# Inside the antitrust maze

There is more competition and antitrust scrutiny of IP owners than ever before. And it is only going to get more intense

By **Joff Wild**

The intersection between intellectual property rights and antitrust/competition law is getting ever more crowded, as both courts and regulatory authorities deal with a growing number of cases that involve what can often seem like contradictory legal rights. In this special roundtable a group of lawyers and economists talk about this vital nexus and offer their opinions on some of the major issues that could challenge IP owners as they face up to ever-increasing scrutiny in both Europe and the United States.

Those participating are: Pierre-André Dubois and Arabella Hinton of Kirkland & Ellis International LLP in London; David Lisi of Howrey LLP in East Palo Alto, and Julie Gabler of Howrey LLP in Brussels; and Jonathan Putnam of CRAI in Boston.

***Joff Wild:*** *To get things started – some people talk about competition law, others talk about antitrust law. Are the terms interchangeable?*

***Pierre-André Dubois:*** *To a large extent they are and we might say they are equivalent. The term antitrust historically described US anti-monopoly legislation aimed at preventing large corporations from using trusts for the creation of monopolies.*

*Competition law in Europe has its origins in the EC Treaty, the economic and social pillar of EU law, and is principally aimed at securing a common market free from restraints of trade, hence enhancing competition.*

*Essentially, both terms describe the same consumer welfare policy but, in practice, the approaches taken by the US and the EU may be different and sometimes divergent. For example, when considering companies in a dominant position, the EU is more sceptical about the behaviour of companies in dominant positions, considering that such companies have a "special responsibility" towards the other players in their market. The US, however, has a more economic effects-based approach.*

***Jonathan Putnam:*** *Yes, I agree with that. In general, the terms are interchangeable. Some actions incur liability in some jurisdictions but not others, such as the abuse of dominant position in the EU and Commonwealth countries, but not the US. This might be said to be a competition issue rather than an antitrust issue, but that has more to do with the fact that the EU and Commonwealth countries tend to refer to competition law while the US refers more often to antitrust law.*

***Julie Gabler:*** *Of course, it depends on who's talking and in what context. Generally, in the US, when someone speaks of antitrust they are referring to specific statutes, including those aimed at regulating certain types of monopolistic and cartel behaviour by entities with market power, as well as pricing and merger activities. These statutes generally require an economic analysis of the challenged behaviour and are largely independent of rules or laws governing other disciplines such as intellectual property, for example.*

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*Competition law, as the term is used in the US, may be thought of as a much broader, inter-disciplinary area that seeks to apply equitable principles as well as common law and economic analyses to address a broader array of legal issues arising at the intersection of intellectual property, commercial law and, of course, antitrust.*

*In Europe, as Pierre and Jonathan say, competition law encompasses the US concept of both antitrust and competition law. There's also the regional distinction in the EU – Europeans talk about competition law, whether referring to a specific law (Article 81/82 of the EU treaty (the equivalents of Sherman 1 and 2)) or the field more generally.*

***JW:** What kind of antitrust competition issues might IP owners typically find themselves involved with?*

***JP:** There are a number of claims that we typically come across.*

*There is fraud on the patent office/inequitable conduct in patent prosecution where the claim is that sham infringement litigation (using a patent known to be invalid) is being employed as a means of monopolising, or attempting to monopolise, the market.*

*Patent misuse is another one. Here, the patentee is said to be extending its exclusive rights in time (beyond the expiration date), space (beyond the jurisdiction) or market (eg, by tying the purchase of a non-patented good to the purchase of the patented good).*

*Essential facility-type claims involve accusations that a patentee is monopolising by attempting to exclude those other than itself who would produce a product that is compatible with the patented product.*

*Patent pools cover multiple patentees that jointly license their technology, which is a generally pro-competitive activity, but the particular terms are allegedly anti-competitive.*

*With standard-setting, the patentee may agree, as a condition of having its patent accepted into an industry standard, to license on fair, reasonable and non-discriminatory (FRAND) terms, but fail to do so (or fail to disclose the existence of a patent when proposing a standard).*

*Finally, there are licences that restrain trade. For example, a branded pharmaceutical manufacturer faces entry by a potentially infringing generic manufacturer; the brand sues the generic; and as a condition of settlement the brand grants a licence but allegedly pays the generic to delay its entry into the market.*

***David Lisi:** I certainly agree with Jonathan's comments. Patent holders may be challenged on the basis that they have misused their patents. For example, this might be by conditioning a licence on the agreement to license other patents or products which are not needed by the licensee, or entering into licence agreements that require royalties past the date of patent expiration. Another area of concern arises in the context of* ex ante *standard-setting licences; that is, licences where the IP holders agree together on the maximum royalty rate and other terms they will demand if their IP is incorporated into the standard. This may raise concerns of price fixing by horizontal competitors that are contributing IP to the standard or, equally, concerns of buy-side attempts at monopolisation where competing licensees conspire to drive royalties to artificially low levels and, ultimately, discourage further innovation.* Ex ante *licences will be judged on a case-by-case rule of reason analysis.*

*More broadly, the EU restricts IP holders who abuse a dominant position with respect to competitors. An example of such abuse includes the behaviour discussed in the recent EC decision requiring Microsoft to change its licensing practices and to decouple its media player from its operating system. The Commission has recently opened a new investigation of Microsoft's licensing practices.*

***Arabella Hinton:** Three key areas where competition concerns often arise for IP owners are as regards: licensing arrangements; the obtention of registered IP rights; and the enforcement of those rights.*

*In the EU, Article 81 prohibits agreements having as their object or effect the restriction of competition. As such,* de facto*, many licence agreements can be caught by Article 81. Many technology licensing arrangements will be safe harboured as a result of the Technology Transfer Block Exemption Regulation (TTBE). The application of the TTBE depends on the market share of the parties concerned and the TTBE distinguishes between competitors and non-competitors. However, IP owners need to be careful when imposing terms on licensees, including – but not limited to – territorial restrictions and fixing royalties or grant-back obligations.*

*Article 82 prohibits the abuse by any business of its dominant position. Evidently, obtaining IP protection is not unlawful. However, if a company fails to follow the administrative rules by, for example, not disclosing certain facts to the patent office or misleading the patent office and it is in a dominant position in a defined market, its conduct could be seen as in breach of Article 82. This was the issue in the* AstraZeneca *case where AstraZeneca was alleged to have failed to disclose certain material facts to national patent offices when obtaining SPCs in relation to patents for its leading drug for the treatment of stomach ulcers. And while the ownership* per se *of IP rights by a dominant company is never prohibited, the exercise of those rights can be.*

***JW:*** *How might an IP-related investigation be triggered?*

***JG:*** *Regulatory authorities might be prompted to investigate alleged anti-competitive activities by complaints from competitors, or on their own initiative based on news reports, private litigation or a staff investigation.*

***PAD:*** *Yes, IP-related investigations in the EU are likely to be triggered through complaints by licensees or third parties resulting from behaviour by IP holders in the marketplace, either to the relevant national competition authority in a member state (NCA) or directly to the European Commission. Recent examples and current cases before the European Commission include* Microsoft *(which no doubt has set the path for a new era in EU investigations of IP holders),* Apple *(now settled and which dealt with the pricing for music downloads),* Qualcomm *(dealing with alleged abuse of conduct and failure to license patents on FRAND terms for the WCDMA standard) and* Rambus *(over allegations of patent ambush).*

*The European Commission can also instigate an investigation into behaviour by undertakings regarding their IP rights where it has concerns as a result of information from independent sources. A recent example is the sector enquiry into pharmaceuticals announced by the European Commission in the middle of January following surprise inspections. The Commission is looking into the possibility that pharmaceutical companies have distorted the market by certain activities, including the settlement of patent disputes and the use of vexatious patent litigation.*

*IP-related concerns may also be triggered from merger notifications, for example, where the acquisition of an undertaking would lead to a strengthened IP portfolio for a dominant company or where a party to the merger would then be able to leverage its position into another market as a result, raising concerns under Article 82. It follows, therefore, that compulsory licensing may be imposed as a condition for merger clearance.*

***JP:*** *There are three main ways that investigations are triggered, in my experience. Two have already been covered by Pierre and Julie, namely: following a request from a licensee (the extent to which a licensee can challenge a licensor is evolving, certainly in the US following the* MedImmune v Genentech *case decided by the Supreme Court); and as the result of government action – in patent pools, for example, the harm may occur to consumers, who do not have sufficient interest to bring private suit. However, on top of these two, there are also situations where an investigation may begin following allegations made as the defence or counterclaim to a claim of infringement.*

***JW:*** *In your experience, what are the attitudes of regulatory authorities and courts towards the IP and antitrust intersection?*

***AH:*** *IP rights confer exclusivity upon their owners, whereas competition law seeks to keep markets open; therefore, conflict exists as it is difficult to strike a balance such that innovation is encouraged and anti-competitive behaviour is reduced.*

*The US courts have noted that both competition law and IP "are aimed at encouraging innovation, industry and competition", while the European Commission has observed that there is "no inherent conflict between intellectual property rights and the Community competition rules".*

*The US generally considers that IP transactions promote rather than restrain competition and takes a broader approach. Territorial restrictions in licensing arrangements are rarely categorised as unlawful in the US, whereas the opposite can be said for the EU. Furthermore, US antitrust treatment of refusal to deal cases tends towards an immunity from antitrust intervention for unilateral conduct of*

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*dominant undertaking with IP, whereas EU competition law takes a more balanced view, holding that the exercise of the IP rights can be limited in exceptional circumstances, such as where there is a risk that market power from one market may be leveraged to another.*

*Regulatory authorities and courts seem to be aware of the tension inherent in the protection of IP and also maintaining an open market, yet case law is still in relatively early stages of development on the subject.*

***JP:** The party line in the US is that the two are in harmony. The FTC-DOJ* Antitrust Guidelines for the Licensing of Intellectual Property *state: "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare"; this citing the CAFC's 1990 decision in* Atari Games Corp v Nintendo of America, Inc*, which states: "The aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition."*

*As a matter of economic theory, the claimed harmony is true: there exists an optimal incentive mechanism, which uses temporary exclusivity to raise prices, and which maximises long-run consumer welfare, just as the competition laws seek to do.*

*As a matter of practice, however, there is considerable tension and even contradiction in the way that the IP and antitrust laws are implemented. Most prominently, antitrust law seeks to reduce consumer prices; IP law seeks to raise them. Antitrust law has no practicable means (or governing principles) for determining whether a temporary increase in price is welfare-increasing or not. Even more fundamentally, antitrust law often does not successfully distinguish between nominal prices and quality-adjusted prices. If nominal prices rise, but quality-adjusted prices fall, consumers are better off. That benefit may escape the analysis of the antitrust authorities; and even when they recognise it in theory, it can be difficult to measure.*

***DL:** Over the past two decades, courts in the United States have become much more conservative in their willingness to apply antitrust restrictions to IP owners. Partly, this is a result of the theory of innovation markets; that is, the fact that even monopolistic behaviour by an IP owner may be rendered harmless by technical innovation by competitors well before a judicial or administrative remedy can be adjudicated. By contrast, regulatory authorities in the EU seem to be more proactive in seeking to restrict the unfettered use of IP ownership to restrict competition.*

***JW:** On a general level, are the antitrust/competition authorities and the courts generally sympathetic towards the needs of IP owners? Do they understand the issues?*

***JP:** Since there is no good analytical framework for balancing static and dynamic welfare interests (which means no one really understands the issues), the sympathy given to the respective needs of IP owners and consumers waxes and wanes with various political cycles. In general, since the creation of the US Court of Appeals for the Federal Circuit in 1982 (which created a uniquely unified appellate court for the patent system), patent owners have gotten a much more sympathetic hearing than they did from 1945-1980, at least in the US. The last 10 years have coincided with a period of relatively lax antitrust enforcement. This may also be a form of sympathy, but that is not to be confused with any analytical or conceptual advance. The issues themselves have, if anything, become murkier.*

***JG:** Yes, US courts seem to be willing to side with IP owners more consistently than the EC regulators. The EC focus, as exemplified by the* Microsoft *decision, seems to be to strike more of a balance between the rights of owners and the need to encourage innovation by competitors for the benefit of consumers.*

***PAD:** Once an IP right is exploited by means of a licence or some other arrangement, the effect on trade is a matter for competition law. However, antitrust policy must not constrain the legitimate exercise of IP rights.*

*Generally, the US will avoid interfering in complex IP cases for fear of undermining the right to innovate and focuses instead on the IP-holder's intent and whether there is objective business justification to refuse to license. The DOJ is more concerned with conditional refusals to license, considering that unconditional refusals "would compel firms to reach out and affirmatively assist their rivals". Europe takes a bolder view; in particular, where a dominant firm owns or controls access to an essential facility that*

*competitors in a downstream market rely on to compete – considering instead whether the refusal to licence will hinder the emergence of a new product.*

*Generally speaking, authorities are sympathetic to IP owners' needs. However, if they feel that there is abuse, then they will be prepared to intervene with a substantial amount of force. Clearly, the outcome of the* Microsoft *case has shown that the European Commission (and European courts) are prepared to clamp down when they feel an IP owner has been abusing its position. The fact that in mid-January, the Commission announced that it is opening two new investigations against Miscrosoft illustrates that IP owners should watch out.*

***JW:*** *Some say that the recent Court of First Instance (CFI) decision in the* Microsoft *case puts the EU on different path to other jurisdictions – particularly the US – with regard to antitrust/competition. Do you agree and, if so, what are the implications of this?*

***DL:*** *I wouldn't go so far as to say it is a different path so much as an approach emphasising different factors and with a somewhat different philosophy on how best to encourage innovation. It must be remembered, however, that the Commission's ruling against Microsoft was based on complaints by other US-based companies and although it requires Microsoft to enable Microsoft's competitors to interoperate with Windows domain architecture on an equal footing with Windows operating systems, it nonetheless requires open-source developers to ensure that their products do not infringe on Microsoft's patents. It remains to be seen whether this limitation will promote the kind of innovation the Commission hopes for.*

*I note only that the US antitrust decision against Microsoft ultimately required Microsoft to make its application programming interface available to competitors so long as such use didn't touch on the "anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product". It would seem, therefore, that the jurisdictions are not so dissimilar in their paths.*

***AH:*** *The Commission weighed up the protection conferred by an IP rights holder with the requirements of free competition under the EC Treaty. This decision has been criticised in the US, which advocates a rule of reason test; the DOJ decided not to extend restrictions placed on Microsoft in its antitrust settlement with the US in 2002. Indeed, the DOJ recently incurred the wrath of Commissioner Neelie Kroes by expressing concerns that: "The standard applied to unilateral conduct by the CFI, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and disparaging competition…In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors."*

*A consequence of this split approach may be forum-shopping from rival companies of dominant companies, who perceive that Brussels is their safest option to secure a sympathetic reception for their complaints. It is difficult to say that the position taken in Europe will in fact deter innovation.*

***JP:*** *From my perspective, the* Microsoft *case is sufficiently* sui generis *that it is hard to generalise. EU competition law is, as a whole, different from US law, with or without* Microsoft.

***JW:*** *Given that antitrust/competition issues are usually decided on a jurisdiction-by-jurisdiction basis, is it possible for IP owners to have a cross-border or global antitrust strategy?*

***PAD:*** *Provided rights owners keep fully briefed as to developments in the IP/antitrust intersection, and are aware of the sympathies of the various regulators, they should be able to successfully manage the exercise of their IP moving forward.*

*It appears that they are best placed to monitor their behaviour in light of EU competition policy, as it is stricter than the US – therefore, compliance should broadly ensure a safer global strategy. This is particularly the case given that the European Commission has a clear goal of tackling competition problems in the European market, irrespective of parallel impacts in other jurisdictions.*

*IP owners should also bear in mind that the Bush Administration in the US was markedly lenient towards antitrust violations, and that a new president could bring in tougher policies. The DOJ has already*

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*indicated a desire to converge approaches, stating that: "There is a significant chance to develop global consistency in this most vital area of commerce." However, for the time being, neither side seems to willing to concede to the other.*

*There is also the added complication that competition rules in Europe are decentralised and the protection of IP rights is ultimately a matter for national courts. IP law is, unfortunately, not well harmonised throughout the EU and therefore rights owners will have to consider national tensions as well.*

***JP:** Note that, as Pierre says, many IP issues are also decided on a jurisdiction-by-jurisdiction basis; if anything, IP law is more balkanised than antitrust law.*

*Another thing favouring a global strategy is that antitrust law is more closely tied to economics, the principles of which can be universalised more readily than the principles of property that underlie IP law.*

*That said, a global strategy will never (in our lifetimes) be a uniform strategy. That strategy often takes the form of adhering to private or quasi-private rules (eg, for contract interpretation, standard-setting etc) that may be more uniform in application than are national laws. It is simply not feasible to define a market and otherwise state (or defend against) the elements of an antitrust claim in more than a handful of jurisdictions.*

***JG:** Just as global companies have to fashion employee regulations and corporate reporting rules in accordance with the rules promulgated by different jurisdictions, so too companies must take into account the differing competition rules of different jurisdictions. I think, however, it is possible and necessary for global companies to fashion a cross-border competition strategy to ensure uniform practices within the organization and to monitor compliance better. In fact, the competition rules in the EU and US are more similar than they are different. The key is to fashion a strategy in consultation with legal advisers who are as familiar with the different jurisdictions' rules and unique facets as they are familiar with the company's business and market space. There is no "one size fits all" policy.*

***JW:** Do you think there is scope for more meaningful cooperation between competition/antitrust authorities in various parts of the world when it comes to looking at IP-related issues?*

***JP:** Of course. But there is a vast difference between the scope for cooperation and the interest in cooperating. As long as it has a comparative advantage in innovation, the US will favour policies that compensate innovators. The US would like to cooperate with other countries in ensuring that compensation, as well it should. But other countries would like the US to cooperate in maximising (short-run) consumer welfare, by tilting the field in favour of competition. Until there is a meaningful benchmark, on which everyone can agree, that points to some kind of optimal compensation, the scope for cooperation will be continually undercut by the divergent political and economic interests of the national antitrust enforcement agencies.*

*One relatively recent economic advance that may assist in this is the measurement by economists of the effect of US R&D on productivity growth in other countries. This is an important form of private foreign aid. When that aid is recognised, the US will have greater economic, political and moral authority to emphasise compensation to innovators in the harmonisation of IP and antitrust laws worldwide.*

***DL:** Cooperation between enforcement authorities certainly exists and from all indications seems to be on the rise. As a result, it is increasingly important for global companies/undertakings to have a complete and nuanced understanding of the various antitrust/competition law legal regimes in which they operate, including the not-so-subtle distinctions between grants of investigative powers and discovery rights, and exemptions, including privilege protection. Having this understanding before the corporation/undertaking is faced with a potential antitrust/competition issue enables the corporation/undertaking to evaluate leniency better and other decisions that often need to be made very early on from a global, rather than a regional or national, perspective.*

***AH:** No doubt on this one – there is great scope for better cooperation between authorities globally. Currently, the different authorities are pursuing their own agendas without entering into any really meaningful dialogue to determine how their decisions fit into a global policy regarding the interface between IP rights and antitrust/competition laws.*

*Authorities and agencies could review their guidelines regarding licensing*

arrangements and other IP-related conduct in order to ensure that they are adopting similar practices and aligned in approach; for example, as regards the distinctions between vertical and horizontal agreements and competitors and non-competitors. Innovation will be enhanced if IP holders and licensees are guaranteed a broader and more consistent protection.

In May last year, the European Commission adopted a Communication entitled "A stronger EU-US Partnership and a more Open Market for the 21st Century" containing a range of practical policy proposals for a joint EU-US strategy to boost economic integration and to strengthen relations. The communication calls for better cooperation in the areas of antitrust policy. This indicates a future intention to cooperate, although it is by no means clear which regulators will concede to the others with respect to the various jurisprudential issues concerning the IP/antitrust interface.

***JW:*** *What powers do the authorities possess in terms of conducting an investigation and in handing down decisions? On what grounds can their decisions be appealed and how do you build a successful case against them?*

***JG:*** Authorities in the US and in the EC have broad powers to bring investigations based on their own initiative or in response to complaints by other players in the market (eg, competitors, customers, suppliers). In aid of such investigations, authorities have the ability to compel the production of documents and testimony from a respondent or from other market participants. The recent Microsoft decision in Europe also demonstrates the broad remedial powers to impose fines and equitable remedies possessed by the authorities. In most cases, the target of an investigation will prevail if it can demonstrate, among other factors, that competition is not impeded by the alleged anti-competitive activities, that new competitors are likely to enter the market, that innovation will probably alter the competitive landscape in the near future and that consumers benefit from the present competitive landscape.

Also, in the US, as you know, a court or agency decision can be upheld if the outcome was right for any reason, not just the reasoning identified in the underlying decision/opinion. In the EC, a decision can be upheld only on the exact grounds of the original decision. So, if the CFI or ECJ thinks the outcome was right but the stated reasoning was wrong, then it has to annul the decision because the reasoning was wrong.

Finally, in the EC, there is no protection for work product of in-house lawyers or for their communications with their internal management. In fact, only outside lawyers barred in an EC member state enjoy privilege protection for their communications with their clients and for certain aspects of their work product. Advice from a US lawyer advising on US or EC law who is not a member of an EC bar may not be privileged vis-à-vis DG Competition. While this exact scenario has not been tested, there is case law strongly suggesting that this would be the outcome of such a challenge.

***PAD:*** In the EU, the Commission has extensive powers of investigation, although it cannot engage in fishing expeditions. Investigations may occur with notice or as dawn raids.

In urgent cases, due to the risk of serious and irreparable damage to competition, the Commission may order interim measures on the basis of a prima facie finding of infringement.

If it concludes that there is merit to a complaint from a third party or from the results of its own investigation, the Commission will send a Statement of Objections to the relevant parties when instigating formal proceedings. An oral hearing may be requested by any party with sufficient interest in the matter. The Commission will then issue a formal decision and may impose behavioural or structural remedies and accept commitments from undertakings to meet any concerns. Fines may be imposed where Article 81 or 82 is infringed in accordance with the Commission's sentencing guidelines.

The CFI is seized with reviewing the legality of all Commission decisions and may increase, reduce or cancel any sanction imposed by the Commission, grant interim relief or declare that the Commission has wrongly failed to act. Appeals from the CFI to the ECJ may be made only on a point of law resulting from: lack of competence of the CFI; breach of the CFI's procedure, adversely affecting the appellant; or breach of EC law.

In addition to the Commission, each NCA in each member state has similar powers of investigation. Sanctions at the national level and decisions of the NCAs are subject to review by the national courts in each member state.

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***JP:*** *You ultimately win competition cases because you can show that certain behaviour is or isn't welfare-increasing. That criterion implicates economic theory, empirical measurement and law, in various degrees. Some of the best industrial organisation economists, who are well-versed in all of these areas, are used to building a successful case, but even then their ability to characterise the issues definitively and succinctly is undercut by the absence of a clear, unified framework for determining how to maximise long-run consumer welfare. For the foreseeable future, there will be room for disagreement, and therefore grounds for appeal, regarding what constitutes the efficient exploitation of intellectual property rights.*

***JW:*** *How can IP owners best avoid falling foul of the antitrust/competition authorities in the first place?*

***AH:*** *It is not the existence of IP rights that causes problems under antitrust/competition law; rather, it is their exercise. Therefore, rights holders need to ensure that they enforce the IP in accordance with guidance set out by the relevant authorities. Companies doing business in Europe should become familiar with the TTBE in order to obtain a better understanding of the Commission's likely treatment of certain practices. Likewise, in the US, IP holders should be aware of the* Antitrust Guidelines for the Licensing of Intellectual Property *and related jurisprudence. Companies should consider effecting competition compliance training for contract managers and other key staff involved in licensing arrangements, and should keep a close eye on all developments in this area.*

*Companies, in particular those with dominant positions in the marketplace, should be particularly wary of using their IP to leverage themselves into other markets; for example, downstream. IP holders should also avoid imposing lengthy restrictions on licensees, or restrictions that go beyond what is necessary to achieve the protection sought in relation to the property. Practices such as typing and bundling should always be approached with great caution.*

***JP:*** *The quick answer is by meekly enforcing their property rights, at low prices. But I assume you mean: "How can profit-maximising IP owners best avoid falling foul of the antitrust/competition authorities?"*

*Until there is a better means of determining what constitutes anti-competitive behaviour and how to measure it, my tactical advice to innovators would be to ensure that they continue to innovate, even after they have made their innovation. Pretend as though you face post-innovation competition, even when you don't. No one likes to see people resting on their laurels, even if the person's initial invention is very important to others. You can probably make more money if you permit competition and remain one generation ahead of your competitors than if you try to exclude all competition and just collect your due.*

*Naturally, ongoing innovation does not immunise you against blatantly anti-competitive conduct. But it blunts the criticism implicit in Sir John Hicks' description of a monopolist: "The best of all monopoly profits is a quiet life." A high-tech firm would be wise not to collect on that profit.*

***DL:*** *Global companies need to have a current antitrust/competition policy that is clearly enforced throughout the organisation. Sales and licensing departments especially need to be interviewed at the policy's drafting stage so that the legal advisers understand their needs and the competitive landscape within which they operate. These departments especially need to understand the policy once enacted and should get continuing education about competition issues yearly. In the unhappy event of an investigation, the company must move aggressively to preserve and collect documents relevant to the inquiry, and should immediately hire counsel with extensive experience in these matters to help fashion a defence.*

***JW:*** *How do you see the next few years panning out with regard to IP and antitrust/competition?*

***JP:*** *Litigation over standard-setting and FRAND will increase, and will initially complicate the standard-setting process until FRAND becomes a well-defined term.*

*It will be interesting to see whether open source is a business model or an ideology. If it is a business model, the argument for certain types of IP becomes less compelling.*

*There will be an increasing need to define communally patent exhaustion and other trade-related aspects of intellectual property. The AIDS crisis has brought to the fore an important question: should*

*patentees be allowed to price-discriminate across countries? In other words, (why) should poor people in poor countries pay less than poor people in rich countries?*

***JG:** I think courts and regulatory authorities will continue to struggle with balancing the rights of patent holders with the need to encourage competition. Such disputes will increasingly assume global significance, especially where entities possessing large market shares, such as Microsoft, are involved. At the same time, patent holders will continue to try to extend their market power through patents and licences designed to defend their lawful monopolies in proprietary technology. At the end of the day, the ability of competitors to continue to innovate will be a significant factor in determining where the courts and the authorities come out on these questions.*

***PAD:** The next few years will no doubt be exciting. The EU has indicated that it will continue to take a tough stance with dominant and super-dominant companies with respect to the acquisition of strategic IP rights and technologies, and their behaviour in the market. The new investigations into Microsoft clearly show that the Commission means business. And generally, the last two to three years have seen more IP-related cases being investigated than ever before.*

*The Commission is currently investigating many companies for alleged abuse of their dominant positions, with these cases raising interesting questions regarding the IP/antitrust interface, including in relation to patent ambush, standard-setting organisations and FRAND issues, and general licensing practices. We expect to see more and more cases investigated by the Commission and NCAs. Also, with the emergence of private actions for damages, we expect an increasing number of cases before the national courts where damages will be sought for the abuse of IP and where the validity of IP rights will be challenged on competition law grounds. National courts used to see defences based on competition grounds with a high degree of scepticism. Going forward, this will change.*

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