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Abuse of Intellectual Property
Rights Under EC Law
-with special emphasis on abuse
of a dominant position.

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Summary

Intellectual property rights are, usually nationally granted, rights conferring a monopoly-like position on their holder. Because of their very nature being exclusive and national, intellectual property rights can come in conflict with the Treaty provisions on the single market and can also restrict competition within the Community. At the same time it is recognised that intellectual property rights are effective ways of stimulating innovation and, essentially, lead to economic growth.

Article 295 of the Treaty states that “the Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership”. Therefore there is no arguing that according to the Treaty, the existence of intellectual property rights is legitimate, and that it leaves the granting of protection of the rights to the individual Member States in the absence of a Community legislative framework.

Because of the clash between the Treaty and nationally granted intellectual property rights, there has been a need to establish where the line is to be drawn between the lawful use and the abuse of the rights in the Community. This has been done on a case-by-case basis by the Community courts, and lead to the establishment of the existence/exercise doctrine and the doctrine of the specific subject-matter. The essential meaning of the existence/exercise and specific subject-matter doctrines is that although the Treaty protects the existence of intellectual property rights as such, the exercise of those rights may fall under the scrutiny of Community law if they are exercised in a manner contrary to the Treaty goals. The exercise of a right is only protected in so far as the specific subject-matter, or core, of the right is upheld.

Through the case law of the courts, the outlines of what will be deemed allowed and abusive conduct on the part of intellectual property holders have evolved. This thesis deals with the identification of abuse of intellectual property rights, as can be ascertained by the case law of the courts, mainly in relation to cases where intellectual property rights have been used to the detriment of intra-Community competition. The greatest emphasis is put on intellectual property cases in relation to Article 82; when an undertaking has abused its dominant position in a certain market.

Because of the lack of unified Community legislation on what exactly intellectual property protection should entail, a case-by-case approach has been necessary. Because of this and the use of the existence/exercise and specific subject-matter doctrines the Community courts have often been able to base their judgments on policy. There has been, especially from the Commission, a tendency of viewing intellectual property rights as essential facilities to which undertakings not in possession of such rights should be

able to gain access. Although the essential facilities doctrine seemingly fits in on the monopolistic position intellectual property rights give their owner, applying the essential facility doctrine too readily would mean not recognising the very idea behind intellectual property protection; the guarantee for future revenue on the investments of time and effort that the exclusivity of right means.

Abbreviations

CFI	Court of First Instance.
ECLR	European Community Law Review.
ECJ	European Court of Justice.
ECR	European Court Reports.
EIPR	European Intellectual Property Review.
ELR	European Law Reports.
ELRev	European Law Review.
NIR	Nordiskt Immateriellt Rättsskydd.
OJ	Official Journal.
Treaty	Treaty of Rome (EC Treaty).

1 Introduction

1.1 Background

Intellectual property rights are vital in our society today. Their existence stimulates both investments and development of new ideas, which in turn promotes economic growth. By providing a number of protective forms for various industrial property rights the incentive to invest in research and development naturally will increase, as these investments become more secure and the right owner will reap the rewards for his creative effort and innovation. Intellectual property rights, by their very nature, give a monopolistic status to the holder of the right, and so put some short-term restraints on competition in the market. However, in the long run they promote increased competition since a good deal of innovation on the part of competitors is promoted, which will lead to new, competing and substitutable products on the market.¹

There is a principle of exclusivity in all intellectual property rights which can be distinguished as a prohibitive right in that it prohibits others from, for example, producing or distributing the goods which are protected to the advantage of the right holder.² Intellectual property rights are also usually still distinguished as national rights, although a Community legislation and harmonization process is slowly building towards a Community-wide legislative framework for intellectual property rights. The predominantly national character of intellectual property rights will come into conflict with the Community goal of a single market, since intellectual property rights can be used to uphold or even create barriers between the different member states. Because of their nature of exclusivity and short-term detrimental effects on competition, intellectual property rights will also come into conflict with the Community competition rules. The Community will therefore aim to strike a healthy balance between the allowed protection for intellectual property rights, needed for the innovation and, ultimately, the economic development, and the Community goals of a single market and workable competition.

Although there are some Treaty provisions recognising the importance of and protecting intellectual property rights, determining the limits of intellectual property rights within Community law has been a matter for the courts of the EC, interpreting the broad terms of the Treaty provisions on a case-by-case basis.

¹ Govaere, I., *The Use and Abuse of Intellectual Property Rights in E.C. Law*, [1996]

Sweet & Maxwell London at p. 5.

² Govaere at p. 14.

1.2 Purpose and method

The purpose of this thesis is to, through analysis of the case law of the Community courts on intellectual property, investigate into the boundaries of intellectual property rights within the ambit of Community law. One of the main questions dealt with will be how the case law of the Community courts have tried to reconcile the clash between nationally granted intellectual property rights and the provisions of the Treaty and its goals. What has the Court deemed to be abusive, i.e. contrary to the Treaty, exploitation of intellectual property rights?

The main focus will be on the relationship between the competition rules of the Treaty, with the most emphasis put on Article 82, abuse of a dominant position, and intellectual property protection. However, for a greater understanding of the depths of the problem of reconciling intellectual property rights and Community law, some attention will also be given to other areas of Community law where intellectual property rules have been deemed to have been used in a manner contrary to EC law.

The thesis starts with a general recollection of the place of intellectual property rights within the Community framework, along with some basic principles that have evolved in this area. It then goes on to delve deeper into how abusive conduct in relation to intellectual property rights have been identified by the courts in general; both as regards the free movement of goods and competition concerns. The thesis then concentrates on the abuse of intellectual property rights in relation to the rules on competition, touching upon both Article 81 and 82, although the main emphasis will be on how the rights have been deemed abusive in connection with a right holder holding a dominant position on the relevant market. The work ends with some final thoughts of the author's.

The method of this thesis is in part descriptive and in part analytical. This is natural considering the developments in the area stems from case law, and as such have developed over time. This makes it relevant both to approach the cases descriptively and analytically.

The sources used consist to a large part of the relevant case law from the ECJ and the CFI, and the Courts' reasoning in the cases. Use has also been made of the opinions of the Advocate General in certain major cases. In addition to this, a number of legal writings on the subject have been used, both in the form of books and of articles out of periodicals.

1.3 Delimitations

This thesis deals with an area of law that requires some, maybe even quite substantial, background knowledge on the part of the reader, especially in certain areas of Community law, such as that of competition. In order to be

able to limit the scope of my work, I must assume that the reader has adequate knowledge in the fields of Community competition law and, at least to a certain extent, the free movement of goods and other fundamental issues of the Community. I will therefore not go into any deeper analysis of for example what, according to Community competition law, constitutes an undertaking, or how the block exemptions work in relation to Article 81, what is the development of the essential facility doctrine etc. This would be far beyond the scope of this work.

The thesis is mainly focused on the clash between the Community competition rules, especially Article 82 about undertakings abusing their dominant position, and intellectual property rights. For reasons stated as above I will not go further into the details of Article 82 as such, but will assume my reader has some working knowledge of the essentials in this area.

I have chosen not to go into the particulars of what exactly entails different kinds of intellectual rights and their protection, as this would widen the scope of my work far too much. This thesis deals with the way intellectual property rights have been deemed abusive by the case law of the Community courts. I have therefore chosen not to go into, at any lengths at least, the legislative and harmonizing methods of the Community in the area of intellectual property, as this itself could form another thesis. Neither will I discuss, for example, the definition of a patent or a copyright in general.

All references to articles are, when nothing else is specifically stated, made with reference to articles in the Treaty.

2 The Place of Intellectual Property Rights in EC Law

2.1 Introduction

In principle, the rules of the Treaty do not have any effect on the contents of national intellectual property laws of the Member States since, according to Article 295, the Treaty “...shall in no way prejudice the rules in Member States governing the system of property ownership”. However, in the event of a collision between national legislation and the rules of the Treaty, national provisions will have to yield for the supremacy of Community law.³

In the area of intellectual property these collisions between national and Community rules can be said to have fallen into three categories; the prohibition of discrimination because of nationality, imports of goods protected by intellectual property rights, which has led to the development of the doctrine of exhaustion of rights, and conflicts with the Community rules on competition due to the more or less dominant position an intellectual property right by its very nature bestows upon its holder.⁴ Even though this thesis will focus mainly on the implications of Community competition law on intellectual property rights, the other two categories, discrimination because of nationality and the doctrine of exhaustion of rights, will be elaborated slightly upon in this chapter and further on when the author deems it relevant.

2.2 Discrimination on grounds of nationality

According to Article 12 of the Treaty any kind of discrimination on grounds of nationality is forbidden. Intellectual property rights are essentially national rights. However, nowadays the member states have ratified the most important conventions on intellectual property rights⁵ and Community legislation has given rise to new or harmonized intellectual property rights⁶,

³ On the supremacy of EC law, see for example Craig, P. & De Búrca, G., *EU Law: Text, Cases and Materials*, 2nd edition [1998] Oxford University Press Oxford at pp. 256- 264.

⁴ *Publica EU 8 Immaterialrätt*, [1996] Norstedts Juridik Stockholm at 8:3.

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Paris Convention for the Protection of Industrial Property and Berne Convention for the Protection of Literary and Artistic Works.

⁶ Some examples of Community legislation concerning intellectual property rights are, in relation to trademarks; Council Directive (EEC) 89/104 to approximate the laws of the Member States relating to trademarks [1989] OJ L40/1, in relation to the legal protection of databases; Directive (EEC) 96/9 of the European Parliament and of the Council on the legal protection of databases [1996] OJ L77/20, and in relation to the harmonization of the term

which has lead to rights gaining protection usually doing so in a non-discriminatory fashion.⁷

The prohibition against discrimination means, as regards intellectual property rights, that both the prerequisites for the emergence of protection of an intellectual property right and the scope of that right must be the same for all seeking to get protection for their right in a member state. It is forbidden to treat nationals or inhabitants of another member state differently than the nationals of the issuing state itself. This can be illustrated by the *Phil Collins* case.⁸

The case involved the well-known British singer Phil Collins. One of Phil Collins' concerts in the USA was recorded without his consent. The recording was made into a gramophone record which was sold in Germany. Mr Collins objected to this, but according to German copyright law only German artists could object to their works being exploited in Germany when the work was performed in a state that had not ratified the Rome Convention.⁹ This meant that Mr Collins was discriminated against because of his nationality, since he was not able to object to the unlawful exploitation of the recording. The Court held that the prohibition against discrimination in Article 12 was applicable on copyrights and that a member state therefore cannot make the obtaining of copyright protection dependent on nationality or domicile.

2.2.1 Geographic market differentiation

The prohibition against discrimination can be relevant also as regards the actions of undertakings. In *Tetra Pak II*¹⁰ the Commission found that Tetra Pak, although being able to sell directly to consumers in different national markets, had abused its dominant position by selling its machines and cartons at widely diverging prices in the different national markets. According to the Commission the difference in prices could not be economically explained by anything other than the market policy of Tetra Pak, which made it possible for Tetra Pak to artificially maintain a partitioning of the market. However, this assessment of the Commission has been criticised in that undertakings should not be punished for taking advantage of the difference in prices which do exist between different

of protection of copyright; Council Directive (EEC) 93/98 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9.

⁷ *Publica EU 8 Immateriellrätt*, [1996] Norstedts Juridik Stockholm at 8:3.

⁸ Joined cases C-92/92 and C-326/92 *Phil Collins v. Imrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH v. EMI Electrola GmbH* [1993] ECR I-5145.

⁹ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

¹⁰ Case C-333/94P *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951.

national markets. The fact that the undertaking taking advantage of this occupies a dominant position should not mean its behaviour should be considered abusive, since that would mean indirectly placing the responsibility of establishing a single market on the dominant undertaking.¹¹ However, if the pricing policy differentiating between national markets within the Community is combined with measures seeking to maintaining obstacles to free trade between member states, those measures ought to be condemned as contrary to Treaty rules, since they counteract the aim of the Treaty.

2.3 Doctrine on the exhaustion of rights

Article 28¹² forbids any quantitative restrictions on imports or measures having equivalent effect. This can pose a problem since most intellectual property rights are national rights, giving a position of monopoly to the holder of the right. Article 30 contains some exceptions to Article 28.¹³ The problem here is that intellectual property rights can come in conflict with the rules of free movement of goods. The conflict arises through the fact that the Treaty protects the existence of intellectual property rights despite their national basis and exploitation. This will lead to conflicts with the free trade within the Community, particularly within the fields of parallel imports, where goods from one member state might be prevented from importation into another member state on the grounds that this would conflict with the exclusivity given to the holder of an intellectual property right existing in that state.¹⁴ This will go against the essential aim of the Treaty, namely the integration of the markets of the individual member states into a single market, since it would isolate national markets.¹⁵

The exercise of an intellectual property right that causes market partitioning will only be upheld insofar as the core of the right, or the specific subject-matter of it, is being protected.¹⁶ The Court has been known to interpret the scope of Article 30 and the exceptions from Article 28 therein narrowly.¹⁷ The jurisprudence of the Court lead to the emergence of the concept of exhaustion of rights. The meaning of the concept is that once a holder of an intellectual property right, or someone with his consent, willingly has placed the goods on the market of a member state within the Community, the specific right has been exhausted. The reason the right is exhausted is that once the good has willingly been put on the market, the right holder has

¹¹ Waelbroeck, M., *Price Discrimination and Rebate Policies Under EU Competition Law*, [1995] Fordham Corporate Law Institute 147.

¹² Article 28 used to be Article 30.

¹³ Article 30 used to be Article 36. The article states that the provisions of Article 28 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified among other things by the protection of industrial and commercial property.

¹⁴ Craig & De Búrca at pp. 1026- 1029.

¹⁵ Prime, T., *European Intellectual Property Law*, [2000] Aldershot Dartmouth at p. 8.

¹⁶ More on the specific subject-matter doctrine below under 3.3.

¹⁷ *Publica EU 8 Immaterialrätt* at 8:4.

been, or have had the opportunity to be, paid for the intellectual property right. After this he may not hinder the goods' free circulation within the Community, since this is not part of the specific subject-matter of intellectual property rights.¹⁸ This means the right holder has no right to prevent parallel imports from other member states where the goods might be sold at a cheaper price.

2.3.1 *Centrafarm v. Sterling Drug*¹⁹

In *Centrafarm v. Sterling Drug* a drug called Negram had been patented by Sterling Drug under Dutch and British law. The drug was considerably cheaper in the United Kingdom than in the Netherlands. Centrafarm started importing the drug into the Netherlands' market and could sell it there at a lower price than the nationally produced Negram. Sterling Drug then tried to prevent Centrafarm from doing this, relying on its exclusive rights under the national patent law before the Dutch courts. In other words, a full on collision between the practice of free movement of goods (Centrafarm's actions) and reliance on national intellectual property rights (Sterling Drug).

In a preliminary ruling referred to it by the Dutch court, the ECJ stated Sterling Drug had exhausted its rights by marketing the same product in more than one member state.

2.3.2 *Merck v. Stephar*²⁰

The intellectual property right of the goods will be exhausted, even if the parallel imported good is not protected by an intellectual property right in the country where it was put on the market. In *Merck v. Stephar* Merck held a patent for a drug in the Netherlands and marketed it there. However, Merck also marketed the drug in Italy, where, at the time, it was not possible to get patent protection for pharmaceuticals. A third party bought stocks of the drug in Italy and was then able to sell it at a lower price than usual in the Netherlands. The Court stated the patent right was exhausted, since Merck had willingly put the drug on the Italian market, and that the undertaking consequently had to take the consequences of that decision.

When a producer has protection for his intellectual property rights as regards a certain good in only parts of the Community, the rule of exhaustion of rights would, in effect, render the right pointless, since the good then could be put on the market of the unprotected countries without the consent of the right holder, and from there imported into countries where an intellectual property protection exists without the holder of the right being able to take action against this. There have been several cases where the ECJ has made

¹⁸ Prime at p. 9.

¹⁹ Case 15/74 *Centrafarm v. Sterling Drug* [1974] ECR 1147.

²⁰ Case 187/80 *Merck v. Stephar* [1981] ECR 2063.

clear that it does not condone this situation. Examples of this are the *Nancy Kean* and *Terrapin Terranova* cases.²¹

2.3.3 *Pharmon v. Hoechst*²²

The *Pharmon v. Hoechst* case involved the interpretation of the Community rules on free movement of goods in order to determine the extent of the protection conferred by a patent where a compulsory license had been granted by a decision of national authorities in respect of a parallel patent.

The ECJ stated that:

“where the competent authorities of a member state grants a third party a compulsory license which allows him to carry out manufacturing and marketing operations which the patentee would normally have the right to prevent, the patentee cannot be deemed to have consented to the operation of that third party. Such a measure deprives the patent proprietor of this right to determine freely the conditions under which he markets his products.”²³

The ECJ also remarked that it makes no difference if a prohibition of exportation is attached to the compulsory license, if the license fixes royalties payable to the patentee or if the patentee has accepted or refused those royalties; the patentee can not be deemed to have consented to the actions of the third party who have received a compulsory license, and thereby the patent right is not exhausted.

2.4 Conclusion

The jurisprudence of the ECJ on intellectual property have made it possible to draw certain conclusions that are valid as regards Article 30, i.e. the allowed exceptions from the free movement of goods, for all intellectual property rights. It is important to remember that the rules on free movement of goods can never widen the scope of what entails the exclusive right a national legislation gives a certain intellectual property right holder, since the details surrounding the gaining of protection for an intellectual property right is a matter solely for national authorities. However, since national intellectual property rights may clash with the Community goal of a single market with free trade and non-discrimination between the member states, on occasion the Treaty rules will have to intervene in the way a right is exercised. Because of this it is not necessarily so that a holder of a right has

²¹ Case 119/75 *Terrapin v. Terranova* [1976] ECR 1039 and case 144/81 *Nancy Kean Gifts v. Keurkoop* [1982] ECR 2853.

²² Case 19/84 *Pharmon v. Hoechst* [1985] ECR 2281.

²³ *Pharmon v. Hoechst* judgment at para. 25.

as extensive a right nationally as the jurisprudence of the ECJ might have accepted.²⁴

If a good protected by an intellectual property right is placed on the common market by or with the consent of the right holder, the right will be exhausted and cannot be relied upon to hinder imports of the good from another member state, even if it is not possible to get intellectual property protection in the other state where the good has also been placed willingly on the market. However, the right will not be exhausted if it has been put on a particular national market unwillingly from the point of view of the right holder, for example by way of a compulsory license, since the market introduction will then have taken place without his consent.

The principle of non-discrimination in Community law will also reflect upon intellectual property rights in that the national rules will have to treat all wanting protection for their rights equally, irrespective of nationality or domicile. Undertakings must also respect the principle in that charging different prices on the markets of different member states may be scrutinized by Community law if the behaviour establishes or preserves an artificial partitioning of the common market through the use of intellectual property rights.

Both the principle of exhaustion of rights and the non-discrimination principle are instruments in making sure the nationally granted intellectual property rights are not used in ways contrary to the goals of the Treaty. As long as there is no unified Community legislation on all types of intellectual property rights, these principles are necessary to somewhat solve the conflicting issues of the right holders' exploitation of the exclusivity of the nationally granted rights, and the interest of the Community in upholding the goals of free trade and equal treatment for all members of the Community.

²⁴ *Publica EU 8 Immaterialellerätt* at 8:5.

3 Abuse of Intellectual Property Rights

3.1 Introduction

Although there is no arguing that the Treaty leaves the granting of intellectual property rights to national authorities, the exercise of the rights can be abusive and contrary to Treaty provisions. Some sort of instrument is therefore needed to set the boundaries between lawful and unlawful exercise of intellectual property rights. The traditional approach taken by the ECJ in establishing whether a misuse of an intellectual property right has taken place has lead to the development of three basic principles. These are to be taken into consideration when assessing the possibility of Community law curtailing the content of intellectual property rights.²⁵ The three principles are the existence/exercise doctrine, the doctrine of specific subject matter of an intellectual property right and the principle of exhaustion of rights. The principle of exhaustion of rights has already been dealt with under chapter 2. The other two principles will be dealt with in this chapter.

3.2 The existence/exercise doctrine

It was quite early established by the ECJ that the existence of an intellectual property right, protected by the national intellectual property laws, is not, in itself, forbidden. The existence of nationally granted intellectual property rights is protected by Articles 30 and 295 of the Treaty. However, it was apparent that problems could arise for the exercise of intellectual property rights in connection with the common market, since these rights are prone to creating barriers to the national markets of the member states.²⁶

The existence/exercise doctrine was first set out in the *Consten & Grundig* case (see below) where the importance of the distinction between the existence and the exercise of an intellectual property right was first made. While the existence of an intellectual property right is protected by Articles 30 and 295 of the Treaty, the exercise of it can be limited by the Treaty rules on free movement or competition.²⁷ This distinction of the Court, made on a case-by-case basis, has been criticised. It gives the Court considerable flexibility, meaning that the Court tend to make policy based decisions; if the Court approves of the exercise of the right it will claim the use of the right falls within the substance of the right, and if it does not approve it can

²⁵ Govaere at p. 100.

²⁶ See above under 2, “The Place of Intellectual Property in EC Law”.

²⁷ Faull, J. & Nikpay, A., *The EC Law of Competition*, [1999] Oxford University Press Oxford at p. 581.

claim the case involves the exercise of the right and as such is subject to the possible limitation of Treaty rules.²⁸

The existence/exercise doctrine has been used both in cases regarding the free movement of goods and cases regarding clashes between intellectual property rights and Community competition rules.²⁹ This thesis will mainly deal with the existence/exercise doctrine as applied to competition cases. The main focus will be on intellectual property rights in relation to Article 82 – abuse of a dominant position. However, at times the rules on free movement will have a significant impact on the application of the competition rules, especially as regards the discussion of the existence/exercise doctrine and the concept of specific subject-matter, and so cannot be ignored completely.³⁰

3.2.1 *Consten & Grundig*³¹

In *Consten & Grundig*, Consten was the exclusive dealer for Grundig's products (and only Grundig's products, no competing brands) in France. In return for only selling Grundig products, Consten was allowed to register Grundig's trademark GINT in France. Grundig sold only to Consten on the French market and made sure the other dealers it supplied with goods outside France undertook not to resell Grundig products in France. When another French distributor, UNEF, parallel imported Grundig goods from Germany into the French market, Consten used its trademark rights to stop the imports.

This sole distribution agreement between Consten and Grundig resulted in Consten's absolute protection on the French market from competition by other suppliers of Grundig goods. The Commission reacted and held that this arrangement was incompatible with Article 81 because it effectively resulted in isolating the French market from the rest of the common market.

The ECJ upheld the Commissions views and stated that this kind of behaviour would indeed fall under the prohibitions of Article 81; the exercise of an intellectual property right could not be allowed if it frustrated the Community competition rules.³² This did not mean however, the Court clearly pointed out, that the enforcement of Article 81 would be interfering with the member states' granting of intellectual property rights. The ECJ did not in any way prohibit nationally granted intellectual property rights. It emphasised that the fact that exercises of intellectual property rights that

²⁸ Korah, V., *Technology Transfer Agreements and the EC Competition Rules*, [1996] Clarendon Press Oxford at pp. 34- 35.

²⁹ Prime at p. 11.

³⁰ Faull. & Nikpay at p. 576.

³¹ Joined cases 56 and 58/64 *Consten & Grundig v. Commission* [1966] ECR 299.

³² *Consten & Grundig* judgment at para. 346.

would fall under the prohibitions of the competition rules would be pursued by the Commission:

“...does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1).”³³

3.2.2 *Parke Davis*³⁴

In the *Parke Davis* case the ECJ once again stated its position on the existence of intellectual property rights. In this case a third party had marketed a product, which was under patent protection in one member state, on the market of another state without the consent of the right holder. When the third party tried to export the good into the member state where it was protected by a patent, the right holder used his exclusive right as the owner of the patent to keep the goods out. The ECJ was asked in a preliminary question whether the national courts’ action, stopping the imports based on the exclusive right the national legislation bestowed upon the holder of the patent, was compatible with the Community rules on competition, i. e. Articles 81 and 82. In other words: could said articles limit the rights a patent holder had obtained by virtue of national patent legislation?

The Court’s answer to this was no. Once again the distinction between existence and exercise was made. The ECJ again indicated that there was no interest from a competition law point of view in regulating the national rules for the legal status of intellectual property rights. However, the Court acknowledged that the national provisions may cause problems in connection with the common market and stated:

“The national rules relating to the protection of intellectual property have not yet been unified within the Community. In the absence of such unification, the national character of the protection of industrial property rights and the variations between the different legislative systems on this subject are capable of creating obstacles both to the free movement of goods and to competition within the Community.”³⁵

This particular statement of the ECJ would be repeated in many later cases regarding the impact of intellectual property rights on the common market.

3.2.3 *Nancy Kean*³⁶

The Dutch undertaking Nancy Kean Gifts had a registered design for a ladies handbag at the Benelux design office. The filing date was April 23 1979. The design was similar to an American design filed in the USA on

³³ Ibid. at para. 345. Article 85 is now Article 81.

³⁴ Case 24/67 *Parke Davis & Co. v. Probel et al* [1968] ECR 55.

³⁵ *Parke Davis* judgment at para. 71.

³⁶ Case 144/81 *Keurkoop BV v Nancy Kean Gifts BV* [1982] ECR 2853.

March 28 1979 by another undertaking. In the Benelux system, the first person to file a design will get the protection of the copyright. The handbag Nancy Kean Gifts marketed was produced in Taiwan. In 1980 Nancy Kean discovered that another Dutch undertaking, Keurkoop, was selling handbags that Nancy Kean considered being identical to their registered design. Nancy Kean applied at a district court for an injunction against Keurkoop, to stop them marketing and selling the handbag. Keurkoop stated that it obtained the handbags from a company in Taiwan. It had then imported the bags into Germany, and then re-exported them to the Netherlands.³⁷

The district court granted Nancy Kean the injunction, prohibiting Keurkoop from dealing in any way with the handbags.³⁸ Keurkoop lodged an appeal against the injunction with the Gerechtshof. The Gerechtshof found that Nancy Kean was not the author of the design of the handbags and that it had filed the design without the consent of the author. The Gerechtshof referred two questions to the ECJ for a preliminary ruling.

One of the questions referred by the Gerechtshof was essentially if the rules of the Treaty were an obstacle to the owner of a nationally protected exclusive right to a design to, relying on national rules, oppose the importation of products with identical design from another member state where their marketing did not infringe the exclusive rights of the owner of the design in the first country.

The ECJ stated that the protection of a design would be rendered meaningless, if the holder of a right in one member state would be stopped by Community rules of free movement of goods from hindering the marketing in that state of products identical to the protected design.³⁹ However, the Court emphasised, restrictions on the free movement of goods as regards prohibitions and restrictions on imports justified on the grounds of protection for industrial property rights must not constitute disguised restrictions on trade between member states.⁴⁰

The Court went on to say that the reconciliation between free movement of goods and the consideration of industrial property rights must be:

“...achieved in such a way that protection is ensured for the legitimate exercise, in the form of prohibitions on imports which are “justified” within the meaning of that Article [i.e. Article 30], of the rights conferred by national legislation, but is refused, on the other hand, in respect of an improper exercise of the same rights which is of such a nature as to maintain or establish artificial partitions within the common market.”⁴¹

³⁷ Nancy Kean did not own the design rights to the bags in Germany since the German system only allowed the original designer of a product to register the design. See Faull & Nikpay at p. 586.

³⁸ See para. 8 of the *Nancy Kean* judgment for more information.

³⁹ *Nancy Kean* judgment at para. 22.

⁴⁰ Ibid. at para. 23.

⁴¹ Ibid. at para. 24.

In other words, exercise of intellectual property rights in a way which would counteract the achievement or working of a common market would be deemed improper, and so would national legislation if it did not take into consideration the reconciliation between nationally granted intellectual property rights and free movement of goods. So, the Court made it clear that a right holder cannot rely on national legislation on intellectual property rights to oppose the importation of a product marketed in another member state with the right holder's consent.⁴²

3.3 Specific subject-matter doctrine

In later years from the firm establishment of the existence/exercise doctrine, opinions were voiced to the fact that the concept of non-intervention on the existence of intellectual property rights should be expanded, in that it should also include the "essential function" or "specific subject matter" of the particular intellectual property right.⁴³ The point of this expansion of the concept of existence of intellectual property rights would be that the mere permission of the existence of an intellectual property right does not really mean anything, unless it also includes a definition of what that right entails. For the sake of the security of undertakings who might be in the danger zone of being accused of abusing their rights, it would seem the Community issuing some definition of its opinion of the essential function of different intellectual property rights would be most useful for parties involved.⁴⁴

The ECJ originally established the doctrine of specific subject matter of intellectual property rights in order to set the boundaries for how a particular intellectual property right is protected by the exceptions to Article 28 in Article 30.⁴⁵ The concept has, however, come to use also in competition cases.⁴⁶ The ECJ has established in numerous cases that Article 30 protects the specific subject matter of an intellectual property right. What this specific subject matter is will vary, depending on what particular right is in question. In the context of using the doctrine on competition cases, it is essential to remember that each intellectual property right may lead to different restrictions on competition; the specific subject-matter of patents might not be the same as for, say, trademarks. This will be further elaborated upon below.⁴⁷ When assessing the possibility for a holder of a right to

⁴² Ibid. at para. 24-25.

⁴³ Anderman, S., *EC Competition Law and intellectual Property Rights: The Regulation of Innovation*, [1998] Clarendon Press Oxford at p. 11.

⁴⁴ The authors own opinion.

⁴⁵ Article 30 reads: "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on...the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

⁴⁶ Prime at p. 10.

⁴⁷ Govaere at p. 5.

hinder imports of goods, the ECJ will at times refer, instead of specific subject-matter, to the essential function of a particular right, which will then also vary from case to case.

3.3.1 Specific subject-matter of patents

In *Centrafarm v. Sterling Drug*⁴⁸ the ECJ defined the specific subject matter of patents as:

“the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation the first time, either directly or by the grant of licenses to third parties, as well as the right to oppose infringements.”⁴⁹

3.3.2 Specific subject-matter of trademarks

The Court has displayed a somewhat negative attitude towards trademark rights, for example saying in the *Sirena* case they were less worthy of protection or at least of a lower level of protection than other intellectual property rights. The Court also said in *Sirena* that:

“the exercise of a trademark right is particularly apt to leading to the partitioning of markets, and thus to impair the free movement of goods between states...”⁵⁰

The Court’s view of trademarks used to be that their foremost function was to protect consumers against confusion, i.e. so they would know what exactly it was they were buying. However, opinions of trademarks have changed. They are no longer viewed solely as indications of the origin of the product, but increasingly as property-like rights designed to encourage and protect the goodwill resulting from the right holder’s investments in the trademark. It has become more and more recognised that trademarks can represent a substantial economic value and also make the product more attractive to potential customers.⁵¹

The EC has issued a Directive concerning harmonization of national trademark protection.⁵² There has also been established a Community trademark system.⁵³ The Court has defined the specific subject-matter of

⁴⁸ Case 15/74 *Centrafarm v. Sterling Drug* [1974] ECR 1147.

⁴⁹ *Centrafarm v. Sterling Drug* judgment at para. 9.

⁵⁰ Case 40/70 *Sirena v. Eda et al* [1971] ECR 69 at para. 7. For a more detailed analysis of the *Sirena* case, see below at 4.4.1.1.

⁵¹ Reindl, A., *Intellectual Property and Intra-Community Trade*, [1996] Fordham Corporate Law Institute 453. See also Prime at p. 14.

⁵² Council Directive (EC) 89/104 to approximate the laws of the member states relating to trade marks (1989) OJ L40/1.

⁵³ Council Regulation (EC) 40/94 on the Community trade mark (1994) OJ L11/1. For more information on the Community trademark, please visit the web-site of the Office for the Harmonization of the Internal Market (OHIM) at www.oami.eu.int.

trademarks for the purposes of Community law. This was done in the *Centrafarm v. Winthrop* case.⁵⁴

Centrafarm v. Winthrop involved the same drug (Negram) and situation as *Centrafarm v. Sterling Drug*⁵⁵, but in this case the action in the Dutch court opposing the imports of cheaper drugs from another member state was attempted by Winthrop, a subsidiary of Sterling Drug, relying on trademark rights rather than the patent, as was the case in *Centrafarm v. Sterling Drug*. The ECJ here defined the specific subject matter of trademarks as:

“...the guarantee that the owner of the trademark has the exclusive right to use that trademark, for the purpose of putting products protected by the trademark into circulation for the first time, and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trademark by selling products illegally bearing that trademark.”⁵⁶

3.3.3 Specific subject-matter of copyright

There has been no explicit definition of the specific subject matter of copyright given by the ECJ. This matter is complicated by the fact that the different member states have varying rules as to the scope of the copyright and also as regards what kind of work can gain protection from copyright. However, in the case law of the Court, certain elements have emerged as to the ways a copyright can be exploited, although the exact specific subject-matter cannot be stated with precision.⁵⁷

Some of the elements entailed in the specific subject-matter of copyright are the right to reproduction, the right to choose when and how the work will first be commercialised, i.e. put on the market, and the right to prevent any violation of the copyright.⁵⁸ This also includes the exclusive right to reproduce the protected work.⁵⁹ Another factor is that the holder of a copyright has the right to require fees for public performances of his works⁶⁰ The right holder also has a right to rent out his work.⁶¹

⁵⁴ Case 16/74 *Centrafarm v. Winthrop* [1974] ECR 1183.

⁵⁵ Case 15/74 *Centrafarm v. Sterling Drug* [1974] ECR 1147.

⁵⁶ *Centrafarm v. Winthrop* judgment at para. 8.

⁵⁷ Faull & Nikpay at p. 583.

⁵⁸ See Pombo, F., *Intellectual Property and Intra-Community Trade*, [1996] Fordham Corporate Law Institute 491 and also joined cases 55 and 57/80 *Musik-Vertrieb Membran GmbH v. GEMA* [1981] ECR 147.

⁵⁹ See for example Van Kerckhove, M., *The Advocate General Delivers his Opinion on Magill*, [1994] ECLR 276.

⁶⁰ Case 62/79 *SA Compagnie Générale pour la Diffusion de la Télévision Coditel v. SA Ciné Vog Films* [1980] ECR 881.

⁶¹ Case 158/86 *Warner Brothers and Metronome Video ApS v. Christiansen* [1988] ECR 2605. On rental rights, see also Council Directive (EEC) 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61.

The right of exclusive reproduction and the right to refuse licenses are necessary to guarantee the sufficient reward the copyright owner should get for his creative effort. However, if special circumstances are present the interest of the copyright owners and the essential function of the right may have to give way to the interest of competition, which would justify the interference of the right by requiring the owner to issue licenses (for royalties if he so wishes).⁶² The reason for this would be that the refusal to license, although covered by the specific subject-matter, is not deemed necessary for the essential function of the copyright to be upheld.

3.3.4 Specific subject-matter of designs

According to the Court's judgment in *Volvo v. Veng*⁶³ the specific subject-matter of a model or design right is:

"to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design."⁶⁴

3.4 Criticism

As mentioned above the Court's way of dealing with the relationship between intellectual property rights and the provisions of the Treaty through the establishment of the existence/exercise and specific subject-matter doctrines has been criticised.⁶⁵ Because of the doctrines, the Court has a wide margin of discretion and gives the Community institutions an arbitrary ability to limit the scope of national intellectual property rights to fulfil policy goals. However, the use of the distinction between the existence and exercise of rights has been defended as well. The main point weighing in favour of the differentiation of the existence and use of rights being, that if the fact that the existence of intellectual property rights is protected by the Treaty would mean it would be impossible to scrutinize their use in practice, the rights would in effect be exempted from the Treaty rules on free movement and competition.⁶⁶ And that would go against the very purpose of the Treaty.

The distinction between the existence and exercise of an intellectual property right does however seem somewhat artificial. What is a right if it cannot be exploited? An intellectual property right is the right to exclude others from exploiting something the holder has put time and effort into producing; how can the fact that the intellectual property right has a legitimate right to exist be separated from the use or exercise of it?⁶⁷

⁶² See the *Magill* case under 6.3.6.

⁶³ Case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211.

⁶⁴ *Volvo v. Veng* judgment at para. 8.

⁶⁵ See for instance Korah at pp. 34- 35.

⁶⁶ Faull & Nikpay at p. 581.

⁶⁷ Haines, S., *Copyright Takes the Dominant Position: The Advocate General's Opinion in Magill*, [1994] 9 EIPR 401.

The Court has used the term specific subject-matter to try and solve this, saying that the use of an intellectual property right within its specific subject-matter will be regarded as a way of preserving the existence of the right, untouched by the Treaty rules on free movement and competition.⁶⁸ This has been criticised since the substance of intellectual property rights have been set out in international law through the many conventions existing.⁶⁹ After *Magill*⁷⁰ the feeling has been that the specific subject-matter might have played out its role, at least in cases regarding Articles 81 and 82.⁷¹ The reason for this is, which will be further elaborated upon below, that the holders of the copyright in *Magill* were deemed to have abused their dominant position through refusing to issue a license, something which has in other cases been part of the very subject-matter of copyright.⁷²

3.5 Conclusion

The Court's attitude is that the exercise of an intellectual property right that causes or maintains the partitioning of markets will only be upheld to such an extent that the specific subject matter of the right is protected. This means that intellectual property rights have a core, the specific subject matter, that the right holder can rely on even if this hinders cross-border trade. Within the specific subject matter, which is different for all intellectual property rights and which is developed through the jurisprudence of the Court, the Community principle of free movement of goods is subordinated to the national rules.⁷³ The existence/exercise doctrine has been used both in cases regarding the free movement of goods and cases regarding competition.

As regards the competition rules, when determining which right fall under a specific subject-matter, a balance must be made between, on the one hand, the protection of the relevant intellectual property right and, on the other hand, the concern for undistorted competition. The definition of the essential function helps the assessment; if an exercise of a given intellectual property right is necessary for that right to fulfil its essential function, that particular exercise should not be affected by the Treaty rules. Only when an exercise is not necessary to fulfil the essential function, the interest of competition and the free movement of goods must prevail over the interest of the right of the

⁶⁸ Faull & Nikpay at p. 581.

⁶⁹ Miller, C., *Magill: Time to Abandon the Specific Subject-matter Concept*, [1994] 10 EIPR 415.

⁷⁰ Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eirann and Independent Television Publications Ltd v. Commission* [1995] ECR I-743. *Magill* and its implications are discussed further below under 6.3.5- 6.3.8.

⁷¹ Prime at p. 24.

⁷² See for example Vinje, T., *The Final Word on Magill*, [1995] NIR 156.

⁷³ Beaumont, P. & Weatherill, S., *EC Law: The Essential Guide to the Legal Workings of the European Community*, 2nd edition, [1995] Penguin Books London at pp. 840- 841.

individual right holder in exercising his right. If the intellectual property right is used in a way which falls outside the specific subject matter, it can be analysed in the light of the Treaty provisions on free movement and competition.

Once the right holder has, or has consented to, the protected product being marketed outside the member state where it is protected, the specific subject-matter of the right is exhausted as regards the Treaty rules on free movement of goods, and the right holder cannot rely on national legislation to stop parallel imports of the product.

This is the case even if, as in the case of *Merck v. Stephar*⁷⁴, there is no possibility of intellectual property protection for the product in another state where it has been put on the market. Merck attempted to stop this by relying on its patent, and defended itself by saying that this case differed from *Centrafarm v. Sterling Drug*⁷⁵ since it was not possible to protect the drug with a patent in Italy. The ECJ rejected this, saying the crucial point was that Merck had placed the drug on the Italian market willingly and that it had to face the consequences of this, namely the exhaustion of the Dutch patent right.

Because of the lack of unified Community rules in the area of intellectual property rights, the Court will need to make decision on what the specific subject-matter of a right entails on a case by case basis. This may lead to legal uncertainty, since the Court has been prone to making decisions based on policy rather than attempting to make things easier for undertakings and set firm definitions on what a right holder can do without risking the involvement of Community law and subsequent intervention on the exercise of the right in question.

⁷⁴ Case 187/80 *Merck v. Stephar* [1981] ECR 2063.

⁷⁵ Case 15/74 *Centrafarm v. Sterling Drug* [1974] ECR 1147.

4 Article 81 and Intellectual Property Rights

4.1 Introduction

Article 81 is the principle weapon to control anti-competitive behaviour by way of agreements or concerted practices between undertakings or decisions by associations of undertakings, which may affect trade between member states, and which have as their object or effect detrimental effects on competition within the Community.⁷⁶ Not all such agreements are contrary to EC competition law however, and therefore the article also contains possibilities to get an exemption from its application. The exemption can either be issued on an individual basis or, which is more common, through a block exemption. An in-depth analysis of Article 81 is beyond the scope of this thesis but some aspects of the article deserves attention, since they deal with the role of intellectual property rights.

4.2 Licensing agreements under Article 81

Nowadays the process of licensing of intellectual property rights is generally regarded as pro-competitive by the Commission. The reason for this is that licensing helps to increase the right holder's reward for creative effort and also the incentive for others to invest in research and development.⁷⁷ As Prime put it:

“A competition law system, geared towards the goal of market efficiency, will encourage innovation, and innovation will in turn stimulate competition.”⁷⁸

An example of the recognition of the benefits of intellectual property licensing is the block exemption for technology transfer agreements.⁷⁹ In general, there have been increased opportunities in getting exemptions for agreements concerning technology transfer and licensing of intellectual property rights. Through the technology transfer block exemption the possibilities of exemption are all covered by one single block exemption, covering patent, know-how and mixed patent and know-how licensing agreements. This must surely simplify matters for undertakings wanting to license their intellectual property.⁸⁰

⁷⁶ See Article 81. For an in-depth discussion on Article 81, see for example Craig & De Búrca at chapter 20 (pp. 891- 938).

⁷⁷ Korah at pp. 10- 11.

⁷⁸ Prime at p. 72.

⁷⁹ Commission Regulation 240/96 on the Application of Article 81(3) of the Treaty to Certain Categories of Technology Transfer Agreements [1996] OJ L 31/2.

⁸⁰ Prime at p. 72.

The fact that the process of licensing intellectual property rights acts as an incentive to increased investment in research and development, and as an increased help for the licensor obtaining a reward for his effort behind the product, provides a justification for restrictions within licenses. These restrictions may be for example in the field of the technical application or geographic scope of a licensing agreement. The problem is that there are circumstances when the restrictions in the licensing agreement can be used as ways of enforcing forbidden cartel behaviour, for example by fixing prices, market sharing and through output limitations. This behaviour can then be used to drive out competitors from the market of the technology itself or for the products made using the licensed technology.⁸¹ This will in turn probably harm consumers since prices are likely to go up. From this it follows that licensing practices can in fact amount to abuses of intellectual property rights.

Under Article 7 of the technology transfer block exemption, the Commission reserves the right to withdraw the benefit of the block exemption where:

“the effect of the agreement is to prevent the licensed products from being exposed to the effective competition in the licensed territory from identical goods or services considered by users as interchangeable or substitutable in view of their characteristics, price and intended use, which may in particular occur where the licensee’s market share exceeds 40%”⁸²

Article 7 has rarely been used by the Commission. The provision displays the link between Articles 81 and 82, since it will apply to undertakings who are more or less dominant due to their market share of 40% or over.⁸³

4.3 The relationship between Articles 81 and 82.

Articles 81 and 82 are both instruments to serve the principles in Articles 2 and 3 (g) of the Treaty, namely a system to ensure that competition is not distorted in the common market. Even though they have a common purpose they should be seen as independent instruments to safe-guard competition.⁸⁴ In some situations both Article 81 and 82 will be applicable on a case. An example would be where a dominant undertaking forces its customers or smaller competitors to enter into restrictive agreements. Also, Article 82 expressly refer to the possibility that more than one undertaking can be in a situation of abuse, this is often referred to as joint or collective dominance. If there is a situation of joint dominance, and some sort of agreement or

⁸¹ Anderman at p. 27.

⁸² Article 7(3) of Regulation 240/96.

⁸³ Prime at p. 41.

⁸⁴ Craig & De Búrca at p. 199.

concerted practice exists between the undertakings in a dominant position, it could be a breach of both Article 81 and 82 at the same time.⁸⁵ The fact that an agreement between undertakings has fallen under a block exemption cannot be used as a defence to an action under Article 82.⁸⁶ This was concluded in *Tetra Pak I*.

In *Tetra Pak I*⁸⁷, Tetra Pak sought to have a Commission decision, regarding the undertaking allegedly having abused its dominant position, annulled. The abuse consisted in Tetra Pak's purchase of an undertaking, which had issued an exclusive license falling under a block exemption to a possible future competitor in Tetra Pak's field of business.⁸⁸ Tetra Pak's main argument in this case was that Article 82 could not be applied if an exemption had been granted under Article 81, since both articles pursued the same objectives. Tetra Pak argued that the inapplicability of Article 82 to an exempted agreement did not jeopardize the objectives of Article 82 since the Commission always was able to withdraw an exemption at any time. Tetra Pak also claimed that if an exempted agreement nevertheless had effects which would fall under the prohibitions of Article 82, the Commission could, after withdrawing the benefit of the exemption, take all steps to bring the infringement of Article 82 to an end; any other method would seriously jeopardize legal certainty.

The Commission responded to Tetra Pak's arguments by pointing out that applying Tetra Pak's view on the matter would imply that an exemption under Article 81 would also mean an, at any rate temporary, exemption under Article 82 since the withdrawal of an exemption does not have retroactive effect. This would not be possible since no exemptions are to be made to behaviour deemed abusive and falling under Article 82. The CFI noted that the ECJ had expressly clarified in *Hoffman – La Roche*⁸⁹ that the fact that Article 81 was applicable to an agreement did not preclude the application of Article 82. The Court then remarked that even though Article 81 and Article 82 pursued the same objective, they were nevertheless two independent legal instruments, addressing different situations.

Tetra Pak I was the first time a Community court clearly stated that the application of Article 82 is not subject to the outcome of an assessment for a possible exemption under Article 81. Article 82 is instead to be seen as an instrument safe-guarding competition independently. Therefore, an undertaking in a dominant position will have to take care when acquiring exclusive intellectual property licenses, so its acquisition will not infringe either Article 81 or 82.

⁸⁵ Goyder, D. G., *EC Competition Law*, 3rd edition, [1998] Oxford University Press Oxford at p. 371.

⁸⁶ Furse, M., *Competition Law of the UK & EC*, 2nd edition, [2000] Blackstone London at pp. 207- 208.

⁸⁷ Case T-51/89 *Tetra Pak Rausing SA v. Commission* [1990] ECR II-309.

⁸⁸ For a closer analysis of the case see below at 6.3.1.

⁸⁹ Case 85/76 *Hoffman- La Roche v. Commission* [1979] ECR 461 at para. 116.

4.4 Abusive agreements under Article 81

Because of the doctrines of existence/exercise and specific subject-matter, some parts of an intellectual property right cannot be called into question by the Treaty rules. Decisions on whether to license an intellectual property right or not normally relates to the specific subject-matter of the right and will therefore not be called into question by Community competition law. However, the way in which the licensing is carried out falls under the exercise of the right and as such may be subject to scrutiny.

In *Nancy Kean*⁹⁰ the ECJ came to the conclusion that a right holder may not rely on national legislation to engage in an agreement or practice which is contrary to the provisions of Article 81. Although a right to a design (as was the case in *Nancy Kean*) does not, as such, fall within the forbidden agreements or practices referred to in Article 81, the exercise of the right may do so if the purpose, means or result of such an agreement, decision or concerted practice will fall under Article 81. An example of this would be, the Court clarified, when persons file the same designs in different member states simultaneously in order to divide the national markets among themselves.⁹¹

To go through all the various licensing practices of intellectual property rights, which have been deemed abusive under Community competition law, is beyond the scope of this thesis. I will therefore settle with some examples from trademark licensing, which illustrates the viewpoint of the Court on agreements threatening the common market through use of intellectual property rights. The reason for choosing trademark licensing is partly because of the Court's statement that trademarks are particularly apt at partitioning markets and consequently going against the basic aim of the Community.⁹²

4.4.1 Trademark licensing

Agreements of trademark licensing that provide the licensee with absolute territorial protection are prohibited under Article 81(1). Parallel imports must never be hindered. An example of this was *Consten & Grundig*⁹³, where national rules on trademarks were used to set an obstacle in the way of parallel imports. This was stopped by the Court which, forbidding this action, held that the exercise of the national trademark in this case was abusive, i.e. outside the specific subject-matter of trademark protection, but

⁹⁰ Case 144/81 *Keurkoop v. Nancy Kean Gifts* [1982] ECR 2853.

⁹¹ *Nancy Kean* judgment at para. 28.

⁹² See above 3.3.2.

⁹³ Joined cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299.

that the judgment did not infringe the right of national granting of intellectual property protection.

In the *Sirena*⁹⁴ case, an Italian court referred two questions regarding the interpretation of Articles 81 and 82 to the ECJ. The facts of the case were as follows. An American undertaking who owned a trademark of a cosmetic cream had, in 1937, i.e. before the Treaty entered into force, transferred all of its trademark rights as regards the cream in Italy to an Italian undertaking. The Italian undertaking had since then produced and put the cream on the Italian market. The cream in question was since the transaction in 1937 a registered trademark in accordance with Italian law. The Italian trademark holder alleged infringement of its right and tried stopping the distribution in Italy of a cream with the same trademark, imported from Germany. The producer in Germany had a similar agreement with the original American trademark right holder for German territory. There existed in other words a market partitioning due to the divided trademark rights.

One of the questions the Italian court asked the ECJ was whether Articles 81 and 82 were to be interpreted as preventing the proprietor of a trademark lawfully registered in one member state, from exercising his trademarks' national exclusive right, by prohibiting third parties from importing, from other member states, products with the same trademark, lawfully registered in that member state.

The Court answered by saying that an existence of a trademark right in itself will not fall under Article 81(1), but the exercise of it might. Agreements dividing markets between undertakings are unlawful according to Article 81(1). If two undertakings have, through agreement between themselves or agreements with third parties, divided markets so that borders between member states are created, this will fall under the prohibition of Article 81(1), overriding national trademark law, if the restrictive agreement affects trade between member states to an appreciable extent. This is also valid for a restrictive practice that arose before the Treaty came into force, provided it produces effects after that date. The judgment in *Sirena* would then mean Article 81 would be applicable no matter how much time had passed since the trademark allocation had taken place.

As regards Article 82, the ECJ stated in *Sirena* that an owner of a trademark right is not in a dominant position merely because he can prevent third parties from putting goods bearing the same trademark in circulation on a market of a member state. In that situation, the Court continued, it would be necessary, in order to establish the existence of a dominant position, to also consider, for example, the existence and position of competitors marketing similar or substitutable goods on that market. A high price level of the good is not enough, the Court stated, to draw the conclusion of the existence of an

⁹⁴ Case 40/70 *Sirena v. Eda et al* [1970] ECR 69.

abuse of a dominant position under Article 82, although it could be a determining factor of such a situation.⁹⁵

The implications of *Sirena* were reduced by the later case of *EMI Records Ltd v. CBS United Kingdom Ltd*⁹⁶. Here the Court confirmed that for Article 81 to be applicable on a trademark allocation agreement, there had to exist some continuing relationship between the original owner of the trademark and its licensees. In *BAT v. Commission*⁹⁷ the Court recognised that delimitation agreements for trademarks, where the parties defined the respective territory of application of their trademark in order to avoid confusion among consumers, were useful. However, these agreements would mean the application of Article 81 if they were also used for market sharing or other restrictions on competition, i.e. simply to partition the market. Basically, the proprietors of trademarks in such an agreement can agree what trademark they will use in a certain member state, but they cannot agree not to compete with each other in those member states.⁹⁸

4.5 Conclusion

Licensing of intellectual property rights provide increased opportunities for the proprietor of such a right to get economic compensation for his efforts. It also acts as an incentive for others to invest in research and development, since there will be an increased return on investments when it is licensed. And increased investments will naturally lead to more innovation, which in turn will lead to economic development and competition benefits.

The problem is, however, that licensing agreements can involve anti-competitive practices which form abuse of intellectual property rights, and as such fall under the Community competition rules. Sometimes the “abusive” terms of a licensing agreement are necessary for the right holder to effectively exploit his right, and the prohibition of them might lead to detrimental effects, both to the individual right holder himself and to the economic development of the Community at large. Therefore there are possibilities to get exemptions from the prohibitions of Article 81, provided the terms of the agreement are reasonable, and needed for the effective licensing of the particular subject-matter of the right in question. However, it is important to keep in mind that even if such an agreement has been exempted from the application of Article 81, the licensing practices of the right holder can still fall under Article 82, if they constitute an abuse of a dominant position.

⁹⁵ The ECJ had come to this conclusion about high price levels of dominant undertakings already in *Parke Davis*.

⁹⁶ Case 51/75 *EMI Records v. CBS United Kingdom Ltd* [1976] ECR 811.

⁹⁷ Case 35/83 *BAT Cigaretten-Fabriken GmbH v. Commission* [1985] ECR 36.

⁹⁸ Faull & Nikpay at p. 615. In *BAT v. Commission* the trademark allocation agreement was not allowed, but fell under the prohibition of Article 81(1).

5 Article 82 and Intellectual Property Rights

5.1 Introduction

It is inherent that conflicting situations can arise between the Community legislation preventing undertakings who are dominant in a certain market abusing their position, and the national rules of intellectual property rights. Intellectual property rights are by their very nature such that they bestow a position of monopoly upon their holder, thus making them, from a certain aspect, anti-competitive by nature. The anti-competitiveness of intellectual property rights is particularly true for those rights that involve some sort of registration procedure, e.g. patents and trademarks.⁹⁹ The question to be investigated is then: Is the exercise of intellectual property rights equivalent to abusing a dominant position in Community law?

If this was the case there would always be a conflict between Article 82 and the exercise of intellectual property rights, and thus the rights would be forced to disappear. And if intellectual property rights were allowed to be exercised with no restrictions in Community law, the holders of these rights could freely abuse their dominant position to the detriment of their competitors, and also, consumers.

An intellectual property right does not in itself give rise to a dominant position, and an owner of such a right does not occupy a dominant position merely by exercising his exclusive right in a normal way. This was set out by the Court already in the *Deutsche Grammophon* case.¹⁰⁰

In the *Deutsche Grammophon* case, the undertaking Deutsche Grammophon Gesellschaft (DGG) distributed gramophone records, directly or through subsidiaries, in several member states. In Germany the records were sold at a controlled retail selling price. In other member states the records were distributed by subsidiaries of DGG, through exclusive licensing agreements. An undertaking in Germany, Metro, refused to sign an agreement where the company would agree to maintain the retail selling price set by DGG. Instead, Metro purchased records from a DGG subsidiary in France through a third company, and then sold the records in Germany at a price below that set by DGG. DGG brought an action before the German court, claiming that Metro had infringed DGG's exclusive distribution rights in Germany.

⁹⁹ Intellectual property rights which arise without registration, e. g.. copyrights, does not confer any exclusive right as such on the holder, but rather a right not to have the protected work copied. See Prime at p. 21.

¹⁰⁰ Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH*, [1971] ECR 487 at para. 16.

The Hanseatisches Oberlandesgericht Hamburg made a reference for a preliminary ruling to the ECJ, and asked, among other questions, whether the exclusive distribution rights of DGG infringed Article 82 of the Treaty if the controlled retail price was higher than the price of the original product reimported from another Member State.

As a response to the Oberlandesgerichts question, the Court stated that, in principle, an owner of a copyright does not occupy a dominant position merely by exercising his exclusive distribution right to the product protected by the copyright. The Court also stated that even though the difference in price between the goods sold at a controlled price and the reimported goods were not sufficient to establish the existence of an abuse of a dominant position, it may be a crucial factor in determining if such an abuse exists, if the difference in price is:

“...unjustified by any objective criteria and if it is particularly marked...”.¹⁰¹

5.2 Conclusion

The fact that an undertaking is the proprietor of an intellectual property right does not mean that it is automatically perceived as occupying a dominant position, even if the very nature of intellectual property rights involves the conferring of a monopolistic status on their holders. Article 82 does not prohibit legitimately acquired market dominance through superior efficiency or innovation, since dominance itself is not forbidden. However, when intellectual property rights are used in a manner such as to form an abuse, damaging competition in markets, the exercise of the right can fall under the application of Article 82.

Once again the existence/exercise doctrine and the specific subject-matter will be needed in order to determine whether a dominant undertaking has abused its position by exploiting its intellectual property rights. This will be examined closer in the following chapter.

¹⁰¹*Deutsche Grammophon* judgment at para. 19.

6 Abuse of a Dominant Position as Applied to Intellectual Property Rights

6.1 Dominance and intellectual property rights

The classic definition of what signifies a dominant position was made by the Court in the *United Brands* case. Here the concept of a dominant position was described as:

“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.”¹⁰²

Since the aim of Article 82 is to prevent monopolistic or near monopolistic undertakings abusing their position within the Community, the article is very significant in the area of intellectual property rights, since these rights are monopolistic by nature. However, as has been stated above under chapter 5, the mere existence of such a right does not automatically mean its holder occupies a dominant position.

When determining whether a proprietor of a right does in fact occupy a dominant position, it is necessary to, as in other cases regarding Article 82, first determine the relevant product and geographic markets. In intellectual property cases it is especially the establishment of the relevant product market that is important. A narrowly determined product market can make the possession of an intellectual property right a strongly contributing factor to establishing dominance, as will be shown below, since the possibilities of substitution may be minuscule due to the right. It can also have the effect of making the lawful exercise of the right in one market, which has detrimental effects on competition in a second market, unlawful. There can be described as existing more than one degree of dominance when it comes to intellectual property holders. One where the holder is dominant but there are some substitutes in the relevant market, which guarantees a certain amount of competition. And one degree of dominance where the right holder holds a position of de facto dominance because of his right, which can be treated like an essential facility, needed by other undertakings for their survival. In these extreme cases of de facto monopoly, Community competition law can intervene in the same ways as in other essential facilities cases, and require the undertaking in possession of it to grant access to the facility.¹⁰³

¹⁰² Case 27/76 *United Brands v. Commission* [1978] ECR 207 at para. 62.

¹⁰³ On essential facilities, see for example Goyder at pp. 346- 350, or Furse at pp. 250- 254.

The establishment of the relevant geographic market in intellectual property cases have not been as controversial and will subsequently not be dealt with at any length in this thesis.¹⁰⁴

6.2 Determining the relevant product market

The Commission and the ECJ have often been accused of tailoring the definition of the relevant product market in order to reflect policies. By drawing the market definitions narrowly, especially in Article 82 cases dealing with for example essential facilities and refusals to deal, the Commission and the ECJ can get results that cannot be said to be based on purely economic concerns about adverse effects on prices in general. Instead the definitions seem to reflect the Community's wish to support small and medium sized undertakings, or at least undertakings not in possession of, but needing to use, intellectual property rights.¹⁰⁵

6.2.1.1 *Hugin*¹⁰⁶

Hugin sought an annulment of a Commission decision imposing a fine on the undertaking for infringing Article 82. According to the Commission, Hugin had abused its dominant position by refusing to supply spare parts to another undertaking for the cash registers Hugin manufactured, and also for prohibiting its (Hugin's) subsidiaries and distributors within the Community selling the spare parts to undertakings outside Hugin's distribution network.

The part of this case that is interesting in the context of this thesis is how the relevant product market was established. Even though the products in question were not protected by an intellectual property right as such, Hugin's position resembled that of a holder of such a right, giving a monopoly-like status to the undertaking. Hugin argued that the maintenance services and supply of spare parts was not a separate market, which the Commission had based its decision of the establishment of the relevant product market on, but

“an essential parameter of competition in the market for cash registers as a whole.”¹⁰⁷

The Court declared that in order to find out whether maintenance and the supply of spare parts in fact constituted a market of its own or if it was part of the wider market of cash registers, it was necessary to determine the

¹⁰⁴ Anderman pp. 165- 167.

¹⁰⁵ Kauper, T., *The Problem of Market Definition Under EC Competition Law*, [1996] Fordham Corporate Law Institute 239.

¹⁰⁶ Case 22/78 *Hugin Kassaregister AB and Hugin Cash Register Ltd v. Commission* [1979] ECR 1869.

¹⁰⁷ *Hugin* judgment at para. 4.

category of clients who required spare parts. The Court went on to say that users of cash registers did not have requirements for spare parts that were openly displayed on the market since the technical nature of the machines made it necessary to use the services of a specialist to fit in the spare parts. So, the Court concluded, even though there existed a market for maintenance and repairs of the cash registers distinct from the market for new machines, the market was essentially for the service provided, not the products (the spare parts). However, there was indeed a market for the spare parts among the independent undertakings which had specialized in for example the repair of Hugin machines, and who consequently needed the spare parts in order to provide their services, since Hugin spare parts were not interchangeable with spare parts of other makes. Therefore the relevant product market was declared to be that of Hugin spare parts required by independent undertakings, i.e. not part of Hugin's service network, in the business of service and repairs of Hugin machines.

6.2.1.2 Relevant product market in *Hilti*¹⁰⁸

In *Hilti* the Commission had found the relevant product market to be three: nail guns, nails and cartridges. *Hilti* disagreed with this, claiming the relevant product market was the whole fastening system (guns, nails and cartridges), substitutable with other fastening applications, as an indivisible whole. It can be added that *Hilti* did agree that if it was deemed to be occupying a dominant position, its actions would be abusing that position under the meaning of Article 82. However, *Hilti* did not agree with the finding of its dominance and also not with the Commission's definition of the relevant product markets as three separate ones.

The CFI agreed with the Commission's definition of the relevant product markets, namely one each for nail guns, cartridges and nails. The CFI commented on this, saying that there had since the 1960's existed independent producers manufacturing only nails intended for use in nail guns, and some even more specialized, producing nails specifically made for *Hilti* tools. This in itself was evidence of a specific market for *Hilti*-compatible nails.¹⁰⁹

The CFI went on to say that if the relevant market was to be defined according to *Hilti*'s opinion, it would let producers of nail guns exclude the use of nails from independent producers in the guns, and as far as Community competition law was concerned, any independent producer was quite free to manufacture nails compatible with any nail guns, as long as no industrial property right was infringed by this.

Hilti had in its appeal to the ECJ made a reference to the *Hugin* case where the Court had concluded there existed a separate market for spare parts since

¹⁰⁸ Case C-53/92 *Hilti AG v. Commission* [1991] ECR I-667.

¹⁰⁹ Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439 at paras. 66-67.

there were independent undertakings specializing in the repair of cash registers, which comprised a distinct class from the buyers of the machines. Hilti drew a parallel to its own business, claiming nails could be regarded as a market distinct from that of nail guns, only if the buyers of the nails were found to be different than the purchasers of the guns. This argument was dismissed. The Advocate General Jacobs made the following remark, distinguishing the *Hilti* case from *Hugin*:

“Rather than laying down any such rule, the Court in *Hugin* was merely deciding whether a relevant product market for spare parts existed in the particular circumstances of that case. The present one is quite different from *Hugin*.¹¹⁰

And:

“in contrast to the situation which obtained in the *Hugin* case, the users of the guns participate directly in the market as purchasers of nails, and it is immaterial that the purchasers of the nails are not a distinct group from the purchasers of the guns.”¹¹¹

6.2.1.3 Relevant product market in *Tetra Pak II*¹¹²

In *Tetra Pak II* the CFI agreed with the Commission’s findings that Tetra Pak was dominant in four markets: the markets for aseptic packaging machinery and non-aseptic machinery, and the two markets for cartons, one for aseptic and one for non-aseptic liquid foods. Tetra Pak was held by the Commission to have a market share of 90 to 95% in the field of systems for the aseptic packaging of liquid food.¹¹³ The sector for non-aseptic systems were held to be more open but still oligopolistic, Tetra Pak holding 50 to 55% of the market.

Tetra Pak contested the Commissions findings of the relevant market, stating that the relevant market was a complex one, encompassing all liquid food packaging systems. Tetra Pak argued that there was a natural and commercial link between the machines and the cartons making the correct definition of the relevant product market the whole integrated packaging system. The ECJ agreed with the CFI who had rejected this argument by Tetra Pak, saying that the machinery was not indivisible from the cartons, since there had been, for a considerable time, independent undertakings who produced cartons specifically for use in Tetra Pak’s machines, without manufacturing machines such as those themselves.

¹¹⁰ Opinion of Mr Advocate General Jacobs in case C-53/92 *Hilti AG v. Commission* [1994] ECR I-667 at para. 18.

¹¹¹ Ibid.

¹¹² Case C-333/94P *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951.

¹¹³ Case T-83/91 *Tetra Pak International v. Commission (Tetra Pak II)* [1994] ECR II-755 at para. 13.

Tetra Pak also argued that segregating machines and cartons into different markets:

“may involve grave risks for public health and serious consequences for Tetra Pak’s customers.”¹¹⁴

The ECJ, agreeing with the CFI, dismissed this and brought forward the same argument as in the *Hilti* case, namely that in the absence of rules to the contrary, any independent user is quite free, as far as Community competition law is concerned, to produce consumables intended for use in equipment produced by others, as long as no intellectual property rights were infringed. The protection of the public health was certainly a legitimate excuse, but it may be guaranteed by other means, i.e. legislation, than Tetra Pak tying the cartons to the machines in question.

The ECJ referred to the CFI’s findings that Tetra Pak held 78% of the overall market in packaging in both aseptic and non-aseptic cartons; a market share seven times larger than its closest competitor. The ECJ also came to the conclusion that the fact that the same packaging materials were used in both the packaging for aseptic and non-aseptic liquid products showed that Tetra Pak’s customers in one sector were also potential customers in the other sector.¹¹⁵

Because of Tetra Pak’s almost complete domination on the non-aseptic markets it also gained a favourable status on the non-aseptic market, and could concentrate its efforts on the non-aseptic markets, acting independently of competitors, and thereby holding a dominant position on all the relevant markets in the case.

6.2.1.4 Relevant product market in *Volvo v. Veng*¹¹⁶

The Advocate General Mischo remarked in his commentary on the *Volvo v. Veng* case that before it was possible to establish whether a car manufacturer such as Volvo held a dominant position in the market for spare parts to its cars, it was necessary to examine whether the relevant market was in fact the market for spare parts and not, as some claimed, the wider market of both motor vehicles and spare parts for those vehicles.¹¹⁷

Advocate General Mischo noted that the price of spare parts was one influence on the decision of prospective buyers of a new car: if the spare parts were judged to be too expensive, the consumer might choose another

¹¹⁴ Case T-83/91 *Tetra Pak International v. Commission (Tetra Pak II)* [1994] ECR II-755 at para 79.

¹¹⁵ Case C-333/94P *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951 at paras. 28-29.

¹¹⁶ Case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211. For the facts of the case see below at 6.3.2.

¹¹⁷ Opinion of Mr Advocate General Mischo in case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211 at para 5.

make with cheaper spare parts. Still, Mischo went on, an owner of a vehicle who is forced to repair the bodywork of his car, instead of buying a new one, must purchase a body panel which is identical to the original. Consequently, the relevant market for owners of a vehicle is the market for the specific body panels sold by the manufacturer of the vehicle and copies capable of substituting the panels. Therefore, the Advocate General concluded, the relevant market cannot be the market for spare parts for cars in general or indeed the even wider market comprising the manufacture and maintenance of motor vehicles.¹¹⁸

The Advocate General also pointed at a number of arguments which in his opinion suggested that a car manufacturer would hold a dominant position in the relevant market even if his industrial property rights were disregarded. Examples given were the close-knit nature of the car manufacturers' distribution networks, which would most likely be the first source of supply which would come to mind for someone needing a spare part. This even more so since the manufacturers' guarantees, for example anti-rust guarantees, which could stretch over a considerable length of time, were valid only under the condition that original parts, controlled by the manufacturer, were used.¹¹⁹

The Court has stated many times that the mere possession of an industrial property right does not automatically mean the holder of the right occupies a dominant position. In assessing a possible dominant position the Court will take into account the existence of similar goods or goods substitutable with the good protected with an intellectual property right on the market. However, in the case of spare parts this leads to a certain dilemma. The only substitutable goods would be products having the exact same shape as, say, the specific body panel for cars, and that particular shape is protected by a design right. There will therefore not be any substitutable goods that do not infringe the exclusive rights of the proprietor of the design right. Consequently, the holder of the right will occupy a dominant position on the relevant market, which would, since no substitutable products exist, be the market for the design protected part.

With this in mind it is quite clear why the car manufacturers argued that the sales of cars and the after-sales maintenance market should be perceived as two parts of a package constituting the relevant market.

The Commission has not, and neither has the Court, agreed with this though, and has resorted to defining the relevant product market in the car spare parts cases more narrowly. Rather than taking into account the supply side's (i.e. the car manufacturers') view of the relevant market as a package deal it offers to the buyer, comprising the purchase of the car and the service and maintenance of it, the competition policy has been more prone to focus on

¹¹⁸ Ibid. at paras. 6- 9.

¹¹⁹ Ibid. at paras. 10- 11.

the viewpoint of the consumers, defining the spare parts market as a separate one, since there was a specific customer demand for the particular product of spare parts.¹²⁰

This will lead to trouble for intellectual property holders. When the relevant product market is defined as narrowly as this, it will in effect eliminate substitutes, making it a single product market, i. e. only the particular spare part which fit will constitute the market. The existence of intellectual property rights will then further eliminate competition since the exclusivity of the right will serve as powerful barriers to entry for other undertakings who would wish to produce illegitimate parts, which of course can be stopped by the holder of the exclusive right. The only product which can be used to substitute the design protected part is one identical to it, and an identical copy made by someone other than the holder of the right and without his consent would of course infringe the right, since the appearance is exactly what is protected by a design right.

This point, which was observed by the Advocate General Mischo both in *Volvo v. Veng*¹²¹ and *CICRA and Maxicar v. Renault*¹²², will lead to the right holder being found to hold a de facto monopoly, since he effectively excludes competitors with the aid of his intellectual property right. This would suggest that the holding of the right itself could in fact amount to dominance, since the exercise of the right would make it impossible for consumers to purchase a product capable of substituting the design protected one.¹²³ Here, the parallels to be drawn with the essential facilities doctrine are quite apparent.¹²⁴

6.3 Normal use vs. Abuse

It is important to keep in mind that the normal exercise of an intellectual property right will not be affected by Article 82. The article will only be applied in exceptional circumstances. However, what exactly will constitute exceptional circumstances is a question which has come up a number of times in the case law of the Community courts. The Community courts have found the actions of dominant undertakings abusive in several cases where the undertakings have made use of their intellectual property rights. Article 82 gives a non-exhaustive list of conducts, which when performed by a dominant undertaking can constitute abuse:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

¹²⁰ Anderman at pp. 158- 159.

¹²¹ Case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211.

¹²² Case 53/87 *Consorzio Italiano della Componeatistica di Ricambio per Autoveicoli (CICRA) and Maxicar v. Régie Nationale des Usines Renault (Renault)* [1988] ECR 6039.

¹²³ Anderman at p. 173.

¹²⁴ Anderman at p. 160.

- b) limiting production, markets or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantaged position;
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In *Tetra Pak II*¹²⁵ the ECJ particularly stressed that the list of abusive practices in Article 82 was not exhaustive, and that, consequently, even tied sales between two products that had a natural link between them may still constitute an abuse under Article 82(d), unless objectively justified.¹²⁶

The *Tetra Pak II* judgment would also suggest that the holding of an intellectual property right does not confer any special position under Article 82 when the issue is predatory pricing. Where a product protected by an intellectual property right is sold at a price below the cost of producing it, the predatory pricing will be governed in the usual way by the Court with reference to Article 82.

Sometimes the actions of an undertaking dominant in one market may produce abusive effects in a second market. In *Tetra Pak II* the ECJ remarked that application of Article 82 presupposed a link between the dominant position and the alleged abusive conduct, and that this link is normally not present when the conduct of the undertaking in a market distinct from the one where dominance occurs produces effects on that distinct market. In the case of distinct, but associated markets, application of Article 82 to conduct found on the associated, non-dominated market, which has effects on that associated market, could only be justified by special circumstances the ECJ concluded.¹²⁷

The Court has even regarded a dominant undertaking buying a competitor as abusive conduct falling under Article 82. This was the case in *Tetra Pak I*.

6.3.1 *Tetra Pak I*¹²⁸

Tetra Pak had a market share of 91% in the market for the supply of machines for sterilizing and filling aseptic cartons, and also for the cartons themselves. Elopak, a licensee of a company called Liquipak, was developing a product to compete with Tetra Pak in the market for aseptic cartons by using an exclusive license of Liquipak's, which fell under a block

¹²⁵ Case C-333/94P *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951.

¹²⁶ Case C-333/94 *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951 at para. 37.

¹²⁷ Ibid. at para. 27.

¹²⁸ Case T-51/89 *Tetra Pak Rausing SA v. Commission (Tetra Pak I)* [1990] ECR II 309.

exemption. When Elopak's product was on the brink of being tested on the market, Tetra Pak acquired the whole Liquipak group of companies and stopped the new product from entering the market. Elopak complained to the Commission that commenced proceedings against Tetra Pak, investigating whether the undertaking had acted in breach of the Community rules on competition in Articles 81 and 82.

The Commission found that Tetra Pak had behaved abusively in acquiring the exclusive license by buying the Liquipak group since this strengthened its dominant, if not monopolistic, market position, and stopped attempts from potential competitors wanting to enter Tetra Pak's field of business. This abuse of its dominant position went on for as long as the exclusivity of the patent license lasted.¹²⁹ In its decision on the matter, the Commission was of the view that in the circumstances of the case, exclusivity as regarded the patent license could not justify an exemption under Article 81(3).¹³⁰

Tetra Pak initiated proceedings before the CFI seeking to have the Commission decision annulled. Tetra Pak's main argument was that Article 82 could not be applied if an exemption had been granted under Article 81, since both articles pursued the same objectives.¹³¹

As regards Tetra Pak's conduct, the Court stated that the mere fact that an undertaking in a dominant position acquires an exclusive license did not per se constitute an abuse of that dominant position. In order for Article 82 to apply:

“the circumstances surrounding the acquisition, and in particular its effect on the structure of competition in the relevant market, must be taken into account.”¹³²

The decisive factor for establishing abuse in this case was, and here the Court agreed with the Commission's findings in its decision, Tetra Pak's position in the market and in particular the fact that the right to use the patented process under the license was the only way another undertaking would get the means to compete effectively with Tetra Pak in the field of aseptic packaging of milk. Tetra Pak's acquisition of Liquipak, and thereby the exclusive license, therefore had the effect of precluding all competition in the relevant market from occurring. The conclusion of the Court was then that under the Treaty goal of protecting competition, the granting of an exemption under Article 81 could not render inapplicable the prohibition in Article 82.

¹²⁹ Tetra Pak had, after the Commission had started its investigation, abandoned all claims of exclusivity on the patent license used by Elopak and agreed to keep it on a non-exclusive basis. The Commission continued with the proceedings since it inter alia wanted to clarify the position on the relevant point of law; the relationship between Articles 81 and 82.

¹³⁰ The need to protect research and development or the improvement of production and distribution.

¹³¹ See above at 4.3.

¹³² *Tetra Pak I* judgment at para. 23.

6.3.2 *Hilti*¹³³

In the *Hilti* case, the foremost abusive conduct was that of a tie-in. Hilti, the largest European producer of PAF (“powder-actuated fastening”) nail guns, nails and cartridge strips had been subjected to a fine, following a Commission decision in which the Commission had found that Hilti had abused its dominant position. Hilti sought the annulment of the decision, but both the CFI and the ECJ upheld the Commissions findings and Hilti was forced to pay the fine of Euro 6 million.¹³⁴

The Commission had responded to a complaint by two undertakings on the British market who produced inter alia nails intended for use in the nail guns manufactured by Hilti. They complained that Hilti was tying the sale of its cartridge strips to sale of its nails. The nail guns were patent protected and the cartridge strips were under copyright protection, but the nails were not covered by any intellectual property right. The Commission also found abuse in the form of excessive and discriminative pricing.¹³⁵ Hilti was charging much higher royalties to independent nail manufacturers for them to obtain licenses of right to the cartridge strips. This reinforced the tie-in since it limited the entry of new producers into the markets for compatible nails and cartridges, and so the practices were found to be abusive by the Commission.

In the Commission’s view Hilti’s patent protection and well organized distribution system served to maintain and reinforce its dominant position. That view deserves a comment. This reasoning would mean that in the Commission’s opinion Hilti should be punished for being efficient. If being technologically superior, i.e. holding a patent and having invested in research and development and in setting up an efficient organization, is viewed as factors aiding in the finding of an undertaking’s dominant position, it would seem the Community competition law is not encouraging research and development investments.

Hilti’s argument, that for safety reasons only Hilti-made nails should be used in the nail guns manufactured by the undertaking, and that this was the reason for Hilti’s actions; to deter owners of nail guns from using independently made nails, was also dismissed. Hilti never approached the competent United Kingdom authorities for a ruling of the incompatibility and safety risks of independently manufactured nails Hilti claimed occurred when they were used with Hilti equipment. The CFI remarked that the solution to this claimed safety problem:

“should lie in the adoption of appropriate laws and regulations, not in unilateral measures taken by nail gun manufacturers which have the

¹³³ Case C-53/92 *Hilti AG v. Commission* [1991] ECR I-667.

¹³⁴ For the CFI’s judgment see Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439.

¹³⁵ See Article 82(a) and (d).

effect of preventing independent producers from pursuing the bulk of their business.”¹³⁶

The CFI noted that Hilti was not prepared to grant licenses for use of cartridge strips voluntarily and when forced to do so, demanded a fee six times higher than would be reasonable, which, the CFI said, was undeniably abusive.¹³⁷ Hilti’s selective and discriminative policies against its competitors and their customers were deemed illegitimate since Hilti was in a dominant position and as such had a special responsibility.¹³⁸

6.3.3 *Tetra Pak II*¹³⁹

In *Tetra Pak II* the abusive conducts were those of predatory pricing, tie ins and also abuse in related markets.¹⁴⁰ Tetra Pak had been deemed to have abused its dominant position in four markets relating to the packaging of liquid or semi-liquid food in cartons. The case had come about after Elopak Italia had filed a complaint with the Commission against Tetra Pak, accusing it of having engaged in trading practices amounting to an abuse of Tetra Pak’s dominant position within the meaning of Article 82. According to Elopak the accused practices essentially involved the sale of cartons at predatory prices, the imposition of unfair conditions on the supply of machines for filling the cartons and the selling of equipment at predatory prices. The Commission initiated proceedings and in its decision on the matter ordered Tetra Pak to adopt certain measures to put an end to the found infringements of Article 82, and also imposed a fine of Euro 75 million. This decision was maintained by the CFI and also by the ECJ.

The Commission had found that Tetra Pak’s pricing of non-aseptic cartons in Italy between 1976 and 1981 was considerably below average variable costs. This was supported by the CFI’s assessment.¹⁴¹ The Commission considered there was no need to show Tetra Pak’s intention to eliminate competitors, since according to what was established in the earlier case of *AKZO*¹⁴², pricing below average variable costs is per se abusive and there is therefore no need to show intent on the behalf of the undertaking charging these extremely low prices. In the *AKZO* case the Commission made use of the so-called Areeda & Turner test. This test is a relatively simple, cost-based rule to establish predatory pricing, which presumes prices at or above

¹³⁶ Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439 at para. 68.

¹³⁷ Case T-30/89 *Hilti AG v. Commission* [1991] ECR II-1439 at para. 99.

¹³⁸ This special responsibility of undertakings occupying a dominant position was established by the ECJ in case 322/81 *Michelin v. Commission* [1983] ECR 3461 at para. 57.

¹³⁹ Case C-333/94 *Tetra Pak International SA v. Commission (Tetra Pak II)* [1996] ECR I-5951.

¹⁴⁰ See Article 82(a), (b) and (d).

¹⁴¹ Case T-83/91 *Tetra Pak International SA v. Commission (Tetra Pak I)* [1994] ECR II-755 at para. 50.

¹⁴² Case C-62/86 *AKZO Chemie BV v. Commission* [1991] ECR I-3359.

the average variable cost, i.e. the cost of the production of a good which varies according to how much is produced, to be lawful. Prices below the average variable cost, i.e. when the undertaking will in fact lose money for every sold good, may be unlawful and will need justification.¹⁴³ After 1981 the Commission found the prices of the cartons to be between average variable costs and average total costs, which made it necessary for the CFI to establish an intent to eliminate competitors on behalf of Tetra Pak.¹⁴⁴

Tetra Pak argued before the ECJ that there was inadequate proof of predatory pricing in the non-aseptic sector since the Commission and the CFI had not shown that Tetra Pak would be able to recoup its losses from when selling cartons below average variable price (i.e. between 1976 and 1981). Tetra Pak argued that in order to characterize prices as predatory, it was necessary for the Court to establish that the low prices (i.e. below average variable cost) Tetra Pak had charged could later, after competitors had been driven out of the market, be raised substantially, in order for Tetra Pak to be able to recoup its losses from the period of extremely low prices. Tetra Pak, making reference to AKZO¹⁴⁵, went on to say that since the Commission and the CFI only had found sales below cost in a market where Tetra Pak had not been found dominant, i.e. the non-aseptic market, it had no realistic chance of recouping its losses later.

The CFI held however, that:

“it is not necessary to demonstrate specifically that the undertaking in question had a reasonable prospect of recouping losses”¹⁴⁶

The ECJ agreed with this, and went on to state that in the present case it would not be appropriate to require the proof that Tetra Pak had a realistic chance of recouping its losses. The reason for this was that in the interest of the aim of undistorted competition it would be unwise to wait until a strategy of predatory pricing such as this had eliminated competition. So, the ECJ concluded, it must be possible to penalize predatory pricing whenever there is a risk of competitors being driven out of the market.¹⁴⁷

The problem as regards predatory pricing is how this should be distinguished from competitive pricing. The temptation would be to find all low prices predatory. This will not be good for competition since it will deter undertakings from embarking upon low-pricing policies, which in the end will affect the consumers. It has been argued that the harm caused by competition authorities condemning large undertakings’ low pricing as predatory, which will discourage competitive prices, outweighs the harm

¹⁴³ Furse at pp. 236- 241.

¹⁴⁴ Case T-83/91 *Tetra Pak International SA v. Commission (Tetra Pak I)* [1994] ECR II-755 at para. 151.

¹⁴⁵ Case C-62/86 *AKZO Chemie BV v. Commission* [1991] ECR I-3359.

¹⁴⁶ Case T-83/91 *Tetra Pak International SA v. Commission (Tetra Pak I)* [1994] ECR II-755 at para. 150.

¹⁴⁷ Case C-333/94 *Tetra Pak International SA v. Commission (Tetra Pak II)* [1996] ECR I-5951 at para. 44.

caused by failing to condemn predatory pricing.¹⁴⁸ The reaction to *Tetra Pak II* would then be that the judgment may cause fear of price competitiveness in concentrated markets where it is more useful being encouraged. Although Tetra Pak's behaviour would not have been possible if the undertaking had not possessed large economic power, some may argue that aggressive competition should be distinguished from anti-competitive conduct. Otherwise undertakings who are successful might be discouraged.¹⁴⁹

The fact that Tetra Pak could not be proven to be able to recoup its losses (and thereby enjoy profits a market with a normal degree of competition would not allow for) makes the original application of the test of predatory pricing fail, which would mean that the prices were in fact not predatory , but only parts of an aggressive competition strategy.

On the other hand, a price below reasonably anticipated average variable costs should be presumed unlawful, since it cannot be objectively justified with the need to meet an equally low price of a competitor. It does seem to be able to produce unreasonable effects if the competition authorities cannot intervene before the competitor is driven out of the market.

6.3.4 *CICRA and Maxicar v. Renault*¹⁵⁰

In the *CICRA and Maxicar v. Renault* case, CICRA, an Italian trade association for undertakings who manufactured body parts for cars, and Maxicar, a member of said organisation, had raised proceedings against Renault in an Italian court. CICRA and Maxicar claimed the production and marketing of non-original spare parts was not an offence under Italian law. Renault, holding the design rights of the spare parts in question, naturally counterclaimed CICRA and Maxicar had infringed its (Renault's) rights. The national court, not denying the right of car parts producers getting design protection under Italian law, considered Renaults exercise of its exclusive rights may be contrary to provisions of the Treaty, and so referred two questions for a preliminary ruling regarding this to the ECJ. One of the questions were whether Renault's attempt to try and stop independent manufacturers of car parts by design protecting the goods was an abuse of Renault's dominant position.

As the Advocate General Mischo said, commenting the case;

"It is not a case here of a proprietor of protective rights defending his "territory" against imports, but of independent producers attacking that

¹⁴⁸ Smith, P., *The Wolf in Wolf's Clothing: The problem with Predatory Pricing*, [1989] 14 ELRev. 209.

¹⁴⁹ Jones, A., *Distinguishing Predatory Prices from Competitive Ones*, [1995] 5 EIPR 252.

¹⁵⁰ Case 53/87 Consorzio Italiano della Componeatistica di Ricambio per Autoveicoli (CICRA) and Maxicar v. Régle Nationale des Usines Renault (Renault) [1988] ECR 6039.

proprietor by challenging his entitlement to exercise his exclusive rights against them.”¹⁵¹

The ECJ promptly answered, saying the securing of exclusive benefits granted by national law to design right holders could never in itself be an abuse of a dominant position. The Court also mentioned that a higher price being demanded for a spare part protected by a design right did:

“not necessarily constitute an abuse, since the proprietor of protective rights in respect of an ornamental design may lawfully call for a return on the amounts which he has invested in order to perfect the protected design.”¹⁵²

This statement of the Court would mean that competition law will in fact tolerate prices on goods protected by an intellectual property being higher than for unprotected goods, even if the competition in the relevant market is diminished due to the intellectual property protection. Community law does recognise the right holder’s right to a reward for his efforts. The judgment also confirms that the holder of a right has a legitimate right in eliminating competition from unauthorized producers of the protected good.

6.3.5 *Volvo v. Erik Veng*¹⁵³

Volvo was the proprietor of a registered design for car body panels in the United Kingdom. It instituted proceedings against Erik Veng Ltd in a British court for infringement of Volvo’s exclusive rights after Veng had imported the same design of body panels, produced without Volvo’s authorization in another member state, and then marketed them in the United Kingdom. The High Court referred some questions regarding the application of Article 82 on this situation, the most important one being whether it was a *prima facie* abuse of an undertaking, in this case Volvo, in a dominant position as manufacturer of body parts for cars, to refuse to license others to supply the parts, even when the other party was willing to pay a reasonable royalty for articles sold under the license. In other words, did Volvo abuse its dominant position when it refused to license Veng with the right to deal in Volvo spare parts?

The ECJ repeated its standpoint from *Nancy Kean*, saying that in the present lack of Community legislation regarding design protection, it was up to the member states legislature to decide what rules should apply, and also which products were to benefit from intellectual property protection. The Court then emphasised that the right to prevent third parties from producing or importing unconsented products incorporating a protected design constitutes the very subject matter of a design right holder’s exclusive right. Thereby,

¹⁵¹ Opinion of the Advocate General Mischo in case 53/87 *Consorzio Italiano della Componeatistica di Ricambio per Autoveicoli (CICRA) and Maxicar v. Régie Nationale des Usines Renault (Renault)* [1988] ECR 6039 at para.7.

¹⁵² *CICRA and Maxicar v. Renault* judgment at para. 17.

¹⁵³ Case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211.

an obligation on the holder of the right to grant licenses for the design protected product, even if the licensor was to be paid a reasonable royalty, would lead to him being deprived of his exclusive right. A refusal to license could therefore not in itself constitute an abuse of a dominant position.¹⁵⁴

However, the Court emphasised, this exercise of the design right holder's exclusive right may be prohibited by Article 82 if the party in a dominant position resorted to certain behaviour which would be regarded as abusive. The Court mentioned:

“the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation...”¹⁵⁵

as examples of such abusive behaviour, provided such conduct was liable to affect trade between member states. In this case, the Court concluded, Volvo had used no such conduct from what the national court had been able to ascertain.

The conclusion that can be drawn from *Volvo v. Veng* is that a refusal to license by an undertaking in a dominant position does not, as such, amount to an abuse of a dominant position, since the right to refuse to license lies within the specific subject-matter of the right. In order for a refusal to license to amount to an abuse of a dominant position an additional abusive behaviour is required, as exemplified by the Court: a refusal to supply without objective justification, abusive pricing or the decision to reduce or stop production. A licensor can even charge different licensees different licensing fees, depending on how long or for how many times they use the licensed process, without this amounting to discrimination, as long as all licensees are being charged the same royalty amount for each use.¹⁵⁶

6.3.6 *Magill*¹⁵⁷

At the time no weekly TV guide was available in Ireland and Northern Ireland. The three biggest TV stations, RTE, ITV and BBC each published a TV guide with their own respective programme for the week. They claimed copyright protection for this under British and Irish law to prevent third parties from reproducing the programme listings. The three broadcasters also provided the programme listings free of charge on request to daily and periodical newspapers. This was accompanied by a license (with no fees charged) with the conditions that the programme information could be reproduced and published daily, and, if the following day was a public

¹⁵⁴ Compare this with the later case of *Magill* where the opinion of the Court was not the same.

¹⁵⁵ *Volvo v. Veng* judgment at para. 9.

¹⁵⁶ Waelbroeck, M., *Price Discrimination and Rebate Policies Under EU Competition Law*, [1995] Fordham Corporate law Institute 147.

¹⁵⁷ Joined cases C-241/91P and C-242/91P *Radio Telefis Eirann (RTE) and Independent Television Publications Ltd (ITP) v. Commission* [1995] ECR I-743.

holiday, for two days. RTE, ITP (which was ITV's publishing company, responsible for its TV guides) and BBC ensured strict compliance with the conditions for the license and instituted legal proceedings when publications failed to comply with them.

Magill TV Guide Ltd (Magill) attempted to publish a weekly TV guide covering the programme listings of all three broadcasters, but was prevented from this by an injunction after the TV channels had applied for one at an Irish court. Magill then lodged a complaint with the Commission, accusing the TV channels of abusing their dominant position by refusing to grant licenses for the publication of weekly listings. The Commission investigated into the matter and found that the three broadcasters had in fact abused their dominant position. The Commission ordered RTE, ITP and BBC to put an end to their behaviour and start supplying third parties, on request with reasonable royalty fees and without discriminating against any third party, with advance weekly programme listings and also to allow the third parties to reproduce the listings. The CFI supported the Commission decision and dismissed the TV broadcasters' application for annulment of the decision.¹⁵⁸ This was later also supported by the ECJ, which upheld the CFI's findings without adding very much reasoning itself.¹⁵⁹

The relevant product markets in the case were held to be the TV stations' weekly programme listings and the TV guide in which these were published, not the market for information on TV programmes in general, which the broadcasters held. The CFI noted that the market for weekly listings and for the TV magazines containing that information did in fact constitute sub-markets within the market for television programme information in general. This sub-market on information on programmes on a weekly basis constituted a product for which there was a demand both from third parties wishing to publish the listings on a weekly basis and from consumers, i.e. the TV viewers.

For parties wishing to publish the listings on a weekly basis it would be impossible to do so, were the copyright holders to have their way, not giving out the necessary information. For the viewers, the CFI remarked, the list of programmes available in newspapers and magazines at the time of the decision, i.e. for at most 48 hours in advance, were only to a limited extent substitutable with comprehensive weekly television guides, covering all available channels in one publication. As the CFI put it:

¹⁵⁸ Case T-69/89 *Radio Telefis Eirann v. Commission* [1991] ECR II-485, case T-70/89 *British Broadcasting Corporation and BBC Enterprises Ltd v. Commission* [1991] ECR II-535 and case T-76/89 *Independent Television Publications Ltd v. Commission* [1991] ECR II-575.

¹⁵⁹ Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eirann (RTE) and Independent Television Publications Ltd (ITP) v. Commission* [1995] ECR I-743. The BBC did not appeal against the CFI judgment since new rules came into force in the United Kingdom in 1991 which obliged broadcasting organizations to license the reproduction of their programme listings.

“Only weekly television guides containing comprehensive listings for the week ahead enable users to decide in advance which programmes they wish to follow and arrange any leisure activities for the week accordingly.”¹⁶⁰

It can be said that the crucial fact in *Magill* is that the monopoly was based on the information in programme scheduling rather than the listings themselves. That very information that also happened to be the raw material needed by Magill for its product. This way the outcome of *Magill* was feared to have serious implications for the computer and telecommunications industries, for example by obliging producers of computer programmes to license the information behind the programme so as not to stop the emergence of new programmes from potential competitors.¹⁶¹

When determining the dominant position of the broadcasters in *Magill*, the ECJ once again stated that the mere ownership of an intellectual property right does not confer a position of dominance on its proprietor. The ECJ agreed with the CFI’s statement as regards the dominant position of the TV companies: as a consequence of their copyright in programme listings, they also possessed the exclusive right to reproduce and market those listings. Third parties, such as Magill, who wished to publish the listings, were then in a position of economic dependence on the companies, who could hinder the emergence of competition on the market of information on the copyright protected material. By force of circumstance, the TV channels were held to enjoy a de facto monopoly over the information used to compile listings.

The appellants had argued that where the conduct of an undertaking in a dominant position consisted of the exercise of a nationally classified copyright, that conduct could never be reviewed in relation to Article 82. The ECJ admitted that the exclusive right of reproduction formed part of the author of a copyrights’ rights, so that, save exceptional circumstances, a refusal to grant a license could not in itself constitute an abusive behaviour, even if the right holder occupied a dominant position.¹⁶² However, the ECJ confirmed, in the present case such exceptional circumstances did exist. The CFI had stated in its judgment that although the exercise of the exclusive right to reproduce was not an abuse in itself, that did not apply when it in the individual case was apparent that the exclusive right was exercised in such a way and under such circumstances that it ventured to pursue an aim contrary to the objectives of Article 82:

“In that event, the copyright is no longer exercised in a manner which corresponds to its essential function...which is to protect the moral rights

¹⁶⁰ Case T-76/89 *Independent Television Publications Ltd v. Commission* [1991] ECR II-575 at para. 62.

¹⁶¹ Greaves, R., *Magill est arrivé...RTE and ITP v. Commission of the European Communities*, [1995] 4 ECLR 244.

¹⁶² See also Case 238/87 *Volvo v. Veng* at paras. 7 and 8.

of the work and ensure a reward for creative effort, while respecting the aims of, in particular, Article 86.”¹⁶³

The conduct objected to was the TV channels’ reliance on copyright conferred by national legislation to prevent the emergence of a new product for which there was no actual substitute, and for which there was a consumer demand, i.e. a weekly TV guide containing the programme listings of all the channels available. Thus the refusal to provide basic information by relying on a national copyright prevented the appearance of a new product, and this constituted an abuse under Article 82(2) b.¹⁶⁴ By this conduct the appellants reserved the secondary market of weekly TV guides for themselves, solely to keep their monopoly. The Courts considered there was no objective reason for the appellants not to license third parties the right to reproduce and publish the weekly listings.

It has been argued that the Court further infringed the content of the specific subject-matter in *Magill*, since according to what was established as regards refusal to license in *Volvo v. Veng*, the broadcasters’ refusal to license the programme listings to Magill did not constitute an abuse. Instead the Court made a policy based decision and used competition law to compel licensing.¹⁶⁵ If a conclusion can be drawn about refusal to license from *Magill*, it might be that a refusal to license is contrary to Article 82 if it is combined with an abusive conduct. The refusal can also be contrary to Article 82 if the mere refusal itself is the means of an abusive conduct that has effects on other markets than the one where the intellectual property right is primarily protected.¹⁶⁶ The copyright in *Magill* can be compared with an essential facility, and as such the Court saw it fit to intervene in the broadcasters’ refusal to allow access to the copyright protected material needed by a potential competitor.

6.3.7 The Advocate General on *Magill*¹⁶⁷

The Advocate General Gulmann’s opinion on the *Magill* cases was not in line with the ECJ’s findings. Instead of focusing on the fact that because of the broadcasters’ refusal to license, consumers were deprived of a new product, the Advocate General focused on the rights of the broadcasters as copyright holders. The Advocate General stated that even though the Commission decision and the CFI’s judgment “produce a reasonable result

¹⁶³ Case T-76/89 *Independent Television Publications Ltd v. Commission* [1991] ECR II-575 at para 71. Article 86 is now Article 82.

¹⁶⁴ Limiting production, markets or technical development to the prejudice of consumers.

¹⁶⁵ Pombo, F., *Intellectual Property and Intra-Community Trade*, [1996] Fordham Corporate Law Institute 491.

¹⁶⁶ Temple Lang, J., *European Community Antitrust Law: Innovation Markets and High Technology Industries*, [1996] Fordham Corporate Law Institute 519.

¹⁶⁷ Opinion of Mr Advocate General Gulmann on joined cases C-241/91 and C-242/91 *RTE and ITP v. Commission* [1995] ECR I-743.

in practice”,¹⁶⁸ that did not mean that result was best achieved by means of Commission decisions adopted under Article 82; that result could be achieved only by legislation, either nationally or on a Community level. The opinion of the Advocate General was seen as a shift in the attitude towards intellectual property rights to a less interventionist approach that many right holders hoped was an indication also of the attitude of the Court, but as mentioned above the Court did not agree with the Advocate General’s findings.¹⁶⁹

The Advocate General criticized the fact that the Commission and the CFI hinted that they did not feel programme listings were worthy of copyright protection.¹⁷⁰ He commented that if there was a need under Community law to restrict the protection copyright gives to certain products, this should be done through Community legislature, not by the Courts. He also stated that:

“To accept that copyright owners must, in their commercial conduct, comply with different standards according to how deserving of protection their works are from the point of view of Community law would in any event signify that Community law is applied to censure rules in national intellectual property legislation on what products may obtain protection.”¹⁷¹

The Advocate General stated that an exercise of intellectual property rights which falls within the specific subject-matter of that right will in fact relate to its very existence. He elaborated on this statement and concluded that the distinction between the existence and exercise of rights are basically different expressions of the same conceptual approach, and that this leads to the distinction having no independent significance for resolving questions of delimitation of intellectual property rights.¹⁷² Therefore it was vital to determine the specific subject-matter of copyright, to be able to set the boundaries for what could not be interfered with by Community law.¹⁷³

The Advocate General concluded that the specific subject-matter of copyright included the exclusive right to reproduction and the right of first marketing, and that the essential function of copyright was to protect the moral rights of the work and ensure a reward for creative effort. In other words, the Advocate General considered the specific subject-matter not being the same concept as the essential function of the right. Because of this, the Advocate General went on, the corollary of the exclusive right of reproduction is the right to refuse licenses, making this also a part of the

¹⁶⁸ Ibid. at para. 5.

¹⁶⁹ Haines, S., *Copyright Takes the Dominant Position: The Advocate General’s opinion in Magill*, [1994] 9 EIPR 401.

¹⁷⁰ Although the Advocate General seemed to agree in principle with this point of view, see paras. 123 and 127 of his opinion.

¹⁷¹ Ibid. at para. 126.

¹⁷² The righteousness of the existence never being questioned but the exercise of that right being subjected to the limitations of Community law.

¹⁷³ Opinion of Mr Advocate General Gulmann on joined cases C-241/91 and C-242/91 *RTE and ITP v. Commission* [1995] ECR I-743 at paras. 27- 32.

specific subject-matter of copyright. The question raised was then whether such special circumstances can exist, which, in connection with a refusal to license, can make the situation no longer being regarded merely as a refusal to license but also lead to the application of Article 82, making the infringement of that article stop only when granting of licenses occur.

The Advocate General pointed out that since the purpose of the concept of specific subject-matter is to define the national intellectual property rights which can not be affected by the Community rules, the possibility that Article 82 can be used to interfere with the exercise of rights falling within the specific subject-matter can give rise to problems at first sight. The Advocate General remarked that a definition by the Courts of a specific subject-matter is not absolute in the sense that any exercise of the right within the boundaries of the specific subject-matter is immune to challenge. The right could be exercised by a dominant undertaking in such special circumstances that it could no longer be regarded as falling within the specific subject-matter of the right, and thereby the application of Article 82 would be possible. The special circumstances are only of any significance for the proper functioning of the common market if they are exercised by an undertaking in a dominant position, the Advocate General concluded.¹⁷⁴

As an example of the Courts' acceptance that it is possible pursuant to Article 82 to interfere with rights falling within the specific subject-matter the Advocate General referred to the third example in the *Volvo v. Veng* case, namely the decision of a proprietor of a design right no longer to produce spare parts for a particular model even though many cars of that model are still in circulation. This was an act falling within the specific subject-matter of the design, namely the right to decide if, when, where and how the right is to be exploited. According to the Advocate General this example differed from the other two mentioned by the Court in *Volvo v. Veng*¹⁷⁵, in that the other two involved acts:

“do not relate to the registered design and...are themselves expressions of an abuse.”¹⁷⁶

The Commission had accused the broadcasters of applying a discriminating licensing policy, and that this behaviour was an abuse in the meaning of Article 82. The Advocate General disagreed; this would signify an interference with the specific subject-matter of the copyright since the right holder would no longer freely determine his remuneration or to whom he would grant a license. The fact that the undertakings wished to reserve to themselves certain use of the protected work, the Advocate General felt, could not be deemed discriminatory. The right to grant licenses, which is part of the specific subject-matter of copyright, would also involve the right to do so on specified terms. The Advocate General warned that the approach

¹⁷⁴ The Advocate General's opinion at para. 52.

¹⁷⁵ The arbitrary refusal to supply spare parts to independent repairers and the fixing of prices for spare parts at an unfair level.

¹⁷⁶ The Advocate General's opinion at para. 57.

by the Courts may give the impression that the concept of specific subject-matter no longer has any real meaning. He felt that:

“ it is clear that substantial and weighty grounds must be put forward to show that rights covered by the specific subject-matter of copyright can be exercised in a manner incompatible with the Treaty.”¹⁷⁷

And even more so when it comes to the right to refuse licenses, since a requirement on copyright holders to do so would reduce the copyright merely to the right to receive an economic reward.

Contrary to the Commission’s findings, the Advocate General believed that whether a new product being stopped by the exercise of the intellectual property right would compete with the copyright owners own product was relevant in the assessment of whether the refusal to grant licenses constituted an abuse in the *Magill* case. The Advocate General considered it to be an abuse of a dominant position only if the copyright owner used his right to prevent the emergence of a new product which would not compete with his own product. Where the prevented product largely would meet the same demands as the right owner’s product, the interest of copyright protection and the owners right to a reward for his creative effort should carry more weight than the pro-competitive view of increasing competition through the emergence of a new product competing on the market.

The Advocate General considered a comprehensive TV guide to meet basically the same needs as the existing TV guides separate for each broadcaster. Therefore there were no special circumstances that would justify applying Article 82 and thereby interfering with the specific subject-matter.

The Commission had also accused the broadcasters of using their dominant position to retain the derivative market of weekly TV guides for themselves. Once again analogies were drawn to the spare parts cases. According to the Commission, the situation of *Magill* could be equalled to that of an independent repairer of cars, since they were both dependant on supplies from an upstream market (car parts and programme listings) for them to go about their business in a derivative market (repairs of cars and production of comprehensive TV guides).

The Advocate General pointed at the differences between *Magill* and the spare parts cases in that *Magill*’s case there was not only a need for the product itself, i.e. the listings, but also for a license to produce a new product containing the listings. The difference was, in other words, that the *Magill* case involved the exercise of an intellectual property right as the crucial element while the spare parts cases was a question of refusal to supply. The Advocate General remarked that the analogy between the different cases should instead be drawn by the fact that the car companies were in fact entitled to refuse to license spare parts manufactured without

¹⁷⁷ Ibid. at para. 86.

their consent. Therefore there should neither be any basis, according to the Advocate General, for treating the *Magill* case any differently since the possibility of exploiting the copyright on a derivative market must be regarded as necessary for the right holder to obtain his reward for his creative effort.

6.3.8 *Magill*- implications and analysis

Are holders of intellectual property rights in dominant positions on a market obligated to give out licenses of their product to others? Will their refusal to do so amount to an abuse of their dominant position? The Court has established in its case law that it is legitimate for an intellectual property holder to limit the exploitation by third parties through licensing of his right.¹⁷⁸ However, as the later case law has shown, sometimes a refusal to license an intellectual property right can in fact amount to an abuse of a dominant position if there is an additional element of abuse. A refusal to license itself can also, as was the case in *Magill*, be deemed abusive if it has effects on downstream or other markets. Then the intellectual property holder will be seen as in possession of something resembling an essential facility.

The essential facilities doctrine originates from US anti-trust law, where it was used to justify obligating a dominant undertaking in sharing its assets with competitors.¹⁷⁹ The Commission defines an essential facility as a:

“facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by reasonable means.”¹⁸⁰

A refusal by the proprietor of an essential facility in granting access to the facility, which has anti-competitive effects and which is not objectively justified, is prohibited by Article 82.¹⁸¹

In *Magill* the Court seemed to implicitly accept that intellectual property rights might be seen as essential facilities, placing the owners of the right under a obligation to provide access to their facilities fairly and on a non-discriminatory basis. The Court did not refer to any case law regarding essential facilities, but did call the refusal to license by the broadcasters a refusal to make available an indispensable raw material, which is in essence what constitutes an essential facility. However, the question to be asked is then how the Court’s imposition on the broadcasters of a duty to license can be reconciled with the fact that the Treaty clearly states that intellectual property rights are a matter for national concern in Article 295.¹⁸²

¹⁷⁸ Case 62/79 *Coditel v. Ciné Vog* [1980] ECR 881.

¹⁷⁹ Furse at p. 250.

¹⁸⁰ Notice on the application of the Competition Rules to access agreements in the telecommunications sector [1988] OJ C256/3 at para. 68.

¹⁸¹ Faull & Nikpay at p. 159.

¹⁸² On this view see for example Crowther, P., *Compulsory Licensing of Intellectual Property Rights*, [1995] 20 ELR 521.

There has been some criticism against the readiness of the Commission in identifying cases as involving essential facilities. In essence the critics claim that it does not make sense to treat a result of disadvantage to a competitor as a sufficient condition for the existence of an essential facility, since this would lead to intervention as soon as a competitive advantage, which its competitors would like to use, is gained by an undertaking. There is an especially large danger of misusing essential facility arguments in cases regarding access to intellectual property rights, since the rights confer a natural monopoly status on their proprietors. If the rights block the possibility of possible competitors developing alternatives that could compete with the right holder, the right holder must expect an intervention by competition law which could lead to the rights being curtailed.¹⁸³ Here the market definition will be most important in establishing whether a particular intellectual property right is an essential facility, and thereby risks competition law intervention if some serious impediment to competition exists because of the right.

If the relevant product market is defined as consisting solely of the protected good, this will in effect put the right holder in a de facto monopoly. The monopoly of the right holder will then produce a situation where other undertakings may be dependent on the licensing in order for them to pursue their chosen line of business. The undertaking will be in a position of economic dependence towards the right holder, and the right will consequently take on an essential facility-like role. The refusal to license by the right holder can then be classified as abusive, even if the product stopped by the refusal might, as in *Magill*, be a potential threat to the product of the right holder, and the refusal to license is based on legitimate economic concerns.¹⁸⁴ If there is a potential demand for a new product which requires the use of the intellectual property right, the right holder can be forced to issue a license.

Magill was seen as a defeat for copyright holders, since if taken literally, the judgment would mean that a copyright owner would be required to issue licenses if this is needed for an entrant on the market who can show that its product is in some way differentiated from the copyright holder's. Knowing this, the launching of expensive research and development programmes leading to products protected by copyright might seem a risky business, since the exclusivity of the copyright in the developed product will be threatened if it is seen as an essential facility or as indispensable raw material for other products.

One aspect of *Magill* that made the case especially difficult was the nature of the protected copyright. Even the Courts themselves expressed a

¹⁸³ Ridyard, D., *Essential Facilities and the Obligation to Supply Competitors Under EC and UK Competition Law*, [1996] 8 ECLR 438.

¹⁸⁴ Poulsen, S. T., *Samarbejdspligt og Tvangslicenser: En kommentar til dommene i Magill-sagerne*, [1995] 3 NIR 355.

somewhat hesitant attitude towards the worthiness of programme listings' copyright protection. The fact was that the reason behind the protection was not that they constituted a work made through creative effort, but that the copyright had its reason in statutory privilege to aid the TV channels' roles as broadcasting authorities.¹⁸⁵ The copyright can as such be seen as a by-product of the main business of the TV channels, namely the broadcasting itself.¹⁸⁶

Because of these special circumstances, the intervention of the Community competition rules in *Magill* might not be very influential outside situations where the whole industrial context makes third parties dependant on licensing from dominant undertakings. The areas that come to mind are information technology and telecommunications. In the Software Directive¹⁸⁷ it is emphasised that an obligation of interoperability should apply to computer and telecommunication products, especially where the owner of an essential facility is operating in a secondary market himself. *Magill* can be applied in the interoperability context; for example, if a dominant undertaking producing operating systems use their control over the products to stop others creating programs or equipment that would be interoperable with that operating system, that could be deemed abusive.¹⁸⁸ This was the situation when IBM was held to have behaved abusively under Article 82 by, among other things, refusing to supply information on its mainframe computer products to competitors who needed the information to be able to adapt their products for them to be able to be interoperable with IBM mainframes.¹⁸⁹

In a more recent case, *Tiercé Ladbroke*¹⁹⁰, the CFI supported the outcome of *Magill*. The case concerned the Commission's rejection of a complaint by the leading operator in the Belgian horse betting market against undertakings holding the video and audio rights to French horse races. These right holders refused to license right for use to Ladbroke's betting shops in Belgium. The CFI stated that, whereas in *Magill* the refusal to grant a license had stopped a competitor from entering the market, in the case of Ladbroke the complainant was already present and even the leading operator in the market where the right was needed. In addition to this, the French right holders refused to license to all Belgian betting operators, not just Ladbroke, and therefore there was no discriminatory element to the licensing refusal. The CFI concluded by saying:

¹⁸⁵ Goyder at p. 358.

¹⁸⁶ Poulsen, S. T., *Samarbejdspligt og Tvangslicenser: En kommentar til dommene i Magill-sagerne*, [1995] 3 NIR 355.

¹⁸⁷ Council Directive 91/250 on the legal protection of computer programs [1991] OJ L 122/42.

¹⁸⁸ Vinje, T. C., *The Final Word on Magill*, [1995] NIR 156.

¹⁸⁹ Case 60/81 *IBM v. Commission* [1981] ECR 2639. The situation was solved by a settlement between IBM and the Commission, where the Commission obtained an undertaking from IBM.

¹⁹⁰ Case T-504/93 *Tiercé Ladbroke v. Commission* [1997] ECR II-923.

“The refusal to supply the applicant could not fall within the prohibition laid down in Article 86 [now Article 82] unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented despite specific, constant and regular potential demand on part of consumers.”¹⁹¹

This would indicate that the impact of *Magill* will most likely be limited to situations where exceptional circumstances in the exploitation of intellectual property rights by a dominant undertaking prevents the emergence of new products not offered by the right owner, and for which there is a consumer demand.

However, the more recent case of *Micro Leader Business v. Commission*¹⁹² implies a more interventionistic attitude from the CFI. Micro Leader Business was an undertaking engaged in selling office and computer equipment, in particular products manufactured by Microsoft, the well-known US giant corporation. It was stopped by Microsoft from exporting copies of French-language software, originally marketed in Canada, to France, where identical products were marketed by Microsoft France. Micro Leader Business complained to the Commission and claimed there was an abuse of a dominant position within the meaning of Article 82 of the Treaty, in that the resale prices of Microsoft products on the French market were influenced by means of a prohibition on importing French-language versions of products marketed by Microsoft on the Canadian market. The complainant mainly based its allegations on a bulletin from Microsoft where it informed its dealers in France that a number of measures had been taken to reinforce the ban on the marketing of Canadian products outside of Canada. Micro Leader Business claimed it had lost significant orders because of this ban, and accordingly complained to the Commission, claiming inter alia that the conduct of Microsoft and Microsoft France constituted a breach of Articles 81 and 82. The complainant argued that the import prohibition was an indirect means of imposing significantly higher resale prices on its dealers in France.

The Commission rejected the complaint, and Micro Leader Business appealed to the CFI. The CFI stated that Microsoft’s marketing of copies of software in Canada did not, in itself, exhaust Microsoft’s copyright over its products in the Community.¹⁹³ However, the CFI noted that the factual evidence put forward by the applicant constituted, at the very least, an indication that, for equivalent transactions, Microsoft applied lower prices on the Canadian market than on the Community market and that the

¹⁹¹ Ibid. at para. 131.

¹⁹² Case T-198/98 *Micro Leader Business v. Commission* [1999] ECR II-3989.

¹⁹³ The CFI did in other words hold on to the principle of EC only exhaustion of rights, not international exhaustion.

Community prices were excessive.¹⁹⁴ The CFI went on, making reference to *Magill*, saying that:

“It is clear from the case-law that whilst, as a rule, the enforcement of copyright by its holder...is not in itself a breach of Article 86 [now Article 82] of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct.”¹⁹⁵

Unfortunately, the CFI left the question as to whether Microsoft’s actions were in fact an abuse of a dominant position through the exercise of its copyright, open, by simply annulling the Commission’s decision since it involved an error of assessment.¹⁹⁶

6.4 Collecting societies

Collecting societies, or copyright-management societies, are organisations having as their object to help the individual copyright holder who is a member of the society to assert his rights against for example a radio station who uses a piece of the member’s music. The collecting society will collect and allocate the royalties for the use of the copyright protected material of the individual copyright holder. By joining a collecting society the author assigns the copyrights of his produced works to the society. The right to refuse to license the use of copyright protected works gets lost for the individual author when the copyright is assigned to a collecting society. Once the society has the works in its repertoire, it is obliged to grant licenses to all agreeing to pay.¹⁹⁷

The collecting societies take care of the practical administration involved for the authors of the copyrights towards users of the copyright protected work. By joining a collecting society the individual copyright holder is more powerful, as part of a collective. The collecting societies are normally national organisations, but are connected through a network of international agreements.¹⁹⁸ Because of the collective power the collecting societies have, often acting as a network of national monopolies, they have been scrutinised under Community competition law.¹⁹⁹ Because of the digital age and the increasing demand for products related to entertainment, it has been envisaged, for example by the Commission in its Green Paper on Copyright and Related Rights in the Information Society²⁰⁰, that the role of collecting

¹⁹⁴ *Micro Leader Business* judgment at paras. 54- 55.

¹⁹⁵ Ibid. at para. 56.

¹⁹⁶ Ibid. at paras. 57- 58.

¹⁹⁷ Jehoram, J. C., *The Future of Copyright Collecting Societies*, [2001] 3 EIPR 134.

¹⁹⁸ Koktvedgaard, M. & Levin, M., *Lärobok i Immaterialrätt*, 6th edition, [2000] Norstedts Juridik Stockholm at pp. 109- 111.

¹⁹⁹ Jehoram, J. C., *The Future of Copyright Collecting Societies*, [2001] 3 EIPR 134.

²⁰⁰ The Commission’s Green Paper - Copyright and Related Rights in the Information Society COM(95)382.

societies will grow even more important in order to supervise copyright administration.²⁰¹

6.4.1 The SACEM cases²⁰²

SACEM was a French collecting society which was involved in a few cases regarding, among other things, the possibility of it abusing its dominant position, the first one being the *Basset* case.²⁰³ Mr Basset owned a discotheque in France. SACEM asserted that Mr Basset had played works from SACEM's repertoire in the discotheque without paying royalties. Mr Basset claimed the contracts on which SACEM's royalty claims were based were void because they were contrary to national and Community competition law. The Cour d'Appel agreed SACEM had a de facto monopoly and thereby occupied a dominant position on the market in France. Mr Basset claimed SACEM had abused its dominant position, firstly by charging an excessive rate of royalties, and secondly by including in the rate a "supplementary mechanical reproduction fee" (this did not occur in other member states, but was perfectly legal according to French law). The Cour d'Appel referred some questions regarding *inter alia* the legitimacy of the extra fee to the ECJ for a preliminary ruling. As regards Article 82, the ECJ stated that the fact that a copyright-management society utilized the possibilities given to it by national legislation did not in itself constitute abuse of its dominant position. However, the Court went on, the amount of royalties may be such that Article 82 could be applied.

The case lead the Commission to performing an investigation into the relations between SACEM and foreign copyright-management societies, and whether the fees charged by SACEM were so high SACEM's behaviour would constitute an abuse of its dominant position. In the later cases of *Ministère public v. Tournier*²⁰⁴ and *Lucazeau v. SACEM*²⁰⁵, the ECJ was referred questions for preliminary rulings from French courts, asking whether certain trading conditions of SACEM's were compatible with *inter alia* Article 82.

SACEM argued the difference in royalty rates compared with other member states was due to different methods of assessment of the rates in different member states, and that if those differences were neutralized, the differences in royalty levels between member states would be minor. The ECJ rejected this, mentioning the Commission's investigations into the royalty rates of

²⁰¹ Porter, H., *European Union Competition Policy: Should the Role of Collecting Societies Be Legitimised?*, [1996] EIPR 672.

²⁰² Case 402/85 *Basset v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM)* [1987] ECR 1747, case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521 and joined cases 110/88, 241/88 and 242/88 *Lucazeau v. SACEM* [1989] ECR 2811.

²⁰³ Case 402/85 *Basset v. Société des auteurs, compositeurs et éditeurs de musique (SACEM)* [1987] ECR 1747.

²⁰⁴ Case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521.

²⁰⁵ Joined cases 110/88, 241/88 and 242/88 *Lucazeau v. SACEM* [1989] ECR 2811.

different member states had shown the level in France to be many times higher than in any other member state, and so “inequitable”.²⁰⁶ This major difference would, according to the ECJ, be indicative of an abuse of a dominant position, which the undertaking in question would have to be able to justify:

“...by reference to objective dissimilarities between the situation in the member state and the situation in all other member states.”²⁰⁷

The ECJ also remarked that the French copyright-management society had a much larger staff and took a considerably larger proportion of the receipts of royalties into SACEM itself, in way of various administration and distribution expenses for example, than any other such society in another member state. In other words, royalties were higher, but the copyright holders themselves did not get paid more. The ECJ suggested this was an indication of the lack of competition on the market in question, taken advantage of by SACEM.²⁰⁸

6.4.2 Conclusions of the Court

An exclusive license of copyright to a collecting society is not necessarily restrictive of competition.²⁰⁹ When setting the limits for what a collecting society may do without risking the application of Article 82 on its actions, the Court has applied a principle of proportionality. This means that the dominant undertaking in question may act as it wishes in order to gain profits from its business and improve its position on the market, but it can only use methods necessary to achieve its legitimate aims, i.e. methods which do not limit competition more than necessary.²¹⁰ This principle has of course also been used by the Court in cases that did not involve collecting societies.²¹¹ As regards collecting societies however, the Court held, for example, in *BRT v. SABAM and Fonier* that conditions in the contracts between the collecting societies and the authors of the copyright imposed conditions on the authors amounted to abuse.²¹² The conditions were deemed to encroach more severely on the freedom of the authors to exercise their right than was necessary to protect the copyright.²¹³

²⁰⁶ *Lucazeau v. SACEM* judgment at para. 24.

²⁰⁷ *Ministère Public v. Tournier* judgment at para. 38.

²⁰⁸ See for example *Lucazeau v. SACEM* judgment at para 29 and *Ministère Public v. Tournier* at para.42.

²⁰⁹ Case 125/78 *GEMA v. Commission* [1979] ECR 3173.

²¹⁰ Anderman at p. 186.

²¹¹ See for example case 27/76 *United Brands v. Commission* [1978] ECR 207 and case 102/77 *Hoffman La Roche v. Centrafarm* [1978] ECR 1139.

²¹² Case 127/73 *Belgische Radio en Televisie et société belge des auteurs, compositeurs et éditeurs (BRT) v. SABAM et Fonior* [1974] ECR 313.

²¹³In the *BRT v. SABAM et Fonior* case this meant that the authors wishing to join the copyright management society was required to assign all, both present and future, copyrights to the society, even for an extended period after the member wanted to withdraw from the membership of the society. See para. 12 of the judgment.

A similar conclusion was reached in *GEMA v. Commission*,²¹⁴ where the Court stated that when examining the statutes of a collecting society in the light of the Treaty, the decisive factors were whether the statutes exceed the limits of what is absolutely necessary for effective protection of the copyrights (the indispensability test) and whether the statutes would limit the individual copyright holder's freedom to dispose of his work no more than necessary (the equity test).²¹⁵

In *GVL v. Commission* the Court regarded the refusal of a German collecting society which refused to make its service available to artists who were non-German residents as an abuse of its dominant position.²¹⁶ This judgment is not surprising, considering the non-discrimination principle as regards nationality in Community law. Therefore it is neither surprising that applying different prices simply because the licensee comes from another member state is not lawful either.²¹⁷

6.5 Summary and conclusions on abuse

In cases regarding intellectual property and the possibility of the actions of the holders of such rights falling under Article 82, the establishment of the relevant product market is especially crucial when assessing whether the holder of the particular right does in fact occupy a dominant position. Because of the intellectual property right the possibilities of substitution may be minute. This may lead to a situation where the right holder is seen as holding a position of de facto dominance and the right is viewed as an essential facility, justifying the intervention of Community competition law.

The Commission and the ECJ have frequently been accused of defining the relevant product market narrowly for policy reasons, wishing to support undertakings not in possession of, but needing access to, intellectual property rights. In *Hilti*²¹⁸ for example, the Commission found the existence of three relevant product markets (guns, cartridges and nails), as opposed to Hilti's view that the whole fastening system with all three components should be deemed the relevant product market. By defining the relevant product market more narrowly, the Commission and the ECJ could protect the right of independent manufacturers of nails compatible with Hilti's patent protected guns and cartridges maintaining their businesses, as long as this did not infringe upon any intellectual property rights.

²¹⁴ Case 125/78 *GEMA v. Commission* [1979] ECR 3173.

²¹⁵ See also Anderman at pp. 186- 187.

²¹⁶ Case 7/82 *GVL v. Commission* [1983] ECR 483. See especially para. 56.

²¹⁷ Anderman at p. 241.

²¹⁸ Case C-53/92P *Hilti AG v. Commission* [1994] ECR I-667.

The same goal of protecting manufacturers of consumables compatible with intellectual property protected equipment was upheld in *Tetra Pak II*²¹⁹, where the machines for packaging various foods were assessed as belonging to a market of their own, separated from the market for cartons, i.e. consumables not protected by an intellectual property right.

In *Volvo v. Veng*²²⁰ the relevant product market was defined as the market for spare parts, not, which was claimed by the car manufacturers, the wider market of sales of cars and after-sales maintenance. The narrow market definition eliminated any substitutes, making it a single product market and thereby placing the right holder in a de facto monopoly situation, being able to exclude competitors through his right. The intellectual property right will in this situation resemble an essential facility. The refusal of an owner of an essential facility in granting access to such a facility, providing this has anti-competitive effects and cannot be objectively justified, is prohibited by Article 82.

As regards collecting societies, who by their very nature are monopolies, the societies may act as they wish in order to gain profits in their business, but are not allowed to use methods which limit competition more than necessary, for example by imposing conditions encroaching too severely on the freedom of the authors.²²¹ The Community does however recognise the importance of collecting societies, and an exclusive license of copyright to such a society is not necessarily restrictive of competition.²²²

Although the normal exercise of an intellectual property right should not be affected by Article 82, the article can be applied in special circumstances on a right holder's exercise of his right, where the Community courts finds the exercise abusive. The ECJ has particularly stressed that the list of abusive practises in Article 82 is not exhaustive. So what constitutes abuse of a dominant position in relation to exploitation of intellectual property rights?

In *Tetra Pak I*²²³, Tetra Pak's acquisition of a possible competitor in a market where Tetra Pak was already dominant was seen as abusive. The abusive element was that through its acquisition of a group of companies and with it a vital exclusive license for a patented process, Tetra Pak effectively stopped any competition in the relevant market from occurring.

In *Hilti*²²⁴, Hilti tied the sales of nails, which were not covered by intellectual property protection, to sales of guns and cartridges, which were

²¹⁹ Case C-333/94P *Tetra Pak International v. Commission (Tetra Pak II)* [1996] ECR I-5951.

²²⁰ Case 238/87 *Volvo v. Erik Veng (UK) Ltd* [1988] ECR 6211.

²²¹ Case 127/73 *Belgische Radio en Televisie et société belge des auteurs, compositeurs et éditeurs (BRT) v. SABAM et Fonior* [1974] ECR 313.

²²² Case 125/78 *GEMA v. Commission* [1979] ECR 3173.

²²³ Case T-51/89 *Tetra Pak Rausing SA v. Commission (Tetra Pak I)* [1990] ECR II-309.

²²⁴ Case C-53/92P *Hilti AG v. Commission* [1994] ECR I-667.

protected. Hilti also reinforced the tie-in through charging significantly higher royalty rates for independent nail producers to obtain licenses of right to Hilti cartridge strips, which limited the market entry of new producers of Hilti-compatible nails.

An undertaking in possession of intellectual property rights can also be deemed to have abused its dominant position through exploitation of its rights in a way which has repercussions in a related market where it is not dominant. This was the case in *Tetra Pak II*, where Tetra Pak was deemed to have abused its dominant position in four markets relating to the packaging of food in cartons, through the sale of cartons and equipment at predatory prices. Tetra Pak's claim that its prices could not be judged as predatory since they occurred in a market where the undertaking was not dominant, and where it therefore would not be able to recoup its losses, were dismissed by the Courts. The ECJ stated that it would not be appropriate to wait until a strategy of predatory pricing had eliminated competition all together in a market, and that it was therefore necessary in the interest of competition to intervene and penalize such a strategy whenever there was a risk of competitors being driven out of the market.

In *CICRA and Maxicar v. Renault*²²⁵ the ECJ recognised a design right holder's right to demand a higher price for a protected spare part in order for him to be rewarded for his efforts. The ECJ also stated that securing the exclusive benefits granted to the right holder by national law could never in itself mean a design right holder abuses his dominant position.

In *Volvo v. Veng* the ECJ reinforced this view by clearly stating that an obligation on a holder of a design right to grant licenses for the design protected product would lead to him being deprived of his exclusive right. A refusal to license was said to not be able to, in itself, constitute an abuse of a dominant position, since the refusal to license lie within the specific subject-matter of the right. However, the ECJ gave examples of additional abusive behaviour which in combination with a refusal to license could amount to an abuse of a right holder's dominant position: refusal to supply without objective justification, abusive pricing or the decision to reduce or stop production.

In recent years, especially since the outcome of *Magill*²²⁶, which can be said to have further undermined the importance of the specific subject-matter doctrine, much of the focus has been on the refusal to license intellectual property rights. This is still a controversial area, since the refusal to license have long been regarded as part of the very core of intellectual property protection.

²²⁵ Case 53/87 *Consorzio Italiano della Componeatistica di Ricambio per Autoveicoli (CICRA) and Maxicar v. Régie Nationale des Usines Renault (Renault)* [1988] ECR 6039.

²²⁶ Joined cases C-241/91 and C-242/91 *RTE and ITP v. Commission* [1995] ECR I-743.

A refusal to license all together seem to be abusive if there is a consumer demand in a downstream market, and the license is required for a potential competitor to be able to provide the new product for which there is no substitutable goods, such as in *Magill*. The holder of the right will then be placed in the same position as a proprietor of an essential facility. However, if a dominant undertaking does license its rights, it must not be done through the charging of excessive royalties²²⁷ or in a discriminatory fashion²²⁸, as this will be assessed through a traditional Article 82 analysis, and so might lead to a finding of abuse of a dominant position.

²²⁷ See the collecting societies cases, e.g. case 402/85 *Basset v. SACEM* and case 395/87 *Ministère Public v. Tournier*.

²²⁸ What I am referring to here is the Court's exemplification of possible abusive practices in *Volvo v. Veng*; the arbitrary refusal to license, see para. 9 of the judgment.

7 Final Thoughts

The relationship between intellectual property protection and exploitation and the provisions of the Treaty have been, and still seem to be, a controversial area. The case-by-case approach through the traditional elements of the existence/exercise and specific subject-matter doctrines have given the Community much room for what can be described as nothing less than policy-based decisions. A main objection that can be made against this is that although a policy-based decision might seem like a good idea in the individual case, in order to stop the abusive exploitation of an intellectual property right by a certain right holder, when looked upon in a more general context, the repercussions of a case can be bigger than was originally bargained for by the Court. A good example of this would be *Magill*, where one of the very core elements of copyright; the right to refuse to license, was said to be an abuse of a dominant position.

However, it could be argued that the facts of *Magill* made it a unique case, because of the nature of the copyright protected material in question. The fact that the Court allowed the Commission to intervene through forcing through a license, could indicate that *Magill* was in fact an exceptional case; normally this intervention into the national rules on what should entail a copyright would go against some very fundamental principles, most importantly the one in Article 295 which clearly states that the terms of intellectual property right protection is a matter for national law to decide. *Magill* may, because of the exceptional circumstances of the case and the way the law evolves with the case law of the Court, have got more attention and have more read into it than could be imagined by the Court. Time will tell exactly how far the implications of *Magill* will reach into the area of, especially, copyright protection.

If anything, the way the case law has evolved in the area of intellectual property rights in relation to abuse of a dominant position, there seem to have been a slight shift in attitude on the part of the Court, where it more readily than before accepts the Commission's partiality for treating intellectual property rights as essential facilities. In doing so, it would seem justifying an imposition of a license on an undertaking holding an intellectual property right would be easier for the Court. Once again a main issue is how the relevant market is defined, as a narrowly defined market will lead to an easier finding of the right holder in fact being in possession of an essential facility.

Although the essential facilities doctrine seemingly fits in on the situation of intellectual property rights, since these rights do in fact by their very nature give a monopolistic position to their holder who can then use the right to hinder the business of others, applying the essential facilities doctrine too liberally would mean not recognising the very idea behind intellectual

property protection. One important purpose of granting protection for intellectual property rights is to guarantee the exclusivity of the right, in order to secure the future revenue for the investors in the development of the right. For the Community to grant others access to the right too readily would not be in the spirit of encouraging innovation and investments in research and development programmes.

The Court's reference to "special circumstances" in *Magill*, and the later case of *Ladbroke* for that matter, seems to have given the Court a sort of a loop-hole. When cases regarding refusal to license intellectual property rights emerge, the Court will most likely, in my opinion, resort to referring to "special circumstances" surrounding the actions of the right holder, in order to be able to legitimise the prohibition of the particular use of the intellectual property right, even if it, in the traditional sense, falls within the specific subject-matter and rightful exercise of the right. This way, the Court will be able to, even in future, base its judgments on policy.

Although this situation may seem to bring with it a certain amount of legal uncertainty on behalf of right holders, it seems to be the only way to go. Until the Community has a unified or at least harmonized set of intellectual property rights, a case-by-case solving of problems arising between the exercise of rights and the Community competition rules seem to be necessary. Even though the use of the traditional doctrines of existence/exercise and specific subject-matter or essential function might have seemed to lose some of their importance through *Magill*, the Court will most likely keep referring to them until the Community legislation or harmonization process have left them other, maybe more solid, arguments to rely upon.

The existence/exercise and specific subject-matter doctrines have come to good use through the Court. They were, and still are, necessary instruments to reconcile the difficult clash between the protection of intellectual property rights and the aims and fundamental ideas of the Community.

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