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# Copyright and contribution to knowledge: towards a fair balance of interests in knowledge society

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#### **Summary**

The present thesis explores the interface between copyright, competition and human rights in the outfit of knowledge society through the balance between both sides of the purpose of copyright, namely to encourage a dynamic creative culture, while returning value to creators and to provide widespread, affordable access to content for the public.

The landscape of intellectual property generally and copyright particularly witnessed important changes in the recent years, with an obvious impact on the public interest dimension. In the light of the debate about adopting new exceptions and limitations to copyright in order to answer to the needs of the public to use the knowledge that resides in the copyrighted materials, we allege for the use competition law as an existing tool in order to discuss how to approach the fair balance.

When copyright interferes with the right to information and the right to freedom of expression, both rights having as key resource knowledge, fundamental rights come into picture. Therefore, in the first part of the paper the relationship between knowledge and copyright is taken into consideration, creating the setting for competition as an appropriate mechanism to apply to copyright balance, to use it in the end in order to benefit human rights.

Key words: copyright, competition, human rights, knowledge society

#### **Preface**

I would like to thank to Mrs. Anna Maria Andersen Nawrot, which with her endless kindness and patience wisely guided me when I most needed it.

I have the pleasure to thank to Ms. Gao Hang, my supervisor during the internship with the World Intellectual Property Organization, within the Copyright Development Services Division, Cultural and Creative Industries Sector, which together with her team and colleagues made my collaboration with WIPO to be a fruitfulness and encouraging experience.

I would also like to thank to the staff from Raoul Wallenberg Institute's Library, with special thanks to Mrs. Lena Olsson.

In the end, I am happy to say that in the road to complete my research I was accompanied by great friends and classmates.

#### **Abbreviations**

CESCR – Committee on Economic, Social and Cultural Rights

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

ECJ – European Court of Justice

EU – European Union

GN – General Comment

ICCPR – International Covenant on Civil and Political Rights

ICESR - International Covenant on Economic, Social and Cultural Rights

ICT – Information and Communication Technologies

ICTSD – International Centre for Trade and Sustainable Development

OECD – Organization for Economic Co-operation and Development

TFEU – Treaty on Functioning of the European Union

TRIPS – Trade Related Aspects of Intellectual Property Rights

UDHR – Universal Declaration of Human Rights

UK – United Kingdom

UN – United Nations

UNCTAD – United Nations Conference on Trade and Development

UNESCO – United Nations Educational, Scientific and Cultural Organization

US – United States

WIPO – World Intellectual Property Organization

WTO – World Trade Organization

#### INTRODUCTION

#### Overview

The author of the present thesis has been curious for some time about exploring the interactions between human rights and copyright system. Bringing knowledge and competition into the scene was the result of the intriguing commodity of knowledge and trying to appeal reasonable mechanisms that might release the genie in the bottle. To know something simulates to have direct access to the world, and whereas originally the law of copyright regulated only the content of the books and publishers for a quite short period of time, today's changes in the copyright's scope that regulates publishers, users and authors, with a dramatic increase of duration, changes also the availability and accessibility to knowledge. If in the 1960's the modern society was a 'society of the spectacle' which emphasized a degradation of knowledge, in the post - modern society, knowledge started to matter in the shift from 'having' to 'being', where human fulfillment prevails.

Thus, when courts started to use competition policies in order to adjust the expansion and extension of copyright, and academics started to build arguments around these decisions for the benefit of human rights, we found the hint to proceed with our research. Our purpose is not to bring a yes or no answer within the perspective of the interaction between knowledge, human rights, copyright and competition, rather to reflect the possibility of 'walking' them together and what it would be the outcome.

#### **Central question**

The central question of the present research is how do we best address knowledge in the public interest within the fundamental conflict between the two groups of right holders of copyright?

#### **Delimitations**

The scope of our paper develops within the boundaries of copyright's balance between private and public interest. The research was stimulated by the recently adopted international regulations concerning copyright system, which catalyzed an impressive number of discussions around the interests that overcome in these laws. Our focus is mainly on the exclusivity of copyright that gave birth to legal and *de facto* monopolies over knowledge, knowledge which in economic terms is characterized as a public good.

However, we acknowledge that in order to have markets which operate and competition to regulate, you have to have property rights, and copyright is considered as such. We appreciate that we should 'start with the beginning', and look at the laws we have and use the mechanisms they provide, while developing new approaches in addressing the public interest.

Our intent is not an in depth analyzes of competition, due to the fact that the paper is not about competition, rather about the instrument that competition represents and how it can be used in order to reach our outcome to promote knowledge in the public interest, which finally might bring the equilibrium that needs to be achieved with human rights. When we talk about public interest, we consider both individual and community.

The complexity of the topic of the thesis can be tackled from different angles: from taking into consideration the meaning of competition within copyright in a knowledge society to how can human rights support competition for the public interest dimension of copyright or what would be the obstacles in this sense.

Nevertheless, the choice of the author is to bring three perspectives on the balance between private and public interest within copyright namely legal, sociological and economic, choice which is justified by the importance that all these spheres have for the big picture of the public interest aspect of copyright and for its full and clear understanding. Our approach throughout the paper is that we live in a knowledge society, where people are defined by their capabilities, which among other characteristics emphasize the freedom of choice, both as individuals in society and as consumers. Moreover, in the knowledge society human rights are reaffirmed, in contrast with knowledge economy where human rights are considered from a purely economic perspective.

Our research question in the light of the delimitations is how do we best redress the balance within copyright system for the benefit of human rights which ask for knowledge as precondition in order to be fulfilled?

#### **Methodology and Outline**

- 1. Chapter I of our thesis is attempted to draw a picture of the interface between knowledge and copyright in order to create the set for our further discussions in human rights context.
- 2. Chapter II of the paper is dedicated to illustrate the laws and practice of competition, to identify its features and to explain how they can be used.
- 3. Chapter III of the essay applies our findings in a real context of a competition decision on copyright limitation, on which we build human rights arguments.

#### Overview of literature

The main sources for references for our paper are based on academic writings and scholars publications.

Our framework evaluates competition laws from the European Union's and the United States' perspective, with support of the case law. In this regard, to some extent our attention is directed towards the European Court of Justice's decision, with no intent however in limiting our analysis to the European Community, rather due to the increased concern that they showed in applying competition regulations to copyright cases.

Other sources will be considered.

## 1 Beyond Knowledge and Copyright

"I own a flower myself, which I water every day. I own three volcanoes, which I rake out every week. I even rake out the extinct one. You never know. So it's of some use to my volcanoes, and it's useful to my flower, that I own them. But you are not useful to the stars."

The Little Prince by Antoine De Saint – Exupery

Knowledge is but a road to wisdom and today, as in the past, the control of knowledge can go hand in hand with serious inequality, exclusion, and social conflict. In the Age of Enlightenment, the demand for democracy, the concept of openness and the gradual emergence of a public forum for knowledge, fostered the spread of the ideas of universality, liberty, and equality. Nevertheless, the wider diffusion of knowledge through books and the printing press accompanied this historical development, which also brought the invention of copyright.

Copyright is one form of the intellectual property rights, intellectual property being the broader term that refers to creations of human mind, describing the ideas, inventions, technologies, art works, and literature that are intangible when first created, but become valuable in tangible forms of products.<sup>3</sup> These products are born through the flow of information, information that must be exchanged, compared, criticized, assessed, and absorbed in order to become a knowledge-generating tool.

It is important to notice that information and knowledge are not synonyms, and from a conceptual level, knowledge, rather than information, is at the heart of the empowerment of individuals and societies.<sup>4</sup> While information is for sure a precondition in the generation of knowledge, acquisition of knowledge remains the ultimate goal.<sup>5</sup>

Our days, looking at the various products that intellectual property involves, from rituals, music and dance to the modern use of technologies

<sup>3</sup> Kavida, V. and Sivakoumar, N., Intellectual Property Rights - The New Wealth of Knowledge Economy: An Indian Perspective (July 12, 2008), p.2.

<sup>&</sup>lt;sup>1</sup> Bindé, Jérôme, 'Towards Knowledge Socities: UNESCO world report', (Paris, UNESCO, 2005), p.17.

<sup>&</sup>lt;sup>2</sup> Ibid.

<sup>&</sup>lt;sup>4</sup> Ahmed Abdel Latif, 'The Emergence of the A2K Movement: Reminiscences and Refelctions of a Developing – Country Delegate', in Krikorian, Gaëlle & Kapczynski, Amy (red.), Access to knowledge in the age of intellectual property (Zone Books, New York, 2010), p. 111.

<sup>&</sup>lt;sup>5</sup> *Ibid.* 

such as software and digital recording , we can conclude that intellectual property rights have became the "predominant framework for regulating, dissemination, and use of knowledge". 6

Even though knowledge always represented the factory for creations and inventions protected by intellectual property system, it is not until recently when it started to receive attention as a weight piece in this discourse. This occurred when the new global environment has focused attention increasingly on international agreements as a new way of trying to enforce intellectual property protection, which are perceived as an enclosure to knowledge with direct effect on accessibility for the public, the classic example being the Trade Related Aspects of Intellectual Property Rights (TRIPS) adopted by the World Trade Organization (WTO). In all the debates, emerging from these various agreements and statutes, it can be noticed the decision making surrounding the need for and ways to control the flow of ideas.

This image can be reflected in a parable from one of the most probably well-known children books worldwide, *The Little Prince* by Antoine de Saint Exupery. The epigraph of our chapter is the Little Prince's answer to the businessman when he visits a number of planets and comes across a range of different characters. On the fourth planet, he meets the businessman who owns millions of stars, and the reason why he owns them is because he was the first one to think of owning the stars. The Little Prince is mystified, because he cannot seem to find a reason for owning the stars beyond the fact that they can be put in a bank to enable the businessman to buy more stars. In our story, the stars are knowledge and the businessman is the expansionist tendency of the intellectual property regimes.

The solutions that are being sought to the question of strengthening exclusivity of intellectual property rights for creation and innovation or making knowledge more accessible for freedom of information and the spread of culture are through the harmonization of intellectual property law.

Nevertheless, the alternative on which this thesis focuses is to address the identified issues by shaping on disciplines of law, as competition law, which exist to promote and protect the other interests involved.

The present Chapter demonstrates the meaning of knowledge in the living moment, and why it is important to advance knowledge in connection with intellectual property regimes generally and with copyright systems in

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<sup>&</sup>lt;sup>6</sup> Ahmed Abdel Latif, *supra* note 4, p. 99.

<sup>&</sup>lt;sup>7</sup> Carlaw, Kenneth I., Oxley, Leslie T., Walker, Paul, Thorns, David and Nuth, Michael, *Beyond the Hype: Intellectual Property and the Knowledge Society/Knowledge Economy*, Journal of Economic Surveys, Vol. 20, No. 4, September 2006, p. 658.

<sup>&</sup>lt;sup>8</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

<sup>&</sup>lt;sup>9</sup> Carlaw, Kenneth I. & others, *supra* note 7, p. 658.

particular. Our statement is that we live in a knowledge society and reflectivity and communication are just two of the differentiation elements.

Further, the research shifts to examine the rise of copyright, creating an historical evidence for the testimonials that stay today as support for copyright regimes, with the purpose to stress the value of knowledge as a free piece that benefits both individuals and society as a whole.

In the light of the findings, we are estimating the current copyright balance, which at origins sought to both encourage creativity and to promote the public interest, but today the tendency is towards protecting economic interests of the right holders. The result of our reflections on knowledge in connection with copyright regimes, grounds to introduce competition for the need to create a balance between the interests that subsist in copyright for the benefit of society and promotion of knowledge.

#### **How Knowledge Matters** 1.1

As Amy Kapczynski notices, "although knowledge has always mattered to the organization of human societies, in recent years, prominent economists and social theorists have sought to demonstrate that knowledge has come to matter in a new way". 10 Knowledge economy and knowledge society are the two main modern expressions that define the content of knowledge that emerges within our specific social context.

Nevertheless, we attempt to stress that the development of society outlines the trend of 'knowledge society', determined by the shift from "people who worked with their hands to people who work with their minds and thought", 11 by identifying its particular attributes in contrast with knowledge economy.

There are voices, which argue that in fact knowledge society is a gloss, which all too often emerges as an extension of the more concrete knowledge economy, or is simply deduced from the existence of information technology and the sheer quantity of available information. 12 Thus, knowledge society is a broader term than knowledge economy in that it encompasses more intellectual activity than narrow economic, commercial, and industrial concern. 13 Furthermore, there is no methodological distinction between knowledge society and other concepts as knowledge economy,

<sup>12</sup> See in this sense Ungar, S., Misplaced metaphor: A critical analysis of the 'knowledge society', Canadian Review of Sociology and Anthropology, Vol. 40(3): 331–347, 2003, p. 335.

<sup>&</sup>lt;sup>10</sup> Kapczynski, Amy, 'Access to Knowledge: A Conceptual Genealogy', in Krikorian, Gaëlle & Kapczynski, Amy (red.), Access to knowledge in the age of intellectual property, (Zone Books, New York, 2010), p. 18.

11 Drucker, Peter, *Post-Capitalist Society*, (Harper Business, New York, 1993), p.12.

Rooney, D., Hearn, G., Mandeville, T. and Joseph, R., Public policy in knowledge based economies: Foundations and frameworks, (Cheltenham, UK: Edward Elgar, 2003), p.16.

information society or economy, since all of them refer primarily to the problem of what distinguishes a knowledge society from its historical predecessors, and they are used as procedures for distinguishing the contrasting, prior phases of the operation of knowledge in the economy and connected social structures.<sup>14</sup>

The historical reason accompanies Carlaw *and others* when they explore the past as a way of understating the present, present that requires a deeper and sustained empirical analysis in the debate about the concepts of knowledge society and knowledge economy. These concepts are clearly related as both leverage off the idea of transformation to create fundamentally different features of society and economy, where information has a special and significantly different place. <sup>15</sup>

McLennan notes that while the concepts of knowledge economy and knowledge society resemble, they run in opposite directions, "one involves a strenuous reductionism whereby cultural and social forms are seen as the functional prerequisites of an endogenous techno-economic momentum at the heart of the post-industrial order. The other connotation, which emphasis knowledge society in a broad sense, is about intrinsic socio-educative goals, that it is intrinsically good to be educated and informed in an ongoing, self-realizing kind of way". <sup>16</sup>

Nevertheless, in our view, knowledge society is taken in close relationship with access to knowledge paradigm, which appears as the appropriate response to the term 'knowledge economy' that had been increasingly used to describe the new, prevailing standard that reflected the changes in the new big economy brought about by globalization trend and new technologies. <sup>17</sup>

Moreover, knowledge society is characterized by the predominance of information, which is a public good, of communication, which is a participative and interactive process, and of knowledge, which is a shared social construction, not a private property. All these features of the knowledge society are united by 'reflectivity'.

Reflection presupposes an effort in order to transform information into knowledge, or to invite to dialogue, which means that this conversion is a process that involves more than a mere verification of the facts. The reflective characteristics of the contemporary society consist in creating movements capable of collective learning and shaping new man who can

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Adhikari, Kamini and Sales, Arnaud, *Introduction: New Directions in the Study of Knowledge, Economy and Society*, Current Sociology July 2001, Vol. 49: 1-25, p. 5.

<sup>&</sup>lt;sup>15</sup> Carlaw, Kenneth I., and *others*, *supra* note 7, p. 659.

McLennan, G., Sociologists in/on 'Knowledge Society, paper presented at the Sociological Association of Aotearoa/New Zealand conference plenary session, Auckland, December, 2003, p.7.

<sup>&</sup>lt;sup>17</sup> See in this sense Ahmed Abdel Latif, supra note 4, p. 111.

think both creatively and critically and who is capable of human cooperation. 18

Therefore, knowledge society focuses on human beings, cultures, forms of organizations and communication and provides for the widespread distribution and access to knowledge, recognizes the public use of knowledge and employs such knowledge in decision-making process. 19

Recently, the concept of knowledge economy was used as a tool to promote an expansion in the scope of intellectual property rights and to increase the levels of intellectual property protection.<sup>20</sup>

In this context, we are arguing for accessibility of knowledge, as part of those who support a more open system of exchange, which favor a move towards a greater balance between the interests of the intellectual property holders and the public interest.<sup>21</sup>

Following this purpose, which supports the shift from knowledge economy to knowledge society, the next subchapter will bring together the notions of copyright and knowledge, as different entities and the way they interact.

#### 1.2 The Rise of Copyright

Copyright is one of the three general stands of the dense concept of intellectual property, together with patents and trademarks.

There is a general consensus that copyright law protects the rights of the authors in their creative works, having a twofold purpose: to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public. Thus, the ultimate goal of copyright is to encourage the creation and dissemination of creative works, while the immediate goal is to enable copyright owners to recoup their investment.<sup>22</sup>

Under the umbrella of copyright, the language of knowledge and property first tied a legal bond. Nevertheless, today, as in the eighteen century, the idea of property rights in knowledge continues to be contested.

<sup>&</sup>lt;sup>18</sup> Nawrot, Anna Maria, 'The Well-Being and the Knowledge Society', (Manuscript forthcoming), p.4.

<sup>19</sup> See in this sense Ungar, S., Misplaced metaphor: A critical analysis of the 'knowledge society.' The Canadian Review of Sociology and Anthropology, Vol. 40(3): 331-347, 2003, p. 339.

<sup>&</sup>lt;sup>20</sup> Ahmed Abdel Latif, *supra* note 4, p. 111.

<sup>&</sup>lt;sup>21</sup> Carlaw, Kenneth I., and *others*, *supra* note 7, p. 659.

<sup>&</sup>lt;sup>22</sup> Cross, John T. and Yu, Peter K., Competition Law and Copyright Misuse, MSU Legal Studies Research Paper No. 04-29 ; UN Cocktail de Droit d'auteurs, Ysolde Gendreau (ed.), Les Éditions Thémis, pp. 55-90, 2007; University of Louisville School of Law Legal Studies Research Paper Series No. 2008-15, p.57.

#### 1.2.1 Historical evidence for copyright

Copyright begins life in the European countries in the form of privileges, accompanied by the advent of the printing in the fifteen century. Practically, the big change in the idea of protection of an intellectual work came when two important inventions took place, namely Gutenberg's moveable type in 1445 and Caxton's printing press in 1478. The printing press redefined the way in which human beings organized knowledge, from oral and script culture to print culture. Before the print medium knowledge of whatever kind was preserved primarily by memorizing, which medieval scholars considered it merely as a virtue, or by manuscripts, which could be copied laboriously by hand, one at time, and made available only to the most privileged members of the society.

However, through the possibility to print multiple copies of books, booksellers had the advantage to copy author's works faster, the manuscripts became cheaper, and this way more accessible to the public. In the same period of time, as a mean of protection for the booksellers, the system of privileges was established, meaning that booksellers were invested with an exclusive right to print and sell, for a limited period, an author's work.<sup>25</sup>

England started to award privileges in 1529, which were the monopoly of the members of the Stationery Company that regulated the printing trade, and was entitled to use powers of search and seizure. However, in 1709 The Statute of Anne was adopted, which sought to break the perpetual monopoly of the booksellers and printers of the Stationers' Company over the book trade. <sup>26</sup>

In France, the system of royal privileges appeared in the early 16<sup>th</sup> century, and during the 17<sup>th</sup> century, they became the main printing trade, and created monopoly for specific publishers. The printers were the rightholders of the author's work, and the privileges were a method of control on the printings for the state and the French Crown introduced through them the system of censorship.

In the United States copyright system grew out of UK's both common law and statutory law. Privileges became a form of protection for the

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<sup>&</sup>lt;sup>23</sup> Grosheide, Willem F., "In search of the public domain during the prehistory of copyright law", in Waelde, Charlotte. & MacQueen, Hector L. (red) *The many faces of the public domain*, (Edward Elgar, Cheltenham, 2007), p. 7.

<sup>&</sup>lt;sup>24</sup> Grosheide, Willem F, *supra* note 23, p. 8.

<sup>&</sup>lt;sup>25</sup> Italy, in the city of Venice, is considered one of the first countries that granted a privilege in 1469. *Scotto v. Benalio* is an early example of a legal step taken against privilege infringement.

<sup>&</sup>lt;sup>26</sup> Gillian Davies, *Copyright and the Public Interest*, (London, Thomson, Sweet & Maxwell, 2002), p. 13.

publishers as well.<sup>27</sup> The printing privileges were sporadic though, and different varieties of them were used in the colonies. Thus, in 1787, United States adopted its Constitution, including an intellectual property clause.

Nevertheless, both the early English Statute of Anne in 1709 and the United States Constitution in 1787, expressing the utilitarian theory, granted limited exclusive reproduction rights for authors, while highlighting the public benefit as a rationale for protection: copyright was seen as an incentive to creation, leading to the enrichment of the pubic.<sup>28</sup>

This was a different approach than the natural rights theory, an effect of the French laws after the Revolution, where the authors were in the center because they were the creators. The ideas belonged to them and emanated from them, thus copyright should protect both the authors' economic and personal interests, irrespective of any utility of the protection of the society.<sup>29</sup>

Nonetheless, the Statute of Anne is recognized as the foundation upon which the modern copyright system was build, and the French legislation from the nineteenth century is appreciated as the establishment of the author's rights system. However, no matter which premises were adopted, authors won more protection under both systems and the copyright regimes spread beyond national borders in the 18<sup>th</sup> and 19<sup>th</sup> century.

Nevertheless, the transition from the system of privileges to copyright took a long time, but the modern copyright systems have three characteristics influenced by the privileges: the exclusive right of reproduction and distribution, the fact that privileges were limited in time and the remedies that included seizure and forfeiture of infringing copies as well as fines. 30

Moreover, the historical evidence of using utilitarian theory or natural rights theory in granting the exclusive right of copyright<sup>31</sup> protection is an important factor that accompanies the law and policymakers in the determination of the modern balance between the interest of the right holders and the public. While it is appreciated that under the utilitarian theory property rights were conceptualized as a tool to encourage creation for the aim of providing new works to the public, and that under the natural rights theory, the property was conceived as a tool to confer individual

<sup>&</sup>lt;sup>27</sup> The first exclusive printing privilege in America is considered to be granted to the bookseller John Usher by the Massachusetts General Court in the North American British Colonies in 1672. The particularities of the privilege consisted in the fact that was limited in time, it regarded only the number of copies that Usher already had and it did not covered future reprints.

<sup>&</sup>lt;sup>28</sup> Silke von Lewinski, *International copyright Law and Policy*, (Oxford University Press, 2008), p. 37.

<sup>&</sup>lt;sup>29</sup> Lewinski, *supra* note 28, p. 9.

<sup>&</sup>lt;sup>30</sup> Gillian Davies, *supra* note 26, p. 21.

<sup>&</sup>lt;sup>31</sup> Unless stated otherwise, the expression 'copyright' refers in the following pages both to the common law system and author's law system.

freedom, concern for the public interest was an important consideration under both principles.  $^{32}$ 

Furthermore, throughout the early modern world, the development of commercial printing and publishing occurred through a system of state-licensed monopolies and the trade custom originated the exploitation, piracy, and enforcement of exclusive rights as a means of protection. <sup>33</sup>

Further, in the light of the findings through historical development of copyright, we mirror the current justifications of copyright, as a base of reflection for the relationship between copyright and knowledge.

#### 1.2.2 Current justifications for copyright

What does it mean to say 'I have a copyright?' Wong is wondering. It is generally accepted that the legal rights associated with copyright are those that flow from the fact that it is property and can be owned, thereby importing fundamental concepts of property law, such as to have an exclusive title, which confers on its owner the right to use, the right to exclude all others from both from use and possession, and the right to transmit use and possession to others. Therefore, some scholars recognized in copyright abundle of rights, which gives the author the exclusive rights to reproduce, to adapt, to distribute, to perform publicly, and to display publicly the copyrighted work."

Nonetheless, 'property talk' that pervades copyright discourse finds its roots in natural law theory. The rights of the author over his work are considered as embodied in the 'very nature of things', meaning that he is the creator of the work, it is an expression of his personality and the fruit of his mind.<sup>37</sup> For granting copyright in the form of property, scholars often cite John Locke's proposition contained in the Second Treatise on Government, both for an instrumentalist, as well as a normative basis.<sup>38</sup>

However, Sterling identifies some difficulties in the property theory as applied to copyright, stating that there are important incompatibilities between the concept of 'intellectual' property and traditional categories of property, such as land or moveable books, due to the limited duration of copyright economic rights and the moral rights theory, which does not fit into the theory of copyright. Moreover, Sterling does not find similarities between Locke's expenditure of labour on existing physical things such as

<sup>&</sup>lt;sup>32</sup> For more details *see* Gillian Davies, *supra* note 26, pp. 129-232.

<sup>&</sup>lt;sup>33</sup> Colston, Catherine & Middleton, Kirsty, (2 ed.), *Modern intellectual property law*, Cavendish Publishing, London, 2005), p. 250.

<sup>&</sup>lt;sup>34</sup> Wong, Mary, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 Cardozo Arts & Ent. L.J. 775 (2009), p. 777.

<sup>&</sup>lt;sup>35</sup> Zemer, Lior, *The Idea of authorship in copyright*, (Ashgate, Aldershot, 2007), p. 44.

<sup>&</sup>lt;sup>36</sup> See in this sense Zemer, Lior, supra note, pp. 50-59.

<sup>&</sup>lt;sup>37</sup> Gillian Davies, *supra* note 26, p. 14.

<sup>&</sup>lt;sup>38</sup> Wong, Mary, *supra* note 34, p. 777.

land and the 'thing' that the author's labour is applied, so that protected work is produced, because it is established that the simple 'idea' of a work does not become the exclusive property of the author, because only the elaborated expression conceived by the author is protected by copyright.<sup>39</sup>

Nevertheless, for Wong there seems to be little analysis or consensus on what copyright as property means. She recognizes that substantive copyright law has become increasingly 'propertized' over time. This view is particularly prominent amongst commentators engaged with the economic analysis model. This economics-based analysis view copyright as a system of incentives. Incentives theory derived from the utilitarian approach and posits that creators will be motivated to create new works through the grant of exclusive rights, 40 because the creation of works involves investment of time, patience, skills, creative endeavour and money. Such investment should be protected. If it is not protected, the author loses the incentive to undertake the project. Protection of works benefits society. Consequently, it is necessary to give authors the incentive to carry on their work by providing, through copyright, the means to ensure their livelihood. 41 Creative incentive theory fits well with the concept of copyright as a form of property, which confers upon a property owner control over the manner, means and extent of its exploitation.<sup>42</sup>

Nevertheless, the exclusive right of the copyright holder is also described as property in a monopoly. Copyright as monopoly has a historical justification, and academics identify the term monopoly bearing two distinct meanings. One meaning associates monopoly with a "market monopoly" that describes a situation of fact, when in the market place, one person is the sole purveyor of a certain commodity, thus having no competition. The second meaning implies monopoly as a "legal monopoly", this being a situation of law, namely the sole right to sell a certain commodity, such right being granted by law. <sup>43</sup>

In copyright reside both understandings, since it is a legal entity with market power, how we will discuss further in the paper.

<sup>&</sup>lt;sup>39</sup> J.A.L. Sterling, *World Copyright Law*, (London, Thomson, Sweet & Maxwell, 2003), pp. 48-49.

<sup>&</sup>lt;sup>40</sup> Wong, Mary, *supra* note 34, pp. 780-781.

<sup>&</sup>lt;sup>41</sup> J.A.L. Sterling, *supra* note 39, p. 64.

<sup>&</sup>lt;sup>42</sup> Wong, Mary, *supra* note 34, pp. 780-781

<sup>&</sup>lt;sup>43</sup> J.A.L. Sterling, *supra* note 39, p. 49.

#### 1.2.3 Economic rationales for copyright

Generally, two contrast images help to illustrate the picture of economic justification for copyright. One image is derived from the property right in knowledge as a material resource, and the second image emerges from economics of knowledge.

The first image, developed from the property approach traced in the previous subchapter, Amy Kapczynski calls it the despotic domination image.

In this image copyright is needed to promote investment in knowledge goods in order to prevent market failure. In this regard knowledge is expensive to produce but cheap to reproduce. Thus, in an unregulated market, second comers could reproduce the protected works, paying only the cost of copying and without paying the full costs of the original producing. This is called the 'free rider' phenomenon.<sup>44</sup>

Due to the presence of 'free riders', dissemination of knowledge is predicted to be lower than would be optimally efficient, because non – appropriability effect of 'free riders' will avert private manufacturers to supply the relevant market adequately. 45 Therefore, copyright protection gives owners the right to prevent others from copying their creations for a period of time, which lets them recoup their investments and make a profit. This way, exclusion rights generate markets in knowledge, solving the 'free rider' problem, and aligning individual incentives with social good. 46

The above image of paying within a system of individual rights in order to enjoy creativity and the benefits associated with it is in contrast with the second image of the theory in the field of knowledge economics. The market for copyright works is characterized by the public goods nature of the protected works, i.e. by their non-excludability and non-rivalry. The role of the non-rival character of knowledge in copyrighted works pose a set of economic problems, emerged mainly from the concept of rivalry itself.

The economist Paul Samuelson, 47 defines public goods in terms of two characteristics, meaning that they are non-rivalrous and non-excludable. A good is non-rivalrous when it is undiminished by consumption. Everybody can consume it without depleting it or becoming "rivals". In the same time, a good is non-excludable when consumption is available to all, and attempts to prevent consumption are generally ineffective.<sup>48</sup>

<sup>&</sup>lt;sup>44</sup> Kapczynski, Amy, *supra* note 10, pp.26-27.

<sup>&</sup>lt;sup>45</sup> Graham Dutfield, Uma Suthersanen, Edward Elgar, Global Intellectual Property Law, (Cheltenham, UK, Northampton, MA, USA 2008), p. 50.

<sup>&</sup>lt;sup>46</sup> Kapczynski, Amy, *supra* note 10, p. 27.

<sup>&</sup>lt;sup>47</sup> Samuelson, Paul A., *The Pure Theory of Public Expenditure*, The Review of Economics and Statistics, Vol. 36, No. 4 (Nov., 1954), pp. 387-389.

<sup>&</sup>lt;sup>48</sup> Peter Suber, http://www.earlham.edu/~peters/fos/newsletter/11-02-09.htm (accessed on 18 April, 2011).

Knowledge is non-rivalrous in consumption because whereby its use by someone does not prevent its use by someone else. Knowledge is also non-excludable, because, how Peter Suber puts it, the books can be burned, but not all knowledge is from books.<sup>49</sup>

For some scholars and policy makers, the exclusive rights deriving from copyright as property makes sense, even considering the non-rivalrous character of knowledge, because it is seen as a mechanism with the purpose to serve society interest in the use of knowledge. Moreover, in these opinions, copyright as property remains one of the most efficient means by which to secure beneficial social progress at minimum public cost. <sup>50</sup>

Hence, copyright laws were created, at least in part, to address a market failure arising from the public good characteristics of creative works of authorship.<sup>51</sup>

However, in both images copyright was adopted as the main tool in order to address the market failure issue that might arise in the market economy of ideas. Because the current copyright regulations are used to create incentives for rightholders/producers, this way restricting access to the knowledge in the copyrighted products for the public/consumers, we argue for the use of competition in the public interest in order to strike the right balance within copyright regime, by accessible prices and diversity of the content.

In the following paragraphs we reflect upon the propertization of copyright and the free flow of knowledge through the filter of the balance that suppose to guide the copyright purpose for protection of creative works.

<sup>&</sup>lt;sup>49</sup> Peter Suber, *supra* note 48.

<sup>&</sup>lt;sup>50</sup> See Dutfield, Graham M. & Suthersanen, Uma, *supra* note 45, p. 50; for the same reasoning see also Smith, Henry E., *Intellectual Property as Property: Delineating Entitlements in Information*. Yale Law Journal, Vol. 116, No. 8, 2007; Moore, Adam D., *Intellectual property & information control: philosophic foundations and contemporary issues*, (Transaction, New Brunswick, N.J., 2001).

<sup>&</sup>lt;sup>51</sup> Guibault, Lucie M.C.R, Copyright limitations and contracts: an anlaysis of the contractual overridability of limitations on copyright (Kluwer Law International, The Hague, 2002), pp. 82-83.

#### 1.3 Knowledge Sharing and Copyright **Protection**

Access to knowledge is a pillar in support of knowledge society, and its effective promotion presumes a balance between the interest of producers and right holders and those of users of knowledge contents, meaning between the copyright protection system and knowledge in the public interest.

The rights provided under the copyright regime since their inception have been subject to limitations of duration and exemptions for personal and scientific use, in order to create a balance between the rights of the right holders on the one hand, and the interest of the public in access to protected works on the other. 52

Therefore, some limited uses of protected subject-matter are free, such as quotations, the use of short excerpts and in some cases copies made for private use. Limitations and exceptions for educational purposes, libraries and archives institutions, and research are other areas of concern when it comes about the balance between private and public interest in copyright protection. These latter mentioned limitations and exceptions share the common objective of encouraging dissemination of knowledge and information among the members of society. However, these exceptions and limitation apply only to non-commercial use.

Copyright system, as we know it today, is build on the concept that providing protection for the author against unauthorized publication for a limited period will encourage and promote learning and progress (knowledge), and preserve the public domain.<sup>53</sup> Thus, the importance of the idea of the 'public domain' is that, it is a body of knowledge and information to which there is general access for use for purposes such as the further development of knowledge, understanding, inventiveness. 54

Therefore, public domain has a place of honour in almost every discourse on copyright and knowledge and to try to understand copyright's public domain we need to make clear two basic distinctions concerning the related concepts of access to and use of a work.<sup>55</sup> First, by following the principle from copyright where the rights granted to the author prevent the others from using the work, it means that if the institution of copyright

<sup>&</sup>lt;sup>52</sup> Gillian Davies, *supra* note 26. pp. 5-7.

<sup>&</sup>lt;sup>54</sup> MacQueen, Hector & Waelde, Charlotte, "Introduction: the many faces of the public domain", in Waelde, Charlotte. & MacQueen, Hector L. (red.), Intellectual property: the many faces of the public domain, (Edward Elgar, Cheltenham, 2007), p. xi.

<sup>55</sup> Deazley, Ronan, "Copyright's public domain", in Waelde, Charlotte. & MacQueen, Hector, *supra* note 23, p. 22.

necessitates permission before use, the public domain allows for use without the need for permission. Second, when a work is publicly accessible, the public may remain restricted in terms how it is able to make use of that work.<sup>56</sup>

Nevertheless, in a world where no one challenges anymore the crucial role of the public domain in the balance of copyright, <sup>57</sup> increasing 'propertization' through the expansion of private property rights necessarily impacts the availability of the property in question for public use. <sup>58</sup> The trend towards longer periods of protection of works diminishes the public domain for the benefit of the right holders and to detriment of society <sup>59</sup> and acts as a barrier to knowledge.

Nevertheless, knowledge, having the quality of being non-rivalrous and non-excludable, it cannot be thought in terms of distribution. It shall stay available to all. Knowledge is a shared resource incompatible with the property approach of copyright. Knowledge should be in the public domain, but the challenge is how to blend systems of rules and norms in order to guarantee general access to the knowledge that empowers humans while ensuring recognition and support for those who create knowledge in various forms.<sup>60</sup>

Thus, in an alchemy that turns immaterial expressions and ideas into tradable commodities, copyright effectively gives creators the ability to market information while also preventing it from being imitated and reproduced by others. These rights allow their holders to exclude other parties from the benefits arising from new knowledge and, more specific, from commercial use of works based on this knowledge. The ability to exercise market power can lead to inefficient allocation of resources, by the fact that these rights can conclude in substantial revenues for those who hold copyrights, and also to substantial economic costs for society. Therefore, in order to try to restore the balance within copyright, courts and litigants no longer rely solely on the internal limitations and exceptions related to copyright such as duration limits of the right described above, but

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<sup>&</sup>lt;sup>56</sup> Deazley, Ronan, *supra* note 55, p. 23.

Dusollier, Séverine, *Scoping study on copyright and related rights and the public domain*, World Intellectual Property study on the public domain, CDIP/4/3/REV./STUDY/INF/1, Original: English, May 7, 2010, p. 13.

<sup>&</sup>lt;sup>58</sup> This expansionist tendency of copyright regime was called a "second enclosure movement", due to the similarities with the English land enclosure movement of the nineteenth century. *See* Boyle, James, *The Second Enclosure Movement and the Construction of the Public Domain.* Law and Contemporary Problems, Vol. 66, pp. 33-74.

<sup>&</sup>lt;sup>59</sup> Davies, Gillian, "The Public interest in the public domain," in Waelde, Charlotte. & MacQueen, Hector L., *supra* note 23, p. 89.

<sup>&</sup>lt;sup>60</sup> Colston, Catherine & Middleton, Kirsty, *Modern intellectual property law*, (2. ed., Cavendish Publishing, London, 2005), p. 31.

<sup>&</sup>lt;sup>61</sup> Kapczynski, Amy, *supra* note 10, p. 23.

<sup>&</sup>lt;sup>62</sup> *Ibid*.

they have turned to legal doctrines that are external to the copyright system, such as competition law.<sup>63</sup>

#### Conclusions

The present Chapter attempted to show how important knowledge is in the present society and thus, our reflective statement is that we live in a knowledge society, which is dependable to the knowledge embodied in the copyrighted works, knowledge that shall be at the free use of both individuals and society. Nevertheless, due to existing copyright regulations, we have to appeal the *in force* instruments that have a real function in relaxing the strength of the copyright protection, and competition represents such an instrument. The following Chapter is structured in order to offer an overview of the rules and role of competition within copyright system.

Therefore, further, we attempt to prove why to use competition for striking the balance between the interests that exist within copyright.

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<sup>&</sup>lt;sup>63</sup> Cross, John T. and Yu, Peter K., *supra* note 22, p. 59.

# 2 Striking the Balance Between the Protection of Copyright and Promotion of Knowledge through Competition

The dwarf sees farther than the giant, when he has the giant's shoulder to mount on.

Samuel Taylor Coleridge

Courts relatively recent started to use competition law to help strike the balance between the aims of intellectual property law to promote innovation and creativity and consumers' interest in accessing knowledge through competitive markets and lower prices. However, it is surprisingly that in most cases governments, courts and academic writings focus more on connections between competition laws' role in disseminating knowledge covered by patents ruling, leaving copyrighted knowledge at a second level of attention. Nevertheless, there is an increasing awareness of the impact of the creation of property rights on knowledge, due to the expanded protection of copyright over a diverse range of subject matters such as novels, computer programs, paintings, films, television broadcasts, and performers etc. and also due to the extension of copyright term duration. This has had as a result an acknowledgement for the need to apply external tools, as competition law, to copyrighted products market.

Further, the Chapter will examine the relationship between competition law and copyright regulations through the means of legislation and case law. Thus, the current attitude of competition law authorities toward intellectual property rights in the European Union, the United States and within the international arena, namely within TRIPS, will be explained. This attitude will be supported by case law, with focus on the circumstances in which copyright facilitates economic outcomes adverse the public interest. In the end, it is indented to prove the role of competition law within copyright, meaning that competition has the potential to provide an effective wide access to knowledge to the public. The utility of the findings will be demonstrated in the final chapter.

#### 2.1 Introducing Competition Law

Competition law is concerned to adopt and apply in pursuance of efficiency and economic welfare. The believe that competition amongst undertakings produces the best outcomes for society is based on economic theory that employs models of perfect competition and monopoly, and concepts of welfare and efficiency.<sup>64</sup> Thus, the basic function of competition law is to deliver economic objectives.

In economic theory is the view that well-being depends on achieving a workable competitive market economy. In setting out the conditions for such market economy, the thought is primarily concerned with allocative efficiency in terms of how effectively the allocation of resources satisfies the economic wants and desires of individuals in society, and generates the highest possible level of social well-being throughout the community as a whole. In other words, the theory is that a market economy based on genuine competition benefits the consumer by preventing artificially high prices and encouraging the development and availability of qualitative and diverse goods and services. Therefore, many commentators consider that competition is merely a means to an end and that is to maximize consumer welfare by achieving the most efficient allocation of resources in the marketplace. 66

Thus, competition employs several benefits. Basic economics teaches that firms in competition will produce more and price lower than monopolies. Monopolies not only take money away from consumers by raising prices, but they impose a 'deadweight loss' on society by reducing their output below the level which consumers will be willing to purchase at a competitive price. Monopoly also inherently reduces consumer choice, and monopolies have fewer incentives to innovate than do competitive firms because much of the profit from any innovation will simply steal profits from the monopolist's prior products. <sup>67</sup>

However, in the history of competition, until about 1990, it was thought that the competition rules should protect competitors, especially those that were of small or medium size. Many officials did not understand the difference between that and protecting consumers. It was generally thought that exclusion was anticompetitive, and justifications based on 'free rider'

<sup>66</sup> Tritton, Guy (2.ed.), *Intellectual property in Europe*, (Sweet & Maxwell, London, 2002), p.p. 565-566.

<sup>&</sup>lt;sup>64</sup> Jones, Alison and Surfin, Brenda, *EU Competition Law: Text, Cases & Materials*, (Oxford University Press Inc., New York, 2011), p.1.

<sup>&</sup>lt;sup>65</sup> Graham Dutfield, Uma Suthersanen, *supra* note 45, p. 49.

Lemley, Mark A., A New Balance between IP and Antitrust (April 1, 2007). Southwestern Journal of Law and Trade in the Americas, Vol. 13, p. 237, 2007, pp. 5-6.

arguments and avoiding hold up problems were not widely accepted.<sup>68</sup> It is quite unexpected that in this climate, officials and courts thought that competition/antitrust laws should limit intellectual property rights in the consumer/public interest.

Therefore, it can be reasonably argued that competition as a limitation on copyright is the result of the legislator's arbitration between granting an incentive to create for authors on the one hand, and allowing dissemination of works among consumers and the creators of new works on the other hand

Nonetheless, after the adoption of the TRIPS Agreement, which led to the trend called 'globalization' in intellectual property area, discussions started around the question whether a solution in order to properly balance interests in intellectual property rights and a competitive environment requires the establishment of a 'global' competition treaty as well. The main argument stays in the 'global' interest in establishing an appropriate balance of competition rules. However, in our understanding, a national or regional system of check and balances through competition is desirable, where a case-by-case approach respects the particularities of each country.

However, in order to evaluate properly the role of competition within copyright it is necessary to discuss the relationship between competition law and copyright regime.

#### 2.2 The Interface Between Competition Law and Copyright Law

At first glace, competition law have little to play in the outcome of an intellectual property suit. Hence, because intellectual property rules often create social costs that far outweigh their intended benefits, most of the scholars advocate for limitations of intellectual property rights located within the field of intellectual property law, promoting the inclusion and use of balancing mechanisms within the laws granting intellectual property rights. However, intellectual property rights are also shaped by their interaction with other fields of law, competition law being a first example. <sup>69</sup>

Since the exercise of copyright by its nature may involve restriction on commercial activities, and since competition laws are designed to ensure the operation of markets without undue hindrance, as well as the prevention of abuse of monopoly rights, it is inevitable that copyright law and competition

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<sup>&</sup>lt;sup>68</sup> Korah, V., *The Interface Between Intellectual Property Rights and Competition in Developed Countries*, (2005) 2:4 SCRIPTed 429 http://www.law.ed.ac.uk/ahrc/scripted/vol2-4/korah.asp, p. 432.

<sup>&</sup>lt;sup>69</sup> Flynn, Sean, M. 'Using Competition Law to Promote Access to knowledge', in Krikorian, Gaëlle & Kapczynski, Amy, *supra* note 4, p. 451.

law will at some stage come into conflict.<sup>70</sup> Queries will arise as to the interest, which should predominate, *i.e* the interest of the author in controlling use of his work and in extracting maximum financial benefits from exploitation, and the interest of the public in having access to published material on fair and reasonable terms.<sup>71</sup>

However, the view that every act to obtain and profit from an intellectual property right could be constructed as an act of monopolization in violation of competition law mandates has been rejected by courts and enforcement agencies in Europe, the United States and other countries. In such jurisdictions, competition law is used, explicitly or implicitly, as a tool to restrict the scope of intellectual property rights without negating them. <sup>72</sup>

Thus, copyright is seen as a privilege granted in recognition of the need of the holder to recoup costs incurrent in the work process, so as to maintain incentives for further creations, and that entails an exclusive right for a limited time, enabling the holder to charge a higher price than the marginal cost of production. This higher price may include prevention of access of consumers to goods, *i.e.* information and knowledge, and may reduce access to other producers to production inputs and methods, because the monopoly granted prevents or deters competition from rivals that can sell at lower prices. There is thus a balancing required between the monopoly privilege granted to the right holder and the public interest, which includes consumer welfare and the competition from other producers.<sup>73</sup>

One interesting example of the nature between copyright and principles of competition law, where the public interest argument was stressed, is found in the Hong Kong case, *Canon K.K. v Green Cartridge (Hong Kong) Ltd* <sup>74</sup>. There, on appeal, the Privy Council had to consider a claim for copyright infringement by the unauthorized manufacture of replacement toner cartridges for laser printers and copiers. The defendant relied on the *British Leyland* <sup>75</sup> case where it was decided that, in the particular

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<sup>&</sup>lt;sup>70</sup> J.A.L. Sterling, *supra* note 39 , p. 27; for different opinion where the authors' analysis emphasises the separation of Intellectual Property Law and Competition Law see for example Tritton, Guy (2.ed.), *Intellectual property in Europe*, (Sweet & Maxwell, London, 2002), p. 573 – 574 or Régibeau, Pierre and Rockett , Katharine, *The Relationship Between Intellectual Property Law and Competition Law: An Economic Approach*, (University of Essex and CEPR, Revised, June 2004); also for the position that these two laws are complementary efforts to promote an efficient marketplace, see Goldstein, Paul, *The Competitive Mandate: From Sears to Lear*, (California Law Review Vol. 59, No. 4 (Jun., 1971), pp. 873-904.

<sup>&</sup>lt;sup>71</sup> J.A.L. Sterling, *supra* note 39, p. 27.

<sup>&</sup>lt;sup>72</sup> Flynn, Sean, M. *supra* note 69, p. 453.

Khor, Martin, *Intellectual property, Competition and Development*. Available at http://www.wipo.int/edocs/mdocs/mdocs/en/isipd 05/isipd 05 www 103984.pdf, p. 2

<sup>&</sup>lt;sup>74</sup> Canon K.K. v Green Cartridge (Hong Kong) Limited [1997] F.S.R 817, in Cornish, William Rodolph (red.), Cases and materials on intellectual property, 5. ed., Sweet & Maxwell, London, 2006.

<sup>&</sup>lt;sup>75</sup> British Leyland Motor Corporation v Armstrong Patents Company Limited, 30 October, [1986] R.P.C 279, in Cornish, *supra* note 139.

circumstances, the copyright owner could not use his copyright to prevent the manufacture of motor car spare parts for the purpose of replacing broken or unusable exhaust pipes, and thus control the aftermarket in spare parts. However, in the *Canon* case, the Privy Council said it was a strong thing, for a judicially declared head of public policy to be treated as overriding or qualifying an express statutory right. The Privy Council considered that, in the circumstances, the copyright owner's enforcement of his rights would not restrict competition in manner adverse to the interest of consumers. The question whether it was contrary to the public interest for a manufacturer to be able to exercise monopoly control over his aftermarket could not usually be answered without some inquiry into the relevant market. Thus the Privy Council brought into the factors of decision economic aspects affecting the interest of consumers. The plaintiff's claim of copyright infringement was upheld.

Consequently, from the existing relation between the exercise of copyright and the principles of competition law, the question that arises is when competition law should limit copyright.<sup>76</sup> The issue has formed a major area of development in the European Union, the United States and at international level. Therefore, further, we will explain the main aspects of the relevant regulations from each region, as legal support for our statements in connection with the issues rising from the copyright and its effects on knowledge.

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<sup>&</sup>lt;sup>76</sup> Flynn, Sean, M. *supra* note 69, p. 456.

#### 2.3 Competition Regulations

As we examined the economic rationales for the grant of copyrights, we evaluated the interface between the encouragement of creativity on one side, and restriction of open markets to the other. This prospective interface is reflected both in regional and international law, by the fact that competition law can provides significant limit to the extent of market power that intellectual property can grant.

## 2.3.1 International influence on competition policy of the Trade – Related Aspects on Intellectual property Rights (TRIPS)

The World's Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) recognizes the right of Member governments to take measures to prevent anti-competitive abuses of intellectual property rights. Therefore, Article 8.2 of the Agreement stipulates that appropriate measures, provided that they are consistent with the provisions of the 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. Article 40 affirms the right of Members to specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights, having adverse effects on competition in the relevant markets and to adopt appropriate measures to prevent or control such practices, consistent with other provisions of the Agreement. However, neither Article 8.2 nor Article 40 obliges the Members to treat specific practices as abuses, or specify remedial measures that must be taken. Hence, the competition provisions of the Agreement are permissive, and not mandatory.

Therefore, the TRIPS Agreement provides international legal authority for countries that wish to take measures to protect themselves against anticompetitive abuses or specific types of intellectual property rights. It sets also conditions governing the use of compulsory licensing in respect of some types of rights, and provides for limited forms of international cooperation in addressing cases of abuse. However, the Agreement does not define measures to be treated as abuses or setting out standards that could be used in evaluating particular practices.<sup>77</sup>

Anderson, Robert, D., *The Interface between Competition Policy and Intellectual Property in the Context of the International Trading System*, (Journal of International Economic Law pp. 655-678, Oxford University Press, 1998), p. 662.

Thus, it is clarifying to turn to regional applications of competition policies, in order to exemplify concrete cases of interactions between competition rules and intellectual property rights laws.

#### 2.3.2 Regional influences

The interrelationship between competition policy and intellectual property rights is of growing interest in both the European Community and in the Unites States. Both of them have implemented some forms of guidelines or regulations regarding intellectual property rights and competition law.

#### 2.3.2.1 The European Union

The relevant provisions of the Treaty on the Functioning of the European Union (TFEU) concerning competition are those contained in Article 101 (ex Article 81 as ex Article 85) and Article 102 (ex Article 82 as ex Article 86).

Article 101 deals with restrictive practices between two or more independent entities, whether horizontal agreements (between parties operating at the same level of manufacturing and distribution chain) or vertical (between parties operating at different levels of manufacturing and distribution chain). In other words, Article 101 prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices, which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market. Article 101 also sets out five types of agreement affected by this provision, such as covering the price fixing, limitation of markets, sharing of markets, application of dissimilar conditions to equivalent transactions and making contracts subject to acceptance of unconnected obligations. However, an agreement which falls within this prohibition may be exempted for a limited period where it can be economically justified, meaning if it contributes to improving production, promoting technical or economic progress whilst allowing consumers a fair share of the resulting benefit.<sup>78</sup>

Coditel No.  $2^{79}$  is a particular ruling case of the European Court of Justice (ECJ), which has shown anti-competitive effects that can lead to market foreclosure. In this decision, a French rightholder gave a Belgian

<sup>&</sup>lt;sup>78</sup> Article 101, Consolidated Version of the Treaty on the Functioning of European Union, (Official Journal of the European Union, C115/49, 2008).

Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, 6 October [1982] E.C.R 3381, case no. 262/81.

Licensee (Cine Vog) the exclusive right to show a film in Belgium. Cine Vog sued Coditel for distributing the film by cable. The ECJ held that the mere fact that the proprietor of a film copyright has granted to a single licensee the exclusive right to exhibit a film in a Member State, for a specific period, is not itself sufficient to justify a finding that the contract breaches Article 85 (1). However, the exercise of rights in a film might "under economic or legal circumstances which have the effect of substantially restricting the distribution of films or distorting competition in the film market having regard to its special characteristics, fall within those prohibitions."

Further, Article 102 applies to the abusive activities of one or more undertakings occupying a dominant position on the market within EU (or a substantial part of it) insofar as it may affect trade between Member States. An abuse may in particular, consist in imposing unfair selling prices or other unfair trading positions, limiting production, etc., to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, and making conclusion of contracts subject to the acceptance of unconnected supplementary obligations. <sup>81</sup>

The first case in which the ECJ affirmed the application of Article 102 to copyright was the Magill case. 82 In the 1980s, three television broadcasters, including the BBC, operated in Ireland. Each company published a weekly guide of its own programs, the listings of which were covered by copyright. Each channel also licensed free of charge advance information about their programming schedule to newspapers. Magill, a publishing company, attempted to publish a magazine that contained the programs and schedules of all three channels. The television companies claimed that this was an infringement of their copyright and obtained an injunction preventing the publication. Magill took the case to the European Commission, which ruled that the refusal to license in this case amounted to abuse of a dominant position. The Commission ordered the three broadcasters to "[supply] third parties on request and on a nondiscriminatory basis with their individual advance weekly program listings and [permit] reproduction of those listings by such parties" (emphasis [added]). The Commission's decision was upheld by the Luxembourg Court of Justice in 1995. The court held that mere ownership of an intellectual property right did not confer a dominant position. However, the court found that the three television networks "had a de facto monopoly over the information used to compile listings for television programs, which put them in a position to

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<sup>&</sup>lt;sup>80</sup> *Ibid*, para. 17.

<sup>&</sup>lt;sup>81</sup> Article 102, Consolidated Version of the Treaty on the Functioning of European Union, (Official Journal of the European Union, C115/49, 2008).

<sup>&</sup>lt;sup>82</sup> Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. EC Commission, Magill TV Guide Ltd. and others intervening, 6 of April, [1995] C.ML.R. 718.

prevent effective competition on the market in weekly television guides." It added that there was no substitute for the information and that, by denying access to it, the broadcasters prevented the appearance of a new product, which they themselves did not offer and for which there was potential consumer demand. Since the Magill case the ECJ had stressed the fact that the decision was exceptional.

However, the Court turned to the principles established in Magill several years later, when it ruled in the IMS Health case. 83 The case was between competitions in collecting, processing and interpreting data about regional sales of pharmaceutical products in Germany. IMS Health were first in the market and structured their market report on divisions of German territory. The structure had become an industry standard and the pharmaceutical industry adjusted its marketing and electronic retrieval data in line with it. NDC Health entered the market with an alternative structure. It encountered the resistance of the pharmaceutical companies who were used to IMS's structure and did not want to change to another one. NDC then marketed reports on the basis of a structure very similar to IMS's. IMS was successful against NDC for copyright infringement before the German courts. NDC asked for a licence to use the structure of IMS but this was refused. NDC complained of this refusal to the European Commission which imposed a licence on IMS for the abuse of a dominant position, framing the decision within the Magill case conditions.

This showed that Magill is not regarded as an isolated case but is rather a decision which can sometimes impose significant limitations on copyright rightholders' control and discretion of its property.<sup>84</sup>

Both regulations show that it is not only the existence and enforcement of intellectual property rights, but also the ways in which they may be dealt with, which interfere with the free market competition philosophy of the European Community and the laws of the Member States. <sup>85</sup>

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<sup>&</sup>lt;sup>83</sup> IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG, 29 April 2004, ECR, case no. 418/01.

MacQueen, H.L., Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law, (2005) 2:4 SCRIPT ed. 466 <a href="http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/hlm.asp">http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/hlm.asp</a>, p. 459.

<sup>&</sup>lt;sup>85</sup> Colston, Catherine & Middleton, Kirsty, supra note 33, p 18.

#### 2.3.2.2 The United States

The relationship between intellectual property rights and competition law has long been studied in the United States as well, and the potential competition – inhibiting aspects of intellectual property rights have been an intermittent source of concern in government regulatory spheres over the last several decades. The rules of competition policy under the United State's law are provided under the label of antitrust law. The main act, which regulates competition in United States, is called the Sherman Act, which was passed in 1890 and is still in force today. Under the Sherman Act agreements in restraint of trade (section 1) and monopolization or an attempt to monopolize (section 2) are condemned as illegal.

Thus, section 1 of the Sherman Act states that every contract or combination in the form of trust or conspiracy in restraint of trade or commerce among the several States, or with a foreign nation, is declared to be illegal, while section 2 refers to 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.

The most highly publicized development is the prosecution of Microsoft by the U.S Department of Justice for allegedly violating the Sherman Act by abusing monopoly power (or dominant position) in the market for computer operating system. In 1998, under the Sherman Antitrust Act, the U.S Justice Department and twenty U.S individual states charged that Microsoft has waged an unlawful campaign in defense of its monopoly position in the market for operating systems designed to run on Intel-compatible personal computers ("PCs"). Specifically, the plaintiffs contend that Microsoft violated Section 2 of the Sherman Act by engaging in a series of exclusionary, anticompetitive, and predatory acts to maintain its monopoly power. They also asserted that Microsoft attempted, albeit unsuccessfully to date, to monopolize the Web browser market, likewise in violation of the same Section. Finally, they contended that certain steps taken by Microsoft as part of its campaign to protect its monopoly power, namely tying its browser to its operating system and entering into exclusive dealing arrangements, violated Section 1 of the Act. The Court concluded that Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market, both in violation of

<sup>&</sup>lt;sup>86</sup> Abbott, Frederick M., Cottier, Thomas & Gurry, Francis, *The international intellectual property system: commentary and materials*, (Kluwer Law International, Hague, 1999, Part Two), p. 1742.

Section 2. Microsoft also violated Section 1 of the Sherman Act by unlawfully tying its Web browser to its operating system. 87

However, *Microsoft* case is just one example of a broader inquiry into the relationship between intellectual property rights and competition law that illustrates some of the monopoly issues born under the intellectual property rights regulations.

### 2.4 Applying Competition Law to Copyright Protection

Copyright in many respects is a grant of a limited statutory monopoly. Due to this monopoly, the copyright's owner is possible to act in a way that may restrict competition in open markets, including in the market of ideas which in the end impose costs on the public which assists free flow of knowledge. Thus, courts started to rely on the guiding principles of competition law to force the sharing of copyrights' in particular cases. <sup>88</sup>

A copyright gives the owner the exclusive right to distribute the protected work. Consequently, a copyright owner may be able to command a higher price than it could have charged if the work were not copyrighted. In Attheraces Limited, Attheraces (UK) Limited v. The British Horseracing Board Limited, BHB Enterprises plc<sup>89</sup> the Court of Appeal considered whether the British Horseracing Board (BHB) was guilty of 'excessive pricing', and thereby abusing its dominant position, in relation with its charges for supplying pre-race data to horse - racing broadcaster, Attheraces. The BHB produces a database of pre-race data on UK race meetings highlighting names, venues, and dates of races, as well as distances of the races, criteria for eligibility to run and entry lists of runners and riders. This information was licensed to Attheraces Ltd (ATR), for use in their audiovisual coverage of races; in turn distributed to bookmakers. The dispute arose in the early part of 2004 following BHB's attempts to obtain additional fee income from the supply by ATR of the pre-race data to overseas users. BHB threatened to suspend supply of the data if ATR did not agree to its terms. The Court of Appeal held that there was an abuse and the pricing had been excessive since it bore no reasonable relationship with production costs, nor did it represent a reasonable return on investment.

<sup>88</sup> Our intention in the following paragraphs is to show a general picture of the copyright abuse in connection with competition law, with no intent to exhaust all the aspects within this relationship.

<sup>&</sup>lt;sup>87</sup> United States of America v Microsoft Corporation, 5 November 1999, TPJ, Civil Action No. 98 – 1232.

<sup>&</sup>lt;sup>89</sup> Attheraces Limited, Attheraces (UK) Limited v. The British Horseracing Board Limited, BHB Enterprises plc, 2 February [2007] EWCA Civ. 38.

Also, if demand for the copyrighted work is sufficiently great, the owner may be able to take advantage of the exclusive power to extract certain legal concessions from a licensee. Such an 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 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 might be deemed an unfair advantage. <sup>90</sup> The 'tying arrangement' as an exclusionary tactic was present in the *Télémarketing* case. 91 Telemarketing was a phonein marketing company providing phone lines and telephone operators to deal with responses to television advertisements. After working with Telemarketing for several years, the TV broadcasting company decided to enter the field itself and stopped supplying services to Telemarketing by the device of withholding advertising time from advertisers who did not make use of the telemarketing services of its own associated phone-in marketing company. The Court held that such a refusal was abusive where the dominant undertaking to enter a related market was accompanied by a practice, which tied the service in the second market to the indispensable service or good in the primary market.

Thus, the tying arrangements are abusive because they exclude competitors as well as limit the freedom of choice of consumers.

Collective societies are another example of cases where competition law can be used to limit the exclusive right of copyrights. Collective societies are bodies created by copyright law in order to administrate the rights of the authors and of owners of related rights. It is generally believed that if they where properly regulated, collective societies performs a function which is in the public interest. 92

However, collective societies gained extensive power over time, and now they have position of sole responsibility for the exercise of rights in particular areas and this enter into conflict with the laws of competition.

For example, a collective society might be a dominant undertaking, which exploit its copyright by a process of discriminatory licensing or by demanding unreasonably high royalties, which would be acting abusively under competition laws. Thus, in the *GEMA* cases<sup>93</sup>, GEMA held to occupy dominant position, and to have abused that position in discriminating between nationals of Member States, biding its members by obligations which were not objectively justified, applying certain conditions regarding

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<sup>90</sup> Cross, John T. and Yu, Peter K, supra note 22, p. 64.

<sup>&</sup>lt;sup>91</sup> Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), 3 October 1985, ECR, case 311/84.

<sup>&</sup>lt;sup>92</sup> Sterling, J.A.L, *supra* note 39, pp. 500-504.

<sup>93</sup> GEMA v. Commission [1971] ECR 791 case 45/71; [1979] ECR 3173, case 125/79.

publishers, applying royalties to unprotected works, and discriminating against foreign importers of tape machines.

Moreover, in Tournier, 94 Lucazeau 95 and Basset 96 the Court of Justice held that the French copyright – management agency practice of charging unreasonably high royalties for the public performances of recorded musical works by importers of sound recordings from other member states amounted to an abuse of a dominant position.

Although copyright provides owners with legal powerful rights, courts shall and use their prerogatives in order to limit exclusive rights. Competition law has the potential to limit owners' rights, especially in the cases where the rightholder ties to control the rights provided by copyright into a more powerful competitive position. The offer of an exclusive right to a copyright owner it entails no careful assessment of the balance between the exclusivity and the access. Thus, competition policies may contribute substantially to achieve efficiencies and ensuring public interest while enforcing copyright regulations.

Nonetheless, in the following we will conclude our Chapter by revealing the role of competition within copyright.

#### 2.5 The Role of Competition within **Copyright Protection**

The existence of intellectual property rights may enable those possessing the exclusive right to charge high prices or otherwise to limit competition, such as by controlling the use of the idea in subsequent products. 97 In the same time, competition policy consists in the measures employed to promote the efficient and competitive operation of markets and to remedy certain deficiencies or market failures that will otherwise arise in the operation of markets. These measures are limited but important degree of intervention to ensure the proper functioning of markets in the public interest and to minimize the scarcities or failures that can result from, among other things, abuses of a dominant position.

The role of competition law in the presence of copyright regime can be seen as countering the abuses of exclusive rights beyond the purpose that copyright protection intend to serve. Thus, using a balancing approach to the relationship between competition law and protection of copyright means that the competition rules are employed to reduce market concentration

<sup>94</sup> Ministere Public v. Tourinier , [1989] ECR 2521 Cases 110/88, 241/88, 242/88

 <sup>&</sup>lt;sup>95</sup> Lucazeau v. SACEM [1989] ECR 2811 Case 395/87
 <sup>96</sup> Basset v. SACEM [1987] ECR 1747 Case 402 / 85

<sup>&</sup>lt;sup>97</sup> Lemley, Mark A., *supra* note 67, p.10.

related with copyright protection and to ensure affordable and adequate availability of protected products.

The long-run benefits of competition law, such as diffusion of knowledge dwarf the benefits of the core of copyright, such as to promote creativity, dissemination and application of its results.

Therefore, well functioning markets are a consequence of competition policy, and these consequences may prove in connection with human rights. A reasons for this affirmation is the fact that well functioning markets are necessary to provide the resources that are required if human rights are to be meaningfully advanced and protected by societies and to promote development. In other words, the need for competition policy in human rights terms is necessary for the fulfillment of both civil and political rights and economic, social, and cultural rights.

#### **Conclusions**

In this Chapter, we argued that there are situations when courts can and must restrict a copyright owner to enforce its intellectual property rights. We developed our argument building on a combination of case law and regional and international legislation. We demonstrated that through creative but legally robust interpretation and analysis, restrictions can and must be imposed by courts on the conduct of the copyright owner and the scope of their rights.

The next Chapter introduces knowledge, human rights and competition, their relationship with copyright and the extent to which competition rules could apply and could be relevant in copyright excessive protection, as a resource for the realization and enjoyment of human rights. These norms could be employed to bind states to design an intellectual property system that strikes a balance between promoting general public interests in areas as health, culture, and education, whilst protecting the rights of the authors. <sup>98</sup>

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<sup>&</sup>lt;sup>98</sup> However, it have to be mentioned that when we speak about the interface human rights / copyright, the discussions expand the way in which human rights law may be applied horizontally, namely operating between private parties. This means that while human rights where generally conceived as protection of the individual against the state, recently, both doctrine and case law have gradually recognized that private relationships may be affected indirectly under a variety of legal theories. Thus, Germany and UK are the most known as developing an indirect horizontal effect of human rights application, and even though horizontal application *stricto sensu* is probably ruled out, in practice, human rights such as freedom of expression will play an important role in relationships ruled by private law.

# 3 Promoting Knowledge by Using Competition as a Limitation to Copyright for Human Rights in Knowledge Society

"Where is the knowledge we lost in information and where is the word we lost in words?"

T.S. Elliot

Intellectual property treats exclusions as natural and inevitable, instead of emphasizing access to maximize the values to be driven from knowledge. In other words, the monopoly that accompanies intellectual property rights makes it possible for copyright owner to maximize profits by offering knowledge goods at supra-competitive prices that exclude consumers who would have purchased or licensed the goods had they been offered in a competitive market. <sup>99</sup> Thus, copyright monopolies impose a social cost, by limiting the productive utilization of the knowledge good, which translates in the fact that individuals with greater financial means can afford knowledge goods whereas those with fewer economic resources cannot. This social cost is a central concern of human rights, which is concretely experienced as trade-offs between intellectual property protection and human rights such as health, education, equality, and freedom of expression. <sup>100</sup>

Therefore, while in intellectual property regime, most societal benefits accrue far in the future when knowledge goods enter the public domain and may be freely used by all, 101 competition policy properly designed and implemented, can be the flexible mechanism that mitigates the costs of this delay, by contributing to create space for access and dissemination of knowledge for the fulfillment of human rights.

<sup>&</sup>lt;sup>99</sup> Helfer, Laurence R. and Austin, Graeme W., *Human Rights and Intellectual Property: Mapping the Global Interface* (January 28, 2011). Cambridge University Press, 2011; p. 23.

Rizk, Nagla & Shaver, Lea (ed.) Access to Knowledge in Egypt. New Research in Intellectual Property, Innovation and Development (Bloomsbury Academic, London & New York, 2010), p. 3.

Helfer, Laurence R. and Austin, Graeme W., *supra* note 99, p. 23.

# 3.1 The Importance of Human Rights in Knowledge Society

What is the meaning of human rights in knowledge society? Is there a difference of addressing human rights in the context of knowledge society than the way they were expressed in 1948 UDHR, and in the two legally binding 1966 covenants, ICCPR and ICESCR?

The knowledge society stresses two main important changes, meaning that introduces a shift from infrastructure to info-structure and brings a human rights participatory role based on capabilities.

Thus, in knowledge society, the focus is shifted from infrastructure to people, shift which emerged the label of info-structure. Info-structure is a characteristic of knowledge society, due to the fact that it has knowledge as the main support to generate human capabilities, which further benefits to the society demand of constant transformation and reproduction, namely to its development. The knowledge society is about capabilities to identify, produce, process, transform, disseminate, and use information in order to build and apply knowledge for human rights. As it was acknowledged, the emerging knowledge societies means to include among the main constituent principles, the safeguarding and promotion of the rights and freedoms proclaimed by universally recognized international human rights instruments, <sup>102</sup> i.e. Universal Declaration of Human Rights (UDHR) <sup>103</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>104</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR). 105

Using rights language in knowledge society, it means to reaffirm human rights, with an inclusive role through the shift from infrastructure and growth of markets, toward issues such as human development, by using indicators as health, education, and livelihood; such as social and cultural development, using indicators as economic opportunities and employment, and cultural and linguistic diversity; and such as democracy, using

Universal Declaration of Human Rights, adopted 10 December 1948, G.A. Res. 217A (III), U.N. Doc.A/810 (1948).

Bindé, Jérôme, 'Towards Knowledge Socities: UNESCO world report', (Paris, UNESCO, 2005), p. 28.

<sup>&</sup>lt;sup>104</sup> International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

indicators as freedom of expression, access to knowledge and information, privacy protection and participation in decision-making. <sup>106</sup>

Moreover, it can be said that the UDHR offers a broader notion created around an ethical rights-based society, which focuses on the just distribution of material and non-material advantages. This is way, the Declaration seeks to guarantee everyone a dignified livelihood with opportunities for personal attainment, because human rights are not merely concerned with fighting for liberation from unjust regimes, rather they concern also the myriad everyday struggles to maintain a balance between the material and moral well-being of different individuals and groups within a society. This approach was perpetuated further in the ICCPR and the ICESCR.

Therefore, the importance of human rights in a knowledge society is emphasized when the freedom and well-being of individuals set on capabilities is well served and traditional 'core' human rights enjoy inherent inclusive participatory character. The importance of basic rights translates into particular focus on freedom of opinion and expressions as well as on freedom of information, <sup>109</sup> on the right to education and its corollary, free basic education and progress towards free access to other levels of education <sup>110</sup> and on the right "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." <sup>111</sup> In other words, rights with specific knowledge content are a precondition for the dynamic and the promotion of other economic, social, and cultural rights and for civil and political rights.

Nevertheless, when we speak about human rights in knowledge society, some questions arise which still include infrastructure, especially when we talk about inequalities in access and costs, and more generally questions around freedom and control <sup>112</sup>, such as who owns and controls the knowledge resources, who has resources to participate in the knowledge society or how are commercial or state interests balanced with public interest and the public domain of knowledge.

Therefore, when copyright's power has expanded to such an extreme degree that it has returned to its roots as a tool for restricting the flow of knowledge, <sup>113</sup> protection of human rights such as intellectual freedom,

<sup>&</sup>lt;sup>106</sup> Greenstein Ran and Esterhuysen, Anriette, 'The Right to Development in the Information Society', in Jørgensen, Rikke Frank (red.), *Human rights in the global information society*, (MIT Press, Cambridge, Mass., 2006), p. 293.

<sup>&</sup>lt;sup>107</sup> Graham Dutfield, Uma Suthersanen, *supra* note 45, p.215.

<sup>&</sup>lt;sup>108</sup> *Ibid*.

Article 19 of the UDHR.

<sup>&</sup>lt;sup>110</sup> Article 13 of the ICESCR; Article 26 of the UDHR.

<sup>&</sup>lt;sup>111</sup> Article 15 (1) of the ICESCR; Article 27 (1) of the UDHR.

<sup>&</sup>lt;sup>112</sup> Drake, William, J. and Jørgensen, Rikke Frank, 'Introduction' in Jørgensen, Rikke Frank, *supra* note 106, p. 32.

Gross, Robin, 'Intellectual Property Rights and the Information Commons', in Jørgensen, Rikke Frank, *supra* note 106, p. 109.

which encompasses freedom of thought and freedom of expression became of highest priority. All these rights are fundamental human rights that require access to ideas and knowledge in order to develop freely. <sup>114</sup> Thus, although access to knowledge itself is not a human right under the UDHR, the ICESCR or other major human rights treaties and documents, it is a premise that necessarily underlines various human rights.

Therefore, propertization, the public domain, and the scope of copyright are not issues that live isolated, and their implementation raise relevant questions, which intersect with human rights concerns. The utilitarian balancing act currently tends to favour intellectual property rightsholders and it does not easily allow for non-economic developmental considerations that are emphasized by human rights jurisprudence and norms, and that are socially beneficial objectives. 115 For this reason, scholars and policymakers started to advance alternatives that are more flexible in order to guide the discussions going forward from the interaction between intellectual property rights and human rights. We need to turn to the existing mechanisms in order to address the impact of expanding copyrights, which reaches the spectrum of existing fundamental legal rights, such as the right to information. Competition policy is an accessible in force instrument, which can help to dissemination of knowledge as a key factor for continued development and wealth on an individual and community level in a knowledge society.

# 3.2 Competition Policy Explained in Human Rights Terms

By now is beyond controversy that copyright regulations can indeed give rise to significant market power and that the exercise of such rights can conflict with the content and the objectives of competition law in a range of ways, elevating a barrier to the free flow of knowledge for the fulfillment of human rights. An obvious reason for this is the increased importance of knowledge as factor of production and strategic asset in copyright industries and in the world economy generally. 116

Bringing together copyright, competition, and human rights, asks for more, than analysing the theoretical legal matters that interact within these three disciplines. Thus,  $Magill\ TV^{117}$  is a reference when competition law

<sup>115</sup> Wong, Mary, W.S., *supra* note 34, p. 826.

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<sup>&</sup>lt;sup>114</sup> Gross, Robin, *supra* note 113, p. 118.

Anderson, Robert D. and Wager, Hannu, *Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy* (September 2006). Journal of International Economic Law, Vol. 9, Issue 3, 2006, p. 744.

<sup>117</sup> See Magill case, supra note 82.

applies to copyright protection that will help us to illustrate the human rights perspective, in this case for a refusal to license intellectual property rights, which constitute an abuse of a dominant position, in particular whether they impede the development of new products.

The right to information <sup>118</sup> is specific to *Magill* case. Lack of information denies people the opportunity to develop their potential to realize the full range of their human rights. Individual personality, political and social identity, and economic capability are all shaped by the information that is available to each person and to society at large. The practice of holding information away from the public and misuse information is an abuse of their rights.

The ECJ qualified the TV program listing as 'basic information' and then concluded that, because the broadcaster makes the program and it is the sole source of the listing, it also holds a monopolistic position in respect to the information. Therefore, due to one enterprise's domination of the market, it internalized the information needed by the entire market, so that its proprietary knowledge turns into knowledge affected by a public interest. Thus, the consumer and competitors have a relevant right to get access to information, which was stifled improperly by the copyright owner, by its refusal to license, which prevented on the one hand the appearance of a new product and excluded all competition on the market, and on the other hand barred the public of its own choice.

Further, the freedom of expression<sup>119</sup> is a fundamental right that draws on values of personal autonomy and democracy.<sup>120</sup> It is closely connected to freedom of thought and freedom of information and is a precondition for individuals' self-expression and self-fulfillment.<sup>121</sup>

In Ashdown v Telegraph Group<sup>122</sup> the UK Court of Appeal first stated that the flexibilities built into the copyright system, such as idea/expression dichotomy and fair dealing can mitigate the conflict between copyright and freedom of expression, but that there exist situations where this is not sufficient to protect freedom of expression, *i.e.* that there exist an external conflict. Thus, the Court allowed for the existence of situation where the existing copyright regime could violate human rights and would therefore have to be influenced by the human rights regime. As a result, even though

<sup>&</sup>lt;sup>118</sup> Protocol to ECHR, Article 2; ICESCR, Article 13; ADRDM, Article 12; Additional Protocol to ACHR, Article 13, UDHR, Article 26; and African Charter, Article 17.

<sup>&</sup>lt;sup>119</sup> Article 19 of ICCPR; Article 19 UDHR; Article 10 of ECHR; Article 13 of American Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights.

<sup>&</sup>lt;sup>120</sup>Cohen, Julie, E. 'Information rights and Intellectual Freedom', in Anton Vedder (ed.) *Ethics and the Internet*, 11-32 (Antwerp: Intersentia, 2001), p. 11.

<sup>&</sup>lt;sup>121</sup> Jørgensen, Rikke Frank, 'The Rights to Express Oneself and to Seek Information', in Jørgensen, Rikke Frank (red.), *Human rights in the global information society*, (MIT Press, Cambridge, Mass., 2006), p. 53.

<sup>&</sup>lt;sup>122</sup> Ashdown v Telegraph Group Ltd, 18 July, [2001] EWCA, Civ. 1142.

copyright and human rights share some common goals, there also exist situations where the copyrights protection of the author conflicts with the primacy principle of human rights.

Nonetheless, considering the relationship between copyright and freedom of expression, it drives to ask ourselves if all forms of expression are to be accorded the same protection when balanced against the more proprietarial aspects of copyright. It was argued that greater weight should be given to freedom of expression claims where there is no substitute for a work, <sup>123</sup> and in particular for those works that make a unique contribution to public understanding and debate. By this means, freedom of expression stresses principles familiar to competition law, such as substitutability and the availability of an alternative source of supply.

In *Magill*, the refusal to license intersects with the right to freedom of expression, defined in our case by the format of the new product. The work in question was unique and innovative, because of the comprehensive TV guide format in contrast with the weekly guides issued separately and it was much in demand also, because it was specific, constant, and regular from the part of consumers. All these elements suggest that there is an alternative of sharing information, which can make a valuable contribution to public understanding and debate, which implies a conflict between freedom of expression and copyright.

In the case, the Court also based its decision on the refusal to supply the program listing on the circumstance in which the refusal blocked the offer of a new product, *i.e.* weekly magazines with full coverage of all broadcasters, developed from the 'basic information', *i.e.* creation of a 'plus value', for which there is a demand. The new product would have been protected by copyright, protection that grants the right to property. Thus, the right to property might be invoked based on consumer and competitor's relevant right to enjoy his or her own property, which could be prevented by the property right of the copyright holder. However, the private rights of individuals have been afforded higher protection than commercial rights, as it was decided in *Campbell v MGN Limited* <sup>125</sup>, thus it can be argued that an individual's wish to educate themselves and others, or to develop their own

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<sup>&</sup>lt;sup>123</sup> Waelde, Charlotte and Brown, Abbe, E.L., 'A practical analysis of the human rights paradox in intellectual property law: Russian Roulette', in Grosheide, F. Willem (red.), *Intellectual property and human rights: a paradox*, (Edward Elgar, Cheltenham, 2010), p.201.

p.201. Leading that the European Convention's right to property (Article 1, Protocol 1) applies to copyright, for example in *Dima v Romania*, App. No. 58472 / 00 (2005) regarding copyrighted works for the designs for the national emblem of Romania (Case report available only in French).

<sup>125</sup> Campbell v Mirror Group Newspapers Ltd, [2004] UKHL 22, para 148; in this case the common law protection of confidential information was extended so that Naomi Campbell's Article 8 ECHR right to privacy could give her a remedy against the publication of surreptitiously taken photographs of her leaving a meeting of Narcotics Anonymous.

second generation of copyrighted products, should be a legitimate exercise of their human right to property. 126

Moreover, the freedom to build upon and create new works is increasingly and almost perpetually restricted under copyright existing law. This is why, when the European Commission and the judgment by the First Instance Court Chairman alike applied competition rules in the case concerning *Microsoft* <sup>127</sup>, it made it clear that the system of intellectual property protection must not interfere with the free and unobstructed access to knowledge. Access to knowledge within specific technology in this manner contributes to development of society and market competition. <sup>128</sup>

Therefore, while the need for competition policy is typically explained in economic or utilitarian terms, as we aimed to show, it can be also explained in human rights terms, particularly as being necessary for the achievement of economical, social, and cultural rights, as well as civil and political rights. In economic terms, competition policy is needed because in its absence, markets will be often subject to failures attributable to practices such as abuse of a dominant position. These practices diminish the welfare of citizens in their capacities as both consumers and producers. Thus, competition markets are necessary to provide resources, *i.e.* knowledge, for human rights to be tangibly advanced and protected. Recognition of the role of competition markets in development and as a vehicle for the exercise of individual choices, together with an effective public interest advocacy, is vital to ensure that the relevant rules and institutions are not captured by private interests. <sup>129</sup>

As Magill TV case showed, society has a strong interest to have access to information and this interest can be impeded by the private interest of the rightholder to enhance its exclusive right by giving it full control over the work and its use. However, as Paul Torremans noticed "it is not only passive access for society as a whole that is required" within copyright exclusivity. Each individual member of society also must have a right to access and the right to borrow in order to exercise its fundamental freedom to create in order in turn to be able to exercise his or her human right to benefit from copyright in his or her creative effort.

<sup>&</sup>lt;sup>126</sup> In *Sporrong and Lonnroth v Sweden*, Application no. 7151/75, 7152/75 [ECHR], 18 December 1984, the European Court of Human Rights decided that there is a need for "fair balance to be drawn between the fundamental right, the interest and welfare of the individual to own and enjoy property and the public interest."

<sup>&</sup>lt;sup>127</sup> Microsoft v Commission, Case T – 201 / 04 [2007] 5 CMLR (11)846.

<sup>&</sup>lt;sup>128</sup> Nawrot, Anna Maria, 'The Well-Being and the Knowledge Society', (Manuscript forthcoming), p. 10.

<sup>&</sup>lt;sup>129</sup> Anderson, Robert, D., *supra* note 77, p. 747.

Torremans, Paul, L.C., 'Copyright as a Human Right', in Torremans, Paul L. C. (red.), *Copyright and human rights: freedom of expression, intellectual property, privacy*, (Kluwer Law International, The Hague, 2004), p. 16.

Therefore, after states adjust the level of protection of the right to the protection of interests in copyright by striking the balance within competition and human rights arguments, they may be able to increase the resources available for the realization of other human rights. A reduction of copyright protection based on competition law principles would free up resources for the realization of human rights, as the right to education and the right to freedom of expression, in terms of copyright works.

## 3.3 The Significance of Competition for Human Rights in Knowledge Society

Intellectual property is a central asset in a knowledge based economy. As Audrey Chapman noted, "knowledge itself has been identified as a corporation's most valuable resource, the ultimate substitute for raw materials, labour, capital, and inputs. In the new global economy of ideas, ownership, control, and access to creative works and knowledge have considerable economic import, giving rise to fierce competition over intellectual and creative works." <sup>131</sup>

However, this perception of copyright laws of the way in which knowledge matters has effects beyond the domain of the economy. They also directly mediate human experience, well-being, and freedom. How Amy Kapczynski puts it, "the rules of copyright regulate who can speak and read, it shapes how we learn and think" because, for example, it affects the prices of textbooks and quality of the content. This is just one reason from a number of critiques on the impact of copyright systems on knowledge and culture due to its expansionist tendency.

The architecture of "one size fits all" system of international copyright regulations resulted in a very significant shift in its balance, away from the public interest and towards the monopolistic privileges of copyright holders.

The imbalance created within the knowledge economy environment, where copyright economics is used as a justification for converting the public character of knowledge in a private good with market potential, has a counter in the knowledge society contextualization. In the knowledge society, artistic and literary works provide the greatest social benefits of being widely diffused, because, if we analysis the present, we observe that humanity uses knowledge as a learning process. The welfare today of an individual, social group or a nation depends on the state of knowledge and

<sup>&</sup>lt;sup>131</sup> Chapman, A.R , *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science*, WIPO Panel Discussions on Intellectual Property and Human Rights (8 November 1998), p. 5.

<sup>&</sup>lt;sup>132</sup> Kapczynski, Amy, *supra* note 10, pp. 23-24.

access to opportunities to learn and apply practical knowledge. <sup>133</sup> Thus, the knowledge society became an essential framework of reflection in all societies. In the knowledge society, the role of public is bound to grow because of the social aspect of creativity. Therefore, enforcing strong copyright law leads to inefficient underutilization of copyrighted knowledge, which poses high costs on creativity, competition and to bases of the pyramid, the society.

A result of the current international copyright regime is the growing prices for consumers' products by copyright holders, by this way consumers' access being reduced. By giving the copyright holders the special privilege of monopoly rights, it prevents competition from other or potential producers, which again reflects on the expense of consumers. Because of the high prices, in many situations above the cost of production, most consumers do not afford them, thus artificially created prices are inappropriate for knowledge-based assets, which would block an important part of the knowledge society.

Hence, it is central that the extent of the copyright monopoly should be limited and balanced in order to ensure the optimal social benefit for diffusion, by means of competition law.

Moreover, there are discussions about the advantages of using competition norms to reframe the debates on the intellectual property protection as to shift struggles into new, potentially more friendly forums. <sup>134</sup> Sean Flynn noted that one benefit of effectively reframing an issue is that it may open the possibilities of action in new forums. <sup>135</sup> For us, the advantage of framing copyright as a monopoly regulation issue opens the potential for advocacy in competition law forums. As we have attempted to prove, these forums offer potential institutional advantages in cases where fundamental rights outcomes made place in competition cases.

Thus, using competition law as an instrumental factor may have tremendous potential to contribute to human prosperity, development and happiness.

However, no strategy is without risks, and using competition law to open access to copyright may bear significant risks. Many of the risks within the competition law strategies involve the fact that competition strategies can create legal precedents that will affect later cases. Furthermore, to not forget that competition law builds on a dominant model, which may prove a barrier to progressive use of the law if it is stuffed with conservative bureaucrats. <sup>136</sup>

<sup>&</sup>lt;sup>133</sup> Benkler, Yochai, *The Wealth of Networks. How Social Production Transforms Markets and Freedom*, (Yale University Press, New Haven & London, 2006), p. 142.

<sup>&</sup>lt;sup>134</sup> See in this sense Flynn, Sean, M., supra note 69, p. 453.

<sup>&</sup>lt;sup>135</sup> Flynn, Sean, M., *supra* note 69, p. 466.

<sup>&</sup>lt;sup>136</sup> Flynn, Sean, M. *supra* note 69, p. 470.

Nonetheless, arguments exist on the basis of the external balance in copyright, based on competition law and increased by the assistance of fundamental rights such as the freedom of information and the freedom of expression. All these human rights are of core importance in a knowledge society, since they catalyze the process of reflectivity, communication and dialogue.

#### **Conclusions**

This Chapter aspired to bring together three different legal concepts, meaning human rights, copyright and competition, which for the most, at the first sight, appears as an utopia or as a paradox. However, it was a reflective intention, in order to weight the possibility of building on competition law as a counter to the exclusivity that copyright promoted in the past years, for human rights. The desired outcome is to relax copyright regulations for the availability and accessibility of knowledge, knowledge which is recognized as a precondition for the fulfillment of economic, social, cultural and civil and political rights. We state that there is a worth to bring such a perspective which may prove valuable for policy making considerations if not for decisions in the courts as such.

### CONCLUSIONS

The present thesis aimed to reflect upon the possibility to 'walk' together knowledge, human rights, copyright and competition with focus on an image in which they are walking on the same side of the road, but in different tempo, whereas a balance is requested with respect for human rights. In other words, we attempted to identify the balance within copyright protection, which needs to be restored by using competition, to promote knowledge for the achievement of human rights, which are reaffirmed in the context of knowledge society.

At the beginning of the essay we distinguished between knowledge economy and knowledge society, and now we can say that knowledge is not an independent resource, knowledge is always about something, it is an indication, a designation of objects, which economics interpreted in its material value. However, knowledge exclusively depends on practice, and the practical proof of knowledge means that it needs to be embodied in the communicative process of society, and not into the suit of copyright regulation. The issues that we highlighted are not only related with whether copyright is 'property', rather with the fact that property right has been granted to balance the important need to give creators' incentives with the equally important need to assure access to creative work and with the fact that the property right that is copyright has become unbalanced. Due to the exclusivity that copyright wears, we should turn our faces to the practical 'dwarfs' that we can use, in order to climb the 'giants'.

Economic power and the attitudes of copyright owners are fundamental to what happens in practice, and competition policies, which can be applied to copyright, already proved results and can be fuelled by the increased value placed on human rights approaches. Such an inclusive approach is consistent with theories of law, which stems not only from court decisions and imposed legislation, but from the values of underlying society as well.

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