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**The Impact of Competition Law on Copyright Law
in New Economy Markets in Canada**

by
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Abstract

The interface between copyright law and competition law has always been a topic of debate in legal and economic circles. Since the last decade however, new economy markets pose new challenges to this interface. Network effects, interconnectivity, rapid innovation, and excludability are characteristics of new economy markets. Particularly network effects can, in connection with copyright protection, increase market power and provoke competition authorities to monitor the exercise of copyrights.

This thesis contains an analysis of the background and underlying principles of Canadian copyright law and competition law. It gives an overview over their interface in the legislation and the impact of competition policy on copyright litigation. It also examines the Intellectual Property Enforcement Guidelines that were issued by the Canadian Competition Bureau in September 2000.

The thesis concludes that competition law and copyright law are complementary instruments that serve the same goals. The two bodies of law are drafted so that they would not oppose one another. Instead of curbing copyright protection through competition policy enforcement, new challenges posed by new economy markets should be met by rethinking copyright policy and protection in these markets.

Résumé

La relation entre le droit d'auteur et le droit de la concurrence fait l'objet d'un débat récurrent dans les sphères juridique et économique. Depuis la dernière décennie, la « nouvelle économie », caractérisée par l'effet de réseaux, l'interconnectivité, l'innovation rapide et la possibilité d'exclure, pose de nouveaux défis à cette relation. Plus particulièrement, l'effet de réseaux, dans le contexte de la protection des droits d'auteur, peut renforcer la puissance commerciale du détenteur de ces droits et amener les autorités en matière de concurrence à réviser certains actes liés à l'exercice des droits d'auteur.

Le présent mémoire analyse le contexte et les principes fondamentaux du droit d'auteur et du droit de la concurrence canadiens. La relation entre ces deux régimes et l'impact des politiques en matière de concurrence sur les litiges liés au droit d'auteur y sont examinés. Le mémoire étudie également les Lignes directrices pour l'application de la Loi en matière de propriété intellectuelle émises par le Bureau de la concurrence en septembre 2000.

Le mémoire conclut que le droit de la concurrence et le droit d'auteur sont des instruments complémentaires dans la poursuite d'objectifs communs. Les deux régimes juridiques sont construits de façon à ne pas entrer en conflit l'un avec l'autre. Plutôt que de limiter la protection du droit d'auteur par l'application du droit de la concurrence, les nouveaux défis posés par la nouvelle économie devraient être relevés en repensant les politiques en matière de droit d'auteur et la protection de ces droits dans le cadre particulier des marchés en question.

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I. Introduction

Competition policy and intellectual property rights are key instruments for governments that seek to foster innovation and rapid diffusion of new technology. Firms that operate in the area of new technology employ intellectual property rights extensively because they constitute important strategic assets.

The interface between intellectual property rights and competition policy is a longstanding topic of debate in economic and legal circles. In the last decade however, competition policy has confronted intellectual property issues with increased frequency and complexity. This is due to the fact that new economy markets are more and more dependent on products and services that are the expression and embodiment of ideas. Expression and embodiment of ideas can be protected by intellectual property rights. This protection can be used and misused in anti-competitive attempts to exclude competitors from the market.

Competition policy and intellectual property rights seem to be fundamentally at odds with one another as intellectual property rights have the potential to create market power through monopoly rights whereas the incentive of competition policy is to curb market power and destroy monopolies. But, competition policy and intellectual property policy are not necessarily antagonistic. In fact, they are complementary instruments that serve the same goals of promoting efficient competition, innovation and diffusion of new technology, albeit in different ways. Intellectual property policy is about creating

incentives for investment in research and development and other creative activities resulting in new products and processes; competition policy is about maintaining healthy inter-firm rivalry in markets, which itself is a vital pre-condition for innovation and productivity improvement.¹ Accumulation of knowledge and innovation is central to growth and the process of competition in a market-based economy.²

Competition policy should not aim to destroy legally obtained intellectual property rights. Rather, it should aim to limit only improper use of intellectual property rights in order to promote competition policy objectives. The question then becomes: under what circumstances and to what extent is the exercise of intellectual property rights improper? Using them in a way that goes beyond the scope of their legal monopoly can violate antitrust provisions dealing with dominant positions or anti-competitive practices and agreements. In this respect, the tension between competition law and intellectual property rights does not differ from the one between competition law and any other legally obtained exclusionary right.

This thesis focuses on the impact of competition law on the use of copyrights in new economy markets. New economy markets are more dynamic and efficient than traditional ones. They are characterized by high innovation costs for information assets. These assets are – mostly due to the emergence of computer technology – easily

¹ Anderson, Robert D., "Intellectual Property Rights and the Competition Act: Different Perspectives on Welfare Maximization, Section C: Competition Policy and Intellectual Property Rights: Complementary Framework Policies for Innovation and Efficiency" in James B. Musgrove, ed., *Competition Law for the 21st Century* (Juris Publishing, Canadian Bar Association, Competition Law Section, 1997 Annual Conference) at 367, at 369f.

² Anderson, Robert D. and Gallini, Nancy T., "Competition Policy, Intellectual Property Rights, and Efficiency: An Introduction to the Issues" in Robert D. Anderson and Nancy T. Gallini, ed., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 1998) at 1, at 2.

reproducible at very low costs. Also, new economy markets depend strongly on communications, which makes interoperability and dependence on network effects inevitable. Therefore, battles occur among firms seeking standard status, first entry, and early lead advantages in large networks. Access to large networks increases product value to new and old users. Control over networks enlarges market penetration and results in significant power. Consequently, competitive strategies – like cooperation or exclusionary tactics – are crucial.

Industries that operate with and create networks pose particularly challenging issues for both the design of intellectual property rights and the optimal application of competition policy. Standardization and compatibility of outputs can provide tremendous advantages for ‘first movers’ and enhance the market power provided by intellectual property rights.³ This outcome is generally referred to as a ‘network effect’ or network externality, describing the phenomenon that the value of a product or service increases with the breadth of demand for that product or service.⁴ A typical example is the telephone system. This system becomes more valuable to any given subscriber as more and more people subscribe because the network of people to communicate with increases. The downside of this process is that the costs to consumers in choosing, or switching to, a rival offering increase.⁵ Subscribers are locked in the network and new subscribers are reluctant to subscribe to a smaller rival network.

³ Anderson, *supra* note 1 at 371.

⁴ ‘Network effects’ or network externalities are described in detail in Chapter III.A. below.

⁵ Shelanski, Howard A. and Sidak, J. Gregory. “Antitrust Divestiture in Network Industries” (2001) 68 University of Chicago Law Review at 1, at 5.

Strong network markets and dominant network standards can look a lot like a natural monopoly. However, network effects are demand-side effects and therefore imply different things for competition than do natural monopoly markets.⁶ But it has also been argued that because of network effects “pure competition is unattainable in network industries, where the success of each firm depends necessarily on cooperation with its rivals.”⁷

This thesis focuses on copyright as one specific intellectual property right. Therefore, future reference to intellectual property rights in this thesis will be interchangeable with copyright specifically, unless otherwise expressly noted. Since there is not much case law to be found concerning the interface of copyright law and competition law in Canada, other intellectual property rights (especially patents and trade marks) will be examined where needed. Also, a comparison with U.S. law will be necessary. As the legal regimes of Canada and the U.S. concerning antitrust and intellectual property are not always identical, differences will be pointed out accordingly.

Following this introduction, Chapter II describes the background and underlying concepts of copyright law and competition law. An understanding of the differences between these two legal concepts clarifies the ongoing debate concerning the interface of intellectual property protection and competition policy. Chapter III explains specialities in network industries. They need to be emphasized because network industries are the core of new economy markets. Chapter IV gives an overview over the current interface of

⁶ McGowan, David. “Symposium: Networks and Intention in Antitrust and Intellectual Property” (1999) 24 *University of Iowa Journal of Corporation Law* at 485, at 488f.

⁷ Epstein, Richard. “Monopoly Is Bad, Trustbusting Can Be Worse” (1998) *Wall Street Journal* at A14.

copyright law and competition law in the Canadian statutes and discusses the impact of the *Competition Act*⁸ on intellectual property litigation. The final chapter reflects upon the Competition Bureau's Intellectual Property Enforcement Guidelines that were released in September 2000. It includes an in-depth analysis of these Guidelines. The conclusion contains closing remarks to this thesis.

⁸ Competition Act, R.S.C. 1985, c. C-34.

II. Theories and Principles of Copyright Law and Competition Law

A. Copyright Law

1. *Legal Theory*

a) Historical Background

Canadian copyright, patent, trade-mark, and industrial design laws are direct descendants of laws tracing back before 1867. Settlers felt the need to protect intellectual property even before Confederation.⁹

Copyright law originated from Crown grants for printing in order to control seditious materials. Copyright protection in Canada was a response to this protectionism of the London book trade.¹⁰ After the imposition of parliamentary democratic systems of government (where freedom of speech and of the press is vital) the censorship focus waned and “the commodification of copyrights became the focus of the law. Copyrights became tradable economic objects.”¹¹ Also, the authors’ participation in the creation of the work started to be recognized. They were to be the first owners of these rights and possession of these rights was perpetual.¹² Then, an exclusively statutory system was put in place, which restricted the term of copyright. This restriction was introduced because “the economic rationale of providing a monopoly over consumer items runs counter to

⁹ Vaver, David. *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Concord: Irwin Law, 1997) at 2.

¹⁰ *Ibid.* at 1.

¹¹ Handa, Sunny. *Understanding The Modern Law Of Copyright In Canada* (Montreal: McGill University, 1998) at 81 [hereinafter Handa 1].

¹² *Ibid.*

notions of freely moving markets”¹³ and because “the rights protected concern the expression of ideas”¹⁴ (which is free speech). Restricting liberty by giving someone a perpetual monopoly over consumer items or over an expression was offensive to the increasingly popular libertarian political philosophy in the seventeenth and eighteenth centuries.¹⁵

b) From Privilege to Property

Intellectual property rights were not always labelled as ‘property’. As the grants of monopoly depended on the favour of the monarch and the royal entourage, “the talk once was more of ‘privilege’ than ‘property’”.¹⁶ But, this changed in the West during the eighteenth century with the forces of the Enlightenment and the Industrial Revolution and discourses switched from ‘privilege’ to ‘property’.¹⁷ “Capitalists want to ‘own’ whatever their enterprise produces and to exclude everyone else from its enjoyment except on their terms.”¹⁸ “Intellectual property in this sense is a peculiarly Western conceit. It is founded on a modern emphasis on the individual and on individual rights, and on encouraging and celebrating creativity and innovation as paths to both self-fulfilment and social advance.”¹⁹ It has become the new wealth of the late twentieth century and “the law in Canada and most Western nations has come to accept this capitalist imperative.”²⁰

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Vaver, *supra* note 9 at 3.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 4.

²⁰ *Ibid.*

Nevertheless, “intellectual property is not considered property in the traditional sense [in Canada], as it lacks physical presence and displays characteristics synonymous with public goods.”²¹ The use of the term ‘property’ “is therefore misleading to the extent that it leads one to believe that tangible property concepts [...] generally apply.”²² In fact, “[i]ntellectual property receives its protection from a sui generis scheme of both statutory and judge-made laws that were designed to accommodate the various idiosyncrasies of the subject matter being protected.”²³

c) Work-Centred Approach

The Canadian (and Anglo-American) copyright regime is based on a work-centred approach²⁴ – in contrast to the author-centred approach that is the rule in continental systems of copyright. The author-centred approach (*droit d’auteur*) focuses on the rights of the creator and “often presume[s] that protecting the creation from copying is necessary for reasons of fundamental justice also referred to as natural rights.”²⁵ Moral rights (defined in sections 14.1 and 14.2 of the *Copyright Act*) are also based on the author-centred approach. They adopt, as described in *Théberge v. Galerie d’Art du Petit Champlain inc.*:

a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist’s *oeuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection. They focus on the artist’s right [...] to protect throughout the duration of the economic rights [...] both the integrity of the work and his or her authorship of it (or anonymity, as the author wishes). [...] The important feature of moral rights in the present statute is that the

²¹ Handa 1, *supra* note 11 at 76f.

²² *Ibid.* at 77.

²³ *Ibid.*

²⁴ *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002] S.C.J. No. 32; 2002 SCC 34 at 12.

²⁵ Handa 1, *supra* note 11 at 80.

integrity of the work is infringed only if the work is modified *to the prejudice of the honour or reputation of the author* (s. 28.2(1)).²⁶

This thesis follows the work-centred approach because historically Canadian copyright law has evolved with a utilitarian mindset.²⁷ As held in *Théberge v. Galerie d'Art du Petit Champlain inc.*:

Generally speaking, Canadian copyright law has traditionally been more concerned with economic than moral rights. Our original Act, which came into force in 1924, substantially tracked the English *Copyright Act, 1911* (U.K.), 1 & 2 Geo. 5, c. 46. The principal economic benefit to the artist or author was (and is) the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatever" (s. 3(1)) for his or her life plus fifty years (s. 6). The economic rights are based on a conception of artistic and literary works essentially as articles of commerce. (Indeed, the initial *Copyright Act, 1709* (U.K.), 8 Anne, c. 21, was passed to assuage the concerns of printers, not authors.)²⁸

The work-centred approach is based on public interest and social utility principles, "such as the advancement of knowledge and progress, or the maximization of wealth."²⁹

The premise in the social utility aspect is that "ideas are free as the air – a common resource for all to use as they can and wish."³⁰ Not every tangible product or idea deserves intellectual property protection. In fact, the opposite is true. As Vaver notes:

[C]opying or independently producing an identical item is acceptable, even to be encouraged, unless it is clearly prohibited. Keeping a broad public domain itself encourages experimentation, innovation, and competition – and ultimately the expectation of lower prices, better service, and broader public choice. [...] [T]he decision to protect, once taken, must be matched by an equally careful decision on how far to protect.³¹

²⁶ *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra* note 24 at 15ff.

²⁷ Not everyone agrees with this position. Therefore, a brief description about what would be different if one were to analyze the interface between copyright law and competition law with the presupposition that the underlying principle of copyright was based on the author-centred approach is given in Chapter VI. below.

²⁸ *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra* note 24 at 12.

²⁹ Handa I, *supra* note 11 at 80.

³⁰ Vaver, *supra* note 9 at 1.

³¹ *Ibid.* at 11.

Without protection, people would not let the public have the benefit of the new ideas they had, through fear of competition from imitators. But overprotection “imposes social costs by stopping or discouraging others from pursuing otherwise desirable activities.”³² The interests of the owner and the users have to be balanced very carefully. Therefore, some monopoly profit has to be assured to the inventor in order to make the incentive to innovate stronger. But, monopoly prices can deter some users whose benefit exceeds dissemination costs and dissemination can therefore be inefficiently small.³³ And this is exactly where the role of the social utility aspect of copyright law³⁴ stands. The aim of copyright law is “to optimize the trade-off between these benefits and costs, by creating enough but not too much protection for the innovator’s property right”.³⁵ Thus, authors are granted limited monopoly rights “through a system of copyright in order to optimally encourage (i) the creation and (ii) the dissemination of their works with the goal of maximizing social utility.”³⁶ Without the grant of such rights, much research and creativity would not be carried on.³⁷ Copyright protection, in particular, encourages work to be disclosed to the public and to increase society’s pool of ideas and knowledge.

³² *Ibid.*

³³ Church, Jeffrey and Ware, Roger, “Network Industries, Intellectual Property Rights and Competition Policy” in Robert D. Anderson and Nancy T. Gallini, ed., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 1998) at 227, at 239.

³⁴ The use of the term ‘social utility’ in this context is based on Handa’s elaboration of the social utility model of copyright law. See Handa 1, *supra* note 11 at 154ff.

³⁵ Church and Ware, *supra* note 33 at 239.

³⁶ Handa 1, *supra* note 11 at 154f.

³⁷ Vaver, *supra* note 9 at 8.

⁴⁰ Copyright Act, R.S.C. 1985, c. C-42.

2. Legal Principles

a) Scope of Copyright Protection

Copyright is protected under the *Copyright Act*,⁴⁰ which was enacted in 1921 as a substantial copy of the 1911 U.K. copyright law. It came into force in 1924 and underwent major amendments in 1931, 1988, 1993, and 1994. The last two amendments were a result of the *North American Free Trade Agreement*⁴¹ and the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)*.⁴² The central aim of the *Copyright Act* is to grant rights of exploitation to authors of original literary, dramatic, musical, and artistic works for a limited time.⁴³ The key features of copyright protection are:

- expression only is protected (no protection for ideas, schemes, systems, artistic style, and methods or principles of manufacture or construction),
- the work has to be original (but compilations, which are works resulting from an original selection or arrangement of data, are also protected),
- the work has to be fixed or stored,
- the work has to be more than just utilitarian (no protection for works that are purely utilitarian in nature),
- the work has to have a connection with Canada or with a *WTO*, *Berne Convention* or *UCC State*,⁴⁴ and

⁴¹ North American Free Trade Agreement, online: <<http://www.nafta-sec-alena.org/english/index.htm>> [hereinafter N.A.F.T.A.].

⁴² Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Annex 1 C to the World Trade Organization Agreement, April 15, 1994, LT/UR/A-1C/IP/1 [hereinafter TRIPs].

⁴³ Copyright Act, *supra* note 40 s.5(1).

⁴⁴ The work has to be created by a Canadian national or a usual resident of Canada, or it has to be published first in Canada. A work is also protected in Canada if its author was, when the work was made, a citizen, subject, or ordinary resident of a *Berne*, *Universal Copyright Convention (UCC)*, or *World Trade Organization Agreement*

- only copying is protected (no infringement without copying).⁴⁵

The economic rights retained by the copyright holder are set out in s.3(1) of the *Copyright Act*. They include “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work [...] in public or, [...] to publish the work.”⁴⁶ There are further exclusive rights set out in subsections (a) to (i) of s.(3)(1). Among others, they include the right to produce, reproduce and publish translations, the creation of mechanical contrivances, the telecommunication to the public, and the rental of computer programs.

Copyright is infringed on any person who, without the consent of the owner of the right, does anything that by the *Copyright Act* only the owner of the copyright has the right to do.⁴⁷ Secondary infringements of copyrights are, among others, to sell or rent out, to distribute to a certain extent, to distribute or offer for sale or rental by way of trade, or to possess or import into Canada for all these purposes a copy of a work.⁴⁸

Copyrighted works can be registered with the Copyright Office at Hull. But since copyright is fully protected automatically upon creation of the work, registration is

(WTO) state or a Commonwealth state. Alternatively, the work is protected if it is first published in a *Berne*, *UCC*, *WTO*, or Commonwealth country. Copyright Act, *supra* note 40 ss. 5(1)(a) and 5(1)(c)(i),(ii).

For further information: Vaver, *supra* note 9 at 46ff.

⁴⁵ As held in *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra* note 24 at 132: “[I]nfringing [...] requires copying or unlawful appropriation regardless of any other concurrent wrongful act (for example, an infringement of moral rights). In my view, it is that definition that has been adopted in the Act.” See also *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra* note 24 at 134.

⁴⁶ Copyright Act, *supra* note 40 s.3(1).

⁴⁷ *Ibid.* s.27(1).

⁴⁸ *Ibid.* s.27(2)(a)-(e).

optional. However, registration creates a presumption of validity in litigation and some priority for registered grants of the copyright.⁴⁹ There is no time limit for registering.

b) Refusal to Disseminate a Work

Where an author has created a work but refuses to disseminate it (through blanket refusal, demanding extremely high levels of remuneration, or other onerous conditions) the expropriation argument arises.⁵⁰

i) Compulsory Licensing

The idea of compulsory licensing, or expropriation, of copyrighted works is based on the utilitarian ethic of the Canadian copyright regime.⁵¹ The *Copyright Act*⁵² and the *Patent Act*⁵³ used to meet blanket refusals to disseminate published works (refusals to deal) through compulsory licensing provisions. They provided that anyone might license copyrighted (or patented) works for a royalty fee fixed by the State. But these provisions have disappeared in Canada. Authors are now allowed to set the price for their works on their own (although these prices can still be subject to misuse provisions). The step to repeal compulsory licensing provisions was taken in order to let the market set the price and enhance the utilitarian goals of copyright. The expectation was that prices would be closer to that which the market can bear and this would lead to further participation in the creation of works.⁵⁴

⁴⁹ For details about copyright registration: Vaver, *supra* note 9 at 245ff.

⁵⁰ Handa 1, *supra* note 11 at 170.

⁵¹ See more to the social utility principle in Chapter II.A.1.c) above.

⁵² Copyright Act, *supra* note 40.

⁵³ Patent Act, R.S.C. 1985, c.P-4.

⁵⁴ Handa 1, *supra* note 11 at 171.

It has to be emphasized that there is a clear distinction between a *regime* of compulsory licensing and compulsory licensing on a *case-by-case* basis as ruled by courts. Court rulings about compulsory licensing are based on the ‘essential facilities’ doctrine or a ‘duty to deal’. There is a debate among commentators whether certain copyrighted works could constitute essential facilities and licensing could therefore become compulsory.⁵⁵

ii) Copyright Misuse

Refusal to disseminate by charging exorbitant prices or implying other onerous conditions can be restricted by the *Competition Act* and, potentially, by the copyright misuse doctrine, based on U.S. case law.

The *Competition Act* deals with misuse in section 32. This section gives the Federal Court the power to restructure the grant of copyright in any way it sees fit where misuse occurs. It contains the following list of actions that are considered misuse:

- (a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
- (b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
- (c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or
- (d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity.⁵⁶

The copyright misuse doctrine is primarily found in U.S. jurisprudence. It provides a defence to copyright infringement where the copyright holder has misused his

⁵⁵ Refusal to deal and the ‘essential facilities’ doctrine or a ‘duty to deal’ are examined in detail in Chapter IV.C.3.a) below.

⁵⁶ Competition Act, *supra* note 8 s.32(1)(a)-(d).
Section 32 of the Competition Act is discussed in detail in Chapter IV.B.1. below.

copyright. “Misuse involves using copyright in ways not envisioned, often to the detriment of copyright’s objectives. It is an abuse of the limited monopoly rights granted by copyright”⁵⁷ by extending the power of copyright beyond its intended scope.⁵⁸ The most common forms are tying arrangements and refusals to license.⁵⁹ Digital works are especially prone to copyright misuse. Examples can be found in the case of computer software, where “the digital nature of a program’s object code can be used to obscure the underlying ideas from view,”⁶⁰ or in licensing technology products where the agreement is more restrictive than the law.⁶¹ The list of actions that constitute equitable misuse is different – and probably wider – than that contained in the *Competition Act*.⁶²

The misuse doctrine was first established in the U.S. in a patent case.⁶³ The first major application of misuse to copyright occurred in *Lasercomb America Inc. v. Reynolds*⁶⁴ in 1990. This case “opened the gates for a flood of misuse defences in copyright infringement cases.”⁶⁵

According to the copyright misuse doctrine, a plaintiff in an infringement case will not succeed if he misused his copyright in the first place. Rather, the defendant will succeed with the copyright misuse defence and not be stopped from infringing as long as

⁵⁷ Handa 1, *supra* note 11 at 32.

⁵⁸ *Ibid.*

⁵⁹ Church and Ware, *supra* note 33 at 250.

⁶⁰ Handa 1, *supra* note 11 at 32.

⁶¹ *Ibid.*

⁶² *Ibid.* at 170f.

⁶³ *Morton Salt Co. v. G.S. Suppiger Co.* 314 U.S. 488 (1942).

⁶⁴ *Lasercomb America Inc. v. Reynolds* 911 F.2d 970 (4th Cir. 1990).

⁶⁵ Church and Ware, *supra* note 33 at 250.

the owner continues to misuse his copyright.⁶⁶ The remedy in copyright misuse cases “is not to correct the misuse directly, but to ‘take back’ the copyright, if only temporarily.”⁶⁷ This result is logically inconsistent because it penalizes the owner of the copyright for an abuse of market power, which is associated, but not necessarily coinciding, with the intellectual property right itself.⁶⁸ “A policy instrument is being applied to the wrong target.”⁶⁹ Rather, the logical approach to finding copyright misuse should be to correct it directly, “not to nullify a perfectly valid copyright in order to achieve a distinct antitrust objective. In the case of a tie to a copyrighted product, the court should simply outlaw the tie, with appropriate damages, rather than take back the copyright, when its existence may have served a useful purpose in fostering the innovation.”⁷⁰ A better way to deal with copyright misuse would be to encourage the defendant to counter-sue on antitrust grounds.⁷¹

The Canadian counterpart to the U.S. misuse defence is the ‘defence of unclean hands’.⁷² It was raised by defendants in the same context as the misuse defence was raised in U.S. cases. But the result in Canada is different. Canadian courts “steadfastly refused to expand the scope of the [...] defence [of ‘unclean hands’] beyond illegalities directly

⁶⁶ An illustrative example is *PCR Realty Sys. v. National Ass’n of Realtors*, 972 F.2d 341 (4th Cir. 1992). The defendant in this infringement case was successful with the copyright misuse defence because PCR included in the copyright license a tie with an unprotected market. The Court saw this as a misuse of the copyright and suspended PCR’s copyright until it ceased its tied licensing provisions.

Other examples can be found in: *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), *Advanced Computer Serv. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994), *Electronic Data Sys. Corp. v. Computer Associates Int’l, Inc.*, 802 F. Supp. 1463 (N.D. Tex. 1992), *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313 (C.D. Cal. 1992), *Sega Enter. Ltd. v. Accolade, Inc.*, 785 F. Supp. 1392 (N.D. Cal. 1992) rev’d 977 F.2d 1510 (9th Cir. 1992).

⁶⁷ Church and Ware, *supra* note 33 at 251.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 252.

⁷¹ *Ibid.*

⁷² See more details and cases to the ‘defence of unclean hands’ in Chapter IV.C.1. below.

relating to title.”⁷³ They are willing to enforce intellectual property rights “even if there is clear evidence that such rights have been or are being used in an anti-competitive manner.”⁷⁴

c) Defining a Use Right for Copyrights in New Economy Markets

Copyright is about protecting copying. It is not about the use of a protected work.⁷⁵ But this could very possibly change as copyright protection, especially in the new economy, is continuously moving away from its original purpose, forcing us “to think of copyright in terms of the right to use a work.”⁷⁶ This is especially true concerning digital information where the focus is not any more on copying of information but rather on the use of the information.⁷⁷ Therefore, a comprehensible definition about what constitutes a rightful use of a copyright (and what goes beyond that) would be very helpful.

A copyright use doctrine should be established in order to be able to define a rightful use of a copyright. This doctrine should elaborate a clear definition about what is the ‘specific subject matter’ of a copyright and what use thus constitutes an inherent part of this right.⁷⁸ The fair dealing provision in the *Copyright Act* can be seen as an example

⁷³ Cameron, Donald M. and Scott, Iain C., “Intellectual Property Rights and the Competition Act: Different Perspectives on Welfare Maximization, Section A: Intellectual Property and Competition Law: When Worlds Collide” in James B. Musgrove, ed., *Competition Law for the 21st Century* (Juris Publishing, Canadian Bar Association, Competition Law Section, 1997 Annual Conference) at 301, at 325.

⁷⁴ *Ibid.* at 327.

⁷⁵ Handa I, *supra* note 11 at 33.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ The Intellectual Property Enforcement Guidelines of the Competition Bureau take a deliberate approach to this subject matter in distinguishing conduct that contains the ‘mere exercise’ of an intellectual property right and conduct that contains something more than the ‘mere exercise’. These Guidelines are discussed in detail in Chapter V. below.

of a use right approach to copyright, as well as the rental right associated with computer programs.⁷⁹

A somewhat different approach is taken by Handa in his proposal of a use right for a new digital copyright law.⁸⁰ It can be summarized as follows:

- The **term** of the use right had to remain limited, as is the case in the current *Copyright Act*. But the term should vary based on the type of the protected work. The term of computer program protection, for instance, should be shortened compared to other works since computer programs are typically obsolete in a matter of a few years.⁸¹
- In terms of **types of use** that should be controlled by the right owner, no use should be permitted without authorization where the work is unpublished. Once published, a work should be subject to new provisions in the *Copyright Act*. Tailoring this use concept would (among other factors) depend on the availability and effectiveness of enforcement mechanisms, the respective lengths of the rights grant, and the availability of alternate schemes to remunerate authors. Varying degrees of protection and therefore grants of different rights could, for example, be stated for: use for commercial purposes, use for private purposes, research for which the work was not directly intended, or use of a work that creates a new product.⁸²

⁷⁹ Handa 1, *supra* note 11 at 33. Copyright Act, *supra* note 40 ss.29-29.2.

⁸⁰ Handa 1, *supra* note 11 at 400ff.

⁸¹ *Ibid.* at 403f.

⁸² *Ibid.* at 404ff.

- **Infringement** should only occur “when the work is used in a manner in which the owner of the copyright has control but has not given authorization.”⁸³ Furthermore, an enumerated list of specific exceptions to infringement should be stated⁸⁴ and a **fair use** (this term is preferred to the term ‘fair dealing’) **defence**⁸⁵ should be feasible as it is already the case in the current *Copyright Act*. The fair use defence should give the courts some guidance as to how to apply it. This could be achieved with a non-exclusive list of factors that have to be considered by examining the use of a work. The list in the U.S. *Copyright Act*⁸⁶ is proposed as a very good example.⁸⁷

S. 107 of this act states:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

- Special focus should be on **enforcement, licensing and royalty mechanisms**. The enforcement should be tightened up “so that there is less uncertainty, more distribution, and fair remuneration for rights holders. One way is through legislative recognition of technological and business solutions that improve work tracking and royalty collection. Another is through public funding and assistance of the copyright administration industry.”⁸⁸

⁸³ *Ibid.* at 408.

⁸⁴ *Ibid.* at 408f.

⁸⁵ *Ibid.* at 410ff.

⁸⁶ Copyright Act, 17 U.S.C. § 101 (1976).

⁸⁷ Handa 1, *supra* note 11 at 411.

⁸⁸ *Ibid.* at 414.

Handa's concept of a use right for a new digital copyright law "marks a shift away from the requirement of copying to one that looks to use of a work and is more consistent with the requirements of digital technologies."⁸⁹

3. *International Treaties*

a) Paris Convention and Berne Convention

The information industry is extremely global in nature. As Canadian suppliers of information-based products exploit their wares around the world they need to obtain intellectual property protection in foreign countries. The need for international copyright treaties is not new. This started even before the advent of the Internet and other networks. Two major international multilateral treaties on intellectual property were created in the late nineteenth century. The *Paris Convention for the Protection of Industrial Property* of 1883⁹⁰ covered patents, trade-marks, designs, and unfair competition. The *Berne Convention for the Protection of Literary and Artistic Works* of 1886⁹¹ covered author's rights. "Britain, as an initial signatory, brought itself and its empire into these folds."⁹²

b) Universal Copyright Convention and Rome Convention

After Canada attained full control over its foreign policy in the early twentieth century, it continued to intensify international protection for its intellectual property. It is a signatory of a number of international treaties and conventions concerning intellectual

⁸⁹ *Ibid.* at 407.

⁹⁰ Paris Convention for the Protection of Industrial Property, 20 March 1883, as revised, CTS 1928/3.

⁹¹ Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as revised, CTS 1948/22.

⁹² Vaver, *supra* note 9 at 2.

property. In the copyright field, it signed the *Universal Copyright Convention* (U.C.C.).⁹³ This treaty was originally proposed by the United States as an alternative to the *Berne Convention*, which the U.S. had refused to sign (merely because “the 1908 Berlin revision had prohibited the requirement of formalities such as registration and marking and because protection under the Berne Convention reflected an author-centred, rather than a work-centred, approach to [copyright] protection”⁹⁴). The U.C.C. generally provides a lower and different level of standardized protection than the *Berne Convention*. The U.S. finally joined the *Berne Convention* and the U.C.C. has now largely become redundant.⁹⁶

Furthermore, Canada has recently become a member of the *Rome Convention*⁹⁷. Many of the amendments to the Canadian *Copyright Act* effected through Bill C-32 aimed at implementing Canada’s obligations under the *Rome Convention*.⁹⁸

These two treaties “grant the nationals of signatory countries reciprocal protection based on the principle of national treatment, as well as establishing certain minimum substantive requirements, such as the term of copyright not being shorter than the life of the author plus fifty years.”⁹⁹ In this context, national treatment involves granting the

⁹³ Universal Copyright Convention (U.C.C.), 6 September 1952, as revised, UNTS 216/132, T.I.A.S. 3324.

⁹⁴ Handa, Sunny. “A Review of Canada’s International Copyright Obligations” (1997) 42 McGill Law Journal at 961, at 971 [hereinafter Handa 4].

⁹⁶ *Ibid.* at 972.

⁹⁷ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), done at Rome on 26 October 1961, UNTS 496/43
online: < <http://www.wipo.int/clea/docs/en/wo/wo024en.htm> > [hereinafter Rome Convention].

⁹⁸ Takach, George S.. *Computer Law* (Toronto: Irwin Law, 1998) at 86.

⁹⁹ *Ibid.* at 86f.

nationals of the signatory countries “the same level of protection/rights as one extends to one’s own nationals.”¹⁰⁰

c) WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

In December 1996, WIPO was instrumental in drafting the conclusion of two treaties, the *WIPO Copyright Treaty*¹⁰¹ and the *WIPO Performances and Phonograms Treaty*¹⁰². They became effective when thirty countries (including Canada) adopted them. They both “update the *Berne Convention* to reflect newer technologies, including computer programs and digital works.”¹⁰³ They provide copyright holders with rights over computer programs, database creations, and works telecommunicated to the public. They also discuss the marking (e.g. digital coding) of information, which can be transmitted in cyberspace.¹⁰⁴ However, these two treaties are not yet implemented in Canada.

d) F.T.A. and N.A.F.T.A.

Canada is a signatory of the *Canada–United States Free Trade Agreement* (F.T.A.)¹⁰⁵ and the *North American Free Trade Agreement* (N.A.F.T.A.)¹⁰⁶. N.A.F.T.A. was designed to create a new relationship between the three parties (U.S.A., Canada and Mexico), which resulted in significant overlap with the measures negotiated between the

¹⁰⁰ Handa 4, *supra* note 94 at 965.

¹⁰¹ WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)
online: < <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>>.

¹⁰² WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996)
online: < <http://www.wipo.int/clea/docs/en/wo/wo034en.htm>>.

¹⁰³ Handa 4, *supra* note 94 at 968.

¹⁰⁴ *Ibid.*

¹⁰⁵ Canada–United States Free Trade Agreement, 22. December 1987, Can T.S. 1989 No. 3, reprinted in 27 I.L.M. 281 [hereinafter F.T.A.].

¹⁰⁶ N.A.F.T.A., *supra* note 41.

U.S. and Canada in the F.T.A..¹⁰⁷ N.A.F.T.A. “includes detailed measures to provide for the reduction and eventual elimination of barriers to trade.”¹⁰⁸ Its chapter 17 deals specifically with the protection of intellectual property (including copyright, trademarks, patents, trade secrets, industrial designs, integrated circuits, satellite signals and sound recordings) and sets out increased minimum requirements for protection, which must be adopted by each signatory country. Art. 1705 deals specifically with copyright. “Protected works include those covered by the *Berne Convention*, 1971, as well as two important additions: computer programs and databases.”¹⁰⁹ As a result of N.A.F.T.A., Canada has had to include the concept of a rental right in the Canadian *Copyright Act*¹¹⁰ as well as protection of compilations.¹¹¹

e) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)

The most recent international development has been the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs)¹¹² appended to the *World Trade Organization Agreement* of 1994 (WTO)¹¹³. TRIPs also requires a number of countries to update their intellectual property laws. Its statement of objectives in article 7 reflects the Anglo-American understanding of copyright. It reads as follows:

¹⁰⁷ Handa 4, *supra* note 94 at 979.

¹⁰⁸ *Ibid.* at 980.

¹⁰⁹ *Ibid.* at 981.

¹¹⁰ Copyright Act, *supra* note 40.

¹¹¹ Handa 4, *supra* note 94 at 982.

¹¹² TRIPs, *supra* note 42.

For an overview over specific TRIPs provisions on copyright and neighbouring rights see Katzenberger, Paul, “TRIPs and Copyright Law” in Friedrich-Karl Beier and Gerhard Schricker, ed., *From GATT to TRIPs – The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich; Weinheim and New York: VCH, 1996) at 59, at 82ff.

¹¹³ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations – Agreement Establishing the World Trade Organization (WTO), April 15, 1994, LT/UR/A/1 [hereinafter WTO].

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPs addresses a broad range of intellectual property concerns, including copyright and related rights. It placed new technologies and rights under copyright. Computer programs as well as databases (compilations) are addressed in the Agreement.¹¹⁴ Furthermore, it includes rental rights for cinematographic works and computer programs.¹¹⁵ The substantive requirements that are set out in the Agreement are to be interpreted as minimum standards and members are free to apply more stringent protections as long as they do not conflict with the Agreement.¹¹⁶ The General Provisions of the Agreement contain a national-treatment requirement¹¹⁷ and a most-favoured-nation treatment clause.¹¹⁸ The most-favoured-nation principle states that if a member provides a foreign member with treatment more favourable than it does its own nationals it must extend the privilege to all other member states as well.¹¹⁹

f) Conclusion

International efforts of adopting stronger intellectual property laws around the world follow the general development of cross-border relationships that are the rule in network industries. The territorial basis of intellectual property laws has already been, and will very likely still have to be, modified “to adequately cope with a number of challenges

¹¹⁴ Handa 4, *supra* note 94 at 977.

¹¹⁵ TRIPs, *supra* note 42 article 11.

¹¹⁶ Handa 4, *supra* note 94 at 976; TRIPs, *supra* note 42 article 1.

¹¹⁷ TRIPs, *supra* note 42 article 3.

¹¹⁸ *Ibid.* article 4.

¹¹⁹ Handa 4, *supra* note 94 at 976f.; TRIPs, *supra* note 42 article 4.

posed by the Internet's ability to facilitate sustained cross-border remote access activities."¹²⁰ Takach noted further:

The Internet, and related networks such as corporate intra-nets, permit intense collaboration among the nationals of multiple countries [and create] serious uncertainties under current copyright regimes. Accordingly, [...] amendments to national intellectual property laws will likely be required, in addition to requiring global adoption of such statutes.¹²¹

International corporate power is effectively curbing national sovereignty in the field of intellectual property policy.¹²²

National copyright law will increasingly be pushed aside in favour of unified copyright rules within blocks of nations, "as trading barriers are reduced and global markets unified."¹²³ This puts even more pressure on the harmonization of copyright rules, which will very likely lead to more tension between competition policy and copyright law.¹²⁴

B. Competition Law

1. Legal Theory

a) Capitalistic Competition Regime

The capitalistic competition regime is based on the underlying principle that the public interest is best served by competitive markets because they lead to an efficient allocation of resources. The benefits of competition should basically be lower prices,

¹²⁰ Takach, *supra* note 98 at 89.

¹²¹ *Ibid.*

¹²² Vaver, *supra* note 9 at 3.

¹²³ Handa 4, *supra* note 94 at 990.

¹²⁴ *Ibid.*

better products, wider choice and greater efficiency than would result under conditions of a monopoly.¹²⁵ Under conditions of perfect competition, consumer welfare is expected to be maximized through the achievement of allocative and productive efficiency, which leads to the overall maximization of society's wealth.¹²⁶ Perfect competition has "a dynamic effect by stimulating innovation as competitors strive to produce new and better products for consumers."¹²⁷

b) Purpose of Competition Policy

The purpose of competition policy is to ensure that market rules operate without restriction. In order to achieve that goal, a system of competition law, in protecting the process of competition, will have to deal with at least the following four issues (variations may be needed depending on the particular system or state):¹²⁸

- preventing firms from entering into agreements that have the effect of restricting competition (between themselves or between them and third parties) and do not have any beneficial features;¹²⁹
- controlling attempts by monopolists or firms with market power to abuse their position and prevent new competition emerging;¹³⁰
- ensuring that workable competition is maintained in oligopolistic industries; and

¹²⁵ Whish, Richard. *Competition Law*, 4th ed. (London: Butterworths, 2001) at 2.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ This list is based on a description by Whish, *supra* note 125 at 15.

¹²⁹ See s.77 about exclusive dealing, tied selling and market restriction in the Competition Act, *supra* note 8.

¹³⁰ See ss.78 and 79 about abuse of dominant position in the Competition Act, *supra* note 8.

- monitoring mergers between independent undertakings to prevent concentration of the market and diminution of the competitive pressures within it.¹³¹

The four issues mentioned above all deal with the concern that one or more firms, which individually or collectively possess power over the market, could attempt to restrict output and raise prices above the level that would prevail in a competitive market and profit from this behaviour.¹³² Competition law aims at preventing anybody from inappropriately creating, enhancing or maintaining market power that undermines competition without offering offsetting economic benefits.

This is especially a concern when a company or a cartel of companies captures a large percentage of the market (or market share) and a monopoly is created. Monopolies can potentially hurt consumers because they enable the monopolist to artificially drive up prices and lower product quality or output.¹³³ Therefore, the aim of competition law is to restrain individuals and entities from monopolizing the market and to encourage competition in product price, quality and service because “competition between businesses generally drives those companies to offer the best product innovation and operational efficiencies.”¹³⁴

¹³¹ See ss.91-103 about mergers in the Competition Act, *supra* note 8.

¹³² Whish, *supra* note 125 at 15.

¹³³ Robinson, David W.. “Fault Lines in the Law: Survey of the Courts’ Attempt to Grapple with Antitrust Issues in the High Technology Industry” (2000) 33 Suffolk University Law Review at 387, at 388.

¹³⁴ *Ibid.*

Competition law is not based only on the principle of maximizing consumer welfare by achieving the most efficient allocation of resources and by reducing costs as far as possible.¹³⁵ Competition policy is always an expression of current values and aims of society at a given time. It does not exist in a vacuum and is subject to changes as political thinking generally changes.¹³⁶ Also, different systems of competition law reflect different concerns.¹³⁷ In addition to consumer welfare, competition policy today is generally based on several other objectives such as consumer protection, redistribution, and protecting competitors and retailers.¹³⁸ Other issues that might be important are unemployment and regional policy issues that can arise in the analysis of mergers and cooperation agreements. Also, protection of domestic companies from foreign takeovers may be achieved through merger control.¹³⁹

2. Legal Principles

a) Purpose of the Canadian Competition Act

The purpose of the Canadian *Competition Act*¹⁴⁰, as set out in section 1.1, is to maintain and encourage competition in Canada in order to:¹⁴¹

- promote the efficiency and adaptability of the Canadian economy,
- expand opportunities for Canadian participation in world markets,
- recognize the role of foreign competition in Canada,

¹³⁵ Whish, *supra* note 125 at 15.

¹³⁶ *Ibid.* at 16.

¹³⁷ *Ibid.*

¹³⁸ Further reading to these objectives: Whish, *supra* note 125 at 16ff.

¹³⁹ Whish, *supra* note 125 at 18f.

¹⁴⁰ Competition Act, *supra* note 8.

¹⁴¹ *Ibid.* s.1.1.

- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and
- provide consumers with competitive prices and product choices.

The *Competition Act* intends to prevent competitors from executing arrangements or conduct that would substantially or unduly prevent or lessen competition. Parties will be found to have done so where an “arrangement or conduct will permit them to obtain and exercise, unilaterally or interdependently with others, a materially greater degree of market power than in the absence of the arrangement or conduct.”¹⁴²

b) Overview over Sections with Potential Relation to Copyrights

The *Competition Act* defines a number of criminal competition law offences, which include bid-rigging,¹⁴³ price maintenance,¹⁴⁴ discriminatory and/or predatory pricing,¹⁴⁵ misleading advertising,¹⁴⁶ and anti-competitive conspiracies.¹⁴⁷ Prosecution of criminal offences “are brought in the criminal courts and require that the Crown prove the offence beyond a reasonable doubt. Penalties include fines or imprisonment, or both.”¹⁴⁸

¹⁴² Corley, Richard F.D., “The Competition Act and the Information Economy, Section A: The Competition Act and the Information Economy” in James B. Musgrove, ed., *Competition Law for the 21st Century* (Juris Publishing, Canadian Bar Association, Competition Law Section, 1997 Annual Conference) at 141, at 158.

¹⁴³ Competition Act, *supra* note 8 s. 45(1).

¹⁴⁴ *Ibid.* s. 61(1).

¹⁴⁵ *Ibid.* ss. 50(1) and 51.

¹⁴⁶ *Ibid.* s. 52(1).

¹⁴⁷ *Ibid.* s. 45(1).

¹⁴⁸ Corley, *supra* note 142 at 158, footnote 36.

The *Competition Act* further states non-criminal reviewable matters, which include mergers,¹⁴⁹ abuse of dominant position,¹⁵⁰ refusal to deal,¹⁵¹ as well as exclusive dealing, tied selling and market restrictions.¹⁵² They are the core, substantive provisions of the *Competition Act*. Concerning refusal to deal and exclusive dealing, tied selling and market restrictions, private individuals and businesses are able to bring complaints directly to the Competition Tribunal.¹⁵³ In all other cases, only the Commissioner of Competition can apply for remedial relief before the Competition Tribunal. The Tribunal is comprised of federal court judges and lay members. It decides cases on a civil standard of proof and has the power to issue interim injunctions and a wide range of orders, but cannot impose penal sanctions or award damages.¹⁵⁴

The *Competition Act* also states a private right of civil action with respect to violations of the criminal provisions of the *Competition Act* or a failure to comply with an order made under the Act by the Tribunal or a court.¹⁵⁵

As mentioned above, competition law is, above all, concerned about the abuse or potential abuse of market power. The two key issues in this context are: the definition of

¹⁴⁹ Competition Act, *supra* note 8 ss. 92-103.

¹⁵⁰ *Ibid.* ss. 78 and 79.

¹⁵¹ *Ibid.* s. 75.

¹⁵² *Ibid.* s. 77.

¹⁵³ This private access to the Competition Tribunal was amended to the Competition Act with Bill C-23 (An Act to Amend the Competition Act and the Competition Tribunal Act) and came in force June 21, 2002.

For further information about private access to the Competition Tribunal see: Competition Bureau, *Backgrounder to Private Access to the Competition Tribunal*, online: <<http://strategis.ic.gc.ca/SSG/ct02393e.html>> [hereinafter "Backgrounder"].

¹⁵⁴ Corley, *supra* note 142 at 158, footnote 37.

¹⁵⁵ Corley, *supra* note 142 at 158; Competition Act, *supra* note 8 s. 36.

the relevant market and the identification of market power itself.¹⁵⁶ These two issues need special attention and are discussed separately in the following sections c) and d).

c) Market Definition

The *Competition Act* defines relevant markets “with reference to actual and potential sources of competition that constrain the exercise of market power.”¹⁵⁷ Typically, the relevant market, where the assessed party competes, “includes all products that customers consider to be good substitutes, products which would be brought into the market from other geographic areas, and other sources of alternative products which would likely serve to prevent a significant increase in the price of the product from being profitable over a non-transitory period (i.e., a year or more).”¹⁵⁸

Two principal aspects define the scope of a relevant market: a product dimension and a geographic dimension. Both of them must be assessed “with reference to the ability of potential competitors to constrain the exercise of market power by defeating a significant and non-transitory price increase.”¹⁵⁹ However, information economy markets are difficult to assess under these characteristics because:¹⁶⁰

- information-based products are fluid and flexible, which fosters the expansion of relevant product markets and creates uncertainty to product market scope;

¹⁵⁶ Whish, *supra* note 125 at 22.

¹⁵⁷ Corley, *supra* note 142 at 159.

¹⁵⁸ *Ibid.*

¹⁵⁹ Corley at 160.

¹⁶⁰ The following list is based on the listings of Corley, *supra* note 142 at 160.

- transaction costs are very low, which makes dealing with distant customers and suppliers easier and therefore fosters the expansion of relevant geographic markets;
- innovation and technological changes are extremely rapid, which makes it very difficult to assess their impact in the relevant market;
- production of a new product can be rapidly expanded and has the potential to constrain the exercise of market power by the incumbent because of the absence of meaningful capacity limitations and the minimal cost of reproduction; and
- in general, traditional economic analysis is too static to accurately assess market power in information economy markets.

Once the relevant market is identified, other considerations, like market share, barriers to entry, and foreign competition can be assessed in relation to that market.¹⁶¹

d) Assessment of Market Power

“Market power refers to the ability of firms to profitably influence price, quality, variety, service, advertising, innovation or other aspects.”¹⁶² However, it is usually assessed primarily in terms of the ability to set prices above competitive levels for a sustained period of time.¹⁶³ In practice, market power is difficult to measure. Therefore,

¹⁶¹ Corley, *supra* note 142 at 159.

¹⁶² *Ibid.* at 158f.

¹⁶³ *Ibid.* at 159.

market share, barriers to entry, the impact of innovation on competition and other similar factors are usually used for the assessment.¹⁶⁴

Market share is probably the most important factor in determining whether a firm has market power. But market share says nothing about potential competition. In order to assess market power it is also necessary to consider how easily other undertakings can enter the market or, in other words, how high the barriers to entry are.¹⁶⁵ A barrier to entry can be defined as “laws, institutions, or practices which make it difficult or impossible for new firms to enter some markets”.¹⁶⁶ Legal provisions such as licensing laws and intellectual property rights conferring a legal monopoly can act as barriers to entry as well as the advantage of scale and anti-competitive practices designed to deter new entrants to the market.¹⁶⁷ For a new entrant, a barrier to entry essentially means costs that must be borne to enter an industry but is not borne by firms already in the industry. There must be some asymmetry between the position of firms already in the market and newcomers.¹⁶⁸

e) Conclusion

The identification of relevant markets and the assessment of market power are becoming increasingly difficult as firms, which offer different products in independent markets, now integrate these different products into one single product. The markets for Internet browsers and desktop operating software are an illustrative example (take for

¹⁶⁴ *Ibid.*

¹⁶⁵ Whish, *supra* note 125 at 39f.

¹⁶⁶ *Ibid.* at 40.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

instance, the integration of Microsoft's Internet browser technology into the Windows desktop operating system).¹⁶⁹ As these different product markets move toward a single, combined market other competitors, or new entrants, need to develop software that is capable of performing all of the functions performed by the new integrated desktop/browser software.¹⁷⁰ The separate relevant markets, which formerly existed for products to perform these functions, have been largely eliminated.¹⁷¹

"[I]t is difficult to predict with a reasonable degree of accuracy which relevant products will still be 'products' and with what they will compete in a year's time."¹⁷² In industries where products change rapidly or are combined with others to create new products, traditional economic analysis is unable to adequately identify relevant markets.¹⁷³ The rapid evolution and change in this area underscores the crucial importance of innovation. Therefore, the focus of anti-competitive inquiry should shift toward innovation as the key indicator of competition.¹⁷⁴ Competition law authorities should focus on the prevention of conduct that reduces innovation and thereby diminishes competition.¹⁷⁵

¹⁶⁹ Corley, *supra* note 142 at 163.

¹⁷⁰ *Ibid.* at 164.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* at 165.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

C. The Tension between Copyright Law and Competition Law

Both copyright law and competition law address the same important issue: the degree of power that market participants are allowed to exercise.¹⁷⁶ But interaction between competition law and copyright law is usually characterized by a lack of comprehension on both sides because the approach to each is completely different.

“Intellectual property policy is not troubled by prices above marginal cost, although intellectual property rights do not guarantee such prices.”¹⁷⁷ Rather, intellectual property rights give the owner of the right a monopoly for a certain amount of time in order to stimulate innovation and, in so doing, limit competition. The essence of copyright protection is the right to keep it to oneself, or the ‘right to exclude’. Using antitrust policy to undermine that protection upsets the incentive to innovate.¹⁷⁸ Firms possessing intellectual property rights naturally seek to maximize the value of these rights. However, steps taken in pursuit of this end may appear anti-competitive. Competition law, on the other hand, looks upon a monopoly with suspicion and is concerned about prices above marginal cost. Competition law is concerned with finding remedies for the creation and abuse of market power. It “generally reflects the premise that consumer welfare is best served by removing impediments to competition.”¹⁷⁹ However, according to Gallini, this is a rather short-run view of competition authorities

¹⁷⁶ Rogers, Douglas L.. “Give the Smaller Players a Chance: Shaping the Digital Economy through Antitrust and Copyright Law” (2001) 5 *Marquette Intellectual Property Law Review* at 13, at 15f.

¹⁷⁷ McGowan, *supra* note 6 at 485f.

¹⁷⁸ Hovenkamp, Herbert. “Symposium: Intellectual Property Rights and Federal Antitrust Policy; Introduction” (1999) 24 *Iowa Journal of Corporation Law* at 477, at 479.

¹⁷⁹ Gallini, Nancy T. and Trebilcock, Michael J., “Intellectual Property Rights and Competition Policy: A Framework for the Analysis of Economic and Legal Issues” in Robert D. Anderson and Nancy T. Gallini, ed., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 1998) at 17, at 18.

and it is actually getting “replaced by a longer-run view, which acknowledges that technological progress contributes at least as much to social welfare as does the elimination of allocative inefficiencies associated with non-competitive prices.”¹⁸⁰

“[C]ompetition policy and intellectual property are not mutually antagonistic policies.”¹⁸¹ They both serve the same goals of promoting efficient competition, innovation and diffusion of new technology, although in different ways.¹⁸² “Intellectual property does this by creating incentives for investment in research and development and other creative activities resulting in new products and processes; competition policy does this by maintaining healthy inter-firm rivalry in markets, which itself is a vital precondition for innovation and productivity improvement.”¹⁸³ In many cases, the mere existence of an intellectual property right does not confer significant market power on the owner.¹⁸⁴ But situations can and do arise where the scope and exploitation of intellectual property rights are too extensive and therefore raise concerns from a competition policy point of view. Then, corrective action by competition agencies can be necessary, which ultimately serves the underlying objectives of the intellectual property system itself.¹⁸⁵

It is important to stress that competition agencies only intervene if a company that takes anticompetitive actions (like attempts to control prices or to exclude competition)

¹⁸⁰ *Ibid.*

¹⁸¹ Anderson, *supra* note 1 at 369.

¹⁸² *Ibid.* at 369f.

¹⁸³ *Ibid.* at 370.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

has a certain amount of market power. The same actions taken by a company without striking market power will not provoke antitrust investigations.

Since competition policy and intellectual property rights, as opposing forces, tend to create tension, the law has to create a common ground that encourages innovation and competition.¹⁸⁶ “Antitrust enforcement in cases where intellectual property rights exist must [therefore] be dynamic in nature.”¹⁸⁷ Antitrust enforcement has, as Pitofsky put it: “to make adjustments and exercise sensitivity towards intellectual property issues on a case-by-case basis. The goal of a coherent overall competition policy, in deciding both what conduct to enforce against and what remedies to require, should be to achieve an appropriate balance between the complementary legal regimes of intellectual property and antitrust.”¹⁸⁸ “Ensuring an appropriate balance between intellectual property protection and competition policy is vital to providing optimal incentives for innovation and efficiency in a knowledge-based economy.”¹⁸⁹

There is no systematic analytical framework in Canada for applying the relevant statutory provisions of the *Competition Act* in enforcement cases concerning intellectual property rights.¹⁹⁰ However, the Competition Bureau released guidelines concerning intellectual property enforcement in September 2000.¹⁹¹ The intention of the Competition

¹⁸⁶ Robinson, *supra* note 133 at 389.

¹⁸⁷ *Ibid.*

¹⁸⁸ Pitofsky, Robert. “Symposium beyond Microsoft: Antitrust, Technology, and Intellectual Property: Keynote Address Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy” (2001) 16 *Berkeley Technology Law Journal* at 535, at 537.

¹⁸⁹ Anderson and Gallini, *supra* note 2 at 1.

¹⁹⁰ *Ibid.*

¹⁹¹ Competition Bureau Intellectual Property Enforcement Guidelines as of September 21, 2000 online: <<http://strategis.ic.gc.ca/SSG/ct01992e.html>> [hereinafter “Guidelines”].

Bureau in releasing these guidelines was to increase clarity on how it will deal with competition issues involving intellectual property.¹⁹² Certainty regarding legal rules and generally predictable decisions are very important to investment decisions “for both the existing market and for firms contemplating whether to invest in future work that might alter the existing mode of competition.”¹⁹³

¹⁹² *Ibid.* Preface.

¹⁹³ McGowan, *supra* note 6 at 486.

III. Specialities in Network Industries

A. Network Externalities, Standardization and Compatibility

‘Network effects’ or ‘network externalities’ can provide a tremendous advantage for ‘first movers’. The general term externalities (also called neighbourhood effects) refers to situations “where a person in using his own property disturbs another’s use of his property (negative externality) or ... confers a benefit upon him (positive externality), without that person, in deciding upon such use, taking the disturbance or the benefit conferred into account.”¹⁹⁴ Network externalities refer to the effect “that the utility that a user derives from a product increases with the number of other individuals who also use the product.”¹⁹⁵ Network externalities can be direct or indirect. Direct network externalities occur when the number of users affects the quality of the product itself (e.g. telephones and fax machines become more useful as more individuals use them).¹⁹⁶ Indirect network externalities refer to the effect that “the number of users affects the availability of complementary products and services, which in turn affects the value of the core product.”¹⁹⁷ For example, the more people buy laser disc players, the more movies will be released in laser disc format. As a result, more movies will be available in that format and the value of the laser disc players to their users increases. Also, the availability of repair and maintenance services will increase, which again adds more value to the players.¹⁹⁸ It has been argued that if a technology company achieves a thirty to forty percent level of market share, network effects will cause that company to rise,

¹⁹⁴ Mackaay, Ejan. “Economic Incentives in Markets for Information and Innovation” (1990) 13 Harvard Journal of Law & Public Policy 3 at 867, at 881.

¹⁹⁵ Wagner, Dana R.. “The Keepers of the Gates: Intellectual Property, Antitrust, and the Regulatory Implications of Systems Technology” (2000) 51 Hastings Law Journal at 1073, at 1096.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

virtually automatically, to the eighty to ninety percent market share level.¹⁹⁹ This is based on “‘virtual’ network effects, with the network being formed by positive feedback among users of a particular system and between users and producers of applications that work with a given operating system.”²⁰⁰

Network effects can expand the horizontal scope of intellectual property protection. Users will very likely be reluctant to buy a new product that is as equally functional as the existing one (that is, for instance, protected by copyright) because compatibility with the installed base of existing users and files is valued higher than diversity of products.²⁰¹

Industries characterized by network externalities comprise some fundamental differences compared to other industries. “[A]n initial head start provided by intellectual property protection can become permanent. A firm that is able to establish a standard first, before rivals enter, it is likely to keep the advantage for a long time.”²⁰² This is due to the fact that network externalities and intellectual property protection reinforce each other. They interact to limit the number of competing systems. This can result in standardization, which is monopolization. If a technology becomes a standard and is protected by intellectual property rights, this protection can effectively exclude others from entering and producing compatible products. The technology has then become the market.

¹⁹⁹ Soma, John T. and Davis, Kevin B.. “Network Effects in Technology Markets: Applying the Lessons of Intel and Microsoft to Future Clashes Between Antitrust and Intellectual Property” (2000) 8 Journal of Intellectual Property Law Association at 1, at 3f.

²⁰⁰ McGowan, *supra* note 6 at 488.

²⁰¹ Church and Ware, *supra* note 33 at 242.

²⁰² *Ibid.*

Compatibility is another key word in network industries. “Computer hardware must be compatible with a computer’s operating system, which in turn must be compatible with the application programs used with the computer.”²⁰³ Furthermore, to maximize the value of the computer system, it “must be able to receive, store, and transmit data through the Internet to and from servers connected to the Internet.”²⁰⁴ Different, single elements of a computer system are not useful “unless the producers of these elements are able to make the various elements of the system work together.”²⁰⁵

On one hand, standardization and compatibility create important benefits for consumers. But on the other hand, they can enhance market power provided by intellectual property rights and therefore provide tremendous advantages for ‘first movers’.²⁰⁶

The issues mentioned above are the main reasons why there is a lot of interaction and more potential for conflict between intellectual property protection and competition policy in network industries. In a number of cases, denying a competitor access to a network has led to successful monopolization cases, typically under the essential facilities doctrine and court-ordered access.²⁰⁷ The best-known examples of cases involving intellectual property and network externalities come from the U.S. (e.g. the *Microsoft*²⁰⁸ litigation and *Lotus v. Borland*²⁰⁹) and the European Community (e.g. the *Magill TV*²¹⁰

²⁰³ Rogers, *supra* note 176 at 14.

²⁰⁴ *Ibid.* at 14f.

²⁰⁵ Rogers at 15.

²⁰⁶ Anderson, *supra* note 1 at 371.

²⁰⁷ Church and Ware, *supra* note 33 at 241.

²⁰⁸ *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.C. Cir. 2000).

²⁰⁹ *Lotus Development Corporation v. Borland Intl. Inc.* 49 F.3d 807 (1995).

case). But also in Canada, several cases of abuse of dominant position illustrate the importance of network externalities and control over information:

- the *Neilsen* case centred on the issue of control over access to proprietary scanner data,²¹¹
- in the *Tele-direct* case, control of copyrighted telephone listings was alleged to be an important source of market power,²¹² and
- the *Interac* case was about control over proprietary operating system and other specialized assets, involving a network industry and asserted market power.²¹³

B. Interconnectivity

Hardware or software as individual products have little value in and of themselves. They have to be combined with other complementary and supplementary components to form a complete computing system.²¹⁴ All the components must be compatible with each other for the system to function and they are typically manufactured by different producers.²¹⁵ Once a technology becomes a standard, producers of complementary and supplementary products depend on access to it. If the developer of the standardized technology attempts to limit access to it, the commercial existence of numerous producers throughout the industry is threatened.²¹⁶ This is where the dispute

²¹⁰ *Radio Telefís Éireann (RTE) v. Commission* Cases C-241/91 & C-242/91 [1995] ECR I-743.

²¹¹ *Canada (Director of Investigation and Research) v. the D & B Companies of Canada Ltd.* (1996) 64 C.P.R. (3d) 216 (Competition Tribunal, 30 August 1995).

²¹² *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al* (1997) 73 C.P.R. (3d) 1.

²¹³ *Canada (Director of Investigation and Research) v. Bank of Montreal et al* (1996) 68 C.P.R. (3d) 527.

²¹⁴ Wagner, *supra* note 195 at 1098.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* at 1099.

about protection for intellectual property rights versus open-access in system technologies stands.²¹⁷

C. Rapid Innovation

Innovation and product evolution are very rapid in high-technology markets.²¹⁸ The most cited example in this context is the release of Microsoft's Windows 95 operating software, which became the industry standard. Software by competitors that was not able to run the Windows 95 quickly became obsolete as did hardware technology that could not meet its processing-speed, memory, and hard-disk requirements.²¹⁹

If access to new technology is denied to companies that produce complementary products these companies do not have a good chance of surviving if they depend largely on this technology. There is no use for those firms to wait for the intellectual property rights to expire. Although intellectual property rights are limited in time they nevertheless last for several years (in Canada, a copyright expires 50 years after the death of the author). By the time they expire, the protected technology has very likely become obsolete because it has very possibly been replaced by a newer and better technology.²²⁰ This is especially true where successive generations of innovations are built upon each other. Excluded firms that depended on access to the previous technology will by this time probably have disappeared from the market anyway.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.* at 1099f.

It is not only denying access that can cause substantial harm to other parties. A firm that holds intellectual property rights in system technology can simply delay access to its new technology (e.g. by extended licence negotiations), leaving firms that produce complementary products with almost no chance to compete.²²¹

D. Excludability

Secrecy and exclusionary engineering are other possibilities to exclude other parties, even without the assistance of any legal protection.²²²

Compatibility with a given system's technology mostly requires detailed internal information about it. If this information is kept secret it is not easy to be detected simply by studying the technology.²²³ In addition, such research may be too expensive or too time consuming to conduct. Once detected, the obtained information is likely to be obsolete as the pace in this technology is very rapid.²²⁴

Through special engineering tactics, a system's technology can be designed to be compatible only with certain products (by designing it either to accept only or not to accept products with particular characteristics).²²⁵

²²¹ *Ibid.*

²²² *Ibid.* at 1100.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.* at 1101.

In both cases described above (secrecy or special engineering tactics) those seeking access must negotiate with the developers about sharing their intellectual property. Refusal by the developers may provoke legal disputes over whether intellectual property rights permit such refusal.²²⁶

E. Conclusion

Compatibility requirements and network effects increase the potential for the concentration of power in the hands of one or a few companies, which explains the increasing frequency of confrontations between intellectual property law and competition law.

Information stored digitally is very easy to transmit, but difficult to protect from copying. The challenges of protecting information encourage inventors of new technologies to seek for more protection than intellectual property rights alone can offer.

Systems-technology markets are characterized by the importance of interconnection. And the influence of network externalities, standardization, and the importance of compatibility increase the dependency of competitors, and those who manufacture complementary products, on knowledge about new inventions in technology. Innovators, on the other side, try to exclude others from their technology by insisting on intellectual property protection, keeping key knowledge secret, and/or using technological

²²⁶ *Ibid.*

exclusivity. Therefore, access demands and intellectual property rights are likely to come into conflict.

The combination of intellectual property protection and network externalities creates a bias toward monopoly that is “less likely to be replaced quickly through the workings of competition.”²²⁷ Any given ‘amount’ of intellectual property protection is likely to result in greater long-run market power.²²⁸ This raises the argument “for weakening the scope of intellectual property rights for products where network effects are important.”²²⁹ But what form of intellectual property right would give the right kind of protection *ex ante* to products in network industries? Church and Ware argue that a new hybrid form of protection should be considered which takes into account “the length, scope and overall effect on efficient innovation and competitive market structure” in this industry.²³⁰

When assessing network effects, the role of “competition between networks (‘intersystem competition’) as well as among service providers within any given network (‘intrasystem competition’)”²³¹ has to be assessed. “Before ruling that any exclusion from a network is anti-competitive, it is important to consider the pro-competitive effects of

²²⁷ Church and Ware, *supra* note 33 at 243.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.* at 244f.

²³¹ The terms ‘intersystem competition’ and ‘intrasystem competition’ come from the discussion in the U.S. Federal Trade Commission Staff Report “Competition Policy in the New High-Tech, Global Marketplace”, Volume I, Chapter 9 at 3. See also Church and Ware, *supra* note 33 at 154.

establishing intersystem competition. The result of this balancing process ultimately depends on whether the relevant market can support multiple networks.”²³²

Designing appropriate remedies in antitrust cases that deal with intellectual property protection in network industries is particularly challenging.²³³ The challenge is not to jeopardize the realization of networks and other efficiencies while alleviating the excessive scope for exercise of market power arising from control over proprietary technology and/or related licensing and other practices.²³⁴ One approach to this problem (that is solely used in the U.S.) is the Essential Facilities doctrine, that provides mandatory access to the facility, often at prices set by a court or regulatory authority.²³⁵ Another, innovative approach was taken in the *Interac*²³⁶ case, which resulted in the opening up the governance structure of the facility. This decision was made in order “to ensure broader access while strengthening incentives for competition within the network and leaving difficult decisions relating to price setting to private participants.”²³⁷

²³² Corley, *supra* note 142 at 154.

²³³ Anderson, *supra* note 1 at 372.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

The ‘essential facilities doctrine’ is discussed in detail in Chapter V.E. below.

²³⁶ *Canada (Director of Investigation and Research) v. Bank of Montreal et al*, *supra* note 213.

²³⁷ Anderson, *supra* note 1 at 372.

IV. Interface between Competition Law and Copyright Law

A. TRIPs Agreement

The *World Trade Organization Agreement*²³⁸ does not contain systematic provisions on competition law (neither on restrictions of competition nor on the law for unfair competition).²³⁹ Competition law has not been integrated into the world trade system so far. Therefore, systematic competition law within the scheme of intellectual property protection does not exist either.²⁴⁰ However, “[t]he close connection between intellectual property protection and competition law [...] necessitated the inclusion of restrictive and unfair competition law provisions in the *TRIPs Agreement*. Consequently, this Agreement contains more competition law than can be found in any other place within the WTO system.”²⁴¹ References to antitrust law are contained in the Preamble, in Art. 8(2), Art. 31²⁴² and Art. 40 of the *TRIPs Agreement*.

1. Preamble

The first paragraph of the Preamble sets out the need to promote effective and adequate protection of intellectual property rights and, at the same time, the desire “to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”. This is more or less just a description of

²³⁸ WTO, *supra* note 113.

²³⁹ Heinemann, Andreas, “Antitrust Law of Intellectual Property in the TRIPs Agreements of the World Trade Organization” in Friedrich-Karl Beier and Gerhard Schricker, ed., *From GATT to TRIPs – The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich; Weinheim and New York: VCH, 1996) at 239, at 239.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Art. 31 refers to patent law provisions and is therefore not examined in detail in this thesis because the focus of this thesis is on copyright law.

the general tension between the protection of intellectual property rights on one side and the protection of competition on the other side.²⁴³

2. *Abuse of Intellectual Property Rights: Article 8(2)*

Article 8(2) reads as follows:

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 the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

This article contains the key principles with respect to intellectual property rights.²⁴⁴ They are:²⁴⁵

- A clarification that ‘reasonable measures to combat abuse’ may be necessary. Taking into account the first words of Article 8(1) as well, it may be inferred that the ‘appropriate measures’ lie specifically in the enactment or amendment of national law by Members. Therefore, Article 8(1) and (2) contain an exception by means of which Members are in a position to counter obligations arising from the TRIPs Agreement.
- The establishment that appropriate measures ‘may be needed’ in order to prevent abuse. This clarifies that Members are not prevented from taking action against the abuse of intellectual property rights. They retain their sovereignty in this field. But they are also not obliged to actually take appropriate measures.

²⁴³ Heinemann, *supra* note 239 at 241. See more to this tension in Chapter II.C. above.

²⁴⁴ Heinemann, *supra* note 239 at 241.

²⁴⁵ The following list is a summary of an elaboration by Heinemann, *supra* note 239 at 241 ff.

- Appropriate measures are only permissible if ‘they are consistent with the provisions of this Agreement’. This is a compatibility clause, which, at first sight, is unexpected and contradictory in the context of an exception clause (as shown in the first principle above, this article contains an exception to obligations arising from this Agreement). But this compatibility clause has just a clarifying function: the article shall not be used to unhinge certain areas of intellectual property protection; the system of intellectual property protection as such must be maintained. Only individual excesses within the system that are to be deemed abusive have to be prevented.
- The most difficult part of this article lies in the understanding of ‘prohibited practices’. There is no detailed definition provided in the Agreement to what in fact constitutes an abuse or a practice that unreasonably restrains trade or impairs the transfer of technology. Any interpretation must therefore be based on experience gained in a different context. It is important to note here that the Agreement merely requires the existence of a right in the field of intellectual property, which does not necessarily entail a dominating position in a relevant market. The EC Treaty and Canadian law, which both require a dominant market position, are therefore not helpful in interpreting the scope of this article. It is more advisable to turn to the concept of the ‘misuse doctrine’ that is primarily found in U.S. jurisprudence. The concept of intellectual property misuse is of significance in connection with restraints of competition that are contained in license contracts.²⁴⁶

²⁴⁶ See details to the ‘misuse doctrine’ in Chapter II.A.2.c)ii) above.

- The terms ‘unreasonably restrain trade’ and ‘adversely affect the international transfer of technology’ have no legal substantive clarity at all. They just emphasize that the requirements of protecting competition have to be in balance with those of protecting intellectual property rights. However, the criteria for this balance remain open.

3. *Antitrust Law in License Contracts: Article 40*

Article 40 contains the most detailed treatment of antitrust aspects in the *TRIPs Agreement*.²⁴⁷ It contains substantive law (Art. 40(1) and (2)) as well as rules of procedure for cross-border violations of competition law (Art. 40(3) and (4)).

a) Substantive Law

Art. 40(1) constitutes a declaration of the Member’s common opinion on the detrimental consequences of certain conditions of licenses.²⁴⁸

Art. 40(2) establishes first that “nothing in this Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market”.

The second sentence of this section authorizes Members to take appropriate measures in order to prevent or control such practices. These measures must be consistent

²⁴⁷ Heinemann, *supra* note 239 at 244.

²⁴⁸ *Ibid.* at 245.

with the other provisions of the Agreement. This sentence has wording identical to Art. 8(2) and gives rise to the same difficulties discussed above in Chapter IV.A.2. It also solely clarifies that this article may not be employed in order to intrude with the basic principles of intellectual property protection.²⁴⁹

Art. 40(2) further states that Members ‘may adopt’ appropriate measures to combat anti-competitive practices. This is an issue that already arose in connection with Art. 8(2) as well. Again, the question is whether Members are obliged to adopt such measures and the answer must be that they have no obligation to intervene against anti-competitive conduct.²⁵⁰

Art. 40(2) provides three (illustrative) examples of provisions that might be contained in license contracts and may be treated as restraints for competition:

- exclusive grantback conditions,
- conditions preventing challenges to validity, and
- coercive package licensing.

These clauses do not necessarily constitute violations of competition law. They are just standard examples. This means that they violate competition law as a rule, but can become necessary from a commercial point of view under particular circumstances, and the restraint of competition can therefore be justified.²⁵¹

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.* at 246.

Art. 40(2) also clarifies that there is still considerable scope for regulation by the Member's national legislature by stating at the end "in the light of the relevant laws and regulations of that Member."

b) Rules of Procedure for Cross-border Violations of Competition Law

Art. 40(3) and (4) oblige Members to cooperate with the purpose of prosecuting violations of competition law that affect more than one Member. They provide "an approach for the solution to a problem that is posed generally in cross-border restraints of competition: which procedure should be adopted where two [or more] legal systems are applicable and two [or more] authorities have jurisdiction?"²⁵² The approach here is to impose an obligation of consultation and information. However, this may not avoid contradictory decisions.²⁵³ Furthermore, the scope of Art. 40(3) and (4) is limited to restraints of competition that are contained in license contracts. These articles are therefore not applicable to other restraints of competition in the context of intellectual property and are, for that reason, only of limited significance.²⁵⁴

4. Conclusion

To summarize, the *TRIPs Agreement* provides international legal authority against anti-competitive abuse for specific types of intellectual property rights and contemplates cooperative approaches for remedies in such cases.²⁵⁵ It contains a number of unfair competition rules and provisions against restraints of competition throughout the

²⁵² *Ibid.* at 247.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Anderson, *supra* note 1 at 375.

Agreement. The most detailed provisions can be found in Art. 40 of the Agreement as discussed above.

But from a systematic perspective, considerations of competition law policy should be contained in an independent regulation of antitrust law.²⁵⁶ However, no systematic world antitrust law exists in the WTO framework so far. This is, according to Heinemann, long overdue and “would represent a first step in resolving the difficulties that arise from the fragmentary inclusion of antitrust provisions in a legal text that is devoted to the protection of intellectual property.”²⁵⁷

B. Competition Act

Under Canadian law, four general areas of the *Competition Act* are likely to have an impact on the use, enjoyment or enforcement of copyrights:

- section 32, which deals with special remedies specifically concerning the anti-competitive use of intellectual property,
- the private action provision (section 36),
- criminal offences against competition (part VI of the Act), and
- the reviewable practice provisions (part VIII of the Act).

Explicit references to intellectual property are actually contained only in three sections: section 32, the price maintenance provision in the criminal offences section, and subsection 79(5) in the reviewable practices section.

²⁵⁶ Heinemann, *supra* note 239 at 247.

²⁵⁷ *Ibid.*

1. *Special Remedy Relating to Intellectual Property: Section 32*

Section 32 of the *Competition Act* gives power to the Federal Court, upon application by the Attorney General, to make various remedial orders where copyrights have been used to unduly restrain trade or commerce or to unduly lessen competition in certain specified ways.²⁵⁸ These orders can include declaring void any agreement or licence relating to that use, ordering licensing of the right, revoking the right, or directing that such other acts be done to prevent such use.²⁵⁹ The competition authorities can intervene in a broad range of circumstances to remedy perceived anti-competitive conduct involving the use of intellectual property rights. However, there is little guidance in this section as to the circumstances in which such intervention is appropriate.²⁶⁰ The Intellectual Property Enforcement Guidelines of the Competition Bureau seek to give some guidance on this matter now.²⁶¹

There is a significant limitation of subsection 32(1)(d): remedies can only be applied in connection with the use of intellectual property rights to lessen competition in connection with an ‘article or commodity’. This subsection does therefore not seem to apply where such rights are used to lessen competition in the provision of services.²⁶²

²⁵⁸ Cameron and Scott, *supra* note 73 at 322; Competition Act, *supra* note 8 s. 32(1)(a)-(d).

²⁵⁹ Cameron and Scott, *supra* note 73 at 322f.; Competition Act, *supra* note 8 s. 32(2)(a)-(d).

²⁶⁰ Cameron and Scott, *supra* note 73 at 323.

²⁶¹ The Intellectual Property Enforcement Guidelines of the Competition Bureau are discussed in detail in Chapter V. below.

²⁶² Cameron and Scott, *supra* note 73 at 323.

Section 32 has been in the statute since 1910 but, according to Grover, “there is no contested proceeding ever decided under this section in favour of the government.”²⁶³ In the copyright sphere, the section was raised in one decision,²⁶⁴ but finally had no application.²⁶⁵

Canada’s recent treaties have also eroded section 32’s potential for effective action.²⁶⁶ Subsection (3) of section 32 specifically provides that “no order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents, trade-marks, copyrights or integrated circuit topographies to which Canada is a party”.²⁶⁷ As mentioned above, Canada is a member of many intellectual property conventions. Many of these treaties have provisions impacting intellectual property.²⁶⁸ For instance, Article 1710 of N.A.F.T.A. prohibits compulsory licensing of registered integrated circuit topography, which is listed as a specific remedy in Section 32(2)(c) of the *Competition Act*.²⁶⁹

2. The Private Action Provision: Section 36

Section 36 provides a private right of action (for recovery of damages) for any person who has suffered loss or damage as a result of conduct that is contrary to either the criminal provisions of the *Competition Act* or an order of the Competition Tribunal or

²⁶³ Grover, Warren, “Intellectual Property Rights and the Competition Act: Different Perspectives on Welfare Maximization, Section B: Intellectual Property and Canadian Competition Law” in James B. Musgrove, ed., *Competition Law for the 21st Century* (Juris Publishing, Canadian Bar Association, Competition Law Section, 1997 Annual Conference) at 353, at 357.

²⁶⁴ *Society of Composers, Authors & Music Publishers v. Landmark Cinemas* [1992] 45 C.P.R. (3d) 346.

²⁶⁵ Grover, *supra* note 263 at 358.

²⁶⁶ *Ibid.*

²⁶⁷ *Competition Act*, *supra* note 8 s. 32(3).

²⁶⁸ Grover, *supra* note 263 at 358.

²⁶⁹ *Ibid.*

another court. Although this right of action is limited to these violations, it has formed the basis of counterclaims in a number of intellectual property infringement actions.²⁷⁰

3. Criminal Offences against Competition: Part VI of the Competition Act

Various criminal offences relating to competition are stated in this part of the *Competition Act*. They are enforced by the Attorney General in the courts, largely on the advice of the Commissioner of Competition.²⁷¹ As mentioned above, these offences provide the basis for recovery of damages by private litigants. Most directly relevant to the intellectual property context are the following provisions:²⁷²

- conspiracy to unduly lessen competition,²⁷³
- price discrimination,²⁷⁴ and
- resale price maintenance.²⁷⁵

The ‘resale price maintenance’ provision specifically refers to intellectual property in prohibiting any attempt of an owner of intellectual property by “agreement, threat, promise or any like means, [...] to influence upward, or to discourage the reduction of, prices”²⁷⁶ or any refusals to supply based on low pricing related to the products subject to the intellectual property.

²⁷⁰ Cameron and Scott, *supra* note 73 at 322. See more to these counterclaims in Chapter IV.C.2. below.

²⁷¹ Cameron and Scott, *supra* note 73 at 322.

²⁷² This enumeration is based on the listing by Cameron and Scott, *supra* note 73 at 322.

²⁷³ Competition Act, *supra* note 8 s. 45.

²⁷⁴ *Ibid.* ss. 50 and 51.

²⁷⁵ *Ibid.* s. 61.

²⁷⁶ *Ibid.* s. 61(1)(a) and (b).

It seems that, “even if a person is acting within the scope of rights granted under an intellectual property statute, the entitlement may not necessarily be a defence under the criminal provisions of the *Competition Act*.”²⁷⁷

It is argued that the fact of identifying one specific section (referring to section 61(1)) where the insertion of intellectual property reference was necessary suggests that the other sections in this part do not engage practices that relate to licensing of intellectual property.²⁷⁸

4. Reviewable Practices: Part VIII of the Competition Act

A number of specific market practices are reviewable by the Competition Tribunal on application by the Commissioner of Competition. Reviewable practices are:

- refusal to deal,²⁷⁹
- exclusive dealing, tied selling and market restrictions,²⁸⁰
- abuse of dominant position,²⁸¹
- mergers that result in a substantial lessening of competition,²⁸² and
- other matters such as delivered pricing, foreign judgments and laws, foreign suppliers and specialization agreements.²⁸³

²⁷⁷ Cameron and Scott, *supra* note 73 at 322.

²⁷⁸ Grover, *supra* note 263 at 358.

²⁷⁹ Competition Act, *supra* note 8 s. 75.

²⁸⁰ *Ibid.* s. 77. See Chapter 5.B. below for a detailed analysis of tied selling.

²⁸¹ Competition Act, *supra* note 8 ss. 78 and 79.

²⁸² *Ibid.* ss. 92-103.

²⁸³ *Ibid.* ss. 80-90.

Concerning sections 75 and 77 (refusal to deal and exclusive dealing, tied selling and market restrictions), private individuals and businesses are able to bring complaints directly to the Competition Tribunal after they have obtained leave from the Tribunal.²⁸⁴ The applicant has to prove an adverse effect on competition.²⁸⁵ In all other cases, only the Commissioner of Competition can apply for remedial relief. Only after the Competition Tribunal has made a finding that conduct is contrary to these provisions can private litigants seek remedies under section 36 of the *Competition Act*.²⁸⁶ The Competition Tribunal does not have the power to award damages or impose penalties under these provisions. But it is authorized to issue interim injunctions and a wide range of orders designed to remedy the anti-competitive effects of the conduct.²⁸⁷

There is some uncertainty as to the extent to which these provisions apply to the use or licensing of intellectual property rights.²⁸⁸ The most important arguments against the application of these provisions to intellectual property rights are:²⁸⁹

- Section 32 of the *Competition Act*, as discussed above, deals specifically with the anti-competitive use of intellectual property rights and grants the Federal Court the power to make orders to prevent such conduct. This may suggest that Parliament may not have intended the Competition Tribunal to deal with these issues other than via this section.

²⁸⁴ This private access to the Competition Tribunal was amended to the Competition Act with Bill C-23 (An Act to Amend the Competition Act and the Competition Tribunal Act) and came in force June 21, 2002.

For further information about private access to the Competition Tribunal see "Backgrounder", *supra* note 153.

²⁸⁵ An economic test is included in s. 75 (refusal to deal) of the Competition Act, *supra* note 8.

²⁸⁶ Cameron and Scott, *supra* note 73 at 321.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ The following list is based on an elaboration by Cameron and Scott, *supra* note 73 at 321f.

- Subsection 79(5) of the *Competition Act*, which is part of the section about abuse of dominance, expressly provides that the use and enjoyment of intellectual property rights is not an anti-competitive act.
- The refusal to deal, exclusive dealing, tied selling and market restriction provisions all deal with the ‘supply’ of a ‘product’. ‘Product’ is defined in subsection 2(1) of the *Competition Act* as including an ‘article’ and a ‘service’. However, this definition is not comprehensive. A ‘product’ includes “that which is produced by any action, operation or work”²⁹⁰; and an ‘article’ is further defined in section 2 as “real and personal property of every description”, and the term ‘service’ is defined as “a service of any description whether industrial, trade, professional or otherwise”. Intellectual property could fall within the scope of ‘personal property of any description’. But this is not very clear with licences of intellectual property. Such assignments or licences are essentially contractual waivers for the right to sue and no actual good or service is involved. It is therefore not entirely clear whether these terms also encompass assignments and licences of intellectual property rights.²⁹¹

²⁹⁰ *R. v. Grange*, [1978] 5 W.W.R. 39, 40 C.P.R. (2d) 214 (B.C. Co.Ct.).

²⁹¹ Although, this issue will probably not arise in most situations because the right or the license will very likely be granted along with an actual product, such as in the case of a computer software licence.

C. Impact of the Competition Act on Copyright Litigation

To date, the largest impact of the *Competition Act* on the use, enjoyment and enforcement of intellectual property rights has probably been on infringement litigation.²⁹² This is where most of the existing case law concerning the interface between competition law and intellectual property protection can be found.²⁹³ The *Competition Act* is brought into such litigation in two ways: First, as an equitable defence to an infringement claim, where defendants allege breach of criminal or civil provisions of the Act by the plaintiff (defence of ‘unclean hands’). Second, as counterclaims under section 36 of the *Competition Act* for damages resulting from an alleged breach of the criminal provisions.²⁹⁴ According to Cameron and Scott, neither strategy has been proven very successful as “Canadian courts have been very reluctant to deny enforcement of intellectual property rights simply because they may have been used in a manner contrary to competition law.”²⁹⁵ The two strategies are examined in more detail below in sections 1. and 2.

1. The Defence of ‘Unclean Hands’

The defence of ‘unclean hands’ was raised as an equitable defence in the early patent infringement case *Philco Products Ltd. v. Thermionics Ltd.*²⁹⁶. The defendant argued that the plaintiff had used its patents in a manner contrary to competition law (in violation of conspiracy provisions) and should therefore not be entitled to enforce them. The Supreme Court first held that a defence based on the equitable doctrine of ‘unclean

²⁹² Cameron and Scott, *supra* note 73 at 323.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Philco Products Ltd. v. Thermionics Ltd.* [1930] 3 D.L.R. 133; affirmed [1940] 4 D.L.R. 1 (S.C.C.).

hands' could effectively be argued.²⁹⁷ But the final decision of the Supreme Court at the subsequent trial was that "the illegal combination [...] did not effect a forfeiture of the statutory rights under the patents."²⁹⁸ The Supreme Court argued that even though the assignments of the patents had been illegal and void, they could still be enforced.²⁹⁹

Concerning copyrights, the defence of 'unclean hands' was raised in *Massie & Renwick v. Underwriters' Survey Bureau*³⁰⁰ as defence for an action regarding copyright infringement. But until now, Canadian courts steadfastly refused to expand the scope of the defence of 'unclean hands' beyond illegalities directly relating to title.³⁰¹ They are willing to enforce intellectual property rights "even if there is clear evidence that such rights have been or are being used in an anti-competitive manner."³⁰²

This is in contrast to the 'misuse doctrine' in U.S. jurisprudence. If a plaintiff in the U.S. used intellectual property rights in a manner contrary to antitrust laws, the courts may refuse to grant relief in an infringement case.³⁰³

²⁹⁷ *Ibid.* at 2.

²⁹⁸ *Philco Products Ltd. v. Thermionics Ltd.* [1943] C.P.R. 17 at 20.

²⁹⁹ *Ibid.*

³⁰⁰ *Massie & Renwick v. Underwriters' Survey Bureau* [1937] 2 C.P.R. 184.

³⁰¹ Cameron and Scott, *supra* note 73 at 325.

Further examples: *Amoco Canada Petroleum v. Texaco Exploration Canada Ltd.* [1975] 24 C.P.R. (2d) 84 (F.C.T.D.); *Proctor & Gamble v. Kimberly-Clark of Canada Ltd.* [1990] 29 C.P.R. (3d) 545 (F.C.A.); *Visx Inc. v. Nidek Co.* [1994] F.C.J. No. 1048 (T.D.) (Q.L.); *Eli Lilly and Co. v. Novopharm Ltd.* [1996] 68 C.P.R. (3d) 254 (F.C.T.D.).

³⁰² Cameron and Scott, *supra* note 73 at 327.

³⁰³ *Ibid.* and cited U.S. case law in footnotes 121-123.

See Chapter II.A.2.b)ii) above for more details and cases to the 'misuse doctrine' in the U.S..

2. Section 36 Counterclaims

Counterclaims under section 36, where defendants alleged that plaintiffs had engaged in conduct prohibited under Part VI (criminal provisions) of the *Competition Act*, were raised in at least two patent infringement cases.³⁰⁴ But in both cases, the defendants were not successful. In *Proctor & Gamble et al. v. Kimberly-Clark of Canada Ltd.*³⁰⁵ the Court refused to strike a counterclaim (which was based on the allegation that the plaintiff had engaged in conspiracy) for damages under section 36. In *Molnycke AB v. Kimberly-Clark of Canada Ltd.*³⁰⁶ the Court struck out the counterclaim as well (the defendants also alleged that the plaintiffs had engaged in a conspiracy contrary to section 45 of the *Competition Act*). The Court held that assignment and enforcement of a patent (which were the only acts alleged) could not in themselves result in an undue lessening of competition.³⁰⁷ The Court reasoned that assignment and enforcement were inherent in the exercise of rights expressly provided by the *Patent Act*. And, as this Act provided a 'due' impairment of competition, it was not arguable that the impairment of competition inherent in the exercise of rights provided by that Act could be undue.³⁰⁸ The Court held that a good cause for action under section 45(1) of the *Competition Act* would have to assert that competition had been impaired unduly.³⁰⁹ No explanation was added as to what would constitute an undue lessening of competition. It seems that the Court took the view that assignment and enforcement of a patent would never constitute a violation of the conspiracy provisions of the *Competition Act*.

³⁰⁴ Cameron and Scott, *supra* note 73 at 327.

³⁰⁵ *Proctor & Gamble et al. v. Kimberly-Clark of Canada Ltd.* [1986] 12 C.P.R. (3d) 430 (F.C.).

³⁰⁶ *Molnycke AB v. Kimberly-Clark of Canada Ltd.* [1991] 36 C.P.R. (3d) 493 (F.C.A.).

³⁰⁷ Cameron and Scott, *supra* note 73 at 327.

³⁰⁸ *Molnycke AB v. Kimberly-Clark of Canada Ltd.*, *supra* note 306 at 498f.

³⁰⁹ *Ibid.*

3. Cases Concerning Reviewable Practices

a) Refusal to Deal and the 'Essential Facilities Doctrine'

Cameron and Scott note that “[e]xcept in certain narrowly defined circumstances, the unilateral exercise of [validly acquired] intellectual property rights to exclude competitors should not constitute a violation of competition law, irrespective of the degree to which competition is lessened as a result.”³¹⁰ To hold otherwise “would effectively nullify such rights and impair or remove the economically and socially beneficial incentives created by them.”³¹¹

So far, Canadian courts and the Competition Tribunal constantly followed this premise in holding that the mere exercise of intellectual property rights, including a refusal to license, does not in itself constitute a violation of competition law.³¹² Examples include:³¹³

- In *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al*³¹⁴ the refusal to license a trade-mark was reviewed under the abuse of dominance provisions. The Competition Tribunal stated in this case that something more than the mere exercise of statutory rights had to be present before a finding of misuse of a trade-mark could be made. Selectivity in licensing was seen as fundamental to the rationale behind

³¹⁰ Cameron and Scott, *supra* note 73 at 330.

³¹¹ *Ibid.*

³¹² *Ibid.* at 331.

Nevertheless, the ‘essential facilities doctrine’ is discussed in some detail here because it seems that the Competition Bureau takes the view in its Intellectual Property Enforcement Guidelines that *de facto* industry standards in network industries could be considered as ‘essential facilities’. See Chapter V.D.4. and V.F.4. below.

³¹³ The following examples are based on those listed in Cameron and Scott, *supra* note 73 at 331f.

³¹⁴ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al*, *supra* note 212.

protecting trade-marks. Thus, this alone could not violate competition law.

But, the Tribunal noted that restrictions in licenses might violate competition law, specifically concerning vertical transfer or sharing arrangements.³¹⁵

- In *Eli Lilly and Co. v. Novopharm Ltd.*³¹⁶ the application of the conspiracy provisions were also examined in a situation involving a refusal to license a trade-mark. The Court held that a refusal to license could not constitute a violation of competition law even though it might have lessened competition in some way. Refusal to license was seen as just an assertion of a valid intellectual property right.
- In *Molnycke AB v. Kimberly-Clark of Canada Ltd.*³¹⁷ the Court concluded that, as a matter of law, an undue impairment of competition could not be inferred from evidence of the exercise of intellectual property rights alone.

In the U.S., courts have long held that refusal to deal (defined as a lawful exercise of intellectual property rights) did not in itself violate antitrust laws. Even a monopolist was entitled to refuse to license its patents, as long as they were lawfully acquired.³¹⁸ However, situations of refusal to deal were challenged by the 'essential facilities doctrine'. This doctrine originated in *United States v. Terminal R.R. Assn.*³¹⁹ where control for the only railway bridge over the Mississippi was examined. In this case, the denial of access was found to limit competition because it was not economically feasible

³¹⁵ See further comments to this case concerning vertical transfer and sharing arrangements: Cameron and Scott, *supra* note 73 at 350.

³¹⁶ *Eli Lilly and Co. v. Novopharm Ltd.*, *supra* note 301.

³¹⁷ *Molnycke AB v. Kimberly-Clark of Canada Ltd.*, *supra* note 306.

³¹⁸ Cameron and Scott, *supra* note 73 at 333.

Example: *SCM Corp. v. Xerox Corp.* 463 F. Supp. 983 (D. Conn., 1978), 643 F.2d 1195 (2d Cir. 1981), cert. denied, 445 U.S. 1016 (1982).

³¹⁹ *United States v. Terminal R.R. Assn.*, 224 U.S. 383 (1912).

to duplicate the bridge. The ‘essential facilities’ doctrine has been extended to situations of a unilateral refusal to deal, but it has not often been applied.³²⁰ It did not have a significant impact in the intellectual property context.³²¹ In several cases, refusals by software suppliers to provide access to their software to maintenance providers have been unsuccessfully challenged under the ‘essential facilities’ doctrine.³²² Also, denying access to interfaces has been unsuccessfully challenged under this doctrine.³²³ Recently, several high-profile cases concerning network industries in the U.S. dealt with questions in this context. *Intergraph Corp. v. Intel Corp.*³²⁴ deals with the question of when a monopolist may refuse to deal and *United States v. Microsoft Corp.*³²⁵ examines under what terms a monopolist may deal.

In Canada, two Competition Tribunal decisions deal with a ‘duty to deal’. But they are both not in the intellectual property context.³²⁶ But in *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*,³²⁷ the refusal to license the right to manufacture and distribute sound recordings was challenged under section 75 of the *Competition Act*. In this case, the questions were whether the respondent could refuse

³²⁰ Cameron and Scott, *supra* note 73 at 338.

³²¹ *Ibid.*

³²² *Ibid.*

Examples: *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F. 2d 511 (9th Cir. 1993); *Advanced Computer Services of Michigan, Inc. v. MAI Sys. Corp.*, *supra* note 61; *Data General Corp. v. Grumman System Support Corp.*, 36 F. 3d 1147 (1st Cir. 1994).

³²³ Examples: *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, (D.C. Cal. 1978) 1978-2 Trade Cases 62, 177; *Memorex Corp. v. International Business Machines Corp.*, 485 F. Supp. 423; *Berkey Photo, Inc. v. Eastman Kodak Co.*, (CA-2; 1979) 603 F. 2d 263;

³²⁴ *Intergraph Corp. v. Intel Corp.*, 88 F. Supp. 2d 1288, 54 U.S.P.Q.2d (BNA) 1431 (N.D. Ala. 2000).

See Wagner, *supra* note 195 at 1082ff., for a detailed analysis of this case.

United States v. Microsoft Corp., *supra* note 208.

³²⁶ Cameron and Scott, *supra* note 73 at 339, note 161.

The two cases are: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989) 27 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990) 33 C.P.R. (3d) 83.

³²⁷ *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321, 43 B.L.R. (2d) 93 (Competition Tribunal).

to deal and whether the Competition Tribunal had the jurisdiction to grant a compulsory license.³²⁸ The respondents brought a motion in front of the Copyright Board, claiming that the Competition Tribunal lacked jurisdiction to grant a compulsory license. The Copyright Board granted the motion. It held:

The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the [Competition] Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.³²⁹

b) Tied Selling

Tied selling involves “the sale of a product (the tying product) on the condition that the buyer purchase a different product (the tied product), or at least agrees not to purchase the tied product from any other seller.”³³⁰ Also, where the purchase of the tied product is not a prerequisite but it can be obtained on more favourable terms, tying may arise.³³¹ The underlying competition policy concern is that if the seller of the tying product has strong market power or a monopoly in that market, he might be able to prevent competitors from selling in the market for the tied product by using tying arrangements.³³² If that is achieved, only competitors that are able to offer an acceptable substitute for the tying product as well can compete in the market of the tied product.³³³ Thus, tying can raise barriers to entry into the market of the tied product and therefore result in market power in that market as well.³³⁴

³²⁸ Handa, Sunny. *Copyright Law in Canada* (Markham: Butterworths, 2002) at 348 [hereinafter Handa 3].

³²⁹ *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, *supra* note 327.

³³⁰ Cameron and Scott, *supra* note 73 at 334.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

Several aspects of the tied selling provision (s.77 of the *Competition Act*) have to be considered concerning intellectual property rights:³³⁵

- It is uncertain whether this section is applicable to the licensing of intellectual property because licenses may not constitute a ‘product’, as required in section 2 of the *Competition Act*.³³⁶
- The supplier of the tying product has to have market power in that market because the provision only applies to a ‘major supplier’ of a tying product. According to the *Tele-Direct* case,³³⁷ the fact that the tying product is protected by intellectual property rights alone is not sufficient grounds to imply the existence of market power.³³⁸
- The tying product and the tied product have to be properly distinct products. In the *NutraSweet*³³⁹ case, the Competition Tribunal stated that the respondent had not engaged in tied selling but noted that a trade-mark could constitute a separate product in appropriate circumstances. The applied test in the *Tele-Direct* case³⁴⁰ (in assessing whether there were two distinct products) has two components:³⁴¹ First, there must be sufficient demand for the purchase of each product separately.³⁴² Second, if the products could be sold more efficiently together, then the products would not be treated as being distinct.

³³⁵ The following comments are based on an elaboration by Cameron and Scott, *supra* note 73 at 334f.

³³⁶ Assignments or licences of intellectual property are essentially contractual waivers of the right to sue and no actual good or service is involved. See further comments to that in Chapter IV.B.4. above.

³³⁷ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al*, *supra* note 212.

³³⁸ Cameron and Scott, *supra* note 73 at 334f.

³³⁹ *Canada (Director of Investigation and Research) v. NutraSweet* (1990) 32 C.P.R. (3d) 1.

³⁴⁰ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al*, *supra* note 212.

³⁴¹ Cameron and Scott, *supra* note 73 at 335.

³⁴² See also the U.S. case *Eastman Kodak Co. v. Image Technical Services, Inc.* 112 S. Ct. 2072 (1992), concerning the first part of the test. In this case, it was examined whether spare parts and maintenance services form distinct markets. Further, the U.S. case *Service & Training, Inc. v. Data General Corp.*, *supra* note 61, deals with the

- Section 77(4)(b) provides an exclusion where tied selling is reasonable having regard to the technological relationship between or among the products to which it applies. Considering this exclusion, situations of technological tying (engineering technological complementarities between two products to link the sale of them) seem not to be subject to the tied selling provisions.³⁴³ The case *Restrictive Trade Practices Commission (Director of Investigation and Research) v. BBM Bureau of Measurement*³⁴⁴ dealt with the scope of this provision. According to this decision, the exclusion is not applicable if the technological relationship relates only to cost efficiencies in the production of two products and not to their use by the buyer. The exclusion was only applicable “where the technological relationship between the products was such that the reputation of the tying product might be injured or destroyed if suppliers were not able to require the purchaser to use only the tied product in conjunction with the tying product.”³⁴⁵

Besides the cases mentioned above, only a few cases occurred in Canada where tied selling involving intellectual property rights had been considered.³⁴⁶ In *R. v. Union Carbide Canada Limited*³⁴⁷ an action was brought by the Attorney General under section 32 of the Competition Act. In this case, Union Carbide tied the licensing of its patented

distinction between a diagnostic software program and general repair services that were held to be distinct products.

³⁴³ Cameron and Scott, *supra* note 73 at 335.

³⁴⁴ *Restrictive Trade Practices Commission (Dir. of Investigation and Research) v. BBM Bureau of Measurement* (1981), 60 C.P.R. (2d) 26 (F.C.T.D.) affirmed (1985), 9 D.L.R. (4th) 600 (F.C.A.).

³⁴⁵ Cameron and Scott, *supra* note 73 at 335.

³⁴⁶ *Ibid.* at 336.

³⁴⁷ *R. v. Union Carbide Canada Limited*, Exchequer Court of Canada, Court No.B-1979. Information filed October 12, 1967; Minutes of Settlement filed December 12, 1969.

extrusion of polyethylene film sheets to the purchase of all the unpatented resin necessary to make these sheets. The case was settled and Union Carbide agreed not to continue tying the licensing to the sale of the raisin.³⁴⁸

More examples of conduct that may constitute illegal tied selling³⁴⁹ and technological tying³⁵⁰ can be found in U.S. case law.

D. Analysis

The *Copyright Act*³⁵¹ and the *Competition Act*³⁵² pursue different goals. The former encourages creation by giving a time-limited right to control copying (and hence distribution), thus creating monopolies. The latter seeks to eliminate monopolies in order to protect consumers.³⁵³ In spite of pursuing these different goals, the two Acts have one underlying principle in common: they both seek to promote consumer welfare. In order to pursue this principle, the two Acts are drafted so that they would not oppose each other.³⁵⁴ This is based on the following considerations:

- In deciding that the *Copyright Act* should provide certain monopoly rights, the legislator previously took into account competition law concerns. Therefore,

³⁴⁸ Cameron and Scott, *supra* note 73 at 336.

³⁴⁹ Examples listed by Cameron and Scott, *supra* note 73 at 336, note 145: *United States v. Loews's Inc.*, 371 U.S. 38 (1962); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), cert. denied 105 S. Ct. 3534 (1985).

³⁵⁰ Examples listed by Cameron and Scott, *supra* note 73 at 336f.: *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, *supra* note 317; *Memorex Corp. v. International Business Machines Corp.*, *supra* note 317; *Transamerica Computer Co. v. International Business Machines Corp.*, (D.C. Cal. 1979) 1979-2 Trade Cases 62,989; 481 F. Supp. 965; *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, (CA-2; 1981) 1981-1 Trade Cases 64,027; *Microsoft Corp. v. Bingamen*, (DC SNY, Misc. No MB-85. 7/3/95. 7/13/95).

³⁵¹ Copyright Act, *supra* note 40.

³⁵² Competition Act, *supra* note 8.

³⁵³ Handa 3, *supra* note 328 at 347.

³⁵⁴ *Ibid.*

this Act already contains an implicit balance that respects competition policy concerns.³⁵⁵

- The *Competition Act* takes this implicit balance into account in stating in section 79(5) that the exercise of a right derived under the *Copyright Act* is not in and of itself anti-competitive.³⁵⁶
- While respecting intellectual property rights, the *Competition Act* also deals with exercise that is improper from a competition law point of view. The Attorney General has the power to apply to the Federal Court for remedial orders where copyrights have been used to unduly restrain trade or commerce or to unduly lessen competition in certain specified ways.³⁵⁷

The *Copyright Act* is, as stated by Handa, “an acknowledgement that an exception to the *Competition Act* is desirable – to give creators the incentive to create, they must be permitted to profit from their creations.”³⁵⁸

Canada’s treaties have to be taken into account as well in analysing the interface of copyright law and competition law. These treaties influence, to some extent, the impact of competition law on copyright law in Canada. They either erode the potential of section 32 of the *Competition Act* for effective action (e.g. Art. 1710 of N.A.F.T.A.)³⁵⁹ or they provide international legal authority against anti-competitive abuse for specific types of

³⁵⁵ *Ibid.* at 349.

³⁵⁶ *Ibid.* at 347.

³⁵⁷ *Competition Act*, *supra* note 8 s.32.

³⁵⁸ Handa 3, *supra* note 328 at 348.

³⁵⁹ See comments on that in Chapter IV.B.1. above.

intellectual property rights and contemplate cooperative approaches for remedies in such cases (e.g. the TRIPs Agreement).³⁶⁰

Thus far, Canadian courts and the Competition Tribunal have respected the balanced drafting of the *Competition Act* and the *Copyright Act*. Until now, they have been reluctant to restrict the exercise of copyrights based on competition policy concerns. U.S. case law, on the other hand, evolved differently: first, more cases about the interface between competition law and copyright law can be found in the U.S.; second, it seems that U.S. courts are placing competition policy higher than the rationales behind copyright protection. U.S. courts are more likely to restrict the exercise of copyrights through competition policy enforcement than Canadian courts.

³⁶⁰ For a detailed discussion of the TRIPs Agreement see Chapter IV.A. above.

V. Intellectual Property Enforcement Guidelines of the Competition Bureau

A. General Remarks

Both American and Canadian competition law authorities have promulgated guidelines that reflect policy positions concerning the interface of competition law and intellectual property law. Policy making is part of their mandate and, basically, guidelines are a good way to clarify how they approach the enforcement of it. However, positions taken in guidelines are not necessarily supported by the existing jurisprudence. As authorities might rely on the guidelines in their decisions, one will have to rely on them for precedential value. In that sense, issuing guidelines can result in ‘law making’ that exceeds competition law authorities’ jurisdiction because it did not undergo a formal process of creating law. However, there is also no formal process needed to adjust them, if necessary.

This being said, the Competition Bureau released the final version of its Intellectual Property Enforcement Guidelines³⁶¹ on September 21, 2000 following an extensive consultation process with interested stakeholders.

B. Goals

The Competition Bureau aimed at providing increased clarity on how it will deal with competition issues involving intellectual property in the future.³⁶² The Guidelines set out how the Competition Bureau views the interface between intellectual property law

³⁶¹ “Guidelines”, *supra* note 191.

³⁶² *Ibid.* Preface.

and competition law, and explains the analytical framework it uses to assess conduct involving intellectual property. The Guidelines seek to clarify the circumstances under which the Competition Bureau would consider to monitor terms and conditions of intellectual property rights transfers and licenses. The approach in the Guidelines is based on the premise that the *Competition Act* generally applies to conduct involving intellectual property as it applies to conduct involving other forms of property, even though intellectual property has important characteristics that distinguish it from other forms of property.³⁶³

C. General Principles

When developing the Guidelines, the Competition Bureau took into account its past enforcement experience, Canadian case law, and the approaches taken in the Antitrust Guidelines for the Licensing of Intellectual Property, issued by the U.S. Department of Justice and the Federal Trade Commission in 1995, and in other jurisdictions, including the European Union.³⁶⁴

The Guidelines distinguish two broad categories of circumstances in which the Competition Bureau may apply the *Competition Act* to conduct involving intellectual property:³⁶⁵

- those involving ‘something more than the mere exercise’ of an intellectual property right (where the general provisions of the *Competition Act* should apply), and

³⁶³ *Ibid.* Part 1.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.* Part 1 and section 4.2.

- those involving the ‘mere exercise’ of an intellectual property right and nothing else (where section 32 of the *Competition Act* should apply).³⁶⁶

In both circumstances, it is not presumed that the conduct is anti-competitive, violates the general provisions of the *Competition Act* or should be remedied under section 32.³⁶⁷

The Competition Bureau states that its approach is consistent with section 79(5) of the *Competition Act*, which acknowledges that the ‘mere exercise’ of an intellectual property right is not an anti-competitive act. Therefore, special remedies under section 32 will only be possible in the very rare circumstances described in that section and in the Guidelines, and when the conduct in question cannot be remedied by the relevant intellectual property statute.³⁶⁸ Furthermore, the Competition Bureau states that the right to exclude is the basis of private property rights and necessary for efficient, competitive markets.³⁶⁹ Therefore, enforcement of the *Competition Act* rarely interferes with the exercise of this basic right. Enforcement action may only be warranted when anti-competitive conduct creates, enhances or maintains market power.³⁷⁰

Since the mandate of the Competition Bureau is to promote competition and the efficient allocation of resources, it states in the Guidelines that it may intervene in policy discussions and debates regarding the appropriate scope, definition, breadth and length of

³⁶⁶ A definition of the ‘mere exercise’ of an intellectual property right and nothing else is given in section 4.2.1 of the “Guidelines”, *supra* note 191. See the discussion in Chapter V.D.2. below.

³⁶⁷ “Guidelines”, *supra* note 191 Part 1. See Chapter V.F.3. below for comments to this approach.

³⁶⁸ “Guidelines”, *supra* note 191 Part 1 and section 4.2.

³⁶⁹ *Ibid.* section 3.3.

³⁷⁰ *Ibid.*

intellectual property rights.³⁷¹ Furthermore, it may intervene in Federal Court and Superior Court cases in order to bring a competition perspective to proceedings.³⁷² And it may also intervene to make representations in other proceedings when it believes that intellectual property rights could potentially be defined, strengthened or extended inappropriately.³⁷³

These interventions before the courts in private litigation concerning the scope of intellectual property rights have to be questioned in two respects. First, it is not in the jurisdiction of the Competition Bureau to define the scope of the protection of intellectual property rights. Second, it seems clear that Parliament did not intend the Commissioner of Competition to intervene in private litigation of intellectual property rights as it provided him in section 32 of the *Competition Act* with his own remedy in the rare cases in which the exercise of such rights has ‘undue’ anti-competitive effects.³⁷⁴

³⁷¹ *Ibid.* section 6.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ Information Technology Association of Canada. *Comments on “Draft” Intellectual Property Enforcement Guidelines. Released by the Competition Bureau, Industry Canada, on April 18, 2000* at 2.4 [hereinafter “ITAC”]. See also the comments in Chapter V.F.5. below.

D. Application of the Competition Act to Intellectual Property

1. Principles

The Guidelines set out the following general principles:

- A firm does not contravene the *Competition Act* if it attains market power solely by possessing a superior product or process, introducing an innovative business practice or other reasons for exceptional performance.³⁷⁵
- The right to exclude others from using a process or product does not necessarily grant the owner market power.³⁷⁶
- Whether an owner of an intellectual property right possesses market power or not is generally assessed by defining the relevant market and examining factors such as concentration, entry barriers, technological change and the existence of a variety of substitutes.³⁷⁷
- Licensing agreements involving intellectual property are not considered to be anti-competitive unless they reduce competition substantially or unduly relative to that which would have likely existed in the absence of the license.³⁷⁸

2. Definition of the ‘Mere Exercise’ of Intellectual Property Rights

The ‘mere exercise’ of an intellectual property right is defined in the Guidelines as “the exercise of the owner’s right to unilaterally exclude others from using the intellectual

³⁷⁵ “Guidelines”, *supra* note 191 sections 2.2 and 4.1.

³⁷⁶ *Ibid.* section 4.1.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

property”.³⁷⁹ According to this definition, use and non-use of intellectual property both fall under the ‘mere exercise’ of an intellectual property right.

3. *General Provisions of the Competition Act*

The Guidelines affirm that the ‘mere exercise’ of an intellectual property right does not raise concern under the general provisions of the *Competition Act*; and therefore exclusion does not violate these provisions, no matter to what degree competition is affected.³⁸⁰

The general provisions will be applied however, when alleged competitive harm stems from arrangements (in the form of transfers, licenses, or agreements to use or enforce intellectual property) between independent entities that are not just the ‘mere exercise’ of the intellectual property right and nothing else.³⁸¹ Thus, limitations may be implemented concerning to whom and how intellectual property can be licensed, transferred or sold. Arrangements may be challenged by the Competition Bureau if they create, enhance or maintain market power and are made between firms or groups of firms that would be actual or potential competitors without the arrangement.³⁸² The Guidelines state that this approach is consistent with both the *Tele-Direct* case³⁸³ and the *Warner* case,³⁸⁴ where it was decided that the ‘mere exercise’ of an intellectual property right to

³⁷⁹ *Ibid.* section 4.2.1.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. et al*, *supra* note 212.

³⁸⁴ *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, *supra* note 327.

refuse to license a complainant was not an anti-competitive act and the competitive harm must stem from something more than the mere refusal to license.³⁸⁵

The Guidelines state further, that competitive harm clearly flows from ‘something more than the mere exercise’ of an intellectual property right when joint conduct of two or more firms lessens or prevents competition.³⁸⁶ If conduct such as conspiracy, bid-rigging, joint abuse of dominance, market allocation agreements and mergers restrict competition, it does not matter whether intellectual property rights are involved or not. Such conduct is in any case subject to review under the appropriate general provision of the *Competition Act*.³⁸⁷ The Guidelines state three examples of conduct that is ‘something more than the mere exercise’ of intellectual property rights and that may substantially lessen or prevent competition. The examples are:³⁸⁸

- Tying a non-proprietary product to a product covered by an intellectual property right.
- Extending market power beyond the term of a patent through an exclusive contract.
- Acquiring market power by systematically purchasing a controlling collection of intellectual property rights and then refusing to license the rights to others.

The acquisition of these rights (not the refusal to license) could be seen as anti-competitive and reviewed under sections 79 (abuse of dominance) or 92

³⁸⁵ “Guidelines”, *supra* note 191 section 4.2.1.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

(mergers) of the *Competition Act*. Without the acquisitions, the owner's mere refusal to license would be unlikely to cause concern.

Another example is given in part 7 of the Guidelines.³⁸⁹ Two large record labels (accounting together for more than 65 percent of total sales and 70 percent of all major label artists) form a joint venture for a new generation of digital playback devices (DISCO). They refuse to license their product to another record label, which developed a similar device (DATCO) that is not compatible with DISCO. But they license their product to other record labels. This conduct soon puts DATCO out of business because consumers do not purchase DATCO technology as they are not able to play recordings from at least 70 percent of the major label artist with it. As a result, the owners of DISCO can substantially increase the price of the product as well as royalties for licenses.³⁹⁰

The Competition Bureau would, in this example, likely determine that the terms of the joint venture agreement and the refusal to license decreased competition. It would therefore review this behaviour under the merger provision (section 92) and/or the abuse-of-dominance provision (section 79) of the *Competition Act*.³⁹¹ According to the Competition Bureau, the anti-competitive acts relate to the acquisition of intellectual property rights and the foreclosure of access to them by the owners of DISCO.³⁹² The behaviour of the owners of DISCO is seen as inefficient, as it reduces consumer choice,

³⁸⁹ *Ibid.* Part 7: Example 7.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.* Part 7: Example 7, Analysis.

³⁹² *Ibid.*

leads to increases in the royalties for licenses and increases the price of the product.³⁹³ The Competition Bureau would likely require that the owners of DISCO divest themselves of this technology or license it for release in alternative formats.³⁹⁴

This last example leads to confusion. It is not clear what the owners of DISCO have done that is more than the ‘mere exercise’ of their intellectual property rights. The Guidelines define the refusal to license as an element of the ‘mere exercise’ of an intellectual property right and nothing else.³⁹⁵ It seems that the Competition Bureau considers the decision as to whom one can license to, transfer or sell its intellectual property may be beyond the ‘mere exercise’ of these rights if there is an anti-competitive effect.³⁹⁶ It is not made clear why this blanket refusal to license goes beyond the ‘mere exercise’ of intellectual property rights, which would make the general provisions of the *Competition Act* applicable.

4. *Matters Outside the General Provisions of the Competition Act: Section 32*

Section 32 of the *Competition Act* contemplates the possibility that the ‘mere exercise’ of an intellectual property right may cause concern and result in the Competition Bureau seeking to have the Attorney General bring an application for a special remedy before the Federal Court.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ “Guidelines”, *supra* note 191 section 4.2.1. This section defines the mere exercise of an intellectual property right as “the exercise of the owner’s right to unilaterally exclude others from using the intellectual property.”

³⁹⁶ Walker, Sandy. “Competition Bureau wades into intellectual property debate: Canada’s watchdog sees its guidelines as means of reducing uncertainty in business community.” (1999) 25 *Computing Canada* at 11.

The Guidelines state that the Competition Bureau will only seek a remedy if the circumstances specified in section 32 are met and the alleged competitive harm stems directly from the unilateral exercise of an intellectual property right to exclude and nothing else.³⁹⁷ In such a case, balancing the interests of the system of protection for intellectual property and the public interest in greater competition in that particular market will be necessary. Only where no appropriate remedy is available under the relevant intellectual property statute would the Competition Bureau recommend applying to the Federal Court.³⁹⁸ The Competition Bureau expects such enforcement action to be required only in certain narrowly defined circumstances after analyzing the situation in two steps.³⁹⁹

- The mere refusal has adversely affected competition to a substantial degree in the relevant market. This step is satisfied only by the combination of the following factors:
 - (a) the holder of the intellectual property is dominant in that market, and
 - (b) the intellectual property is an essential input or resource for firms participating in this market; thus, they are effectively prevented from competing through the refusal of access to it.
- Invoking a special remedy against the intellectual property holder would not adversely alter the incentives to invest in research and development in the economy.

Furthermore, the Competition Bureau would also have to be satisfied that the refusal is not just preventing the replication of existing products (which would be consistent with

³⁹⁷ "Guidelines", *supra* note 191 section 4.2.2.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

the intellectual property right) but stifling further innovation.⁴⁰⁰ Only if all these factors were met would the Competition Bureau recommend that the Attorney General bring an application for a special remedy to the Federal Court.⁴⁰¹

The Guidelines state that only in very rare circumstances would all these factors be satisfied and name network industries as an example.⁴⁰² In network industries, intellectual property rights and network externalities can interact to create de facto industry standards. A protected technology can become essential for competitors' products to be viable alternatives. Without access to the standard, competitors are effectively excluded from entering and producing in the market. In this context, the Guidelines refer to example 8 in part 7 of the Guidelines. In this example, ABACUS introduced a spreadsheet for personal computers, which established personal computers as an essential tool for business. ABACUS' annual market share grew to more than 75 percent of the market. Then, CALCULATOR introduced spreadsheet software that was cheaper and had a number of innovative features not found in ABACUS but was not compatible with it. As CALCULATOR ran into financial difficulties it requested a license from ABACUS in order to make the two products compatible. ABACUS did not grant a license and publicly announced that it would enforce its intellectual property rights against CALCULATOR if it copied its command hierarchy. This announcement led several other prominent software makers to discontinue their spreadsheet development programs.⁴⁰³

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.* Part 7: Example 8.

The Competition Bureau analysed ABACUS' refusal to license in this example as the 'mere exercise' of an intellectual property right.⁴⁰⁴ But, after considering network effects, switching costs, and barriers to entry, the Competition Bureau concluded that ABACUS is dominant in the relevant market and its intellectual property is an essential facility for firms participating in this market.⁴⁰⁵ Therefore, it would seek to have an application brought under section 32 of the *Competition Act* in order to examine whether the refusal to license had adversely affected competition in the relevant market to a substantial degree.⁴⁰⁶ According to the Competition Bureau, the facts of this example suggest that ABACUS' ability to impose incompatibility has a chilling effect on the development in this market.⁴⁰⁷ Therefore, the Competition Bureau sees the need to correct this situation through a special remedy under section 32 of the *Competition Act*, which restores incentives for other firms to engage in research and development of competing compatible spreadsheet programs.⁴⁰⁸ The implemented remedy should allow competitors to gain access to the words and layout of ABACUS' menu hierarchy.⁴⁰⁹

This example leads to confusion. It is not clear why a remedy under section 32 is applied to ABACUS. ABACUS attained market power solely by possessing a superior product and exceptional performance. It has done nothing to extend its power to products beyond those protected by its intellectual property.⁴¹⁰ Its intellectual property protection extended naturally to a broad category of products because ABACUS developed a feature

⁴⁰⁴ *Ibid.* Part 7: Example 8, Analysis.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ "ITAC", *supra* note 374, Comments to example 9 (example 8 was example 9 in the Draft of April 2000).

which made the product very popular and which cannot be duplicated without infringing on its intellectual property.⁴¹¹ The Guidelines recognize in sections 2.2 and 4.1 that a firm does not contravene the *Competition Act* if it attains market power solely by possessing a superior product or process, introducing an innovative business practice or other reasons for exceptional performance. But that is exactly what is described in example 8. This example should therefore not attract a remedy under section 32 of the *Competition Act*.⁴¹²

5. *Matters Outside of the Competition Act*

The Competition Bureau reaffirms that disputes arising outside the scope of the *Competition Act* should still be resolved by the appropriate intellectual property authority under the appropriate intellectual property statute.⁴¹³ The Guidelines give two examples.⁴¹⁴

- an illegitimate extension of an intellectual property right, and
- a claim to justify infringement of a legitimate intellectual property right on competition grounds.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ “Guidelines”, *supra* note 191 section 4.2.3.

⁴¹⁴ *Ibid.*

E. Analytical Framework in the Context of Intellectual Property

Part 5 of the Guidelines states the analytical framework for the Competition Bureau's assessment of relevant markets, market power, anti-competitive effects and efficiency in the context of intellectual property. The analysis in this part of the Guidelines is basically a summary of the Merger Enforcement Guidelines.⁴¹⁵

1. Relevant Markets

For transactions or conduct involving intellectual property, the relevant market will, in general, be defined based on one of the following:⁴¹⁶

- intangible knowledge or know-how that constitutes the intellectual property (this is likely to be important when intellectual property rights are separate from any technology or product in which the knowledge or technology is used); or
- processes that are based on the intellectual property rights; or
- final or intermediate goods resulting from, or incorporating, the intellectual property.

In cases involving the licensing of intellectual property, the Competition Bureau does not define a relevant market around a license, but rather focuses on what the legal rights granted to the licensee actually protect.⁴¹⁷

⁴¹⁵ "ITAC", *supra* note 374, Comments to § 46.

⁴¹⁶ "Guidelines", *supra* note 191 section 5.1.

⁴¹⁷ *Ibid.*

2. *Market Power*

The assessment of market power depends, according to the Guidelines, on various factors, such as the level of concentration, entry conditions, the rate of technological change, the ability of firms to ‘leap-frog’ seemingly entrenched positions and the horizontal effects on the market.⁴¹⁸ The Guidelines deal specifically with market concentration, ease of entry and horizontal effects. These factors are discussed in sections a) to c) below.

a) Market Concentration

The degree of market concentration is examined to get a preliminary indication of the competitiveness of the relevant market.⁴¹⁹ Market concentration for intermediate or final goods is typically assessed through calculation of the market share of the firms that are actual participants in this market (this includes firms that offer demand substitutes as well as supply substitutes) and are able to respond to a price increase within one year with minimal investment.⁴²⁰ But, a high degree of market concentration alone is not enough to justify the conclusion that a transaction or conduct will create, enhance or maintain market power.⁴²¹

Conduct of a firm that possesses less than 35 percent market share is, in general, not challenged by the Competition Bureau. A market share of more than 35 percent is not

⁴¹⁸ *Ibid.* section 5.2., first paragraph.

⁴¹⁹ *Ibid.* section 5.2.1.

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

considered as evidence of market power or as anti-competitive, but rather as a circumstance that may warrant further review.⁴²²

The Competition Bureau is likely to focus on qualitative factors such as conditions of entry, the pace of technological change and the views of buyers, market participants and experts when assessing market power.⁴²³ This is due to the fact that a firm's entire actual output or total sales or total capacity is difficult to assess in cases involving intellectual property.⁴²⁴

b) Ease of Entry

The Guidelines acknowledge that conditions of entry are often more important than market concentration when market power involving intellectual property has to be assessed.⁴²⁵ Evidence of a rapid pace of technological change or the ability of firms to 'innovate around' or 'leap-frog' an existing entrenched position may in many cases fully address potential competition law concerns.⁴²⁶ Also, conduct that forces competitors to exit the market or erects barriers to entry is considered as being important.⁴²⁷

An example of conduct that **forces competitors to exit the market** is given in example 3.2 in part 7 of the Guidelines. In this example, ADVENTURE, a mountain bike manufacturer, has purchased patented mountain bike gear systems and now represents 70

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.* section 5.2.2.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

percent of mountain bike sales. It has independently negotiated long-term, exclusive licenses and supply arrangements with the three biggest suppliers of these systems (which account together for about 80 percent of sales). Manufacturers that compete with ADVENTURE were not able to obtain suitable gear system technology and a number of them are now out of business. For the remaining firms, a substantial cut in their sales occurred.⁴²⁸

In this example, the Competition Bureau would examine ADVENTURE's conduct under the abuse-of-dominant-position provision (section 79) of the *Competition Act*. It would assess whether ADVENTURE substantially or completely controlled the supply of products within the relevant market.⁴²⁹ The Competition Bureau judges the use of an exclusive licensing arrangement to effectively control the supply of an essential input as anti-competitive.⁴³⁰ The systematic manner in which ADVENTURE prevented its competitors from obtaining access to the vital input from suppliers is seen as anti-competitive.⁴³¹

An example for conduct that erects barriers to entry is given in example 4 in part 7 of the Guidelines. In this example, the sole supplier of Megasalt, a unique salt substitute, entered into long-term exclusive supply contracts with its principal customers shortly before the intellectual property right, that protected Megasalt, expired. With these contracts, the supplier of Megasalt precluded its principal customers from obtaining salt substitutes from alternative suppliers. A competitor, that developed a potential alternative

⁴²⁸ *Ibid.* part 7: Example 3.2.

⁴²⁹ *Ibid.* part 7: Example 3.2, Analysis.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

to Megasalt, claims that these contracts ‘lock up’ a substantial part of the market, thereby precluding competitors from profitably entering the market.⁴³²

In this example, the Competition Bureau would review the contracts under the exclusive dealing provision (section 77) or the abuse-of-dominance provision (section 79) of the *Competition Act*.⁴³³ If the supplier of Megasalt substantially controlled the relevant market, the Competition Bureau would assess the supplier’s share of sales and examine the barriers to entry to this market.⁴³⁴ The long-term exclusive licenses would likely be seen as anti-competitive if they were determined to be the principal barrier to entry into the market.⁴³⁵

c) Horizontal Effects

To assess market power in a merger transaction, licensing arrangement or other form of contractual arrangement involving intellectual property rights, the Competition Bureau focuses on whether the conduct will result in horizontal anti-competitive effects for firms producing substitutes or producing potential substitutes.⁴³⁶ Vertical arrangements can have horizontal effects in a relevant market as well and the Competition Bureau would evaluate, whether they could result in horizontal effects among either sellers or buyers.⁴³⁷

⁴³² *Ibid.* part 7: Example 4.

⁴³³ *Ibid.* part 7: Example 4, Analysis.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.* section 5.2.3.

⁴³⁷ *Ibid.*

The Guidelines give three examples for **vertical arrangements that can have horizontal effects**:

- Example 3.1 in part 7 of the Guidelines describes a supplier-customer relationship between the firms SHIFT and ADVENTURE. These two firms are not competitors in the same market and enter into an exclusive license agreement (vertical agreement).⁴³⁸ Since the two firms do not compete, the exclusive license would likely not lessen competition between them. Nonetheless, the Competition Bureau would examine the relevant markets (for both suppliers and customers) to determine if the exclusive license lessened or prevented competition substantially in either or both of those markets (which would be horizontal effects).⁴³⁹ The Competition Bureau would examine the conduct of both firms under the abuse-of-dominant-position provision (section 79) of the *Competition Act*.⁴⁴⁰ But it would, in this example, very likely conclude that the exclusive license did not raise any competition issues.⁴⁴¹
- Example 3.2. in part 7 of the Guidelines examines a purchaser of patented mountain bike gear systems (which has 70 percent of sales in the relevant market) that enters into exclusive licenses and supply arrangements with all suppliers in the market (vertical agreements). Thus, its competitors are excluded from the market (horizontal effect of the vertical agreements).⁴⁴² The Competition Bureau would, very likely, see the systematic manner with which the purchaser prevented its competitors from obtaining access to a vital input

⁴³⁸ *Ibid.* part 7: Example 3.1.

⁴³⁹ *Ibid.* part 7: Example 3.1, Analysis.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.* part 7: Example 3.2.

as anti-competitive under the abuse-of-dominant-position provision (section 79) of the *Competition Act*.⁴⁴³

- Example 4 in part 7 of the Guidelines deals with recently closed exclusive contracts between the sole supplier of a unique salt substitute and its two principle buyers (vertical agreements). The product is protected by an intellectual property right, which is about to expire. A competitor supplier, that developed a potential alternative to the product, claims that these contracts ‘lock up’ a substantial part of the market and preclude other suppliers from the market (horizontal effect).⁴⁴⁴ The Competition Bureau would review these agreements under the exclusive dealing provision (section 77) or the abuse-of-dominance provision (section 79) of the *Competition Act* and would likely conclude that they were anti-competitive.⁴⁴⁵

The first example (example 3.1) is confusing. It is not clear why the conduct is seen as ‘something more than the mere exercise’ of an intellectual property right and why an investigation of the Competition Bureau is necessary at all. Is it because an exclusive license was granted, even though this is defined as nothing more than the ‘mere exercise’ of an intellectual property right in section 4.2.1 of the Guidelines?

The Guidelines also give an example of an anti-competitive **horizontal agreement** in example 3.3. in part 7. This example deals with three mountain bike gear

⁴⁴³ *Ibid.* part 7: Example 3.2, Analysis.

This example is also examined under the aspect of forcing competitors to exit the market. See Chapter V.E.2.b) above.

⁴⁴⁴ “Guidelines”, *supra* note 191 part 7: Example 4.

⁴⁴⁵ *Ibid.* part 7: Example 4, Analysis.

This example is also examined under the aspect of erecting barriers to entry. See Chapter V.E.2.b) above.

suppliers that enter into a (horizontal) agreement, which subdivides the market among them. At the same time, they enter into exclusive license agreements, at premium prices, with a dominant purchaser.⁴⁴⁶ This matter would be examined by the Competition Bureau under either section 45 of the *Competition Act* as a conspiracy case (if the agreements were a blatant market allocation scheme implemented in a covert manner) or section 79 as a joint abuse-of-dominance case against the other suppliers in the market (if they were specialization agreements, under which each supplier publicly agreed to focus on a particular system technology that the parties disclosed to and discussed with the purchaser).⁴⁴⁷ According to the facts given in this example, the Competition Bureau would conclude that the arrangement had either unduly or substantially lessened or prevented competition.⁴⁴⁸

This example is confusing as well. The Guidelines do not provide an analysis of why the conduct in question constitutes ‘something more than the mere exercise’ of intellectual property rights. Rather, the example seems to “illustrate the distinction between conspiracy and joint abuse of dominance than to illuminate the [Competition] Bureau’s approach to intellectual property issues.”⁴⁴⁹ The conduct of the mountain bike gear suppliers does not constitute an exercise of intellectual property rights. Also, anti-competitive conduct must be exclusionary in nature⁴⁵⁰ in order to be subject to review under section 79 of the *Competition Act*, which is not the case in this example.⁴⁵¹

⁴⁴⁶ “Guidelines”, *supra* note 191 part 7: Example 3.3.

⁴⁴⁷ *Ibid.* part 7: Example 3.3, Analysis.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ “ITAC”, *supra* note 374, Comments to example 3.3.

⁴⁵⁰ See the holding in *Canada (Director of Investigation and Research) v. NutraSweet*, *supra* note 339.

⁴⁵¹ “ITAC”, *supra* note 374, Comments to example 3.3.

3) *Anti-competitive Effects*

The Guidelines state that a transaction or conduct must create horizontal effects for the Competition Bureau to conclude that it is anti-competitive.⁴⁵² If the transaction or conduct facilitates a firm's ability to exercise market power (unilaterally or in a coordinated manner) in pricing or output and competitor's costs increase, anti-competitive horizontal effects arise.⁴⁵³ Examples for such anti-competitive effects are:⁴⁵⁴

- A transaction that prevents or raises the cost of competitors' access to important inputs.
- Licensing arrangements that are inherently vertical but have horizontal effects because the licensor and licensee would have been competitors in the absence of the licensing arrangement.
- A transaction or conduct that reduces innovative activity because it prevents future competition in a prospective product or process market.

4) *Efficiency Considerations*

The Competition Bureau repeats in the Guidelines that the fundamental objective of competition law is to ensure the efficient use of resources through vigorous competition.⁴⁵⁵ But, at the same time, it acknowledges that restrictions on competition can actually lead to a more efficient use of resources in certain instances (e.g. vertical arrangements and transactions that combine complementary factors).⁴⁵⁶ It states further in the Guidelines that, in some instances, creating or increasing market power can be

⁴⁵² "Guidelines", *supra* note 191 section 5.3.

⁴⁵³ *Ibid.*

⁴⁵⁴ The following examples are listed in section 5.3. of the "Guidelines", *supra* note 191.

⁴⁵⁵ "Guidelines", *supra* note 191 section 5.4.

⁴⁵⁶ *Ibid.*

justified because of the efficiencies created (especially if intellectual property rights are involved).⁴⁵⁷ The Competition Bureau essentially describes in this section the tension between intellectual property protection and competition law.

When analysing efficiencies in cases involving intellectual property, the Competition Bureau considers both the short-term and long-term efficiency implications of conduct or transactions.⁴⁵⁸ Any pro-competitive effects (efficiencies or business justification) generated by or associated with a potentially anti-competitive conduct have to be taken into account in assessing whether this conduct substantially lessens or prevents competition.⁴⁵⁹

Examples for potentially anti-competitive conduct that enhances the level of competition in the market and therefore has pro-competitive effects are:⁴⁶⁰

- A licensing arrangement that restricts intra-brand competition but furthers inter-brand competition.
- A licensing arrangement between two potential competitors that results in a new product that would not otherwise have been developed.

If the parties could have used commercially reasonable means to achieve efficiencies that were less harmful to competition, the Competition Bureau will compare

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ The following examples are listed in section 5.4 of the “Guidelines”, *supra* note 191.

the anti-competitive effect of the transaction or conduct to such alternatives.⁴⁶¹ Firms should use such alternatives if their use would still allow them to exercise their intellectual property rights.⁴⁶²

F. Analysis

1. General Comments

To date, there have been relatively few competition cases involving intellectual property in Canada. Section 32 of the *Competition Act* has been almost dormant for years.⁴⁶³ However, the fact that the Competition Bureau issued these Guidelines indicates, that it will likely take a greater interest in monitoring the exercise of intellectual property rights in the future. This would represent a significant change in its policy and practice.⁴⁶⁴

The Competition Bureau states that the Guidelines are based on the premise that the *Competition Act* generally applies to conduct involving intellectual property in the same manner as it applies to conduct involving other forms of property.⁴⁶⁵ However, it takes into account that intellectual property has important characteristics that distinguish it from other forms of property.⁴⁶⁶ This premise ignores that Parliament did not intend for the general provisions of the *Competition Act* to apply to intellectual property. Section 32 of the *Competition Act* is especially drafted to deal with conduct involving the exercise of

⁴⁶¹ "Guidelines", *supra* note 191 section 5.4.

⁴⁶² *Ibid.*

⁴⁶³ Morrow, David. "Litigation – Intellectual Property, Recent Developments of Importance" Lexpert Articles on Recent Legal Developments, Canadian Legal Lexpert Directory 2001, LEXD/2001-41.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ "Guidelines", *supra* note 191 Part 1.

⁴⁶⁶ *Ibid.*

intellectual property rights that raise competition policy concerns. The general provisions of the *Competition Act* should therefore have no application in the context of the exercise of intellectual property rights.

2. Use of the General Term ‘Intellectual Property’

The term ‘intellectual property’ describes various statutes and laws that protect intangible creations.⁴⁶⁷ However, it is not a defined term in law. In the Guidelines, the term is used for all the various statutes and laws together.⁴⁶⁸

Furthermore, the Guidelines assume a position regarding the ‘inherent’ nature of intellectual property rights. But this is currently the subject of much debate.⁴⁶⁹ Understanding the ‘inherent’ nature of each intellectual property right necessitates an interpretation of the underlying theoretical basis of each statute or law separately.⁴⁷⁰ But not all of them have a well defined theoretical underpinning. Copyright law, for instance, is entitled ‘copyright’ in English but ‘droit d’auteur’ in French. These terms refer to two very different concepts (the former refers to the protection of the right to copy whereas the latter refers to the protection of a right belonging to an author).⁴⁷¹ One will reach very different conclusions as to what is the ‘inherent’ nature of copyright, depending on which theoretical approach one takes.⁴⁷²

⁴⁶⁷ Handa, Sunny. *Letter to the Competition Bureau: ‘Comments Regarding Intellectual Property Enforcement Guidelines (Draft of June 11, 1999)’*; online: <<http://strategis.ic.gc.ca/SSG/ct01571e.html>> [hereinafter Handa 5].

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ See for further explanation to this difference Chapter II.A.1.c) above and the final remarks in Chapter VI. below.

⁴⁷² Handa 5, *supra* note 467.

3. *The ‘Mere Exercise’ and ‘Something More than the Mere Exercise’ of Intellectual Property Rights*

A further analysis of the Guidelines leads to the conclusion that it is key for the Competition Bureau to differentiate what conduct involves:

- the ‘mere exercise’ of an intellectual property right and nothing else (and therefore does not raise competition issues in general; or if it does, section 32 of the *Competition Act* should apply); and
- ‘something more than just the mere exercise’ of such a right (and therefore should be treated like any other anti-competitive act regardless of the fact that intellectual property rights are involved).

Basically, this approach narrows the application of section 32 of the *Competition Act* down to cases concerning unilateral refusals to deal that affect competition and necessitate the application of the ‘essential facilities doctrine’.⁴⁷³ That is problematic for different reasons:

- It is not consistent with the wording of section 32, which reads: “In any case where use has been made....”⁴⁷⁴
- The distinction between conduct that constitutes the ‘mere exercise’ of an intellectual property right and conduct that constitutes ‘something more than the mere exercise’ is not based on the statutes or on case law.

⁴⁷³ See the description in section 4.2.2. and example 8 in part 7 of the “Guidelines”, *supra* note 191. Chapter V.D.4 above examines this section in more detail.

⁴⁷⁴ Section 32(1) of the Competition Act, *supra* note 8.

- The ‘essential facilities doctrine’ is, especially in new economy markets, very controversial. Furthermore, it is based on U.S. case law and has no basis in Canada.⁴⁷⁵
- Parliament did not intend to give section 32 of the *Competition Act* such a narrow application.
- Whereas section 32 of the *Competition Act* gives jurisdiction over the exercise of intellectual property rights to the Federal Court, the Competition Tribunal has jurisdiction over the application of the general provisions of the *Competition Act*.⁴⁷⁶ Therefore, the approach taken in the Guidelines moves the jurisdiction away from the Federal Court to the Competition Tribunal and ignores the fact that Parliament wanted the Federal Court to deal with the exercise of intellectual property rights.

Even if one were to take the point of view that the approach of the Competition Bureau was based on statutes or case law, the Guidelines do not provide a sharp distinction between conduct that is the ‘mere exercise’ of intellectual property rights and conduct that is more than that. Although there is a short and clear definition given in section 4.2.1 of the Guidelines,⁴⁷⁷ the hypothetical examples at the end of the Guidelines lead to more confusion than clarification. In particular, examples 3.1,⁴⁷⁸ 3.3,⁴⁷⁹ 7,⁴⁸⁰ and

⁴⁷⁵ See more comments to the ‘essential facilities doctrine’ in Chapter V.F.4. below.

⁴⁷⁶ With the possibility of appeal to the Federal Court of Appeal, according to section 13 of the Competition Tribunal Act, R.S.C. 1985, c. 19.

⁴⁷⁷ Section 4.2.1 of the “Guidelines”, *supra* note 191, defines the mere exercise of an intellectual property right as “the exercise of the owner’s right to unilaterally exclude others from using the intellectual property”.

⁴⁷⁸ See Chapter V.E.2.c) above for the analysis of this example.

⁴⁷⁹ See Chapter V.E.2.c) above for the analysis of this example.

⁴⁸⁰ See Chapter V.D.3. above for the analysis of this example.

⁸⁴⁸¹ are not clear about what the parties have done that is more than the ‘mere exercise’ of their intellectual property rights.

The European Court of Justice developed a distinction between conduct within the ‘subject matter’ of an intellectual property right and an abusive exercise of such a right.⁴⁸² But, according to Walker, “case law [in this context] has been inconsistent, confusing and the subject of much criticism.”⁴⁸³ In *Volvo v. Veng*,⁴⁸⁴ the Court held that “the right of the owner of a protected design to prevent third parties from manufacturing, selling or importing products incorporating the design was the very subject matter of the exclusive right.”⁴⁸⁵ The refusal to license itself was, therefore, not considered as an abuse of dominant position.⁴⁸⁶ In the *Magill* case,⁴⁸⁷ the Court held, at first, that the copyright owner has the exclusive right of reproduction, but then concluded that the exercise of that right (which was a refusal to license) was abusive. According to the different results in these cases, it seems that “the scope of intellectual property rights may shrink or expand depending on [the particular] circumstances.”⁴⁸⁸ Experience in Europe shows that the distinction between the ‘mere exercise’ and ‘something more than the mere exercise’ of intellectual property rights depends on the respective facts in each case.

⁴⁸¹ See Chapter V.D.4. above for the analysis of this example.

⁴⁸² Walker, *supra* note 396.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Volvo v. Veng* Case 238/87 [1987] ECR 6211.

⁴⁸⁵ Walker, *supra* note 396.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Radio Telefis Eireann (RTE) v. Commission Cases*, *supra* note 210.

⁴⁸⁸ Walker, *supra* note 396.

4. *Industry Standards and the 'Essential Facilities Doctrine'*

The analysis of section 4.2.2 of the Guidelines, in combination with example 8 in part 7 of the Guidelines,⁴⁸⁹ reveals that the Competition Bureau takes the view that de facto industry standards in network industries could be considered as 'essential facilities' and thus, access of competitors to the standard could be enforced. It seems that this view is based on the U.S. 'essential facilities doctrine' or the Canadian 'duty to deal', described in Chapter IV.C.3.a) above.

In fact, interfaces in standards are an area of emerging concern. Cameron and Scott held that "[w]here a product itself becomes a standard, either informally through the market process or through a formal standards setting mechanism, a duty to deal may be imposed."⁴⁹⁰ They provide as examples the consent decree proceedings by the U.S. Federal Trade Commission (FTC) against Dell⁴⁹¹ as well as the U.S. case *Litton Systems, Inc. v. American Telephone and Telegraph Co.*⁴⁹² However, these two cases deal with **formal standard-setting proceedings**. Competition concerns may arise in such proceedings when a participant attempts to abuse the standard-setting process (e.g. by asserting that compliance with an agreed-upon standard violates its intellectual property rights, as happened in the Dell case). Competition concerns arise in this context not because of the exercise of intellectual property rights but rather, because of bad faith behaviour of one of the participants during the negotiations for the standard.

⁴⁸⁹ See Chapter V.D.4. above for the description of section 4.2.2 and example 8.

⁴⁹⁰ Cameron and Scott, *supra* note 73 at 340.

⁴⁹¹ Federal Trade Commission, *In the Matter of Dell Computer Corp., Proposed Consent Order to Cease and Desist*, FTC File No. 931-0097 (2 November 1995). For more details to that Consent Order see: *Antitrust and Intellectual Property in the Year 2000*, Remarks of Commissioner Mary L. Azcuenaga, Federal Trade Commission, Before the American Intellectual Property Law Association, January 24, 1996
online: < <http://www.ftc.gov/speeches/azcuenaga/intelp.htm> >.

⁴⁹² *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, (CA-2; 1983) 700 F. 2d 785.

Whether **de facto standards** can be considered as ‘essential facilities’, as implied by the Competition Bureau in the Guidelines, is an open question and the subject of much dispute. Corley⁴⁹³ held that high technology products rarely consist of more than the intellectual effort that created them. Therefore, they can almost never be essential facilities like a bridge across a major river.⁴⁹⁴ On the other hand, Church and Ware⁴⁹⁵ argue that, especially in network industries, there are instances where an installed base of an incumbent can constitute an ‘essential facility’. They hold that this is the case when entry by competing suppliers is not feasible without access to the installed base⁴⁹⁶ and cite the U.S. case *MCI Communications Corp. v. AT&T*⁴⁹⁷ as the leading ‘essential facilities’ case. In this case, it was held that an ‘essential facility’ exists when the following four elements are met: “a) control by a monopolist of a facility or resource serving the monopolist’s market, b) the inability of an entrant to practically or reasonably duplicate the facility, c) the denial of the use of the facility to a competitor or entrant, and d) the feasibility of providing access to entrants.”⁴⁹⁸

The ‘essential facilities doctrine’ and compulsory licensing as remedies remain an open and controversial issue in the U.S. In Canada, courts are very reluctant to apply the ‘essential facilities doctrine’ or to imply a ‘duty to deal’. Furthermore, the Copyright Board made it very clear in *Canada (Director of Investigation and Research) v. Warner*

⁴⁹³ Corley, *supra* note 142 at 184, note 131.

⁴⁹⁴ This is where the essential facilities doctrine originates. See Chapter IV.C.3.a) above for more details. See also Corley, *supra* note 142 at 184.

⁴⁹⁵ Church and Ware, *supra* note 33 at 259.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *MCI Communications Corp. v. AT&T*, 708 F.2d (7th Cir. 1983) cert. denied 464 U.S. 891 (1983).

⁴⁹⁸ Church and Ware, *supra* note 33 at 259.

*Music Canada Ltd.*⁴⁹⁹ that the Competition Tribunal lacks jurisdiction to grant a compulsory license. In view of these facts, the Competition Bureau should not implement an ‘essential facilities doctrine’ in the Guidelines.

Even if an ‘essential facilities doctrine’ would be applied under certain circumstances in network industries, many unresolved problems would remain. The remedy in such cases would either be to open up interfaces or to order a compulsory license. This would essentially involve regulating the terms and conditions of access to the installed base,⁵⁰⁰ which would cause some difficult practical problems. For instance, “[i]f a product does not work in forced open interfaces than there is all kinds of finger-pointing, and in a technologically complex industry, that can get us in a regulatory mess.”⁵⁰¹ Or, as McFetridge put it:

Is compulsory licensing a good remedy if you decide that you want to, for whatever reason, cut short the intellectual property right? [...] You can get access, but that is really all you are getting, and to the extent that something else is required from the licensor, you may have to go a long way with a lot of regulatory intervention to get it.⁵⁰²

Jorde held that the ‘essential facilities doctrine’ should not be applied to the refusal to license intellectual property.⁵⁰³ Among other arguments, he stated that:⁵⁰⁴

⁴⁹⁹ *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, *supra* note 327.

⁵⁰⁰ Church and Ware, *supra* note 33 at 260.

⁵⁰¹ Schwartz, Marius. Comments made at: “Roundtable Discussion on Competition Policy, Intellectual Property and Innovation Markets” in Robert D. Anderson and Nancy T. Gallini, ed., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 1998) at 447, at 454.

⁵⁰² McFetridge, Donald G., Comments made at: “Roundtable Discussion on Competition Policy, Intellectual Property and Innovation Markets” in Robert D. Anderson and Nancy T. Gallini, ed., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (Calgary: University of Calgary Press, 1998) at 447, at 461.

⁵⁰³ Jorde, Thomas M., “The Competition Act and the Information Economy, Section B: Antitrust and the Information Economy: A United States Perspective” in James B. Musgrove, ed., *Competition Law for the 21st Century* (Juris Publishing, Canadian Bar Association, Competition Law Section, 1997 Annual Conference) at 187, at 193.

⁵⁰⁴ The following list is based on (and a summary of) the arguments made by Jorde, *supra* note 503 at 193f.

- The doctrine does not apply well in the area of intellectual property. “The fact that replication may be very expensive and time-consuming is not enough to support compulsory licensing.”⁵⁰⁵
- Compulsory licensing as a remedy would require on-going regulation.
- “A refusal to license intellectual property should always be viewed as a legitimate competitive strategy,”⁵⁰⁶ regardless of whether the holder of the intellectual property “makes an initial decision not to license, or later has a change in strategy and refuses to extend the term of a previously granted license.”⁵⁰⁷
- Compulsory licensing is a dubious undertaking because it can have negative welfare effects in the short-run (compelling inefficient licensing) as well as in the long-run (reducing incentives to invest in innovation).
- “Problems associated with the breadth of intellectual property should be addressed within intellectual property law and before institutions created for that purpose.”⁵⁰⁸

Nevertheless, it seems that firms working in networks industries are now facing risks not seen in the past. According to example 8 in part 7 of the Guidelines, section 32 of the *Competition Act* could be successfully applied “in the case of a network industry in which intellectual property protection and the size of the network result in substantial

⁵⁰⁵ Jorde, *supra* note 503 at 193.

⁵⁰⁶ *Ibid.* at 194.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

market power.”⁵⁰⁹ The Competition Bureau fears that the combination of intellectual property rights and network effects may create de facto industry standards, and intellectual property protection may therefore effectively exclude others from entering and producing in the market.⁵¹⁰ Thus, as Walker noted: “if you are successful enough to have created an industry standard in a network industry, the [Competition] Bureau might compel you to share your intellectual property with your competitors.”⁵¹¹

However, the combination of intellectual property protection and network effects is not necessarily a source of market power. Unless competition is constrained, this combination does not merit a higher level of competition law scrutiny or intervention. In fact, network effects can provide substantial consumer benefits and facilitate dynamic, leapfrogging competition where a leader can rapidly be deposed by a superior competing product.⁵¹² Where technologies compete, it is not merely the combination of intellectual property protection and network externalities that inhibit the development of competing technologies, but the extension of intellectual property rights to products and competition markets beyond the scope of the intellectual property rights and their natural outflows.⁵¹³ Only such extensions merit a higher level of competition law scrutiny or intervention.

⁵⁰⁹ Walker, *supra* note 396.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² See also the comments made by Microsoft Canada Co. in: *Letter to the Competition Bureau: 'Comments Concerning Draft Intellectual Property Enforcement Guidelines'*, September 7, 1999
online: <<http://strategis.ic.gc.ca/SSG/ct01576e.html>>.

⁵¹³ “ITAC”, *supra* note 374 Comments to §46 of the Guidelines.

5. Interventions of the Competition Bureau in Proceedings

The Competition Bureau intends to intervene in proceedings between private litigants when it believes that intellectual property rights could potentially be defined, strengthened or extended inappropriately.⁵¹⁴ This intention is very questionable. The Competition Bureau does not have the jurisdiction and mandate for such an intervention. Furthermore, Parliament did not intend for the Commissioner of Competition to intervene in private litigation of intellectual property rights.⁵¹⁵ Also, it is difficult to envision situations in which such intervention could be appropriate.

⁵¹⁴ “Guidelines”, *supra* note 191, section 6.

⁵¹⁵ See also the comments in Chapter V.C. above.

VI. Final Remarks: Work-Centred versus Author-Centred Approach

This thesis is based on the premise that copyright has a utilitarian purpose, based on a work-centred approach of copyright law.⁵¹⁶ However, not everyone agrees with this position. Some see copyright as being about natural rights. “Natural rights arguments for copyright protection derive from personality, labour and desert, rights to liberty/free speech, and privacy theories, to name a few.”⁵¹⁷ The natural rights theory is based on existing systems of *droit d’auteur*, which support economic rewards for authors and creators.⁵¹⁸ *Droit d’auteur* regimes “are based on the notion that rights flow from the author and therefore remain tied to the author throughout his life. The rights reflect the author’s personality, creativity and intellect, and this is sufficient reason to afford them protection.”⁵¹⁹

If one were to analyze the interface between copyright law and competition law with the presupposition that the underlying principle of copyright is based on the author-centred approach, the outcome would in some parts differ from that reached in this thesis:

- The author’s right of being rewarded with a strong monopoly right for his creations is stronger in the natural rights theory than in the social utility theory. This aggravates the tension between copyright law and competition policy.
- The Competition Bureau’s Intellectual Property Enforcement Guidelines contain an ‘essential facilities doctrine’ that might be applied to firms in

⁵¹⁶ See Chapter II.A.1.c above.

⁵¹⁷ Handa 3, *supra* note 328 at 84.

⁵¹⁸ *Ibid.* at 126.

⁵¹⁹ *Ibid.* at 85f.

network industries. The natural rights theory provides for a strong argument against this doctrine. If one takes the view that personality rights are manifested in copyright law, it seems unimaginable to force a creator to disseminate his work through a court ordered 'duty to deal'.

Nevertheless, this thesis favours the social utility theory because historically Canadian copyright law (as with Anglo-American copyright laws in general) has evolved with a utilitarian mindset.⁵²⁰

⁵²⁰ *Ibid.* at 127 and *Théberge v. Galerie d'Art du Petit Champlain inc.*, *supra* note 24 at 122; see also Chapter II.A.1. above.

VII. Conclusion

This thesis has described and analyzed the background and underlying principles of the interface between Canadian copyright law and competition law. The analysis reveals that both bodies of law serve the same goals of promoting efficient competition, innovation and diffusion of new technology, albeit in different ways. Copyright law aims at fostering creative activity to provide society with new creations. It grants the creator of a work a monopoly for a limited amount of time, which provides for adequate rewards for the creative act. Copyright law has the potential to create market power through monopoly rights. Competition law, on the other hand, looks at a monopoly with suspicion and tends to destroy monopolies in order to provide consumers with increased competition, which leads to lower prices.

The *Copyright Act*⁵²¹ and the *Competition Act*⁵²² are drafted so that they would not oppose each other as Parliament took the conflicting objectives between these two bodies of law into account when enacting the *Copyright Act*. Therefore, the *Copyright Act* contains an inherent balance of copyright protection and competition policy concerns.

In the last decade, new economy markets began to pose new challenges for the interface between copyright law and competition law. New economy markets are characterized by high innovation costs for information assets, which are easily reproduced at very low costs. These markets depend strongly on communication, which makes

⁵²¹ Copyright Act, *supra* note 40.

⁵²² Competition Act, *supra* note 8.

interoperability and dependence on network effects inevitable. Firms in new economy markets seek standard status, first entry, and early lead advantages in large networks. They naturally try to maximize the value of their intellectual property rights through competitive strategies like cooperation or exclusionary tactics. However, these tactics can appear anti-competitive and provoke competition authorities to monitor the exercise of intellectual property rights.

There are different ways to handle these new challenges. The Competition Bureau, in issuing its Intellectual Property Enforcement Guidelines,⁵²³ took the view that monitoring the exercise of intellectual property rights and strengthening the impact of competition policy was the appropriate remedy. While this is not based on the existing jurisprudence in Canada, it seems that the Competition Bureau chose this solution in view of the growing number of cases in this field in the United States. But also in the U.S., case law is not consolidated in this field and different courts come to different solutions.

The analysis of the Guidelines discloses that the Competition Bureau does not distinguish between different types of intellectual property rights. This view does not respect that every intellectual property law or statute has its own rationale and underlying balance of interests. Parliament took competition policy concerns into account when creating the *Copyright Act*. It also did so when creating, for instance, the *Patent Act*.⁵²⁴ But, the balance between competition policy and intellectual property protection does not necessarily have the same outcome in these different statutes. Therefore, the interface of

⁵²³ "Guidelines", *supra* note 191.

⁵²⁴ Patent Act, *supra* note 53.

competition law and intellectual property law has should be examined separately for each type of intellectual property protection.

Furthermore, the Competition Bureau announced in its Guidelines, the application of the 'essential facilities doctrine' in network industries. But, a court-ordered 'duty to deal' based on pure exclusion contradicts the basis of intellectual property rights. Applying the 'essential facilities doctrine' in cases of unconditional refusals to deal "would severely limit the protection offered by the intellectual property statutes, while providing benefits to competition that are ambiguous at best."⁵²⁵

A more workable solution would be to revisit copyright policy and assess whether copyright protection has expanded in ways that threaten the appropriate balance between copyright protection and competition policy.⁵²⁶ If that is the case, the legislator should rethink the scope of copyright protection, particularly concerning network industries, and Parliament could implement a new section in the *Copyright Act* to deal with these new challenges.⁵²⁷ This solution would be more feasible than curbing copyright protection through competition policy enforcement.

⁵²⁵ Hovenkamp, *supra* note 178 at 479.

⁵²⁶ Pitofsky, *supra* note 188 at 559.

⁵²⁷ A comprehensive analysis, as well as suggestions, to a new section in the Copyright Act can be found in Handa 3, *supra* note 328, in Chapter 8.2. at 448ff. The decision of the Competition Bureau to surge ahead in issuing the Guidelines also seems premature in view of the ongoing copyright reform process, as this process deals exactly with the scope of copyright protection in new economy markets. The copyright reform documents were released on June 22, 2001, just a couple of months before the Competition Bureau issued its Intellectual Property Enforcement Guidelines. These documents include: 'Framework for Copyright Reform', 'Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet', and 'Consultation Paper on Digital Copyright Issues.' These documents are discussed in detail in Handa 3, *supra* note 328 at 448ff.

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