

1-1-2013

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Recommended Citation

Rose, Keith D. (2013) "Protection from the Protectors: Does the Competition Act Provide an Answer to the Misuse of Technological Protection Measures?," *Canadian Journal of Law and Technology*: Vol. 11 : No. 1 , Article 5.
Available at: <https://digitalcommons.schulichlaw.dal.ca/cjlt/vol11/iss1/5>

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Protection from the Protectors: Does the Competition Act Provide an Answer to the Misuse of Technological Protection Measures?

Keith D. Rose*

INTRODUCTION

Canada has recently joined the ranks of countries that provide legal protections for Technological Protection Measures (TPMs)¹ in its copyright law. Long-awaited by some, long-feared by others, this feature of the recent *Copyright Modernization Act (CMA)*² remains one of its most controversial elements.³ Supporters insist that such measures are necessary to defend innovative business models from the threat of pervasive infringement via online file-sharing. Detractors note that these measures often vest actual control over usage, not in the rights holder, but in the device manufacturer.⁴ The manufacturer could use this control for purposes that have little to do with restraining infringement of intellectual property rights.⁵ In-

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¹ These kinds of measures are frequently referred to as “Digital Rights Management” (DRM) schemes. This terminology is potentially problematic, because it can confuse two different types of schemes. International law distinguishes Technological Protection Measures, which are aimed at enforcing rights, from Rights Management Information (RMI), which is generally aimed at describing rights. See, e.g., *WIPO Copyright Treaty*, 20 December 1996, WIPO Publication No 226 (entered into force 6 March 2002) [*WCT*]. RMI generally has no anticompetitive implication. This article adopts the more precise international terminology to preserve that distinction.

² S.C. 2012, c. 20 [*CMA*].

³ See, e.g., Christine Dobby, “Canada’s copyright overhaul and the digital locks controversy”, *Financial Post* (29 September 2011) online: <http://business.financialpost.com/2011/09/29/canadas-copyright-conundrum-and-the-digital-locks-controversy/>.

⁴ See, e.g., Lydia Pallas Loren, “Technological Protections in Copyright Law — Is More Legal Protection Needed?” (2002) 16:2 *Int’l Rev L Comp & Tech* 133; see also Russell McOrmond, *infra* note 8 and accompanying text and Ian Kerr, “Digital Locks and the Automation of Virtue” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 247 at 267–275.

⁵ See, e.g., Michael Geist, “Anti-circumvention Legislation and Competition Policy: Defining a Canadian Way?” in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 211 at 245.

stead, a vendor could use the ability to restrict the use of unauthorized content to promote a vertically-integrated supply chain, potentially locking out competing suppliers.

The argument that such controls raise inherent competition law problems was explicitly addressed to the Legislative Committee on Bill C-32, a predecessor of the current *CMA*. Russell McOrmond used the example of the content scrambling system (CSS) for Digital Versatile Discs (DVDs) to illustrate how TPMs do not reside in the content which is subject to copyright, but rather in the hardware and software that is used to interact with that content.

CSS is an encryption scheme for DVD content. In order to encode or play back CSS-encoded content, a device manufacturer must first obtain a suitable cryptographic key. These keys are exclusively licensed by the DVD Copy Control Association (DVD CCA), a consortium of content providers, consumer electronics manufacturers, and computer hardware and software vendors.⁶ As a result, this organization has the ability to impose contractual limits on the ability to encode or play back CSS-compliant content, which includes essentially all commercial DVDs.⁷ In effect, only approved players can play the encoded content, and a group of nominal competitors controls access to the necessary authorization.

McOrmond suggested that this linkage of authorized content and devices may fall within the definition of tied selling:

If you are a competitor of the members of the DVD CCA, or for any reason cannot sign on to their contractual obligations, you will not receive the keys to encode your own content or decode content. It should be reviewed by the Competition Bureau to determine whether such contractual obligations should be allowed. Tying the ability to access content encoded with DVD CCA keys requiring a DVD CCA-approved access device seems like a textbook example of “tied selling” under section 77 of the *Competition Act*.⁸

This article attempts to assess this claim. Specifically, it asks whether Part VIII of the *Competition Act*⁹ is capable of addressing these concerns, while permitting the potential benefits that rights holders seek. The argument proceeds in two parts.

First, the analysis is contextualized by examining how challenges to the anticompetitive effects of TPMs have been treated in other jurisdictions. Although the details vary, the fundamental themes and issues of competition law tend to be similar around the world. Useful insights can be drawn from a comparative review of the global jurisprudence.

⁶ US, Department of Justice, Antitrust Division, “Notice Pursuant to the *National Cooperative Research and Production Act of 1993*; DVD Copy Control Association (‘DVD CCA’)” (3 August 2001) 66:150 Federal Register 40727 [US Dept of Justice, “Notice”].

⁷ There are a few exceptions. For example, *Revolution OS*, a film about the Linux operating system, is commercially available in a CSS-free DVD format; see *Revolution OS*, online: Revolution OS Store <<http://www.revolution-os.com/store1.html>>.

⁸ Legislative Committee on Bill C-32, 3d Sess, 40th Parl, *Evidence*, Meeting 17 (8 March 2011) at 4-5 (testimony of Russell McOrmond).

⁹ R.S.C., 1985, c. C-34 [*Competition Act*].

Then, the analysis turns to two key sections of the *Canadian Act*. Sections 77 (Tied Selling) and 79 (Abuse of Dominant Position) may each potentially apply to the conduct of concern. These sections will be examined by testing them against the Apple iTunes ecosystem. A single vendor example will be easier to analyze than an alleged conspiracy. Moreover, the case represents a high-water mark in that Apple has a dominant position in both the content and the device businesses. If the *Competition Act* can restrain the anticompetitive exclusionary effect of TPMs in general, these facts should provide a suitable test case.

I. LEGAL TREATMENT OF ANTICOMPETITIVE ABUSE OF TPMS AROUND THE WORLD

(a) United States

(i) *RealNetworks, Inc. v. DVD Copy Control Association, Inc.*

The first case of interest concerns the very subject matter that McOrmond raised: the exclusive licensing practices of the DVD CCA. On September 8, 2008, RealNetworks (Real), an early leader in streaming media technologies, announced a new product called RealDVD. This was a software application designed to allow consumers to copy the content of encrypted DVDs to PCs or portable hard drives so that it could be played back without the original discs.¹⁰ Real had delayed the product launch because of on-going discussions with the motion picture studios, who were concerned about the potential ability to copy discs the consumer did not own. Those negotiations were unsuccessful.

On September 30, 2008, Real launched both the product and a lawsuit against the studios and the DVD CCA seeking a declaration that the product did not violate either US copyright law or Real's CSS license agreement. The studios counter-claimed and obtained a preliminary injunction blocking Real from manufacturing, distributing, or otherwise trafficking in the product. After the preliminary injunction hearings, but before the order issued, Real amended its complaint to include antitrust claims under both federal and state law, essentially arguing that the DVD CCA itself was an illegal cartel.¹¹

The studios and DVD CCA succeeded on a motion to dismiss these claims. Real had no standing to pursue antitrust relief because the only harm it alleged, the inability to market its product, resulted from the injunction against it and not from the alleged cartel agreement. Strictly, the decision was based on deficiencies of the pleadings. But Patel J. also denied leave to amend the pleadings on the grounds that it would be an exercise in futility; the complaints could not possibly succeed.¹²

Patel J. noted two fatal problems. First, at the preliminary injunction stage, she had concluded that the studios were likely to prevail on their claims that Real's

¹⁰ RealNetworks, "RealNetworks Introduces RealDVD: The Best Way to Watch DVDs" (8 September 2008), online: RealNetworks <http://www.realnworks.com/pressroom/releases/2008/090808_realdvd.aspx>.

¹¹ *Opinion Re: Motions to Dismiss Plaintiffs'/Counter-Defendants' Antitrust Counter-claims* at 2–4, *RealNetworks, Inc. v. DVD Copy Control Association, Inc.*, (No. 3:08-CV-04548), ECF No. 484, 641 F. Supp. 2d 913 (N.D. Cal., 2009) [*RealAT*].

¹² *Ibid.* at 12.

product was illegal under the anti-circumvention provisions of the *Digital Millennium Copyright Act*.¹³ These claims included circumvention of TPMs that were not covered by the CSS license agreement. So, even if Real had the right to bypass CSS, the injunction would most likely have been issued anyway.¹⁴ Second, and more significantly for this analysis, Real had not alleged that the studios refused to license their content outside of the supposed cartel. If either Real or consumers could obtain the content free of CSS encryption, then a refusal to license CSS decryption would be no barrier to entry to the market for management and playback of digital media files.¹⁵

This analysis rests entirely on Real's situation and conduct. It does not consider the conduct of the DVD CCA at all, nor does it deal with the merits of the claim that there is an anticompetitive cartel. In the wake of this decision, and based on a thorough review of the facts on record in the case, Turetzky argued that a full Rule of Reason analysis leads to the conclusion that there is such a cartel.¹⁶

The Rule of Reason involves a four-stage inquiry into: 1) the specific restraint; 2) its anticompetitive effects; 3) any countervailing pro-competitive effects; and 4) whether the parties have market power. The core of the analysis is the balancing of pro- and anticompetitive effects to determine whether an impugned practice is reasonable. At the risk of oversimplifying Turetzky's analysis, his basic argument was that the practice is unreasonable because it is more restrictive than would be necessary to protect the legitimate interests of the rights holders. In particular, Turetzky drew an analogy to the studios' former practice of tying access to high demand works to contracts for lower demand works, which had been ruled to violate the *Sherman Act*.¹⁷ The US Supreme Court asserted that copyright law did not include a right to extend the statutory monopoly to anticompetitive ends.¹⁸

Turetzky argued that the relevant market for the analysis was CSS-encrypted DVD content, not digital video generally.¹⁹ In fact, this would seem to be the pivotal issue. If there is a distinct market for CSS-encrypted content, it would be impossible to argue that the DVD CCA does not control access to it. Developing, promoting, and licensing CSS technology is the entire purpose of the organization.²⁰ Access to that technology is expressly contingent on acceptance of the terms imposed by the cartel, which are not subject to negotiation and which can only be modified with the unanimous consent of all members.²¹

¹³ 17 U.S.C. s. 1201–1205 [DMCA].

¹⁴ *RealAT*, *supra* note 11 at 8.

¹⁵ *Ibid.* at 8.

¹⁶ Matthew W Turetzky, "Comment: DVD Copy Protection Rules Violate The *Sherman Act*" (2010-2011) 11 Wake Forest Journal of Business and Intellectual Property Law 103.

¹⁷ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948); *Sherman Antitrust Act*, 15 USC ss. 1–7 [*Sherman Act*].

¹⁸ *RealAT*, *ibid.* at 158; *supra* note 11 and accompanying text.

¹⁹ Turetzky, *supra* note 16 at 122, 144 and note 244.

²⁰ *Ibid.* at para. 7; see also US Dept of Justice, "Notice", *supra* note 6.

²¹ Turetzky, *supra* note 16 at 116.

If, however, the relevant market is broader than that, this may not be conclusive. Patel J. did not make any formal determination of what the relevant product market was; she relied on Real's pleadings. As noted above, however, she seemed to favour the broader view. In a more complete analysis, one might still have to determine whether the DVD CCA held market power in the broader market.

A reasonable *prima facie* argument can be made that it did, at least at the time. While the higher-resolution Blu-Ray format is gaining in popularity, in 2011 DVDs still accounted for 75–80 percent of the US disc-based market by unit sales.²² This is down from 90 percent or more in 2008.²³ On a revenue basis, DVD sales accounted for 44 percent of the total US video market in 2010, with combined rental revenues totalling 35 percent, Blu-Ray sales accounting for about 8 percent, and digital downloads and Video On Demand services another 13 percent.²⁴ If short-term rentals are excluded, that would translate to roughly a 2/3 share of the sales market by revenue for DVDs.²⁵ It may, however, be reasonable to conclude that rentals are a substitute for sales of media products and they should, therefore, be considered in the same market. In any case, DVDs presumably account for a comparable proportion of the rental market.

On any view it seems that DVDs account for a dominant share of the market, but it also seems that the DVD share of the broader market is declining. It may be open to question whether the DVD CCA has market power. If nothing else, the presence of alternative formats and business models convinced Patel J. that the rights holders had not entirely ruled out the possibility of licensing their content outside of the DVD CCA “cartel.” Entry into the broader market remained possible.²⁶

In fact, Real tried and failed to reach independent license agreements with at least some of the studios.²⁷ The studios may only be willing to entertain certain *kinds* of offers and not others. One might be able to argue that the CSS license is

²² See, e.g., Blu-RayStats.com, which approximates US market share based on the top 20 best-selling titles in a week, online: Blu-RayStats.com <<http://www.bluraystats.com/MarketShare/index.php>>.

²³ See Dave Cowl, “Market Share Blu-ray vs DVD, Week Ending June 7th” (13 June 2008), online: Format War Central <<http://formatwarcentral.com/2008/06/13/market-share-blu-ray-vs-dvd-week-ending-june-7th/>>; see also Geoff Duncan, “Blu-ray Market Share . . . Drops?” (24 September 2008), online: Digital Trends <<http://www.digitaltrends.com/home-theater/blu-ray-market-sharedrops/>>.

²⁴ Associated Press, “US home video revenue down; DVD sales off 16.5 pct” (23 October 2010), online: Washington Times <<http://www.washingtontimes.com>>.

²⁵ That would actually be an underestimate as it would include Video on Demand services, which are not sales. Netflix, which operates on a subscription basis, currently accounts for over 60 percent of the pure digital download market. The industry views digital video as a single market, combining subscription-based services like Netflix with title-based services like Apple's iTunes. See, e.g., Zak Stambor, “Netflix dominates digital video retailing” (15 March 2011), online: Internet Retailer <<http://www.internetretailer.com/2011/03/15/netflix-dominates-digital-video-retailing>>.

²⁶ *RealAT*, *supra* note 11 at 8.

²⁷ *Ibid.* at 11.

really just one element of a broader anticompetitive practice, though such an argument would be outside of the scope of a discussion of the role of TPMs.

It is important to note, however, that the general purpose of competition law is to ensure the proper functioning of markets, not to guarantee that would-be competitors can obtain terms of their choosing. Real's failure to obtain consent for its proposals may not be cognizable as a competition problem.

(ii) *Tucker v. Apple Computer, Inc.*

One of the lessons to be drawn from the *RealNetworks* case is that who the plaintiff is matters. While Real's complaint against the DVD CCA was dismissed for lack of standing, Melanie Tucker's antitrust complaint against Apple for unlawful tying and attempted monopolization initially survived a motion to dismiss.²⁸ Ms. Tucker brought her complaint as a consumer who had purchased both an iPod music player and music files from Apple. She alleged that Apple deliberately made its iPod hardware incompatible with music, and its music files incompatible with hardware, supplied by other vendors. She further alleged that, as a result, Apple was able to charge a "supracompetitive price" and that its practices "[deterred] consumers from even considering doing business with its competitors' music and video stores, allowing it to monopolize these markets."²⁹

Tucker pled a *per se* illegal tying arrangement under section 1 of the *Sherman Act*. Ware J. set out the required elements as follows:

To establish that a tying arrangement is *per se* illegal, a plaintiff must prove (1) a tie between two separate products or services sold in separate markets; (2) sufficient economic power in the tying product market to affect the tied market; and (3) an effect on a substantial volume of commerce in the tied product market. Implicit in these elements is the need of the seller of the tying product "to force the buyer into the purchase of the tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms."³⁰

Tucker had alleged facts sufficient, if proven, to establish all three elements.

Significantly, Ware J. held that there was no need for Tucker to demonstrate that Apple coerced her to buy anything. All that was required was "use by the seller of its 'leverage' to force a purchaser to do something that he would not do in a competitive market."³¹ Tucker's allegation that the technical limitations Apple deliberately imposed on its iPods forced consumers to obtain their music from Apple's iTunes store was enough for the complaint to survive the motion to dismiss.

Apple argued there was no tie because consumers could (and some did) buy the devices without buying any media files, or vice versa. Ware J. considered this

²⁸ *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d. 1090 (N.D. Cal., 2006) [*Tucker*].

²⁹ *Ibid.* at 1095.

³⁰ *Ibid.* at 1096 [citations omitted]; *Sherman Act*, *supra* note 17.

³¹ *Murphy v. Business Cards Tomorrow, Inc.*, 854 F. 2d. 1202 at 1204 (9th Cir., 1988), quoting *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 14 N. 20, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (U.S. Sup. Ct., 1984).

irrelevant. Citing *Eastman Kodak Co. v. Image Tech. Servs.*,³² he stated that the mere fact that some consumers might choose to buy the products separately was no barrier to a tying claim.³³

Apple also argued that the complaint amounted to a demand that Apple deal with a competitor, which was subject to the analysis set out in *Verizon Communications, Inc. v. Trinko*.³⁴ In that case the US Supreme Court recognized a qualified right for companies to refuse to deal with their competitors. The dividing line was motivation: if the refusal to deal was intended to exclude competition, rather than to achieve some legitimate business goal, it would violate the *Sherman Act*.³⁵

The plaintiff had alleged that Apple had made a deliberate decision to make its products incompatible with those of its competitors. In Ware J.'s view, this amounted to an allegation that Apple had deliberately chosen to forego potential sales. The plaintiff had further alleged that, by doing so, Apple was able to maintain its prices above competitive levels and deterred consumers from dealing with its competitors. Ware J. held that these facts were sufficient, if proven, to establish that Apple had acted with an anticompetitive intention. The potential business justifications that Apple had raised were questions of fact that were not appropriate for resolution at the motion to dismiss stage.³⁶

The Tucker action was later consolidated into a class action and, although some of the claims were certified, the court decided *sua sponte* to reconsider whether the tying claim was cognizable. In May 2009, Ware J. dismissed the *per se* tying claim. After reviewing the case law on “technological ties,” he concluded that a technological interrelationship between products, without more, was not enough to establish *per se* unlawful tying.³⁷ A technological tie could potentially be unlawful if the seller’s dominant purpose was to compel purchase of an entire package, but consumers were free to purchase iPods separately from iTunes music. In effect, Ware J. held that for the tie to be *per se* unlawful the consumer would have to be deprived of any reasonable option to obtain the products separately.³⁸ The plaintiffs had not pleaded any such deprivation. On the contrary, they admitted the devices and music files were available separately.

Five months later, Ware J. also dismissed the tying claim based on the Rule of Reason, for similar reasons. It was not enough to allege that the products were less useful if they were not used together. Both the music and the devices were available separately and each could be used without the other. “The increased convenience of using the two products together due to technological compatibility does

³² 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992).

³³ Tucker, *supra* note 28 at 1098.

³⁴ 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

³⁵ *Ibid.* at 409; see also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 at 604–609, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985); *Sherman Act*, *supra* note 17.

³⁶ Tucker, *supra* note 28 at 1101.

³⁷ *The Apple iPod iTunes Antitrust Litigation*, (No. C 05-00037), Doc. 213 at 7 (N.D. Cal., 2009).

³⁸ *Ibid.* at 8.

not constitute anticompetitive conduct under either *per se* or rule of reason analysis.”³⁹

But the monopolization claim under section 2 of the *Sherman Act* survived a second motion to dismiss in 2010, based on the same argument.⁴⁰ The pleadings included allegations that Apple had intentionally modified its software to prevent music purchased from a rival music store from being playable on Apple’s devices and to prevent music purchased from the iTunes Store from being played on competitors’ devices. These claims were independent of any technological inter-relationship between Apple’s products and were distinct from the tying claim.⁴¹

As of this writing, the action is in discovery.⁴² There has not yet been any trial on the merits.

(b) France

(i) Competition Council review of Apple’s refusal to license FairPlay (2004)

The French Competition Council⁴³ addressed a very similar complaint in 2004.⁴⁴ VirginMega,⁴⁵ an online music retailer based in France, used Microsoft’s Windows Media DRM system, which is not supported by Apple’s portable devices. VirginMega wished to license Apple’s proprietary FairPlay system so that it could make its offerings compatible with Apple devices; Apple refused. VirginMega brought an abuse of dominance complaint under Article L-420.2 of the *French Commercial Code* and Article 82 of the EC Treaty (now Article 102 of the Treaty of the Functioning of the European Union).⁴⁶ On a preliminary review, the Council

³⁹ *The Apple iPod iTunes Antitrust Litigation*, (No. C 05-00037), Doc. 274 at 9 (N.D. Cal., 2009).

⁴⁰ *Sherman Act*, *supra* note 17.

⁴¹ *The Apple iPod iTunes Antitrust Litigation*, (No. C 05-00037), *Somers v. Apple*, (No. C 07-06507) Doc. 377 at 5–7 (N.D. Cal., 2010).

⁴² *The Apple iPod iTunes Antitrust Litigation*, (No. C 05-00037) Doc. 719, Joint Case Management Statement (N.D. Cal., 2012).

⁴³ The Council, officially known as *Le Conseil de la concurrence*, was subsequently replaced by *L’Autorité de la concurrence*, as a result of a substantial restructuring of French competition law.

⁴⁴ France, Conseil de la concurrence, “Décision n° 04-D-54 du 9 novembre 2004 relative à des pratiques mises en oeuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques.”, (9 November 2004) online: Autorité de la concurrence, <<http://www.autoritedelaconcurrence.fr/pdf/avis/04d54.pdf>> [VirginMega]. An English language summary of the decision is available in the Authority’s Press Release; see online: Autorité de la concurrence, <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=134&id_article=356>.

⁴⁵ Although VirginMega shares branding with the UK Virgin Group, it is an unrelated corporate entity. At the relevant time it was a wholly-owned subsidiary of the Lagardère Group, which is itself a French-based multinational conglomerate. See *VirginMega*, *supra* note 44 at para. 4.

⁴⁶ *Ibid.* at para. 8.

rejected the complaint for lack of evidence.⁴⁷ The analysis that it relied on to come to this conclusion is instructive.

The Council considered three possible product markets that might have been relevant: a market in TPMs themselves, a market in portable music players, and a market in paid music downloads.

The Council dispensed with the TPM market relatively quickly. The Council considered that this market consisted of three main products: Apple's FairPlay, Microsoft's Windows Media DRM, and Sony's OpenMG.⁴⁸ The European Commission, in the context of a merger review, had previously concluded that Microsoft was the market leader. Although the Council noted that this was a rapidly evolving market driven by technological innovation that was difficult to predict, it assumed that in a three-way market that Apple did not lead, Apple could not have market power.⁴⁹

The analysis of the portable music player market was more elaborate. The main question was whether larger capacity hard-drive-based players should be grouped with smaller capacity flash-memory-based players. The Council found that over the twelve preceding months, Apple's market share on a dollar value basis was 25 percent if all players were considered, rising to 53 percent if only hard-drive-based players were considered.⁵⁰ But the Council noted that this was an emerging market, which was changing rapidly. In the circumstances, market share alone was not a sufficient indicator of potential market power. Other criteria needed to be considered as well.

The Council cited survey data indicating that consumer preferences rated basic characteristics like rechargeable batteries, physical size, and the ability to connect to a computer to be far more important than compatibility with any particular music format. Only 1 percent of consumers rated compatibility with Apple's AAC codec as the most important feature of a music player.⁵¹ Moreover, rival products from at least seven other manufacturers were credible alternatives to the iPod. In response to this competition, Apple had recently reduced the prices of all iPods by 25 percent. The Council's view was that this indicated a vigorously competitive market, characterized by rapid technological innovation originating from multiple entrants.⁵² That said, the question on the preliminary review was whether the evidence excluded any possibility that Apple had market power in the portable music player market. On balance, the Council considered that it did not.⁵³

The music download market, within France, received the most analysis. The Council identified six principal actors. Apple's market share, by volume, had been estimated to be as high as 75 percent, but the Council noted that in a nascent mar-

⁴⁷ *Ibid.* at para. 105.

⁴⁸ *Ibid.* at para. 14.

⁴⁹ *Ibid.* at para. 40.

⁵⁰ *Ibid.* at para. 41.

⁵¹ *Ibid.* at para. 44.

⁵² *Ibid.* at para. 50.

⁵³ *Ibid.* at para. 51.

ket, there was very little track record. Moreover, the total market size was growing quickly, so positions could easily change.⁵⁴

Apple had a first-mover advantage, but multiple competitors had subsequently entered the market. Entry costs were relatively high; most competitors had reportedly invested tens of millions of euros in establishing their platforms. But the Council thought that this cost should be assessed in relation to the scale of the competitors, who were large multinational corporations. Furthermore, there were many other potential entrants, including some who were actively pursuing the same business in nearby geographic markets. Media companies like MTV, software companies like RealNetworks, Internet Service Providers like AOL, and retailers like Wal-Mart were all potential entrants that had made some forays into the music download business.⁵⁵ Finally, the Council noted that there was an alternative to the paid download model. Subscription-based services were growing more quickly than paid downloads and were forecast to potentially surpass them on a revenue basis by 2008.⁵⁶

These factors combined to cast significant doubt on Apple's market power. The Council again seemed inclined to view the market as vigorous and thriving. Apple did have some significant advantages, but so did its competitors. In particular, VirginMega could draw on its synergy with a major retail operation and its knowledge of local market conditions, which Apple lacked.⁵⁷ But, again, the Council concluded that the evidence did not negate the possibility that Apple had market power.⁵⁸

The pivotal question, in the Council's view, was whether Apple's refusal to license FairPlay denied the complainant access to an essential input. The Council concluded that it did not, for three principal reasons. First, the complainant's offerings were useful to consumers even if they could not be played on Apple's devices. The evidence on record was that the majority of consumers played their downloaded music on computers. One survey indicated that only 15 percent of respondents who downloaded music at least once a month transferred it to *any* portable device.⁵⁹ Apple's refusal to license FairPlay was no barrier to playing the complainant's music on computers.

Second, it was possible to load the complainant's music on Apple's devices via the simple expedient of burning the music to a CD and then re-encoding it as an unprotected MP3 file. The Council asserted this was legal, even though it would seem to run contrary to at least the spirit of legal protections for TPMs. At the time of the decision, however, France had not enacted legislation implementing those

⁵⁴ *Ibid.* at para. 53.

⁵⁵ *Ibid.* at paras. 57–61.

⁵⁶ *Ibid.* at para. 62.

⁵⁷ *Ibid.* at para. 63.

⁵⁸ *Ibid.* at para. 64.

⁵⁹ *Ibid.* at para. 78.

protections.⁶⁰ The Council's attention was on the terms of the relevant consumer agreements, not copyright law or international obligations.

Nonetheless, this argument is not entirely satisfying. If selling music free of TPMs was acceptable to VirginMega, presumably it would simply have chosen that option in the first place. This would clearly have been more convenient and, therefore, should have been an attractive option to consumers. VirginMega's agreements with the rights holders probably prohibited it from selling music without acceptable TPMs in place.⁶¹ Surely sustainable competition cannot be founded on the technical possibility that consumers could convert VirginMega's product into a different one which it did not wish to, and may have been legally unable to, offer. Such an argument effectively expands the product market to include potentially unlawful copies. It seems untenable to suggest that the answer to anticompetitive behaviour by a dominant player is competition by unlawful means.

The Council's third line of reasoning was perhaps more compelling: FairPlay, or even compatibility with iPods, was not the reason for Apple's success in the music market. There was, therefore, no causal link between Apple's market position and the allegedly abusive behaviour. The Council highlighted multiple distinguishing factors including price, catalogue size, terms, and promotional activities which may have made the iTunes music store more attractive to consumers than VirginMega's platform.⁶² Given the consumer preference data, the Council put relatively little weight on Apple's tight integration between its online store and its devices as an explanation for its success in the music market. Thus compatibility with iPods could not be considered essential, especially given the large number of alternative devices which supported the format VirginMega used. VirginMega could compete with Apple on other factors that were more important to consumers.

Moreover, the Council also considered Apple's evidence that it had legitimate business reasons for not wanting to license the FairPlay technology. Apple's contracts with the major record labels imposed obligations on it to maintain the effectiveness of the TPM. Apple maintained that licensing FairPlay to third parties would undermine its control of the technology, making the TPM more vulnerable to penetration and increasing its costs to rectify any breach.⁶³

Three elements had to be established to make out abuse of dominance based on deprivation of an essential input: there had to be no actual or plausible substitute for the input, there had to be a demonstrated risk of complete elimination of compe-

⁶⁰ This law was not enacted until 1 August 2006. See *Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information*, J.O., 3 August 2006, 11529 [Dadvsj].

⁶¹ The Council did not discuss VirginMega's agreements with record labels, but it seems reasonable to expect that they would have been substantially similar to Apple's agreements with the same rights holders. Not only did Apple's agreements at the time require the music files to be protected by TPMs but, if that protection was breached, the rights holders had the right to withdraw their entire catalogues from the iTunes music store if the breach could not be rectified within a few weeks. See *VirginMega*, *supra* note 44 at paras. 93-94; see also Steve Jobs, "Thoughts on Music" (6 February 2007), online: Apple <<http://www.apple.com/fr/hotnews/thoughtsonmusic/>>.

⁶² *VirginMega*, *supra* note 44, at paras. 90-92.

⁶³ *Ibid.* at paras. 93-94.

tion, and there had to be a causal connection between the dominant position and the allegedly abusive conduct.⁶⁴ The Council concluded the evidence on the record could not establish any of the three. The complaint had no prospect of success.

(ii) *Sony v. UFC-Que Choisir*

Somewhat similar facts, argued by different parties on a different legal theory, led to quite different results in the following year. In 2005, L'Association Union Fédérale des Consommateurs — Que Choisir (UFC-Que Choisir), a federation of consumer groups, brought an action in France against Sony France and Sony UK Ltd.⁶⁵ The complaint alleged the music files supplied by the Sony Connect Music Store, operated by Sony UK Ltd., were not playable on portable music devices other than the ones sold by Sony France. Sony had developed a proprietary music format, called ATRAC, which was designed with the specific goal of efficient hardware implementation.⁶⁶ It also offered an associated “copyright management, protection, and online distribution technology,” called OpenMG.⁶⁷ The Connect Music Store only offered content in these proprietary formats, which were not supported by non-Sony music players. Similarly, the portable devices sold by Sony France were allegedly unable to play music files acquired from other legal download sites.⁶⁸ In a 2006 decision, the Court of First Instance found Sony liable for both misleading practices and tied selling.⁶⁹

The statutory provisions at play in the case reside in the *French Consumer Code*.⁷⁰ Significantly, they do not involve any element relating to restraint of competition. But otherwise they are comparable to the practices of Deceptive Marketing and Tied Selling as defined in the *Competition Act*.⁷¹

The heart of the misleading practices complaint was that Sony had not clearly informed consumers of the limitations of both the devices and the music files. The court first considered and rejected an argument that the *Consumer Code* did not apply to intangibles on the basis that the contract was for a service rather than an abstract license to an intellectual property right. It then proceeded to carefully parse

⁶⁴ *Ibid.* at para. 96.

⁶⁵ Tribunal de grande instance de Nanterre, (15 December 2000) *Sony v. UFC — Que Choisir*, online: Juriscom.net <<http://www.juriscom.net/>> [*QueChoisir*]; for an English summary of the decision, see Bradley L Joslove, Olivier Haas & Vanessa De Spiegeleer-Delort, “Sony Online Music Platform and Music Players in Breach of Consumer Law” (31 May 2007), online: International Law Office <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=cdd1cf4d-ed09-42b5-8c1a-3552fe5ed380#1>>.

⁶⁶ Sony, “ATRAC Developer’s Interview” (September 2004), online: Sony <<http://www.sony.net/Products/ATRAC3/special/developers01.html>>.

⁶⁷ Sony, “What is OpenMG?” (2004), online: Sony <<http://www.openmginfo.com/overview/index.html>>.

⁶⁸ *QueChoisir*, *supra* note 65 at 3.

⁶⁹ *Ibid.* at 13-14.

⁷⁰ *Code de la consommation*, Art. L.213-1 and L.122-1.

⁷¹ *Competition Act*, *supra* note 9, ss. 74.01, 77.

the applicable agreement.⁷² The court found that the terms misleadingly suggested that the “examples” of compatible hardware were not a complete and closed list. The court found this to be an intentional misrepresentation that knowingly concealed material information from the consumer.⁷³

The court dealt with the allegation of tied selling in an almost summary fashion. The court characterized the provision as effectively defining a strict liability offence: “En tout état de cause, s’agissant d’une contravention, l’élément intentionnel de cette infraction importe peu.”⁷⁴ It did not matter that there was no express agreement that tied the two transactions together. The fact that there was a double use restriction, in that both the service and the device were dependent on each other, was enough to find that the sales were tied.⁷⁵

Despite this finding, the court did not attempt to constrain the use of the TPMs that bound the products together. The court recognized that those TPMs were expressly authorized by and given legal protection in European and French copyright law.⁷⁶ It concluded that the product and service were lawful, provided that the consumer was fully informed of the limitations imposed by the TPMs.⁷⁷ In addition to monetary penalties, the order merely required clear information on both the product packaging and the service’s web site.⁷⁸

In the wake of that case, two subsequent developments are worth noting. The first is that Sony’s efforts in this market were ultimately commercially unsuccessful. Sony abandoned the ATRAC and OpenMG formats and shut down the Connect Music Store in 2008.⁷⁹ It is no longer possible to authorize new devices to play ATRAC content protected by the OpenMG system, although existing devices can continue to operate. Sony advised customers who had purchased its TPM-protected music files to remove the TPMs by the same method suggested by the Competition Council in *VirginMega*.⁸⁰

The second is that UFC-Que Choisir launched a similar lawsuit against Apple in 2005 with essentially identical pleadings. That case was removed from the

⁷² *QueChoisir*, *supra* note 65 at 11.

⁷³ *Ibid.* at 12.

⁷⁴ Approximately: in any event, as a regulatory offence, the intentional element of this infraction is of little importance; *Ibid.* at 13.

⁷⁵ *Ibid.* at 14.

⁷⁶ *Ibid.* at 10, citing Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and article L.331-7 of the *French Intellectual Property Code*.

⁷⁷ *QueChoisir*, *supra* note 65 at 14.

⁷⁸ *Ibid.* at 15-16.

⁷⁹ Anthony Bruno, “Sony shutting down Connect Music Store” (30 August 2007), online: Reuters <<http://www.reuters.com/article/2007/09/01/industry-sonyconnect-dc-idUSN3044730220070901>>.

⁸⁰ *Ibid.* See also Eliot Van Buskirk, “Sony Connect Music Store Closing (Sony Players to Add PlaysforSure)”, *Wired* (30 August 2007), online: [Wired](http://www.wired.com/listening_post/2007/08/sony-connect-mu/) <http://www.wired.com/listening_post/2007/08/sony-connect-mu/>.

docket on April 7, 2009.⁸¹ This was the precise date when the complete iTunes music catalogue was made available free of TPMs.⁸²

(c) Norway: Consumer Ombudsman review of iTunes Terms and Conditions (2006)

Norway's approach demonstrates a different option for controlling the potential negative consequences of TPMs. In 2006, the Norwegian Consumer Council brought a complaint to Norway's Consumer Ombudsman alleging that Apple's iTunes Music Store's standard terms and conditions violated Norway's *Marketing Control Act* as well as European competition law, as reflected in Articles 81 and 82 of the *Treaty of Rome*.⁸³ On a strict view, this proceeding does not fit entirely comfortably within the boundaries of the present analysis. The competition law complaint was restricted to Apple's imposition of geographic market restrictions that permitted discriminatory pricing.⁸⁴ The primary legal theory of the complaint was that Apple's use of TPMs breached the *Marketing Control Act* prohibition of unreasonable terms and conditions in consumer contracts; the underlying allegation, once again, was that Apple imposed TPMs to enhance its market position, not to protect rights holders.

It is the view of the Consumer Council that iTunes' DRM is an unreasonable technical term of use, in so far as it prevents purchasers of music files at iTunes from using other MP3 players than iPods. The sole purpose of this type of DRM is to lock consumers into buying products from a dominant market player.⁸⁵

The complaint was largely successful: the Norwegian Consumer Ombudsman ordered Apple to change the iTunes terms and conditions.⁸⁶ In particular, the

⁸¹ See Apple, Form 10-Q (27 July 2009) at 45, online: Apple <<http://investor.apple.com/secfiling.cfm?filingID=1193125-09-153165&CIK=320193>>.

⁸² See, e.g., Rob Pegoraro, "DRM Ends, Variable Pricing Begins for iTunes Music", *Washington Post* (7 April 2009) online: Washington Post <http://voices.washingtonpost.com/fasterforward/2009/04/the_drm_era_ends_for_itunes_mu.html>.

⁸³ Norwegian Consumer Council, "Complaint against iTunes Music Store", Letter to the Norwegian Consumer Ombudsman (25 January 2006) in English translation, online: Forbrukerrådet <<http://forbrukerportalen.no/filearchive/Complaint%20against%20iTunes%20Music%20Store.pdf>> [Norwegian Consumer Council].

⁸⁴ *Ibid.* at 4-5. At the time, this issue was under investigation by the European Commission, which levelled formal charges in 2007, but withdrew them in 2008 after Apple took steps to equalize its pricing across EU countries. See AFP, "EU drops antitrust case against Apple's iTunes" (9 January 2008), online: AFP <http://afp.google.com/article/ALeqM5gmnlrqgq_NITt4LcgfYokGLcZK_g>.

⁸⁵ Norwegian Consumer Council, *supra* note 83 at 3.

⁸⁶ Norwegian Consumer Ombudsman, "Terms of Service to the iTunes Music Store — *Marketing Act*, §9a", Letter to iTunes SARL, Luxembourg (30 May 2006), English translation via Google translate, online: Forbrukerombudet <http://www.forbrukerombudet.no/asset/2406/1/2406_1.pdf> [Ombudsman]. For an English summary, see Norwegian Consumer Ombudsman, "iTunes violates Norwegian

Ombudsman declared that copyright law granted no right to impose otherwise unlawful contractual terms. He expressed significant concern about Apple's use of TPMs, noting that their anticompetitive effects could lead to adverse price consequences for consumers.⁸⁷ Seven months later, after soliciting reply comments from Apple, the Ombudsman issued a final ruling that the use of TPMs to achieve platform lock-in was illegal.⁸⁸ As noted above, Apple ultimately abandoned the use of FairPlay on music files sold via the iTunes Store.⁸⁹

II. APPLICATION OF PART VIII OF THE COMPETITION ACT

(a) Standing

Having reviewed the foreign jurisprudence involving challenges to TPMs, the focus of this inquiry can turn to its core question: whether Part VIII of the *Competition Act* provides a means to control the potential abuse of TPMs. By analogy to the foreign cases discussed above, the most likely provisions to be applied would seem to be the Tied Selling provision in section 77 or the Abuse of Dominance provision in section 79. Before considering these provisions in detail, however, a threshold question arises: who would have standing to invoke them?

The answer to that question depends in part on the provision selected. The Commissioner of Competition, with the support of the Competition Bureau, has the statutory authority and responsibility for the enforcement of the *Competition Act*.⁹⁰ Section 79 applies "on application by the Commissioner," while section 77 also applies on an application by "a person granted leave under section 103.1."⁹¹ The Competition Tribunal has exclusive jurisdiction to hear these applications.⁹² Civil courts have confirmed that section 77 does not give rise to a free-standing cause of action.⁹³ Furthermore, conduct falling within section 79 is not unlawful unless the Competition Tribunal issues a prohibition order. In the absence of such an order, there can be no action for damages under section 36.⁹⁴ Since the complaints in *VirginMega* and *RealNetworks* can best be analogized to section 79, under Cana-

law (7 June 2006), online Forbrukerombudet <<http://www.forbrukerombudet.no/id/11032467.0>>.

⁸⁷ *Ibid.* at 10.

⁸⁸ Pinsent Masons, "Apple DRM is illegal in Norway, says Ombudsman" (24 January 2007), online: Out-Law <<http://www.out-law.com/page-7691>>.

⁸⁹ Rob Pegoraro, *supra* note 82.

⁹⁰ *Competition Act*, *supra* note 9, s. 7.

⁹¹ *Ibid.* ss. 77 and 79.

⁹² *Competition Tribunal Act*, R.S.C. 1985 c. 19 (2d Supp.), s. 8.

⁹³ *Ceminchuk v. IBM Canada Ltd.* (1995), 62 C.P.R. (3d) 546, 101 F.T.R. 38, 1995 CarswellNat 153 (Fed. T.D.); see also *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.* (1992), 40 C.P.R. (3d) 1 at 55 (Fed. T.D.), *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia* (1993), 9 B.L.R. (2d) 81 at 88 (B.C. S.C.).

⁹⁴ *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030, 2010 CarswellBC 1962, at para. 37; see also *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2006 BCSC 1047, 40 C.C.L.T. (3d) 45, [2006] 11 W.W.R. 688, 57 B.C.L.R. (4th) 323, 2006 CarswellBC 1691, at para. 49, ; additional reasons 2006 CarswellBC 2892 (S.C.).

dian law, those applications could only have been brought by the Commissioner, and only to the Tribunal.⁹⁵

By contrast, section 77 can be directly invoked by a private party, but only with leave of the Tribunal. The Tribunal may grant leave if it “has reason to believe that the applicant is directly and substantially affected in the applicants’ business by any practice referred to in [s. 77] that could be subject to an order under that section.”⁹⁶

The Federal Court of Appeal has defined the applicable legal test. The applicant must essentially demonstrate a *prima facie* case. The Tribunal must find that there is some evidence to establish all of the elements required to justify an order, but:

The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.⁹⁷

The applicant must have a direct business interest at stake. For example, a trade association may not bring the application on behalf of its members even if the members themselves are directly affected.⁹⁸ Furthermore, the impact must be substantial. The Tribunal has indicated this must be quantified and assessed with regard to the impact on the complainant’s enterprise as a whole, not just a subset of the business that relates to the complaint.⁹⁹ Finally, the complaint must be something that could lead to an order, which means that it must fall within the Tribunal’s jurisdiction.¹⁰⁰ Notably, the Tribunal does not have the authority to order a compulsory license to an exclusive intellectual property right.¹⁰¹

Neither consumers nor their representatives would be likely to obtain leave under section 103.1, since they would not be able to demonstrate a direct and substantial effect in their business. Consequently, neither the *Tucker* action nor the *Que Choisir* action could have succeeded in Canada unless the application was brought by the Commissioner. As none of the foreign actions discussed above

⁹⁵ The complaint in *RealNetworks* could also be analogized to s. 90.1, which would be treated the same way.

⁹⁶ *Competition Act*, *supra* note 9, s. 103.1(7).

⁹⁷ *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339, [2005] 2 F.C.R. 254, 2004 CarswellNat 3582, at para. 17.

⁹⁸ *Canadian Standard Travel Agent Registry v. International Air Transport Assn.*, 2008 Comp. Trib. 14, 2008 CarswellNat 2593.

⁹⁹ *Construx Engineering Corp. v. General Motors of Canada Ltd.*, 2005 Comp. Trib. 21, 2005 CarswellNat 7062, at para. 8.

¹⁰⁰ *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41 at paras. 16–29, 23 C.P.R. (4th) 77, 2002 CarswellNat 4487; affirmed 2004 CarswellNat 124 (F.C.A.) (holding that the Tribunal had no jurisdiction to issue an order that could breach Parliamentary privilege).

¹⁰¹ *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321, 43 B.L.R. (2d) 93, 1997 CarswellNat 281 (Competition Trib.) [*Warner*].

could have been initiated in Canada without the assistance of the Commissioner, it is clear that a Canadian complainant is operating under a procedural handicap, compared to other jurisdictions.¹⁰²

The Commissioner can be compelled to hold an inquiry into whether grounds exist for an order under Part VIII by any six adult residents of Canada, but the decision to bring an application to the Tribunal is at her discretion.¹⁰³ Assuming that a proper application was before the Tribunal, the complainant would have to prove the substantive elements required to justify an order. Each of the sections features its own unique issues, which must be considered in turn.

(b) Section 77: Tied Selling

Section 77 actually defines three distinct reviewable practices: exclusive dealing, market restriction, and tied selling. Consideration of tied selling will suffice for present purposes. The other two practices have no likely application to the paradigm case of a device manufacturer who is excluded from a potential market because of a rival's use of a TPM to control access to content products.

The *Competition Act* defines tied selling to include two kinds of express ties. The first is the traditional case where supply of one product (the tying product) is conditional on acquisition of another (the tied product). The second arises if the acquirer is limited to only using or distributing the tying product with designated supplies. The precise wording of this provision may be important. The purchaser of the tying product must be required to:

refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee.¹⁰⁴

Tied selling under the *Act* does not require that the products may only be acquired together. It is enough for the supplier to offer the tying product on favourable terms as an inducement for the purchaser to voluntarily combine it with the tied product. This is broader than the requirement in *Tucker* that there be no reasonable opportunity to acquire the products separately. A mere package discount may be enough to engage this definition.

However, the definition is not the end of the matter. To justify an order, the complainant must also prove: 1) that the tied selling was engaged in by a “major supplier” or that the practice was widespread in the market; 2) that the practice had

¹⁰² This is not to suggest that there is no merit to the Canadian approach. On the contrary, it seems to be theoretically sound. The *Competition Act* is primarily aimed at public wrongs resulting from a lack of competition, not the private harms that might be suffered by any particular competitor. Consequently it is entirely appropriate that a public entity should be responsible for, and have control over, proceedings under the *Act*. On appropriate facts, aggrieved parties will also have recourse to private law causes of action, such as the tort of intentional interference with economic relations, to protect their private interests. See, e.g., *Canadian Community Reading Plan Inc. v. Quality Service Programs Inc.*, 2001 CarswellOnt 174 (Ont. C.A.); additional reasons 2001 CarswellOnt 853 (Ont. C.A.).

¹⁰³ *Competition Act*, *supra* note 9, s. 9.

¹⁰⁴ *Competition Act*, *supra* note 9, s. 77(1), “tied selling” (a)(ii).

an exclusionary effect; and 3) that the practice resulted in, or was likely to result in, a substantial lessening of competition.¹⁰⁵

The first element is similar, but not identical, to a requirement that the supplier have market power, although market power will be sufficient to establish it.¹⁰⁶ The Tribunal has defined the criterion: “A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells.”¹⁰⁷ A 30 percent market share was enough for Bombardier to be a major supplier because of its historical position as an industry leader and its innovation in product development: “[t]he characteristics which are most relevant will vary from industry to industry.”¹⁰⁸ This strength must be assessed in relation to the tying product which is being leveraged.

The second and third elements are typically dealt with together, with the exclusion simply being the means by which competition is lessened.¹⁰⁹ The question is not whether there is substantial competition, but whether the impugned practice has, or is likely to have, the *result* of substantially *lessening* competition. The Federal Court of Appeal described the relevant test as a “but-for” analysis: “would the relevant markets [. . .] be substantially more competitive but for the impugned practice of anticompetitive acts?”¹¹⁰ Market power and the presence or absence of barriers to entry will be critical to the analysis:

Generally speaking, a substantial lessening or prevention of competition is an effect that creates, preserves, or enhances market power. [. . .] A firm can create, preserve, or enhance market power by erecting or strengthening barriers to entry, thus inhibiting potential competitors from challenging the market power of the dominant firm.¹¹¹

In the paradigm case described above, the complainant would be a device manufacturer. The tying product would be the TPM-restricted content and the tied product would be the player implementing the TPM. The competing device manufacturer is excluded because of the inability to use the content, which someone else controls. But this is not the only possible scenario. For example, game consoles will generally not execute unauthorized software. This allows the manufacturer to control third party access to the platform, which it can either block or license on terms of its choosing. The manufacturers can sell hardware at a loss which they

¹⁰⁵ *Ibid.* s. 77(2).

¹⁰⁶ *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, 1997 CarswellNat 3120, 73 C.P.R. (39) 1 (Competition Trib.), at para 72, 73 [*Tele-Direct*].

¹⁰⁷ *Canada (Director of Investigation & Research) v. Bombardier Ltd.* (1980), 57 C.P.R. (2d) 216 (R.T.P. Comm.), at 223.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at 224; see also *Canada (Director of Investigation & Research) v. NutraSweet Co.*, 1990 CarswellNat 1368, [1990] C.C.T.D. No. 17, 32 C.P.R. (3d) 1, [1990] C.L.D. 1078 (Competition Trib.), at para. 168 [*NutraSweet*].

¹¹⁰ *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, 49 C.P.R. (4th) 241, 268 D.L.R. (4th) 193, 350 N.R. 291, [2007] 2 F.C.R. 3, 2006 CarswellNat 1763 at para. 38 [*Canada Pipe I*].

¹¹¹ Competition Bureau, “The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*) — Draft for Public Consultation” (January 2009) at 19 [*AoD*].

recoup, in part, through license fees charged to software publishers.¹¹² In that scenario, the console would be the tying product and the software the tied product. The complainant would be a publisher who was unable to obtain access to the platform.

None of the cases under consideration involve an explicit tie. Consumers are free to buy the device independently of the media; on the contrary, as was noted in *Tucker*, there is generally no option to buy them together. Nor is there typically any kind of package pricing to act as an inducement.¹¹³ If the paradigm case falls within the definition of tied selling, it must be in sub-paragraph (a)(ii), quoted above. Rather than positively tying the products the supplier must require that the purchaser not use or distribute the tying product in conjunction with some other product.

The simple objection may be that the supplier in the paradigm case may not *require* anything at all of the customer. The purchaser of the content may well be free to attempt to use that file with any device he or she wishes. It will simply fail to work with an unauthorized device.

Any legal requirements imposed on the purchaser would be located in the applicable contractual terms. The Canadian version of the iTunes Store “Terms and Conditions” contains the following language:

You agree that the iTunes Service and certain iTunes Products include security technology that limits your use of iTunes Products and that, whether or not iTunes Products are limited by security technology, you shall use iTunes Products in compliance with the applicable usage rules established by Apple and its licensors (“Usage Rules”), and that any other use of the iTunes Products may constitute a copyright infringement. Any security technology is an inseparable part of the iTunes Products. Apple reserves the right to modify the Usage Rules at any time. *You agree not to violate, circumvent, reverse-engineer, decompile, disassemble, or otherwise tamper with any of the security technology related to such Usage Rules for any reason-or to attempt or assist another person to do so.* Usage Rules may be controlled and monitored by Apple for compliance purposes, and Apple reserves the right to enforce the Usage Rules without notice to you. *You agree not to access the iTunes Service by any means other than through software that is provided by Apple for accessing the iTunes Service.* You shall not access or attempt to access an Account that you are not authorized

¹¹² See, e.g., “Report: PS3 to sell for \$399, cost \$494 to make”, *GameSpot*, (28 June 2005), online: GameSpot <www.gamespot.com/news/report-ps-6128295>.

¹¹³ This is not always the case. Apple at one time sold a special edition “U2 iPod,” which included a US\$50 coupon that could be redeemed against the purchase of “The Complete U2,” a so-called digital box-set of over 400 music tracks. The music bundle could be purchased separately for US\$149, while the iPod itself had a suggested retail price of US\$349. See Apple Press Info, “Apple Introduces the U2 iPod” (26 October 2004), online: Apple <<https://www.apple.com/pr/library/2004/10/26Apple-Introduces-the-U2-iPod.html>>. The discount was therefore just over 10 percent of the total value of the combined package. This would be a “real benefit,” the existence of which depended on the purchase of both products and would therefore qualify as an inducement within the standard articulated in *NutraSweet*, *supra* note 109 at para. 162. But in that instance, the tying product would have to be the device, not the music, since it was the purchase of the device that triggered the discount.

to access. You agree not to modify the software in any manner or form, or to use modified versions of the software, for any purposes including obtaining unauthorized access to the iTunes Service. Violations of system or network security may result in civil or criminal liability.¹¹⁴

This imposes an explicit contractual requirement that the customer refrain from accessing the service with software provided by anyone other than Apple. That would clearly fall within the definition of sub-paragraph (a)(ii), but it only establishes a tie between the service and the software, not the content obtained via the service and any particular device.¹¹⁵ The agreement also imposes a requirement that the customer refrain from modifying any security technology (a TPM). To the extent that the TPM itself is the very barrier to using a device of another brand or manufacture with the content, this requirement would seem to indirectly create a tie within the meaning of sub-paragraph (a)(ii). Such a functional view would be consistent with the French court's approach in *Que Choisir*. Moreover, the scheme of the *Competition Act* supports this approach. The definition must cast a wide net in order to catch all of the undesirable conduct; the remainder of the section narrows the focus to exclude conduct which is not objectionable.

The situation would be quite different if the prohibition on circumventing the TPM was imposed by law and not the agreement with the supplier. In such a case, there would likely be no practice of the *supplier* to require the customer to refrain from such circumvention. There would be no need for such a practice. The supplier would simply benefit from a protection granted by law.¹¹⁶ Indeed, it could then be argued that it would be outside the Tribunal's jurisdiction to encroach on that benefit.¹¹⁷

But, on the assumption that there is a contractual tie, the question remains whether the practice has an exclusionary effect that results in a substantial lessening of competition. Here, the Apple iTunes example is particularly interesting. In 2009, Apple abandoned the use of TPMs on music.¹¹⁸ This makes it possible to compare market conditions with and without the practice. If the presence of the

¹¹⁴ Apple, "iTUNES STORE — TERMS AND CONDITIONS" (12 October 2011), online: Apple <<https://www.apple.com/legal/itunes/ca/terms.html>> [emphasis added].

¹¹⁵ That tie would likely be saved under the technological relationship exception, which will be discussed below, even if it otherwise justified a remedial order. See *Competition Act*, *supra* note 9, s. 77(4)(b).

¹¹⁶ The supplier's practice might exceed the scope of the applicable legal protection. In some circumstances the CMA restricts the protection it grants to those TPMs that are authorized by the copyright owner of the underlying work. See *CMA*, *supra* note 2, s. 41. If TPMs were applied to work that was not subject to copyright, or in defiance of the copyright owner's wishes, this could potentially be an anticompetitive act even if this provision came into force.

¹¹⁷ The analogy to an exclusive Intellectual Property right is imperfect: the CMA does not include a right to apply TPMs within the definition of copyright. Instead it simply deems circumvention to be an infringing act in certain circumstances. However the policy argument that the Tribunal should not interfere with a decision that Parliament has assigned to the rights holder can readily be extended to a deemed infringement. See *Warner*, *supra* note 101; see also *NutraSweet*, *supra* note 109 at para. 173.

¹¹⁸ Rob Pegoraro, *supra* note 82.

TPMs caused a substantial lessening of competition, one might expect competition to have increased when they were withdrawn. In 2007, iPod sales represented 72.7 percent of the U.S. market for digital music players.¹¹⁹ In 2011, iPod sales accounted for 78 percent of that market.¹²⁰ Competition in the player market certainly does not appear to have increased in the wake of Apple's move to selling TPM-free music.

Finally, even if the elements of section 77(2) can be established, the statutory language includes yet another hurdle to surmount. The Tribunal may not make any order if the tied selling is "reasonable having regard to the technological relationship between or among the products [. . .]."¹²¹ There is little case law to establish what this means. The limitation seems to apply if the tie is reasonably necessary because the use of unapproved substitutes for the tied product could harm the reputation of the supplier, presumably because the tying product would not perform adequately.¹²² If that is the extent of the provision, it would seem to have little application. The supplier should not be able to shield an otherwise unlawful tie under the aegis of an artificial compatibility problem; the only threat to the supplier's reputation would be of its own making. But the statutory language is not obviously that narrow. It might extend to other technological relationships.

(c) Section 79: Abuse of Dominant Position

The language of section 79 is slightly different, but the analysis is largely the same. The statute sets out the required elements:

79. (1) Where, on application by the Commissioner, the Tribunal finds that
- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
 - (b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and
 - (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
- the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.¹²³

¹¹⁹ Phillip Cruz, "U.S. Top Selling Computer Hardware for January 2007", *Bloomberg* (13 March 2007), online: Bloomberg <<http://www.bloomberg.com/>>.

¹²⁰ Chris Nuttall, "iPod's 10-year evolution a playlist of Apple's greatest hits", *The Globe and Mail* (4 November 2011), online: The Globe and Mail <iPod's 10-year evolution a playlist of Apple's greatest hits>.

¹²¹ *Competition Act*, *supra* note 9, s. 77(4)(b).

¹²² *Canada (Restrictive Trade Practices Commission, Director of Investigation & Research) v. BBM Bureau of Measurement* (1981), 60 C.P.R. (2d) 26 (R.T.P. Comm.), at 33 [BBM].

¹²³ *Ibid.*, s. 79(1).

Control is equated to market power.¹²⁴ The list of potential anticompetitive acts is not closed; according to the Federal Court of Appeal such acts are to be identified by “an intended predatory, exclusionary or disciplinary negative effect on a competitor.”¹²⁵ The substantial lessening of competition test is the same as in section 77 except that it makes explicit reference to past effects.¹²⁶

In a marginal case, section 79 should be more demanding than section 77 in the degree of dominance required, but broader in the range of practices that may be captured. Apple’s market position in digital music players and digital music downloads would seem to be strong enough to engage section 79(1)(a), assuming of course that the Canadian market share is reasonably similar to the U.S. data.

A tying practice is necessarily exclusionary, so it would also tend to fit within section 79(1)(b). But the advantage of section 79 is that one doesn’t have to fit the practice into such a restrictive box. Even if the practice is characterized differently, perhaps as refusal to deal or withholding a necessary input, section 79(1)(b) can be satisfied based on an intended negative effect. While a mere refusal to license IP will not be considered an anticompetitive act, “[i]f a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the *Competition Act*, then the Bureau may intervene.”¹²⁷ But it is important to note that the effect must be on *a competitor*; harm to consumers is not relevant under section 79.¹²⁸ The *Tucker*, *UFC-Que Choisir*, and Norwegian Consumer Council complaints would, therefore, not fit within this section at all.

The “but-for” test for substantial lessening of competition defined in *Canada Pipe 1* applies, as discussed above. But the test applicable to section 79(1)(c) requires a consideration of an alternative past as well.¹²⁹ In 2004, Apple’s U.S. market share was 42 percent.¹³⁰ In 2002, it was only 7.1 percent.¹³¹ One could reasonably ask whether Apple, having achieved dominance on the basis of its TPMs, no longer needs them because it is now simply enjoying a field free from challenge by new entrants. The Bureau’s approach recognizes that “monopoly leveraging” can

¹²⁴ *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236, 49 C.P.R. (4th) 286, 268 D.L.R. (4th) 238, 350 N.R. 264, [2007] 2 F.C.R. 57, 2006 CarswellNat 1762 at paras. 102–105, leave to appeal refused 2007 CarswellNat 1107 (S.C.C.) [*Canada Pipe 2*]; see also *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606.

¹²⁵ *Canada Pipe 1*, *supra* note 110 at para. 66.

¹²⁶ *Ibid.* at para. 94.

¹²⁷ Competition Bureau, “Intellectual Property Enforcement Guidelines” (September 2000) at 8 [*IPEG*]. This statement refers to recourse to the Special Remedies provision in s. 32, but the logic can be generalized.

¹²⁸ *Ibid.* at para. 79.

¹²⁹ *Canada Pipe 1*, *supra*, note 110 and accompanying text.

¹³⁰ Bryan Chaffin, “iPod Claims 82% HD-Based Retail Market Share; 42% All Players”, *The Mac Observer* (11 October 2004), online: The Mac Observer <<http://www.macobserver.com/article/2004/10/11.11.shtml>>.

¹³¹ Olga Kharif, “iPod: A Seed for Growth?”, *Bloomberg Business Week* (27 August 2002), online: Bloomberg <http://www.businessweek.com/technology/content/aug2002/tc20020827_7649.htm>.

occur over time “if tying discourages investment in research and development by competitors, or otherwise discourages potential dynamic innovation that would be profitable for competitors only if a larger portion of the market were contestable.”¹³²

But the history of the digital music player market does not seem to indicate any lack of would-be competitors. On the contrary, one retrospective review seems to indicate that, from 1998 to 2008, there were progressively more products introduced each year by progressively more competitors.¹³³ This is a far cry from the *BBM* case in which there had been no entrants in the market for the tied product in 18 years, with no prospect of any to come.¹³⁴ Although Apple clearly has achieved a dominant position, the Tribunal, like the French Competition Council, would probably perceive no significant barriers to entry.

Another potential explanation for Apple’s success could be that it out-marketed its competitors. The critical period of 2003 to 2005, when Apple’s market share exploded from also-ran to dominant, was also precisely the period of its “Silhouette” advertising campaign. In the first half of 2004 alone, Apple reportedly spend \$49.6 million on that campaign, a substantial fraction of the then-applicable forecast of \$400 million in revenue for the product.¹³⁵ This coincidence is, of course, not conclusive. But, in the absence of significant barriers to entry, it seems likely to be somewhat persuasive.

The situation is not substantially different on the music side of the equation. As of 2011 Apple had a dominant share of 70 percent of the U.S. digital download market, with second place Amazon holding 14 percent.¹³⁶ Amazon’s second place share has been growing steadily for at least three years.¹³⁷ Moreover Google has just entered the online music store market.¹³⁸ Beyond the paid download market, there is a wide spectrum of alternate music-based service models, with over 400

¹³² *AoD*, *supra* note 111 at 37.

¹³³ Andreas Ødegård, “Celebrating 10 Years of MP3 Players” (31 March 2008), online: anythingbutipod <<http://anythingbutipod.com/2008/03/10th-anniversary-of-the-mp3-player/>>.

¹³⁴ *BBM*, *supra* note 122 at 35.

¹³⁵ Bali Sunset, “Silhouette Campaign”, *Marketing Campaign Case Studies* (28 February 2008), online: Marketing Campaign Case Studies <<http://marketing-case-studies.blogspot.com/2008/02/silhouette-campaign.html>>.

¹³⁶ Alex Pham, “Google Music debuts as sales battle with Apple, Amazon begins”, *Los Angeles Times* (16 November 2011), online: LA Times <<http://articles.latimes.com/2011/nov/16/business/la-fi-ct-google-music-20111117>>.

¹³⁷ 5 percent in 2008, 8 percent in Q2 2009, 11 percent in Q4 2009, 13 percent in Q4 2010; see Peter Kafka, “Amazon’s Digital Music Store Takes a Tiny Step Forward, Still Trails Apple by Miles” (18 August 2009), online: AllThingsD <<https://allthingsd.com/20090818/amazons-digital-music-store-take-a-tiny-step-forward-still-trails-apple-by-miles/>>; Ethan Smith & Geoffrey A Fowler, “Amazon Can’t Dent iTunes”, *The Wall Street Journal* (16 December 2010), online: The Wall Street Journal <<http://online.wsj.com/article/SB10001424052748704073804576023913889536374.html>>.

¹³⁸ Pham, *supra* note 136.

licensed music services worldwide.¹³⁹ Again, Apple's dominance does not appear to have relied on barriers to entry.

One is inexorably led to the conclusion that the hallmarks the Bureau and Tribunal look for as indicia of a substantial lessening of competition are not present. Prices are generally declining.¹⁴⁰ New entrants are relatively plentiful. Product innovation remains vigorous. Where competitors have the option to "innovate around" or "leap-frog over" an apparently entrenched position, there is unlikely to be market power or a substantial lessening of competition.¹⁴¹ While some would-be entrants have undoubtedly been stymied, the success or failure of individual ventures is not the focus of the *Competition Act*. It is concerned with the market as a whole, which seems reasonably healthy.

III. CONCLUSION

The global jurisprudence reveals that complaints based on abuse of TPMs have, to date, only succeeded when they focus on harms to consumers. The successful actions bear a superficial resemblance to the reviewable practices in Part VIII of the Canadian *Competition Act* in that they identify similar practices as being suspect: in particular, limiting consumer choice by imposing unnecessary compatibility problems via TPMs seems similar to restricting competition by denying competitors the opportunity to provide alternatives.

But there are crucial differences of perspective. Consumers' unsatisfied demand does not fit within the Canadian *Competition Act*. Where there is a range of products, none of which satisfies customer preferences, the *Act* may well nonetheless characterize the market as fully competitive. Moreover, this may be so even if particular would-be entrants are prevented from responding to the unsatisfied demand by the practices of incumbents.

Unlike the *Que Choisir* case, a mere tie is not enough to create a cause of action under the Canadian *Act*. It requires that the tie have an exclusionary effect that results in a substantial lessening of competition. TPMs cannot be entirely exclusionary if competitors can choose not to use them.

This suggests potential circumstances in which a claim might nonetheless succeed. If a device with market power did not support unprotected formats at all,

¹³⁹ International Federation of the Phonographic Industry, "IFPI Digital Music Report 2011: Music at the touch of a button" (London: IFPI, 20 January 2011) at 6.

¹⁴⁰ The original iPod launched with a suggested retail price of \$399 [all prices in US\$]. See Apple Press Info, "Apple Presents iPod" (23 October 2001), online: Apple <<http://www.apple.com/pr/library/2001/10/23Apple-Presents-iPod.html>>. This is the price of the most expensive iPod Touch available today, a vastly more capable device. The entry level iPod Shuffle currently has a lower capacity than the original iPod but is available for \$49. On the music side, although Apple raised prices on some popular music tracks from \$0.99 to \$1.29 in 2010, it dropped prices on others. Amazon responded with a price cut to \$0.69 per track. See Alex Pham, "Price war! Amazon launches 69-cent MP3 store for top-selling tunes", *The Los Angeles Times* (28 April 2011), online: LA Times <http://latimesblogs.latimes.com/music_blog/2011/04/price-war-amazon-launches-69-cent-mp3-store-for-top-selling-tunes.html>.

¹⁴¹ *IPEG*, *supra* note 127 at 6.

competing content providers would not have the choice to avoid the TPM. The exclusionary effect could then cause a substantial lessening of competition among content providers. Similarly, as in the *RealNetworks* case, if a competing device maker had no prospect of obtaining its own parallel agreement with a content provider with market power, there is a real prospect that there could be a substantial lessening of competition in the content market.

But real market conditions are not so extreme; even in highly concentrated markets, the exclusion has never been complete. Rapid technological evolution and equally rapid shifts in market share are characteristic of digital media and device markets. Competitors have generally had the option of “innovating around” any TPMs. As the *VirginMega* and *RealNetworks* cases demonstrate, available alternatives will tend to undermine any claim of insurmountable barriers to entry.

Without barriers to entry, success is not anticompetitive. Moreover, the *VirginMega* case also demonstrates how alternative explanations for that success can undermine any causal link between the TPM and a dominant party’s market position.

The *RealNetworks* case demonstrates that endowing TPMs with a privileged status in copyright law limits the options available to competitors to innovate around them. But because this is a restriction imposed by law, and not by the dominant player, competition law would be unable to respond.

Those who seek protection from the protectors should not look for it in competition law. Though this protection might have the result of promoting competition, the harm in question does not fit the competition law paradigm. The harms that critics connect to TPMs are more qualitative than quantitative in nature. They turn primarily on the ability to exert potentially unfair control over particular choices, not the aggregate economic context of those choices. For the consumer faced with the prospect of replacing a content library because a provider has abandoned a particular platform, the harm is the same whether the perpetrator has market power or not. Similarly, if a license condition prohibits an open source software product that can interact with protected content, it may be of little comfort to someone who wishes to use open source software that any number of proprietary alternatives are available. These are harms to individuals, not to markets. So it would make little sense that a remedy to those ills should depend on an economic analysis of their competitive effects.

If there is a need to define new legal protections from the effects of TPMs, it would be more appropriate to locate these provisions in consumer protection statutes than in the *Competition Act*. This would permit the analytical focus to be directed to the fairness or reasonableness of the practices and their impact on individual choice, rather than on market power and effects on competition.