IPR – the intangible asset that confuses the European Union
# Table of contents

Summary .................................................................................................................. 3  
Preface ..................................................................................................................... 4  

Abbreviations ......................................................................................................... 5  

1. Introduction ......................................................................................................... 6  
   Background .......................................................................................................... 6  
      1.1.1 Purpose and delimitations ........................................................................ 8  
      1.1.2 Method and material ............................................................................... 8  
      1.1.3 Outline ..................................................................................................... 8  

2. The legal framework ............................................................................................ 10  
   The EU approach .................................................................................................. 10  
      1.1.4 *Magill* and the ‘exceptional circumstances’ ......................................... 11  
      1.1.5 The ECJ judgment .................................................................................. 12  
      1.1.6 Post-Magill decision ............................................................................... 13  
      1.1.7 *Oscar Bronner* .................................................................................... 15  
      1.1.8 The ECJ judgment .................................................................................. 15  
      1.1.9 Post-*Oscar Bronner* decision ................................................................. 17  
      1.1.10 *IMS Health* ....................................................................................... 18  
      1.1.11 The ECJ judgment ................................................................................ 20  
      1.1.12 Post-IMS judgment ............................................................................... 21  
      1.1.13 *Microsoft* ........................................................................................... 22  
      1.1.14 The General Court judgment ................................................................ 26  
      1.1.15 Post-*Microsoft* decision ................................................................... 28  
      1.1.16 Guidance on the Commission’s Enforcement Priorities in Applying Article 82 .... 30  

3. Is it possible to strike a balance between IPR and Competition law? .............. 32  

4. Is the EU perspective on IPR the right perspective? ........................................... 37  

5. Conclusion .......................................................................................................... 40  

Bibliography .......................................................................................................... 41  
   Legislation ........................................................................................................... 41  
   Literature ............................................................................................................ 41  
   Journals ............................................................................................................... 42  
   Official documents of the EU ............................................................................. 43  
   Internet sources .................................................................................................. 44  
   Table of cases ...................................................................................................... 44
Summary

This thesis will be concerned with one of the main concerns and highly discussed topics in the relationship between Article 102 TFEU and Intellectual Property Rights. Predominately, it will focus on the enforcement of IPR(s) as an abusive practise of dominance and whether a dominant undertaking has the ability to protect its IPR by refusing to licence its IPR to a third party.

The main purpose will be to analyse the legal framework from previous case law and the development of ‘exceptional circumstances’ doctrine. The thesis will argue that the ECJ and the General Court have expanded its flexibility by widening the doctrine to an extent that has contributed to uncertainty in its application. Additionally, the development of a case-by-case approach in the most recent judgment in Microsoft has left some unanswered questions, which may have a significant impact on future cases. Lastly, there has been a shift in the approach of consumer harm in the cumulative criteria, which illustrates the attempt to advance the effect of the doctrine by considering it as a key factor in the assessment of refusal to licence.

The focus of this thesis will be on the development of the doctrine stretching from Volvo v. Veng leading up to Microsoft, with support from the opinions and views of scholars and debaters on the various cases, and how each case have impacted the following judgments. In addition to this, the thesis will show that as the law stands today, there is an imbalance between the two legal areas. Since, the more the EU Authorities continue to widen the ‘exceptional circumstances’ doctrine the more superior will Competition law become against IPR. Subsequently, the thesis will argue that the EU Authorities’ approach in protecting the consumer welfare could potential have the opposite effect on the inventors by not acknowledging that innovation is more than money.

With that said, it is concluded that the European Courts’ judgments, in the cases within, have contributed to an inconsistent application of the ‘exceptional circumstances’ that has resulted in the law becoming imbalanced, inconsistent and unclear.
Preface

I would like to take this opportunity to say thank you to the two most important people in my life. **Alexander**, thank you for continuously giving me unconditional love and support, for always believing in me, when I needed it the most, and for the endless amounts of encouragements to always follow my dreams. And last but not least, to the strongest woman I know. **Mum**, thank you for always inspiring me to aim higher, for giving me the confidence to stand on my own two feet and for always giving me everything that a daughter could ever wish for.

I will be forever grateful for having you in my life.

23rd of May 2017, Malmö, Sweden.

*Sahar Torabi*
# Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<td>Commission</td>
<td>European Commission</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EU Authorities</td>
<td>Collectively referring to the European Commission, The National Competition Authorities, The General Court and the Court of Justice of the European Union</td>
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<td>ECJ or the Court</td>
<td>European Court of Justice</td>
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<td>EU</td>
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<td>European courts</td>
<td>European Court of Justice and General Court</td>
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<td>GC</td>
<td>General Court</td>
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<td>GEP</td>
<td>Article 102 Guidance on Enforcement Priorities</td>
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<td>IPO</td>
<td>Initial Public Offering (Stock market)</td>
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<td>IPR(s)</td>
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<td>R&amp;D</td>
<td>Research and Development</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TTBER</td>
<td>Technology Transfer Block Exemption Regulation, revised in 2014</td>
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1. Introduction

Background

The relationship between antitrust law and patent policy has proved to be a source of endless confusion and controversy since the enactment of the Sherman Act in 1890.¹ This is down to the concept, that the two are generally viewed as completely opposed principles. IPR creates monopolies whilst the main purpose of Competition law is to prevent them.² However, the motivating notion behind granting IPR is to create an incentive for the innovator to create more innovations by being provided the exclusive protection for its innovative accomplishments.³ By granting a patent, for example, provides the inventor the protection for scientific innovations for a restricted period of time, normally for twenty years. Whereas, copyright grants the creator the exclusive rights to commercially exploit their works of authorship, which generally is extended beyond the lifetime of the author.⁴ In the United States, patent and copyright protection is constitutionally guaranteed⁵ and has been a part of the federal law since 1789⁶. Whereas, in Europe, the law surrounding patents and copyrights is largely a result from national law as harmonised by Council Directives.⁷

Furthermore, the underlying rationale with antitrust/and competition law is to encourage competition between rivals, since non-abusive competition between rivals could result in maximising consumer welfare in terms of lower prices and better quality products.⁸ Thus, in order to achieve non-abusive competition in the market, the law places limits on practises on firms whom have market power. Therefore, section 2 of US Sherman Act condemns ‘every person who shall monopolize, or attempt to monopolize…any part of trade or commerce among several States’, and similarly, Article 102 TFEU states that ‘[a]ny abuse by one or more undertaking of dominant position…in so far as it may affect trade between Member

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² M. Angelov, The “Exceptional Circumstances” Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU, (European Competition Journal, 2014) at 38
⁴ ibid at 262
⁵ See Article I, s.8 US Constitution
⁶ See Copyright Act 1790; Patent Act of 1790
⁷ K. Wok, A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes, World Competition, 2011 at 262
⁸ ibid at 262
States’ shall be prohibited as incompatible with the internal market. Even though the CJEU has clarified that solely being an owner of an IPR will not be considered as conferring a dominant position in the market despite the fact that the IPR facilitates the formation of legal barriers to entry. Rather, it is the practise of refusing to licence IPRs or charging excessively expensive royalties which may result in excluding others from exploiting the IPR. Hence, it has the potential of abusing market power and even creating monopoly by limiting the secondary market since the exclusive right of use prevents competitors from free riding on the inventor’s patented idea(s).

Nevertheless, it is important to identify that IP law and competition law have the same goals to uphold but they achieve them through different means. Hence, looking at both areas o law in general terms, the aim is to advance and promote consumer welfare. The objective of IP law is to promote technical progress to the ultimate benefit of consumers and providing sufficient reward to ensure that the inventor is benefitted from its inventive efforts. Therefore, it is important for the Competition Authorities to find the right balance where the initial proprietor is entitled to exercise his or her right to IP whilst upholding an open and free market where the economic efficiency is not hindered. Thus, the Competition Authorities must consider a proper balance between static and dynamic efficiency, where static efficiency considerations consist of the effects of the proprietor’s actions in the current market and, where dynamic efficiency involves the long-term effects of a particular behaviour. This is because, static efficiency requires a minimal IPRs protection, whilst, dynamic efficiency demands stronger and it has generally been accepted to have greater capacity to increase social welfare by producing higher quality products and lower price levels in the future than static efficiency alone.

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11 Luc Peeperkorn, 'IP licences and Competition Rules: Striking the Right balance”, (World Competition 26, 2003) at 528
12 ibid at 528
13 M. Angelov, "The "Exceptional Circumstances” Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU”, (European Competition Journal, 2014) at 40
14 A. Ezrachi, M. Maggiolino, ”EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012)) at 596
1.1.1 Purpose and delimitations

The purpose of this thesis is to illustrate whether the relationship between the rules of European Competition law and Intellectual Property is balance, coherent and consistent. As well as analyse the European Court’s judgments on refusal to supply and licence IPR and what the implications have been and will be in the future. Consequently, the thesis will analyse whether the EU perspective on IPR is for the benefit of the consumers or if it actually harms the consumers by limiting the dominant undertakings’ practise.

This thesis will predominately examine the legal implications within IPR in the European Community context. However, since the topic affects different areas of business and regions, it will consider the economic aspects, Article 101 TFEU, and the US opinions, but in a limited version. Finally, in order to provide an overview of the implications of the relationship between the two areas of law, this thesis will only speak on a more overview considering the different forms of IPR(s).

1.1.2 Method and material

This thesis will focus on four cases, Magill, Oscar Bronner, IMS Health and Microsoft. It will structure the cases with background information concerning the case, the courts judgment as well as the implications and impacts resulting from the judgment. The methods and arguments will be heavily supported by opinions and views of scholars, government officials and practitioners whom are active within the areas of law. Furthermore, as part of the legal framework, the Guidance paper will be analysed in order to identify the Commissions perspective relating to the area of refusal to supply and licence IPR(s). This material has been selected in order to give an overview on the legal tensions and to provide varied arguments from different sources.

1.1.3 Outline

Chapter two will provide the reader with the legal framework and the development of the ‘exceptional circumstances’ doctrine throughout the years and ending with Microsoft.
Chapter three will be more analytical concerning the relationship between the two areas of law and if it is possible to establish a fair balance, which benefits both the consumers and the inventors.

Chapter four questions whether the EU perspective for moving forward is the right perspective for the development of innovation and encouraging competition. Additionally, personal experiences will be shared and alternative perspective will be suggested.

Finally, Chapter five, a brief conclusion is given.
2. The legal framework

The EU approach

The reasoning behind Article 102 TFEU is to prohibit any dominant undertakings from abusing and exploiting their position within the internal market by for example charging unfair prices or by limiting production to the prejudice of consumers.\textsuperscript{15} Since a dominant position is a mixture of economic assessments and legal considerations,\textsuperscript{16} the main focus is therefore to protect the consumer welfare from actions, which could lead to seriously disturbing the competitive structure of the market.\textsuperscript{17} So, in order for Article 102 TFEU to arise in IPRs matters, an undertaking must enjoy a dominant position whilst taking into account of variables such as relevant product and geographical market as well as temporal factor.\textsuperscript{18}

Following the decisions in Magill,\textsuperscript{19} IMS\textsuperscript{20} and Microsoft\textsuperscript{21}, and with the support from Article 102 Guidance on Enforcement Priorities (GEP)\textsuperscript{22}, the EU Authorities have been able to create a list of ‘exceptional circumstances’ where a refusal to licence could lead to an abuse under Article 102 TFEU:\textsuperscript{23}

i) Indispensability or objective necessity of the refused input;

ii) Likelihood or liability or risk of excluding all or effective competition;

iii) Emergence of a new or improved product or technical development being impeded, or simply consumer harm;

iv) No objective justification

\textsuperscript{15} A. Jones, B. Sufrin, “EU Competition law: Text, Cases and Materials”, (OCL, 2016) at 258

\textsuperscript{16} P. Wymystowski, “From innovation to Domination: Exercising IPR as abuse of art.102 TFEU”, (Lund University 2014) at 9

\textsuperscript{17} Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215 at paragraph 20

\textsuperscript{18} Slaughter and May, “The EU competition rules on intellectual property licensing”, (June 2016) at 17

\textsuperscript{19} Case C-241-1/91 RTE & ITP v Commission [1995] I-743

\textsuperscript{20} Case C-418/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG [2004] ECR I-5039

\textsuperscript{21} Case T-201/04, Microsoft v Commission [2007] ECR-II-3601

\textsuperscript{22} Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7)

\textsuperscript{23} K. Wok, “A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes, World Competition”, 2011, at 263
1.1.4 *Magill*\(^2^4\) and the ‘exceptional circumstances’

The case concerned British and Irish television companies’ refusal to licence their copyright protected television programme schedule. RTE (Irish State Broadcaster) was able to enjoy statutory monopoly television broadcasting in Ireland and BBC and IBA had a statutory duopoly in the United Kingdom (UK), since under the national UK and Irish legislation, copyright protected literary and artistic work as well as compilations of information such as listing of programmes to be TV-broadcasted.\(^2^5\) Hence, the majority of the households in Republic of Ireland and roughly two-fifths of Northern Irish homes were able to receive television programmes broadcast through the RTE, ITV (acting through a subsidiary, Independent Television Publications “ITP”) and the BBC (the ‘broadcasting companies’).

Since the broadcasting companies owned the copyright programme listings for their own respective channels, they would publish their own individual weekly TV guide containing only their own programmes listings. This resulted in that household audiences who wished to plan their TV-consumption for the upcoming week where forced to purchase each individual TV guide separately since there was no comprehensive weekly listing guide. However, the broadcasting companies did, on request, provide the daily or periodical newspapers the listing information to be published free of charge but they had to follow a strictly enforced licensing conditions. Because of this, an Irish publisher, Magill, decided to start publishing a comprehensive weekly guide, which included all programmes that were available through all three broadcasting companies. However, the broadcasting companies argued that the comprehensive TV guide was infringing their copyrights and therefore initiated legal proceedings in domestic court by obtaining injunctions in order to hinder Magill’s actions from producing and publishing the compilation of information. Consequently, Magill complained to the Commission by stating that the broadcasting companies were in fact abusing their dominant position by refusing to give out reliable advance listings information and protecting their listings by enforcing their copyright, thus infringing Article 102 TFEU.\(^2^6\)

Following this, the Commission held that the broadcasting companies were abusing their dominant position and therefore acting contrary to Article 102 TFEU. It stated that all three


\(^2^5\) H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 37

the broadcasting companies were each dominant in the market for weekly listing and due to their policies, it limited the availability for the compilation of information, and therefore it was seen as an abusive practise where the aim was to protect their own individual weekly guides. Consequently the Commission ordered the companies to supply Magill, on a non-discriminatory basis, the advanced weekly programme listing and allowing Magill to reproduce such information. The General Court upheld the Commission’s decision by proclaiming that its judgments was supported by the concept of trade between Member States and it had been affected by limiting potential commercial exchanges between Ireland and the United Kingdom and therefore it must be dismissed. As a result, RTE and ITP appealed the decision to ECJ, where ECJ confirmed the finding of abuse but it held that its judgment was strikingly narrow.

### 1.1.5 The ECJ judgment

The Court held that when considering the existence of a dominant position under Article 102 TFEU, ‘the mere ownership of an intellectual property right cannot confer such a position’ and that a refusal to grant a licence to reproduce information, ‘even if it is the act of an undertaking holding a dominant position, cannot in itself constitute as an abuse of a dominant position (Volvo v. Veng, paragraphs 7 and 8)’. The Court supported its decision from Volvo and established that the exercise of an exclusive right by the proprietor may constitute an abusive conduct in “exceptional circumstances”, whereas in this case four the exceptional circumstance were identified:

I. there was no substitute for a composite weekly television guide, for which there was a specific, constant, and regular potential demand on the part of consumers;

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28 The Commission delivered the decision in three separate judgments but containing the same information: see RTE v Commission, paragraph 71, BBC v Commission, paragraph 58, ITP v Commission, paragraph 56
31 ibid at paragraph 49
32 Case 238/87 AB Volvo v Erik Veng (UK) Ltd [1988]
II. by refusing to supply the information prevented the creation of a new product for which there was a potential consumer demand (constituted as an abuse under Article 102(b) TFEU).

III. there was no objective justification for such refusal.

IV. the appellants were reserving the secondary market of weekly television guides to themselves by excluding all competition on the market.

Accordingly, the ECJ supported the Commission’s decision and held that practices and its policies, which the three broadcasting companies had adopted, constituted as an abuse of dominant position, thus infringing Article 102 TFEU. As a result of this decision, the Court issued a compulsory licence as a remedy in order to cease the infringement and forced the broadcasting companies to provide Magill with the compilation of information for the television programme listings.35

1.1.6 Post-Magill decision

Following the decision in Magill, the ‘list’ of ‘exceptional circumstances’ gained great significance36 and the application of the doctrine to IPR constituted a significant landmark in the debate on the interference between the two areas of law.37 Even though the Court decided that the mere ownership of an IPR does not create the existence of a dominant position, it provided a “list” in which a refusal to a licence could amount to an abuse. However, it has been unclear whether the list of exceptional circumstances should be viewed as cumulatively necessary, cumulatively sufficient, or individual sufficient. In particular, whether a hindrance of a new product should be considered separately or a necessity, and a sufficient ground in order for it to be viewed as abusive if an undertaking refuse to supply.38

For example, Jones and Sufrin questioned if the broadcasting companies had already produced a composite guide by cross-licensing each other, then the composite guide of a third party, such as Magill, would not have been new product. However, the broadcasting companies would still have reserved themselves the special position on the secondary

37 A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012)) at 600
market and the third party’s like Magill would not have been able to introduce the new product.

Moreover, the Court noted in *Magill* and *Volvo v. Veng*, that a dominant undertaking’s refusal to grant a licence to its IPR(s) does not in itself establish an abuse of dominance. Meaning that if Article 102 TFEU should arise in an IPR matter, the refusal to licence must be combined with an added element and ‘exceptional circumstances.’ Therefore, the underlying notion in EU competition law following the *Magill*’s judgment is that a dominant undertaking are not under a general obligation to licence its intellectual property, but there might be exceptions, where such a duty may arise in ‘exceptional circumstances’.\(^{39}\) Furthermore, an element in *Magill* judgment was the fact that the ECJ utilised Article 102(b) TFEU as the legal basis\(^{40}\) in that an abuse can involve ‘limiting production, markets or technical development to the prejudice of consumers’. With that said, the list of abusive practises found in Article 102(b) TFEU is not exhaustive and authorities whom enforce the EU competition rules have the right to oppose against practises which do not necessarily fall within one of the sections in the provision. Because of this, the effect that the Court had when it relied on Article 102(b) TFEU has proven to have created significant consequences in subsequent cases, notably in *Microsoft*,\(^{41}\) where the General Court applied a broad interpretation of the ‘exceptional circumstances’ doctrine by building its argumentation around Article 102(b) TFEU.\(^{42}\) I will address the case of *Microsoft* later on in this thesis.

The special circumstances in *Magill*, which swung the balancing favour of an obligation to licence, were later emphasised and limited in the case of *Oscar Bronner*.\(^{43}\)

\(^{39}\) H. Catovic, *'Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law'* , (Stockholm University, 2015) at 40


\(^{41}\) Case T-201/04, *Microsoft v Commission* [2007] ECR-II-3601

\(^{42}\) H. Catovic, *'Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law'* , (Stockholm University, 2015) at 41

1.1.7 Oscar Bronner

In Oscar Bronner, the ECJ repeated the ‘exceptional circumstances’ from the Magill judgment, whilst it did not strictly concern IPR, the judgment did offer a new perspective and further clarification regarding the ‘exceptional circumstances’.

The case concerned a preliminary ruling from an Austrian court involving two newspaper publishers and distributors, Mediaprint and Bronner. Bronner published and distributed the daily newspaper called Der Standard, which covered roughly 3.6 per cent of the newspaper market. Mediaprint published and distributed two daily newspapers, which combined had market coverage of 71 per cent. Furthermore, Mediaprint had established a nationwide home delivery service, and Bronner argued that Mediaprint had abused its dominant position by not including Der Standard in Mediaprint’s delivery scheme. Therefore, Bronner sought an order from an Austrian court to cease the alleged abuse by including Der Standard in the delivery scheme in return for a reasonable remuneration since it would have been unprofitable for Bronner to construct its own home delivery service.

1.1.8 The ECJ judgment

In order for the ECJ to decide whether the refusal to include Bonners newspaper in its home delivery scheme constituted as an abuse of a dominant position, the ECJ sought guidance from previous case law in Commercial Solvents and Magill. The Court did not explicitly confirm that the criteria, which it had established in relation to refusal to licence intellectual property rights in Magill, could be directly applicable to a refusal of a home delivery service. However, the Court highlighted that it is necessary to effectively rely on the Magill judgment in order to plead the existence of an abuse within the meaning of Article 44 Case C-7/97, Oscar Bronner GmbH Co. KG v. Mediaprint, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112


48 Case C-241-1/91 RTE & ITP v Commission [1995] I-743

As result, the ECJ outlined three factors which where relevant whilst determining whether Mediaprint’s refusal was an abusive act within the meaning of Article 102 TFEU:

I. the refusal of the service comprised in home delivery must be likely to eliminate all competition in the daily newspaper market;
II. the refusal is incapable of being objectively justified and;
III. the service in itself be indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.

In addition to this, the Court established that the parties had already acknowledged that there were other existing distribution methods available for daily newspapers, such as using postal services and/or through sale in shops and at kiosks. Whilst it may have been considered as a less of an advantageous method for distribution of certain newspapers, irregardless, they did exist and they were being used by other daily newspaper publishers. Additionally, ECJ noted that the refusal did not appear to have any technical, legal nor economic obstacles for making it impossible, or even unreasonably difficult, for any other publisher to establish their own nationwide home delivery schemes and to use that established scheme to distribute their own newspapers. Therefore, the Court highlighted the Advocate General Jacobs opinion in that for such an access to be considered as indispensible it is necessary to demonstrate that it would not be economically viable to create a second home delivery scheme for the distribution of circulation daily newspapers with a circulation comparable to the existing scheme.

Thus, the Court concluded that it was not enough for the Bronner to argue that the creation of their own home delivery scheme would not be economically viable for the small circulation of the daily newspapers, as well as, that there were already several substitutable

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51 ibid at paragraph 41
53 ibid at paragraph 45
delivery methods available for Bronner to use and therefore Mediaprint’s refusal was not considered to be an abuse of its dominant position.

1.1.9 Post-Oscar Bronner decision

The Oscar Bronner dealt with the issue regarding tangible property unlike in the cases of Magill and Volvo Veng where the matter involved licensing intangible property (IPR). However, as shown in Oscar Bronner, assessing the refusal of an intangible and tangible property was practically identical in either situation. The main difference between the two is that whilst assessing a refusal to provide access to IPR, the refusal must prevent the emergence of a new product.55 However, by clarifying the ‘exceptional circumstances’ in the Bronner judgment, it seems that it limited the enforcement boundaries of Article 102 TFEU. Its main focus was on the need for the balancing of considerations before analysing the dominant undertaking’s freedom to contract.56 As Advocate General Jacobs argued, in the long term, it will mostly depend on pro-competitively and in the interest of the consumers to allow a company to retain for its own use of facilities, which they have invested in and developed for the purpose of furthering their own business.57 In his opinion, the incentive for the dominant undertaking to invest in new efficient facilities would be reduced if its competitors were to have the opportunity to request the access to their facilities. However, even if it is clear that in some situations a refusal of access may cause elimination or substantial reduction of competition, which has the risk to be detrimental to the consumers in both short and long term,58 the level of assessment for such a risk should reflect that ‘in assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to licence intellectual property rights’.59

Furthermore, since the ECJ heavily relied on the ‘indispensability’ criteria, it can be argued that when the Court established that the access to the home delivery scheme was not

56 A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012)) at 601
58 ibid at paragraph at 61
considered to be as indispensible, it did not proceed to reflect on the two remaining factors. Although, the Court did, however, emphasised that the refusal must be ‘likely to eliminate all competition’ from the requesting undertaking. Despite this, the Court did not provide interpretation for the term ‘likely’, but it can be suggested that the interpretation should be considered as it is not necessary for the competition to be eliminated, but rather proving that there can be a risk for such an effect.60

However, the Bronner balancing formula did not survive for long and has then been eroded in subsequent cases.61

1.1.10 IMS Health62

Similarly to the Court’s judgment in Bronner, the ECJ repeated its ruling from Magill, and it reiterated the formulation from Bronner in regards to the ‘exceptional circumstances’, thereby confirming the course set, away from the initial position in Volvo,63 in refusal to licenses cases concerning IPR.64

The case concerned a reference to the German court concerning a dispute between IMS and NDC regarding the use of IMS’s ‘1,860 brick structure’ by NDC. IMS had developed a system, which provided data on regional sales of pharmaceutical products within the German territory. The system was based on segmentation structure that divided the territory into small geographical segments (bricks) which was based on factors such as postal codes, political boundaries and the location of pharmacies and doctors. Furthermore, the system was marketed and distributed free of charge to pharmacies and doctor’s surgeries which allowed IMS to collect pharmaceutical sales information and provide that information to its customers (pharmaceutical companies). According to the national court, the practise helped

60 H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 44
61 A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012)) at 601
63 Case 238/87 AB Volvo v Erik Veng (UK) Ltd [1988] ECR 6211
64 M. Angelov, The "Exceptional Circumstances” Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU, (European Competition Journal, 2014) at 47
those structures to become the normal industry standards\textsuperscript{65} to which its clients adapted their information and distribution systems after. Since the system was so well received within the market, competitors to IMS tried to create similar brick structures. However, since IMS had copyrights on regional pharmaceutical sales reports, it created the opportunity for IMS to seek interim injunctions in domestic court for infringement against its competitors.

The company PII, which was later acquired by NDC, were also active within the same market as IMS, by marketing regional data on pharmaceutical products in Germany by using a brick structure that was similar to the IMS product. As a result, IMS applied to German court for an interlocutory order prohibiting NDC from using any brick structure systems, which derived from the IMS 1,860 brick structure.\textsuperscript{66} The German court granted the order and based its reasoning on that the brick structure used by IMS is a database which has the capability of being protected by copyright. Following this, NDC and the Commission argued that IMS’s refusal to licence its copyright-protected system, may be considered as an abusive practice, by referring to the judgment in Bronner,\textsuperscript{67} that the criterion for determining whether that structure is indispensible or not is dependant on whether a competitor can create a viable alternative.\textsuperscript{68} Following this, the Commission reiterated the ‘exceptional circumstances’ doctrine and established that IMS structure was 1) indispensible for NDC to continue moving forward with its business model since respecting the legal and technical constraints would be far too significant in the creation of a new structure\textsuperscript{69}, 2) IMS had no objective justification not to licence to NDC.\textsuperscript{70} As a result, the Commission found that the test was fulfilled and ordered an interim measure requiring IMS to grant NDC a licence the 1860-brick structure on non-discriminatory basis.\textsuperscript{71}

\textsuperscript{69} 2002/165/EC: Commission Decision of 3 July 2001 – (Case Comp D3/38.044 – NDC Health/IMS Health: interim measures) at paragraph 127-131
\textsuperscript{70} ibid at paragraph 174
\textsuperscript{71} ibid at paragraph 215
1.1.11 The ECJ judgment

The judgment largely followed the Opinion of Advocate General Tizzano with support from settled principles established in Volvo v. Veng and Magill. The ECJ reiterated that the act of a dominant undertaking that refuses to licence its intellectual property does not solely constitute as an abuse of a dominant position but in some ‘exceptional circumstances’ the practise of an exclusive right could amount to an abusive conduct.\(^72\) In addition to this, the ECJ tried to reconcile the rulings from Magill and Bronner and it confirmed that it is sufficient that three cumulative conditions are satisfied; i) that the refusal is preventing the emergence of a new product for which there is a potential consumer demand, ii) it is unjustified and iii) the refusal excludes any competition on a secondary market.\(^73\) Since the first criteria was already established in Magill, the ECJ took the opportunity to further elaborate the issue by clarifying that where the product is indispensible for operating on a secondary market, the refusal may only be regarded as abusive if ‘the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.’\(^74\) However, as the Advocate General pointed out, whilst it is important to acknowledge the balancing of interest in the protection of IPR and economic freedom, the vital factor with the condition is that the refusal should not prevent the development of the secondary market, which would lead to the detriment of consumers.\(^75\) Hence, the first criteria established that it is not a necessity for the new product to be considered as a new innovation but solely different to what is already being provided by the proprietary holder and the outcome should be in the interest of protecting consumers. As for the second criteria, the Court decided to take a more cautious approach by stating that no specific observations had been made and it held that it is for the national courts to examine the justifications, in the light of the facts, whether the refusal of the request could be justified by objective consideration.\(^76\) Finally, the third criteria, the Court reiterated its method in Bronner and established that it is appropriate to differentiate between an upstream


\(^{73}\) ibid at paragraph 38


\(^{75}\) ibid at paragraph 48

\(^{76}\) ibid at paragraph 51
market, established by the indispensible product or service, and a secondary market, which the product or service is developed for the production of another product or the supply of another service.\textsuperscript{77} Even though the Court did not clarify what the Court meant with the reference to a secondary market, they did however provide clarification that if it were possible to identify a potential separate market, even if it was hypothetical, then it would be sufficient.\textsuperscript{78} Thus, if a refusal to licence has the ability to limit potential competition on an imaginary secondary market, then such practise could constitute as a violation.

To conclude, the Court referred the case back to the national court without any indication as to whether the requirements were in facts were satisfied in the case, unlike in Bronner, where it held that conditions were not satisfied.

\subsection{1.1.12 Post-IMS judgment}

Even though the judgment in IMS concerned with a preliminary ruling under Article 267, the Court did not provide a ruling on the merits of the case. However the Court did take the opportunity to provide clarity and legal certainty since it was almost ten years after the Magill judgment. The judgment provided a further understanding as to what is to be considered as the ‘exceptional circumstances’ doctrine, reaffirmed that IPR are different from other forms of property, and most importantly, clarified that it would be sufficient if four cumulative conditions were fulfilled in order to establish that the refusal to licence to be considered as an abuse.

The IMS judgment clarified that copyright is safeguarded and only ‘where a refusal to grant a licence prevents the development of a secondary market to the detriment of consumers’\textsuperscript{79}; competition law will retake its rights. Thus, it established that when a competitor requests to use the copyrighted work in order to develop a second derived product, which solely reproduces the proprietor’s product, copyright should prevail.\textsuperscript{80} Meaning that, if there is a consumer demand for a new product, the competitor should not be prohibited in developing

\textsuperscript{77} H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 47
\textsuperscript{79} ibid at paragraph 48
\textsuperscript{80} E. Derclaye, The IMS Health Decision: A Triple Victory’, (World Competition 27(3), 2004) at 403
a better product, which may have the ability to promote and enhance social welfare. But if the competitors’ intention is to merely develop a product, which aims to duplicate or imitated the already existing product offered by the proprietor, then the refusal to licence would not be regarded as an abuse.\(^8\) As a result, the Court managed to reconcile the aims of both competition and copyright laws.\(^9\)

Whilst, the decision clarified a few important matters, it did, however, fail to provide legal certainty as what is meant by a “new” product. The lack of clarity could have the potential risk of being interpreted as the same product, but if it is offered at a cheaper price or with better conditions, it would not be identical nor the “same” product and thus differing from the original product and therefore having the ability to be identified as “new” product. Consequently, the uncertainty in its interpretation creates the opportunity for competitors to be granted a compulsory licence if they could successfully argue that the refusal has lead to the limitation of creating a product which could be considered as a “new” product.

### 1.1.13 **Microsoft**\(^8\)

Some scholars argue that there are some inconsistencies in the CJEU’s judgment in both *Magill* and *IMS*, but the Commission has continued to develop a broader interpretation regarding circumstances where a refusal may be contrary to Article 102 TFEU. The Commission decided that the three conditions of ‘exceptional circumstances’, developed in *Magill* that there are three distinct abuses rather than a single cumulative set of conditions, which the CJEU developed in *IMS*.\(^9\) Although, the *Microsoft* case is a particular kind of refusal to supply, which arises in the information technology sector in respect of ‘interface information’, meaning that software developers need to have access to interface information in order to make products that are compatible with other systems and programs. This is often referred to as ‘interoperability’ and it has the ability to be protected by intellectual property rights as copyright.\(^5\) Whilst the information can be accessible by using reverse-engineering, it has been shown that in some situations reverse-engineering attempts, are neither

\(^{81}\) H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 49

\(^{82}\) E. Derclaye, *The IMS Health Decision: A Triple Victory*, (World Competition 27(3), 2004) at 403

\(^{83}\) COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965

\(^{84}\) P. Wymystowski, *From innovation to Domination: Exercising IPR as abuse of art.102 TFEU*, (Lund University 2014) at 22

successful nor economically feasible.\textsuperscript{86} Therefore, when an undertaking has significant market power within the software market, it may be essential that other providers develop their products in order to be compatible with the dominant undertakings’ products.

The issue first arose in 1984 when the Commission dealt with a number of IBM’s practises, the world’s biggest computer manufacturer. In the Statement of Objections, The Commission argued that IBM had been abusing its position in the market by failing to supply other competitive manufactures with interface information which was required in order to successfully develop products which was compatible with IBM’s System/370. IBM sought to immediately challenge the validity of the Commission’s action but the application was dismissed. Thus, in a written reply to the Statement of Objections, IBM denied that they have a dominant position nor were they committing any of the alleged abuses. As well as, IBM had already informed the Commission that they had taken steps to make IPOs available to all users of its software and they were unbundling all software. While not admitting the existence of a dominant position nor any abuse thereof, IBM agreed to disclose sufficient information, which enabled competitors to develop their own soft- and hardware products and attach it to IBM System/370, because IBM had the effect of substantially improving the position of both users and competitor in the markets for System/370.\textsuperscript{87}

Following this, the Commission began an investigation into the software company, Microsoft, after a complaint had been filed by Sun Microsystems (“Sun”). Microsoft had over 90 per cent of the PC operating systems market and the Commission defined this as approaching a position of complete monopoly, which was said to be an overwhelmingly dominant position.\textsuperscript{88} As a result, Sun complained that Microsoft was not providing them, and others who provided server operating systems, with sufficient interoperability information in order for them to be able to develop workgroup server operating systems, which were compatible with Microsoft’s Windows desktop and server operating systems (“WGOS”). During previous years, Microsoft had supplied full interoperability information to server manufacturers but had decided to limit the information that they supplied since their incentives had changed since they entered the market themselves. Therefore, in 2004, the Commission concluded that Microsoft held a dominant position on both the client PC operating systems market and the WGOS markets and thus it had committed an abuse by

\textsuperscript{86} ibid at 509
\textsuperscript{87} XIVth Report on Competition Policy (Commission, 1984) at paragraphs 94-95
\textsuperscript{88} COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 435
refusing to supply the interoperability information, since it had the risk of eliminating competition, hence infringing Article 102 TFEU. As a result, Microsoft was fined €497,196,304 and the Commission ordered that within 120 days the applicable information should be made available to undertakings whom are on the WGOS market and that they should guarantee that the information was regularly updated in a timely manner.

The Commission examined whether the Bronner and Magill criteria were fulfilled since the case considered the disruption of previous levels of supply, unlike Bronner and Magill, and therefore, Microsoft argued that the Commission could not prove any of the elements. However, it was established that the criteria’s were satisfied, but they elaborated that on a general note the ‘exceptional circumstances’ in previous cases did not specify that it was limited from considering other circumstances of exceptional character and that ‘there is no persuasiveness to an approach that would advocate for an exhaustive checklist of exceptional circumstances’, meaning that refusals to supply should be examined on a case-by-case basis so that refusals that did not fall within the criteria have the ability to be held as an abusive practise. For example, the Commission recognised circumstances, which fell outside the Magill criteria such as; 1) Microsoft’s dominance over the client PC operating system has a significant impact on the adjacent secondary market for WGOS which could eliminate and exclude competitors and 2) that the case was concerned with the disruption of previous levels of supply. Consequently, the Commission held that case-law of the European Courts suggests that the Commission must analyse the entirety of the circumstances surrounding a specific instance of a refusal to supply and assess its decision based on the results from its examination. As a result, the Commission followed the ‘effects-based’ approach in relation to the application of Article 102 TFEU, which it established the following year in the Discussion Paper. It considered the facts of the case, acknowledged the effects, which it could have on the consumers as well as the issues of incentives to innovation. It established that the information was in fact indispensable by adopting a tow-stage approach. Firstly, it examined the level of interoperability that was

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89 COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 692
91 COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 555
92 ibid at paragraph 526
93 COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 556
94 ibid at paragraph 558
95 DG Competition Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005
required for Windows non-Microsoft WGOS in order for the competitors to be able to remain viably on the market and secondly, whether the information that Microsoft refused to supply was indispensible to attaining such viability. Following the results from a customer survey, the Commission identified that even though the customers enjoyed features and functionalities with the competitors’ systems to those of Microsoft, this was overlooked by the experience of achieving full interoperability with Windows. Therefore, the Commission were able to conclude that the competitors’ system had to have access to the interoperability information from Microsoft in order for the competitors to compete viably. Especially, considering that there were no substitutes for such disclosure by Microsoft.\(^97\) However, Microsoft sought to argue that reverse-engineering provided an alternative route for its competitors for accessing information necessary for interoperability with the Windows domain architecture.\(^98\) Nevertheless, the Commission established that the reverse-engineering of the interfaces of a program, as voluminous as Windows, required considerable efforts with uncertain chances of success. Even if the reverse-engineering was thought to be of a less compressive set of interfaces, its competitor would still have had difficulties in locating the adequate points of connections, which are buried in the over 30 million lines of code of Windows and that the viability of products produced by reverse-engineering depended on Microsoft not breaking the compatibility.\(^99\) Therefore, in regards to the risk of eliminating competition, the Commission held that the refusal to supply could impact the technical development to the prejudice of consumers, contrary to Article 102(b) TFEU, since it would in the longer-term perspective make the competitors confined to niche existences or not be viable at all.\(^100\) Thus, there would be little scope for innovation for the competitors and the disappearance of competitors would diminish Microsoft’s incentives to innovate.\(^101\) However, Microsoft sought to argue that its refusal was justified since the information was information was protected under IPR and that forced disclosure would lessen its incentives to innovate. But, the Commission rejected the plea by establishing that the negative impact on Microsoft’s incentives to innovate was outweighed by its positive impact on the level of innovation of the whole industry.\(^102\)

\(^{98}\) COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 683
\(^{99}\) ibid at paragraph 685-686
\(^{100}\) COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 700
\(^{101}\) ibid at paragraph 725
\(^{102}\) COMP/C-3/37.792, Commission v. Microsoft [2004] 4 CMLR 965 at paragraph 783
Following the Commissions’ decision, Microsoft brought an action by application to the General Court for annulment.

1.1.14 The General Court judgment

In the General Court, the Commission argued that applying an automatic application of the criteria laid down in IMS would cause problems in the case. Therefore, in order to examine whether such practise could be seen as abusive, it had to take into account all the circumstances surrounding that refusal. Thus, the Commission identified that three characteristics which allowed it to be considered as abusive; i) the information which Microsoft refused to disclosed to its competitors related to interoperability, ‘a matter to which the Community legislature attaches particular importance’, ii) that Microsoft used its extraordinary power in the client PC operating systems to eliminate competition on the adjacent WGOS, iii) it involved the disruption of previous levels of supply. Due to this, the Commission contended that the criteria recognised in Magill and IMS were also satisfied in this case. Following this, the General Court observed that even though undertakings have the freedom to choose their business partners, in certain circumstances, a refusal to supply on the part of a dominant undertaking may constitute as an abuse of a dominant position within the meaning of Article 102 TFEU. Therefore, the General Court reiterated previous settled case law by confirming that the refusal to licence a product which is covered by intellectual property rights cannot in itself amount to an abuse, however, in exceptional circumstance such an exercise of the exclusive right by the owner may give rise to such an abuse under Article 102 TFEU. Thus, the General Court interpreted the ‘exceptional circumstances’ doctrine by providing three circumstances which had to be considered to be exceptional: i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market; iii) the refusal prevents the appearance of a new product for which there is potential consumer demand. When the three circumstances had been established, the refusal to grant a licence may infringe Article 102

104 ibid at paragraph 316
106 ibid at paragraph 319
107 Case T-201/04 Microsoft v. Commission [2007] ECR II-3601 at paragraph 331
TFEU, unless the refusal was objectively justified. It was also noted that the circumstance that the refusal prevents the development of a new product is only found in the case law on the exercise of IPR.

Consequently, the General Court held that the Commission was correct in finding that the interoperability information was indispensible and rejected Microsoft’s argument that other alternative operating systems, such as Linux, were competing effectively on the market, by concluding that ‘the growth of Linux products on the work group server operating systems market was only modest’. Secondly, regarding the elimination of competition, the General Court held that the Commission is entitled to bring a action under Article 102 TFEU where there is a ‘risk of elimination of competition’ and ‘likely to eliminate competition’ by relying on ‘accurate, reliable and coherent evidence’. Without such capability, the Commission would not be able to safeguard the competition that still exists on the relevant market. Thus, the General Court upheld the Commissions argument and the criteria were satisfied. Thirdly, in relation to the interpretation of the new product requirement, the General Court observed that the Commission was correct in its examination by establishing that the refusal prevented its competitors from developing WGOS which as a result impacted the consumer’ behaviour into purchasing a standardised Windows solution. Thus, the limitation that was placed on consumers’ choice was far more damaging to consumers, especially since they considered that non-Microsoft WGOS worked better than Windows WGOS. Therefore, the General Court held that the Commission was correct to consider that the artificial advantage retained by its refusal discouraged its competitors from developing WGOS with innovative features. In addition to this, the General Court noted that even if the competitors were to have access to the interoperability information, they would not be able to clone or reproduce its product solely based on such information, nor would they have the incentive to merely reproduce Windows WGOS, since implementing specifications is a difficult task which would require significant investment in money and time. Lastly, Microsoft relied that its refusal was objectively justified based on two separate grounds; i) the technology was protected by intellectual property rights and

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109 ibid at paragraph 334
110 Case T-201/04 Microsoft v. Commission [2007] ECR II-3601 at paragraph 432
111 ibid at paragraphs 561-564
112 Case T-201/04 Microsoft v. Commission [2007] ECR II-3601 at paragraph 651
113 ibid at paragraph 652
114 Case T-201/04 Microsoft v. Commission [2007] ECR II-3601 at paragraph 653
115 ibid at paragraph 658
constituted trade secrets and that ii) an order of compulsory licence would eliminate or prejudice its future incentives to invest in the development new technology. However, the General Court rejected Microsoft’s’ plea relating to the interoperability information being protected by intellectual property right, since accepting such a ground to objectively justify a refusal to licence would consequently amount to never being able to apply case-law which is in favour of free competition.\textsuperscript{116} Furthermore, the General Court dismissed the defence regarding trade secrets and claimed that ‘there is no reason why secret technology should enjoy a higher level of protection, than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure’\textsuperscript{117} As well as, Microsoft defence concerning the negative impact on its incentives to innovate were also dismissed since it failed to provide initial burden of proof of such impact and the General Court found the plea to be ‘vague, general and theoretical arguments.’\textsuperscript{118}

In conclusion, the General Court held that the exceptional circumstances, identified by the Court of Justice in Magill and IMS, has been satisfied and therefore it rejected Microsoft’s plea as wholly unfounded.\textsuperscript{119}

\textbf{1.1.15 Post-Microsoft decision}

The Microsoft case was an extremely crucial case for the Commission since they were provided the opportunity to highlight its authority and its position of power in relation to dominant firms across the world. Thus, the Microsoft decision resulted in that the Magill criteria’s were stretched following the extensive interpretation of the ‘exceptional circumstances’ doctrine. Most importantly, the decision clarified that the criteria was not exhaustive but rather that it merely provided a list of circumstances, which was sufficient to satisfy. However, it has been argued by Ahlborn and Evans that the Microsoft’s judgment embraces the Bronner/Magill/IMS test, but, it significantly weakness the presumption that dominant firms have the freedom to chose their trading partners. They argue that in Magill, for example, the firm claimed that they could not offer a weekly television guide without having access to the television listings that the stations broadcast in Ireland. Therefore, it was argued that the listings were indispensable for the of making the weekly guide since

\begin{flushleft}
\textsuperscript{116} Case T-201/04 \textit{Microsoft v. Commission} [2007] ECR II-3601 at paragraph 690 \\
\textsuperscript{117} ibid at paragraph 693 \\
\textsuperscript{118} Case T-201/04 \textit{Microsoft v. Commission} [2007] ECR II-3601 at paragraph 698 \\
\textsuperscript{119} ibid at paragraph 712
\end{flushleft}
access to the listing would have created the emergence of a weekly television guide, which would have been a new product in Ireland at the time. Unlike the situation in Magill, the competitors in Microsoft where in a different position when Sun complained to the Commission. At the time, Microsoft had a 60 per cent share of the WGOS market and a 27 per cent share when the judgment was made and the manufactures that entered the market following Sun’s letter, had a 5-15 per cent share of the WGOS market in 2003 as a result from Linux open source operating system. Hence, competition had not been eliminated even if the Commission had the ability to act when it found that there might be a risk for elimination in the future. Therefore, the criteria’s that was established in Magill were stretched from being a concept of new product test to the concept of the potential risk of eliminating competition. As a result, Ahlborn and Evans argued that the General Court had added the new product test element for refusal to licence intellectual property on an already rigorous indispensability and elimination of competition test for physical property. Thus, it required evidence to demonstrate that the practise would not only eliminate competition but also that the practise would eliminate a new product that consumers can benefit from. Hence, limiting technical development to the prejudice of consumers in accordance with Article 102(2)(b) TFEU.

Catovic argues that the General Court should have developed the traditional approach by furthering the new product criterion instead of creating an entirely new and uncertain area by introducing a new restriction, which considered the ‘limitation on technical development’. Since the General Court had already established that the competitors would not limit themselves simply by reproducing Microsoft’s WGOS, but that rather having the incentive to develop an improved and distinguishable product, hence reaching a similar conclusion in Magill and IMS criteria. Consequently, this would have limited the creation of uncertainty with the doctrine and contributed towards a more uniformed interpretation of the ‘exceptional circumstances’ doctrine.

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121 ibid at 19
1.1.16 Guidance on the Commission’s Enforcement Priorities in Applying Article 82

Long after the ruling in *Microsoft*, the GEP was released in February 2009, which introduced new concepts and explanations, whilst still reflecting the principles from previous case law. The purpose of GEP was to set forth the enforcement priorities, which would guide the Commission’s practise in applying Article 102 TFEU to exclusionary conduct by dominant undertakings. The intention with the document was to provide greater clarity and predictability as regards to the general framework of analysis in which the Commission takes into account when measuring various forms of exclusionary conduct and providing assistance to undertakings in assessing whether certain behaviour has the capability to result in intervention by the Commission under Article 102 TFEU. Specifically, paragraph 75 covers the section on refusal to supply and margin squeeze and it establishes that any undertaking shall have the right to freely select its trading partners and to dispose freely of its property, however, a dominant undertaking has an obligation to supply. A consequent of this obligation may lead to the dominant undertaking to invest less or minimise its investments, as well as, it has the possibility to create a free ride for competitors to lean on the dominant undertakings investments instead of investing themselves. Hence, the Commission has the reasonability to avoid such events since both of them has the ability to harm consumers. It should be noted, however, that the section will only apply to the ‘downstream market’, which refers to the market for which the refused input is needed in order to manufacture a product or provide a service.

Furthermore, when assessing a dominant undertakings refusal to supply, the Commission will consider a range of practise such as the refusal to supply products to exiting or new customers, refusal to licence IPR, including the licence which is necessary to provide interface information and/or refusal to grant access to an essential facility or a network. In addition, the GEP provides a test, which reflects previous case law, for the Commission to consider when assessing whether a practise should be considered as an enforcement priority.

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124 Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) now applying to Article 102 TFEU  
125 ibid at paragraph 2  
126 Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) at paragraph 75  
127 ibid at paragraph 78
The enforcement priority will be confirmed when the three cumulative conditions are satisfied;\textsuperscript{128}

i. the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

ii. the refusal is likely to lead to the elimination of effective competition on the downstream market, and

iii. the refusal is likely to lead to consumer harm.

Whilst it is recognised in the GEP that the Commission will consider claims by the dominant undertaking that a refusal to supply was necessary in order to create incentives to continue to invest in the future and taking the potential risk of failed future projects. As well as, the obligation to supply could have the potential negative effect on the dominant undertaking innovations, it is however, established that the burden of proof lies on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation.\textsuperscript{129} With that said, it is argued that the responsibility that the dominant undertaking is subjected is too unpredictable and too difficult to justify since it rather impossible to assume future predicaments. Which as a result leads to further confusion regarding the level of intervention by the Commission.

\textsuperscript{128} Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) at paragraph 81

\textsuperscript{129} ibid at paragraphs 89-90
3. Is it possible to strike a balance between IPR and Competition law?

The tension between the two areas of law has developed over the years as a result of the EU Authorities arguing that IP law is domineering because it enables behaviour, which undermines effective competition, thus having an immense effect on consumer welfare. But as technology develops and innovation becomes more important for a companies success, it is crucial to establish a fair balance between competition law and IPR. In fact, on 24 may 2016, Commissioner Vestager delivered a speech where she identified that both competition and IP have a vital role in business development. Without competition, competitors would not seek to continuously innovate in order to stay ahead of their rivals and without innovation; competitors would not be able to get ahead of their rivals. Hence, “to encourage innovation, you need both competition and a reward for innovators” (emphasis added).\(^{130}\)

Following the demonstrated case law, it is clear that the practise of dominant undertaking whom refuse to licence IPR with a competitor or a third party will not solely be considered as an abusive conduct contrary to Article 102 TFEU. However, following the GEP, there appears to be a change from competitors to consumers in regards to when the Commission would interfere with the possibility of anti-competitive behaviour. The emphasis on consumer harm in the cumulative criteria’s, established in paragraph 81 in GEP, signals the attempt to advance an effect-oriented approach by introducing consumer welfare as a key factor in the assessment. Since it is a new condition, one can argue, that the Commission will balance the likelihood of a negative consequences of refusal to supply on consumer welfare, against the consequences of ordering an obligation on the dominant undertaking to provide access to its innovation. Whilst the prevention of innovation is generally considered to be harmful to the consumer welfare, it has not been identified in the condition, thus it creates uncertainty for future developments, as well as it enables the Commission the ability to expanded the condition as cases develop further. However, if the changed development could be structured in a fully manageable condition, it has the potential to provide a useful

limiting principle since it would only be triggered where consumer harm is proven rather than illustrating the exclusion of competitors.  

Furthermore, it has been established that for practise to amount as an abusive act it must have the added element of it being considered as ‘exceptional circumstance’. This notion has the ability to function as an important stage in the assessment of a refusal, since it highlights the need for proportionality and it restrains the application of competition law. But, the usage of the term ‘exceptional’ signals a strong restrictiveness as to how the Courts should apply the criteria in concrete and practical situations, and it indicates a clear guideline from the ECJ that the EU competition law does not create an automatic presumption nor does it impose an obligation on dominant undertakings to share their IPR. However, it also provides the opportunity in ordering a compulsory licence in order rectify or to prevent the anti-competitive behaviour, which may encumber growth for competitors on secondary market and where the development of product differentiation or cumulative follow-on innovation is hindered. On the other hand, ‘exceptional circumstances’ doctrine provides the ECJ with flexibility for assessing cases involving refusals to licence IPR, which as result could create both positive and a negative consequences. The flexibility has the ability to produce uncertainty for dominant undertaking since it has not been established as to how broadly the ECJ can the interpret what should be considered an ‘exceptional circumstance’, as well as the adoption of a case-by-case approach creates limitations for dominant undertakings in order to be able to avoid a particular situation which may render an act of refusal to licence as an abuse. Likewise, the flexibility has also the ability to provide the ECJ with sufficient authority to examine each case individually, based on its own facts, thus enabling the ECJ to consider particular reasoning and actions for that specific refusal to licence. Therefore, it has the potential to serve as a balancing tool, even in cases such as Microsoft, where the Court widened the realm of competition law.

Furthermore, Peeperkorn argues that Competition policy should not be used as an instrument to systematically develop a balance between IPR, but rather be applied to situations where

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131 A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012) at 607-608
132 ibid at 608
134 A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012) at 608
IPRs are exploited. The European Courts have created the distinction between the existence of an IPR, which cannot be affected by the Treaty rules of free movement and competition, whilst the exercise of the IPR can be affected by the free movement and competition provisions of the Treaty.\textsuperscript{135} It is evident that the Courts and the Commission try to narrowly define the existence of an IPR since it enables the proprietor exclusivity to licence and ask for royalties during a certain period of time and within a certain market. Therefore, the flexibility is crucial for the Commission have the ability to be supported by Article 102 TFEU in order to protect the free competition.

With that said, it is important to assess how the Commission views the evolvement of the relationship between competition law and IP. In the recent Technology Transfer Block Exemption Regulation (“TTBER”), it clarifies the Commissions current position by stating that both legal disciplines “are necessary to promote innovation and ensure a competitive exploitation thereof”.\textsuperscript{136} Whilst it is questionable in how that principle is supposed to be applied in the block exemption regulations, the underlying issue is that the three areas of exclusive grant-back restrictions; no-challenge clauses; and obligations relating to the use of competing technology or further reach and development, has been excluded from the the new TTBER compared to the previous regulation.\textsuperscript{137} The three areas will be briefly discussed herein.

**Grant-back restrictions**

Generally, licensors require licensees to grant-back to the licensor if any improvements has been made to the licensed technology. However, under the new TTBER, exclusive grant-back obligations are not block exempted because such obligation is likely to reduce the licensee’s incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties.\textsuperscript{138} Consequently, this would result in falling within the scope of the prohibition in Article 101(1) and thus requiring individual assessment of the grant-back under Article 101(3). However, non-exclusive grant-back

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\textsuperscript{135} L. Peeperkorn, ‘IP licences and Competition Rules: Striking the Right balance’, (World Competition 26, 2003) at 531
\textsuperscript{136} TTBER at paragraph 7
\textsuperscript{138} TTBER at paragraph 129
\end{flushleft}
obligations are block exempted since, by contrast to exclusive grant-back, it allows the licensee to benefit from the improvements to the licenced technology and therefore it creates the incentive for licensees to innovate.¹³⁹

**No-Challenge clauses**

A no-challenge clause prevents the licensee from challenging the validity of the IPR(s). Previously, a termination based on challenge provisions were acceptable, however, these are now only exempted if the licence is exclusive. Meaning that if the licence is non-exclusive, such clauses will be considered as excluded from the block exemptions, thus having the likelihood to be considered within the prohibition of Article 101(1) TFEU, as well as, requiring an individual assessment under Article 101(3) TFEU. The consequence that may occur from such actions is that it might have an adverse effect on innovation resulting from the maintenance of invalid IPR(s), which may act as a barrier to both product entry and to innovation.¹⁴⁰

**Limitations on the licensee’s use of its own technology and engaging in further R&D**

The reasoning behind such limitation is understandable; it creates the incentive to engage in further innovation and the ability exploit already developed technology rights are protected under Competition law. However, Treacy argues that such restrictions are quite stringent, regardless if the parties are competitors or not. Since the limitations have the capability to limit the proprietors’ freedom to negotiate their own terms and conditions on which it will licence its technology.

Furthermore, it has been widely accepted that the Commission’s approach to competition and IP has been in favoured within the pharmaceutical sector. It acknowledges that the procedure for development can be quite lengthy, the success-rate is fairly low, and when the procedure has been successful and placed on the market it could be replicated at lower cost. Therefore, it is especially important to implement an effective IP protection since it is vital


¹⁴⁰ ibid
factor for a companies’ commercial success and for furthering the motivation to innovate and research.

As a result, in order to strike a balance within the two legal disciplines, the objectives for the balance must allow those who wish to undertake further research to be motivated to continue developing attractive products and services which will benefit the consumers and it will be rewarding for the inventors, whilst ensuring that the objectives does not result in preventing further growth due to the IP protection. With that said, it is not an easy task for the European Authorities to find a balance between the two legal areas since it cannot favour one specific sector more or less, a uniformity is extremely crucial in order prevent future implications. Thus, establishing policies that have the ability to both protect IPR(s) and creating the incentive for innovation, whilst managing the policies surrounding competition law as well as cross boarder trade, is truly difficult.
4. Is the EU perspective on IPR the right perspective?

It is clear from the past cases that the line between competition law and enjoying the exclusivity of IPR is not always a visible one. However, it should be questioned whether the interference with competition law actually affects the incentives to innovate. If we are suppose to look at the direct link between the two legal areas, the application of competition law may limit the width of the protection that IPR should provide, however, it does not eliminate the fundamental motivation to wanting to innovate more, whereas the impact of strong IPR has the ability to eliminate competitors and distort the free market. Despite this, the relationship between IPR and competition creates a lot tension, however, it does not seem as if the widening of the criteria of ‘exceptional circumstances’ has been subject to floodgates, nor an increase in competition challenges that IP holders may be subjected to. In additional to this, Ezrachi argues that, even if there is an ongoing competitive pressure within innovation driven sectors, the challenges from past litigation will not be sufficient to severely affect their innovation rate. Since dominant undertakings that are facing challenges from competition law will most likely continue to research and develop products and services in order to maintain their market position.\textsuperscript{141}

However, it cannot be denied that the Commission’s intervention in IP law has the potential to impact innovation on national level as well as elsewhere. Following the Microsoft case, Neelie Kroes\textsuperscript{142} expressed her satisfaction with the General Courts judgment in that it had upheld the most vital factors in the Commission’s decision, which was aimed towards the consumers and providing them additional and alternative choices within the WGOS market as well continuing motivating the companies to innovate within these market to the benefit of consumers. During her speech,\textsuperscript{143} she highlighted that the Court had confirmed that Microsoft could no longer prevent the market from performing properly and the importance of interoperability for consumer choice and the ability to benefit from competitive prices. However, whilst the ruling was welcomed for its confirmation of the Commission’s decision and its underlying policy, she proclaimed, that the case was still “bitter-sweet since it

\textsuperscript{141} A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012) at 610
\textsuperscript{142} The European Commissioner for Competition Policy during the time of Microsoft judgment.
\textsuperscript{143} SPEECH/07/539, N. Kroes, 'Introductory remarks on CFI ruling on Microsoft’s abuse of dominant market position’, (Brussels, 17th September 2007)
illustrated how the consumers were suffering by Microsoft’s actions. But, she pointed out that since the Commission’s investigation began, Microsoft’s market share had increased from 40 per cent to 80 per cent for WGOS. As well as there had been innovations in high technology market, but mainly in areas where Microsoft was not dominate. Whilst, that may have been the result in the Microsoft, I do question whether the emphasis concerning the “harm” which the dominant undertakings may potentially could cause the consumers, if this the right approach forward? If there is not any noticeable consumer harm, then firms, including the dominant undertakings, should be encouraged to compete vigorously rather than being questioned and challenged about their dominance within a specific market. As Thomas O. Barnett\textsuperscript{144} mentioned in his press release\textsuperscript{145} regarding his concerns following the Microsoft case, the US Court would recognise the potential benefit to consumers when a company, including a dominant company, makes unilateral business decisions, for example by adding features to its popular products or licence its intellectual property to its rival or if they wish to refuse to licence to its rivals. Therefore, I strongly argue that limiting a dominant undertaking may have the opposite effect on the firms since their growth is dependant on good customer relationships and the constant strive to be better than their rivals. In addition to this, the amount of exposure that dominant undertaking are subjected to following a complaint from the Commission could have the potential outcome that their investors would view them as too much of a liability and as result they would step back. Consequently, the accumulation of varies events can result in suffering in research and development by limiting resources which ultimately harms the consumers. 

In addition to this, when the Commission orders a compulsory licence, it seem to overlook a extremely crucial practical challenges which impacts the licensor to consider. Ezrachi and Maggiolino has identified five factors which may cause the licensor difficulties:\textsuperscript{146}

i. Identification problems, which are connected to the definition of the content and terms of the licence and are aggravated when the refusal does not interrupt a pre-existing business relationship;

\textsuperscript{144} The assistant Attorney General for Anti-trust division of the US Department of Justice
\textsuperscript{146} A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012) at 612
ii. **Administrability problems**, regarding the management of the licences over time including disputes concerning terms of access and pricing issues which call for expert input and technical commitments;

iii. **Generalisation problems**, caused by the habit of morphing compulsory licences into tools for market regulation.

iv. **Collusion danger**, once cooperating via a compulsory licence, the parties will start to collude with the other and finally;

v. **The risk of the burdening problem**, the risk of depressing entrepreneurs’ innovation spirits more than the refusal already does.

For me, the fifth factor is the most crucial element, which does not receive enough credibility. Working with IP and entrepreneurs, I understand that the amount research, time and money, they spend on developing for new technology, which they later file for an application in order to protect their “work”. Far too often, I meet inventors who would “like” to gain more revenue based on their inventions but it is not their first instinct. With that said, I argue that the EU seeks to encourage start-ups to be more creative and innovative, however, when they have reached a certain stage where they are becoming dominant on the market based market percentage, the perspective of the EU becomes a lot more stringent. Where as I believe that each company has been in a start-up position and after a lot hard work, determination and great customer relationship has resulted in them become a superpower, which should be praised rather than discouraged. Therefore, I don’t think that the EU’s approach is the right approach, because the encouragement to develop businesses should receive the same level of support even if you are a dominant undertaking. Since an undertaking would not seek to “harm” their consumers, in fact, it is the quite opposite since the business would not be successful if the consumers did not enjoy their products or services.
5. Conclusion

In conclusion, it has been established that the act to refuse a licence of IPR will not in itself constitute as an abuse contrary to Article 102 TFEU. However, if that act is linked with the non-exhaustive list of exceptional circumstances, then it may have the potential to be considered as an abusive act, if it cannot be objectively justified. Nonetheless, the ‘exceptional circumstances’ doctrine has been criticised for being inconsistent and uncertain, especially following the widening of the doctrine by the General Court in *Microsoft*. The legal framework that has been established by the ECJ has provided a lot flexibility for the EU Authorities to assess the abusive practise by implementing a case-by-case approach, however, the approach has also caused vagueness to the framework since the four condition has been applied irregularly to the cases, thus, expanding the criteria’s. The EU Authorities are so concern with protecting the consumer welfare and competition on the market that they forget that their stringent approach can cause unwillingness and discouragement on them who are our inventors in our market. As a result, competition law is overpowering IPR and causing an imbalance between the legal areas since even if the IPR is lawful under Intellectual Property it can become unlawful when competition intervenes. As a result, the *Microsoft* case left some unanswered questions behind such as, what will amount to an “new product”, and is it even possible for a dominant undertaking to argue objective justification if all criteria’s have been satisfied? Unfortunately, these questions will not be answered in this thesis and they will remain unanswered until a new case arises but until then, the law will be imbalanced, inconsistent and unclear.
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