

**Abuse in the exercise of copyright: Is Mexico ready to use compulsory licensing as a remedy?**

The potential of copyright exclusivity to affect competition and the readiness of competition law tools in Mexico to bring balance

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## **MAIN TERMS AND ABBREVIATIONS USED**

CLs: Compulsory Licences

CFI: The European Court of First Instance

CFC: The Mexican Federal Commission of Competence

EC: The Commission of the European Union

ECJ: The European Court of Justice

EU: The European Union

FLAR: The Mexican Federal Law of Authors Right

FLEC: The Mexican Federal Law of Economic Competition

IMS Health Decision: The EC Decision in IMS Health (See Table of Cases)

IMS Health Judgment: The ECJ preliminary ruling in IMS Health (See Table of Cases)

IP: Intellectual Property

NAFTA: The North American Free Trade Agreement.

Magill Decision: The EC Decision in Magill (See Table of Cases)

Magill Judgment: The ECJ judgment in Magill (See Table of Cases)

Microsoft Decision: The EC Decision in Microsoft (See Table of Cases)

SCJN: The Mexican Supreme Court of Justice of the Nation

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights.

U.S: The United States of America

WCT: The WIPO Copyright Treaty

## 1 Introduction

### 1.1 Background

In a seminal work concerning CLs specifically addressed to policymakers and legal professionals from developing countries, Correa examined the grounds for the provision of CLs in various developed countries and highlighted how such countries had employed such a remedy as a regulatory tool in order to attain diverse public interest objectives.<sup>1</sup> The study submitted that developing countries had little experience in the field and that an examination of the experience of developed countries with regard to such remedy may bring options to developing countries willing to legislate on this matter.

The present work is about CLs and pursues the same objective. However, it deals in the main with a recent and particular application of CLs. It focus on how CLs have been provided by the EC as a solution to bring to an end the abusive use of copyright by copyright holders enjoying a dominant position. The aim of discussing such an application is twofold: first, to explore how CLs have been used in Europe to limit copyright and attempt to find the logic supporting the provision of such a remedy; next, to examine if it would be possible under the current Mexican regulatory framework to use such a remedy as an option to resolve similar conflicts that could arise in Mexico.

CLs appear in two different ways in national frameworks. They might be incorporated into copyright laws, as an *internal* limitation to right-holders' exercise of rights. Alternatively, they may occur as a consequence of the application of competition law by judicial or administrative authorities.

While patent exclusivity has traditionally been the target of CLs, their application to copyright is very recent.<sup>2</sup> Differences among the patent and copyright paradigms may

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<sup>1</sup> Correa (1999) p. 2

<sup>2</sup> The first application was the Magill Decision. See section. 3.3.2.

explain copyright's isolation from competition law.<sup>3</sup> Unlike what happens in the field of patents, the argument that states that copyright by nature confers a monopoly right, is unclear.<sup>4</sup> Moreover, while patents protect *specific solutions* copyright only protect *expression of ideas*. Therefore, a patent holder may prevent third parties from using a specific invention, while no copyright infringement may occur if two persons write similar poems, as long as both have followed a separate creative process. Finally, unlike patents, a copyright user may find it easier, to a certain degree, to find substitutes to cover the same need.<sup>5</sup>

Nevertheless, it is perceived that competition authorities in developed countries are increasingly extending their surveillance over copyright owner's behaviors. In my opinion, the social and legal developments which are briefly described hereunder might be the cause of such new perspective. Since I believe that developing countries will follow a similar path, one of the main objectives of this work is to contribute to create awareness in developing countries with regard to such trends and developments.

#### A. Increasing application of competition rules toward copyright.

To perceive IP law as separated from competition law is still a common place.<sup>6</sup> A somewhat romantic and still widely held notion of copyright's rationale, as a tool for protecting poets and writers rather than powerful software corporations, lies at the heart of such separation. However, such a misconception is apparently changing. Interestingly, Gervais notes that, after the marriage of IP rights and competition rules in the TRIPS agreement, the notion of IP rights, as a variation of the classic theme of property or even as human rights – theories developed in the XIX century – might be condemned to fall.<sup>7</sup> Experience of developed countries has gradually pointed out that IP rights may allow their owners to take advantage of their position to control a market, by preventing or deterring potential competitors from developing products similar to their own, with the specific purpose of maintaining high prices for the product, to the

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<sup>3</sup> For a detailed economic and legal comparison of such paradigms, see Rahnasto (2003) and Ghidini (2006).

<sup>4</sup> Sterling (2003) p. 993.

<sup>5</sup> Ghidini (2006) p. 61.

<sup>6</sup> Ghosh (2005) p.794 who observes that the U.S. experience was built on such misconception.

<sup>7</sup> Gervais (2005) p. 505

disadvantage of competitors and consumers alike.<sup>8</sup> Even though copyright *per se* cannot be hold as a *legal* monopoly right, recent case law and literature reveal that its *exercise* may create *factual* monopolies or at least give rise to anticompetitive behaviors.<sup>9</sup> It is observed that doctrinal and jurisprudential approaches are gradually shifting from immunizing IPR-based restraints on trade from antitrust challenges. IP rights are treated in the eyes of competition law as any other property.<sup>10</sup>

### B. Competition law as a cure for copyright “overprotection”

It is alleged that the past decades have seen an expansion in the reach of intellectual property, both over time and across countries.<sup>11</sup> Examples frequently quoted in literature as evidence of such alleged “over-extension” are the legislative protection granted to digital right management systems<sup>12</sup> and the extension of the term of protection of copyright from 50 to 70 years. Due to its potential to foreclose access to information, two examples of such apparent over extension *over time* are worth mentioning: the extension of copyright protection to software, achieved on the basis of a disputable analogy<sup>13</sup> and the legislative trend to protect databases through *sui generis* rights.<sup>14</sup>

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<sup>8</sup> Bainbridge (1999) p. 22-24. The term monopoly bears to distinct meanings: (i) describing a situation of fact, namely the situation where, in the market place, one person is the sole purveyor or a certain commodity Sterling (2003)

<sup>9</sup> The term monopoly bears to distinct meanings: (i) describing a situation of fact, namely the situation where, in the market place, one person is the sole purveyor or a certain commodity, thus having no competition and; (ii) describing a situation in law, namely the sole right to sell a certain commodity, such right being granted by law see further Sterling (2003) section 2.13.

<sup>10</sup> Ullrich (2005) p. 728

<sup>11</sup> “Over time” because copyright has extended protection to every new technology; “Across countries”, because TRIPS has created a worldwide system of heightened protection of IP. See Fink (2005) p. 770; Okediji (2005) p.144

<sup>12</sup> See, e.g., Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (O.J. L 167, 22.6.2001, p. 10), Articles 6 and 7.

<sup>13</sup> Apparently, software gained copyright protection when the code was deemed to be a representation of an idea. Ghidini argues that software is a solution with a commercial application, more than an aesthetic expression of an idea and, therefore, is a product that might be closer to qualify for patent, rather than for copyright protection. Software assimilation to a copyright product has a dramatic consequence: software products are protected for 70 years instead of receiving perhaps a protection similar to patents (generally, 20 years). See Ghidini (2006) p. 63..

<sup>14</sup> A *sui generis* right granted to database-owners protects databases not due to their originality – perhaps the main criteria for a work to qualify under copyright protection – but merely because of the investment placed on the development of the databases. See further Directive 96/9/EC on the legal protection of databases (O.J. No. L 77, 27.3.1996, p. 20), Article 7.



Similarly, the extension of copyright *across countries* has been recently subject to considerable criticism and high public awareness. It is argued that developed countries prompted the universalization of their own IP protection standards, without any consideration about its impact on developed countries; the objective was to secure and expand markets for their own companies worldwide.<sup>15</sup> It is frequently remarked that knowledge industries conducted intense lobbying, both at national and international forums, and that such lobbying afforded right-holders with the best laws money can buy.<sup>16</sup> It might therefore not be surprising that some industrialized countries receive 91% of cross-border royalties and technology license fees.<sup>17</sup>

While developing countries have intensified their claims for reforming WIPO copyright instruments in order to incorporate measures that promote access to knowledge and technology<sup>18</sup> literature is exploring if competition law would be a more appropriate “cure” for the problem. It is submitted that competition law works against excessive protection of IP rights and, thereby, may promote the social interest in gaining access to otherwise protected subject matter.<sup>19</sup> This might not only happen case by case, but also by incorporating competition rules as part of a broader policy that promotes access where such access is necessary for national strategies concerning education and innovation.<sup>20</sup>

### C. Rediscover of copyright protection. Copyright as a strategy

Until very recently, copyright was seen as being a part of cultural policy as the legislation was relevant only to the experts of collecting societies and media houses.<sup>21</sup> This has all changed. Information is indisputably a key factor in the new economy. Rahnasto observes that companies are increasingly using IP rights as part of their business strategy because firms are conscious that through IP rights it is possible to

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<sup>15</sup> Correa (2003) p. 178.

<sup>16</sup> Samuelson (2005) p. 7.

<sup>17</sup> A study with regard to royalties derived from patents reveals these numbers. See Correa (2003) p. 177.

<sup>18</sup> See Proposal by Argentina and Brazil for the establishment of a development agenda for WIPO. WO/GA/31/11, August 27 2004.

<sup>19</sup> Drexl (2005) p.716-724.

<sup>20</sup> Fink (2005) 771.

<sup>21</sup> Rahnasto (2003) p.7.

control other firms' behaviors.<sup>22</sup> Such strategies include the use of "leverage" practices, which actively aim to control the external effects<sup>23</sup> of patents and copyright in order to maximize business.<sup>24</sup>

Moreover it is important to mention that this development is powered by the two trends referred above. Professor Ghidini observes:

[...] Copyright protection is much more reliable than patent protection, since the former is less difficult (selective) and less expensive to access ("no test, no cost"), longer in duration, richer in monopolistic content... and, last but not least, much more generous in extending exclusive protection to subject-matter... It is not surprising if the many industrial and financial interests involved in developing the innovations typical of modern advanced technology, especially innovation, consisting in representations expressing informative content intended for purely functional purposes seek succor within the realm of copyright: a realm much less beset with anti-monopolistic concerns than the patent-based regulatory framework of technological innovation...<sup>25</sup>

#### D. Changes in models for innovation and network effects.

Copyright exclusivity has traditionally been justified as the most adequate tool for promoting innovation. However, it is gradually noted that as industrial economies change to information-based network economies, so are the models of innovation changing. Rahnasto compares the "serial model of innovation" (where a company makes an invention and other companies develop such invention further) with the emergence of a "simultaneous model of innovation" where there is not one, but multiple sources of information (either private or in the public domain). For innovating through the second model, access to basic information is vital.<sup>26</sup> The consequences might be

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<sup>22</sup> Id.

<sup>23</sup> An "external effect" or "externality" is an economic term. Rahnasto provide in her study a widely used definition of the concept. However, in order to clarify the term, I choose to include here the example she offers: "*If the Linux operating system is less attractive for users because copyright owners manufacturing DVD movies with technical protection means allowing them to be played only on Windows operating system, the exercise of copyright has an external effect on the market of software operating system*". Id. p. 1.

<sup>24</sup> Rahnasto (2003) p. 7. For an example of this kind of leverage practice, see the Microsoft Decision referred to in section 3.4.2 below.

<sup>25</sup> Ghidini (2006) p. 64.

<sup>26</sup> Rahnasto (2006) p.5. The author cites the development of Linux as an example of this model.

huge for an innovation policy. In the first model, the IP owner appears as the innovator and the licensee as a follower, as an adapter and, at the best, as an adopter.<sup>27</sup> Conversely, in the second model, the licensee may contribute with its own know-how and improve the first innovation. As observed by a commentator: With digital goods, every user is potentially a creative re-user and not a mere consumer.<sup>28</sup>

A second issue concerning IP and the so-called new economy is the capability of IP-protected products to generate network effects. In simple terms, this means that a product may become extremely valuable to consumers because so many other people use the same or compatible products.<sup>29</sup> Products that interact with other products would be preferred by the consumer in his/her initial choice. This might lead to the development of *de facto industry standards* in particular markets.<sup>30</sup> As the network increases in the number of people so will the demand for a product increase; consequently, people willing to leave the network will have to evaluate the cost of switching. Moreover, such demand-side costs will play against potential competitors, which will consider such costs as a barrier to entry to the market, isolating the IP owner in a *de facto* monopoly.<sup>31</sup>

In view of these developments, it is imperative for policymakers, judges and legal professionals of developing countries to rethink the relationship between copyright and competition. A country which allows IP companies to enjoy immunity from competition; which succumbs to IP industry pressures and adopts strong IP protections with minor or no public debate; which allows corporations to exercise their copyright abusively, exploiting benefits from network effects and traditional models of innovation and which ultimately lets them increase their market power by not preventing obvious leverage practices – such a country should not be surprised if the TRIPS promise of development is never accomplished.

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<sup>27</sup> Ullrich (2005) p. 751.

<sup>28</sup> Dreier (2001) p. 312.

<sup>29</sup> Gitter (2005) p. 189.

<sup>30</sup> For an example of a copyright deemed to be a *de facto standard* see the IMS Health Decision, referred to in Section 3.3.2. For an example of one deemed as causing network effects, see the Microsoft Decision, referred to in Section 3.4.2.

<sup>31</sup> Narciso and Torremans (2005) p. 181.

It is necessary to develop a more rigorous relation between competition law and intellectual property. I agree with Correa that this objective may only be achieved by conducting an examination of developed countries experiences with regard to IP and competition law. Such experiences may lead developing countries to determine appropriate competitive baselines for designing more innovative intellectual property systems.

## 1.2 Research Problem

CLs are versatile tools, both in design and practical application. This thesis deals with CLs both as a limitation provided by IP law and as a remedy provided by competition law.

The thesis is divided in two main parts. The first explores the legal grounds and the rationale that supports the three CLs ordered by the EC, in competition cases, where such application created an obligation to license a copyrighted work. The understanding of such structure and rationale may allow us to assess if such a remedy represents an option for developing countries.

The second part discusses Mexico's readiness to benefit from such legal European development. Options are submitted to appear in two directions. The first explores the possibilities and hurdles that Mexico might face if choosing to build a CL regime under the TRIPS agreement. The second path explores the possibilities of using such licenses without a substantial copyright reform, merely by applying Mexican competition law rules.

## 1.3 Structure

The second chapter provides an overview of the main compulsory licenses schemes, both within and outside the IP universe. The objective of such exploration is twofold: first, to help the reader to identify the remedy and distinguish it from other concepts that might be confusing; secondly, to offer the reader an overview of the rationale and efficacy of the remedy and the public objectives pursued by its provision.

The third chapter deals with the European experience in the field and the development of the doctrine that supports the use of CLs. Three cases are analyzed: *Magill*, *IMS Health* and *Microsoft*. In the analysis, a conscious choice has been made in trying to highlight in which specific circumstances copyrighted information was found as needed to be licensed in order to restore competition.

The fourth chapter explores the second research problem. It explores the penetration of CLs in Mexican copyright law. Then, it explores the possibilities of designing a CL regime within that copyright law. Finally, it explores the possibilities of providing CLs based on the current regulatory competition law framework in Mexico.

#### 1.4 Methodological considerations and limitations

This work is about how CLs may be used as remedy in copyright abuse cases. The use of CLs with regard to industrial designs, trademarks and other IP rights are not discussed in this book. As an exception, references concerning the provision of CLs with regard to patents have been made. Such reference is obligated since developing countries' academics and judges are making use of the rich experience in this field when discussing the benefits of CLs as a remedy in copyright cases. A reference to such debate is also relevant in order to cast light over the nature and efficacy of such a tool in developed countries, which is one of the goals of this thesis. Consequently, such references do not pretend to be exhaustive, but only serve the abovementioned objectives.

Despite the above-mentioned limitation, this work does not deal with CL regimes designed in the context of specific copyrights. The goal is to cast light on how this remedy has been used in cases where an undertaking, in a dominant position, exercises their copyright abusively and such abuse harms competition. Therefore, this work does not deal directly with cases or provisions involving CLs and distribution of rights, parallel importing of copyright works, performers or rental rights. Likewise, this work does not deal with CLs as an established remedy in the context of mergers that otherwise would violate the law. Such a remedy is not discussed since CLs are not issued to cure an abuse, but as an efficient alternative to divestiture.

My review focuses on the law and case law of the European Union because this is the leading jurisdiction when it comes to the use of CLs as a competition law remedy to copyright abuse. Limited references are made to the law and policy of the U.S. and other developed countries in order to highlight the relevance of CLs in such jurisdictions, as a check and balance mechanism, particularly, with regard to misuse of patents. In general, such debate provides important conclusions which are applicable also to CLs in copyright.

I am aware that the method used for interpreting case law and administrative decisions potentially affects the results of the research. Such materials include arguments advanced by copyright owners, potential users and the authorities. CLs, therefore, might be presented by different studies as heroic tools that promote access and development or as enemies that jeopardize investment in innovation. When reporting the cases, a deliberate choice has been made to emphasize where institutions have made a bet for supporting fairness on the merits rather than following (or even twisting) a particular doctrine; to highlight where competition, access to information and socio-economic development, and governmental intervention have outweighed copyright, individual reward and “strong” property rights theories, respectively. My choice pursues consistency with the aim of this thesis. However, this work strives to present also the polemic generated by the use of the remedy in order to offer a complete picture.

In any case, it is important to remark that this work does not intend to serve as a comprehensive study of the laws, case law or doctrines discussed, nor deal in detail with such materials, nor assess the legitimacy of their application within a particular national or international legal framework. Such work is more appropriate for, and has been carried out by, numerous outstanding scholars in developed countries. My work stands on their shoulders and is aimed just to provide information that might serve Mexican (and other developing countries’) policymakers and judges to get acquainted with these developments. Similarly, Mexican scholars should not seek in this work absolute conclusions but ideas that might server as a departure point for future debate and more in-depth analysis of the many issues raised here.

My research problem is located in the interface between competition law and IP. However, this work does not describe the basic legal frameworks covering such

disciplines in any particular country. It is presumed that the reader has a general understanding of the basic concepts of such disciplines. It is presumed as well that the reader has a general idea of which countries might be considered as developed and which as developing. Readers interested in such topics will find several outstanding books listed in the bibliography to this thesis.

I acknowledge that there are a number of considerable differences between the copyright and competition law systems of the European Union, the U.S. and Mexico; such differences do not arise only due to the historical background but also from the differences between the common law and the civil law tradition and the copyright and author's right tradition. However, it is important to consider that IP laws have converged to a large extent in those jurisdictions with the universalization of IP standards through international and regional instruments, such as TRIPS, WCT and NAFTA. While such universalization has not occurred in the field of competition law, there is some evidence that soft harmonization of criteria among authorities of the three jurisdictions may provide sufficient ground for undertaking useful comparative studies. This is particularly true with regard to developing countries, like Mexico, where legal transplants in these fields are usually undertaken in order to mirror developed countries' legislation and create "friendly" frameworks that may attract developed countries' investment.

## 2 Compulsory licenses: Structure, rationale and efficacy.

### 2.1 CLs: General understanding.

IP national laws, in general, allow IP owners to license their rights. By means of the license, a licensee is authorized to perform certain acts with regard to the copyright or patent involved, acts which otherwise would be considered as an infringement of IP laws. Conventional wisdom would follow that we may identify a CL whenever it appears that the owner is forced to grant such permission, involuntarily, to one or more potential licensees. Such coercion, in a democratic society, shall necessarily derive from the application of statutory law or occur as a consequence of a legal process.

Yet, this chapter reveals that CLs are versatile remedies. What they all have in common is that they represent a limitation to the exercise of IP rights.

#### 2.1.1. CLs as limitations within the IP system.

CLs are one among many tools that legislators may use to balance the conflicting interests of right owners' exclusivity with users' desire to access protected works.<sup>32</sup> A succinct comparison with some other copyright limitations available may cast light over the concept. From a structural point of view, limitations inherent to copyright system may be roughly classified as follows:<sup>33</sup>

1. Full exception. This kind of limitation simply withdraws from the owner the right to prohibit user's actions over the copyrighted work. There is no need for the user to ask for an authorization and the use is not subject to any economic compensation.

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<sup>32</sup> Dreier (2001) p. 307.



2. Statutory licences. In this kind of limitation, authorization is provided by the statutory law, but against the payment of an equitable remuneration. Particularly important is to mention that there is no intervention of the copyright owner in negotiating the amount of the remuneration because in this kind of limitations, the royalty fee is fixed by law or by a regulatory authority.
3. Compulsory licenses. When subject to a compulsory license, the right owner is forced to grant individual licences, at a price and under conditions to be determined jointly with the user or fixed by the authorities where agreement cannot be reached.
4. Mandatory collective administration of rights. In this case, the right owner is forced to assign certain rights to a collective entity because such an entity is entitled by law to exercise exclusively the rights.

While limitations described in numbers 1 and 4 above can be clearly distinguished from CLs, such is not the case with regard to statutory licences. In fact, Guibault notes that, in the field of copyright, both terms are used interchangeably.<sup>34</sup> Likewise, Okediji apparently focusing more in the effect of its application, includes both terms in the broader category of limitations that provide “mandatory compensated access” in contrast with “negotiated access”.<sup>35</sup>

In my opinion, CLs represent, first, an obligation to contract –a duty to licence – with one or more potential licensees.<sup>36</sup> In a wide-used definition, Gorecki observes:

"A compulsory license is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state."<sup>37</sup>

The main practical consequence of this feature is that in principle, the order to license does not affect the ability of the IP owner to negotiate the terms of the contract, including the royalty fee.

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<sup>33</sup> Guibault (2002) p. 23.

<sup>34</sup> Guibault (2002) p. 25.

<sup>35</sup> Okediji (2005) p. 148.

<sup>36</sup> Guibault (2002) p. 25.

<sup>37</sup> Gorecki (1981) p.18.

A second feature is the intervention of a government's administrative or judicial authority. While statutory licenses derive from the application of statutory law, CLs may only be granted after a specific application of a court or administrative resolution.<sup>38</sup> However, authors differ in the level of involvement of the government. While for Julian-Arnold's definition the license is "arranged" by the government<sup>39</sup> in Correa's definition, the government grants directly the authorization to use the protected good, apparently without intervention from the right owner.<sup>40</sup> Gorecki's definition suggests that governments also *enforce* such license. This element could be important if we consider that some licences may be granted to past, present and future IP products and that therefore, enforcement mechanisms shall be put in place.<sup>41</sup>

### 2.1.2 CLs as a limitation provided by Competition Law

While copyright preserves the exclusive right, competition law *prima facie* has a problem with whatever restricts competition and particularly with monopoly effects.<sup>42</sup>

CLs ordered to restore competition do not bear a similar structure to those provided by IP regimes. This is mainly because the two systems operate in different ambits. IP regimes define rights and structure an array of diverse limitations. On the other hand, competition deals with specific behaviours and tries to bring them to an end through sanctions and/or remedies.

Competition law may play a role in defining the boundaries of IP rights at a policymaking level.<sup>43</sup> At such a stage, the tool may be framed in copyright instruments either in vague or in highly complex terms. For example, in TRIPS, CLs concerning copyright do not have a specific structure; conversely, the issuance of CLs for patents, are conditioned by TRIPS article 31, to a number of qualifications.<sup>44</sup>

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<sup>38</sup> Sterling (2003) p. 993.

<sup>39</sup> Julian-Arnold (1993) p. 352.

<sup>40</sup> Correa (1999) p.3.

<sup>41</sup> See Microsoft Decision, Section 3.4.2.

<sup>42</sup> Narciso and Torremans (2003) p.145.

<sup>43</sup> Drexl (2005) p.718.

<sup>44</sup> See Section 4.4.

On the other hand, CLs may be granted on grounds of specific competition rules. Competition regimes usually structure prohibitions of anti-competitive behaviours through *per se* rules. For example a rule may consider “price fixing” *per se* as an anticompetitive behaviour. It might not matter if the firms involved in the practice operate in the oil or the copyright industry or if any of the undertakings have or have not substantial market power. Liability would arise from the mere evidence of the behaviour. Since CLs are granted to terminate such practices, the remedy is usually tailored to address the specific problem.<sup>45</sup> Consequently, the structure of the license will vary from case to case. In most cases, competition authorities let the licensor choose the terms of the contract and reserve for themselves the faculty to approve the final draft. If an agreement is not reached within a specific date, a Court may impose the license. Royalties, as well, may vary. While in the EU the right owner is usually entitled to reasonable royalties, in U.S. law and practice sometimes even no royalties have been conceded in favour of the right owner.<sup>46</sup>

## 2.2 Overview of the use of Compulsory Licences: provision, application, rationale and efficacy.

### 2.2.1. CLs within the IP system.

#### Patents

CLs arrived on the scene at the Paris Convention for the Protection of Intellectual Property, after the Conference that reviewed such instrument in 1925. Article 5 (2) entitled countries of the Union to adopt in national laws provisions for the granting of CLs in case of “abuse” of patents. However, the instrument only dealt with one type of abuse: Non-working patents. CLs were implemented here with the intention of promoting local working of patented inventions and to prevent the patentee from denying the public access to novel and needed inventions, where to withhold such subject matter was unreasonable or contrary to the public interest.<sup>47</sup>

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<sup>45</sup> See Chapter 3.

<sup>46</sup> See *Infra* Note 47.

<sup>47</sup> Julian-Arnold (1993) p. 352.

After the referred Conference, provisions on CLs were adopted in several countries. Correa notes that the process of diffusion of CLs took place in parallel to the broadening of the grounds under which such licenses might be granted, and that the original rationale of preventing the non-working of patents was gradually extended to other situations such as public interest, government use and anticompetitive practices.<sup>48</sup>

Several studies that have analysed diverse jurisdictions have identified the most prevalent grounds for the provision of CLs<sup>49</sup>. CLs are provided in order to prevent the existence of non-working patents, including dependent patents,<sup>50</sup> and on different grounds connected to public (government) non-commercial use.<sup>51</sup>

Patent literature provides a broad debate among supporters and critics of the limitation.

First and foremost, it ought to be mentioned that developed and developing countries have different viewpoints on this matter. Developed countries consider that the goal of the patent system is to encourage investment in innovation. CLs are seen as having the effect of making such investment less secure and attractive. Developing countries, on the other hand, fear that multinational companies will exploit local consumers by charging high prices for access to patented goods, particularly medicines and therefore have strongly advocated maintaining systems of CLs.<sup>52</sup> It is imperative for the purpose of this work to remark that despite developed countries' apparent hostility with regard to the tool, CLs have only been actually provided in such countries.<sup>53</sup>

With regard to the efficacy of the tool, Kaufmann observes that CLs are a fact of law, but not a fact of life. The author bases his conclusion on surveys that explore the actual

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<sup>48</sup> Correa (1999) p.4 .

<sup>49</sup> For a detailed classification and examples in several countries, see Julian-Arnold (1993); Fauver (1988).

<sup>50</sup> Cases where a second-in-time-issued (dependent) patent cannot be worked without infringing an earlier issued patent.

<sup>51</sup> Governments may use CLs for the prevention of anticompetitive practices; for supplying the market with essential goods (such as medicines), to face emergency situations and for the acquisition of inventions related to national defense See Note *supra* 47.

<sup>52</sup> Julian-Arnold (1993) p. 357.

<sup>53</sup> CLs have been used only in Japan, Germany and Canada: see. Kaufmann (1998) p. 530. It is interesting to observe that the U.S. has rejected the tool in its legal tradition and has opposed the incorporation of CLs in the framework of developing countries; notwithstanding this, it is perhaps the country where most CLs have been granted, in antitrust cases. See further Correa (1999). Likewise, the EU is the only jurisdiction in which CLs have been granted against copyright holders. See further Chapter 3.

application of CLs in patent cases and concludes that while CLs provisions exist in nearly every important country, such licenses are almost never present in real life.<sup>54</sup> While this argument is accurate according to my research, it is also important to mention that it is generally accepted that such numbers do not reveal the efficacy of the remedy. The mere threat of CLs encourages parties to grant licenses voluntarily.<sup>55</sup>

CLs for governmental non-commercial use have not attracted so much criticism as long as such licenses are granted against the payment of a reasonable royalty.<sup>56</sup>

### Berne Convention

The Berne Convention includes three of the best-known examples of CLs in the field of copyright.<sup>57</sup> Such provisions are included in Article 13, Article 11 bis (2) and in the Appendix of the Berne Convention.

Article 13 allows a country to design in its jurisdiction a CL scheme where an author might be forced to license his exclusive right to authorize the sound recording of his musical work and/or lyrics. Ricketson explains that before the Berlin Revision of the Berne Convention in 1908, a flourishing recording industry was able to record works without fees or compensation to the authors. The recognition of an author's mechanical right in the Convention was seen as a peril by the industry. CLs were provided here in order to secure, for the recording industry, a possibility to have access to protected material.<sup>58</sup> The only requirement provided in Article 13 is that CLs might not prevent the author from obtaining an equitable remuneration.

Subject to a similar condition, CLs provided in Article 11 bis (2), might be issued in order to force an author to license his right for broadcasting his work. The rationale is similar. After the extension of the authors' right to include the right to broadcast, in 1928, broadcasting companies were concerned about the prospect that collecting

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<sup>54</sup> Kaufmann (1998) p. 530.

<sup>55</sup> Of this opinion are Fauver (1998) p. 667 and Julian-Arnold (1993) p. 367.

<sup>56</sup> Julian-Arnold (1993) p. 365.

<sup>57</sup> Guibault (2002) p.25.

<sup>58</sup> Ricketson (1999) p. 15.

societies may be unreasonably denied access to material that might be used for public broadcasting.<sup>59</sup>

It is perceived that these regimes were included to secure the interests of particular industries rather than those of authors or society as a whole. Guibault asserts that this fact may explain why such licenses have hardly been implemented.<sup>60</sup> Davies, however, alleges that these regimes embrace a public interest in preventing monopolies.<sup>61</sup>

The only CLs that might be provided under Berne based on a clear public interest objective are the ones set forth in the Appendix of the Convention.

Developing countries may avail themselves of two types of CL. The first is a CL regime that allows a potential licensee to obtain a license for translation, when the purpose of such translation is teaching, scholarship or research. The second concerns the right to reproduction for use of works connected with systematic instructional activities. Both include also the right of publication.

The structure of the provisions is extremely complicated due to the multiple conditions that must be satisfied by a potential licensee in order to obtain the license. Roughly, some of the hurdles are:

- a. CLs may only be available after a period of 3 years following the publication of a work.
- b. After the three years have elapsed, the right owner enjoys a period of grace of 6 months starting after a citizen of a developing country has requested the CL. During such period the owner may avoid the CL by publishing the translation.
- c. At any moment after the CL has been granted, the license may be terminated if the copyright owner exercises the right of translation and offers the publication for sale at a reasonable price.

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<sup>59</sup> Ricketson (1999) p. 17.

<sup>60</sup> Guibault (2002) p. 25.

<sup>61</sup> Davies (2002) p. 10-021.

These systems were aimed to promote developing countries' access to knowledge and education. It has been noted, however, that their complex provisions make them still favourable to developed countries.<sup>62</sup> Indeed, such conditions may render the cost of exercising a compulsory license so high that its application is economically unfeasible.<sup>63</sup> A recent survey evidences the failure of the provisions: only two out of 11 developing countries have tried to incorporate this benefit.<sup>64</sup>

## TRIPS

There is no specific reference to the term “compulsory licenses” in the TRIPS agreement. However, literature in the field considers Article 31 as the main provision concerning CLs in TRIPS.<sup>65</sup> It is important to mention that this article deals specifically with patents.

Article 31 includes emergency and extreme urgency, anticompetitive practices, public non-commercial use (governmental use) and dependent patents, as grounds for providing CLS.

Concerning the structure, it is observed that the potential licensee would have to satisfy as well a number of conditions before they are granted. Countries shall draft their legislation bearing in mind no less than 10 conditions. Among them, we can mention:

- a. The proposed user shall make efforts to obtain the authorization on reasonable commercial terms over a reasonable period of time;
- b. The scope and duration of the license should be limited to the purpose for which it was granted; the license must be terminated when the circumstances that led to its grant cease to exist;
- c. The licensor shall be entitled to adequate remuneration;

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<sup>62</sup> Ricketson (1999) p. 16.

<sup>63</sup> Okediji (2005) p. 164.

<sup>64</sup> Consumers International (2006) p.10.

<sup>65</sup> Article 31 is titled: “On use without the authorization of the right holder”.

### 2.2.2. CLs as an antitrust remedy.

CLs have appeared both in Europe and the U.S. in cases involving an unjustified *refusal to supply*. Doctrines have been developed attempting to explain when an IP owner may be forced to “supply” IP protected goods through the granting of a license.

In general, doctrines have developed to solve two kinds of conflicts:

- a. Misuse of IP. A misuse conflict may arise when IP rights are used contrary to the objectives that afford IP protection. The misuse doctrine has developed mainly in the U.S. case-law concerning patents. U.S. statutory law and courts have expressly rejected that a mere refusal to license may trigger antitrust liability if the IP right has not been misused.<sup>66</sup> Misuse has been found only in three cases: tying of products, fraud in the Patent and Trademark Office and “sham” litigation.<sup>67</sup> However, the misuse doctrine was not followed apparently for the first time in *Kodak*.<sup>68</sup> Interestingly for the purpose of our study, in this case the Court, after assessing the behavior of the patentee *on the whole* concluded that the IP right was (mis)used as part of a leverage strategy.
- b. Abuse of Dominant position. The assumption is that IP dominant firms may extend the protection of IP beyond its purpose, such as to expand or extend monopoly power. It is debated if the mere exclusive right may grant the IP owner a market dominant position and if network effects need to be considered. In Chapter three, I discuss in detail how the EC has granted CLs in refusal to deal cases, under the essential facilities doctrine.

In general, it is observed that both in Europe and in the U.S., an antitrust violation for refusal to license IP is exceptional. For Fox, it is clear that the two dominant

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<sup>66</sup> See *Xerox* (refusal by Xerox to grant a license to use its patents was upheld due to the fact that Xerox did not misuse its IP rights).

<sup>67</sup> For a complete description of the cases and a full explanation of the development of the doctrine, see Taladay (2002).

<sup>68</sup> See *Kodak* in which the Ninth Circuit of Appeals, do not seek for one of the three objective criteria of misuse. On the other hand, the court looked at the subjective intent of the company and its employees in implementing the refusal to supply and found that the protection of IP was not in fact a motivating factor



jurisdictions in the world are reluctant to push back the boundaries of IP by application of antitrust.<sup>69</sup> *Kodak* and the cases reviewed in Chapter three may indicate that courts have supported the remedy when leverage practices are obvious after an *overall* review of the specific circumstances of the cases.

While the theoretical grounds for applying CLs are subject to considerable criticism (on similar allegations than those referred for patents), it is important to highlight that practical problems may arise. Competition law authorities may not have the necessary experience for drafting or assessing the final license. Shall the license grant only use of the IP good or shall it include know how? Is the judiciary or the competition authority capable of overseeing the fulfillment of the license?<sup>70</sup> How shall a reasonable compensation be figured out?<sup>71</sup>

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but rather was being used as a pretextual justification for excluding competitors. See Taladay (2002) p. 446.

<sup>69</sup> Fox (2005) p. 759.

<sup>70</sup> Areeda (1989) p. 853 asserts: “No Court should impose a duty to deal that it cannot [...] adequately and reasonably supervise”.

<sup>71</sup> Leveque (2005) p. 21 observes: “From an economic perspective, the [European] Commission’s requirement is puzzling. Economists are familiar with optimal prices, not reasonable prices.

### 3 Compulsory Licenses for copyright: The European Experience

#### 3.1 Intellectual property and Competition rules in the Treaty of Rome

The Treaty of Rome was designed to ensure the free circulation of goods, capital, people and services within the common market now being forged and administered by the European Union. Conflicts between IP and competition rules may arise from a complex set of rules in the Treaty. In principle, Articles 295 and 30 entitle Member States to define the rights and boundaries of property rights, including IP rights. Notwithstanding, restrictions to free movement of goods placed by the Member States with regard to property (such as copyright exclusivity) may not constitute means of arbitrary discrimination or a *disguised restriction on trade* between Member States.<sup>72</sup> The problem that arises immediately from this conundrum of rights and exceptions consists in defining when are IP rights' exclusive protection a disguise for free movement of commercial goods. The ECJ found a way out by considering that the reconciliation had to be achieved in such way as to protect the *legitimate exercise* of IP rights and to preclude *any improper exercise* of them.<sup>73</sup> Fox observes that while Articles 295 and 30 might seem to point towards the primacy of IP over competition, such is not the case due to the fact that freedom from undistorted competition, provided in Articles 81 and 82, is a Treaty right of almost constitutional dimension.<sup>74</sup>

The CLs that are examined in this chapter were issued in order to bring to an end infringement of Article 82 (b) of the EC Treaty. The relevant parts of this provision read:

Article 82: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with

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<sup>72</sup> Treaty of Rome, Article 30.

<sup>73</sup> See Magill Judgment, par. 51.

<sup>74</sup> Fox (2005) p. 762.

the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a)...

(b) limiting production, markets or technical development to the prejudice of consumers

(c)...

(d)...

It is observed that nothing in the text of the Article makes any reference to CLs. The power of the European Commission to apply such a remedy derives directly from its statutory powers as endorsed by the interpretation of the ECJ. At the outset, it has to be mentioned that the Commission may not order a duty to license unless there is at least *prima facie* evidence that the right owner has *abused its dominant position*.

A possible abuse is assessed through a two-phase process. Put briefly, in a first stage, the Commission performs an analysis of dominance, which includes:

a) Defining the relevant product/market: Definition takes into account the nature of the product; the existence of substitute products, both from a competitors and consumers' perspective; the geographical market, among other factors;

b) Evaluation of the market power of an undertaking in the relevant market. Such a test takes into account, inter alia, the market share of the undertaking, and the level of dependency of other players with regard to the dominant firm.

Once dominance has been found, the Commission assesses if the undertaking has abused such dominance. Article 82 in sections a) through d) only provides a non-exhaustive list of types of abusive conduct. The EC and the Court have taken the task of identifying other types of abuse in particular circumstances.

*Volvo*<sup>75</sup> was the first case in which the ECJ faced a request for CL of IP rights. Veng was importing into the UK, and marketing, body panels the design of which was owned by Volvo, without Volvo's authority. Volvo claimed infringement of its exclusive rights

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<sup>75</sup> See Volvo (Table of Cases).

to import and market the panels and Veng defended the case on the basis that Article 82 required Volvo to supply the panels or license Veng the authority to produce them. The ECJ ruled that Volvo was under no obligation to license because such obligation, even against a reasonable royalty, would deprive Volvo of the *very subject-matter of their exclusive right*. However, the ECJ indicated that IP rights may be subject to compulsory licensing (even though this was not the case) if the proprietor was found to be in a dominant position, and if the *exercise* of the right revealed an “abusive conduct”.<sup>76</sup>

Since *Volvo*, it has become clear that whether an obligation to license IP rights or not would depend on the circumstances. Two months after the ruling of the ECJ in *Volvo*, the EC proved that such circumstances could be found in real life and, for the first time, ordered a compulsory license as a remedy in the case of *Magill*.<sup>77</sup>

The obligation under Article 82 to license has therefore been interpreted not as a general obligation to license applicable to any firm, but as a specific obligation on dominant firms to deal with any potential customers in specific circumstances.<sup>78</sup> In my opinion, the obligation to license the reproduction and use of copyright information only has arisen where such information was considered to be *essential* for third parties *to compete*, either in the same market in which the copyright holder operated, or in a related market.

Consequently, the question is: When is copyrighted information deemed to be essential to compete? The presentation of the three cases in this chapter will try to offer the reader the reasoning followed by the EC and the ECJ to conclude that the license of certain copyright-protected information is essential for restoring competition. Since commentators concur that such reasoning is based on the *essential facilities* doctrine, it is imperative to refer briefly in this section to the development of that doctrine.<sup>79</sup>

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<sup>76</sup> *Volvo*, par. 9.

<sup>77</sup> See *Magill* Decision (Table of Cases).

<sup>78</sup> See Anderman (2006) p. 282 who suggests that the premise is: A firm or a group of firms that hold a dominant position have a special responsibility to act in a manner that does not harm competitors and, ultimately, consumers.

<sup>79</sup> Neither the ECJ nor the CFI have ever explicitly referred in their case law to the essential facilities doctrine. See *IMS Health* Decision p. 64.

### 3.1.1. The Essential Facilities doctrine.

An essential facilities doctrine has been developed both in the U.S and in the EU albeit with certain differences.<sup>80</sup> The basic premise, in Europe, is that where access to a facility is essential in order for a person to operate in a certain market, the owner of the facility may, in certain circumstances, be obligated to grant access to the person.<sup>81</sup>

One commentator<sup>82</sup> locates the origin of the doctrine in Community Law in the *Commercial Solvents* case.<sup>83</sup> Commercial Solvents Corporation (CSC) refused to keep on selling to one of its clients, Intituto Chemioterapico Italiano (ICI), raw material used in the production of a material called ethambutol. While assessing the dominance of CSC, the ECJ found that the company had a dominant position because there was no other material that can easily substitute such raw material in the market. The Court dismissed allegations about the existence of possible alternative processes for the creation of such raw material since such processes were still not conducted at an industrial level. The Court found that CSC had decided to stop supplying ICI the raw material – even though ICI was its customer – because CSC was starting to produce ethambutol itself. Because the refusal to supply was aimed to take out ICI from the supply chain, the conduct was considered as an abuse of dominant position.<sup>84</sup> The facts of this case are relevant to our study, because both the EC and the ECJ have relied on the metaphor of “raw material” to consider that certain information might be indispensable material for developing other informational products.

Later, in *Bronner*<sup>85</sup>, the ECJ clarified some aspects on the application of the doctrine. In that case, the Court established that an undertaking controlling a facility shall be obligated to grant access to competitors:

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<sup>80</sup> Unlike in Europe, in the U.S. (where such doctrine originated) the doctrine requires the existence of two markets. Taladay (2002) p. 449-450 includes this definition of the U.S. doctrine: “The essential facilities doctrine is a specific type of refusal to deal characterized by a monopolists’ control of an essential facility, or bottleneck, that can extend monopoly power from one stage of production to another or from one market to another.”

<sup>81</sup> Fine (2002) p. 457.

<sup>82</sup> *Id.*, p. 460.

<sup>83</sup> See *Commercial Solvents* (See Table of Cases).

<sup>84</sup> *Id.*, par. 25.

<sup>85</sup> See *Bronner* (See Table of Cases).

- a. If the refusal of access to the facility is likely to *eliminate all competition* in the relevant market;
- b. If such refusal is not capable of being objectively *justified*; and
- c. If the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility.

In *Bronner*, the alleged essential facility was a system for house-to-house distribution of newspaper created by Mediaprint, the major newspaper publishing. Bronner, a small competitor, claimed that without access to such facility it would be unable to compete. After analyzing the system, the Court found that Mediaprint's home delivery system was not an "essential facility" because it was not impossible or even *unreasonably difficult* for any other publisher to establish alone, or with others publishers, such a system.<sup>86</sup> In our cases, the Court relied on *Bronner* when assessing if certain information was unreasonably difficult for competitors to substitute in order to compete.

### 3.1.2. Power of the EC to grant CLs.

The Commissions' powers to issue compulsory licenses are grounded in the EEC Council Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty. Article 3(1) states:

Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty<sup>87</sup>, it may by decision *require the undertakings or associations concerned to bring such infringement to an end* (emphasis added).

As can be observed, nothing in that provision article clearly allows the EC to order a CL. Such power derives from the interpretation of the ECJ in *Commercial Solvents*, which was further confirmed in *Magill*.

In *Commercial Solvents*, it was disputed that such provision enabled the EC to require an undertaking to order specific supplies of raw material.<sup>88</sup> Furthermore, the applicants

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<sup>86</sup> Fine (2002) p. 460.

<sup>87</sup> Now Articles 81 and 82 of the Treaty.

<sup>88</sup> *Commercial Solvents*, par. 43.

alleged that the amounts to be supplied ordered by the EC were *disproportionate*.<sup>89</sup> However, the ECJ endorsed the Commissions' actions observing that a power "to bring an infringement to an end" may include *an order to do certain acts*. Likewise, the ECJ rejected the argument that the EC had exceeded its discretionary powers by ordering certain amount of material to be supplied. The Court found that the EC acted according to the proportionality principle by fixing the quantities to be supplied on the basis of the quantities previously supplied by one company to the other in their previous client-customer relationship.<sup>90</sup>

Later, in *Magill*, one of the claimants alleged that the EC could not actively require a party to grant a license. However, the CFI sanctioned the EC powers by stating that the EC was entitled under Article 3, in order to ensure that its decision was *effective*, to require the copyright holders to provide the copyrighted information to the potential licenses. The ECJ upheld the decision of the CFI: the imposition of an obligation to license the right of publication subject to certain conditions, including payment of royalties, was the only way of bringing the infringement to an end.<sup>91</sup> Likewise the ECJ endorsed the CFI finding that the principle of proportionality had not been violated. The remedy was adequate to bring the infringement to an end.<sup>92</sup>

Once that we have reviewed the basic regulatory, administrative and judicial framework of CLs in the Community Law, we discuss in the next sections when copyright information has been deemed to be essential to compete.

## 3.2 Compulsory License in *Magill*

### 3.2.1. Summary of case

*Magill* represents the first case in which a refusal to license a copyright has been held to be an abuse.<sup>93</sup> In 1985, the EC was called upon to review the behaviour of three

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<sup>89</sup> *Id.*, p. 44.

<sup>90</sup> *Id.*, p. 46.

<sup>91</sup> *Magill* judgment, p. 91.

<sup>92</sup> *Id.*, par. 94-95.

<sup>93</sup> Forrester (1998) p. 35.

broadcasters whose radio and television (TV) programmes were broadcasted in Ireland and Northern Ireland. Such broadcasters were Independent Television (ITV), Radio Telefis Eireann (RTE) and the British Broadcasting Corporation (BBC) (the “Broadcasters”).

Before 1985, the Broadcasters used to publish their own weekly programme details in their own magazines. Since no comprehensive weekly TV guide existed in the market of such countries at that time, a viewer wanting to know what was going to be shown in the forthcoming week was forced to make a combined purchase of the three different magazines. On June 1986, a firm incorporated in Dublin named Magill TV Guide LTD (Magill TV) started publishing a weekly magazine containing such forthcoming programmes. Therefore, Magill TV’s magazine competed directly against the channel-specific weekly TV guides sold by the Broadcasters. But, only two months later, Magill TV was prevented by UK Courts from conducting its business. The BBC and RTE obtained injunctions in national legal proceedings, relying on their copyright with regard to the TV programme listings. Magill complained to the EC on the basis that RTE, ITP and the BBC were abusing their dominant position by refusing to license their reproduction right to third parties and were in breach of Article 82 of the EC Treaty. The EC issued the Magill Decision in which it found breach of Article 82 and ordered a compulsory license. The CFI confirmed the EC Decision on appeal. Finally, and nearly 6 years after the EC Magill Decision, in 1995, the ECJ resolved the case by basically upholding the CFI judgment.

### 3.2.2. The EC Decision

In the Magill Decision,<sup>94</sup> the EC found that there was a breach of Article 82 and ordered a CL in the following terms:

ITP, BBC and RTE shall bring the infringements [...] to and end forthwith by supplying each other and third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties. [...] If they choose to supply and permit

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<sup>94</sup> See Magill Decision (Table of Cases).



reproduction of the listings by means of licenses any royalties requested by ITP, BBC and RTE should be reasonable. [...] The parties are therefore required within two months from the date of notification of this Decision to submit proposal for approval by the Commission of the terms upon which they consider third parties should be permitted to publish the advanced weekly programme listings which are the subject of this Decision<sup>95</sup>

With regard to the license terms, it is important to note the following:

- a. The license was narrow. It only included the right to reproduction for publication and encompassed only the basic information needed by Magill TV: the title of each programme to be broadcast, the channel and the date and time of the transmission. Other information usually licensed by the broadcasters to third parties (i.e., to newspaper companies) such as summaries and additional factual information were expressly excluded by the EC in its Decision.<sup>96</sup>
- b. The Broadcasters were forced not only to license their rights to Magill TV, but to any other third party, on request and in a non-discriminatory basis. The EC explained in its Decision that an order to cross-supply the listings among the three Broadcasters would discriminate against third parties in the situation of Magill TV in a manner not compatible with Article 82.<sup>97</sup>
- c. The Broadcasters were entitled to include further terms in the license, particularly, terms considered necessary to ensure comprehensive high-quality coverage for all the programs.
- d. While apparently the parties were allowed to negotiate directly the terms and conditions of the license (including the royalties as far as they were reasonable), the EC reserved for itself the right to approve the final draft.

### 3.2.3. Grounds: Information as necessary raw material

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<sup>95</sup> Id., Art. 2.

<sup>96</sup> Id., Art 2. For product definition, see par. 7.

<sup>97</sup> Id., par. 27.

The EC, in general, did not question the validity of the copyright. It rather searched for anti-competitive behaviour. It asserted that not the copyright but the policies and practices of the Broadcasters, were the ones constituting infringements of Article 82 (b).

The first hurdle for the EC was to prove that copyright owners were subject to competition law. It argued that they were, since the Broadcasters were receiving revenues both from direct sales of their magazines and from sale of advertising space.<sup>98</sup> When such argument was contested by the Broadcasters, the ECJ dismissed the contention and observed that it was a mistake to presuppose that the *exercise* of copyright may not be subject to competition law.<sup>99</sup>

#### A. Dominance in the relevant market

The EC then assessed the dominance of the Broadcasters with regard to the advance TV listings market. When defining the market, the EC analyzed if it was possible both for competitors and consumers to substitute the weekly listings. The EC found that for any third party willing to publish a comprehensive publication, the listings constituted the essential *raw materials*. This was mainly because an attempt to publish a comprehensive publication without the three sets of listings was economically unviable; likewise, consumers did not have any substitute for weekly TV listings; the only other substitute was the daily listings that newspapers published under the Broadcasters licenses; however, that was held to be a different product and therefore, a different market.<sup>100</sup> The CFI and later the ECJ uphold the EC finding, observing that the Broadcasters were, by force of circumstances the only sources of the basic information on programme scheduling which was the *indispensable raw material* for compiling a weekly television guide.<sup>101</sup>

When assessing dominance, the EC found that only the Broadcasters were entitled to make last-minute changes to the broadcasting schedule. Consequently, third parties' dependency in this case was driven by the impossibility of creating reliable substitutes,

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<sup>98</sup> Id., par. 19.

<sup>99</sup> Magill Judgment, p. 48.

<sup>100</sup> Magill Decision, par. 20 and 21.

<sup>101</sup> Magill Judgment, par. 53.

a characteristic of dominant position.<sup>102</sup> Later, the CFI and the ECJ upheld this finding observing that since the Broadcasters were the *unique source* of such information, they constituted a *de facto* monopoly. By force of circumstance, the appellants were in a position to prevent effective competition in the market.<sup>103</sup>

#### B. Abuse of Dominant Position.

Once the Broadcasters were held to have dominance, the EC assessed if their conducts constituted an abuse of their dominant position. The EC highlighted a variety of corporate practices which ultimate goal was the prevention of competition. From the arguments proposed by the EC, the ECJ found the existence of an abuse, upon the evidence of the following “exceptional circumstances”:

- a. The Broadcasters relied on national copyright provisions in order to prevent the appearance of a *new product*.<sup>104</sup> Injunctions obtained by Broadcasters under copyright procedures were found to make competition impossible without a license. The refusal to supply was hindering competition and was prejudicial to consumers, because it was impeding the emergence of a new product (Magill TV Magazine) which enjoyed considerable demand, albeit in a brief period.
- b. There was no justification for such refusal to license.<sup>105</sup>
- c. By refusing to license, the Broadcasters reserved to themselves the market of weekly television guides by *excluding all competition* in that market since they denied access to the *basic* information which was the *raw material* indispensable for the compilation of such a guide.

### 3.3 Compulsory License in *IMS Health*

#### 3.3.1. Summary of the case.

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<sup>102</sup> Id., par. 22.

<sup>103</sup> Id., par. 47.

<sup>104</sup> Id., par. 54.

<sup>105</sup> Id., par. 55.

The IMS case was brought to the ECJ after a complex factual procedural history which involved two different proceedings: first, an intellectual property case heard by the courts of Germany, and, secondly, a competition action before the EU Courts.

In brief, IMS Health (“IMS”) was a company that collected data of pharmaceutical sales from drugstores and then elaborated and provided sales reports for pharmaceutical firms. Those reports were elaborated under a specific format named the “1860 brick structure” (the “1860 structure”), a database developed by IMS, after several years of working closely together with the pharmaceutical industry. By dividing Germany into 1860 geographical areas, according to the same number of postcodes, the structure allowed IMS to elaborate useful reports for pharmaceutical firms.

In February 1999, an ex-director of IMS created a rival firm named PII, which entered into the market with a brick structure of 2201 segments. The product was rejected by the industry because it was impossible to aggregate such information into the 1860 structure. PII launched then a second product with 3000 bricks, fully compatible with the 1860 Structure and was a market beauty. However, IMS obtained injunctions in copyright proceedings thus preventing PII to use either the 1860 Structure or any derivate structure.<sup>106</sup> After such judgment, two competitors of IMS, NDC (a global competitor of IMS, which had acquired PII) and AzyX, tried to obtain a license from IMS. After IMS’s refusal to license, both firms filed before the EC alleging that such refusal was an abuse of dominant position under Article 82. The EC ordered a CL as an interim measure,<sup>107</sup> but later this order was overruled by the CFI, considering that such relief shall not be applied while there was pending CFI analysis on the merits. By the same days, the Court that was reviewing the copyright issues requested the ECJ for a preliminary ruling. The ECJ ruling not only confirmed *Magill* but also broadened the “exceptional circumstances” that may reveal an abuse of dominant position.

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<sup>106</sup> A Frankfurt Court judgment of 28 December 2000 granted an injunction preventing the selling of data in both the 2847 and 1860 segments and any other number of segments so far as it constitutes a derivative from the 1860 brick structure.

<sup>107</sup> Community law establishes that the Commission may grant protective interim measures when it considers that, in a case, there is a risk of serious and irreparable harm and intolerable damage to the public interest. In such cases, it suffices for the EC to find a *prima facie* infringement.

### 3.3.2. The EC Decision

On 3 July 2001, the EC issued a Decision imposing upon IMS, as an interim measure, a duty to license its copyright.<sup>108</sup> This CL differs in some aspects from the one granted in *Magill*, almost 15 years before. Article 1 of the Decision states:

IMS Health (IMS) is hereby required to grant a license without delay to all undertakings *currently present on the market for German regional sales data services*, on request and on a non-discriminatory basis, for the use of 1860 brick structure, in order to permit the use of and sales by such undertakings of regional sales data formatted according to this structure. (Emphasis added)

Unlike the Broadcasters in *Magill*, IMS was forced to license to specific competitors. The EC shift may be explained by considering that the competitors did not seek from the EC a final decision but only immediate relief through interim measures. Another difference is that Article 2 of the Decision introduces a price-setting mechanism.<sup>109</sup> While the parties are entitled to negotiate the royalties, such faculties are lost if no agreement is reached within two weeks after the request has been made. Then, royalties shall be determined by independent experts chosen by the parties. If such procedure does not suffice, the EC intervenes by appointing experts. Ultimately, the EC is entitled to approve such royalties.

Article 2 of the Decision does not clarify if the EC powers for approving the royalties extend also to other terms of the license. Apparently, the EC did not strive to narrow the scope of the license in order for the remedy to be proportionate. The EC alleged that the information to be disclosed was only information that was already in the public domain and not secret information.<sup>110</sup> The real issue was that only reports processed through the 1860 structure were useful for the industry and therefore the use of the 1860 structure or compatible structures was essential for competitors to compete in the market.

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<sup>108</sup> See IMS Health Decision (See Table of Cases).

<sup>109</sup> IMS Health Decision Art. 2.

<sup>110</sup> *Id.*, par. 199.

It is also notable that the Decision includes a coercion element: Failure of IMS to license within the timeframe provided by Article 2 triggered a penalty, which was supposed to be charged on a daily basis until the obligation was fulfilled.<sup>111</sup>

### 3.3.3. Grounds: Copyrighted database as a *de facto* industry standard

The high market share that IMS had in the German market, being such country, the largest market for sales of data services in Europe was enough evidence of dominance. Relying again in *Bronner*, the EC assessed whether the 1860 Structure or any compatible structure was *indispensable to compete* on the relevant market defined (the market was that of regional sales of data services). In order to find out such indispensability the EC examined if it was possible to create a substitute that pharmaceutical companies would be willing to buy. For such purpose, the EC requested and received information from 85 industry players.<sup>112</sup>

The EC found that even though the use of the 1860 Structure was not required by law, such structure had become a *de facto industry standard*.<sup>113</sup> Most companies – the EC quoted statements of many pharmaceutical firms – were reluctant to switch to a different format due to the major internal cost to be incurred in the process.<sup>114</sup> Refusal to switch was absolutely understandable. IMS had developed the 1860 Structure by working together with the industry (in a Working Group)<sup>115</sup> over years and as a result, IMS and the industry developed systems that were compatible to analyze the data.<sup>116</sup> The EC found that by doing so, the pharmaceutical companies became voluntary *locked into* this standard. Switching away, so as to buy sales data formatted in a non-compatible structure, whilst theoretically possible, would be an unviable economic proposition.<sup>117</sup> In the opinion of the Commission, there had arisen a *de facto standard*:

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<sup>111</sup> Id., Art. 3.

<sup>112</sup> Id., par. 27.

<sup>113</sup> Id., par. 89.

<sup>114</sup> Id., par. 89.

<sup>115</sup> Some pharmaceutical firms were apparently surprised that IMS was claiming copyright in the database since – they alleged – the structure was developed by several industry firms. See Id., Par. 80-84.

<sup>116</sup> I.e. Compare the sales of company products with the sales of a competitor in a specific block (a “block” is a postal code territory); measure sale representative performance or compare old sales data with new for the same territories.

<sup>117</sup> Id., par. 92 and following.

In part because of [investment in Working Group cooperation] the 1860-brick structure appears to be the optimum to be achieved and to correspond exactly to the requirements of the pharmaceutical companies. This in part explains their dependence, built up over a long period, on this structure, the extremely high disincentives they have to switch to a new one, and so the impossibility for a regional sales data service formatted in another structure to be able to compete.<sup>118</sup>

The ECJ confirmed these findings and upheld the new element for assessing the *indispensability* of the facility: the degree of participation by users in the development of that structure shall be taken into account, particularly in terms of cost, on the part of potential users in switching to a different structure.<sup>119</sup>

Likewise, the EC found that there was no likelihood of competitors creating an alternative structure. According to *Bronner*, the EC needed to find technical, legal or economic obstacles that make *impossible* or *unreasonably* difficult, the creation of a similar facility to compete. The EC found that such obstacles were in place in this case. From a technical perspective, even though it was possible to create and use other structures based on diverse criteria, only reports based on post codes would be useful for the industry.<sup>120</sup> From a legal perspective, the Frankfurt Court injunction prevented any potential competitor to produce “derivates” from the 1860 structure without a license. However it had failed to clarify what a derivative work was. The EC evidenced that IMS had exploited such uncertainty by warning pharmaceutical companies about not dealing with its competitors in order to avoid copyright infringements.<sup>121</sup> In any case, the mere threat to be suited after investing in developing a new structure was found to be sufficient legal constraint.

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<sup>118</sup> *Id.*, par. 83.

<sup>119</sup> IMS Health Judgment, p. 30 (See Table of Cases).

<sup>120</sup> An alternative database using as main criteria drugstores names may cause computers not to recognize misspelled names; likewise, an alternative based on drugstores addresses would have to be manually imputed in case of a changes of domicile. See IMS Health Decision, p. 131.

<sup>121</sup> *Id.*, p. 143, 144.

Finally the EC found that the refusal to license was unjustified under community law.<sup>122</sup>

### 3.4 Compulsory License in *Microsoft*<sup>123</sup>

#### 3.4.1. Facts of the case

Sun Microsystems, a competitor of Microsoft in the market of workgroup servers, complained in 1998 before the EC alleging that: (i) Microsoft had a monopoly in the Windows 2000 Operating System (Windows OS) and Microsoft's Windows 2000 Office Suite (Windows Office) and that it was using such dominance in order to leverage its monopoly in the Microsoft's workgroup server OS (Windows Server OS) within the workgroup server OS market. Sun alleged that such leveraging strategy consisted in Microsoft's refusal to supply adequate information about the interface codes that would enable Sun servers to interoperate efficiently with Microsoft-integrated packages of the referred Window products, all of them dominant products in the market. Such refusal, thus limited the possibilities of Sun to offer workgroup servers that may interact with customers who used Microsoft products but were willing to be served by non-Microsoft servers.

After 6 years of research, the EC issued a Decision finding that Microsoft held near a monopoly in the referred Windows OS and that its refusal to supply information that may ensure the interoperability of such system with non-Microsoft servers constituted an abuse of such dominant position. The Decision is under current review by the CFI.

#### 3.4.2. The EC Decision

In its Decision, the Commission ordered Microsoft to disclose complete and accurate specifications for the protocols used by Windows work group servers. It is important to stress that the license was narrowly construed: It do not compel Microsoft to disclose its

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<sup>122</sup> Id., p. 169. It is important to mention that the Frankfurt Court found that the refusal to license by IMS was justified because the firm did not possess a clear title on the 1860 structure and could not grant a license without its possible co-authors. See Gitter (2002) p. 160-161.

<sup>123</sup> See Microsoft Decision (See Table of Cases).



source code, but only the protocols:<sup>124</sup> the mere interface specifications that are necessary to achieve interoperability.

The EC, mindful that such protocols have evolved – and would continue to develop – over time, locking in customers through network effects, stressed that the obligation encompassed not only the current protocols (for Windows 2000) but all past products for which Microsoft still supports online self-help support,<sup>125</sup> and future products.<sup>126</sup> The order to supply encompassed also an order to authorize the implementation of such specifications in work group server operating system products. The license was limited to reproduce the protocols and use them to write their own specification interfaces.<sup>127</sup>

Even though the Commission allowed Microsoft to mould the terms of the licenses, it stressed that such terms must not be unreasonable with respect to the access and use ordered.<sup>128</sup> With regard to future products, the EC included terms that might be difficult to monitor in the future: protocols concerning future products shall be granted in a “timely manner” and the policies for qualifying to license shall be “stable” in order to protect competitors’ investment when developing new products.<sup>129</sup>

With regard to the royalties, the EC did not specify any price-setting mechanism. Microsoft was free to fix the compensation for a period no longer than 120 days, such compensation being subject to approval from the EC. While the “reasonability” requirement was maintained, the Microsoft license included a new element: price 1 should not reflect a strategic value. Even though there existed similarities with *Commercial Solvents*, the EC was unable to fix a royalty fee here since before refusing to deal, Microsoft used to disclose such information to Sun free of royalty.

### 3.4.3. Grounds: The protocols as an essential facility

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<sup>124</sup> Id., par. 999. A protocol is treated in the Decision as information that provides an interaction between instances of the Windows client PC operating system and the Windows work group server OS.

<sup>125</sup> Id., par. 1001.

<sup>126</sup> Id., par. 1002.

<sup>127</sup> Id., par. 1003.

<sup>128</sup> Id., par. 1005.

<sup>129</sup> Id., par. 1007.

Bearing in mind that the reader may have at least a general idea of the economic power of Microsoft in the software industry, I will not stop here to describe the reasoning followed by the EC in order to define the relevant market and assess the firm's market power.

What is important to understand is why the protocols were found to be an essential facility. The main task of the EC here was to undertake a complex, technical and lengthy analysis of the information to which access was denied. The goal of such examination was to determine which precise information was essential for Sun and other players to compete in the market. The EC evaluated the arguments of Sun, Microsoft and other industry members and found that work group servers needed a "core" of information to interoperate with other PCs and other servers. Such technical specifications were necessary to compete because the protocols were needed for developing compatible products. Interestingly, the EC, on its reasoning, considered that the refusal of Microsoft to supply some other information requested by Sun was out of the scope of the evaluation and therefore of the final Decision.<sup>130</sup>

After determining which information was essential, the EC then attempted to evidence that Microsoft's refusal to supply reflected a leveraging conduct which ultimately aimed to foreclose the market.

It is remarkable that even though the EC tried to follow the Magill/IMS test, it did not focus on finding a limited number of "exceptional circumstances" that may indicate that the refusal to supply was an abuse of dominant position. Conversely, it followed its tendency to expand this test to include new circumstances. Furthermore, the EC did not hesitate to state that the Decision was based on the "entirety of the circumstances" as they are discovered "in the whole comprehensive investigation".<sup>131</sup> In my opinion, the EC could be seen as sending a message to the Courts: the exceptional circumstances test developed in Magill/IMS, which states that only in a narrow set of circumstances may a refusal to supply be considered as abusive, might be too narrow.

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<sup>130</sup> Id., par. 566.

<sup>131</sup> Id., par. 555.

While assessing if there were exceptional circumstances to assert abuse, two factors appeared to be decisive: The Sun Solaris workgroup OS which would be unable to operate smoothly without the protocols, was not only not a *clone* product of the similar product of Microsoft but was also not a new product under the meaning of the “exceptional circumstances” test. Conversely, such servers preceded those of Microsoft’s in the market and had a considerable demand. Under these facts, the EC considered that the refusal to supply was actually harming an *innovative* competitor.<sup>132</sup> Sun did not need the protocols to be a “follower” that may compete with Microsoft product. Sun needed access to continue with its innovating process with regard to a product which had an enormous demand in the market.

The second factor would have sufficed by itself to indicate the illegality of Microsoft behaviour. The EC found that Microsoft had followed over the years, as a business strategy, an “open system” policy where interface protocols were given free of royalty. Due to the consolidation of Microsoft products and network effects, Microsoft’s refusal to keep on supplying this information might discourage consumers from choosing non-Microsoft servers.<sup>133</sup> Therefore, Microsoft strategy was to leverage its power in the workgroup server OS market, into the server market. This conduct, as we saw in *Commercial Solvents*, sufficed to conclude that the refusal to deal was in breach of Article 82.

A commentator observes two important new features in the Microsoft case. First, the introduction of a new exceptional circumstance: A copyright holder may be found to be reducing the incentives to innovate of a competitive firm. Apparently, the EC is proposing that if an input is indispensable and that the refusal to supply eliminates competition and reduces incentives to innovate in the industry and there is no justification for such conduct, then an abuse would be evidenced. The CFI and the SCJ would have now the difficult task of evaluating if the “exceptional circumstances” test would continue to expand to new circumstances. The second element is that the Decision suggests that network effects need to be considered as factors that might produce monopolistic outcomes in the information industries.<sup>134</sup>

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<sup>132</sup> Anderman (2006) p. 230.

<sup>133</sup> Id., par. 706.

<sup>134</sup> See, in general, Lévêque (2005).

### 3.5 Evaluation

The cases studied provide evidence that the EU experience demonstrates: (i) that copyright is not, and shall not be, isolated from competition rules; and (ii) that compulsory licenses might be a proper and versatile tool to stand as a proportional remedy in competition-copyright conflicts. The EU experience, however, has not been free of criticism.

It has been argued, for example, that the distinction between the *existence* and the *exercise* of copyright is artificial. The ECJ invented it to justify its competence in IP-related cases;<sup>135</sup> and that even in those cases the essence of copyright substance has been narrowly conceived by the courts, the result being that competition outweighs the interest in protecting IP.<sup>136</sup>

The fact that the ECJ has developed a variation of the U.S. essential facilities doctrine has been highly criticized. The U.S. doctrine establishes a *per se* rule that under a certain narrow and cumulative set of circumstances, the refusal to license may be disapproved without any further justification.<sup>137</sup> The trend started by the EC and upheld by the ECJ to include new circumstances in light of the peculiarities of the cases reviewed, make it difficult to establish general conclusions.<sup>138</sup> The reliance on the particular facts of each case has made the application of the doctrine extremely complicated.<sup>139</sup>

Additionally, Ullrich considers that equating information to raw material is a simplistic analogy and claims that information hardly lends itself to an objective test of

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<sup>135</sup> In an early stage, it was argued that the Court had not competition to review IP cases since Article 222 of the Treaty of Rome provides that questions of property had to be dealt with under national law. See Groves and Martino (1993); the need to examine the “essential function” of copyright and its “specific subject matter” were invented by the ECJ to justify its encroachments upon national trademark and patents laws in order to pursue market integration. See Forrester (1998) 35-10.

<sup>136</sup> Fox (2005) p.762.

<sup>137</sup> Rahnasto (2003) p.144. For clarification on the term *per se rule* see Section 2.1.2 above.

<sup>138</sup> Forrester (1998) p. 35-10 notes that most scholars considered that if the EC would have been unable to act in *Magill*, it would have never been able to intervene in an IP-competition conflict. The author asks if the “exceptional circumstances test” shall be renamed as the “*odd* exceptional circumstances” test.

substitutability.<sup>140</sup> It is alleged also that the participation of customers in the creation of IP, which is today a commonplace, has been overestimated when assessing if protected work is essential.<sup>141</sup> Moreover, CLs with regard to such goods confer *access* to information and create potential problems of co-ownership.<sup>142</sup> This means depriving the owner of the substance of its exclusive right<sup>143</sup> therefore removing a policy tool which encourages innovation and the production of IP.<sup>144</sup>

A further deviation from U.S. theory is that, in the U.S., the essential facilities doctrine may only apply where there are two clear separate markets and a firm uses its rights in one market to leverage its power – harming competition – in a second market. The Commission, based on ECJ case law, has blurred such a distinction allowing CLs in benefit of undertakings competing against the right owner in the same market.<sup>145</sup>

Even though the IMS Health Judgement clarifies the “new product” requirement, sending a powerful message that new products were required and that no clones of protected works would satisfy the test,<sup>146</sup> some authors consider that such interpretation is not straightforward and may cause an avalanche of litigation by non-innovative, would-be free-riders.

In addition, before the Microsoft Decision, scholars observed that trivial copyrights, such as those at stake in Magill and IMS, would hardly gain copyright protection under traditional copyright regimes.<sup>147</sup> However, others assert that relevant industries in which IP serves to create standards (like information technology industries) where customers’ ability to switch from one system to another is difficult, shall be worried by the EC case law, due to the fact that the duty to license is broadening.<sup>148</sup>

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<sup>139</sup> Rahnasto (2005) p. 144.

<sup>140</sup> Ullrich (2001) p. 387.

<sup>141</sup> Gitter (2002).

<sup>142</sup> Ullrich (2001) p. 397.

<sup>143</sup> Rahnasto (2003) p 145.

<sup>144</sup> Gitter (2002) p. 184.

<sup>145</sup> Narciso and Torremans (2005) p. 153.

<sup>146</sup> Anderman (2006) p.230.

<sup>147</sup> Forrester (1998) p. 35-10 with regard to Magill; with regard to IMS, see Fine (2002).

<sup>148</sup> Gitter (2002) p. 154.

Finally, it has been said that the Court has contributed to creating unpredictability as the emphasis has shifted from competition-specific analysis to the issue of fairness between the parties.<sup>149</sup> The Court has relied more on equity than in developing precise tools for a competition-specific analysis of information access.<sup>150</sup> Not the EC but the Courts have betrayed classic competition law principles, which goal is to protect competition rather than competitors.<sup>151</sup>

In my opinion, all these criticisms evidence how Community law is still struggling in balancing the interest of copyright owners and competition law beneficiaries. By striving to anchor in previous case law related to physical facilities, the theory has evolved with considerable irregularities. It is clear that cases which had called upon some sort of fairness criteria rather than a purely economic approach, along with the peculiarities of Community Law, have contributed to such complex development.

For developing countries or countries with less experience in the application of competition tools, both the review of the doctrine and the criticisms offer useful information that may serve for Competition authorities, judges and policymakers. Furthermore, such countries might have the opportunity to develop the doctrine specifically for informational goods without having to deal with a baggage of history. Some of the lessons that I consider important to recoup from the European experience are the following:

- a. Copyright holders shall not be isolated from competition rules.
- b. There might be at least two behaviours that may be considered abuse: (i) the refusal to sell/provide essential information to a dependant innovative enterprise in order to eliminate that company as a competitor; and (ii) the exercise of copyright to prevent the emergency of new products for which there is consumer demand.
- c. Case-law evidence that only copyright holders with market power need to worry about facing this additional obligation to license.

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<sup>149</sup> Ullrich (2001) p. 397.

<sup>150</sup> Id., p. 398.

<sup>151</sup> Narciso and Torremans (2005).

- d. Access to certain protected informational goods may be necessary to compete, particularly when databases or software products reach a category of *de facto* industry standards.
- e. CL may prevent leveraging practices (using one market to increase power in a second market) and also practices that attempt market foreclosure (there is no need for two markets).<sup>152</sup>
- f. CLs shall be drafted narrowly to include only the information that is necessary to restore competition. Such proper definition is key for the remedy to be considered proportional.
- g. CLs are used exceptionally.<sup>153</sup> Companies that invest in technology shall not be worried of facing an avalanche of requests for licenses since that has not happened in Europe.
- h. Even if unusual, its use should be exemplary. Copyright-holders in dominant positions would need to consider seriously request for licenses.
- i. Competition authorities shall allow the licensor to draft the license. Such licenses are easier to enforce and monitor than those designed by authorities.
- j. Competition authorities shall be entitled to undertake long-term research. The evaluation of the whole circumstances is essential in order to use the tool only in special cases.

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<sup>152</sup> Fine (2002) p. 459.

<sup>153</sup> Id. The author observes that following the Magill Decision, many commentators predicted an avalanche of litigation brought by free riders and that such scaremongering has proved unfounded; likewise, the EC has stated that it would use such a powerful weapon carefully. See Forrester (1998) p. 35-14.

## 4 Can Mexico benefit from the European experience?

### 4.1 Introduction

This chapter discusses how Mexico may avail itself of the legal and doctrinal developments examined in Chapter 3. Such analysis should begin with an overview of the Mexican IP and competition law frameworks. However, since this work is addressed mainly to Mexican judges and policymakers, it is assumed that such framework is known already. Consequently I will focus mostly on the provisions that may serve as a basis for the discussion.

Mexico lies within the tradition of civil law countries. Commercial matters are governed by statutory law enacted by the Federal Congress. Our discussion will be based on three statutory laws enacted by such Legislature: The Industrial Property Law of 1991 (IPL) which governs patents; the Federal Law of Authors Right of 1996 (FLAR), which governs copyright and neighbouring rights; and the Federal Law of Economic Competence of 1992 (FLEC), which deals with monopolies and anticompetitive behaviours.<sup>154</sup>

Such instruments were enacted almost simultaneously as part of the Mexican negotiation strategy to execute the NAFTA regional trade agreement with Canada and the U.S.<sup>155</sup> The goal of the new laws was to create a friendly environment for foreign investment, since the U.S. had heavily criticized the prior protectionist framework.<sup>156</sup> As a consequence, one of the main goals of the new laws was to limit greatly the

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<sup>154</sup> See Table of Legal Instruments.

<sup>155</sup> NAFTA Chapter XVII (Articles 1701 through Article 1721 and four annexes) dealing with IP entered in force in Mexico in December 1992.

<sup>156</sup> Mexican laws on IP and foreign investment were considered by the U.S. as restrictive on the import of foreign technology, and the prospect of being part of NAFTA forced Mexican policymakers to draft more foreign investment friendly policies. See Vaca (1994) p. 183.



conditions where Mexican government may avail for CLs, particularly in the field of patents.<sup>157</sup>

#### 4.2 Penetration of Compulsory Licenses in Copyright Law

In line with the Berne, TRIPS and WCT agreements, FLAR assimilates software products to literary works and protects with exclusivity rights such works and original databases. Non-original databases receive a *sui generis* protection. While FLAR includes a number of limitations concerning the exercise of copyrights, CLs may only be granted for the publication or translation of some artistic works.

Chapter I of Title 6 is named: “With regard to copyright limitations due to Public Utility.” However, Article 147, reproduced below, stands alone in that chapter.

*The publication or translation of literary or artistic works necessary for the advancement of national science, culture and education shall be considered of public utility. When it is not possible to obtain the consent of the holder of the corresponding patrimonial rights, the Federal Executive branch, through the Department of Public Education, ex officio or as requested, may authorize the aforementioned publication or translation against the payment of a compensatory remuneration. The preceding shall be without prejudice to international treaties on copyrights and related rights signed and approved by Mexico. (Emphasis added).*

The title of the chapter suggests that CLs provided there may serve the broad concept of public utility.<sup>158</sup> However, in my view, the wording of the provision seemingly allows only for a more restricted interpretation. Similarly to the CLs contained in the Berne Appendix, the only rights that the license may encompass are the publication and the translation rights and apparently, only if the right holder cannot be located. In addition, CLs may only be granted if the work belongs to the scientific, culture and educational

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<sup>157</sup> Id. Consequently, under current IPL, CLs might be issued to prevent the existence of non working patents (See IPL Art. 74-74); also on grounds of governmental non-commercial use, in cases of emergency or national security (See IPL Art. 77). There is no evidence that any of those CLs have ever been issued.

fields. Apparently, a public interest in promoting access to copyright works for economic or technological development is not likely to qualify clearly on any of those categories; likewise, arguably copyright works that have been subject to license in Europe would qualify for a license under this provision.

#### 4.3 Designing a Compulsory Licenses regime within the Copyright law system

This section explores the possibilities of designing in Mexico a regime of compulsory licenses as an internal limitation within copyright law. An attempt to sketch a specific proposal for legal reform, including the substantive and procedural conditions that such regime may comprise, is outside the scope of this thesis. For our discussion, it suffices to assume that a CL regime might be fashioned to remedy cases where an authority finds (cumulatively):

- (i) copyright abuse; and
- (ii) where such abuse has been aimed at, or has had as effect, the obstruction of access to certain copyrighted products; and
- (iii) where such access is desirable on grounds of public utility, such as socio-economic or technological development.

It is submitted that such reform might move forward along two possibilities. A first option would be to draft a detailed provision within Chapter I of Title 6 of the FLAR describing a hypothesis built under the referred conduct. A second alternative would be to amend Article 147 to clarify that “public utility” may encompass access to information that may promote the goal referred in number (iii) above.

In any case, the Federal Congress shall avoid drafting a legal reform that may be found to contravene international treaties.<sup>159</sup> Mexico is party to the Berne Convention, TRIPS, WCT and NAFTA agreements. Since TRIPS incorporates automatically all the

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<sup>158</sup> Labariega, (2002), when analyzing the constitutional framework for copyright law in Mexico, considers this kind of compulsory license as an example that authors’ rights, as any other property, may be limited on grounds of public utility

<sup>159</sup> The SCJN has ruled that international treaties executed by Mexico which do not contravene the Mexican Constitution have Constitutional level and therefore may preempt Statutory Federal law.

“exceptions and limitations” admitted under Berne<sup>160</sup>, and considering that NAFTA’s relevant chapter may be considered a “specific arrangement” within the meaning of Article 20 of the Berne Convention,<sup>161</sup> TRIPS might be the relevant starting point for assessing any legal text which attempts to include a new limitation to copyright.

#### 4.3.1. Exploring TRIPS possibilities

There are few doubts that TRIPS entitles Member states to create regimes of CLs. Article 8.2 provides the following as one of the TRIPS principles:

*Appropriate* measures, provided that they are *consistent* with the provisions of this Agreement, may be needed to prevent the *abuse* of intellectual property rights by right holders or to resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. (Emphasis added).

Certainly, the drafters of TRIPS were concerned about IP owners’ “abuse” of rights. Furthermore, according to TRIPS literature, it is indisputable that CLs may qualify as “measures”. However, how may Member States understand *abuse* and how may a CL regime qualify as “consistent” with the treaty objectives and “appropriate” to prevent such abuse?

Literature is divided between a strict interpretation of the principle and a broad one. Further complicating the interpretation is the fact that the TRIPS limitations were drafted having in mind patents and licensing (transfer) of technology, but not trademarks or copyright.<sup>162</sup> Therefore, only until very recently have scholars focused on how CLs might be drafted by Member States in copyright legislation. Our question, however, has not been explored, but barely posed by leading scholars in the field. For instance, Ullrich observes:

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Moreover, international treaties in Mexico are self-executing see Amparo en Revisión 1475/98 Sindicato Nacional de Controladores de Tránsito Aéreo. 11 de mayo de 1999. LXXVII/1999.

<sup>160</sup> Ricketson (1999) p. 15.

<sup>161</sup> Rangel (1998) p. 30-3.

<sup>162</sup> Ullrich (2005) p. 738.

“One question for example is what the TRIPS agreement might say about the use of certain intellectual property as an “essential facility” or as “raw material” or interface for access to various peripheral and after-markets.<sup>163</sup>

Proponents of a rigorous interpretation consider that TRIPS provides examples in the field of patents and (licenses for) transfer of technology concerning how CLs must be drafted. It suffices to observe how Article 31 subjects the issuance of CLs to a number of conditions, thus sending a message that the drafters considered its provision as a last (and, perhaps, little desired) remedy. National laws that do not set forth similar conditions would be *inconsistent* with the Agreement by evaporating TRIPS concessions to right holders.<sup>164</sup> Similarly inconsistent would be the provision of CLs, when grounded in general broad terms such as “public interest” and even with regard to anti-competitive behaviours if not justified by objective criteria (i.e., a CL provided on a judicial rationale closer to “fairness” rather than “market efficiency”).<sup>165</sup> In any case, and particularly for copyright works, consistency shall be measured as well against TRIPS Article 13, which not only incorporates the famous “Three Step Test” set forth in the Berne Convention Article 9(2) but also extends it to all possible uses of protected works.<sup>166</sup> Considering all these limitations, it is observed that competition laws’ limits on patents may be more likely to survive a challenge than similar limits on copyrights.<sup>167</sup>

The TRIPS negotiation history may support such a view. TRIPS was designed to create IP standards, not competition rules. All rules concerning anticompetitive behaviour were included after strong pressure from developing countries. In such a context, one commentator observes that the “consistency” requirement was included to address a general concern of industrial countries that developing countries may rely too much on competition law with a view to limiting TRIPS concessions.<sup>168</sup> Article 8.2 shall therefore not be considered as an invitation to developing countries to counterbalance increase of IP protection by offering grounds for proactive license and technology

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<sup>163</sup> Ullrich (2005) p. 729.

<sup>164</sup> UNCTAD (2005) p. 551.

<sup>165</sup> UNCTAD (2005) p. 554.

<sup>166</sup> TRIPS Article 13: “limitations or exceptions to exclusive rights may only be established by Member States in certain special cases; (ii) which do not conflict with a normal exploitation of the work; (iii) and do not unreasonably prejudice the legitimate interest of the right holder.”

<sup>167</sup> Ghosh (2005) p. 808.

transfer strategies, but rather as cautious form of containment of any (developing country) national regime of limitations.<sup>169</sup>

Some other commentators promote a broad interpretation. To them, the “consistency” requirement shall not be measured against how limitations were drafted for patents; it shall be measured against the *objectives* of the Treaty, and the principle included in article 8.1., which entitles Member States to adopt measures “to protect public health and nutrition, and to promote the public interest in sectors of vital importance of (Members States’) socio-economic and technological development”.<sup>170</sup> Yusuf observes that a broad interpretation of “public interest” may offer member states a considerable degree of flexibility on the basis of each country’s particular socio-economic and technological development considerations.<sup>171</sup>

The fact that there is no explanation of what constitutes an “abuse” is found here to be an area of opportunity, conceding states broad authority to define what may constitute an abuse. There are no TRIPS restrictions that such a term may encompass unilateral or bilateral conduct as far as IP rights are found to be *exercised* contrary to the basis and or objectives of national particular IP protection tradition.<sup>172</sup> Dysfunctional use or misuse of copyright may exist with substantial market power, relative market power or not market power at all.<sup>173</sup> From such a perspective, the grounds provided by TRIPS (i.e. Article 31) are by no means the only ones. Public interest may encompass other interests too.<sup>174</sup> May a refusal to supply access to copyright-protected information be considered as blocking a public interest of socio-economic or cultural development? The answer is not straightforward. However, Watal, when analyzing examples in comparative law, observes that some countries apply compulsory licenses on basis of broad public interest formulations and quotes as an example the German law, where CLs might be issued “whenever they are indispensable”.<sup>175</sup>

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<sup>168</sup> UNCTAD (2005) p. 551.

<sup>169</sup> Ullrich (2005) Art. 739.

<sup>170</sup> TRIPS. Art. 8.1.

<sup>171</sup> Yusuf, (2001) p. 14.

<sup>172</sup> UNCTAD (2005) p 547; see also Ullrich (2005) p. 731.

<sup>173</sup> Ullrich (2005) p. 733.

<sup>174</sup> Watal (2001) p. 321.

<sup>175</sup> Id. p. 322.

Authors of such viewpoints argue that the history of the provision may as well support such a broad interpretation. It is observed that U.S. negotiators were willing to include a non-exhaustive list of “abusive” conducts mirroring the U.S. misuse doctrine. The fact that such a list was not accepted at the end implies that broad discretion was given to the states to define abuse and possible limitations.<sup>176</sup>

#### 4.3.2. Exploring NAFTA possibilities

In any case, after building a (successful) regime under TRIPS, the creature would need to survive as well a NAFTA test. Even though NAFTA provisions were almost literally copied from the TRIPS Agreement,<sup>177</sup> the slight differences suffice to consider NAFTA as a TRIPS-plus regional agreement.<sup>178</sup> Article 1705(6), for example, provides that:

No party may grant translation and reproduction licenses permitted under the Appendix to the Berne Convention where legitimate needs in the Parties territory for copies or translation the works could be met by the right holder’s voluntary actions but for the obstacles created by the parties’ measures.

Since I am not offering here a specific proposal of reform, I will not undertake here a discussion aimed to prove if a particular text may contravene expressly or implicitly NAFTA provisions. It suffices here to point out that such review might represent another hurdle for legislators.

Furthermore, it is clear that including an express provision of “compulsory license” (as is usual in copyright instruments) may create tensions with NAFTA partners and jeopardize foreign investment.<sup>179</sup> Recently, Mexico has been heavily criticized by the U.S. due to an alleged lack of enforcement of copyright law and is actually struggling to reduce piracy rates and counterfeiting in order to attract NAFTA partners’ investment.<sup>180</sup> Consequently, the inclusion of an *express* measure aimed to allow legal

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<sup>176</sup> Id., p.319. Reference is made to Correa and Gervais, among other authors supporting such view.

<sup>177</sup> This is the opinion of one of the leading Mexican practitioners in the field: see Rangel (1998) p. 30-2.

<sup>178</sup> Endeshaw (2006) p. 376.

<sup>179</sup> Vaca notes that the very notion of a CL may seem unsettling to U.S. practitioners and businesses. See Vaca (1994) p. 183.

<sup>180</sup> See IPPA (2006). Mexico has recently returned to the U.S. Special 301 Watch List. The U.S. government places on this list jurisdictions which, from the U.S. point of view, do not provide adequate IP protection.

access to copyrighted works might be evaluated as an unfortunate and even unfriendly policy.

#### 4.4 Possibilities of compulsory licences under the current Mexican Competition Law framework

The goal of this chapter is to examine specifically whether Mexican current competition law framework would provide ground for issuing CLs in cases similar to the ones examined in Europe and under analogous economic reasoning. The question might be: Is the Federal Competition Commission (hereinafter “CFC”) entitled to issue CLs as a remedy if it faces enough evidence that a copyright holder in a dominant position has abused their copyright by refusing to license, prejudicing competitors and consumers? This study indicates that such an answer will only be solved on the merits of a particular case. Consequently, this chapter rather focuses on assessing the structural possibilities: Would the CFC be ready to provide such license (lawfully)?

Article 28 of the Mexican Constitution prohibits monopolies, monopolistic practices and practices interfering against commerce, within the boundaries that such activities may have in statutory law. Such boundaries are set forth in the FLEC.<sup>181</sup> Its enforcement is entrusted to a branch of the executive federal government – the CFC.

##### 4.4.1. Traditional isolation of copyright from competition rules.

A first significant hurdle will be the traditional perceived isolation that copyright holders have enjoyed from competition rules; such separation originates in Article 28 of the Constitution and has been supported by statutory law and legal doctrine. Article 28 states:

All temporal production privileges granted to authors and artists with respect to their creation shall not be considered monopolies. The same privilege shall be granted to

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<sup>181</sup> During the course of writing this thesis, on 28 June 2006, the FLEC underwent substantial amendments which are crucial for this study. The current analysis is based on the amended text.

the inventors or improvers of inventions who are using their creations in an exclusive way.

Such provision was copied textually into Article 5 of the FLEC and remained untouched until the very recent reform to the FLEC (the “Reform”).<sup>182</sup> Conveniently for the purposes of this work, the Reform apparently has provided ground for believing that such isolation might be coming to an end. The new text of Article 5, *in fine* incorporates, together with the paragraph quoted above, a new paragraph which clarifies, at least, that FLEC is applicable to authors:

The economic agents in the above mentioned paragraph shall be subject to the application of this Law with regard to those acts which are not expressly encompassed within the protection provided in article 28 of the Constitution.

Even though this clearly suggests a shifting from the traditional isolation of IP rights from competition rules, the extent of such a move is not clear. Moreover, the new paragraph is somewhat confusing given that the Constitution does not expressly refer to any specific “acts”, but merely refers to “privileges”. Mexican legal doctrine has traditionally linked such an old-fashioned term with the package of economic benefits derived from copyright exclusivity.<sup>183</sup> Consequently, it is difficult to read which acts derived from copyright exercise are not encompassed in the term and, therefore, subject to the review of competition laws.

The “Exposition of Motives”<sup>184</sup> does not explain the rationale of the amendment. Yet, at least, it casts light on the aim pursued by the Federal Congress. Article 14 of the Exposition explains that the FLEC was designed in order to be applied to all economic agents and that it is important to remark that authors, artists, inventors and improvers

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<sup>182</sup> Decree that amends the FLEC (published D.O.F 06.28.2006.).

<sup>183</sup> See Lavariega (2002) p. 50.

<sup>184</sup> The “Exposition of Motives” is a statement akin to an Explanatory Memorandum which is drafted together with any new law or legal reform and aimed at elucidating the intention of the legislature. Such a document is crucial for the judiciary when trying to interpret the goal that the legislator pursued with any new provisions.



are subject to the law with regard to acts attributed to them that harm the competition process.<sup>185</sup>

To summarize, while it is clear that that the legislature attempted to clarify that authors shall be treated as economic agents, it largely left to the judiciary the difficult task of identifying which acts are covered by the Constitutional protection and therefore not subject to competition.

#### 4.4.2. Exploring the possible ground for the provision

While Article 82 of the Treaty of Rome clearly refers to an “Abuse of Dominant Position”, FLEC does not embrace a provision dealing specifically with such conduct. However, an OECD report notes that single-firm practices that may be defined as abuse of dominant position or monopolization in other countries are treated as relative monopolistic practices under FLEC.<sup>186</sup> Accordingly, it is worth exploring similarities with the European developments in the context of Article 10(v) of the FLEC, a provision that specifically deals with refusal to supply:

Subject to verification of [substantial market power in a relevant market] relative monopolistic practices are deemed to be those acts, contracts, agreements, procedures or combinations, *which aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favor of one or several entities or individuals, in the following cases:*

I ...

V.. The unilateral action based on *refusing* to sell, commercialize or *provide* to specific individuals, goods or services available and normally offered to third parties; (emphasis added)

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<sup>185</sup> Id., Article 14.

<sup>186</sup> OECD (1998) p. 10. Relative monopolistic practices or “vertical” practices are those whose objective or effect is to improperly displace other agents from the market, substantially limit access, or establish exclusive advantages in favour of certain persons. Practices such as tying sales, exclusive dealing or refusal to deal are encompassed in the list of behaviors prohibited by Article 10. These practices are prohibited *per se* only if the undertaking is found to have substantial market power in a relevant market.

In order to apply such an Article, the CFC follows a similar procedure to the European Commission:<sup>187</sup> (i) defining the relevant product market, through a relevant market test analysis; (ii) assessing if the undertaking has substantial market power; (iii) locating a refusal to deal practice; and (iv) evaluating if the refusal is justified. Only unjustified refusals create competition liability.

#### 4.4.3. Relevant market and substantial market power test

My conclusion that the analysis carried out by the CFC is similar to the one carried out by the EC is far from tenuous. The Supreme Court of Justice of the Nation (SCJN) has expressly relied on such similarity. In *Warner Lambert*,<sup>188</sup> the SCJN was called upon to clarify such concepts in a merger case, where the CFC issued a decision to nullify a merger.

Warner Lambert alleged that the FLEC violated its constitutional rights because: (i) FLEC failed to define the concepts of “relevant market” and “substantial market power”, among others; and (ii) CFC violated the “Division of powers” principle<sup>189</sup> by defining such terms in its Decision, a “legislative” power that may only be exercised by the Federal Congress. The SCJN, while conceding that indeed the FLEC failed to provide definitions, dismissed the Warner Lambert argument. The Court resolved that legislators are called upon to formulate general, abstract and impersonal rules and that it is the administrative authority which shall give more precise meaning to such terms when applying them in a particular case. In such exercise, the administrative body may only be prevented from performing an arbitrary interpretation. The Court found that that was not the case, since CFC had interpreted the concepts within the meaning of competition law discipline. Such interpretation was – according to the SCJN – the intention of the legislator when incorporating purely economic concepts in the law

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<sup>187</sup> See FLEC Articles 11 – 13. The procedures for assessing market power in a relevant market are similar to the ones used in the U.S. and the recent “modern” approach that is being developed in Europe. See OECD (1998) p. 11. Anderman (2006) p. 136 and Ullrich (2005) p. 750 have noted the recent influence of U.S. “efficiency” criteria in EU organs, which used to conduct such analysis with less analytical rigor. (Cf. the use of “fairness” criteria in, e.g., *Magill*).

<sup>188</sup> See. *Warner Lambert* p. 290 and followings.(See. Table of Cases)

<sup>189</sup> This is, the “check and balances” principle.

without providing them with a specific meaning. It is important for this study to note that the Court considered that there was substantial international experience in defining such terms and expressly quoted Article 82 of the Treaty of Rome and a doctrinal review of the reasoning of the ECJ in the *Hugin* case as examples of how such concepts have been interpreted within the discipline.<sup>190</sup> In line with such experience, the SCJN observed that it was within the powers of the CFC to construe such definitions basing its reasoning on the specific facts of every single case reviewed.

I therefore consider that CFC has been empowered by the Highest Court in Mexico to carry out an analysis of market power that might consider interpretations of the EC and ECJ.

#### 4.4.4 Refusal to deal as an abuse of an undertaking with substantial market power

In my opinion, Art. 10(v) gives sufficient ground to the CFC to assess a refusal to license by copyright holders bearing substantial market power. Copyrights are goods available and normally offered to third parties pursuant to Art. 10(v). The question then would be to find out if such undertaking might be forced to license if the refusal to deal is found to be *unjustified*. Article 10 provides in its preamble three criteria for assessing such justification.

Two of these criteria appear to be important for our study: Is such refusal to deal intended to, or does it have the effect of, (i) *improperly* displacing other agents from the market; or (ii) substantially hinders other economic agents access to such market? I have not found any CFC Decisions or Court precedents which deal directly with how these questions are to answered. However, some rulings may provide more indirect guidance. These rulings are considered briefly in the following.

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<sup>190</sup> Id., p. 296-298.

The CFC Decision in *Federal Commission of Electricity* <sup>191</sup>

The Federal Commission of Electricity (CFE) is the state-owned electricity company. It owns the electrical infrastructure of the country (transmission line towers and distribution line posts) and is obligated by statutory law to lease such infrastructure to telecommunications carriers as long as the safety and operative conditions make such lease possible. For telecom carriers, such agreements are the only possibility for operating, since it would be legally impossible and economically unreasonable to develop own infrastructure to lay down their cables.

WLC was a telecom carrier which started negotiations with CFE. Although WLC was in compliance with all requirements, CFE was apparently delaying the execution of the leasing contracts, alleging that the general conditions for executing the contract had not been defined yet. The CFC started an investigation of a relative monopolistic practice on grounds of unjustified denial of treatment.

During the investigation, the CFC found that:

1. CFE was an agent with substantial power in the relevant market, since CFE was the proprietor of almost all the electrical infrastructure available for leasing to telecommunications licensees;
2. CFE did have the capacity to restrict supply since it determined the necessary technical safety and operation conditions to provide the relevant service;
3. However, CFE had failed to sign lease agreements with 3 other carriers because it was undertaking an internal revision of participation schemes in the telecom industry. Therefore, the failure to close the contracts was not a denial of treatment but a suspension of the formalities, which would be resumed when the CFE governing body approved new schemes that would allow qualified applicants access to the infrastructure on non-discriminatory bases.

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<sup>191</sup> See CFE. Investigation Ex-Officio CFC.File: IO-01-2001. (Date of Resolution April 3, 2002).

The CFC ruled that the alleged refusal to deal was not unjustified since there was not evidence that such refusal was aimed to deny WLC access to the market or to discriminate against it with respect to other companies.

The CFC Decision in *Aeromexico*.<sup>192</sup>

In another Decision, the CFC followed a similar reasoning yet found a refusal to deal as unjustified. In this case, Aeromexico, a major Mexican airline, refused to receive travel agency services from entities that sold Aeromexico's competitors airline tickets. In such a case, the CFC found:

1. That Aeromexico enjoyed substantial market power in the market of tickets for air travel services in the City of Chihuahua, since Aeromexico controlled most of the flights to and from the City.
2. That the refusal to deal caused at least one travel agency, Bault, to buy tickets allocated by Aeromexico to other travel agencies. Such restriction placed Bault at a disadvantage position with regard to other agencies.
3. That Aeromexico's refusal to deal with Bault was not justified, since Bault met the requirements established by the Airline for transactions of that kind and;
4. That Aeromexico's conduct was clearly aimed to prevent or discourage its current and potential clients from looking for alternative sources of supply.

The Commission ruled that Aeromexico's practice was causing the undue exclusion of several economic agents and substantially hindering their access to the market and *ordered Aeromexico to suspend its unilateral action and provide Bault and any other agent who met the applicable requirements, with any tickets requested under the applicable policies.*

Following the reasoning of the CFC in these cases, it might not be unreasonable to assert that a justification of a refusal to deal case involving copyright would be assessed against the potential of such refusal to hinder third parties' access to the market or improperly displacing them from it.

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<sup>192</sup> See. Aeromexico. Complaint. File: DE-35-99 and DE-55-98. (Date of Resolution: August 3, 2000)

Moreover, the SCJN in *Warner Lambert* interpreted CFC powers as broad for conducting such assessment:

“... The solution of a concrete case depends upon the appreciation of the authority of the particular circumstances in such case. It do not follows that the authority is free to dictate –even arbitrarily – the correspondent resolution because in all cases the exercise of its powers would be subject to the principles of *fundamentacion*<sup>193</sup> and *motivacion*<sup>194</sup> ... The application of broad legal concepts [on cases like Warner Lambert] allows to recognize two valuable [legal] principles: First, the need that it shall be the authority entitled to apply the law the one that shall evaluate the particular circumstances of the case, in order to reach the most *fair* decision (emphasis added); on the other hand, the need that [the judiciary] exercise afterwards a control over the authority in order to preserve [the constitutional rights] preventing the authority arbitrary actions.”<sup>195</sup>

Bearing in mind that the EC and the ECJ (and even the Court in *Kodak* in the U.S.) have relied not only on economic analysis, but also on some sort of subjective fairness arguments when ruling in specific cases after evaluating the circumstances of these cases *as a whole*, I consider that the CFC may attempt to grant CLs based on refusal to deal cases, if the particular facts of the case merit such a remedy.

Moreover, it is submitted that the Mexican judiciary might evaluate “fairness” in the field not as purely “market efficiency” (even if that would be the probable reasoning of the CFC). I base this observation on a binding resolution issued by the SCJN in previous case law, where it dealt with the powers of the government to establish limitations to free participation in the market.<sup>196</sup> In such precedent, the Court observed that Article 28 was introduced to protect the social interest, not individual merchants, and that the concept of “monopolistic practices” was introduced by the legislator in order to deter practices that may damage society, and to strength the position of medium and small size companies and consumers, which are the ultimate victims of such practices.<sup>197</sup>

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<sup>193</sup> In brief, it set forth that the administrative authority shall refer to the exact legal provision in which the resolution is based.

<sup>194</sup> In brief, it set forth that the administrative authority shall link the provision to the actual conduct.

<sup>195</sup> See *Warner Lambert*, supra note

<sup>196</sup> See “Comercio, Derecho del Estado para establecer limitaciones a la libre concurrencia” (Tomo XLV del citado Semanario, Quinta Epoca, pág. 1978).

<sup>197</sup> See *Warner Lambert*.

#### 4.4.5 Powers of the CFC to grant CLs

Article 35 sets forth the powers of the CFC to issue remedies and penalties.

The former text of Article 35 granted broad powers to the CFC but narrowed the field of application only to concentration cases.<sup>198</sup> The new provision allows the CFC to suspend or correct monopolist practices and not only concentrations.

Article 35: The Commission may apply the following remedies:

- I. Order the suspension or correction of the *monopolistic practice* or concentration in question (emphasis added)

It was noted in Chapter 3 that the ECJ interprets that the EC's power to "bring an infringement to an end" encompasses the power to impose positive obligations; otherwise, EC action may not be "effective". In the present context, while the terms "correct" and "suspend" may not be precise, it has already been pointed out that an "obligation to sell" was imposed over Aeromexico. The obligation to sell in that case was considered as a means of *suspending* the practice.

The powers of the CFC to issue preliminary injunctions have been the main target of litigation in the last 10 years. In most cases, the SCJN has upheld CFC decisions issuing preliminary injunctions even if the legal ground of such injunctions was unclear.<sup>199</sup> The SCJN has upheld such Decisions noting that the CFC has a Constitutional mandate to take decisive actions against monopolistic practices due to the pernicious effects that such practices bring to the society: Efficacy, security and swiftness shall be the characteristics of CFC procedures.<sup>200</sup> In the light of such precedents, it is submitted that CLs might be justified as an *effective* remedy to suspend a refusal to license practice.

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<sup>198</sup> The term "Concentrations" in Mexican law encompasses mergers and other kinds of structural combinations, such as share or asset acquisitions, joint ventures, cross-share-holdings and interlocking directorates.

<sup>199</sup> OECD (2004) p. 12.

<sup>200</sup> For a comprehensive study concerning the main Mexican Court resolutions in the field of competition in the first 10 years of the FLEC, see Moguel (2004).

#### 4.4.6. TRIPS and NAFTA tests

Would the effective provision of CLs be deemed as in line with TRIPS, NAFTA and Berne? It is important to remember that in *Magill*, the Broadcasters claimed that the EC was acting illegally by imposing a remedy which contravened Article 9(2) of the Berne Convention (the “Three Step Test”), The ECJ refused to undertake such analysis and found a way out by observing that the European Community was not part of the Berne Convention.<sup>201</sup> Likewise, in *IMS Health*, it was alleged that the EC Decision may conflict with the European Community’s international obligations because it caused IMS an unreasonable prejudice to their legitimate interest under Berne and TRIPS.<sup>202</sup> The EC defended its Decision by offering arguments to surpass the Three Step Test; similarly, the EC considered that the CL was a *consistent* remedy under TRIPS Article 8.<sup>203</sup> However, such arguments have still not been reviewed or confirmed by the ECJ. The question remains hanging in the air.

Again, CFC would also need to carefully assess whether the remedy is possible with respect to NAFTA provisions. Article 1505, for example, when defining “Monopoly”, expressly excludes from being considered monopolies those entities that enjoy an IP right, merely because of the enjoyment of such right.

In this case, the CFC may find useful the *existence/exercise* dichotomy developed by the ECJ. Despite such distinction has received substantial academic criticism,<sup>204</sup> it is apparently admitted in cases where the legal monopoly provided by the existence of the right has grown into a factual monopoly in the market. For Ullrich, this means that it is not the exclusive right or the operation of the intellectual property what is at stake, but the use that is made of it *in the absence of competition*. Where a factual monopoly has aroused, antitrust rules shall apply to IP, because IP protection cannot longer meet its purpose nor operate as intended by the legislator.<sup>205</sup>

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<sup>201</sup> *Magill* Judgment, par. 72-74.

<sup>202</sup> *IMS Health* Decision, par. 206.

<sup>203</sup> *Id.*, par. 207-212.

<sup>204</sup> See Note 135

<sup>205</sup> Ullrich (2001) p. 384.



The CFC apparently followed a similar reasoning when it resolved to authorize the merger of Glaxo Wellcome and Smithkline Beecham on the condition that both firms divest themselves of the patents rights of certain medicines.<sup>206</sup> In such case, the CFC found that the patent term of protection placed a barrier that hindered the entry of other players in the market because it made impossible for new players to compete in the short term. This however, did not apparently suffice for disapproving the merger. An additional and crucial finding was that with the merger, the referred firms would reach a joint market share that would be considerable higher than that of Novartis, their only competitor; therefore, the merger would provide the agents with the capacity to substantially restrict supply in the market of such product, since Novartis would not have sufficient capacity to counteract actually or potentially those firms power.

It can be inferred from that Decision that it was not the existence of the patent right what created the monopoly effects; conversely, it was the fact that such right would provide the merging Firms with a factual monopoly in a market where no competition was possible.

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<sup>206</sup> See Glaxo Wellcome PLC / Smithkline Beecham PLC. File: CNT-76-2000 (Resolution date: 09.07.2000).

## 5 Conclusions

The European Institutions have taken the lead in showing how CLs – as a remedy provided by competition law – can be used to prevent a copyright owner, holding a dominant position, from abusing its copyright, when such abuse has a potential to hinder competition in prejudice to competitors and consumers. Such development is remarkable, if considering that socio-economic and industrial developments are pointing out that copyright owners, particularly in the knowledge industries, are increasingly using copyright in order to control the behavior of competitors and secure undesirable monopolistic profits. The European experience reveals that copyright owners shall not be immune to competition surveillance and that competition law may counterbalance unwelcome effects of copyright exclusivity. It further serves as an example of how CLs may be used as versatile instruments which, if carefully tailored to correct specific behaviors, can stand as appropriate, exceptional and proportional remedies to contain the abuse of copyrights.

It is observed that this European exercise is not free of substantial criticism. The doctrine that serves as platform for analyzing such cases has developed with inconsistencies due to the nature of Community law, the particularities of the cases that were resolved and the transplantation of such doctrine from physical goods to informational goods. Such irregularities have created a doctrine which is difficult to defend as a proper scientific method to evaluate similar cases. It does not provide rational or efficient outcomes on when protected information shall be subject to a duty to license. Consequently, it has the potential either to become only applicable in straightforward cases or to keep unfolding without rigor, and become a tailor-made remedy for each circumstance. If the first possibility happens, it might lose its leading light (up to now, it has been able to react to developments such as *de facto* industry standards and pernicious networks effects); if the second possibility occurs, it might

continue to create uncertainty within the business and academic community. Under these circumstances, in my view, the doctrine is not a product suitable for exportation.

However, it is submitted that the European experience indicates that judges and policymakers in developing countries should re-think the relationship between copyright and competition law. Such reconsideration is urgent bearing in mind that the developments referred to in this thesis suggest that copyright overprotection or the abuse of copyright points toward a future where information, the key element for development, might become unlawfully appropriated. Under these circumstances, this thesis concludes that the European experience provides noteworthy elements that might be used by developing countries as building blocks for creating competitive-based IP systems.

I have reviewed here two possibilities that Mexico may have for benefiting from such experience. With regard to the first path – a reform under TRIPS possibilities– I conclude that even though it is clear that a reform might be valid under TRIPS and probably under NAFTA, Mexican legislators may need to carefully review TRIPS and NAFTA interpretations on how to incorporate such a remedy without incurring international liability. It is submitted that a key for a successful reform would be to design a normative hypothesis sufficiently specific and that may not be considered as a pretext to undermine protection of IP rights. However, as this would necessarily imply the use of the (perhaps fearsome) term “compulsory license”, such a legal reform would face substantial political hurdles, mainly coming from the foreign (particularly U.S.) industries.

The second path – issuing CLs based in the current regulatory framework – seems a more straightforward solution. It is submitted that CFC is provided with sufficient powers to act decisively in cases involving refusal to supply copyright works. Of course the path has a number of hurdles but such hurdles, particularly the political ones, cannot be compared with those on the first path. It is submitted that the structural provisions are in place; what is needed is legal experience that might serve to break the traditional paradigms. In my opinion, a CL which (i) is justified by sound research and solid economical analysis; (ii) succeeds in narrowing the field of the license only to information necessary to compete; and (iii) as a consequence can be defended as an

effective and proportionate remedy under the circumstances of the case, has substantial possibilities to succeed a SCJN review and even a TRIPS and NAFTA challenge.

## References

### a. List of Judgements/Decisions

#### (i) United States

##### *Kodak*

Image Technical Services, Inc. v. Eastman Kodak Co., 125-F.3d-1195 (9<sup>th</sup> Cir.1997)

##### *Xerox*

CSU, L.L.C. v. Xerox Corp., 203 F.3d 1322, 1327

#### (ii) European Community

##### *Bronner*

Oscar Bronner GmbH v. Mediaprint [1998] ECR I-7791

##### *Commercial Solvents*

ICI and Commercial Solvents v. Commission [1974] ECR 223

##### *IMS Health Decision*

Commission Decision 2001/165/EC of 3 of July, 2001 in Case COMP D3/38.044—  
NDC Health/IMS Health: Interim Measures [2002] OJ L59/18

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RTE, BBC AND ITV v. Commission [1995] ECR I-743

##### *Microsoft Decision*

Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 Microsoft)

##### *Volvo*

AB Volvo v. Erik Veng (UK) (Case 238/87), [1988] E.C.R. 6211; [1989] 4 C.M.L.R.  
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#### (iii) México

*Warner Lambert*

Amparo en Revision 261/96 Grupo Warner Lambert Mexico, S.A. de C.V.

*Aeromexico*

Complaint. File: DE-35-99 and DE-55-98. (Date of Resolution: August 3, 2000)

Alleged absolute monopolistic practices in the market for distribution of airplane tickets

*CFE*

Ex officio investigation; File: IO-01-2001 (Date of resolution: April 3, 2002). Alleged relative monopolistic practices in the market for leasing of electrical infrastructure for the installation of public telecommunications networks

*Glaxo Wellcome PLC / Smithkline Beecham*

PLC. File: CNT-76-2000 (Resolution date: 09.07.2000) authorization of the transaction notified, on the condition that GW and SB divest themselves of the brand and necessary assets to produce Kytril.

b. Treaties/Statutes

(i) International Instruments

Berne Convention for the Protection of Literary and Artistic Works. Paris Act of July 24, 1971, as amended on September 29, 1979.

Agreement on Trade Related Aspects on Trade-Related Aspects of Intellectual Property Rights. April 15, 1994 (TRIPS)

(ii) European Instruments

Treaty of Rome (Consolidated Version July 24, 2002)

EEC Council: Regulation No. 17: First Regulation implementing articles 85 and 86 of the Treaty

North American Free Trade Agreement, (NAFTA) (Dec. 17, 1992) U.S.-Can.-Mex.

(iii) Mexican Instruments.

Political Constitution of the United Mexican States (Published D.O.F. .02.05.17).

Federal Law of Economic Competition: (Published D.O.F. 12.24.92)

Federal Law of Author's Right (Published D.O.F 12-24-96)

Law of Industrial Property. (Published D.O.F. 16.11.91)

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