU legislation providing for IP protection of databases has triggered (so far also unsuccessful) efforts by stakeholders in the United States to lobby for the introduction of similar IP protection.

But the trend is not limited to U.S./EU bilateral contacts. Free trade agreements that are used to introduce IPR beyond minimum TRIPS standard are becoming more frequent. In the area of database rights, for example, competition agencies might have been able to raise questions about the wisdom of requiring third-world countries to introduce IP-based database rights along the lines of the European Union. Serious concerns have been raised by several scholars in Europe about the potentially anticompetitive effects of EU database legislation.[100] National courts have struggled to limit the rights of database owners by applying national and EU competition laws.[101] Language in some of the reported cases raises some of the concerns discussed earlier in the Paper that poorly designed IP regimes distort competition, which in turn may trigger reactions by CP agencies and courts and result in bad antitrust case law.

In such international discussions, CP agencies could, where appropriate, contribute to the debate by advocating the view that IPR should be defined — and such definition should be harmonized on an international level — only to the extent necessary to encourage innovation, and that creating or granting excessive exclusive rights could be undesirable from a competition point of view. The question whether certain IPRs are necessary to encourage innovation (or the same amount of innovation likely would exist without a given IPR and the social costs associated with it) will rarely have an unambiguous answer. But raising questions about competitive effects may add an important aspect to discussion whether and at what level IPR should converge.

This Paper does not suggest that CP agencies will frequently

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100. *See* P. BERNT HUGENHOLTZ, ABUSE OF DATABASE RIGHT 2 (2004), *available at* http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueAntitrust2004/Hugenholtz.pdf; *see also* John H. Barton, *The Balance Between Intellectual Property Rights and Competition: Paradigms in the Information Sector*, 18 EUR. COMPETITION L. REV. 440, 443 (1997).

101. *See* John Edwards, *Has the Dreaded Data Doomsday Arrived?: Past, Present, and Future Effects of the European Union's Database Directive on Database and Information Availability in the European Union*, 39 GA. L. REV. 215, 239 (2004).

have significant contributions to the process of international convergence of IP systems and cooperation among IP agencies. In fact, in many cases, if anything, they likely will support efforts to achieve greater harmonization and cooperation. For example, CP agencies will have no specific views on or will support improving the international patent filing system within the Patent Cooperation Treaty ("PCT") to facilitate international filings, eliminate duplication, and therefore reduce the costs of applying for patents. Strengthening copyrights in a digital environment by way of international treaties also appears at first sight unlikely to trigger any concerns about harmful effects on innovation and competition, so long as the rights are carefully defined. In this case, harmonized levels of protection might well facilitate cooperation among right holders and the exploitation of works, and therefore increase competition and consumer choice.[102]

C. *Greater Investment in CP/IP Research by CP Agencies*

As in the domestic context discussed above, taking a more active interest in IP policies in an international context and in the context of cooperation would impose significant burdens on CP agencies. In order to cooperate effectively, and to contribute to the debate about the competitive effects of IPR systems on competition, CP agencies would have to invest in research and build up expertise. If they want to contribute to a debate about IPR and IP policies in an international context, CP agencies must ensure in their own jurisdictions that they understand IP issues and can anticipate areas in which novel competitive issues are likely to emerge.

Other areas could include joint efforts by CP agencies to better understand competitive issues raised by overly broad biotech patents, which would require an extensive analysis of the biotech industry and the way patents may affect innovation.

There also appears to be a great need to invest in developing better understanding of CP/IP issues in emerging market economies. Much has been written about the effects of TRIPS IPR requirements on emerging market economies and continued efforts by industrialized countries to push for even higher levels of IP protection. The views expressed cover a broad spectrum from strong support for TRIPS standards and concerns

102. Further research would be required, however, to verify such an assumption.

about efforts in emerging market economies to undermine them,[103] to a rejection of TRIPS standards and concerns that stronger IPR in emerging market economies favor only right holders in industrialized economies.[104]

Emerging market economies with little domestic research and patenting activities may consider balancing the interests between right holders and (potential) users of technologies differently than industrialized economies. At least, this would be an intuitive reaction, given that they find themselves in a disadvantaged situation as regards the development of, and/or access to, new technologies. It is not clear, however, whether every emerging market economy will always be better off by adopting stricter enforcement standards for licensing agreements or unilateral conduct, or by adopting efficiency oriented enforcement standards. Too much emphasis on the transfer of existing technologies and on limiting the right to exercise exclusive rights could harm the interests of domestic firms who would benefit from more innovation based competition. And/or it could deter investment by foreign firms who will be less likely to transfer technology.[105]

Much more rigorous research would be required, taking into account the situation of domestic firms, before an emerging market economy develops an optimal IP and CP policy mix. In the long term, CP agencies might be able to contribute to the debate of proper levels of IP protection and help develop CP laws and policies as regards IPR and IP policy that take the specific situation of emerging market economies into account. This would require both research in emerging market economies about industry structures and the effects of IP regimes on innovation, and a focus in technical assistance programs on competition and innovation issues. But much work remains in this largely unexplored area in terms of research, evaluation of empirical data, technical assistance, and formulation of appropriate policies.

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103. *See* Silke von Lewinski, *Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39, 50-51 (1997); *see also* Rill & Schechter, *supra* note 77, at 791.

104. For a discussion of various interests involved in the debate, see Reichman, *supra* note 94, at 450-55.

105. *See, e.g.*, OECD, PROMOTING IPR POLICY AND ENFORCEMENT IN CHINA 23 (2005) (emphasizing that decisions in developing countries about strengthening IPRs should take levels of scientific, economic and industrial development into account).