COMPETITION LAW AND COPYRIGHT MISUSE†

*John T. Cross** & *Peter K. Yu***

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* Grosscurth Professor of Intellectual Property Law, University of Louisville School of Law; B.S. Bradley University, 1981; J.D. University of Illinois, 1984; Doctor of Laws, University of Turku, 2006.

** Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Visiting Professor of Law, Faculty of Law, University of Hong Kong; Research Fellow, Center for Studies of Intellectual Property Rights, Zhongnan University of Economics and Law; B.A. University of Wisconsin-Madison, 1996; J.D. Benjamin N. Cardozo School of Law, Yeshiva University, 1999.

I. INTRODUCTION

In the past two decades, copyright protection throughout the world has been greatly expanded to respond to challenges posed by new communications technologies and copyrightable subject matters. As protection has increased, the growing power of copyright owners has also led to market abuses that stifle competition and innovation. In response to these abuses, courts, litigants, policymakers, and commentators have increasingly embraced competition law, the doctrines of copyright misuse and unclean hands, and tort law concepts as counter-balancing tools. This Article discusses four different types of abuse that have occurred in the copyright area and examines the various legal doctrines that have been employed by Canadian and U.S. courts to resolve cases involving such abuse.

Part II discusses the limited monopolies of copyright owners and the various safeguards that have been built into the copyright system. Using five recent cases—four in the United States and one in Canada—this Part highlights the growing abuse of copyright by its owners in recent years. Part III discusses the uneasy relationship between copyright law and the law of monopolies. It explores four categories of abuse cases and how the law has been applied in these cases. Part IV examines legal doctrines that lie outside competition law but that could be used to deal with copyright abuse. In particular, this Part discusses the doctrines of copyright misuse and unclean hands and the claims of abuse of process and tortious interference.

II. COPYRIGHT PROTECTION AND COPYRIGHT ABUSE

Copyright law grants to authors exclusive rights in their creative works. In the case of the United States, these rights include the rights to reproduce and distribute copyrighted works, the right to publicly perform or display these works, the right to create derivative works, and the right to digitally transmit sound recordings.[1] Although these rights vary from country to country, there is a general consensus that the ultimate goal of a copyright is to encourage the creation and dissemination of creative works, while the immediate goal is to enable copyright owners to recoup their investment. The U.S. Supreme Court declared in *Twentieth Century Music Corp. v. Aiken*: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[2]

In addition to copyright, most countries offer moral rights protection. Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works explicitly recognizes the right of attribution and the right of integrity.[3] As the Convention states, "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[4] Although the United States has been widely criticized for its lack of moral rights protection, U.S. copyright law offers limited protection to moral rights in selected works of visual arts, including paintings, drawings, prints, sculptures, and still photographic images.[5]

Notwithstanding the protection of this wide variety of rights, the copyright system includes many built-in safeguards to maintain the appropriate balance between exclusive control and public access. Examples of these safeguards include the originality requirement, the idea-expression dichotomy, durational limits of copyright, the fair dealing or fair use privilege, the exhaustion of rights or first sale doctrine, the parody defense, and the *de minimis* use exception. In light of these safeguards, one may assume that the copyright system adequately accommodates the public interest. One may therefore wonder whether there is any need for courts to use legal doctrines outside the copyright system. After all, copyright users can always rely on these internal safeguards, while copyright owners can rarely prevent others from finding satisfactory market substitutes.

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1. 17 U.S.C. § 106 (2000 & Supp. 2007).
2. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
3. Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, *revised at Paris* July 24, 1971, 1161 U.N.T.S. 3, 36.
4. *Id.*
5. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000) (granting rights of attribution and integrity to authors of works of visual art); *see also* 17 U.S.C. § 101 (Supp. 2007) (defining works of visual art).

Although this general view is still largely correct today, the balance in the copyright system has shifted dramatically toward copyright owners in the past two decades. The emergence of new communications technologies and the proliferation of new copyrightable subject matters have led to the gradual expansion of copyright protection. The widespread use of mass-market contracts and alternative technological protection measures, along with the newly-instituted protection against the circumvention of those measures, has also greatly enhanced the market power of copyright owners.[6]

Unfortunately, this growing power has tempted some copyright owners to use their exclusive rights beyond what is permissible under the grant or beyond what is in the public interest. To reduce abuse and to maintain the appropriate balance in the copyright system, courts and litigants no longer rely solely on the internal safeguards mentioned above. They increasingly have turned to legal doctrines that are external to the copyright system, such as competition law, the doctrines of copyright misuse and unclean hands, and other tort law concepts. To help us understand why external tools are needed, this Part discusses five recent cases in which the copyright owners were claimed to have abused their exclusive rights—four in the United States and one in Canada.

Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc. concerned the potentially overreaching agreements Disney used to license movie trailers to website operators for use on the Internet.[7] The agreements required licensees to keep their websites free of material critical of Disney and the entertainment industry.[8] As stated in the relevant portion of the agreements:

> The Website in which the Trailers are used may not be derogatory to or critical of the entertainment industry or of [Disney] (and its officers, directors, agents, employees, affiliates, divisions and subsidiaries) or of any motion picture produced or distributed by [Disney] . . . [or] of the materials from which the Trailers were taken or of any person involved

6. *See* Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, *in* 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 73, 91–94 (Peter K. Yu ed., 2007) [hereinafter INTELLECTUAL PROPERTY AND INFORMATION WEALTH]; Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13 (2006).

7. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 195 (3d Cir. 2003).

8. *Id.* at 203.

> with the production of the Underlying Works. Any breach of this paragraph will render this license null and void and Licensee will be liable to all parties concerned for defamation and copyright infringement, as well as breach of contract . . . .[9]

Because Disney sought to use copyright law to suppress criticism, Video Pipeline claimed that Disney had engaged in copyright misuse and therefore should not receive protection under copyright law.[10]

In *United States v. Microsoft Corp.*, a widely-reported antitrust case, the government contended, among other claims, that Microsoft had illegally bundled its web browser, Internet Explorer, with its Windows operating system.[11] Although Microsoft did not require computer manufacturers to install Internet Explorer along with its licensed operating system, it provided the browser software free of charge and included in its license provisions that essentially prohibited the manufacturers from installing any other browsers.[12] Thus, although Microsoft did not technically require manufacturers to install Internet Explorer, the manufacturers' perceived need to include browsers on computers meant that they would install Microsoft's product by default.[13] The government therefore claimed that Microsoft violated the Sherman Act by tying its browser to the operating system in an effort to foreclose competition in the browser market.[14]

In *Online Policy Group v. Diebold, Inc.*, two Swarthmore students posted an archive of internal emails among Diebold employees concerning the flaws of its electronic voting machines.[15] Diebold, in response, sent cease-and-desist letters to Swarthmore and other internet service providers claiming copyright infringement.[16] Under the Digital Millennium Copyright Act (DMCA), an internet service provider is shielded from copyright infringement if it takes expedited action to remove or disable access to allegedly infringing material.[17] Although Swarthmore required

9. *Id.* (quoting one of the leasing agreements).

10. *Id.*

11. United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

12. *Id.* at 60–61.

13. *Id.*

14. *Id.* at 47.

15. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1197 (N.D. Cal. 2004).

16. *Id.* at 1198.

17. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(b)(2)(E) (2000).

the students to remove the email archive from their website, the students filed suit seeking injunctive, declaratory, and monetary relief.[18] The plaintiffs also claimed that Diebold's copyright claims were "based on knowing material misrepresentation" of copyright infringement.[19] Instead of protecting its copyright interests, Diebold was merely using the threat of copyright litigation to prevent others from posting information to the internet that revealed serious flaws in its electronic voting machines.

In *Lexmark International, Inc. v. Static Control Components, Inc.*, Lexmark sought an injunction against Static Control Components for manufacturing and selling computer chips that enabled users of Lexmark printers to use replacement toner cartridges that were not refilled and refurbished by Lexmark.[20] In the lawsuit, Lexmark claimed that Static Control Components unlawfully reproduced, on its chip, the Toner Loading Program, a computer program that was designed to monitor toner levels and report such information to the printer.[21] The printer manufacturer also claimed the defendant violated the DMCA by circumventing the technological measures designed to control access to that particular program as well as another program that controlled printer functions.[22] Although Lexmark cited copyright infringement and DMCA violations, it clearly was not in the business of selling copyrighted programs. Rather, it sought to use—or, more correctly, abuse—copyright to suppress competition in the market for printer toner cartridges.

Finally, in *Euro-Excellence, Inc. v. Kraft Canada, Inc.*, a Canadian distributor of confectionary products sued its competitor for infringing on the copyright in the logos affixed to its chocolate bar wrappers.[23] Kraft held an exclusive license to import chocolate bars under the brands Côte d'Or and Toblerone.[24] The bars were packaged in distinctive wrappers featuring logos that were protected as copyrighted artistic works.[25] Euro-Excellence, a former distributor of Côte d'Or bars, acquired the same Côte d'Or and Toblerone bars legally in Europe and sold them in Canada.[26]

18. *Online Policy Group*, 337 F. Supp. 2d at 1198.
19. *Id.*
20. Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 528–29 (6th Cir. 2004).
21. *Id.* at 529.
22. *Id.*
23. Euro-Excellence, Inc. v. Kraft Can., Inc., [2007] S.C.C. 37, at 2 (Can.).
24. *Id.*
25. *Id.*
26. *Id.*

Because Kraft held an exclusive license to use the copyrighted logos in the packaging material, Kraft sued Euro-Excellence for secondary copyright infringement.[27] Notably, Kraft in this case did not rely on its rights as a trademark owner. Euro-Excellence therefore defended the suit by noting that the real purpose behind Kraft's suit was not to protect its copyrighted works, but to protect the commercial interests that are unrelated to the copyright.

In each of these cases, it was claimed that the copyright owner abused the rights granted by copyright law. While the copyright owners in *Video Pipeline* and *Microsoft* abused the rights in their effort to expand the scope of the limited monopolies granted by copyright law, the copyright owners in *Diebold*, *Lexmark*, and *Euro-Excellence* abused those rights in their effort to gain control or advantage in areas that are unrelated or merely incidentally related to the copyright. The ensuing Parts discuss four different categories of copyright abuse cases and the legal doctrines that have been employed by Canadian and U.S. courts to resolve those cases.

III. COPYRIGHT AND COMPETITION LAW

At first glance, competition law might seem to have little, if any, role to play in the outcome of a copyright suit. In its various guises, competition law seeks to ensure full and fair competition in the sale of goods and services. Copyright law, however, is one area in which the legislature has decided that ordinary competition should not exist—at least during the copyright term. Thus, copyright, in many respects, is a grant of a limited statutory monopoly. Unlike its treatment of other monopolists, the law expects copyright owners to invoke the courts' assistance to protect their exclusive rights.

This narrow focus on the copyrighted work, however, misses the bigger picture. At its heart, copyright law does serve a procompetitive role—not in the market for the particular book, painting, or film, but in the larger market for ideas.[28] The law affords the author an exclusive right in his or her own expression in order to provide a "commodity" that can be sold in that larger market. The author's own expression, together with the expressions created by others, will compete in this broader market for the underlying idea.

27. *Id.*

28. *See generally* Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. 483 (2006).

Once one recognizes the importance of copyright for this larger market, it becomes clear that competition law can play a role in the outcome of a copyright suit. In some cases, it is possible that a copyright owner's dominant position, or acts taken by the owner to protect its rights, will restrict or destroy competition in other markets, possibly even the market for ideas. Under the right conditions, competition law may intervene to preserve some degree of competition in these other markets.

A. *Four Types of Copyright Abuse*

Claims of copyright abuse[29] have arisen in a wide variety of cases. Indeed, it seems that the potential for mischief in the use of copyright is limited only by the copyright owner's imagination. People have alleged abuse when a copyright owner refused to license its work,[30] when it licensed its work subject to various conditions,[31] and when it sued or threatened to sue for infringement.[32] A complete discussion of the specific facts of all the actual cases is well beyond the scope of this Article. Nevertheless, it is instructive to consider the categories of cases in which abuse claims tend to arise.

In essence, there are four types of abuse cases: (1) the use of copyright to exact concessions from the licensee; (2) restriction of the licensee's ability to deal with the copyright owner's competitors; (3) dealings that limit another's ability to compete; and (4) the anticompetitive use of the judicial system. This Part discusses in turn each of these categories. Although categorization in such a rough form runs the risk of overlooking the important nuances of each individual case, it provides a

29. The terms "misuse" and "abuse" are both commonly used in case law and legal commentaries, the former perhaps somewhat more than the latter. However, in the United States, the term "copyright misuse" refers to the independent defense that courts have recognized in particular situations. This Article will accordingly use the term "copyright abuse" to describe the general issue of a party using its copyright in an improper way and will reserve the term "copyright misuse" for the independent defense discussed in Part IV.A.

30. *See, e.g.*, Dir. of Investigation & Research v. Warner Music Can. Ltd., [1997] 78 C.P.R.3d 321, 324 (Competition Trib.) (Can.).

31. *See, e.g.*, Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 973–79 (4th Cir. 1990).

32. *See, e.g.*, Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1197–1205 (N.D. Cal. 2004); New Era Publ'ns Int'l, ApS v. Key-Porter Books Ltd., [1987] 18 C.P.R.3d 562, 566 (Fed. Ct.) (Can.). In both cases, the party challenging the threatened litigation claimed that the copyright owner was using its copyright to stifle speech.

useful basis for analyzing the ways in which competition law applies.

1. *Exacting Concessions from the Licensee*

Because copyright gives the owner the exclusive right to distribute the protected work, a copyright owner often enjoys a favorable bargaining position when dealing with potential buyers and licensees. If demand for the copyrighted work is sufficiently great, the owner may be able to take advantage of that bargaining power to exact certain legal concessions from a licensee.[33] First, and most obviously, the owner may be able to command a higher price than it could have charged if the work were not copyrighted. Second, the owner may insist on other non-price concessions involving the use of the copyrighted work. For example, many software licenses allow only for noncommercial use; others prevent the licensee from reverse engineering the software to determine how it works.[34] Third, the owner may even insist on non-price concessions that do not involve the copyrighted work itself, but are nevertheless valuable to the owner. For example, the owner may agree to license only on the condition that the licensee keeps the terms of the agreement secret. From a competition law perspective, each of these types of concessions presents its own unique policy concerns.

2. *Limiting the Licensee's Ability to Deal with Competitors*

One special category of concessions that copyright owners have sought to extract from their licensees concerns the licensees' ability to deal with the copyright owners' competitors. This category is discussed separately here both for analytical convenience and in light of the large number of abuse claims that fall into this category. Obviously, if a copyright owner can ensure that a licensee buys only from the owner, its economic position will improve. One example of such an agreement is the exclusive supply contract, in which the licensee agrees to acquire all of a particular type of product from the owner. Another example is the so-called "tying arrangement," in which the owner conditions its license of the copyrighted product on the licensee's agreement to acquire a second

33. The copyright owner has considerably more control in the case of a license than in the case of an outright sale. Rules of property law may limit the copyright owner's ability to control what a buyer does with the work. *Cf.* 17 U.S.C. § 109 (2000) (providing that various rights comprising a copyright be exhausted when the work is sold to another).

34. "Reverse engineering" is the process of disassembling a product in order to determine how the product is made or how it works.

product in the same transaction. By linking a competitor's ability to compete in the market for that other product, the copyright owner gains what may be deemed an unfair advantage.[35] A variation on the tying arrangement is the exclusive service clause, under which the licensee agrees to use only the owner's maintenance or repair services in connection with the copyrighted product.

3. *Limiting Another's Ability to Compete*

The third line of cases involves situations in which a competitor has entered, or would like to enter, into some sort of contract with the copyright owner. These contracts take two basic forms. First, the competitor may want to buy or license the owner's work for its own use. In these cases, as in the first category, the competitor is also a potential licensee. However, because of the competition between this potential licensee and the owner, cases in which a competitor wants to license the copyrighted work typically involve the copyright owner's refusal to deal, rather than terms imposed as part of a deal. For example, a copyright owner may refuse to sell or license copies of the work to a competitor who wishes to compete in the market for the sale of that work.[36] In the alternative, the owner may refuse to sell or license the work to someone who competes with the owner not in the market for the work, but in some other market. Thus, if the owner sells both the copyrighted software and the service of installing that software, the copyright owner's refusal to license the software will limit the ability of other firms to compete in the market for installation services.[37]

A second, and equally important, subcategory involves a competitor that enters into an agreement other than a license or sale of the copyright. For example, multiple firms with copyrighted products may enter into an agreement to pool their assets or divide the market among themselves. These cases present serious opportunities for anticompetitive collusion.

35. The massive U.S. antitrust litigation involving Microsoft concerned a similar, but slightly different, situation. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

36. *See, e.g.*, Dir. of Investigation & Research v. Warner Music Can. Ltd., [1997] 78 C.P.R.3d 321 (Competition Trib.) (Can.) (involving a refusal to license sound recordings to a company that wanted to compete in the sale of those recordings).

37. *Cf.* Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1215–18 (9th Cir. 1997) (involving a refusal to license copyrighted and patented products to an independent service organization that needed to use those products to compete in the market for repair).

After all, an agreement to divide up a market on geographical or other terms is a paradigmatic competition law problem; it creates a set of submarkets in which each seller becomes a de facto monopoly. Because agreements among copyright owners create similar threats of increased market concentration, the law of monopolies tends to view these agreements critically.

4. *Anticompetitive Use of the Judicial System*

Copyright law provides copyright owners with certain procedural advantages in litigation. Because of these advantages, and the potential for considerable damages in a copyright case,[38] defending a copyright suit can be daunting. Some copyright owners recognize this procedural edge and use a lawsuit—or even the threat of a lawsuit—as a tool to control the behavior of others. In some cases, the defendant alleges that the claims are objectively groundless and that the copyright owner is bringing the case not to protect its legitimate copyright interests, but to extend its rights or to control the defendant in regards to conduct that is unrelated or only incidentally related to the copyright.[39] In others, the plaintiff's main motive in bringing the action is to protect other, non-copyright interests even though the defendant's conduct may technically infringe the copyright.[40]

Like those in the preceding categories, infringement suits in this category are used abusively against potential licensees or competitors to increase sales of the copyrighted product or to limit competition in some other market. However, this category of abuse is distinct in the owner's use of the judicial system to gain an advantage afforded by neither copyright nor contract law. Although these cases are discussed here, they may also fall into one or more of the above categories.

The four categories of cases described above are admittedly a somewhat stylized and simplified way of approaching the issue of copyright abuse, and some of these cases may fall into more than one category.

38. U.S. law, for example, allows a copyright owner to opt for "statutory damages," a fixed amount that the defendant must pay regardless of the actual harm suffered by the copyright owner. 17 U.S.C. § 504(c) (2000 & Supp. 2007).

39. *See, e.g.*, Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

40. *Euro-Excellence* is an example of this latter situation. Euro-Excellence Inc. v. Kraft Can. Inc., [2007] S.C.C. 37 (Can.). In that case, plaintiff was using copyright law to prevent the sale of goods with an identical logo, a situation ordinarily dealt with under trademark or unfair competition laws. *Id.* at 2.

Nevertheless, it is very useful to conceptualize the issue in this fashion, as each category presents its unique policy concerns, which are often reflected in the courts' analyses.

B. *Application of the Law of Monopolies to Copyright Abuse*

The most obvious tool for dealing with copyright abuse is the law of monopolies. In Canada, this area is called the law of "combines"; it is governed primarily by the Competition Act.[41] In the United States, the field is generally referred to as antitrust law and is governed mainly by the Sherman and Clayton Acts.[42] Although these respective national laws focus on the same basic concerns, they differ significantly in certain particulars. As a result of these differences and in light of the highly technical nature of the law of monopolies, this Article will provide only a general overview of how the law affects a copyright. Readers should consult other sources for more in-depth discussion of each particular issue.[43]

1. *Basic Principles of Canadian Law*

The Canadian Competition Act is a complex statute that deals in considerable detail with a number of different types of anticompetitive acts. In many respects, the Act strikes a delicate balance between a seller's need for flexibility in the ways it markets its goods and services and society's need for free competition. Insofar as intellectual property is concerned, however, the balance clearly favors sellers of intellectual property at the expense of the public interest in competition and free trade. Two provisions explicitly govern how the Competition Act applies to copyrights, patents, and other forms of intellectual property. The basic provision, which in some respects is the default rule, is section 79(5).

Although section 79, taken as a whole, deals with situations in which a party abuses its dominant position in a market, subsection 5 creates a broad exception for the enforcement of intellectual property rights. This

41. Competition Act, R.S.C., ch. C-34 (1985).

42. Sherman Act, 15 U.S.C. §§ 1–7 (2000 & Supp. 2007); Clayton Act, 15 U.S.C. §§ 12–27 (2000).

43. Those interested in a more in-depth discussion of the question under Canadian law are referred to the Competition Bureau's study of intellectual property and the Competition Act. COMPETITION BUREAU, INTELLECTUAL PROPERTY ENFORCEMENT GUIDELINES (2000), *available at* http://strategis.ic.gc.ca/SSI/ct/ipege.pdf [hereinafter ENFORCEMENT GUIDELINES]. In the United States, a good starting point is 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.09 (2007).

subsection provides:

> For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.[44]

This provision acknowledges the basic clash between copyright law and the law of monopolies. Parliament has decided to give copyright owners a certain degree of market power. Any act taken solely to protect that privileged position cannot run afoul of the Competition Act, even if it results in higher prices or limits the ability of other firms to compete.[45] However, if the act involves something more than the exercise of an intellectual property right, the section 79(5) exception does not apply, and the act may be challenged as an abuse of the intellectual property owner's dominant position.[46]

The other specific provision of the Competition Act that deals with intellectual property is section 32, which grants the Federal Court broad remedial power over certain types of intellectual property abuses. Section 32 provides:

> (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to
>
> (a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
>
> (b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
>
> (c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

44. Competition Act § 79(5).
45. *See id.*
46. *See id.*

> (d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,
>
> the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.[47]

Section 32 is the "exception to the exception." As noted above, section 79(5) provides an exception from the general "abuse of dominant position" provisions for certain acts involving intellectual property. Provided the act in question involves nothing more than the exercise of an intellectual property right, it cannot be challenged under section 79. However, that conduct can still be challenged under section 32 if it is found that the conduct has an "unduly" detrimental effect on the market.[48] Unlike cases arising under the general provisions, section 32 cases are heard in the Federal Court of Canada, not the Competition Tribunal.

There is little case law dealing with these provisions.[49] However, the Competition Bureau has published a set of Intellectual Property Enforcement Guidelines,[50] which provide a useful tool for interpreting the Act. As interpreted by the Competition Bureau, cases involving nothing more than the exercise of an intellectual property right include those in which a right owner refuses to license its intellectual property to another or in which it brings suit to enforce the right.[51] These cases are governed solely by section 32.[52] However, when a party enters into some form of contract with another involving the intellectual property, the case involves something more than the mere exercise of an intellectual property right.[53] In these latter cases, the entire Competition Act, including the "abuse of dominant position" provisions of section 79, applies.[54] Because section 32 requires a more significant showing of market impact than do the general provisions of the Competition Act, it is important to keep in mind when

47. *Id*. § 32.
48. *Id.* § 32(1).
49. *Warner Music* does an excellent job of outlining the roles played by the various provisions of the Competition Act in intellectual property cases. Dir. of Investigation & Research v. Warner Music Can. Ltd., [1997] 78 C.P.R.3d 321 (Competition Trib.) (Can.).
50. ENFORCEMENT GUIDELINES, *supra* note 43.
51. *See id.* at 7.
52. *See id.*
53. *See id.*
54. *See id.*

the various provisions apply.

2. *Basic Principles of U.S. Law*

Compared to its Canadian counterpart, U.S. antitrust law is a model of brevity. Indeed, most of the law stems from two provisions that are remarkable in both potential scope and ambiguity—namely, sections 1 and 2 of the Sherman Act. These provisions state in relevant part:

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .
>
> § 2. Monopolizing trade a felony; penalty
>
> Every 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 among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .[55]

Most of the myriad and complex doctrines that comprise U.S. antitrust law stem from these two simple provisions. Unlike Canadian law, U.S. antitrust law contains no special provisions dealing with rights granted by intellectual property law. Therefore, courts have had to weigh the competing policies in the two legal regimes to arrive at a proper balance. The case law is voluminous and often hard to reconcile. Fortunately, the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), the main federal bodies responsible for enforcing antitrust law, have weighed in on the issue of antitrust and intellectual property on two separate occasions. In 1995, the DOJ and FTC issued a relatively straightforward document geared primarily toward firms and other private entities.[56] In April 2007, these organizations followed up with

55. Sherman Act, 15 U.S.C. §§ 1–2 (Supp. 2007). Although the Sherman Act provides for only criminal sanctions, the 1914 Clayton Act allows for private suits to enforce federal antitrust laws. Clayton Act § 4, 15 U.S.C. § 15 (2000) (treble damages); Clayton Act § 16, 15 U.S.C. § 26 (injunctions).

56. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf [hereinafter 1995 GUIDELINES].

a far more analytical, and much longer, report updating the state of the law and addressing various policy concerns that have arisen.[57] Taken together, these two documents provide a relatively clear picture of how U.S. antitrust law applies to conduct involving intellectual property; they provide detailed analyses similar to the Enforcement Guidelines published by the Canadian Competition Bureau.

At the outset, it is clear that the basic analysis in the United States starts at a very different place than it does in Canada. U.S. law does not presume that the enforcement of an intellectual property right will ordinarily be acceptable under antitrust law. As stated in the 1995 DOJ/FTC report, "The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property."[58] However, this different starting point does not necessarily mean that the propriety of any given intellectual property licensing practice will differ in Canada and the United States. Notwithstanding the broad and seemingly absolute language of sections 1 and 2, over the years the courts have developed a multifaceted and nuanced approach to antitrust claims.

Most claims involving copyright abuse will be dealt with under section 2 of the Sherman Act.[59] Depending on the particular practice, courts deal with cases arising under this section using one of two basic approaches. Certain practices—for example, explicit price fixing, limits on output, group boycotts, and agreements to divide a market—are deemed per se

57. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf [hereinafter 2007 REPORT].

58. 1995 GUIDELINES, *supra* note 56, at 3. As a U.S. federal judge stated more metaphorically, the notion that the exercise of rights provided by the copyright cannot violate antitrust "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." United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001).

59. Section 1 of the Sherman Act requires a conspiracy. Sherman Act, 15 U.S.C. § 1 (Supp. 2007). Only a few intellectual property licensing agreements will involve an effort by both contracting parties to restrict trade. One example is an agreement among intellectual property owners to fix prices or divide the market. *See* Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948). Some courts will also treat tying agreements under section 1, even though only one party intends to restrain trade. *See In re* Wireless Tel. Servs. Antitrust Litig., 385 F. Supp. 2d 403, 413–14 (S.D.N.Y. 2005) (finding that tying agreements are prohibited by section 1 of the Sherman Act).

violations.[60] All other cases involve application of the "rule of reason."[61] The difference between these two approaches is that, in "rule of reason" cases, the court will balance the anticompetitive effects of the challenged practice against any pro-competitive effects of the practice, as well as any economic reasons justifying the practice. If the procompetitive effects outweigh the anticompetitive effects, the practice does not violate antitrust law. Virtually all cases involving allegations of copyright abuse will be decided under the rule of reason.[62]

3. *Applying the Basic Principles to Copyright Abuse*

To determine how Canadian and U.S. laws deal with copyright abuse, consider again the four categories of abuse discussed in Part III.A. Although both the default rules and the wording of the statutes are different in Canada and the United States, many of these situations will be treated the same in both countries. Nonetheless, there are notable differences on certain types of agreements.

a. *Exacting Concessions from the Licensee*. The first category of abuse concerns the copyright owner leveraging its exclusivity to demand various concessions from a licensee in the license agreement. These concessions can be subdivided into three basic types: price, limits on the use of the work, and limits on other acts. As with Part III.A, limits on the ability to deal with the copyright owner's competitors will be discussed separately in the next section.

Price concessions will rarely, if ever, violate either Canadian or U.S. law. Indeed, the ability to command a higher price lies at the very core of copyright. In order to encourage the creation of new works, the Canadian Parliament and U.S. Congress give authors the exclusive right to control dissemination of their works, a right that both legislatures knew would likely result in higher prices for such works. If the law of monopolies was invoked to deprive authors of the ability to command monopoly profits, that law would undermine the entire copyright scheme. The only place where the law of monopolies could play a role is the extremely rare case in which the copyright owner has achieved an overwhelming level of dominance in the market for works of the same genre as the copyrighted

60. *See* 1995 GUIDELINES, *supra* note 56, at 16.
61. *Id.*
62. *See id.*

work.[63] Although Microsoft might have such dominance in the market for operating systems, few, if any, other copyright owners will.

The second type—non-price concessions involving the use of the work—presents fundamentally different policy concerns than price concessions. Price concessions simply reflect the author's agreement to sell or waive one or more of the exclusive rights granted by law. Other concessions on use, however, involve an attempt by the copyright owner to add to the collection of exclusive rights. In essence, the owner leverages the demand for the copyrighted work to gain additional rights beyond those provided by the copyright. For example, a license term preventing the licensee from making backup copies of the software extends the exclusive reproduction right beyond the limits set out in the copyright laws of most jurisdictions. These laws allow software users to make backup copies for personal use. Because these additional rights negotiated by the copyright owner were not part of the "bargain" between society and the underlying author, the additional rights should not necessarily be treated the same as price concessions.

U.S. law clearly recognizes that antitrust liability may exist when a party engages in licensing practices that increase the intellectual property owner's exclusive rights.[64] However, all of these cases are gauged under the rule of reason. Unless the practice has significant anticompetitive effects, there is no antitrust liability. Moreover, recent decisions applying the antitrust laws make it clear that the harm must be to competition as a whole, not merely to one potential competitor.[65] Although some attempts to augment the copyright owner's exclusive rights may have such an effect on the market (by, say, limiting the licensee's ability to obtain substitutes), other restrictions may not. Even if such an anticompetitive effect exists, it may in some cases be outweighed by its procompetitive effects or by other justifications. For example, a license provision that prevents the licensee

63. Market dominance cannot be determined simply by sales percentages. It is also important to consider whether there are barriers to entry in the market. Thus, even if one firm is currently the only seller, the law of monopolies may not apply if other firms could easily begin to compete for the same buyers. *See generally* ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 137–39 (5th ed. 2004).

64. *See* 2007 REPORT, *supra* note 57, at 115 (recognizing that attempts to extend a patent beyond its statutory term may subject a patent holder to antitrust challenge); *id*. at 91 (recognizing that grantback provisions may do the same). Although the 2007 Report deals only with patents, its conclusions in this regard should apply with equal strength to copyrights.

65. *See* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

from using the licensed software on noncompliant computers can be justified based on technological concerns.

Canada's position on these types of provisions appears to be the same as that of the United States. Language in the Enforcement Guidelines indicates that an intellectual property owner who extends the term of its monopoly by restrictive terms in a license agreement has engaged in conduct that exceeds the mere exercise of its intellectual property rights.[66] As a result, that license could fall outside the section 79(5) exception and be treated as an abuse of dominant position.[67] Similarly, a party who limits the ways in which a licensee can use the copyrighted materials may be held liable for abusing its monopoly, because its imposition of additional restrictions also involves something more than the exercise of the rights provided by the copyright.[68]

Of course, even if such agreements do fall outside the protection of section 79(5), a party challenging such a license term would have to show an increase in the licensor's market power before a violation would be found—an analysis basically similar to the determination of anticompetitive effects in the United States. Thus, in neither country are such clauses per se illegal. Instead, they are problematic only if the copyright owner has significant market power and the restriction on the licensee's use threatens to increase that power. In actual practice, this degree of market power will seldom exist, especially in the realm of copyright.

The third type of concessions—those involving matters other than the use of the licensed copyrighted work—is not specifically addressed in any of the government reports on the issue. Nevertheless, these cases present some of the most interesting questions. To illustrate, consider the facts of *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*—the case involving movie trailers licensed by Disney to website operators.[69] As the court in that case recognized, there is something troubling about allowing a copyright owner to use its intellectual property rights to stifle the speech of

66. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 8.

67. *See id.* Like the 2007 Report, this language technically refers only to patents, but the logic should also apply to copyright licenses.

68. *See id.* at 19–21 (discussing how a contractual term that required buyers not to mix the patent owner's product with any other substitutes might run afoul of section 79's "abuse of dominant position" provisions).

69. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191 (3d Cir. 2003).

others.[70] And yet, such practice is likely to survive challenge under the law of monopolies in either Canada or the United States. Unlike the second type of license restrictions discussed above, it is difficult to see how a clause limiting the licensee's speech about the copyright owner directly affects competition. The licensee's use of the product itself remains unconstrained. Moreover, the licensee remains free—both legally and economically—to purchase competing goods from other sellers. Although there may be an incidental effect on the market for the copyright owner's product due to reduced criticism, it is unlikely to rise to the level of having a significant effect on market power or competition.[71]

b. *Limiting the Licensee's Ability to Deal with Competitors.* In the second category, the copyright owner has licensed its copyright to a licensee, but included in that agreement terms that, as a legal or practical matter, make it more difficult for the licensee to deal with others. One example of such an agreement is the exclusive source license, in which the licensee agrees to purchase all of its product from the copyright owner. Another is the so-called "tying arrangement," in which the copyright owner insists that the licensee acquire not only the high-demand copyrighted product, but also another product for which there is less demand.[72] In both cases, the licensee has little incentive to acquire products from the copyright owner's competitors. Thus, both cases present implications for competition law.

Both Canada and the United States will analyze these types of agreements in terms of their effect on the market power of the copyright owner and its competitors. To illustrate the basics of this analysis, consider a hypothetical tying arrangement. A copyright owner holds the copyright in certain backup software. However, it only sells this software preloaded onto a portable hard drive. Thus, in order to acquire the software, the purchaser must also buy the owner's hard drive. The effect of such a

70. *See id.* at 205–06.

71. The court in *Video Pipeline* dealt with the case not under antitrust law, but instead under the U.S. doctrine of copyright misuse. As Part IV.A will discuss, that doctrine does not require a showing of harm to competition. However, the court ultimately found that a limitation on the licensee's ability to make negative statements on its website was not misuse because there were adequate, alternate channels of communication available to the licensees. *Id.* at 206.

72. Of course, as these cases involve contractual limitations on the licensee, they are facially similar to cases in the first category. Unlike cases in that category, which mainly affect only the copyright owner and the licensee, those in this second category have a direct impact on competitors.

provision is to limit the competition in the market for portable hard drives, a market in which the copyright owner does not have significant control.[73]

In Canada, because the license term involves something more than the mere exercise of the rights provided by the copyright, it could be challenged as an abuse of dominant position under section 79 of the Competition Act.[74] The Competition Tribunal would evaluate whether the copyright owner had substantial market power.[75] Note that in these cases the relevant market is the market for the tying product (the software), not the market for portable hard drives. If market power exists, the Tribunal would then consider whether tying the company's hard drive to the software threatened to prevent or lessen competition in the market for portable hard drives.[76] Meeting these elements makes a core case for abuse. However, the company would not be held liable if it was determined that the company's dominant position was achieved mainly due to the superiority of its product or service,[77] or that technological considerations justified the requirement that software users use only one particular model of hard drive.[78]

The analysis in the United States would involve a modified version of the "rule of reason" analysis.[79] As in Canada, there is no liability unless the copyright owner has market power in the market for the tying product (again, the software). If the owner has sufficient power in that market—that is, if the demand for its software is high enough—to allow it to restrain

73. It may be that the copyright owner also has a patent on its model of portable hard drive. That fact alone would not give the owner market power. Instead, one would have to consider how many alternative versions of hard drives were available for purchase.

74. *See* Competition Act, R.S.C., ch. C-34, § 79 (1985).

75. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 6.

76. *See* Competition Act § 79(1)(c). This standard of "lessening competition" is not as rigorous as a requirement that the owner have established market power in the market for hard drives.

77. *See id.* § 79(4).

78. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 20–21.

79. The United States used to apply a strict per se rule to tying arrangements. Indeed, earlier cases applied this standard to hold that tying arrangements involving films and sound recordings violated the antitrust laws. *See* United States v. Loew's Inc., 371 U.S. 38, 39, 44–45 (1962) (films); Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888, 890, 893 (S.D.N.Y. 1948) (music compositions synchronized on films). Today, however, considerations of market power are relevant. *See* 2007 REPORT, *supra* note 57, at 105–06. In true per se cases, by contrast, courts do not consider market power. *Id.*

trade in the market for portable hard drives, a court would then determine whether the tie might affect a "not insubstantial" amount of trade in the market for the hard drives.[80] In essence, the analysis proceeds along the same lines in both countries.

c. *Limiting Another's Ability to Compete.* The third category involves situations in which the copyright owner deals with an actual or potential competitor. Such agreements are immediately suspect under the laws of monopolies in both Canada and the United States because of the potential risk of reduced competition in the market. As one may imagine, the studies published by the Canadian Competition Bureau and the DOJ/FTC discuss these issues in great depth.

There are two subcategories of these cases, as discussed in Part III.A. The first, and most common, subcategory is the outright refusal to deal. On this issue, the Canadian and U.S. views are almost identical: in the words of the agencies, it is extremely "rare" for an intellectual property owner's refusal to license or sell to a competitor to violate the laws of monopolies.[81] Simply put, one is ordinarily under no duty to help out a competitor, even though one has a legal advantage stemming from the grant of an intellectual property right. The rare exception, which is similar in both countries, will prove to be even rarer in cases of copyright monopolies.

In Canada, cases involving a unilateral refusal to deal will be resolved under section 32 of the Competition Act. Because the right to distribute—or to choose not to distribute—is one of the core rights granted to the copyright owner, any refusal to deal involves nothing more than the exercise of the rights provided by the copyright. As a result, section 79(5) makes it clear that such refusal cannot qualify as an abuse of dominant position. Section 32 still allows for liability, but only if the refusal to deal unduly affects certain aspects of competition.

The Competition Bureau has prescribed a three-part analysis concerning when refusals to deal are actionable under section 32 of the Competition Act.[82] First, the owner of the intellectual property right must

80. *See* 2007 REPORT, *supra* note 57, at 105–06.

81. *See id*. at 27 (stating that antitrust liability for refusing to assist a competitor "is a rare exception to the ordinary rules of antitrust"); ENFORCEMENT GUIDELINES, *supra* note 43, at 9 (stating that "only in very rare circumstances" would an antitrust violation exist).

82. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 9.

be "dominant in the relevant market."[83] It is important to note that the relevant market is not the market for the sale of the owner's intellectual property, but instead the market for some affiliated good or service. Second, the intellectual property the owner refuses to license must be "an essential input or resource for firms [that want to compete] in the relevant market."[84] Even if both of these factors are met, a federal court will not necessarily grant relief. Instead, relief is warranted only if the refusal to license is stifling innovation in the relevant market. This final factor recognizes that, in some cases, a refusal to license the accepted technology will encourage others to develop competing technologies.[85]

This three-part test will rarely be satisfied in copyright cases. First, very few copyright owners have dominance in markets other than the market for their copyrighted product.[86] The Competition Bureau almost never concerns itself with conduct by a firm that has a market share of less than thirty-five percent.[87] Second, and more importantly, copyrighted works are rarely an "input or resource" for firms wanting to compete in another market.[88] The only notable exception is in what the Bureau dubs a "network industry"—a special situation in which there is a high degree of standardization by law or custom and in which intellectual property serves as an essential resource.[89] For example, if everyone in a particular market

83. *Id.*

84. *Id.*

85. *See id.*

86. *See id.* at 12 ("In general, the more firms there are in the relevant market, the less likely it is that any one firm acting unilaterally . . . could enhance or maintain market power through the transaction or conduct being examined.").

87. *See id.*

88. This problem has existed for many years in the area of patent law. Because advanced technology often turns on the use of certain resources and components, companies often try to obtain "blocking patents" on those constituent technologies. *See id.* at 22 (discussing how a firm may invent around the blocking patent or enter into a licensing agreement with the firm to use the blocked technology). In contrast, the problem is of fairly recent vintage in the field of copyright. Unlike technology, copyrighted works typically are not "resources" that are incorporated into other works. Historically, a party rarely needed to copy one copyrighted work to compete effectively in the market for some other type of work. However, the extension of copyright protection to computer technology has changed this to some extent and created a similar problem of "blocking copyrights." *See generally* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1075–77 (1997) (proposing a rule of "blocking copyrights").

89. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 9. Recent lower court decisions in the United States apply the doctrine only if the item in question is truly essential. *See, e.g.*, Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544–46

needs to use files that are compatible with Microsoft's newest operating system, that particular market might qualify as one involving a network industry. Although network industries are more common—yet still relatively rare—with respect to patented products, few copyright cases will present such a situation.[90]

The United States also starts from the premise that a company has an unrestricted right to refuse to deal, even if it enjoys a statutory monopoly such as a copyright.[91] Although a handful of recent decisions have cast some slight doubt on this rule,[92] it nevertheless appears that the basic

(9th Cir. 1991). If there are substitutes—even though those substitutes are inferior or more costly—the doctrine does not apply. *See id.* at 542–46.

90. The Competition Tribunal had occasion to apply this basic analysis in the *Warner Music* case. Dir. of Investigation & Research v. Warner Music Can., Ltd., [1997] 78 C.P.R. 3d 321 (Competition Trib.) (Can.). In that case, Warner Music held the copyrights in many popular recordings and distributed those recordings itself and also through a mail order business that it operated in partnership with another company. *Id.* at 324–25. BMG, which wanted to operate a competing mail order business, tried to negotiate a license for the more popular recordings. *Id.* at 325. Warner refused to license the operation. *Id.* The Tribunal held that such refusal fell squarely within the section 79(5) exception, as the copyright owner was doing nothing more than exercising its right not to distribute. *Id.* at 332. Any remedy, the Tribunal indicated, would have to lie under section 32 of the Competition Act. *Id.* at 331. Because section 32 is administered by the Federal Court, not the Tribunal, the Tribunal did not address section 32. *Id.* at 331–32. In *In re Independent Service Organizations Antitrust Litigation*, a number of independent service organizations complained about a company's refusal either to sell patented replacement parts or to license its patented and copyrighted software. *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1324 (Fed. Cir. 2000). The organizations argued that without that software, they could not compete in the market for servicing the company's products. *Id.* The court rejected the antitrust claim, reasoning that the right to exclude others lies at the core of a patentee's rights and thus is not an antitrust violation unless there is illegal tying, fraud, or sham litigation. *Id.* at 1327–28.

91. In the patent area, the picture in the United States is somewhat complicated by section 271(d)(4) of the Patent Act. 35 U.S.C. § 271(d)(4) (2000). Added in 1988, this provision states that a refusal to license a patented invention cannot by itself be deemed patent abuse. *Id.* There is some debate as to whether this provision is immunized from the antitrust laws. Regardless of whether such an exception exists in patent law, there is no similar provision applicable to a refusal to license a copyright.

92. For one example of a U.S. Supreme Court decision that has caused some confusion see Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). *Aspen Skiing* concerned real property, not copyrights or patents. However, the tone of the decision has raised some doubt as to whether there is an absolute right to refuse to deal. It appears to suggest that the right to refuse to deal is not absolute, but instead is subject to a rule of economic rationality. More directly on point is the Ninth Circuit's

principle is at least as firm in the United States as it is in Canada. The 2007 DOJ/FTC Report strongly suggests that the intellectual property owner's right to refuse to license will generally not be challenged, even though it may hinder competition.[93] The recent U.S. Supreme Court case of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* appears to support this conclusion.[94]

As in Canada, however, the intellectual property owner's rights are not absolute, and a refusal to deal may be actionable when the intellectual property right operates as a "bottleneck." Sometimes called the "essential facilities" doctrine, this analysis proceeds along largely the same lines as the analysis under section 32 of the Canadian Competition Act.[95] To prove a bottleneck, the challenger must show "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[96] Note that factor two will always be met in the case of intellectual property because only the owner has the legal right to use the copyright or patent. Even if these four factors are met, the refusal may be justified if supported by valid business reasons.[97]

Admittedly, considerable debate surrounds the bottleneck doctrine,[98] which, in essence, is the functional equivalent of the Canadian section 32

decision in *Image Technical Services, Inc. v. Eastman Kodak Co.*, which held that a company's refusal to sell patented spare parts to companies that wanted to service its products violated the antitrust laws due to Kodak's desire to monopolize the service market. Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997). Although *Kodak* involves intellectual property, it has been roundly criticized and probably does not accurately reflect the law.

93. *See* 2007 REPORT, *supra* note 57, at 27–31.

94. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). The Court in this case indicated that it had "been very cautious" in finding exceptions to the general principle that a party could refuse to deal, because such refusals could often be justified in economic terms. *Id.* at 408.

95. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 9.

96. MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983).

97. This additional element stems from the *Aspen* case discussed above. *See* GELLHORN ET AL., *supra* note 63, at 180 ("[A] monopolist has a right to refuse to deal 'only if there are legitimate competitive reasons for the refusal.'" (quoting Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992))).

98. In *Trinko*, the U.S. Supreme Court noted that it had "never recognized" the doctrine. *Trinko*, 540 U.S. at 410–11. The doctrine has also been criticized in the literature.

test discussed above. For now, though, the lower courts in the United States continue to apply it.[99] Under both Canadian and U.S. laws, the only situation in which a refusal to deal has antitrust implications occurs when the intellectual property owner leverages its exclusive rights in one market to improve its competitive edge in some other market. This interrelationship in markets, as noted above, will apply only in what the Competition Bureau calls a network industry.

The other type of cases involving copyright owners and competitors is comprised of those situations in which the parties enter into a deal other than a licensing agreement. These cases are in many respects the easiest of all because the anticompetitive nature of the agreement is often the most obvious. Nevertheless, there is a significant difference in the way Canadian and U.S. laws deal with many of these cases.

In the United States, many agreements between competitors that do not involve licensing will fall under the per se analysis. In per se cases, antitrust liability exists even if there is no evidence of anticompetitive effects. Thus, if various owners of copyrights in sound recordings or films enter into an agreement to divide up the market or fix prices, they will automatically be found liable for an antitrust violation.[100]

In Canada, by contrast, such agreements will typically be dealt with under section 45 of the Competition Act, which governs conspiracies and other agreements that restrict trade. Section 45 incorporates a rule similar to the U.S. rule of reason, providing a remedy only in cases of significant market power and acts that reduce competition in that market.[101] To illustrate, consider again the example of various recording or movie companies that enter into an agreement to fix prices for their copyrighted goods. While in the United States such an agreement is per se invalid, in Canada the government will act only if the parties have significant market

99. *See, e.g.*, Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1204 (10th Cir. 2006); City of Malden v. Union Elec. Co., 887 F.2d 157, 160 (8th Cir. 1989); Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 456, 460–61 (E.D. Pa. 1996); TCA Bldg. Co. v. Nw. Res. Co., 873 F. Supp. 29, 39 (S.D. Tex 1995).

100. *See* United States v. Loew's, Inc., 371 U.S. 38 (1962) (holding that block booking of copyrighted motion pictures for television exhibition violated antitrust laws); Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948) (holding that ASCAP's practices of withholding the right to perform compositions for profit in motion pictures and requiring exhibitors to pay annual blanket licensing fees violated antitrust laws); 1995 GUIDELINES, *supra* note 56, at 16.

101. *See* Competition Act, R.S.C., ch. C-34, § 45 (1985).

power and the agreement threatens to augment that power.[102] Moreover, unlike U.S. law, Canadian law places considerable significance on the parties' intent to increase market share.[103]

d. *Anticompetitive Use of the Judicial System*. Like the copyright owners in the three categories of cases mentioned above, the copyright owner in this category is taking what might be deemed to be unfair advantage of the rights granted by the copyright. In this situation, however, the owner is asserting those rights before a judicial tribunal. The focus of the concern, therefore, is somewhat different in this category than in the others. In addition to the concern about market power, these cases raise the issue of whether a party should be able to make use of the courts when its motive is not primarily to protect its existing rights but instead to enhance its competitive position.

Both Canada and the United States recognize the competition implications of copyright claims. But only the United States deals with these situations under the law of monopolies.[104] The Canadian Competition Bureau has taken the position that assertions of intellectual property rights—whether they involve spurious claims or proper claims brought for improper reasons—are matters for courts and intellectual property authorities, not for the application of the Competition Act.[105] In the United States, by contrast, claims may violate section 2 of the Sherman Act, provided that all of the elements of a section 2 violation are met.[106] To demonstrate such a violation, it is necessary to show that the firm bringing the claim has market power and that the act in question threatens

102. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 16–17 (analyzing a hypothetical price-fixing conspiracy under section 45 of the Competition Act).

103. *See* Competition Act §§ 103.3(2)(c), 104.1(1)(b)(ii).

104. *See, e.g.*, Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56–57 (1993) (recognizing that a "sham" copyright suit can result in antitrust liability even though the court found that the suit involved in this particular case was not a sham); Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984) (imposing antitrust liability on a bad faith patent suit).

105. *See* ENFORCEMENT GUIDELINES, *supra* note 43, at 10, 16.

106. *See* 1995 GUIDELINES, *supra* note 56, at 32. The Federal Trade Commission has also indicated that spurious suits could violate section 5 of the Federal Trade Commission Act, which allows the FTC to challenge "unfair" and "deceptive" methods of competition. *Id.* In both cases, it would be necessary to demonstrate that the party bringing the action or making the threat knew, or had reason to know, that the claim was groundless. *Id.*

to decrease competition.[107] If those factors are satisfied, it would seem impossible for a party to be able to offer proof of any procompetitive reasons for bringing a false claim.[108] The difference between the Canadian and U.S. views boils down to the question of whether criminal sanctions ought to be available as a deterrent to parties who would use the courts to augment their market power.

4. *Remedies Under the Law of Monopolies*

As demonstrated above, in some situations the law of monopolies will apply to acts taken by a copyright owner that have a significant effect on the market. However, certain aspects of the law of monopolies have limited its usefulness to the party being subjected to copyright abuse. First, the victim of abuse needs to initiate the claim, either with a government agency (as in Canada) or with a court. Second, although the law of monopolies may be a good sword, it is not a particularly effective shield. In other words, while the law gives the victim some authority to challenge the acts of a copyright owner and to obtain compensation or some other remedy, it does not necessarily go to the root of the problem—abuse of the underlying intellectual property right. Violation of the law of monopolies is not a defense to a copyright infringement claim. Nor can the victim use that law to have the copyright declared invalid.[109]

Moreover, many parties who have been subjected to copyright abuse do not want to take the time and trouble to invoke the Draconian law of monopolies, which often results in drastic penalties. These parties instead

107. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (delineating the elements of a section 2 violation).

108. Nor would the party be protected by *Noerr-Pennington* immunity. Under that doctrine, a party cannot be held liable under the antitrust laws for seeking the assistance of government, even if it does so to restrict competition. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The doctrine evolved in cases in which a party sought legislative change, but has since been extended to the use of courts. NIMMER & NIMMER, *supra* note 43, § 13.09[A][1][c]. However, *Noerr-Pennington* immunity does not apply to purely sham activity. *Id.* Thus, a party who brought a baseless infringement action that violated section 2 would not be immune from liability. *Id.*

109. There may be rare exceptions to this rule in Canada. Section 32 of the Competition Act gives the Federal Court of Canada authority to issue a "special remedy" in situations in which the exercise of an intellectual property right harms competition. The Competition Bureau has indicated that this special remedy could, in certain cases, involve revocation of the intellectual property right. ENFORCEMENT GUIDELINES, *supra* note 43, at 4.

prefer a more precise remedy: either cancellation or suspension of the copyright or a defense to an infringement claim while the abuse continues. Because the law of monopolies does not ordinarily provide this sort of relief, parties have on occasion turned to other legal principles.

IV. Application of Other Laws to Copyright Abuse

The law of monopolies tends to focus on the "big picture." In both Canada and the United States, competition laws usually provide a remedy only in cases in which there is significant harm to the market as a whole. As such, they are not necessarily of much use to individual players in the market who have suffered harm that is quite serious to them but that has little effect on overall competition. Coupled with the limits on remedies discussed above, this focus on the market as a whole severely restricts the role of the law of monopolies in policing copyright abuse.

Because of these problems, it should be no surprise that parties who have been subjected to copyright abuse have sought relief under other laws. The most obvious place to look, of course, would be copyright law itself. However, copyright law is conspicuously silent on copyright abuse. Both Canadian and U.S. laws freely provide copyright owners with an impressive array of rights and limits on those rights, but these laws rarely deal with the question of when it might be improper for a copyright owner to use these rights in ways that affect competition.[110] Parties have accordingly been forced to look to rules outside the intellectual property area.

This Part explores three distinct claims that parties have made in an attempt to deal with alleged copyright abuse. Most of the attempts have occurred in the United States. Moreover, as will be demonstrated, each of the legal theories has its problems. Nevertheless, the developments offer potential ways to alleviate select types of copyright abuse.

A. *Copyright Misuse*

This Article uses the term "copyright abuse" to describe any situation in which a copyright owner uses its rights in an improper way. In the United States, however, there is also a growing discussion of "copyright misuse." Unlike the generic term "abuse," copyright misuse is a specific

110. The rare exception is 17 U.S.C. § 512(f) (2000), which provides an action for damages against any party "who knowingly materially misrepresent[ed]" that another party infringed its rights under the DMCA. These types of provisions are fairly rare.

defense—separate from, and independent of, antitrust law—that a party may invoke when a copyright owner uses its rights in a competition-restricting fashion. Although the doctrine's exact parameters are not entirely clear, there is increasing acceptance of the basic premise.[111]

U.S. courts have long recognized an independent doctrine of patent misuse.[112] The doctrine provides a defense to patent infringement in cases in which the patentee has misused its statutory rights.[113] Yet, notwithstanding the similarity between patents and copyrights, it took some time for courts to apply similar principles in the field of copyright. The breakthrough came in the 1990 decision of *Lasercomb America, Inc. v. Reynolds*.[114] In that case, the Fourth Circuit engaged in an exhaustive review of the development of the doctrine of patent misuse in both England and the United States.[115] Because patent and copyright laws serve similar purposes, the court held that patent misuse principles ought to apply with equal force in a copyright case.[116]

Of course, misuse is a very broad term. In addition to finding a logical home for the doctrine of copyright misuse, *Lasercomb* helps to define when misuse exists. The facts of that case are illustrative. A copyright owner licensed its software to others.[117] The license agreement contained a term that forbade the licensee from developing any other software that would compete with the licensed software.[118] The court held that the clause constituted misuse because it constituted use of the copyright "in a manner violative of the public policy embodied in the grant of a copyright."[119] Copyright law distinguishes between protectible expressions and the unprotectible ideas underlying those expressions.[120] Although copyright law gave the owner the right to protect against copying of its particular expression, it did not grant any right to limit the

111. *See In re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1102–03 (N.D. Cal. 2002) (stating that in recent years courts have been more willing to recognize the copyright misuse defense).

112. *See* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 975–76 (4th Cir. 1990) (discussing the history of the patent misuse defense).

113. *Id.* at 976.

114. Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990).

115. *Id.* at 974–76.

116. *Id.* at 976–77.

117. *Id.* at 971.

118. *Id.* at 978.

119. *Id.*

120. *See id.* at 978–79.

development of competing expressions of the underlying idea.[121] Because the license term was an attempt to limit those expressions, the court held that the copyright owner was barred from suing the licensee for breaching the license restriction.[122]

On the surface, *Lasercomb* looks much like an antitrust case. When one digs deeper, however, there are several important differences between the doctrine of copyright misuse and the antitrust law doctrines discussed earlier. First, and most practically, the remedy is different. Whereas antitrust law affords a party the right to bring an action to challenge anticompetitive acts, copyright misuse is a defense to an infringement claim. That defense exists as long as the misuse continues.[123] Thus, rather than forcing the victim of infringement to take the time and trouble to challenge the license provision, the doctrine of copyright misuse allows the victim to wait until he is being sued.

Second, there is a subtle, but important, difference in the types of conduct that constitute copyright misuse and the types that violate antitrust law. As discussed above, antitrust law focuses on large-scale disruptions in competition. The policies underlying copyright misuse, by contrast, stem from copyright, not competition, law.[124] The copyright owner's acts in *Lasercomb* constituted misuse because they were an attempt to evade one of the limits that Congress placed on a copyright owner's rights: the idea-expression dichotomy.[125] Admittedly, those acts might also prove to be anticompetitive, but general market considerations are secondary. Thus, in theory, any act by which a copyright owner attempts to expand its rights beyond the limits imposed by the Copyright Act could constitute misuse.

That second difference leads directly to a third. Copyright misuse, as envisioned by *Lasercomb*, clearly exists as a separate and independent alternative to the antitrust laws.[126] Note that the trial court in *Lasercomb* found that the license did not violate the antitrust laws.[127] The Fourth

121. *Id.* at 978.

122. *Id.* at 978–79.

123. The *Lasercomb* court explicitly noted that the doctrine was a defense to an infringement claim, not an invalidation of the underlying copyright. *Id.* at 979 n.22.

124. *See id.* at 973 ("[A] misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense is inherent in patent law.").

125. *See id.* at 978–79.

126. *See id.* at 979 ("[T]he analysis necessary to a finding of [copyright] misuse is similar to but separate from the analysis necessary to a finding of antitrust violation.").

127. *Id.* at 977. The trial court found the license did not necessarily have an

Circuit rejected this approach, holding that it was irrelevant whether the agreement might have violated the antitrust laws.[128] Because the considerations underlying the doctrine of copyright misuse are separate from those underlying antitrust, the court found that the lower court erred in importing concepts such as the rule of reason from the antitrust laws.[129] Thus, conduct may constitute copyright misuse even if it does not violate the antitrust laws.

In sum, the independent doctrine of copyright misuse provides a useful alternative to the law of monopolies. It focuses on whether the owner is attempting to avoid some limit imposed by copyright law. Although many such acts will also have some anticompetitive effect, a finding of significant effect is not a necessary element of the claim. Thus, copyright misuse will apply in many cases in which the law of monopolies would not reach. On the other hand, the penalty for copyright misuse is far less drastic. Rather than criminal penalties or treble damages under U.S. antitrust law, the sole penalty for copyright misuse is the inability to sue for infringement. That penalty exists only as long as the misuse continues.

In recent years, there has been growing acceptance of the copyright misuse doctrine in the United States, even though the Supreme Court and a number of circuits have yet to rule on the issue.[130] Canadian courts, by contrast, have given the doctrine a considerably cooler reception. In fact, one could argue that the Canadian Supreme Court has completely rejected the misuse doctrine in *Euro-Excellence*, which concerned the use of copyright to combat parallel importation.[131] Although Justice Michel Bastarache, along with Justices Louis LeBel and Louise Charron, stated that the Copyright Act should be read *in pari materia* with the Trade-marks Act and that the plaintiff's act of filing the copyright claim constituted copyright abuse,[132] he found the doctrine unnecessary in the parallel

effect on the broad market for this type of software because it only prevented the licensees from developing, not buying, competing products. *See id.* at 978. The main harm occasioned by the clause was to the licensees, not to the market as a whole. *See id.* Moreover, the trial court found that the clause could be justified under the rule of reason because there were significant business justifications for such a provision. *See id.* at 977.

128. *Id.* at 978.

129. *See id.* at 977–78.

130. *See* Brett Frischmann & Daniel Moylan, *The Evolving Doctrine of Copyright Misuse*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra* note 6, at 269, 280–290; NIMMER & NIMMER, *supra* note 43, § 13.09[A][2][b].

131. Euro-Excellence Inc. v. Kraft Can. Inc., [2007] S.C.C. 37 (Can.).

132. *Id.* ¶¶ 83–86.

importation context and "best left for another day" the determination of the doctrine's possible application in Canada.[133] Meanwhile, Justice Marshall Rothstein, joined by Justices Ian Binnie and Marie Deschamps, went a step further to explicitly declare the lack of support in Canadian law for a doctrine of copyright misuse.[134] Justice Morris Fish also agreed with Justice Rothstein, although he expressed "grave doubt" as to "whether the law governing the protection of intellectual property rights in Canada can be transformed in this way into an instrument of trade control not contemplated by the *Copyright Act*."[135] Thus, although the Court's reasoning is confined to the particular, and somewhat peculiar, circumstances of the case, there seems to be very little, if any, support within the Canadian Supreme Court for an independent doctrine of copyright misuse in Canada.

B. *The Doctrine of Unclean Hands*

The doctrine of "unclean hands" is a traditional defense available in actions in equity. It applies when the party bringing suit has engaged in certain questionable conduct in connection with the action and when the conduct is sufficiently egregious to warrant the denial of relief.[136] A few U.S. courts have invoked the doctrine as a defense in copyright infringement actions.[137]

At first glance, the doctrine of unclean hands might appear to have a significant potential for dealing with copyright abuse. Like "abuse," "unclean hands" is a flexible term that could, in theory, reach many different types of conduct. Although the doctrine requires that the conduct in question directly involve the subject matter of the suit, most abuse claims stem out of the copyright that is the basis of the infringement action or that is the subject of a license agreement. Like the independent claim of copyright misuse, the remedy in a case of unclean hands—denying the party the right to sue while the objectionable conduct continues—is far less drastic than invalidating the copyright or exposing the party to sanctions

133. *Id.* ¶ 98.

134. *Id.* ¶¶ 7–13.

135. *Id.* ¶ 56.

136. Traditionally, the doctrine only applied when a party sought equitable relief, such as an injunction. However, U.S. courts apply equitable defenses, such as unclean hands, in all intellectual property actions, regardless of the form of relief sought.

137. *See, e.g.*, QAD, Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1266 (N.D. Ill. 1991).

under the law of monopolies.

To date, however, the doctrine of unclean hands has not realized its potential. Its use seems to be limited mainly to U.S. courts. Moreover, those courts have applied it only rarely, and even then only in one particular category of abuse—cases involving objectively groundless actions. The "unclean hands" in those cases almost always involve some form of fraud, such as misrepresenting to the court or the other party the extent of one's rights or falsifying evidence. Courts rarely apply the doctrine of unclean hands in situations falling in the other three categories of abuse.

C. *Abuse of Process*

On occasions, parties have also tried to invoke other traditional tort law concepts to deal with alleged copyright abuse. In situations involving spurious lawsuits, defendants have sometimes charged that the case involves abuse of process. However, courts have not been particularly responsive to these sorts of allegations. A party does not abuse the judicial process merely by bringing a weak claim in its good-faith attempt to protect rights provided by the copyright. Instead, a party abuses the process only when it uses the courts to accomplish tangential goals unrelated to the subject matter of the lawsuit. Thus, a groundless copyright claim does not itself constitute abuse, even if the party bringing the action knew the suit was very likely to fail. Instead, abuse exists only if the party's motive was to gain some advantage that was unrelated to its copyright.

The limitations on the action for abuse are perhaps best illustrated by the Canadian decision of *New Era Publications International, ApS v. Key-Porter Books Ltd.*[138] New Era, a publisher, had obtained exclusive rights to publish the works of the controversial religious leader and author L. Ron Hubbard.[139] These rights were apparently quite valuable.[140] One of the defendants obtained copies of thousands of documents produced by Hubbard.[141] Quoting extensively from these documents, that individual wrote a book highly critical of Hubbard.[142] New Era sued, claiming the documents were obtained illegally and the use of major passages infringed

138. New Era Publ'ns Int'l ApS v. Key-Porter Books Ltd., [1987] 18 C.P.R.3d 562 (Can.).

139. *Id.* ¶ 13.

140. *See id.* ¶ 3.

141. *Id.* ¶¶ 6–8.

142. *Id.* ¶ 8.

its rights in Hubbard's works.[143] The individual claimed that New Era was attempting to use its copyright to squelch critical speech.[144] The court ultimately dismissed New Era's claim on purely procedural grounds.[145] However, it also rejected the defendants' claim that the case constituted abuse of process.[146] The publisher's decision to protect its "very valuable copyright," the court reasoned, could not be an improper basis to invoke the judicial process.[147]

D. *Tortious Interference*

A potentially more far-reaching claim is tortious interference. Although historically this tort was limited to situations in which one party interfered with another's contract, it has, in recent years, been extended—with significant limitations—to the situation in which a party interferes with another's ongoing business relationships.[148] Many acts that fall under the general heading of copyright abuse could also be analyzed as situations in which a party wrongfully interferes with a competitor's business. For example, when a copyright owner forbids a licensee from dealing with the owner's competitors, or imposes a tying arrangement on the licensee, the owner has arguably prevented the licensee from forming a business relationship with the owner's competitors.

One possible reason for the lack of interest in using tortious interference is that the remedy is limited. Like the law of monopolies, tortious inference can only be used by a party who wants to affirmatively challenge the actions of a copyright owner. It would not afford the same party a defense in an infringement action or invalidate the copyright. Parties charged with copyright infringement may well find themselves faced with more pressing concerns. Therefore, they do not bother seeking tort remedies.

143. *Id.* ¶ 13.

144. *Id.* ¶¶ 15–18.

145. *Id.* ¶¶ 20–26.

146. *See id.* ¶ 29.

147. *Id.* Although the Canadian Supreme Court's recent *Euro-Excellence* decision did not involve a claim for abuse of process, precedent like *New Era Publications* suggests that the Supreme Court would similarly have rejected such a claim had it been presented.

148. In the United States, compare RESTATEMENT (SECOND) OF TORTS § 766A (1979) (interference with contract), with *id.* § 767 (interference with prospective contractual relationship).

V. Conclusion

This Article deals with the evolving concept of copyright abuse. Although a copyright provides owners with an array of powerful rights, those rights are limited. Copyright law places important limits on a copyright owner's ability to deal with others. Other laws may also limit the owner's rights, especially in situations in which the owner tries to leverage the rights provided by the copyright into a more powerful competitive position.

To date, the main avenue for dealing with copyright abuse in both Canada and the United States has been the law of monopolies (the Canadian Competition Act and the U.S. antitrust laws). In the proper case, these laws can provide a valuable tool for dealing with anticompetitive uses of copyright power. However, the law of monopolies is not always an adequate solution to the problem. It paints with too broad a brush, focusing on the market as a whole rather than on individual actors within that market. Moreover, the penalties for violating the Competition Act or the U.S. antitrust laws are often far too drastic. Therefore, courts, especially those in the United States, have begun to explore other ways to deal with copyright abuse. Whether this exploration will ultimately bear fruit and whether any lessons learned in the United States can ultimately be exported to other countries remain to be seen.