Submission to the Public Policy Forum relating to the Competition Act Consultations[1].

by Russell McOrmond[2]

Introduction

  While this specific round of consultations[3] do not include the issues I wish to bring forward, I felt it appropriate to offer them in a short submission such that they may be included in the near-future. Most of my work is in relation to Free/Libre and Open Source Software(FLOSS)[4] public policy and have included recommendations on competition policy in previous submissions including a consultation paper for the Innovation Agenda[5]. This Innovation Agenda submission included a section titled: Competition Bureau's Intellectual Property Enforcement Guidelines (IPEG) as example of policy conflict[6].

  My primary interest is to encourage the competition bureau to re-visit IPEG[7] , taking into consideration the unique public policy implications that FLOSS introduces. There is ongoing work on revising copyright policy[8] which the competition bureau should be involved in as suggested by of IPEG Part 6: Competition Policy Advocacy[9]. Related to this work I recently presented a report on software patents[10] that was commissioned by ICT branch of Industry Canada.

  In addition to this submission to the Competition Bureau I am making a submission to the House of Commons Standing Committee on Canadian Heritage in relation to their section 92 review of the copyright act[11]. My hope is that the competition bureau will include the copyright act submission in their thinking around competition policy advocacy.

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1 The latest version of this document is available as http://www.flora.ca/competition2003 . It is made available in OASIS open office XML (http://www.oasis-open.org/committees/tc_home.php?wg_abbrev=office) , Portable Document Format (PDF) http://www.flora.ca/pdf.shtml and as HTML (http://www.w3c.org/MarkUp/)

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   His personal website which includes commentary related to copyright policy is at http://www.flora.ca/russell/

3 Competition Act Consultations care of the Public Policy Forum   http://www.ppforum.ca/competitionact/ (accessed September 30, 2003)

4 I attempt to define the term Free/Libre and Open Source Software (FLOSS) at http://www.flora.ca/floss.shtml

5 Submission to Innovation Strategy, 2002 http://www.flora.ca/innovation-2002.shtml (accessed September 30, 2003)

6 IPEG section has direct link at http://www.flora.ca/innovation-2002.shtml#ipeg

7 http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01992e.html (accessed September 30, 2003)

8 Heritage Committee is currently reviewing the section 92 report that was brought to parliament last year. I am making a submission to this committee which would be relevant for the competition bureau to review as well http://www.flora.ca/copyright2003/ as I include relevant competition issues.

9 http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01992e.html#Part%206 (accessed September 30, 2003)

10 http://www.flora.ca/patent2003/ (accessed September 30, 2003)

11 http://www.flora.ca/copyright2003/ (accessed October 1, 2003)

Summary of policy suggestions

1. Do analysis on Free/Libre and Open Source Software (FLOSS), contrasting with "software manufacturing"[12], including not only price issues but also more important issues such as vendor independence, protection of consumer rights (including guaranteeing user serviceability, accountability, access to source code which mirrors governmental access to information laws), and other offerings of the FLOSS model

2. Re-visit IPEG with knowledge of FLOSS public policy, removing promotion of interface copyright or interface patent that currently exist in poor examples

3. Competition bureau should get involved in current Copyright policy consultations as well as helping to instigate new consultations on patent policy

4. Considerations beyond price should be included in determining whether there are competition problems in a given market, especially when there are multiple methodologies offering similar products and/or services

Competition Bureau's Intellectual Property Enforcement Guidelines (IPEG)

On September 21, 2000 , the Competition Bureau released its Intellectual Property Enforcement Guidelines. Unlike the 2001 Copyright consultation process[13], the Open Source community was not made aware of the consultation process and thus did not have a chance to send in any input.

   The document is oriented toward those who already have strong support for specific interpretations of Intellectual Property policy and who need explanation of the applicability of Competition policy when Competition and Intellectual Property policy come in conflict. The introduction tries to gloss over some of the huge differences in the purposes of these laws, and the need for balance between the creation of monopolies that IP laws enforce and the protection from the undue influence and other harm of monopolies that Competition law deals with.

    It is critical that the Competition Bureau become involved in ongoing copyright consultations and possible future patent policy discussions (on information process patents, such as software and business models) as described under part 6 of IPEG. This is a clear case where competition policy advocacy is needed.

Relevant Software history

   The origins of the FLOSS movement can be found in the formation of the software sector generally. Prior to the 1960's software was always bundled with hardware as part of an integrated device. You had a device that could do word processing, but it could not be easily reprogrammed to do other work. Hardware was obviously manufactured, distributed and sold on a per-unit basis and thus the bundle of hardware and software was marketed that way.

   In the 1960's the software sector formed with the separation of software from hardware. At this point

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12 "Software Manufacturing" is a term used to discuss those methodologies and businesses in the software industry which treat software as a product which is manufactured, distributed, and sold on a per-unit price.

13 The FLOSS community was very involved in the 2001 copyright consultation process http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwGeneratedInterE/Home including starting a focum and related website at http://www.digital-copyright.ca/

two very different parts of the software industry were formed. There were those who felt that software should be treated the same as hardware, with those in the "software manufacturing" branch relying almost entirely on business models from the manufacturing sector. This subset of the software industry has been very successful from the 1960's up to today.

Another group of people noticed that software, being intangible and naturally non-rivalrous, has very different attributes than hardware. They felt that there was no need to arbitrarily limit software and software business models to those from the manufacturing sector, and think of per-unit royalty payments as simply one business model among many.

The growth of the Internet was simultaneous with the growth of FLOSS. These two innovations are co-dependent in that much of the core technologies of the Internet are FLOSS[14] (or derivatives of FLOSS[15]), and FLOSS development methodologies thrive best in the open and international collaborative environment created by the Internet.

In my FLOSS public policy work I try to ensure policy makers understand the nature of software. In ICT tools and in cyberspace software code is the law[16] that governs what citizens can do. I strongly advocate for ensuring that software that controls ICT, automates government policy, or electronically counts votes has the same requirements of citizen input and accountability[17] that physical-world laws should.

Is FLOSS understood as a "Relevant Market"?

An important question that the Competition Bureau needs to ask itself is: Is Free/Libre and Open Source Software adequately understood as a relevant market, and a market separate from "software manufacturing"?

To help raise this question I tried to bring a complaint to the Competition Bureau in relation to some vague legal issues with the DVD-CSS[18] technology. This technology is claimed to be owned by the DVD Copy Control Association (DVD CCA)[19]. I offered some details of the issue first in a submission to Industry Canada as part of the copyright consultation that was a reply to the Canadian Motion Pictures Distributors Association (CMPDA) submission [20].

In this case, the IP claimed by the DVD-CCA is excluded from use by any FLOSS DVD playing software by virtue of the fact that DVD-CSS is claimed as a trade secret. Due to the open and publicly accountable nature of FLOSS, implementing technologies based on trade secrets in FLOSS is not possible. This trade secret is embedded in any DVD-CCA licensed player.

This "secret" can be determined through simple reverse engineering the data on a DVD-CSS encoded

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14 The examples of BIND http://www.isc.org/products/BIND/ , Sendmail http://www.sendmail.org/ , and Apache http://www.apache.org/ entirely dominate their category. The category dominance of Apache is probably the lowest of the three and it represents over 60% according to Netcraft http://news.netcraft.com/archives/web_server_survey.html . The most well-known example of a FLOSS project is Linux, although as of yet it does not command the same dominance in the operating system category. On the desktop there are popular projects include Mozilla (previously Netscape) http://www.mozilla.org/ and OpenOffice.org http://www.openoffice.org/

15 Internet Explorer is a derivative of NCSA Mosaic http://archive.ncsa.uiuc.edu/SDG/Software/Mosaic/ which was the first FLOSS browser. Details of this licensing is available from a submission from co-founder of Spyglass in a submission to Microsoft anti-trust case http://www.microsoft.com/presspass/doj/11-10Krauskopf.asp . Mosaic was an early example of a dual licensed project with both FLOSS and a non-FLOSS licenses available.

16 See Lawrence Lessig http://www.lessig.org/ , author of The Future of Ideas and Code and Other Laws of Cyberspace

17 The access to source code and ability to share this knowledge with others that FLOSS enables can be considered similar to access to information laws for governments.

18 Content Scramble System, http://www.dvdcca.org/css/ (September 30, 2003)

19 DVD Copy Control Association, http://www.dvdcca.org/ (September 30, 2003)

20 McOrmond, Russell (2001) 2001 copyright reform: CMPDA reply. <http://www.flora.ca/copyright-2001-cmpda-reply.shtml> (September 30, 2003)

CD, so is in many ways it is already an "open secret". A public domain piece of software named DeCSS, which makes public this "secret", has been converted to many forms of protected free speech such as mathematical descriptions, dramatic readings, and even songs as part of a square-dance. Many of these can be viewed from the DeCSS Gallary[21].

Without purchasing a DVD-CCA licensed CD player, it is claimed in the USA that one cannot legally purchase and view a DVD-CCS encoded DVD movie. This ties the purchase of a DVD movie (one market) to the purchase of a specific subset of DVD players (a second market). This type of market manipulation is referenced under 'tied selling' which is part of section 77 of the Competition Act.

There is also an issue with the region encoding of DVD movies, which many believe to also be an issue with the Competition Act under barriers to trade.

When I received a reply from the Competition Bureau to my complaint, I was essentially told that that simple answer was that IP policy superseded competition policy. I did not know about IPEG at the time, but my reading of this document mirrors what this investigator told me.

The person who called me also indicated that they did a "relevant market" analysis and found that there was no price issues with DVD players. He suggested that licensed DVD players would need to be expensive for there to be a competition issue. He also suggested that since most movies are released in DVD Region 1 (North America), that there was also no barrier to trade.

This answer ignored the problem of the insurmountable barriers to market entry to the DVD player market that exists for FLOSS DVD players. The price of the existing proprietary players is not the only issue that should be investigated, but the entire inclusion of the FLOSS services market needs to be included in all policy analysis. Doing a simple price analysis may be appropriate when there is a single industry or production methodology that is serving a given market, but this is not the case for ICT tools. There are many important reasons why a consumer may favor a FLOSS-developed solution over a "software manufacturing" solution even if the price of the FLOSS solution were higher.

Bad IPEG hypothetical example

Part 7 of IPEG offers a few hypothetical examples that are used to demonstrate the application of competition law. The example that demonstrates the most critical problem with IPEG is "Example 8: Refusal to License a Standard".

In this example there is both a file format and a user interface, neither of which should not be offered any IP protection at all. This is a critical example for FLOSS creators and users as the very existence of office suites such as OpenOffice.org[22], and the adoption of other Open Source desktop software rely on these interfaces not being eligible for copyright or patent protection.

> CALCULATOR approached ABACUS and requested a licence(sic) to copy the words and layout of its menu command hierarchy (for the purpose of this example assume that permission was required since ABACUS had valid IP rights in these works). With permission, CALCULATOR could have relaunched its product with an emulation mode and a key reader, which would have given CALCULATOR the ability to read ABACUS files and ensured compatibility between the two products.

Why must we assume that permission was required, or that claimed IP rights are valid? These are cases involving the look-and-feel of the user interface for software, or a file format that should be able

21 Touretzky, D. S. (2000) Gallery of CSS Descramblers. Available: <http://www.cs.cmu.edu/~dst/DeCSS/Gallery>, *(September 30, 2003)*.
22 More information on the OpenOffice.org FLOS project can be found at http://www.openoffice.org (accessed September 30, 2003). It should be noted that this document was created with the software from this project.

to be able to be legally reverse-engineered. These are cases that should never be brought to the competition bureau as the invalidity of these claimed IP rights should be made clear within the copyright and patent acts.

If we substituted the word "CALCULATOR" for OpenOffice.org (specifically the spreadsheet component, called "calc") and "ABACUS" for Microsoft (specifically the component called "excel"), the example would almost become a real-life example. OpenOffice.org is an international community based FLOSS project (and thus is vendor-neutral) and not a company that can run into financial difficulties, but otherwise the issues are similar.

OpenOffice.org can read and write Microsoft Office files, and the look-and-feel (user interface, menu layout, etc) of OpenOffice.org is very similar to that of Microsoft Office. These two facts have been critical in the worldwide adoption of this Open Source alternative to Microsoft Office.

It should be obvious that if ever asked, Microsoft would never license these interfaces to either the OpenOffice.org community project, or to Sun Microsystems which originated OpenOffice.org when it released the StarOffice product to Open Source. Microsoft has been very public with its hostility toward the Open Source and Free Software movements, which represent the greatest threat to its existing monopoly and to its legacy business model.

One of the simplest ways for domestic governments to deal with illegal monopolies such as Microsoft (which has been tried and convicted in the USA) is to modernize IP and Competition policy to ensure that Competition policy takes precedence. One of the ways to accomplish this is for governments to simply not offer copyright or patents in areas such as computing interfaces that would create considerable competition problems.

The public policy position of not offering copyright on computing interfaces was specifically discussed in the 1991 European Union directive on the legal protection of computer programs[23] . The directive offers standardization and interoperability as important public policy justifications for this position. Interface patents are given as an area needing a "fair use" defense in Maureen A. O'Rourke's article[24] on patent law. It would be appropriate for the competition bureau to become fully aware of these policy alternatives and to offer advise to the relevant copyright and patent policy branches.

23 31991L0250, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
   http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31991L0250&model=guicheti
24 Maureen A. O'rourke, "Toward a doctrine of fair use in patent law", Columbia law review, volume 100, No. 5 (June 2000)