Compulsory license in Brazil: competition tool or just a threat?

Milton Lucídio Leão Barcellos[1]

ABSTRACT

The compulsory license flexibility should be considered as a real tool in order to correct the abuse or deviation in the use (or absence of use) of intellectual property rights. This paper looks into one of the hypothesis that could be connected with the internationally recognized (but not used) compulsory license in the patent field related to the Brazilian context. The mentioned hypothesis is connected with the recognition of the fraternity principle as a hermeneutic basis to illuminate the compulsory license system in order to become more than just a threat and confirm its essential competition functionality.

Key Words: Compulsory license.

INTRODUCTION

Brazil has a system of compulsory licenses that is aligned with international standards for non-voluntary license exceptions. Any analysis of the compulsory license system as a policy tool in the international context takes us back to the Paris Convention of 1883 (Article 5, implicating an obligation to use the patented invention) and its Hague Act of 1925 (specifying the possibility of non-voluntary licenses based on the abuses of the patent-holder).[2] In the Brazilian context, we would look to the Brazilian Constitution of 1824, not for containing a specific provision regarding non-voluntary licenses, but as suggesting an alternative to loss of patent rights when the expropriation of the invention would serve the public interest.[3] Later Brazilian constitutions and industrial property laws allow both the protection of inventions and the option of expropriation of inventions or, in more recent constitutions and laws, specific regulations in the industrial property laws related to compulsory licenses (Law 9279/96).[4] This Chapter seeks to identify why the

[1] Independent Intellectual Property Researcher and Professor in Brazil. Lawyer, Licensed Patent and Trademark Attorney in Brazil. Partner of Leão Intellectual Property Firm. Address: Av. Plínio Brasil Milano, 757, 13th Floor, Porto Alegre, RS, Brazil, Zip Code 90520-002. E-mail: milton@leao.adv.br. Phone: +55 51 32260624.

[2] See Milton Lucídio Leão Barcellos, Licença Compulsória: Balanceamento de interesses, motivação e controle dos atos administrativos, Brazilian Intellectual Property Association Review (Magazine) November/December 2005, p. 60. In the book "Propriedade Industrial e Constituição" (Industrial Property and the Constitution), I also analysed the compulsory license system based on a balanced and harmonic preponderance of the utilitarian and social plan theories.

[3] Art. 179, item XXVI of the Brazilian Constitution of 1824.

[4] Art. 72, § 25 of the Brazilian Constitution of 1891; Art. 141, § 17 of the Brazilian Constitution of 1946; Art. 150, § 24 of the Brazilian Constitution of 1967 combined with the Articles 33 to 36 of the Brazilian Industrial Property Law n. 5772 dated 1971; Art. 5, item XXIX of the Brazilian Constitution of 1988 (in force) combined with the Articles 68 to 74 of the Brazilian Industrial Property Law n. 9279/96.

compulsory license system has not been used as a tool to ensure better balanced technological competition in Brazil.

According to the Federal Constitution of Brazil of 1988, the patent system is bounded to the accomplishment of the following: ". . . social interest and the technological and economic development of the country" in a harmonic and balanced sense. The compulsory license system, as part of the Brazilian patent system and industrial property law regulations, should be seen as a complementary tool to accomplish those harmonic and balanced constitutional goals. When we analyse the Brazilian patent system through the constitutional principles of liberty and equality, we can understand the system in general terms as involving a balance of free expression of creations in a free competition environment and "ideal" protection of technologies.

This understanding is possible when we consider an invention as one of the creativity expressions of the human being (focused on solutions for our day-by-day problems in all technological fields), and this expression it is only possible when we have freedom guaranties[5]. The "ideal" protection of technologies should be understood as the customized ideal protection of each technology based on its natures and environment characteristics. The one-size-fits-all model (here considering the same requirements and the same protection to an invention in all fields of technologies) it is far from the "ideal" protection of technologies. And here we find the need of reconnection of the equality principle with the basis of the patent system: it is impossible to reach the right balance without considering the differences between the different technologies in order to grant customized protection for different technologies[6].

This chapter examines how the compulsory license works (or should work) as an effective tool to provide a desirable (constitutional) harmonic and balanced patent system. In particular, it asks why compulsory license provisions exist in Brazil but are not really

[5] The view proposed of the principle of liberty is based on its competition dimension. The free competition and free enterprise are dimensions of the liberty. Based on that, we must make sure that the patent system will be helping, in the innovation dimension, a free competition and free enterprise. See Charlene Maria de Ávila Plaza and Nivaldo dos Santos in A Interface da Propriedade Intelectual e o Direito da Concorrência: Direitos Excludentes ou Convergentes (2010).

[6] Here we understand the equality principle not only related to its formal dimension (equal treatment and opportunity to all. See Jacques d'Adesky in Ação Afirmativa e Igualdade de Oportunidades (2003)), but in its material dimension in order to allow different treatment to different situations through the decision of the basis of the differentiation. For example, the extension of the 20 year protection of a patent based on the delay to get into the market with products related to the patent. Of course that this example (together with examples such as those related to new uses of an already patented invention) is a different treatment of one specific technology based on the peculiarities of the specific market (and of course that this behavior it is a kind of discrimination that theoretically would not be allowed by the article 27.1 of the TRIPS Agreement). To see a deep view of how the equality principle should be understood as a basis of the patent system, see Milton Lucídio Leão Barcellos in Hermeneutic Limits and Possibilities of the Equality Principle in the Brazilian Patent Law (2010)..

used. The limited use of compulsory licenses can be explained in part by the lengthy prosecution of a patent application in Brazil, by misunderstanding about the role of the patent system, and by the procedural difficulties of implementing compulsory licenses.

Instead, we should take an approach to the compulsory license system that is based on the general principle of fraternity[7]. A compulsory license can be conceived not in terms of the restriction of rights of the patent owner, but in terms of helping others without diminishing ourselves. Even if we look at the compulsory license from behind Rawlsian veil of ignorance,[8] we would have to think about the fraternity principle as a complementary way of balancing the general constitutional principles of liberty and equality.

II THE ABSENCE OF USE OF THE COMPULSORY LICENSE FLEXIBILITY IN BRAZIL

Perhaps the view expressed by the US Supreme Court judge, Justice O'Connor, can shed some light on the way we should understand the flexibility offered by compulsory licenses. Justice O'Connor stressed that the free exploitation of ideas should be the rule and the privatization of certain innovation creativity through the patent system should be the exception.[9] Although compulsory licenses contribute to that flexibility,[10] it is remarkable that the flexibility created by the Brazilian compulsory license provision has not been used. The reasons for this absence of use of the flexibility stem in part from a failure to understand the patent system as an exception to free competition[11]. In Brazil, we use the term "patent rights flexibilities." But the logic of the Brazilian patent system is different from

[7] The principle of fraternity is based on the fact that liberty and equality are not enough to establish and sustain a free, equal and inclusive society. So the fraternity principle is the balance needed in a democratic system in order to assure minimum human rights. The meaning of the fraternity principle is related to the fact that it is impossible to live without living together, and based on that the fraternity is essential in social relations (see Fabiana Barletta in Liberdade, Igualdade e Solidariedade como Direitos Fundamentais na Democracia (2005)). And the fraternity dimension is needed in order to guarantee the participation of the society of the benefits generated by a system based on liberty and equality. For example and specifically related to the patent system, the access of essential patented medicines would not be possible without the enforcement of a fraternity view of the patent system since the liberty and equality alone would not be able to answer to the demand of poor countries for those medicines.

[8] See John Rawls. *A Theory of Justice*, Harvard University Press, 1999, chapter III, p. 118.

[9] *Bonito Boats, Inc. v Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

[10] In connection with the view of the free exploitation of ideas as a rule and the patent system as an exception, the Brazilian case of compulsory license in the competition field can be seen as a non-exploitation or insufficient working of the patented invention based in the *Nortox Agroquímica S.A. v Monsanto* case (1984). See Denis Allan Daniel in Realities of Licensing in Brazil (1988) available at http://lesnouvelles.lesi.org/lesnouvelles1988/lesNouvellesPDF06-88/Realities-of-Licensing-in-Brazil.pdf.

[11] See João da Gama Cerqueira in Tratado da Propriedade Industrial (1982) where the author is based on a patent protection as a natural right and, based on that, believes that the patent right has a kind of "immunity" from the competition scrutiny about the legitimate use of the patent rights. With the same natural rights view see José Carlos Tinoco Soares in Tratado da Propriedade Industrial – Patentes e seus sucedâneos (1998). Many contemporany authors have a different view of the patent rights as part of the competition system policy or as a kind of an exception of the free competition (aligned with the author view) such as Denis Borges Barbosa in Uma Introdução à Propriedade Intelectual (2003), Newton Silveira in Abuso de Patentes (2014) and Karin Grau-Kuntz in O CADE e o caso das peças de reposição *must-match* (2010),

the logic of the TRIPS Agreement.[12]The logic of the use of the compulsory license system at the national level in Brazil should not be the same as the logic of this flexibility in the TRIPS Agreement.[13] We should recognize national patent law in the context of free competition. As soon as we consider the patent system as an exception to free competition, we should consider the compulsory license as one of the expressions of free competition instead of a "flexibility" of the patent system. Even if we look at that in a strictly semantic way, we must pay attention to the message that we are receiving when considering the compulsory license from a "flexibility" point of view (as international law might suggest).

The nonuse of the flexibility of compulsory licenses is also attributable to procedural difficulties in implementing a compulsory license based on abuse of rights, abuse of economic power or patent dependency. Looking into the procedural system underlying the grant of compulsory license in Brazil, we see that from a competition law perspective a fine would be faster, efficient and easier to implement than a compulsory license obligation when dealing with the abuse of economic power cases.

According to the Brazilian Patent and Trademark Office (Instituto Nacional da Propriedade Industrial – INPI),[14] the request of a compulsory license must be accompanied by:

1. official fee
2. a formal petition
3. documents that justify the compulsory license request, such as, for example, market survey that proves the insufficient exploitation of the patented invention
4. the applicant of the compulsory license request must prove that they have full conditions to practice the invention by themselves

[12] See Nuno Pires de Carvalho. A estrutura dos sistemas de patentes e de marcas – Passado, presente e futuro. Ed. Lumen Juris, Rio de Janeiro, 2009, p. 406: "Therefore, the logic of the international protection of patents is different from the logic of national protection. And it will continue to evolve, because as some players find new techniques to counter the gains of the other players, some of these players introduce new assets, or simply change tables – to play the same game" (author translation).

[13] This statement should not be interpreted as suggesting that the Brazilian Industrial Property Law is not compliant with the TRIPS Agreement. It should be understood in the meaning of the Christophe Geiger well-defined affirmation when referring to the TRIPS limitations and exceptions: "However, the TRIPS Agreement, despite having many unsatisfying provisions, has one major advantage: some provisions are vague, unclear and their exact scope is often hard to understand. This can be an advantage because when legal provisions are unclear, judges or scholars have to give them a meaning, to propose interpretations. This allows the IP community to have a certain influence where provisions of the TRIPS Agreement offer some flexibility, by 'rethinking' them in a balanced manner when they present a risk of leading to unbalanced solutions" Christophe Geiger, *Exploring the flexibilities of the TRIPS Agreement's provisions on limitations and exceptions* in *The Structure of Intellectual Property Law – Can one size fits all?* (Annette Kur and Vytautas Mizaras eds, Cheltenham, Edward Elgar, 2011) 287–288.

[14] See http://www.inpi.gov.br/portal/artigo/guia_basico_contratos_de_tecnologia. (Accessed August 18, 2013).

5. the prosecution of the compulsory license application will be as follows: once the compulsory license request is officially published, the patent-owner will have 60 days to present a response. After that response, INPI will have 30 days to examine the request and issue a decision.

As we can see from the requirements listed above, the items 1 and 2 are formal requirements easily accomplished. The elapsed time involved with the prosecution of the compulsory license procedure (item 5 above) it is also reasonable.

The item 3 could involve an obstacle for the applicant in order to fulfill the INPI requirements because of the open clause without informing the specific documents that would be considered enough to justify the compulsory license request[15].

To fulfill the item 4 requirement the applicant would have to prove the full capacity to practice the invention by themselves. In the pharmaceutical field and other technological fields that are sensitive to different market and health regulations, for instance, this requirement would involve a high investment in the Brazilian context in order to make possible to one solely applicant to fulfill this requirement[16]. The combination of two or more different companies would be needed.

The main difficulties of implementation of the compulsory license based on absence/insufficient exploitation and/or the abuse of rights and/or the abuse of economic power and/or the dependency of patents are related to the third and fourth requirements listed above.

There are other problems. For example, in Brazil, the full patent prosecution usually takes around 10 years (before the grant of the patent). But a compulsory license based on non-exploitation or insufficient exploitation can be applied only three years after the grant of the patent.[17] Moreover, the “abuse of rights” standard is an open clause that admits different interpretations, making the application of this compulsory license modality uncertain. Brazilian law recognizes traditional concepts of abuse of rights, such as those related to license agreement clauses. But establishing abuse of rights based on refusal to license, requesting abusive royalty rates, and similar hypothetical abuse of rights, and thus justifying the grant of a compulsory license, have proven difficult.

[15] See Carla Eugênia Caldas Barros *in* Aperfeiçoamento e Dependência em Patentes (2004).
[16] See Denis Borges Barbosa *in* Patentes de Invenção – Licenças Compulsórias (2002).
[17] The INPI President has promised to reduce examination of patent applications to 5 years by 2015, with fast-track possibilities mainly related to infringement situations. But at present, the prosecution issue still represents an obstacle to the use of the compulsory license system.

Of course that the multiple barriers for the compulsory license implementation as a real tool also passes through prosecution difficulties, as stated by Haris Apostolopoulos, "The advantages of compulsory licenses are outweighed by administrative difficulties"[18].

III THE FRATERNITY PRINCIPLE IN BRAZIL

There is an ongoing discussion in Brazil about the concept of fraternity as a constitutional value or virtue.[19] The meaning of fraternity that is intended in this chapter is the one connected to solidarity[20]. Fraternity it is clearly a value, but really difficult to recognize as a constitutional principle, notwithstanding that the Brazilian Federal Constitution establishes that one of the objectives of the Brazilian Republic is to build a free, just and solidary society (Article 3, item I). Based on that, can we affirm, for example, that the so-called "social function" of the property rights stressed in Article 5, XXIII of the Brazilian Constitution is one of the multiple ways to express the concern about fraternity/solidarity as a balance between liberty and equality?

Addressing concrete disputes via "fraternity" or "solidarity" may seem too abstract and vague. But isn't it the same as when we deal with the definitions and effectiveness of "liberty" and "equality" generally? Maybe the comprehension of fraternity as a principle is just a matter of comprehension the vagaries of human identity, and recognizing the individual human being as inseparable from society.

Carlos Augusto Alcântara Machado[21] stressed the historical recognition of fraternity:

> However, it is with the advent of the Universal Declaration of Human Rights, adopted at the UN General Assembly on December 10, 1948, that important steps were taken, going far beyond that of 1789.
>
> As Marco Aquini states, the 1948 Declaration differs from the Declaration of 1789, particularly for the character universally achieved and for the

[18] See Haris Apostolopoulos *in* Anti-competitive abuse of IP Rights and compulsory licensing through the international dimension of the TRIPS Agreement and the Stockholm proposal for its amendment (2006).

[19] See Carlos Augusto Alcantara Machado (*A fraternidade como categoria constitucional*); Brazilian Supreme Court Minister Gilmar Mendes stressed the need in the 21st century to rethink the equality and liberty principles according to the fundamental value of fraternity (in Carlos Ayres Britto (in ADPF 186-2/DF)); see Brazilian Supreme Court Minister Carlos Ayres Britto vote (ADI 3128-7/DF and Pet 3388/RR). Based on those Supreme Court cases related to the Fraternity principle as a Constitutional Value or Principle, we are focusing on the Fraternity as one of the Constitutional basis to be considered when understanding and applying to a patent system aligned with its functional Constitutional obligations related to "social interest, technological and economic development of the country".

[20] Differently from the Paul Spicker explanation about the differences between the concepts of Fraternity and Solidarity (See Paul Spicker in Liberty, Equality, Fraternity (2006)), the Fraternity as a principle aligned with Brazilian Supreme Court Judge Carlos Ayres Britto it is based on the fact that Fraternity and Solidarity would share the same concept including a moral obligation focused on the common good, reciprocity and social responsibility.

[21] See Carlos Augusto Alcantara Machado (*A fraternidade como categoria constitucional*, p.10).

> expressed recognition of the responsibility of everyone in the realization of human rights.
>
> It proclaimed in its art. 1, that "all men are born free and equal in dignity and rights. They are endowed with reason and conscience and should act to each other in a spirit of brotherhood."[22]

The new/old approach of fraternity as a constitutional principle recognises that a system based only on liberty and equality is not balanced enough to allow for the main objectives of mankind.

IV COMPULSORY LICENSE FLEXIBILITY SEEN THROUGH THE FRATERNITY PRINCIPLE: COMPETITION BENEFITS

The problems with the effectiveness of the compulsory license are well explored by van Zimmeren and Van Overwalle. They suggest that the rarity of compulsory licenses, although internationally allowed through the Paris Convention and TRIPs Agreement, are several: the application procedure takes quite some time to be completed (and during the prosecution it is difficult to receive an injunction in order to make it effective); the elapsed time that the patent-owner has to start work on the patent from the filing/grant date; and the so-called negative effects on future negotiations in the market when a company decides to apply for a compulsory license against another company that owns one or more patents (a kind of retaliation).[23]

These barriers to the effectiveness of compulsory license implementation make the system slightly schizophrenic, since it is internationally defined and accepted but not effective. Some researchers would say that the mere existence of the possibility of using this tool would be enough to impact the willingness of the patent-owner to use their rights in a way that is disconnected from the purposes of the patent system as a whole, working as an "effective" threat. This is unpersuasive. It may be an effective way to make patent-holders think about how to avoid the use of flexibilities by third parties, but it is not an effective tool in the competition field since a "threat" based on a weapon with "blank

[22] Author translation of the original: "No entanto, é com o advento da Declaração Universal dos Direitos Humanos, aprovada na Assembleia Geral da ONU, em 10 de dezembro de 1948, que importantes passos foram dados, indo muito além daquela de 1789. Como aduz Marco Aquini, a Declaração de 1948 diferencia-se da Declaração Francesa de 1789, particularmente, pelo caráter alcançado de universalidade e pelo expresso reconhecimento da responsabilidade de todos na realização dos direitos humanos. Proclamou, no seu art. 1º, que "todos os homens nascem livres e iguais em dignidade e direitos. São dotados de razão e consciência e devem agir uns aos outros com espírito de fraternidade".

[23] Esther van Zimmeren and Geertrui Van Overwalle. *A Paper Tiger? Compulsory Licenses Regimes for Public Health in Europe*. (IIC 2010 001062 1). p. 19.

bullets" does not affect substantially the behavior of a patent-holder[24].

Through an analysis of the compulsory license related to the essential facilities doctrine, Kung-Chung Liu[25] stressed that "an obligation to deal or license is the second best solution to guarantee at least allocative efficiency in market situations where IP protection does not reach its goal of promoting dynamic efficiency due to the lock-in effect" and concluded the study, affirming that:

> the patent system is meant to strike a balance between public and private interests. It is therefore imperative to add public policy considerations into the compulsory patent licensing regime of the TRIPs Agreement. A compulsory patent licensing regime based on the well-defined essential facilities doctrine that is enforced jointly by the competition and IP authorities can prevent monopolies from extending their market dominance to adjacent markets by refusing others the use of their patents on reasonable terms, and thereby maintain market competition.

In a patent system with absence of a uniform doctrine related to patent abuse and patent misuse[26], each specific market demands a tailoring of the patent use limits related to the use/abuse notion in each specific relevant market and specific technological scenario. Based on this challenge, the Fraternity principle should be interpreted as a way to balance the collective Constitutional goal viewed as a base for reciprocity and social responsibility of the patent holder in relation to the society in a fair competition scenario[27]. Since the compulsory license it is supposed to be a tool in order to keep the patent system align with the Constitutional goals of the social interest, technological and economic development of the country[28], it is important to stress that it is not possible to strike the correct balance without using the Fraternity principle as one of the hermeneutical basis of the patent rights in a specific market and technological environment.

Based on the need of a comprehension of the compulsory license beyond the

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[24] See Reto M. Hilty and Kaya Köklü. Access and use: open vs. proprietary worlds. Max Planck Institute for Innovation and Competition Research Paper n. 14-07, p. 09 where they mentioned: "Often overlooked is the importance and effectiveness of compulsory licenses, which significantly may open up the proprietary world by allowing third parties to use the subject matter of protection against the payment of a remuneration determined by court".

[25] Liu, Kung-Chung. *Rationalizing the Regime of Compulsory Patent Licensing by the Essential Facilities Doctrine* (November 1, 2008). Available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831302.

[26] See Mark Lemley in The Economic Irrationality of the Patent Misuse Doctrine (2012); Daryl Lim in Patent Misuse and Antitrust Law: Empirical, Doctrinal and Policy Perspectives (2013); Marshall Leaffer in Patent Misuse and Innovation (2010); Fábio Konder Comparato in O Abuso nas Patentes de Medicamentos (2010); between others.

[27] See Paula Forgioni in Os Fundamentos do Antitruste, 3rd Edition, 2008 specifically the chapter 4.3 (p. 190/191) where she analysis the Brazilian Constitutional basis and the goals of the antitrust law in the Brazilian context she stress that the Brazilian Cosntitution of 1988 it is clear about the fact that the "competition is, between us, a way, a tool in order to reach a higher objective, which is to 'ensure to all dignified existence, according to the dictates of the social justice'" (Author translation).

[28] See Brazilian Federal Constitution, art. 5, XXIX.

"simple" relation between public and private interests' harmonization goals, it is needed to take a look into the evolution of the unauthorized legitimated use of patent rights in the international context.

The compulsory license system was adopted, in an international harmonization perspective, in the Paris Convention through the Revision of Hague in 1925, replacing the original Paris Convention rule of the so-called "obligatory work", where the patent-owner was obliged to work their invention in all countries where they applied the patent protection. This substitution, according to Di Blasi, Garcia and Mendes,[29] was the result of a search *of a more flexible disposal that would attend the national necessities of the economy, but that would not cause lack of interest to the owner of the patent.*

According to Bodenhausen comments to the Paris Convention (1967 Revision of Stockholm), the compulsory license based on Article 5, section A paragraph (g) raises the following challenges:

> (g) The provision concerning the abuses which might result from the exercise of the exclusive rights conferred by the patent relates to a very important question of patent law. Although patents, even apart from their exploitation, are considered beneficial to industry, as they publish inventions which may inspire other inventions, and fall into the public domain after the expiration of their term, it is believed in many countries that, in order to be fully justified, patents should also be used for working the patented invention in the country where the patent is granted, and not merely as an exclusive right to prevent others from doing so or to control importation. On the other hand, immediate exploitation of the same invention in. all countries where patents are granted for the invention is generally impossible, so that the patentee must be given sufficient time to organize exploitation, be it by himself or by licensees, in the countries concerned.[30]

The effective use of the Compulsory License Institute, in its different modalities, is prescribed in Articles 68–74 of Law No. 9.279/96 in Brazil. Denis Borges Barbosa,[31] divides the compulsory license into the following modalities in Brazil:

- license for abuse of rights

[29] See Clésio Gabriel Di Blasi, Mario Augusto Soerensen Garcia, Paulo Parente Marques Mendes in A propriedade industrial (1997), p. 42. Author translation.
[30] See G.H.C. Bodenhausen in Guide to the Application of the Paris Convention for the Protection of the Industrial Property (1969).
[31] See Denis Borges Barbosa *in* Uma Introdução à Propriedade Intelectual (2003). Author translation.

- license for abuse of economic power
- license of dependency
- license based on public interest
- legal license that the employee, co-owner of a patent, concedes *ex legis* to their employer, according to Article 91 § 2º of the BIPL/96.

It is evident that each of the modalities of compulsory license deserves a deep and detailed analysis, which is not the objective of the present work, highlighting only the existence of different modalities of compulsory license application resulting in the restriction of the particular exercise of the right of property of patents, always searching for the balance between the involved public and private interests.

According to Denis Borges Barbosa, it is important to apply the principle of proportionality when we are analyzing the compulsory license flexibility:[32]

> Such principles, which also derive from the clause of the due legal process included in the Brazilian Constitution, in the balance between two constitutional requirements – protection of property and social interest – induce us to apply the principle of proportionality. In other words, the public interest must only prevail until the exact proportion, and not beyond, that is needed to satisfy such interest. It means that the compulsory license, according to the constitutional models, cannot exceed the extension, the time limit and the indispensable form to supply the relevant public interest, or to repress the abuse of patent or economic power.

When we start to look at the compulsory license through the eyes of the fraternity principle, we are inducing a new look, some kind of “contributory look”, that is intended to help the patent system to fulfill its main objectives: the social interests together with the economic and technological development of the country.[33]

Far from being a utopic look, the comprehension of the fraternity principle as one additional hermeneutic base to the patent system Constitutional functionality and as long as we see the compulsory license less as an “intervention” or an “exception” to patent rights and more as a “tool” or a “concretization” of competition policy, we will be reinforcing the whole patent system itself instead of weakening it.

[32] See Denis Borges Barbosa *in* Uma Introdução à Propriedade Intelectual(2003). Author translation.
[33] See Article 5, XXIX of the Brazilian Federal Constitution.

V CONCLUSIONS

The proposed approach of the ongoing study is that we start to look at the patent system using the eyes of the fraternity principle, which means a necessary rethinking of the compulsory license as an effective, legal and internationally approved tool instead of a simple threat with limited (if none) positive effects in competition behavior.

It seems that the whole meaning of the Fraternity principle is based on helping each other without diminishing ourselves. And when we look to the basis of the competition system as an instrument to promote a higher goal of society we should also see the compulsory license as one real (and legitimate) tool in order to promote efficiency and/or correct abuses in the patent/competition relationship environment, fostering this apparently utopic and abstract fraternal society.

Besides that, as also stressed by other scholars, we should facilitate the prosecution of a compulsory license request in order to make it easier to be achieved once its requirements are fulfilled, avoiding the absence of use of the tool because of administrative difficulties. In order to facilitate the prosecution of a compulsory license request as well as make it an option available for competitors, we should also have faster regular patent prosecution (final grant decision in less than four years) and better communication and effective cooperation between the Brazilian Patent and Trademark Office (INPI) and the Brazilian Competition Authority (CADE).

The fraternity principle as a “starting and leading” point should be the hermeneutic additional fuel to give the compulsory license the capability to be a real tool in the competition field on behalf of society, instead to be a simple and useless competition threat. But, of course, this conclusion is based on a hypothesis to be confirmed with further debates and studies.

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