Compulsory Licensing in Intellectual Property Rights (IPR): Current Application and Future Prospects in Indonesia

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Abstract

The implementation of Compulsory Licensing in the procurement of anti-retroviral drugs to combat the HIV/AIDS epidemic, which poses a significant threat to Indonesia and global public health, exemplifies the essential necessity and utility of this concept. Compulsory Licensing is pivotal not only for community health but also for advancing Intellectual Property Rights (IPR) law. This research aims to explore the future prospects of Compulsory Licensing and propose regulatory reforms in Indonesia. Utilizing a normative juridical approach, the study concludes that Compulsory Licensing holds strong potential as a countermeasure and in balancing rights and obligations. It underscores the critical need for a robust regulatory framework to support its effective application and growth. Future enhancements, such as allowing appeals against government compensation determinations through judicial review, could bolster acceptance and ensure the sustainability of this concept.

A. Introduction

Unlike voluntary licensing agreements negotiated between patent holders and licensees, compulsory licensing is enforced through legal mandates issued by authorities. The concept of compulsory licensing is acknowledged in international agreements such as the Paris Convention, the Washington Treaty, and to a lesser extent, the Berne Convention, albeit with varying interpretations and conditions.
Initially introduced in the 1934 Fourth Amendment to the Paris Convention, compulsory licensing was not formally defined within the Convention itself. The TRIPs Agreement, which governs intellectual property rights including patents and integrated circuits, provides more detailed regulations on compulsory licensing\(^1\).

Under the TRIPs Agreement, compulsory licensing in patents is covered in Article 31, titled "Other Use Without Authorization of the Right Holder." This article outlines twelve specific conditions under which patents can be utilized without the consent of the patent holder. Similarly, for integrated circuits, Article 37(2) of the TRIPs Agreement establishes provisions for compulsory licensing.

Compared to the Paris Convention, which sets out four general conditions for compulsory licensing, the TRIPs Agreement imposes twelve stricter criteria and procedural requirements. These provisions aim to balance the rights of patent holders with the need for public access to essential technologies and innovations, particularly in critical sectors such as health, environment, and national emergencies.\(^2\)

1. The application of the use of rights without the authority of the owner or right holder (if what is meant by that: Compulsory Licensing or Government Use) must be considered on a case-by-case basis.

2. The applicant must have attempted to obtain a license from the owner or rights holder on the basis of applicable commercial terms, but these efforts have been unsuccessful after a reasonable period of time. This requirement can be waived if the government uses it in an emergency, but the owner or holder of the right must still be notified as soon as possible of such use.

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3. The scope and period of use must be limited according to the purpose specified in the permit. In the case of patents for semiconductor technology, their use is only for public and non-commercial purposes, which is not reasonable, or simply to remedy circumstances arising from competitive practices.

4. Must be non-exclusive.

5. Not transferable, except with a business unit or goodwill that benefits from the use of rights without permission or authorization from the owner or rights holder.

6. Mainly intended only to meet the needs of the domestic market.

7. It must be terminated immediately if the circumstances that justified the use of the right without permission or the granting of authority from the owner or holder of the said right have ended or no longer exist.

8. The owner or right holder must be compensated in accordance with the economic benefits derived from the use of said right.

9. The validity of a decision to use a right without permission or the granting of authority from the owner or holder of said right can be reviewed by a judicial body or by another body that has higher authority in the country concerned.

10. Decisions regarding the amount of compensation that must be given can also be reviewed by a judicial body or another body that has higher authority in the country concerned.

11. The requirements in points 2 and 6 do not have to be applied if the use of rights without permission or the granting of authority from the owner or right holder is intended as an effort to remedy conditions that have arisen due to unfair competitive practices.

12. In the event that the use of a right without permission or authority from the owner or right holder is applied due to the dependence of a patent on a previous patent, additional conditions must be observed:
   a. Technological inventions in a recent patent must contain significant technological development and economic benefits compared to the technology that was previously patented;
b. The previous patent owner or holder must obtain the right to obtain a cross licensed from the later patent owner or holder;
c. The use of said right is non-transferable except by later transfer of the patent.

Except for the conditions referred to in number 12, eleven other conditions apply mutatis mutandis to Integrated Electronic Circuits. In addition to issues of loose interpretation, differences in needs and interests will lead to varying approaches to the mandatory licensing provisions. Specifically, there will be differences in the selection and determination of terms and conditions among countries participating in the agreement when formulating provisions regarding compulsory licenses in their respective national laws and regulations. Furthermore, the use of the term "without authorization" (meaning without a permit or without authority) is not only inaccurate but also lacks clarity in Article 31. It is not explicitly stated what actions or situations are considered "without authorization." This ambiguity increases the potential for conflicts of interest and disputes, especially in a deteriorating and expanding economic situation.

Compulsory licensing issues are critical for several reasons. This problem holds two conflicting potentials and needs to be managed properly. On one hand, its existence and application represent a breakthrough in developing the concept of compulsory licensing and provide a legal basis for practical purposes in implementing national development. On the other hand, the arrangement and application of compulsory licensing hold the potential for conflict on an international scale. Therefore, in-depth research is necessary to provide the appropriate form and direction for regulating mandatory licensing issues in national laws and regulations in the field of Intellectual Property Rights.3

Starting from the background of IPR (Intellectual Property Rights) and compulsory licensing, several important issues need to be studied.

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more deeply regarding the future prospects of compulsory licensing and the need for its rearrangement and direction in Indonesia. The objective of this research is to explore the development of law in the field of IPR, study the concept of compulsory licensing, and assess the prospects for its application. Specifically, the research aims to clarify the future prospects of compulsory licensing and the need for its rearrangement and direction in Indonesia.

In the landscape of Indonesia's legal system, the ongoing endeavor to enhance intellectual property rights (IPR) institutions stands as a crucial and formidable challenge. This research assumes paramount importance within this context, poised to make substantial contributions. Strategically, its findings promise to fortify the theoretical underpinnings essential for the evolution of IPR law in Indonesia. Central to this endeavor is a nuanced exploration of the inherent nature of IPR, particularly its exclusive character often linked with monopolistic tendencies.

Furthermore, this study aims to shed light on pivotal issues that influence the trajectory of IPR law development in Indonesia. By doing so, it seeks to lay a more robust groundwork that can effectively support and guide future advancements in this legal domain. Thus, through rigorous examination and analysis, this research endeavors to provide clarity, deepen understanding, and ultimately foster a more cohesive framework for the protection and advancement of intellectual property rights within Indonesia's legal framework.

Regarding the program and implementation of national development, this research will seek an acceptable justification for the regulation and application of compulsory licensing. It will particularly focus on balancing exclusive rights with accompanying obligations and providing sufficient grounds for determining the types of IPR subject to compulsory licensing.

In addition to these strategic benefits, the research results will also provide practical benefits, specifically by disseminating an understanding of Intellectual Property Rights (IPR). This research will contribute additional literature for teaching law in the field of IPR and offer a deeper understanding of its significance and role in society,
particularly in law, economics, and education. This, in turn, will support efforts to enhance the quality of human resources in Indonesia.

This empirical normative approach was performed thorough document studies (Library Research) and field studies. The descriptive and analytical aspects of this research clearly, thoroughly, and systematically describe the research object. The study includes an overview of the Compulsory License System and its implementation in the field of IPR in Indonesia.

The analytical aspect of this research strives to delve deeply into key elements pertinent to the research subject, aiming for comprehensive elaboration. This encompasses a thorough exploration of Indonesia's National Legal System concerning compulsory licenses within the realm of intellectual property rights (IPR).

Firstly, the study intends to elucidate the policy basis underpinning compulsory licenses, examining the foundational principles that guide their application within Indonesia's legal framework. This includes an examination of how these principles are formulated into rules and regulations that govern the issuance and management of compulsory licenses.

Secondly, the research aims to provide a detailed analysis of the managing institutions involved in the process of granting compulsory licenses. This involves identifying the roles and responsibilities of relevant governmental bodies or agencies tasked with overseeing the application, review, and enforcement of compulsory license provisions in IPR.

Thirdly, the study seeks to outline the procedural aspects governing compulsory licenses in Indonesia. This entails a systematic exploration of the processes involved, from the initial application and review stages to the final determination and implementation phases. Special attention will be given to documenting the procedural requirements, timelines, and criteria that applicants must satisfy to obtain a compulsory license.

Lastly, the research endeavors to highlight the challenges encountered in the practical application of compulsory licenses within Indonesia's IPR landscape. This includes identifying legal, administrative, and practical hurdles that may hinder the effective
implementation or utilization of compulsory licenses. By doing so, the study aims to offer insights and recommendations aimed at addressing these challenges and improving the overall efficacy of compulsory license mechanisms in safeguarding both intellectual property rights and public interest within Indonesia.

B. Discussion

1. Implementation of Compulsory Licenses in the Field of Intellectual Property Rights (IPR)

The regulation of Compulsory Licensing and Government Use in Patent Law, Plant Variety Protection Law, and Copyright Law has prompted new developments in the realm of patents and usage rights. Specifically within patents, procedures for implementing Government Use provisions are detailed in Government Regulations.

In response to the HIV/AIDS epidemic, the Indonesian government has taken decisive action through a presidential decree mandating the utilization of patents for anti-retroviral drugs. This decree empowers the Minister of Health to designate a specific Drug Factory tasked with the production of these essential medications.

Under the provisions of this decree, patent holders of critical anti-retroviral drugs like Nevirapine (originally developed by Boehringer Ingelheim) and Lamivudine (originally developed by Biochem Pharma Inc.) are entitled to compensation. The decree outlines clear stipulations regarding the compensation amounts that must be provided to these patent holders, ensuring that their intellectual property rights are respected while also enabling the widespread availability and affordability of life-saving medications for HIV/AIDS patients in Indonesia.

This governmental initiative underscores a proactive approach towards public health crises, balancing the imperative of protecting

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intellectual property rights with the urgent need to address healthcare challenges, particularly in combating HIV/AIDS within the country.\textsuperscript{6}

Despite these efforts, ongoing issues persist in this field, particularly concerning perception and understanding, both domestically and internationally. Differences in perspectives and needs among countries contribute to varying practices and interpretations of Intellectual Property Rights (IPR), especially in the context of Compulsory Licensing.\textsuperscript{7} These disparities can escalate into conflicts, particularly in international trade relations.

These two factors have significantly shaped the development of the Intellectual Property Rights (IPR) system at the national level. Perception issues concern the understanding of IPR's function and developmental direction, while understanding pertains to the substance of IPR and the institutions and procedures governing it.

At the national level, regulatory advancements have indeed outpaced the development of community perceptions and understanding among key stakeholders such as law enforcement and government agencies. While human resources are widely acknowledged as pivotal for national development and industry growth, integrating policies and fostering positive attitudes towards technology and intellectual property rights (IPR) continues to present enduring challenges.

The rapid evolution of regulatory frameworks has been critical in adapting to technological advancements and global economic shifts. However, these advancements often require a concurrent evolution in societal awareness and preparedness among stakeholders. Issues such as understanding the nuances of IPR, implementing effective enforcement measures, and fostering a culture that values innovation while respecting intellectual property rights remain complex and multifaceted.


\textsuperscript{7} \textit{Ibid.}

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Furthermore, the integration of technology into various sectors demands a proactive approach to policy development that aligns with global standards while catering to local needs and capabilities. This necessitates not only legislative and regulatory reforms but also comprehensive education and awareness campaigns to bridge the gap in understanding and application of IPR laws.

Diverse perceptions regarding IPR's function and direction, both within and between government agencies and the private sector, pose ongoing obstacles. These differences have weakened synergy between sectors and institutions, hindering effective policy synchronization and operationalization of IPR, particularly in industrial and trade contexts.

Additionally, inadequate outreach, uneven distribution, and instability in IPR education at higher education levels contribute to widespread IPR violations and ineffective law enforcement. These issues are frequently highlighted in seminars and media reports, serving as benchmarks for assessing the progress of Indonesia's IPR system.

The critical role of managing the Intellectual Property Rights (IPR) system in shaping our nation's future. This system fosters an environment for creating intellectual works that are essential for sustaining economic development, enriching cultural heritage, and enhancing the dignity of Indonesians. Moreover, it aims to boost productivity, improve quality, and enhance the competitiveness of our economic products.

However, building and maintaining such a system is a complex and gradual process. It requires patience, national commitment, consistent attitudes, and policy continuity. Regrettably, our past experiences reveal weaknesses in these areas. Our actions and attitudes have not always demonstrated a unified understanding of the meaning, role, function, and importance of intellectual property rights for our future.

Reports, particularly in the mass media, highlight ongoing challenges such as piracy and other forms of rights violations that

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remain inadequately addressed. These issues contribute to doubts about the effectiveness of the IPR system. Consequently, these challenges not only undermine enthusiasm for creating intellectual works but also create numerous legal and commercial problems.

Despite these difficulties, there is a sense of pride in achieving progress towards establishing a regulatory framework for intellectual property rights. Today, Indonesia has a comprehensive set of laws and regulations covering Copyright, Patent, Trademark, Trade Secret, Industrial Product Design, Layout Design of Integrated Circuits, and Protection of New Plant Varieties.

The correlation between perceptions of Intellectual Property Rights (IPR) understanding and the necessity of Compulsory Licensing in Indonesia's regulatory framework presents an intriguing area of study. Current research suggests that while there may be gaps in public understanding of IPR, this does not diminish the critical importance of comprehensive IPR regulation within the context of human rights.

International obligations dictate diverse requirements, emphasizing the need for robust IPR frameworks even when public perception may lag behind. Comprehensive regulation not only ensures compliance with minimum international standards but also supports legal development within Indonesia. This framework necessitates expanded provisions for various forms of licensing, including Compulsory Licensing and Government Use, to balance the protection of intellectual property with broader societal interests such as public health and access to essential medicines.

Therefore, while addressing gaps in public awareness and understanding of IPR remains essential, regulatory frameworks must

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continue to evolve to meet international obligations and effectively safeguard both intellectual property rights and public welfare in Indonesia. This approach underscores the complex interplay between legal frameworks, public perception, and international obligations in shaping effective policy responses in the realm of intellectual property and human rights.\textsuperscript{12}

Research indicates that Compulsory Licensing, initially designed to counteract IPR misuse, has evolved beyond a deterrent tool. It now serves various needs: addressing emergencies, fulfilling public interest demands, fostering technology development amid interdependence, and countering anti-monopoly activities. These developments illustrate that Compulsory Licensing can safeguard broader interests beyond exclusive rights protection. It also highlights its role in achieving a balance between rights and obligations within the framework of IPR regulation.

Misconceptions about Intellectual Property Rights (IPR) prevailed during Indonesia's early development of its IPR system by the government since the mid-1980s. IPR was often misunderstood merely as exclusive rights, associated with monopolistic tendencies and described as individualistic, contrary to Indonesia's cooperative societal values\textsuperscript{13}.

Thus, the integration of Compulsory Licensing into IPR regulation, as explored in this study, becomes crucial and necessary. This integration aims not only to restructure activities necessitating Compulsory Licensing and Government Use but also to redefine its role beyond countering exclusive rights abuses.\textsuperscript{14} It serves as a tool to maintain a balance between rights and obligations, essential in the realm of IPR and law overall. By framing Compulsory Licensing within this

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\textsuperscript{13} Marni Emmy Mustafa and M H SH, \textit{Prinsip-Prinsip Beracara Dalam Penegakan Hukum Paten Di Indonesia, Dikaitkan Dengan TRIP’s-WTO} (Penerbit Alumni, 2022).

broader rationale of balancing rights and obligations, it establishes a robust foundation for its inclusion in Indonesia's Intellectual Property Rights framework.

2. Prospects for the Development of Compulsory Licenses and their impact on IPR regulation in Indonesia

From the perspective of national development, the presence of Compulsory Licensing and Government Use in Intellectual Property Rights regulation is crucial, particularly in addressing emergencies or threats to public interest.\textsuperscript{15} One intriguing aspect of Compulsory Licensing is its static conceptual development since its initial introduction in laws like the Copyright Law and the Plant Variety Protection Law. Notably, in the Patent Law, Compulsory Licensing was distinctively introduced apart from Government Use.

Despite distinctions in the events or activities warranting their application, there has been minimal conceptual advancement concerning a comprehensive reevaluation of Compulsory Licensing and the broader concept of balancing IPR exclusivity.

Under Presidential Decree Number 83 of 2004, dated October 5, 2004, the government authorized the use of patented anti-retroviral drugs Nevirapine and Lamivudine, owned by Boehringer Ingelheim and Biochem Pharma INC respectively, to combat the urgent HIV/AIDS epidemic.\textsuperscript{16}

This decision underscores the distinction between Compulsory Licensing and Government Use. In critical situations, Government Use is preferable as it allows the government to directly utilize patents, rather than invoking Compulsory Licensing. This strategic choice reflects a broader approach to balancing interests and optimizing IPR


for emergency response and societal protection, demonstrating that Compulsory Licensing is not the sole instrument available.

Nevertheless, the role of Compulsory Licensing and Government Use remains crucial and necessary not only within Indonesia's IPR system but also based on real and substantial needs. For instance, various epidemics have demonstrated this need vividly. Diseases like HIV/AIDS, SARS, avian influenza, and cattle hoof and mouth disease persist as ongoing challenges.\textsuperscript{17} In agriculture, threats such as fungal diseases affecting crops like the Tawangmangu tangerine underscore the need for effective responses.

Medical, veterinary, and agricultural sciences have made strides in identifying epidemic types, causes, sources, and transmission patterns. While some antidotes have been developed, they often remain costly and insufficiently accessible.

Amidst Indonesia's geophysical vulnerability to potential disasters, legal instruments are essential to swiftly meet emergency needs and mitigate the often devastating impacts on people's lives. The 2004 tsunami disaster in NAD and North Sumatra vividly illustrated the urgent requirement not only for massive quantities of drinking water but also for rapid availability of production technology and machinery to facilitate its distribution. Similarly, the need for medications, though available, necessitates legal mechanisms to expedite production and distribution in large quantities during emergencies.

While international aid and donations can supplement local needs, self-sufficiency in meeting fundamental requirements remains paramount. Therefore, the robustness of legal frameworks supporting emergency production and distribution is critical. This underscores the importance of Compulsory Licensing and Government Use within Indonesia's national IPR system, enabling swift responses to crises like drug shortages and other essential supplies.

Reframing our approach to Compulsory Licensing as a tool to mitigate or address the impacts of Intellectual Property Rights (IPR) abuse is crucial for several reasons. First and foremost, it allows us to uphold a balance between promoting innovation and ensuring public welfare. By viewing Compulsory Licensing through this lens, we acknowledge its role in safeguarding broader societal interests, such as public health and access to essential medicines, without compromising the rights of intellectual property holders.

A clear conceptual framework helps articulate the underlying reasons for invoking Compulsory Licensing. These reasons often include situations where there is evidence of IPR abuse, such as unjustified high prices that create barriers to access, inadequate supply of essential goods or services, or instances where patent holders fail to exploit their patents effectively for public benefit. By aligning these reasons with proportional responses, policymakers can ensure that Compulsory Licensing is invoked judiciously and in ways that address specific challenges without undermining incentives for innovation.

Furthermore, structuring a clear conceptual framework enhances transparency and predictability in the application of Compulsory Licensing. This clarity is essential for both intellectual property holders and public interest advocates, as it fosters confidence in the regulatory system and encourages responsible innovation.

Ultimately, reframing our approach to Compulsory Licensing involves recognizing it not as a tool of last resort but as a proactive mechanism to correct market failures, promote competition, and ensure equitable access to essential goods and services. This perspective not only strengthens the legal and regulatory framework but also supports sustainable development goals by balancing innovation incentives with societal needs.

Expanding the scope of issues around the balance of IPR exclusivity, other reasons highlighted by WIPO Guidelines include situations of interdependence. For instance, when utilizing a later patent

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necessitates infringing on an earlier one, Compulsory Licensing may be sought to resolve this conflict without violating existing patents.

Additionally, the WIPO Guidelines recognize Public Interest considerations such as national security, health threats, food security, and sustaining key sectors of the economy. These situations, particularly those affecting vital national interests, were historically addressed through Government Use provisions.

Moving forward, restructuring our understanding and application of Compulsory Licensing aims to enhance clarity and effectiveness in addressing various forms of IPR abuse and safeguarding broader societal interests.¹⁹

New reasons for invoking measures against misuse or abuse include emergencies, public or national interests (especially urgent ones), interdependence, and activities that contravene anti-monopoly laws or unfair business competition regulations.

Initially, efforts to mitigate or minimize the negative impacts of these activities primarily involved Compulsory Licensing or Non-Voluntary Licensing. Subsequently, Government Use provisions were introduced and utilized. In certain contexts, such as in the United States under the 1995 US Department of Justice Guidelines and Federal Trade Commission regulations, Antitrust Laws were enforced. Similarly, in the European Union, regulations like the Technology Transfer Block Exemption (TTBE) were applied to address anti-monopoly concerns.

Comparing the outcomes of these approaches reveals a mixed situation, summarized as follows:

¹⁹ WIPO Model Law for Developing Countries on Invention, Patents, WIPO Publication. Vol.1 1989, p. 840(E)
Table 1: Compatibility of Compulsory Licensing with Government Use

<table>
<thead>
<tr>
<th>No</th>
<th>Reason</th>
<th>Forms of Countermeasures</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Abuse</td>
<td>1. Mandatory licensing</td>
<td>Paris Convention</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Government Use</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Government Use</td>
<td>2. TriPs approval (using the term &quot;use without authorization of the right holder&quot;, without specifying the specific form of action)</td>
</tr>
<tr>
<td>3.</td>
<td>Public/national (and urgent) interest</td>
<td>1. Mandatory licensing</td>
<td>1. Ditto No.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Government Use</td>
<td>2. WIPO Guidelines 1979</td>
</tr>
<tr>
<td>4.</td>
<td>Interdependence</td>
<td>1. Mandatory licensing</td>
<td>1. Ditto No.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Government Use</td>
<td>2. WIPO Guidelines 1979</td>
</tr>
<tr>
<td>5.</td>
<td>Violate</td>
<td>1. Mandatory licensing</td>
<td>Ditto No. 2</td>
</tr>
<tr>
<td></td>
<td>• Antitrust Act</td>
<td>2. Government Use</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Anti Monopoly Law</td>
<td></td>
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</table>

The alignment between reasons and countermeasures in current practice often appears disjointed and lacking in coherence, primarily due to the underdeveloped organization of thought in this area. The
concept of needing countermeasures against potential abuse of exclusive rights has evolved beyond mere misuse of IPR. Factors like interdependence, emergencies (such as wartime, natural disasters, or epidemics), and urgent public interest, which prompt the use of IPR on a non-voluntary basis (as outlined in the 1979 WIPO Guidelines or the Washington Treaty)\textsuperscript{20}, differ significantly from issues of abuse. Applying Compulsory Licensing as a response to these diverse reasons may seem conceptually forced.

Interdependence should be viewed more as a natural state or condition rather than a reason for Compulsory Licensing. It arises from technological advancements and patent applications built upon existing technologies, leading to inherent linkages and dependencies. Typically, this process involves agreement or at least awareness from the owners or inventors of the respective technologies. Therefore, interdependence itself should not justify the application of Compulsory Licensing under such circumstances.

Compulsory Licensing should only be implemented if agreement cannot be reached for valid reasons, and if the relationship between the two inventions demonstrates significant technological progress in terms of technique, economy, and efficiency. Thus, ensuring technological development becomes a more appropriate reason for Compulsory Licensing than mere interdependence, which typically reflects a common aspect of technological discovery and patents.

The same principle applies to emergencies and reasons of public interest, along with applicable countermeasures. It is crucial to distinguish between instances of intellectual property abuse (such as failure to work, non-working, or insufficient working) and emergencies or public interest protections. These contexts differ significantly in their objectives and the measures intended to address them. If mitigating the impact of emergencies or threats to public interest, which burden the community with suffering, is the duty and responsibility of a government, then it should be unequivocally stated that the government's primary concern lies in safeguarding public welfare.

\textsuperscript{20} Paris Convention for the Protection of Industrial Property, WIPO Publication No.201 (E), Geneve. 1979.
In circumstances where balancing rights and obligations is crucial, it is imperative for governments to possess sufficient flexibility to proactively utilize intellectual property rights (IPR) as needed to mitigate the adverse impacts of emergencies or events that threaten public interest. This flexibility allows governments to swiftly respond to crises, such as public health emergencies, natural disasters, or economic shocks, where access to essential goods, services, or technologies is critical for safeguarding public welfare.

The proactive use of IPR in such situations enables governments to implement measures like Compulsory Licensing or Government Use, which can facilitate rapid production, distribution, or affordability of essential products. For instance, during a pandemic, Compulsory Licensing can enable the production of vaccines or treatments at scale to ensure widespread access, particularly in low-income populations.

Further considerations are needed regarding the implementation of Compulsory Licensing to meet the requirements outlined in the Washington Treaty, particularly to ensure free competition. In the practice and literature of IPR, terminology has evolved to address concrete issues, especially regarding the use of IPR that may infringe upon Antitrust or Antimonopoly rules.

The application of Compulsory Licensing in relation to free competition and Antitrust regulations has been minimal outside of the United States and European Union countries. However, it's important to note that even in the United States, the application of Antitrust rules concerning IPR utilization, guided by the 1995 Guidelines from the US Department of Justice and Federal Trade Commission, is limited to specific licensing practices. Similarly, in the European Union, similar principles apply to certain technology transfer practices, as guided by the 1996 Technology Transfer Block Exemption Regulation issued by the European Commission.\textsuperscript{21}

Recent developments in the United States and the European Union reveal a growing trend where certain practices of intellectual property

\textsuperscript{21} American Bar Association, Section of Antitrust Law, 2000, Intellectual Property Misuse: Licensing and Litigation, ABA Printed in the USA. v
rights (IPR) licensing, deemed to infringe upon Antitrust or Antimonopoly regulations under the 1995 Guidelines, are addressed and resolved within the framework of these regulatory frameworks. These cases are managed through Antitrust and Antimonopoly rules, prioritizing compliance and enforcement measures.\(^\text{22}\)

The conventional approach of resorting to Compulsory Licensing, as traditionally understood in the IPR system, is less viable in these contexts. Compulsory Licensing, while theoretically debated, is seldom implemented due to its complexities and limited practical application.

Innovative solutions are necessary to prevent future legal bottlenecks. For instance, current Patent Laws, particularly provisions concerning the grounds for Compulsory Licensing or Government Use, do not comprehensively address licensing practices that may later be deemed in violation of laws prohibiting monopolistic practices and anti-competitive behaviors, as outlined in Law Number 5 of 1999.

Therefore, it would be beneficial to consider and take steps to relax or refine the provisions of Article 50(b) of Law Number 5 of 1999 early on. This could pave the way for easier resolution of certain practices in intellectual property rights (IPR) licensing that are deemed to violate anti-monopoly and fair competition regulations, thereby promoting healthier competition.

With the aforementioned direction in mind, another issue to be considered is the simplification of the role of Compulsory Licensing itself as a "counterbalancing" measure. Undeniably, whether viewed as a counter concept or a counterweight, Compulsory Licensing has played a significant role. Despite often being ambiguously referred to as a "non-voluntary license" or more broadly under "other uses without authorization of the right holder" as per the Washington Treaty and the TRIPS Agreement, Compulsory Licensing remains a pivotal concept.\(^\text{23}\)

\(^{22}\) Section of Antitrust Law, 1996, The 1995 Federal Antitrust Guidelines for the Licensing of Intellectual Property, Commentary and Text, ABA Printed in the USA

Compulsory Licensing should be limited in its application only in cases of abusive activities taking place, whether in the form of “failure to work”, “non-working”, or “insufficient working”, and in matters required to guarantee technological development. In matters or for other reasons, it is submitted to other forms of countermeasures, namely Government Use and Antitrust or Antitrust Laws, or the Prohibition of Monopolistic Practices and Unfair Business Competition.

The question that finally arises now is, how about the form of this rearrangement. The entire description above is summarized in the comparison below:

**Table 2 : Rearrangement between Compulsory Licensing and Government Use**

<table>
<thead>
<tr>
<th>No</th>
<th>Reason</th>
<th>Forms of Countermeasures</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Abuse : a. “failure to work” b. “non-working” c. “insufficient working”</td>
<td>Mandatory licensing</td>
<td>In the event that the Compulsory Licensing does not bring any results at all, the possibility of revocation by the Government is opened</td>
</tr>
<tr>
<td>2.</td>
<td>State of Emergency/Urgent Public Interest</td>
<td>Government Use (Government Use)</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Technology development guarantee (So far it is called interdependence)</td>
<td>Mandatory Licensing</td>
<td>Taken only if no agreement is reached between the parties concerned through an agreement to give licenses to each other (Cross Licensing Agreement)</td>
</tr>
<tr>
<td>4.</td>
<td>Violation of the Monopoly Law/prohibition of Unfair Business Competition Practices</td>
<td>Lawsuits by competitors who are disadvantaged in the framework of the Antitrust Law/ Anti-Monopoly Law/ Law on Prohibition of Monopolistic</td>
<td>To overcome certain practices in the licensing of intellectual property rights which are then proven to be harmful/damaging a fair business competition climate.</td>
</tr>
</tbody>
</table>
C. Conclusion

Compulsory Licensing holds promising potential both as a remedy and in balancing rights and obligations. Establishing a robust foundation for its growth is crucial. Future enhancements, such as allowing appeals against government compensation determinations through judicial review, could significantly enhance acceptance and strengthen its prospects. The application of Government Use, exemplified by its role in procuring anti-retroviral drugs amidst Indonesia's HIV/AIDS crisis, underscores its essential and beneficial nature akin to Compulsory Licensing. Such regulatory and implementation prospects are not only beneficial for communities but also advance Intellectual Property Rights law development.

By structuring these concepts cohesively, linking reasons to necessary actions like Compulsory Licensing and Government Use, clarity is achieved, avoiding ambiguity. This approach also pioneers efforts for international improvements, crucial for harmonizing regulations and mitigating state-level disputes arising from interpretative flexibility. At the national level, this reorganization promotes understanding and smoother implementation, thereby reducing enforcement challenges.

D. Suggestion

Compulsory licensing should be implemented in cases where patents are underutilized or not adequately utilized, or where it is essential to promote technological development. This includes situations where efforts to negotiate mutual cross-licensing agreements fail due to interdependence between inventions, or where patents do not yield practical outcomes. Additionally, compulsory licensing may be necessary to swiftly address adverse consequences stemming from emergencies like war or national disasters, or urgent public interests such as combating epidemics, hunger, malnutrition, and advancing...
education—areas inherently the responsibility of government, applicable under Government Use provisions.

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