Unilateral Refusal to License Intellectual Property Rights
A Comparative Perspective

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要　　旨

知的財産の使用許諾の拒絶は、反トラスト法における最も困難な問題の一つである。かかる行為は、排除する権利を基盤とする知的財産の枠組において許されている。しかしながらそれは、競争に焦点を合わせる反トラスト法によって罰せられる場合がある。反トラスト法と知的財産は両者ともに、技術革新と経済的厚生という目的において共通する。それにもかかわらず、知的財産は技術革新のプロセスにインセンティヴを与えるために投資の回収とともに合理的な利益を確保することにより、各権利の保有者に知的財産の創造を推進する排他的なフレームワークを与えている。他方、競争政策は、市場における条件が可能な限り均衡がとれていることを確保して、市場集中と市場力を克服することによって競争のプロセスを保護する。知的財産に由来する排他性は、一定の場合には反競争行為の事案となり得る。

使用許諾の拒絶の権利は一般に承認されている一方で、競争当局による介入のレベル（強制許諾の基盤）は、国によって大きく異なる。本稿は、かかる異なるアプローチを考察し、かかる多様な見解について若干の評価と提言を行うものである。

Keywords: Intellectual Property, anticompetitive practices, licensing, private monopolization, abuse of dominant position.

Introduction

I.　*Refusal to License Intellectual Property in the World Intellectual Property Organization*

A.　*The 2007 Developmental Agenda*

B.　*Difference between Tangible and Intangible Property*

C.　*Different Approaches to Refusal to License Intellectual Property Rights*

II.　*Refusal to License Intellectual Property Rights in The United States*

A.　*Overview*

Introduction

The anticompetitive implications of unilateral refusal to license intellectual property Rights (IPR) has been among the most attractive research subject within antitrust in recent years. It occurs when an IPR holder unilaterally refuse to make IP available at any price[1]. From the antitrust perspective, it becomes important as soon as such refusal produces anticompetitive consequences in the market and produces harm to consumers. Therefore, once a legal controversy arises regarding a refusal to license intellectual property, it is important to establish the ground for the refusal, as well as the consequences that the refusal will produce.

At first glance, refusal to license IP is taken for granted as the essence of an IPR is the exclusionary power that implies been able to negate or refuse access to owns property. IPR gives its holder an exclusive framework to explode its creation, assuring the recovery of the investment as well as reasonable profit in order to encourage the innovative process. On the other hand, competition policy protects the competitive process by combating market concentration and market power, assuring that the conditions on the market remains as balance as possible and benefits consumers. The exclusivity, which arrives from intellectual property, can lead to cases of anticompetitive behavior in certain circumstances in which antitrust will intervene. A common ground for intervention is refusal to supply IPR.

While the right to refuse to license IP is universally recognized, the level of intervention (ground for a compulsory license) by competition authorities varies a lot among jurisdictions.

This paper will look at these different approaches. Part I focus on unilateral refusal to license within the World intellectual Property Organization's framework and multilateral agreements such as Paris and Berne conventions as well as the TRIPS agreement. This segment will present the basic principles as well as a general perspective on the issue. Part II, III, and IV describes unilateral refusal to license from the viewpoint of the some of the most important economic regimes worldwide such as United States, The European Union and Japan, providing an analysis of unilateral refusal to license IPR from the substantive perspective as well as the case law in each regime. Finally, in part V, we will offer our concluding remarks.

I. Refusal to License Intellectual Property in the World Intellectual Property Organization

A. The 2007 Developmental Agenda

Recommendation 7 of the World Intellectual Property Organization's (WIPO) development agenda promotes a better understanding of the interface between IPR and competition policies, so that those members with less experience in the pro-development management of IP can benefit from the experience of other Member States.[2]

Recently the organization prepared a brief overview of the various approaches found in a number of jurisdictions that are committed to applying internationally harmonized IP standards, such as those set in the Paris[3] and Berne Conventions[4], as well as in the TRIPS Agreement[5], regarding refusal to license IPR based on the aforementioned recommendation 7.[6]

B. Difference between Tangible and Intangible Property

IPR are fundamentally the right to say 'no,' or, in other words, the right to exclude. Almost invariably, international agreements and national statutes define them in a negative way, thereby expressing their essentially exclusive nature.[7]

IPR differ sharply from property rights in tangible goods. Tangible property is naturally exclusive and rivalrous; possession over a tangible good excludes others per se from possessing it.[8] Therefore, property rights in tangible goods are primarily defined as rights to use and exploit. There is no need for the law to establish the right to prevent others from using a tangible good, because that exclusion is a natural (if not physical) consequence of possession.[9]

By contrast, IPR are property rights in intangible goods. Being intangible, the possession of their subject matter does not de facto impede per se others from possessing them simultaneously. In economics jargon, IPR cover non-rival subject matter.[10]

Therefore, the right in that subject matter must be, primarily, protected by a legal right to exclude others from using (or copying) them, for possession alone is not enough to secure exclusivity. This explains why intellectual property rights are usually stated in a negative manner (i.e., the right to exclude others from doing something rather than the positive right to do something), as opposed to rights in tangible goods. In other words, this explains why the essence of an IPR is the right to say 'no' – this negative dimension corresponds to the very intangible nature of the subject matter protected.[11]

IPR owners' rights to exclude others from using their protected intangible assets are at the heart of the IP system. However, the legal implications of this core right have led to different approaches in WIPO member states' national statutes as well as in their construction by courts and agencies in charge of enforcing IP and antitrust law.[12]

C. Different Approaches to Refusal to License Intellectual Property Rights

The national statutes of WIPO members' states have taken three different attitudes toward the antitrust interface with refusals to license IPR. We could see those perspectives as steps that gradually increase in complexity:[13]

- Refusal to license is referred to as a mere expression of the right to exclude by statutes, guidelines, and court opinions.
- Refusals to license are deemed abuses. Here, legal solutions may vary, because national statutes tend to qualify the abusive exercise of an IPR by associating it with certain circumstances that make the otherwise lawful exercise of the right an abuse.
- Refusals to license may reach, in certain cases, the status of antitrust violations and, therefore, may trigger the harsh sanctions that such illegal practices entail.[14]

1) Right to Refuse To License As The Core Of Intellectual Property Right

Absent an aggravating or qualifying factor, law should not reprimand refusing to license either a competitor or a non-competitor. As explained above, the faculty to deny a license is the very expression of the IPR conferred.[15]

According to this approach, article 31(b)[16] of the TRIPS agreement merely establishes refusals to license, under reasonable conditions and terms, as formal requisite, but not as grounds for granting a compulsory license of a patent. If refusals to license were to be invariably seen as a sufficient ground for the grant of compulsory licenses, article 28.2[17] would make no sense, because patent owners would have no right to conclude licensing contracts but rather an obligation to conclude those contracts. Such a situation would lead to undermining private property rights and the consequent annulment or voiding of the effects of article 28.1.[18]

As we see, the right to refuse to license is well established by international agreements; similarly, various national statutes[19] and guidelines[20] make this understanding clear so as to assure IPR owners the relative freedom with which they are bestowed to exploit their assets the way they see fit. Moreover, a vast number of court opinions in various jurisdictions have echoed the same reasoning.[21]

For many agencies, the type of intellectual property involved (e.g. patents versus trade secrets) does not change the analysis.[22] Nevertheless, the United States notes that, although the basic antitrust principles applied in cases involving refusals to deal are the same for all forms of property, including IP, the outcome of a refusal to deal case could be affected by the form of the IP involved.[23]

This is in line with article 21 of the TRIPS agreement, which prohibits compulsory licenses of trademarks.[24] Nevertheless, the nature of the subject matter covered does have a particular impact on the antitrust analysis of refusals to deal. An example could be information (protected by IP) necessary to achieve the interoperability of products.[25] Also, patent subject matter that corresponds to mandatory technical standards, or when the use of a patented invention is necessary for the use of another patented invention, where the latter involves an important technical advance of considerable economic significance in relation to the invention claimed in the first patent.[26]

2) Refusals to License as Abuses of Intellectual Property Rights

In other jurisdictions, courts and statutes consider denial to license an IPR as an abuse when associated to certain circumstances qualifying that refusal as contrary to the objectives of the law.[27] The notion of abuse of IPR appears in Article 5(A)(2) of the Paris Convention[28] and Article 8.2 of the TRIPS Agreement.[29]

The concept of abusive behavior is divergent among different jurisdictions because abuse means the use of rights in a way contrary to the objectives of the law; therefore, the notion of abuse is symbiotically linked to the very objectives that the law sets for IP. These objectives can vary greatly, which means that the modalities of abuses also vary.[30]

The problem of the language of Article 5(A)(2) is that the core right that is granted to IP owners is the right to exclude others. As a corollary of the right to deny, certain provisions can also be found asserting positively the rights of patent owners – the right to license and the right to assign.[31]

Nonetheless, these rights exist in their positive dimension only because of their negative core. After all, if the patent owner were not primarily entitled to refuse to license, he would not be endowed with a right to license – he would be actually obliged to license. That is the reason for Article 28.2 of the TRIPS Agreement using the word "also." This word means that the positive rights are complementary and consequent to the right to exclude.[32]

According to the practice of WIPO member states, a refusal to license may be deemed an abuse in the following circumstances:

- When it leads to a failure to make the products embodying the patented invention available on the local market, either by local manufacturing or by importing,[33]
- The patent owner has not given reasonable justifications for this failure;
- There is prejudice to the establishment or development of domestic commercial or industrial activities.[34]

The difference between treating a conduct as an abuse instead of considering it an anticompetitive practice is significant not only in terms of applicable sanctions – antitrust violations do not need to be sanctioned merely by compulsory licenses; they may lead to the outright revocation or forfeiture of the IPR used as market power levers – but also in procedural terms.[35]

While, abusive practices do not need to be scrutinized in a judicial or administrative process before a compulsory license is granted; anticompetitive practices do.[36] It follows that when the need for remedying anticompetitive refusals is invoked as ground for granting a compulsory license, the provisions of article 31(k) must be applied. This explains why if the conduct is qualified as merely abusive, it requires that the prospective beneficiary of the compulsory license make a serious attempt to obtain a voluntary license before applying for the compulsory license, whereas if the conduct is qualified as anticompetitive practice that requirement is waived.[37]

3) Refusals to License as Anticompetitive Practices

Sometimes, typically under exceptional circumstances, the refusal to authorize a third party to use an IP protected asset may amount to a violation of competition or antitrust laws to the extent that such refusal constitutes an attempt to monopolize or to maintain a monopoly in a relevant market or, in broader terms, it constitutes an abusive expression of a market dominant position.[38]

Even when the refusal has anticompetitive effects, valid business justifications may exempt the patent owner from antitrust laws.[39] In addition, it has been stated that rarely IP rights alone accord market power.[40] Moreover, a refusal to license could be anticompetitive only when the prospective licensee is a competitor (actual or potential) in the relevant market.[41]

In general, the anticompetitive nature of refusal to license an IPR is associated with the concept of essential facilities.[42] A facility is essential if it is otherwise unavailable and cannot be reasonably or practically duplicated.[43]

The essential facilities doctrine has a very narrow impact on refusal to license an IPR, because of their inherent capacity of being alter-created or alter-invented. No IP title or right is – or should be – capable of constituting an insurmountable barrier for competitors who wish to enter the same relevant market. In other words, IP should never be an essential facility.[44]

When it is, the IPR in question is likely to be invalid or exceptional circumstances (which have, in general, a regulatory dimension) transform it into an essential facility. The example that comes immediately to mind is technical standards; i.e., if an IPR is a 'technical standards' in a particular relevant market this IPR is 'essential' for competitors to compete in that market.[45]

II. Refusal to License Intellectual Property Rights in The United States

A. Overview

United States antitrust law is relatively permissive of refusal to license IP even in the setting of a rooted dominant position. It is only in rare circumstances that an obligation to license has been imposed.

Following the Supreme Court's judgment in Trinko, the emphasis is put on dynamic efficiency[46] and the incentives of the dominant undertaking to invest and not on the allocative efficiency losses[47] of monopoly pricing.[48]

This position has been qualified as a one-sided view of the relationship between economic power and innovation.[49] This position presumes that innovation is higher in monopolistic markets. However, while it is generally accepted that a certain degree of market power and the possibility to recoup investments spur innovation, it is also well known that a monopoly is dynamically inefficient. Without any competitive constrains, the monopolist has no incentive to invest in innovation.[50] Let's explain how the United States' legal system evolves into this position.

B. Legal Framework

1) Sherman Antitrust Act Section 2

The basic legal provision regarding unilateral refusal to deal in United States is section 2 of the Sherman Act, it provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce … shall be deemed guilty of a felony."[51]

An offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power.[52] Furthermore, a claim of attempted monopolization under Section 2 must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.[53]

U.S. courts have struggled to provide clear guidance as to precisely what constitutes anticompetitive or exclusionary conduct.[54] In general terms, however, anticompetitive or exclusionary conduct refers to conduct that excludes rivals on grounds other than efficiency, or in a manner inconsistent with competition on the merits, or in a manner that does not make economic sense but for the elimination or reduction of competition.[55]

2) Intellectual Property Guidelines

According to the IP Guidelines, the agencies generally evaluate restraints in intellectual property licensing arrangements under the rule of reason.[56] Therefore, the agencies look to see whether the restraint is likely to have anticompetitive effects, and if so, whether the restraint is reasonably necessary to achieve pro-competitive benefits that outweigh those anticompetitive effects.[57]

C. Case Law

Several decisions have treated the refusal to supply IP rights in United States. Different jurisdictions have given different treatment to the issue. The most important decisions in chronological order are as follows: Data General Corp. v. Grumman Systems Support Corp.,[58] Image Technical Services v. Eastman Kodak Co.,[59] (circuit courts level), CSU, L.L.C. v. Xerox Corp. (In re Independent Services Organizations Antitrust Litigation),[60] (Federal Circuit Court), and Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,[61] (United States Supreme Court). Let us analyze each one individually.

1) Circuit Courts

a. Data General Corp. v. Grumman Systems Support Corp (1st Cir. Mass. 1994): Presumptive Legality Principle

In this case, Data General, a computer manufacturer refuses to license copyrighted diagnostic software to independent service organizations (ISO) that competed with Data General in the maintenance and repair of Data General's Computers. The court acknowledged that while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers.[62] The ruling creates a rebuttable presumption, although acknowledges that cases in which antirust liability is unlikely to frustrate the objectives of copyright law are certain rare.[63] The court sought to read the two statues in the light of each other, rather than giving primacy to one over the other. Instead of adopting Data General's proposed irrebutable presumption, the court held that it must inquire into whether a refusal to license could support a claim for monopolization.[64] This ruling established a strong presumption that even a monopolist acts lawfully by refusing to license its copyright.[65]

b. Image Technical Services v. Eastman Kodak Co (9th Cir. Cal. 1997): Presumptive Legality with Intent Based Rebuttal

In Eastman Kodak, independent service organizations (ISO) that serviced Kodak photocopying equipment alleged that the defendant used its monopoly in the market for its photocopier and micrographic parts to create a second monopoly in the equipment service markets since Kodak's parts were not interchangeable with other manufacturers. The ninth circuit endorsed the rebuttable presumption established in Data General, changing the original approach by applying the presumption to both patents and copyrights. The ruling upheld a jury finding of antitrust liability,[66] since Kodak had power in the market for service of

Kodak's copiers.[67] Furthermore, Kodak engaged in anticompetitive conduct by refusing to sell parts to the ISO's or to their clients.[68] While considering justifications for its conduct, the court recognized that although patent owners are not immune from antitrust liability "patent and copyright holders may refuse to sell or license protected work."[69] The court considered that the presumption had been rebutted because only 65 of thousands of Kodak parts were patented and because Kodak only alleged IP justifications after the fact.[70] The important feature in this case is that the court considered the motivation of the defendant by stating "neither the aims of intellectual property law, or the antirust laws justify allowing a monopolist to rely upon a pre-textual business justification to mask anticompetitive conduct."[71]

The subjective intent standard has been criticized by the pundits as been against the modern antitrust analysis which consider objectives rather than subjectives elements for conduct evaluation.[72]

2) Federal Circuit Court

a. CSU, L.L.C. v. Xerox Corp. (In re Independent Services Organizations Antitrust Litigation): Near Absolute Immunity

In contrast with the approach followed by the first and ninth circuits which with slightly variation admitted the possibility of refuting the presumption of legality of a refusal to license, the Federal Circuit (at least with regards to patents) established a per se rule of legality.[73]

In this instance, CSU LLC sued Xerox, claiming that the later refusal to sell patented parts and copyrighted manuals and to license copyrighted software violated federal antitrust laws. The court distinguished between types of intellectual property. While following the rebuttable presumption stated in Data General for copyrights,[74] the court held that, in the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, a patent holder could enforce its given statutory right to exclude free from antitrust liability.[75]

3) The Scope of the Intellectual Property Right

Despite some dissimilarity in the approaches taken by the three Courts of Appeals, they all, however, agree on granting antitrust immunity to refusal to license within the scope of the IPR. Hence, the scope of the right becomes the decisive criterion to draw the borderline between legitimate and unjustified restrain of competition.[76]

The protection of the intellectual property laws from antitrust liability should extend only as far as those IP laws themselves extend. Therefore, an exemption from antitrust is presumed legitimate as far as the conduct for which a license is withheld is actually within the scope of the intellectual property right.[77]

The Kodak and Xerox courts agreed that the scope of the patent grant is not coincidental with the bounds of the relevant market, so the right to exclude may permit a patent holder to maintain a monopoly over not just the market for the patented parts but possibly also over closely related markets. Neither court, however, defined the scope of the patent grant.[78]

Regarding the scope of the IPR in Microsoft the court stated that intellectual property rights do not confer a privilege to violate the antitrust laws and impose on licensee whatever conditions the licensor wanted.[79] The court ruled that by modifying certain minor aspects of the windows platform interface the original equipment manufacturers didn't violate it intellectual property rights as far as the change didn't involve a substantial alteration of Microsoft's copyrighted work.

4) United States Supreme Court

a. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP

i. Grounds for the Judgment

In Trinko,[80] the court reaffirmed that maximizing firms' freedom to act and to use their property as they choose is pro-competitive since it induces firms to invest and to innovate.[81] Usually, there is no general obligation on single firms possessed of market power to deal with others unless they had previously dealt or cooperated with them.[82] Neither would the monopolist be under the obligation to offer explanation for its refusal where there had been no prior dealing between the parties.[83] The court arrived to this conclusion based on its 1985 decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,[84] recognizing an exception involving termination of a voluntary and "presumably profitable" course of dealing that made it a case "at or near the outer boundary of § 2 liability."[85] The Aspen Court upheld a jury verdict for the plaintiff, concluding that Aspen Skiing "elected to forgo" short-run benefits "because it was more interested in reducing competition . . . over the long run by harming its smaller competitor."[86] In Trinko, Verizon never voluntarily assisted its rivals and would not have done so absent the compulsion provided by the Telecommunications Act,[87] hence no previous relation existed between undertakings. According to the court in the Aspen case Aspen's conduct "suggested a willingness to forsake short-term profits to achieve an anticompetitive end while no such factor was present in the Verizon situation.[88]

The Court emphasized the presence of a "regulatory structure designed to deter and remedy anticompetitive harm," leading to a judgment that the "slight benefits" of antitrust intervention are outweighed by the costs and risks of any court's attempted enforcement of "detailed sharing obligations."[89]

Furthermore, referring to the hypothetical case of a judicial mandate for compulsory licensing, Trinko stated that the courts are in principle ill-suited to determine the terms of dealing or of grating access to IP and compelling negotiation may facilitate collusion between undertakings.[90]

ii. Critics of the Ruling

- Short- term profit

Regarding the short-term profit criteria, stated by judge Scalia in the ruling, Skitol criticizes it in the following terms "profit sacrifice is both under-inclusive and over-inclusive as a standard of general applicability. In some circumstances, a refusal to deal without any profit sacrifice can bring about exclusionary effects without any efficiency justification; in other circumstances, a refusal to deal entailing some profit sacrifice could be justified by legitimate business reasons."[91]

- Role of intent

Regarding the role of intent, apparently the court made motive or intent a central element in Section 2 law in contrast to lower courts' preference for a focus on effects in these cases.[92] While emphasizing motive/intent differences between Aspen and Trinko, the court opinion seemed to be that discontinuance of an existing relationship would now be considerably more vulnerable to a Section 2 claim than a refusal to initiate a relationship of any kind: an inference of anticompetitive animus is plausible in the former but not in the latter.

On the other hand, the ruling seemed to diminish the fundamental place of effect evidence in Section 2 cases. Thus, the more likely message might be that the Court had now made proof of bad intent an additional significant burden on plaintiffs rather than diminishing the longstanding significant burden of providing anticompetitive effects.[93]

- Essential Facilities Doctrine

While expressly declining either to recognize or to repudiate the essential facilities doctrine, the Court cited approvingly to Professor Areeda's slashing attack on it.[94] Regarding, the monopoly leveraging doctrine, it was given short shrift: "leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected."[95]

On the other hand, the court reason for rejecting the essential facilities argument on the Trinko facts, for example, was that a necessary element—unavailability of access to essential facilities—was not met since the applicable telecom regulatory regime ensured that access. In markets without that regulatory protection, a monopolist's denial of rivals' access to resources necessary for competition could still be a sound basis for Section 2 liability. Others author also commented on the ruling with diverse opinions.[96]

D. Summary

Following the Supreme Court's judgment on Trinko, it looks highly unlikely that a unilateral refusal to deal (and even more a unilateral refusal to license) would be found to violate Section 2 of the Sherman. As a general principle there should be no duty to license intellectual property to others.[97]

This ruling established three main postulates. First, the right to freely choose business partners and dispose freely of owns property;[98] furthermore, an obligation to license even under fair and reasonable circumstances will undermine the incentive to invest and innovate, harming consumers.[99]
Finally, the court is unlikely to be an efficient enforcer in the case the duty to license should be imposed more frequently.[100]

III. Refusal to License Intellectual Property Rights in the European Union

A. Overview

As in the United States, a property owner has the right to choose whether and with whom to deal. This principle will apply to IP as well as in relation to tangible property.[101] In some circumstances, however, article 102 of The Treaty on the Functioning of the European Union (TFEU) [102] establishes an exception from the principle of contractual freedom by prohibiting a refusal to deal as an abuse of a dominant position.[103] The use of IPR as an instrument of commercial strategy has in fact resulted in a number of cases where IP owners have been found guilty of abusive conduct.[104]

The interpretation of the case law and in particular the decisional practice of the commission and its soft law rule making activity indicate that these "exceptional circumstances" have been expanded. They cover an array of situations and the conditions set by the European Court of Justice (ECJ) in IMS/NDC Health[105] do not effectively limit the scope of liability under Article 102 TFEU.[106]

The exact nature of these circumstances is far from clear. The past ECJ and General Court (GC) judgments suggest that an outright refusal to license violates Article 102 if: (1) The IP holder is dominant in a relevant market; (2) The intellectual property is indispensable to an activity in a downstream market; (3) The refusal eliminates effective competition in that downstream market; (4) The would-be licensee seeks to sell products or services not currently being offered for which there is customer demand; and (5) the refusal to license is not objectively justified.[107]

B. Legal Framework

1) Article 102 of Treaty on the Functioning of the European Union (TFEU)

Article 102 does not allude in its non-exhaustive list of examples of anticompetitive conduct to unilateral refusal to deal in general, let alone to refusals to license intellectual property in particular.[108] Nonetheless, the article has been interpreted to apply more widely than merely prohibiting exploitative abuses; [109] it is also aimed at structural[110] or exclusionary[111] abuses directed against competitors, both in primary and related markets.[112] Refusal to supply is classified among the exclusionary abuses; therefore refusal to license intellectual property is an exclusionary abuse. The theory is that maintaining existing levels of competition in markets that have already been weakened by the presence of the dominant firm operates indirectly to protect consumers and contributes to innovation.[113] As soon as an IP owner holding market power uses that power or attempt to eliminate existing competition and impeding innovation, it has been difficult to argue that possible long term innovative efficiencies can provide a justification for a refusal under article 102.[114]

The Court of justice has interpreted article 102 to protect competitors as well as consumers and costumers.[115] The general rule contains three notable constituent elements:

- Conduct which is likely to weaken the stricture of a market by restricting competition, (i.e. driving out existing competitors or denying entry to new forms, will be prima facie abusive:
- It must be shown that the methods used to achieve this effect are different from those which govern normal competition on the basis of traders' performance
- The nature of the evidence required establishing that the conduct in question has the effect of hindering the maintenance or development of the level of competition still existing in the market.

Currently despite the desire for a policy change suggested by the commission, the EU courts have insisted that is not necessary to prove actual harm or likely harm. It is sufficient to prove that the conduct give rise to a risk of eliminating existing levels of effective competition. This interpretation of article 102 shapes it into what is effectively a per se rule.[116]

2) Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings,[117]

Refusals to license intellectual property do not figure largely in the guidance; in the entire body of the document, there are only two direct references to the concept. A refusal to license in the commission's view is no longer to be viewed as significantly special just as one more example of the broad range of potential abusive practices.[118]

By contrast, the discussion paper[119] circulated by the director general of competition in December 2005 not only had dedicated a whole section to refusal to license intellectual property, but also had contained a subsection of refusals to supply information needed for interoperability. Indeed the discussion paper discussion had gone so far to suggest an intervention differential between the refusals to license intellectual property in general and refusal to license interoperability information. The paper pointed out that even if the interoperability information that had been denied could be considered intellectual property, it might not be appropriate to apply to the refusal at same high standards for intervention as those prescribed for refusals to license patents or copyright.[120]

C. Case Law

1) Radio Telefis Eireann (RTE) & Indep. Television Publ'ns Ltd (ITP) v. Comm'n (Joined Cases C-241/91 P & C-242/91 P) (Magill)

In Magill[121], the plaintiff had published a comprehensive weekly guide to three television channels broadcasting in Ireland and Northern Ireland, but had been successfully sued for copyright infringement by the three television stations which had for some time been publishing stand-alone guides for their own programs. Both the General Court and the Court of Justice upheld the decision of the European Commission against the three television stations for abusing their dominant position in relation to the information contained in their separate guides.

Both courts found that a refusal to license copyrighted material, but noting more, established neither dominance nor abuse, but if the former was proven by other means, the latter might be present under exceptional circumstances.[122]

In the view of the Court of Justice, the requirements of a new product and potential consumer demand for it, in conjunction with the television channel' failure to offer the new product themselves had a clear resonance in the actual text of article 102 (b). The article stipulates that abuse may arise by limiting production, markets or technical development to prejudice of consumers.[123]

Furthermore, the ruling stated that there was no objective justification for the refusal of TV companies to license Magill, either in the activity of television broadcasting or in that of publishing television magazines. The implication here is that in the face of a violation of article 102(b), the mere possession of the IPR is not an objective justification for exclusionary conduct. There must be evidence of some other objective-justifying factor such as poor creditworthiness or safety.[124]

Finally, the court established that the TV companies reserved to themselves the secondary market for weekly television guides by excluding all competition on that market, since they denied access to the basic information, which was indispensable to the publication of such guide. Effectively they used a de facto monopoly position on one market, consisting of an essential input or facility, to maintain a monopoly on a secondary, dependent market.[125]

Magill became important because it opened a wider window of opportunity for those on the receiving end of a refusal to license who might whish to attack the refusal by owners of copyright (and arguably of other kinds of intellectual property too) under article 102 TFEU. The outcome in Magill was the expansion of the concept of exceptional circumstances by the Court of Justice, which treated copyrighted material as something like an essential facility and imposed liability for refusal to supply it.[126]

The scope of the exceptional circumstances in Magill was subsequently parsed and construed in two other refusal cases: Tierce Ladbroke[127] and Oscar Bronner[128], by the General Court and the Court of Justice respectively. Uncertainty lingered from some time in two aspects; first, whether the criteria for the exceptional circumstances were to be read cumulative or disjunctively and second, whether the list of circumstances was exhaustive or merely illustrative.[129] The Court of Justice attempted to clarify these issues in IMS.[130]

2) IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (C-418/01)

IMS Health was a company that for some time had been providing pharmaceutical manufacturers with a detailed analysis of retail sales of pharmaceutical products in Germany. In order to produce these regular breakdowns, it used a sales-tracking map it had designed in cooperation with customers and adapted to many of their internal marketing and data retrieval systems. This “brick structure” divided the country in to 1,860 segments based on political boundaries, postcodes, and retail distribution systems.

Use of the brick structure extended well beyond the company’s immediate customer to doctors, retail pharmacies and health insurers, whose use of it IMS neither charged for nor objected to. The structure became the industry standard and posed a formidable barrier to entry for any potential competitor given the evident and unsurprising reluctant of IMS’s customer to accept anything other than reports based on it.[131]

When a competitor devised a similar reporting methodology to shield users from the cost of switching systems, IMS claimed copyright ownership on the brick structure. Moreover, IMS sued its rival for infringement in the German courts, which after grating IMS interim relief and finding it's dominant in the market for the pharmaceutical sales data in Germany, asked the Court of Justice for a preliminary ruling as to whether IMS's refusal to license its brick structure amounted to abuse in terns of Article 102 TFEU.[132]

The Court of Justice ruling treated Magill's exceptional circumstances as cumulative, in the limited sense that if all factors were present there was a breach of Article 102 TFEU.

It then laid down it conditions of it own (conditions alternatively described as sufficient or determinative) to formulate its own five-point test under which as refusal to license copyright by its dominant owner would be anticompetitive if:

- A copyright license was essential for carrying on the prospective licensee business
- The prospective business was in a separate (secondary) market from the (primary) market in which the copyrighted material might be sold, although one or both markets might remain purely hypothetical until the license issue was resolved
- The refusal prevented the emergence of a new product that the copyright owner does not offer and for which there is a potential consumer demand
- There was no objective justification for the refusal
- The refusal foreclosed all competition in the secondary market[133]

The court emphasized that a refusal to license an IPR can be abusive only when it prevents the emergence of a new product in the secondary market. In addition, the ruling stated that this requirement would not be satisfied if the refusal were merely to prevent competitors from offering duplicates of the products that the IPR owner already offered on the secondary market.[134] A refusal to license in such situation would clearly be a case of limiting technical development under article 102(b).[135] The ECJ viewed this requirement as manifesting and ensuring a fair balance between the protection of IPR and the public interest in competitive markets.[136]

Some aspects were not clarified by the ruling, first, whether the cumulative five-point test was intended to be exhaustive. Second, whether a refusal could be constructive. Third, whether the new product concept should be judged objectively, subjectively or subjectively through an objective lens. Although it seem clear that the court was not mandating that the new product or process had to meet patent law's high standards of novelty ad non-obviousness, it is far from clear the scope of the concept.[137]

3) Microsoft Corp. v. Comm'n (T-201/04)

In its IMS judgment the Court of Justice seemed to indicate that the Magill conditions did not offer the only test of exceptional circumstances. It held that it is sufficient rather than necessary to meet the three Magill criteria in order to show an abusive refusal to license.[138] That proposition would seem to follow from the purpose of Article 102 (b), which in principle prohibits as abusive conduct by dominant firms, which limits technical development of markets to the detriment of consumers.[139]

This new exceptional circumstances could arise where a dominant firm with an IPR protected monopoly in the form of an indispensable input refuse to supply or license a competitor in a second dependent market whom it had been supplying with a view to obtaining that secondary market for itself.[140] Microsoft[141] depicts such second circumstances.

The Commission applied Article 102 TFEU to the refusal by Microsoft to supply Sun Microsystems the necessary information to establish interoperability between their work group server operating systems and Microsoft's PC operating system Windows. Microsoft was ordered to disclose interoperability information in a reasonable, non-discriminatory and timeliness way.[142]

The commission findings that Microsoft had abused its near monopoly in the Windows operating system was based on an entirety of circumstances test asserting that its decision must be based on the result of a comprehensive investigation and not be bound by an exhaustive checklist of exceptional circumstances.[143] There as little doubt that Microsoft met the threshold test of a monopoly, which was an indispensable input to a secondary product. There was little doubt as well that Sun Microsystems technologies was offering an innovative product for which there was a substantial and demonstrable demand.[144]

The ruling substantially relaxed the requirement in earlier case law that the refusal to license an IPR must prevent the emergence of a new product for which there is consumer demand.[145] Microsoft's conduct was not necessarily impeding the emergence of an identifiable new product. Microsoft's conduct had nevertheless, according to the Commission, the effect of reducing the incentives of its competitors to innovate (and produce new products in the future) and therefore to limit consumer choice.[146] Rather, the CFI suggested that the underlying analysis considers whether the refusal to deal causes "prejudice to consumers," and it indicated that the limitation of "technical development" could also cause such prejudice. Arguably, this lower standard can be satisfied in any circumstance where the licensing of the IPR will not simply result in a competitor creating a copy of the IP owner's product.[147]

Furthermore, the court used a language that implying that these conditions were not the only exceptional circumstances in which the exercise of the exclusive right by the owner of the intellectual property rights may give rise to such an abuse. Although it noted that the requirement "that the refusal prevents the appearance of a new product for which there is consumer demand is found only in the case-law on the exercise of an intellectual property right."[148]

Finally, it also drew attention to the fact that Microsoft was disrupting an existing pattern of a history of supply of interface information to the sector and the discontinuation of supply had occurred after Microsoft had made use of interoperability in the sector to build up its market and the Windows operating system became a standard.[149] The case interrupted an existing relationship, it did not established a new one (contrary to IMS y Magill).[150]

If Microsoft had opted for a closed system in the way Apple initially did, the circumstances might have been different because the company would have achieve its dominance on the basis of the originally integrated products and it would normally have been entitled to continue to compete on that basis. However, the company built up its dominant position on the basis of interoperating with the downstream application makers. In consequence, it should not be allow to hold back interface information as its operating system becomes an industrial standard.[151]

After Microsoft, the category of exceptional circumstances when applied to new entrant continues to require that the new entrant offers a new product, however it is defined by case law. Nowadays, the definition of new product continues to be opaque.[152]

D. Summary

As exposed EU courts are more willing than their American counterparts to find that a refusal to license an IPR can constitute an antitrust violation. While liability for refusal to deal stands on very tenuous ground in the United States, it is firmly established in the European jurisprudence and has been used to compel the licensing of IPR on a number of occasions.[153] Also, EU Courts have rejected the position that merely controlling an IPR is a presumptively legitimate business justification; precept accepted in the United States under a narrow no-liability rule.[154]

On the other hand, both jurisdictions accept that the refusal to license an IPR, even by a dominant firm, does constitute by itself an abuse of dominance. Despite European decisions that exemplify a more active antitrust approach, European authorities have in a number of cases declined to find that a refusal to license an IPR constituted an abuse of dominance.[155]

Importantly, while the Microsoft case seemingly represents a high point in the application of Article 102, a plausible argument can be made that it would have been decided similarly under American law.[156]
One argument advanced by the Commission for imposing liability on Microsoft was that it had disrupted previous levels of supply of interoperability information; the Commission alleged that Microsoft had earlier disclosed such information and had only stopped disclosing such information when its own product had achieved a reasonably strong position in the marketplace. This liability arguably could have been found in the United States under the Aspen Skiing exception.[157]

Moreover, the European Microsoft antitrust litigation followed on the heels of related U.S. litigation that ultimately resulted in a settlement that, among other remedies compelled Microsoft to disclose interoperability information to competitors.[158]

Finally, the differences between EU and U.S. law on refusal to license IPRs should not be overstated because the small number of decided cases involving refusals to license IPRs makes it difficult to draw meaningful conclusions on the precise contours of IPR owners' obligation to license their IPRs. It may be too early to know whether the European decisions reflect core principles of EU law or whether they will eventually be regarded as outliers, similar to such U.S. cases as Kodak, that should be understood in light of their unique contexts.

IV. Refusal to License Intellectual Property Rights In Japan

A. Overview

The Japanese legal framework generally accepts the position that an IP holder unilaterally may refuse to license its IP; nevertheless, it also recognizes certain exceptions to the general rule.[159] The Intellectual Property Guidelines (IP guidelines) provide that a decision by an IP holder not to grant a license is viewed as an exercise of the underlying IPR and normally constitutes no problem.[160] It is important to bear in mind that the majority of positions set forth by the JFTC in the Intellectual Property Guidelines have yet to be tested in court.[161]

B. Legal Framework

1) Act on prohibition of private monopolization and maintenance of fair trade (Japanese antimonopoly law)

a. Prohibition of Private Monopolization

The basic provision regarding unilateral refusal to license IPR is article 2(5) of the Antimonopoly Law. It defines private monopolization, as: business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[162]

As stated by the article, private monopolization will comprise exclusionary conduct that includes unilateral refusal to deal. Embodied within the refusal to deal category is the unilateral refusal to license IPR. In its broadest terms, the concept of private monopolization is similar to the concept of monopolization under Section 2 of the Sherman Act in the United States and Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The antimonopoly law prohibits companies with market power from excluding or controlling other companies' business activity. Mere possession of monopoly power alone does not constitute private monopolization. In other words, it would not be in violation of private monopolization if an entrepreneur dominates a market because of fair competition.[163]

b. Prohibition of Unfair Trade Practices

Article 2(9) of the Antimonopoly Law specifies certain conducts as unfair trade practices.[164] The article also provides that, in addition to the types of conduct expressly listed in article 2(9)(i) to 2(9)(v), unfair trade practices include any act coming under any one of article 2(9)(vi) sub-paragraphs, acts which tends to impede fair competition and which are designated by the Fair Trade Commission as such.[165]

The prohibited activities fall into three categories: conducts that restrains free competition,[166] conducts that are considered unfair in the sense of being fraudulent, misleading or causing unjust business obstruction to a competitor[167], and conducts deemed as abuse of a dominant bargaining position.[168]

Although unfair trade practices may overlap with the prohibition of unreasonable restraints of trade or private monopolization in many cases, the prohibition of unfair trade practices differs from those prohibitions in the sense that it does not require a substantial restraint of competition.[169]

The prohibition on unfair trade practices thus emphasizes fair and equitable methods of competition, and surpasses the scope of the antitrust and competition laws in the United States and European Union, respectively.[170]

2) Guidelines For The Use Of Intellectual Property Under The Antimonopoly Act (IP Guidelines)

As mentioned before the IP Guidelines recognizes refusal to license IPR as a legitimate exercise of rights; therefore, in most cases such conduct will be lawful. However, if such refusal is found to deviate from or run counter to the intent and objectives of the intellectual property systems it is not recognizable as an exercise of rights. It then constitutes private monopolization if substantially restrains competition in a particular field of trade.[171]

This interpretation is consistent with the reading given to article 21 of the antitrust law, regarding the exemption of its application in relation to intellectual property rights.[172]

In addition, the IP Guidelines used both subjective and objective elements when classifying a conduct as it states that whether a restriction (ex. refusal to license) is classified as exclusion or control may not be uniformly determined according to the manner of the conduct, but it should be judged specifically by examining the intent and effects of the individual conduct.[173]

Illustratively, the guide presents a series of examples applicable to private monopolization. Within these examples, there are three particularly appropriate for unilateral refusal to license cases:

- Where a technology is found to be influential in a particular product market and is actually used by numerous entrepreneurs in their business activities, it may fall under the exclusion of business activities of other entrepreneurs if any one of the entrepreneurs obtains the rights to the technology from the right-holder and refuses to license the technology to others, preventing them from using it. (Interception)[174]
- In a case in which an entrepreneur conducting business activities in a particular technology or product market collects all of the rights to a technology that may be used by its actual or potential competitors but not for its own use and refuses to license them to prevent the competitors from using the technology, this activity may fall under the exclusion of business activities of other entrepreneurs. (Concentration of rights)[175]
- In circumstances in which a product standard has been jointly established by several entrepreneurs, it may fall under the exclusion of the business activities of other entrepreneurs when the right-holder refuses to grant licenses so as to block any development or manufacture of any product compliant with a standard, after pushing for establishment of that standard, which employs a technology of the right-holder, through deceptive means, such as falsification of the licensing conditions applicable in

the event the technology is incorporated into the standard, thereby obliging other entrepreneurs to receive a license to use the technology.[176]

3) Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (Exclusionary Conduct Guidelines)

The exclusionary conduct guideline aims to ensure further transparency of law enforcement and to improve predictability for entrepreneurs by clarifying the requirements for exclusionary private monopolization.[177]

At first the exclusionary guidelines describes the investigation policies concerning exclusionary private monopolization cases. Furthermore, it defines what behavior may fall under exclusionary conduct and depicts the requirements for it to arise.[178]

The guideline defines exclusionary conduct as various actions that would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities, causing a substantial restraint of competition in a particular field of trade. In case the entrepreneur has an efficiency justification for the conduct it does not fall under the exclusionary category.[179]

Regarding the subjective element, it is not essential that for falling under exclusionary conduct, the entrepreneur had the exclusionary intent. However, the exclusionary intent can be an important fact leading to the presumption that the alleged conduct is exclusionary. The guidelines describe four typical exclusionary conducts: Predatory pricing, exclusive dealing, tying and refusal to supply and discriminatory treatment (this will include refusal to license IPR).[180]

Specifically on the issue under study in this paper, the guideline recognizes that an entrepreneur has the discretion to select to whom and on what conditions it supplies products.[181]

However, if an entrepreneur carries out, beyond reasonable degree a refusal to supply in a product necessary for the trading customers to carry out business activities in the downstream market, such conduct may cause difficulty in the business activities of such customers who would be unable to easily find an alternative supplier in the upstream market. In consequence, such refusal may undermine competition in the downstream market.[182]

Whether or not a product in the upstream market can be considered to be a product necessary for the trading customers to carry out business activities in the downstream market will be assessed from the viewpoint of whether or not (1) the product is not substitutable and indispensable product for the trading customers to carry out business activities in the downstream market and (2) it is impossible for the trading customers to produce the given product through the trading customer's own effort, such as investment and technological development.[183]

C. Case Law

1) Osaka District Court, 26th Civil Division Case Number: 2004(Wa) No.13972,

In this case, the court accepted the plaintiff's claims by dismissing the defendant's argument that the defendant's refusal to conclude a license agreement with the plaintiff and the exercise of its patent rights constitute an abusive use of the rights.[184]

The plaintiff, holders of patent right and other rights to manholes, demanded damages for and an injunction against the defendant's production and sale of manholes, who, according to the plaintiff, infringed the plaintiff's patent right by producing and selling manholes without the plaintiff's consent in the fiscal year 2004.[185]

In response, the defendant offered several arguments,

- When the municipalities in the north Kyushu region had designated as their standard the manholes produced by use of the patent of the plaintiff, the plaintiff promised to license other producers to use the plaintiff's patent right and other rights.[186]
- The plaintiff's rights including the patent right need not be protected as far as the iron covers produce and sold by the plaintiff in response to the orders from these municipalities are concerned. The plaintiff's monopoly should be restricted in this respect.[187]

For these reasons, the plaintiff's act of refusing to license its patent right should be considered to amount to an act of unlawfully excluding competitors from the market in the guise of the exercise of these rights. Therefore, such act should not be permitted under Article 3 and Article 2(5) of the Antimonopoly Act. Such act would contravene the purpose of these provisions and public policy; the plaintiff's exercise of the patent right should be regarded as an abusive use of the rights.[188]

In addition, the defendant claimed the following

- The plaintiff should be considered to have allowed the defendant to produce and sell the products in view of the course of negotiations between the plaintiff and the defendant.[189]

Regarding the defendant's argument of abuse of rights, the court held that under the principle of good faith, the plaintiff shall not, without any legitimate reasons, refuse to grant a license of its patent right and other right to other registered producers in the territories of the regional municipalities to which the plaintiff has given a written promise to grant such a license to each of the producers.[190]

Consequently, as the plaintiff once has refused to grant a license to those registered producers without any legitimate reasons, if the plaintiff exercise their patent right against the registered producers to which the plaintiff has refused to grant a license and demanded…such act of the plaintiff should be considered as an abuse of their rights and therefore impermissible."

However, after having examined whether the plaintiff had a legitimate reason to refuse a license agreement with the defendant, the court found that

- While the defendant argued that the provision for quantitative restriction on the number of the goods to be produced in the license agreement presented by the plaintiff violated the Antimonopoly Act and was therefore invalid, such argument of the defendant was groundless because "no clarification has been made about the specific circumstances surrounding the market"
- When considering the fact that the defendant gave the plaintiff a false report on the number of products it had produced under the license agreement for the previous fiscal year and refused to meet a request of the plaintiff, who had detected the untrue reporting and demanded correct information, it is considered that the plaintiff may have had a legitimate reason to refuse to conclude a license agreement with the defendant.[191]
- Regarding the remarks made by a plaintiff's employee in charge of negotiations with the defendant which was considered by the defendant as giving the latter the permission to produce and sell the products, the court held, after finding the facts relating to the course of negotiations between the parties, that the remarks could not be understood as such permission.[192]

D. Summary

In general, terms, in Japan an entrepreneur could unilaterally refuse to license its intellectual property right without infringing the legal framework. Just in few exceptional cases, the refusal will produce anticompetitive consequences and becomes a private monopolization attempt.

The antimonopoly act gave us a clear definition of private monopolization and both the IP guidelines as well as the exclusionary conduct guidelines recognizes the aforementioned refusal to license right as an intrinsic characteristic of intellectual property.

In addition, the guidelines describe the situations in which a refusal to license could become subject to the antimonopoly law.

The Japanese system does not have a voluminous jurisprudence in cases of refusal to license intellectual property right.　Nevertheless, the legal framework depicts a quite clear scenario, leaving little room for the interpretation of the rules.

In the near future, the application of the guidelines to specific cases as well as better doctrinal elaboration will contribute to the studied subject development.

Conclusion

Situations in which an IPR owner could be criticized for refusing to license his active assets to a competitor are rare and exceptional. Refusing to license is at the core of an IP right. Therefore, denying IPR owners the right to refuse to license is the same as denying the exploitation of the very IP.[193]

There are, however, some few situations in which the IP owner may be deprived from his intrinsic right to refuse. These situations should be the exception rather than the rule, and they should be treated with caution by courts, intellectual property offices, and competition authorities.[194]

Punishing IPR owners because they exercise the very basic right conferred to them under applicable laws, without any aggravating factor, even if by exercising their right they embarrass competitors, is likely to undermine the very foundation of the IP system.

Such actions will eliminate IP attractive power for merchants and manufacturers, and reduce its pro-competitive appeal by failing to instigate competitors to create alternative, competing IP assets.[195]

The jurisdictions surveyed recognize this principle in general terms. In the case of the United States and Europe, the jurisprudential development has been extensive, with more interventionist will of the European Union and greater protection of intellectual property rights by the United States. Japan for its part has a clear legislation on the subject, albeit a rather limited jurisprudential development.

To the extent that there is a better jurisprudential and doctrinal development, greater harmonization will occur in the studied area; as well as in the interface between intellectual property and antitrust law in general terms.

Endnotes

1 The Unilateral Conduct Working Group, Report on the Analysis of Refusal to Deal with a Rival Under Unilateral Conduct Laws, 36 (2010), http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf. Refusal to su pply Intellectual property rights is a sub category of refusal to supply in general. "This typically occurs when a firm refuses to sell an input to a firm with which it competes (or potentially competes) in a downstream marke t. A refusal to deal defined in this manner is distinct from a conditional refusal to deal with rivals, in which the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements."

2 Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), The 45 Adopted

Recommendations Under The WIPO Development Agenda 45 7 (2007), http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf. Recommendation 7: "Promote measures that will help countries deal with intellectual property-related anti-competitive practices, by providing technical cooperation to developing countries, especially least developed countries (LDC), at their request, in order to better understand the interface between IPRs and competition policies."

3 Paris Convention for the Protection of Industrial Property, (1883), http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf.

4 Berne Convention For The Protection of Literary and Artistic Works, (1886), http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

5 Agreement On Trade-Related Aspects Of IPR (Trips Agreement) Annex 1C to the Agreement Establishing The World Trade Organization, (1996), http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

6 World Intellectual Property Organization (WIPO), Refusals To License IP Rights: A Comparative Note of Possible Approaches 38 10 (2013), http://www.wipo.int/export/sites/www/ip-competition/en/studies/refusals_license_IPRs.pdf.

7 *Id*. at 6. See e.g. TRIPS AGREEMENT, *supra* note 5. Most of the provisions of the agreement define the rights granted to IP owners, by providing for the right to prevent others from copying or using the subject matter of protection. Ex. articles 14.1 (performances) and 14.3 (broadcasting), 16.1 (trademarks), 22 to 24 (geographical indications), 26 (industrial designs), 28.1 (patents), 36 (layout-designs) and 39.2 (undisclosed information). Compare, with BERNE CONVENTION, *supra* note 4. Exceptions to the negative connotation can be found in some articles that enunciates copyrights with a positive declination. Ex. Article 9.1 provides that "Authors of literary and artistic works protected by the Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." Also a positive language is also found in two provisions of the TRIPS Agreement, article 11: "the right to authorize or to prohibit the commercial rental to the public"; article 14.2: "the right to authorize or prohibit the direct or indirect reproduction of […] phonograms". These are, however, exceptional cases that do not change the essentially negative nature of IPRs, copyrights included.

8 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 7.

9 *Id*. at 7.

10 *Id*. at 7.

11 *Id*. at 7.

12 *Id*. at 9.

13 *Id*. at 12.

14 *Id*. at 12.

15 *Id*. at 13.

16 TRIPS AGREEMENT, *supra* note 5 at 31(b). Article 31 Other Uses Without Authorization of the Right Holder. Where the law of a Member allows for other use [than allowed under article 30] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (b) Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public noncommercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

17 *Id*. at 28(2). Article 28(2) Rights Conferred. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

18 *Id*. at 28(1). Rights Conferred. A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

19 See e.g. United States' Patent Law, 35 U.S.C. § 271(d)(4). Infringement of Patent. (d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (4) refused to license or use any rights to the patent.

20 See e.g. Guidelines for the Use of Intellectual Property Under the Antimonopoly Act, 30 3(1)(i) (2007). (i) Inhibiting the use of technology. Restrictions by the right-holder to a technology such as not to grant a license for the use of the technology to an entrepreneur (including cases where the royalties requested are prohibitively expensive and the licensor's conduct is in effect equivalent to a refusal to license; hereinafter the same shall apply) or to file a lawsuit to seek an injunction against any unlicensed entrepreneur using the technology are seen as an exercise of rights and normally constitutes no problem. However, if any such restriction is found to deviate from or run counter to the intent and objectives of the intellectual property systems, as mentioned below, it is not recognizable as an exercise of rights. It then constitutes private monopolization if it substantially restrains competition in a particular field of trade.

21 See Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195 (1997); CSU, L.L.C. v. Xerox Corp. (In re Independent Serv. Orgs. Antitrust Litig.), 203 F.3d 1322 (2000); Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); See also Case C-481/01 IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (IMS Health), 2004 ECR I 5039 (2004), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001CJ0418&from=EN; Joined Cases C-241/91 P & C-242/91 P Radio Telefis Eireann (RTE) & Indep. Television Publ'ns Ltd (ITP) v. Comm'n (Magill), 1995 ECR I 743 (1995),
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61991CJ0241&from=FR.
22 The Unilateral Conduct Working Group, *supra* note 1 at 23. E.g., Canada, European Commission, Germany, Ireland, Italy, New Zealand, Singapore, United Kingdom.
23 *Id*. at 23.
24 TRIPS Agreement, supra note 5 at 21.
25 See United States v. Microsoft Corp., 253 F.3d 34 (2001).
26 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 19.
27 *Id*. at 19.
28 PARIS CONVENTION, *supra* note 3 at 5(A)(2). (2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses, which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.
29 TRIPS AGREEMENT, *supra* note 5 at 8.2. Principles. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.
30 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 20.
31 See TRIPS AGREEMENT, *supra* note 5 at 28(2).
32 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 22.
33 *Id*. at 24 nn.30. e.g., France, Germany, Bolivia, Colombia, Ecuador and Peru
34 *Id*. at 24 n.31. e.g., Australia, India and the United Kingdom.
35 *Id*. at 25.
36 TRIPS AGREEMENT, *supra* note 5 at 31(k). Article 31 Other Uses Without Authorization of the Right Holder. Where the law of a Member allows for other use [than allowed under article 30] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
37 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 25.
38 *Id*. at 26.
39 XEROX 203 F.3D, *supra* note 21 at 1326; Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1994).
40 Illinois Tool Works Inc., et al., Petitioners v. Independent ink, Inc, 547 U.S. 28, 45 (2006).
41 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 28.
42 See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), THE ESSENTIAL FACILITIES CONCEPT 133 (1996), Http://Www.Oecd.Org/Competition/Abuse/1920021.Pdf; James Turney, *Defining The Limits Of The EU Essential Facilities Doctrine On Intellectual Property Rights: The Primacy Of Securing Optimal Innovation*, 3 NW J TECH INTELL PROP 179–202 (2005); Sergio Baches Opi, *The Application Of The Essential Facilities Doctrine To Intellectual Property Licensing In The European Union And The United States: Are Intellectual Property Rights Still Sacrosanct,*, 11 FORDHAM INTELL PROP MEDIA ENT LJ 409–207 (2001); ALI A. MASSADEH, THE ESSENTIAL FACILITIES DOCTRINE UNDER SCRUTINY: EU AND US PERSPECTIVE (2011), Http://Papers.Ssrn.Com/Abstract=1738326 (Last Visited Oct 10, 2014).
43 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 30.
44 *Id*. at 30.
45 *Id*. at 30.
46 Tejvan R. Pettinger, Dynamic Efficiency Economics Help,
http://www.economicshelp.org/microessays/costs/dynamic-efficiency/ (last visited Sep 7, 2014). Dynamic efficiency is concerned with the productive efficiency of a firm over a period. A firm that is dynamically efficient will be reducing its cost curves by implement new production processes
47 Tejvan R. Pettinger, Allocative Efficiency Economics Help,
http://www.economicshelp.org/blog/glossary/allocative-efficiency/ (last visited Sep 7, 2014). Allocative efficiency occurs when there is an optimal distribution of goods and services, taking into account consumer's preferences
48 Ioannis Lianos & Rochelle C. Dreyfuss, New Challenges in the Intersection of Intellectual Property Rights with Competition Law - A View from Europe and the United States, 157, 81 (2013).
49 See e.g. Bhaskar Sastry, *Market Structure and Incentives for Innovation*, INTERTIC POLICY PAP. (2005), http://www.intertic.org/Policy%20Papers/Sastry.pdf (last visited Oct 6, 2014).

50 Beatriz Conde Gallego, Unilateral Refusal to License Indispensable Intellectual Property Rights –US and EU Approaches, in Research Handbook on Intellectual Property and Competition Law 215, 220 (Josef Drexl ed., 1 ed. 2008).
51 United States' Sherman Act, 15 U.S.C. § 2 (2013).
52 United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).
53 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).
54 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 212 20 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf.
55 MICROSOFT 253 F.3D, *supra* note 25 at 58.
56 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property 34 § 3.4 (1995), http://www.justice.gov/atr/public/guidelines/0558.htm. (Hereinafter IP Guidelines). The 1995 IP guidelines reflected a significant change in antitrust policy since the era of the Nine No-No's of the early seventies. Over time, as the antitrust laws shifted from per se rules and came to focus more on rule of reason analysis, the bright line rules of the Nine No-No's fell out of favor with both agencies. The somewhat formalistic U.S. antitrust law of the seventies viewed these licensing practices as generally unlawful, if not per se illegal.
57 *Id*. at § 3.4.
58 DATA GENERAL 36 F. 3D, *supra* note 39.
59 KODAK II 125 F.3D, *supra* note 21.
60 XEROX 203 F.3D, *supra* note 21.
61 TRINKO 540 US, *supra* note 21.
62 DATA GENERAL 36 F. 3D, *supra* note 39 at 1187.
63 *Id*. at case note 64.
64 Herbert Hovenkamp & Mark A. Lemley, Unilateral Refusal To License, in IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law, 13–29 (Herbert Hovenkamp ed., 1 ed. 2010).
65 *Id*. at 13–30.
66 KODAK II 125 F.3D, *supra* note 21 at 1220.
67 Hovenkamp and Lemley, *supra* note 64 at 13–31.
68 KODAK II 125 F.3D, *supra* note 21 at 1220.
69 *Id*. at 1215.
70 *Id*. at 1219. Kodak asserted its intellectual property justification after more than 10 years of litigation. Even its owns employees testified that it didn't influence the final decision of cutting off supply.
71 *Id*. at 1219.
72 See U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *supra* note 54 at 17.
73 Conde Gallego, *supra* note 50 at 216.
74 DATA GENERAL 36 F. 3D, *supra* note 39 at case note 64.
75 XEROX 203 F.3D, *supra* note 21 at 1327.
76 Conde Gallego, *supra* note 50 at 218.
77 Hovenkamp and Lemley, *supra* note 64 at 13–39. Some jurisdictions established this statement as a positive provision. See e.g. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Japanese Antimonopoly Law), Art. 21 (1947). "The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act"
78 U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *supra* note 54 at 20, n.35. Citing Kodak and Xerox ruling on the scope issue. KODAK II 125 F.3D, *supra* note 21 at 1217. "Parts and service here have been proven separate markets in the antitrust context, but this does not resolve the question [of] whether the service market falls reasonably within the patent . . . grant for the purpose of determining the extent of the exclusive rights conveyed."; XEROX 203 F.3D, *supra* note 21 at 1327. "[A] patent may confer the right to exclude competition altogether in more than one antitrust market."; Id. at 1328. ("We answer the threshold question of whether Xerox's refusal to sell its patented parts exceeds the scope of the patent grant in the negative.").
79 MICROSOFT 253 F.3D, *supra* note 25 at 63. Microsoft primary copyright argument borders on the frivolous. The company claims an absolute and unfettered right to use its intellectual property rights as it whishes: [I]f intellectual property rights have been lawfully acquired" it says, then "their subsequent exercise cannot give rise to antitrust liability". That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal circuit succinctly stated: " intellectual property rights do not confer a privilege to violate antitrust laws".
80 TRINKO 540 US, *supra* note 21.
81 Conde Gallego, *supra* note 50 at 219.
82 TRINKO 540 US, *supra* note 21 at 409.
83 Ian Eagles & Louise Longdin, Refusals to License Intellectual Property: Testing the Limits of Law and Economics 134 (1 ed. 2011).
84 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
85 Robert Skitol, Broad Dissatisfaction with the Whole Thrust of Refusal to Deal, 905 Antitrust Source 1–10, 2 (2007).
86 *Id*. at 2.

87 *Id*. at 2. See Telecommunications Act of 1996, 56–161 (1996). (Codified as amended in scattered sections of 47 U.S.C.) The act imposed duties to Verizon as an ILEC (incumbent local exchange carrier) to facilitate competitor's entry into local markets.
88 Skitol, *supra* note 85 at 2.
89 *Id*. at 3.
90 Conde Gallego, *supra* note 50 at 219. See also, e.g. U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *supra* note54. and Herbert Hovenkamp, The Monopolization Offense, 61 Ohio St LJ 1035 (2000).
91 Skitol, *supra* note 85 at 4.
92 See DATA GENERAL 36 F. 3D, *supra* note 39; XEROX 203 F.3D, *supra* note21.
93 Robert Skitol, *Correct Answer To Large Questions About Verizon v. Trinko*, ANTITRUST SOURCE 1–6, 5 (2004).
94 Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 8 Antitrust Law J. 841. "You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits….it is less a doctrine than an epithet". See also Herbert Hovenkamp, Hovenkamp's Federal Antitrust Policy, The Law of Competition and Its Practice, 4th (Hornbook Series) (4 ed. 2011).
95 Skitol, *supra* note 85 at 4.
96 See Jonathan L. Rubin, The Truth About Trinko, 50 Antitrust Bull. 725 (2005). Dismissed Trinko's importance as little more than "a restatement of the status quo ante of monopolization doctrine" and as announcing no "substantive change in Section 2 doctrine." George Alan Hay, Trinko: Going All the Way, 50 Antitrust Bull. 527 (2005). Opined that Trinko "planted the seed for a complete overhaul" of duty-to-deal law and predicted, "There will be few, if any, exceptions to the principle that a firm, even a monopolist, has absolutely no duty to sell to or cooperate with a potential competitor." Eleanor M. Fox, Is There Life in Aspen after Trinko - The Silent Revolution of Section 2 of the Sherman Act, 73 Antitrust Law J. 153 (2005). Argued that Trinko altered the law of Aspen in a "devious" manner, opening "wide the door to argument in every Section 2 case that the starting point is skepticism about Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient. See also Marina Lao, Aspen Skiing and Trinko: Antitrust Intent and "Sacrifice," 73 Antitrust Law J. 171 (2005).;
97 Lianos and Dreyfuss, *supra* note 48 at 81.
98 United States v Colgate & Co, 250 U.S. 300, 307 (1919). In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with he will deal"
99 TRINKO 540 US, *supra* note 21 at 407–408. "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities".
100 *Id*. at 408. "Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill-suited."
101 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45/7) 7–20 75 (2009), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property.
102 Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326/47) 47–390 102 (2012), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN. "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.
103 University of Oslo, Refusal to License IP as Abuse of Dominance□: Balancing Intellectual Property and Competition Law, 2010, https://www.duo.uio.no/bitstream/handle/10852/36378/178756.pdf?sequence=4.
104 Steve Anderman & Hedvig Schmidt, EU Competition Law and Intellectual Property Rights: The Regulation of Innovation 73 (2 ed. 2011).
105 CASE C-481/01 IMS HEALTH, *supra* note 21.
106 Lianos and Dreyfuss, *supra* note 48 at 81.
107 ABA Section of Antitrust Law, Antitrust Issues in International Intellectual Property Licensing Transactions 178 (American Bar Association ed., 2 ed. 2012), http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=213819.
108 EAGLES AND LONGDIN, *supra* note 83 at 150.
109 Barry E. Hawk, Article 82 and Section 2: Abuse and Monopolizing Conduct, in 2 Issues In Competition Law and

Policy 871–893, 873 (2008), http://papers.ssrn.com/abstract=1301690 (last visited Sep 23, 2014). "An exploitative abuse has been defined as conduct that makes "use of the opportunities arising out of [a company's] dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition." See Case 27/76, United Brands Co. & United Brands Cont'l v. Comm'n (United Brands), 1978 E.C.R. 207, 249 (1978), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN. "There are no exploitative abuses under § 2."　See Richard A. Posner, Exclusionary Practices I,　in Antitrust Law, Second Edition 193–244 (2001), http://www.press.uchicago.edu/ucp/books/book/chicago/A/bo3628468.html (last visited Sep 23, 2014).

110 Structural abuses concern mergers and acquisitions that strengthen a dominant position See Case 6/72 Cont'l Can Co. v. Comm'n (Continental Can), 1973 E.C.R. 215 (1973), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0006&from=EN.

111 Exclusionary abuses concern direct or indirect harm to competitors.　The classic definition is found in Case 85/76 Hoffman La-Roche & Co. AG v. Comm'n (Hoffman La-Roche), 1979 E.C.R. 461 (1979), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0085&from=EN.

112 ANDERMAN AND SCHMIDT, *supra* note 104 at 74.; Exclusionary abuses includes acquisitions, predatory pricing, and refusal to supply and refusal to license, none of which are explicitly mentioned in article 102.

113 *Id*. at 74.; CASE 6/72 CONTINENTAL CAN, *supra* note 110 at 24.

114 ANDERMAN AND SCHMIDT, *supra* note 104 at 74.; CASE 6/72 CONTINENTAL CAN, *supra* note 110 at 26.

115 Both the EC and the U.S. courts have formulated general definitions of "abuse" and "monopolize." See CASE 85/76 HOFFMAN LA-ROCHE, *supra* note 111 at 6.　In the ruling the court stated that an abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."　Also see Case 322/81 N.V. Nederlandsche Banden-Industrie Michelin v. Comm'n (Michelin), 1983 E.C.R. 3461 (1983), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0322&from=EN.　In this case the court stated one of the clearest statements of the wider approach of article 102, the CJEU reaffirmed "article 102 covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition is weakened and which through recourse to methods different from those governing normal competition in product s or services based on traders' performance, has the effect of hindering the maintenance or development of the level of competition still existing in the market."

116 ANDERMAN AND SCHMIDT, *supra* note 104 at 75.

117 GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, *supra* note 101.

118 EAGLES AND LONGDIN, *supra* note 83 at 176.

119 DG Competition, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 1–72 9.2.2.6 (2006), http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

120 EAGLES AND LONGDIN, *supra* note 83 at 176. See also The Unilateral Conduct Working Group, *supra* note 1 at 23.

121 JOINED CASES C-241/91 P & C-242/91 MAGILL, *supra* note 21.

122 EAGLES AND LONGDIN, *supra* note 83 at 162.

123 JOINED CASES C-241/91 P & C-242/91 MAGILL, *supra* note 21 at 54.　"The [television channels] refusal to provide basic information by relying on national copyright provisions which thus prevented the appearance of a new product, a comprehensive weekly television guide to television programs, which the appellants di not offer and for which there was a potential consumer demand"

124 ANDERMAN AND SCHMIDT, *supra* note 104 at 104.

125 Id. at 104.

126 EAGLES AND LONGDIN, *supra* note 83 at 162.

127 See Case T-504/93 Tierce Ladbroke SA v European Commission (Tierce Ladbroke), 1997 ECR II (1997).　The Magill judgment was not also clear as to the cumulative or alternative character of these exceptional circumstances and some confusion resulted from this of the General Court, which treated conditions (i) and (ii) of Magill as alternative rather than cumulative.

128 See Case C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG (Oscar Bronner), 1998 ECR I 7791 (1998).　The case did not involve a refusal to license but the refusal by a dominant firm to share its distribution network with a competitor, interpreted the four conditions of Magill as being cumulative and narrowed down the duty to deal doctrine in EU competition law, by interpreting the indispensability condition as requiring evidence from the undertaking requesting access that it should not be economically viable for an undertaking with a comparable size with the dominant firm to develop its own facility or input.

129 EAGLES AND LONGDIN, *supra* note 83 at 163.

130 CASE C-481/01 IMS HEALTH, *supra* note 21.

131 EAGLES AND LONGDIN, *supra* note 83 at 164.

132 *Id*. at 164.

133 CASE C-481/01 IMS HEALTH, *supra* note 21 at 38. "[I]n order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market."
134 *Id*. at 49.
135 ANDERMAN AND SCHMIDT, *supra* note 104 at 109.
136 CASE C-481/01 IMS HEALTH, *supra* note 21 at 48.
137 EAGLES AND LONGDIN, *supra* note 83 at 165.
138 ANDERMAN AND SCHMIDT, *supra* note 104 at 109.
139 *Id*. at 109.
140 *Id*. at 109.
141 Case T-201/04 Microsoft Corp. v. Comm'n (Microsoft), 2007 ECR II 3601 (2007).
142 Lianos and Dreyfuss, *supra* note 48 at 80.
143 ANDERMAN AND SCHMIDT, *supra* note 104 at 112.
144 *Id*. at 112.
145 Ariel Katz & Paul-Erik Veel, Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies, 79 Antitrust Law J., 151 (2013).
146 Lianos and Dreyfuss, *supra* note 48 at 80.
147 Katz and Veel, *supra* note 145 at 151.
148 Lianos and Dreyfuss, *supra* note 48 at 81.
149 ANDERMAN AND SCHMIDT, *supra* note 104 at 116.
150 *Id*. at 116.
151 *Id*. at 114.
152 *Id*. at 118.
153 Katz and Veel, *supra* note 145 at 151.
154 *Id. at 151*.
155 *Id*. at 151. See CASE T-504/93 TIERCE LADBROKE, *supra* note 127. The ruling found that the refusal by a French organizer of off-course betting in France to license the use of sounds and pictures of French races to Ladbroke, the largest owner of betting shops in Belgium, did not amount to abuse of dominance. See also, C-7/97 OSCAR BRONNER, *supra* note 128. The holding established that Mediaprint, a large newspaper publisher and operator of a home delivery scheme did not abuse its dominant position when it refused to let Oscar Bronner, the publisher of a small newspaper, to use Mediaprint's distribution scheme.
156 Katz and Veel, *supra* note 145 at 152.
157 *Id*. at 152. See ASPEN 472 US, *supra* note 84.
158 See United States v. Microsoft Corp. II, 231 F Supp 2d 144 (2002). For background on the litigation, see MICROSOFT 253 F.3D, *supra* note 25.
159 ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 404.
160 JFTC IP GUIDELINES, *supra* note 20 at 3(1)(i). "Restrictions by the right-holder to a technology such as not to grant a license for the use of the technology to an entrepreneur (including cases where the royalties requested are prohibitively expensive and the licensor's conduct is in effect equivalent to a refusal to license; hereinafter the same shall apply) or to file a lawsuit to seek an injunction against any unlicensed entrepreneur using the technology are seen as an exercise of rights and normally constitutes no problem."
161 ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 404.
162 JAPANESE ANTIMONOPOLY ACT, *supra* note 77 at Art. 2(5).
163 ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 396.
164 JAPANESE ANTIMONOPOLY ACT, *supra* note 77 at Art. 2(9).
165 *Id*. at Art. 2(9).
166 *Id*. at 2(9)(i)–2(9)(vi). Such conducts includes concerted and unilateral refusals to deal (i), discriminatory pricing (ii), predatory pricing (iii), tying (v)(a), non-price restraints (vi), and resale price maintenance (iv).
167 *Id*. at 2(9)(vi). Such conducts includes deceptive customer inducement (vi) and interference with a competitor's transaction (vi)
168 *Id*. at 2(9)(v). ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 397.
169 ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 397. See Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, 42 2 (2009), http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_exclusionary.pdf. If it would be deemed that an entrepreneur commits exclusionary conduct but not be deemed that the conduct substantially restrains competition in a particular field of trade, the conduct would not fall under exclusionary private monopolization
170 ABA SECTION OF ANTITRUST LAW, *supra* note 107 at 397.
171 JFTC IP GUIDELINES, *supra* note 20 at 3(1)(i).
172 JAPANESE ANTIMONOPOLY ACT, *supra* note 77 at 21.For a detailed study on art. 21 see Christopher Heath, *The*

interface Between Competition Law and Intellectual Property in Japan, *in* THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 312, 253–258 (Steven D. Anderman ed., 1 ed. 2009); See also AKIRA INOUE, 27 JAPANESE ANTITRUST MANUAL 45–53 (1 ed. 2007).
173 JFTC IP GUIDELINES, *supra* note 20 at 3(1).
174 *Id*. at 3(1)(i)(b).
175 *Id*. at 3(1)(i)(c).
176 *Id*. at 3(1)(i)(d). This could be applied as well to the case of de facto standard. (Ex. Microsoft Windows)
177 EXCLUSIONARY CONDUCT GUIDELINES, *supra* note 169 at 2.
178 *Id*. at 2.
179 *Id*. at 4.
180 *Id*. at 5.
181 *Id*. at 26.
182 *Id*. at 26.
183 *Id*. at 26.
184 Case (Wa)13972, [Osaka Chiho Saibansho] Osaka Dist. Court 26th Civ. Div., 1 (2006), http://www.ip.courts.go.jp/app/files/hanrei_en/278/000278.pdf. The plaintiff and the defendant were also party to another lawsuit (Case (Wa)10298) Osaka District Court, [Osaka Chiho Saibansho] Osaka Dist. Court 2004) for which a judgment was handed down on the same day as this case.
185 *Id*. at 1.
186 *Id*. at 1.
187 *Id*. at 1.
188 *Id*. at 1.
189 *Id*. at 1.
190 *Id*. at 1.
191 *Id*. at 2.
192 *Id*. at 2.
193 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), *supra* note 6 at 37.
194 *Id*. at 37.
195 *Id*. at 37.

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