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Competition Law vs. Intellectual Property Law- a Difficult Act of Balance

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Sammanfattning

I dagens kunskapsekonomi representerar immaterialrätter enorma summor. Att kunna skydda innovationer och nytvecklade produkter är essentiellt för företag på den mycket kompetitiva gemensamma marknaden.

Detta examensarbete behandlar diskrepansen mellan immaterialrätter och konkurrensregler. Konkurrensreglar syftar till att kontrollera den interna marknaden och stärka konkurrensen. Immaterialrätter, å andra sidan skapar monopol, dock tidsbegränsade och begränsade till ett uttalat område. Dessa motsättningar skapar spänningar mellan områden som hindrar en effektiv tillämpning av de båda områdena.

Som en huvudregel inom EG-rätten kan inte en ägare av immaterialrätter tvingas licensera sin rätt till andra intressenter. EG-domstolen har dock funnit att om ett dominant företag missbrukar sina immaterialrätter kan sådan tvångslicensering komma ifråga men enbart under mycket speciella omständigheter. För att rättfärdiga sådan intervention utvecklade domstolen en doktrin om existens och utnyttjande.

Den första delen av detta examensarbete behandlar den legala basen för doktrinen, doktrinens substans och relaterade regler om fri rörlighet. I den andra delen tas en närmare titt på rättspraxis angående tvångslicensering.

Tillämplig lagstiftning på områden är knapp, därför har praxis fått sätta upp ramarna för hur lagstiftningen skall tillämpas och även satt ut ytterligare villkor som skall vara uppfyllda. Domstolen har generellt varit konsekvent i sin praxis då de balanserat immaterialrätten mot konkurrensreglerna, dock har de varit mycket försiktiga. Dock har Kommissionen i Microsoft fallet indikerat en mindre sträng attityd tvångslicensering, frågan är nu om domstolarna kommer stämma in i Kommissionens bedömning.

Summary

In today's knowledge economies, Intellectual Property represents large values. To be able to protect innovations and new products is essential for undertakings on the highly competitive internal market.

This thesis deals with discrepancy between the system of Intellectual Property Rights and Competition Law. Competition Law is aimed at controlling the internal market and promoting competition. Intellectual Property Rights on the other hand creates monopolies, limited in time and created for a certain purpose. This discrepancy leads to tensions, which must be solved for the areas to function together.

As a general principle in EC Law, the holder of an Intellectual Property Right is not obliged to license the right of usage to others. The ECJ has though found that if a dominant undertaking is abusing its Intellectual Property Right, the law can intervene under certain specific circumstances. To justify such intervention and set out in which situations that can be done, the Court developed the doctrine of existence/exercise.

The first section of this Master Thesis is devoted to the legal basis of the doctrine, as well as the doctrine itself and the related rules on free movement. In the second section, some of the case law concerning the application is examined the case law focuses on compulsory licensing and, naturally connected, refusal to supply information.

The legislation applicable on the problem is scarce, therefore how the law should be applied and additional conditions and rules have been set out in case law. The Courts have in general been quite consequent, although very careful in its judgments. The latest decision in the Microsoft case indicates a change of direction.

Preface

With this thesis, I now conclude my University years. There are especially four very special persons, which has made the last five years a marvellous time! Charlotte, Anna T, Anna B and Alexandra, thank you! I am sure we have just as much fun, and more, ahead of us as we have had these years!

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Abbreviations

AG	Advocate General
BC	The Berne Convention
CFI	Court of First Instance
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECT	European Community Treaty
EEC	European Economic Community
EIPR	European Intellectual Property Review
e.g.	(<i>exempli gratia</i>), for example
EU	European Union
GATT	General Agreement on Tariffs and Trade
IPR	Intellectual Property Rights
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Communities
PC	Paris Convention
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation
UN	United Nations

1 Introduction

“In today’s world, intellectual assets are one of the primary sources of wealth and competitive advantage. Our ability to manage innovation, and the resulting intellectual property we create, are the key to our business success”¹

On the globalised markets of today, national borders are rapidly losing its former importance. Goods and services are moving faster and easier than ever around the world. The benefits for those who participate and deal on the new global market are great. Nevertheless, new risks have arisen. One of Europe’s main comparative advantage is, and has for a long time been, technology advanced products and services. The ability to protect and exploit intellectual property is the key issue to a large percentage of the European undertaking who specialise in such high technology products and services. To identify the limits and be able to plan their businesses, undertakings must be able to recognise the limits of their rights. IPR’s can, if used abusively, distort competition on markets. Thus, legislators and judges seek to balance the need for competition on the European market and the undertakings need for foreseeability.

This thesis deals with how the European Competition Policy counteracts with Intellectual Property Rights. How do these two systems of laws and regulations function in the European framework? Are there frictions or do they practise work in symbiosis?

1.1 Background

The primary function of EC competition law is to safeguard and promote competition on the European market. Intellectual property rules on the other hand create monopolies. Although these created monopolies are, contrary to “natural” monopolies, limited in time and for a certain purpose.²

The two systems have in a sense the same goal, which is to promote innovation and research on the common market. The competition rules ensure that undertakings do not abuse their position to distort the competition on the market whereas the system of Intellectual Property Rights seek the same goal by ensuring that a creative person or undertaking is able to profit on its investment. The problem has some similarities with two political parties. They usually want to achieve the same goals but they have different views on how to achieve them. Sir Robin Jacob³ pinpoints

¹ Quote from a speech by the ICC Chairman Marcus Wallenberg on “International Trade and the global economy”, held at the ICC 80th Anniversary in Helsinki, Finland the 6 February 2007.

² Temple Lang, article, s 558

³ Lord Justice of Appeal, United Kingdom

the problem when he in the foreword to Korah's book⁴ writes: "The conflict between intellectual property (laws for stopping people to do things) and competition laws (laws for allowing people to do things) is obvious- the monopolist v. the anti-monopolist. Moreover by its very nature the key areas of competition law are apt to be fuzzy both in law and in the facts"

Competition law is one of the main tools to reach one of the overarching goals and purposes of the European Union, a common market and trough that European integration. It is not unusual that IPR's are seen as a threat to that goal.⁵ Therefore, there is a fear that IPR's could be used as a tool to partition the common market and hindering the free movement between the Member States. As a principle rule, which often is the source of the problem, Intellectual Property is a national system which content varies amongst the Member States.⁶ So far, no comprehensive official synthesis has been attempted.

If kept isolated from the other areas of European Law, it is recognized that IPR's can be used as a tool to circumvent the competition rules. Therefore, the ECJ found themselves obliged to interfere and strike balance between the interests of the property rights owner's exclusivity and the aim of the European Union - integration. Thus, the competition rules sets an outer limit of the exploitation of IPR's and defines the border between permitted and prohibited conduct.⁷ It is not clear where this border is to be drawn.

There are several reasons for the difficulties to converge the two areas of law in practice. Both the Commission and the Community Courts have preceded cautiously and pragmatically on a case-by-case basis without establishing clear general principles. The nature of the questions to some extent hinders a set of absolute principle; it will be shown that the issue needs clarification. From time to time the Commission has not clearly considered the implications of what it was saying.⁸ The cases so far has primarily summarized previous case law without considering more basic issues.⁹ One has to keep in mind that competition rules deals with markets which are dynamic and ever shifting. Therefore, the legislation must follow the market, a too rigid set of rules would soon be outdated

1.2 Purpose

The thesis concerns two of the areas in law, Competition Law and Intellectual Property Rights, which the author finds to be two of the most interesting and often most controversial areas of European Law. Besides being interesting in the legal aspects, IPR's are of great economically

⁴ Korah, *Intellectual Property and the EC Competition Law*.

⁵ Keeling, p. 5

⁶ Cornish, p. 25-31

⁷ Anderman, p. 4

⁸ Temple Lang, p. 558

⁹ Temple Lang, p 558

importance. As stated in the opening quote by Mr. Marcus Wallenberg; Knowledge is one of Europe's most important comparative advantages and is ever growing. To be able to protect our inventions and knowledge is therefore essential for the continuous economic well-fare. Intellectual property is not only of great importance today, it is also an ever growing and dynamic field considering the processes of harmonization, both on a European and a global level. At the same time the European Union is expanding and consists today of 27 of the 46 European countries.¹⁰ This dual expansion, the growing importance of both intellectual property and European integration makes the choice of thesis subject delicate and interesting.

The thesis aims to examine mainly how Competition Law inflicts on Intellectual Property. How well protected are the right holder and under which situations can his Intellectual Property Rights be restricted? Which requirement has to be met to restrict the use of an Intellectual Property Right?

The thesis deals with how the Courts and doctrine has solved, or tried to solve, the conflict between Intellectual Property Rights and Competition Law. The general aim is to examine in what extent the use and exploitation of Intellectual Property Rights can be restricted. Intellectual Property Rights is essential for the large part of European Company and it is of great importance for them to be able to rely on the protection given by law when planning their activity and investments.

The thesis is written with the perspective that the two systems do not work in a symbiosis but are developed separately.

1.3 Method and material

The method used is customary legal deductive method. The analysis is based on knowledge gained by studying primarily and secondary legislation, case law and doctrine. Competition law, at least concerning the issues in focus of this thesis are mainly set out in primarily legislation, which is very broad. Therefore, the interpreting of case law is very important to be able to understand the rules and how they should be applied in each case. The area of intellectual property is only to a small extent harmonised. Thus, when examining it from a European perspective little legislation can therefore be useful. Instead, case law and doctrine have been used.

Regarding doctrine, the author has used mostly international books; few Swedish authors have discussed the problem in any depth¹¹. Few articles discuss the matter and most material is to be found in the more extensive works on Competition Law and Intellectual property. Valentine Korah is

¹⁰ Not including countries that are only partly situated in Europe.

¹¹ There are though some exceptions that have helped a great deal such as "Bernitz m.fl; Immaterialrätt och otillbörlig konkurrens" and "Dan Ekelöf; Upphovsrätt i konkurrens".

one author that has highlighted the problem in a separate book, just as Stephen Anderman. These have helped tremendously in the writing of this thesis and have, together with the “EC Law bible” of Craig & de Burca, been used as a framework when writing this thesis. It should be noted that Anderman writes from the perspective that Competition Law should prevail over Intellectual Property.

Due to the specificity of the problem and the European Union, little can be acquired by comparing the national solutions to this problem. Where suitable, comparison has been made with US law. This is meant to put the European solutions in an international perspective and thereby increase the understanding. The American system is as developed as the European. To compare these two systems with less developed systems would not give the reader any further insight.

1.4 Delimitations

The thesis does not aim to cover every aspect and case concerning the problem. The thesis aims to discuss areas and cases which are of most interest and which gives insight to the questions raised. The reader has to remember that the issues at hand are of principle character, although it has a large practical relevance. Thus, some sections might be of a more abstract character. The Court of Justice has so far approached the problem pragmatically on a case-to-case basis without trying to establish general principles.¹² Focus is on Art. 82 and compulsory licensing.

The first part of the thesis focuses on the discrepancy between Intellectual Property rules and Competition law in general. The section part are devoted to the case law concerning a specific problem in the area, compulsory licensing. There are naturally other problems arising from the discrepancy as abuse trough mergers, price discrimination and predatory pricing, not to mention behaviour falling under Art. 81.

1.5 Outline

The Thesis is divided in three parts; firstly is a descriptive part outlining the framework of rules in which the problem arises. The second part describes and partly analyse selected parts of the relevant case law. The last part analyses the information provided, thereof conclusions will be drawn and answer the questions set up in the introduction.

The first part consists of three chapters. The first chapter describes the Competition Law by examining the general purpose and the two central articles, 81 and 82 of the ECT. Competition Law is discussed solely from a

¹² Temple Lang, p. 558

European perspective, the Member States solutions are not of any interest, partly because they all follow the outline and application of the European Rules. The second chapter describes Intellectual Property Rights. Intellectual Property is created and protected nationally. I have therefore discussed these issues in the perspective of national law and European Law to outline the relationship between them. Under “European legislation” a section on free movement of goods can be found. The use of IPR’s on the common market can besides through competition law be restricted by the rules on free movement of goods. The part of the second chapter is looking at the ownership of IPR’s. This section is aimed at understanding the specific problems and nature following their immaterial nature. The third chapter deals with the relationship between IPR’s and Competition law. Firstly, I examine the common and diverse goals of the two systems of law. After that, I describe the doctrine of existence/exercise that has developed to enable the ECJ to restrict the abusive exercise of IPR’s despite Art. 295 of the ECT.

The second part describes the most important case law regarding compulsory licensing. This section is intended to examine in depth issues arising from the problems described in the first part. Compulsory licensing is an area, which has generated most cases so far, mainly because it involves a great deal of money. The access to a protected good or service can decide whether a new undertaking can penetrate a market successfully.

2 Competition rules

2.1 General purpose

The goal of European Competition Rules, as well as for Competition Law in general, is to establish and protect efficient competition on a market. This entails that competition law should prevent market power from being used in ways that waste limited resources in both the short and the long run.¹³ The Community has as its explicit task to establish a common market in order to promote the social and economic goals set out in Article 2 ECT, e.g. a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection. To achieve the task of a common market and, in a wider sense, European integration the activities of the Community shall include a system, which ensures that competition at the internal market is not distorted.¹⁴ Article 81 and 82 ECT is the two main means of achieving this particular goal.¹⁵

Craig and de Burca identify three objectives community competition law, which reflects the goals the policy aims to achieve. The objectives are though not always compatible:

1. Enhance efficiency in the sense of maximising consumer welfare and achieving the optimal allocation of resources.
2. Protect consumers and smaller firms from large aggregations of economic power.
3. Facilitate the creation of a single European Market and to prevent this aspiration from being frustrated by the activities of private undertakings.¹⁶

By joining the European Union and thereby adopting the ECT, the Member States has accepted the basic principle of an open market with free competition. The MS are also thereby obliged to follow laws, judgements and decisions from the EU institutions.¹⁷ Although the actual competition rules in the Treaty stays the same, the policy¹⁸ in which light they function vary. The interpretation of these rules and their role changes in accordance with political value judgements and economic desiderata.¹⁹

The competition provisions can, roughly speaking, be divided into those, which primarily focus on the activities of governments,²⁰ and those, which

¹³ Van den Bergh & Camesasca, p. 5

¹⁴ Article 3.2 (g) ECT

¹⁵ Andermann, p 8; A merger control regulation was added in 1989.

¹⁶ Craig & de Burca, p. 937

¹⁷ Article 98 ECT

¹⁸ The 2005 Commission Report on Competition Policy states the most recent policy considerations.

¹⁹ Arnall, Dashwood, Ross & Wyatt, p. 540

²⁰ State Aid, which is regulated in Art. 87-89 ECT

deal with the actions of undertakings.²¹ As mentioned in the introduction, government actions are not within the sphere of this thesis and will not be discussed further. Neither is Art. 86 concerning public undertakings granted special or exclusive rights. Focus is on the rules concerning anticompetitive agreements and concerted practises between undertakings and, especially, on the prohibition on abuse of dominant position by one or more undertakings. The competition articles are worded shortly and widely, they have over the years required considerably interpretation by the ECJ. Following is a brief run through of the relevant competition rules.

2.2 Article 81²²- Anticompetitive Agreements and Concerted Practises

Competing undertakings now and again comes to the conclusion that they both²³ would benefit if they divided the market between them or fixed the prices on the product or service they offered. Such practise is detrimental to the market and distorts competition. Art. 81 ECT seeks to ensure that once government inspired obstacles to free movement of goods has been removed; they will not be re-erected in commercial agreements between businesses.²⁴

To prevent such practise Art. 81(1) prohibits *all agreements* between *undertakings*, decisions by associations of undertakings and concerted practises, which may *affect trade between Member States* and which has as *their object or effect*²⁵ *the prevention, restriction or distortion of competition within the common market* as incompatible with the common market. The rules would render little practical use if only explicit formal agreements were caught by the rules. Thus, context, qualifications and enforceability under national law is irrelevant.²⁶ If the effect on the internal market is under the threshold set out by the Commission the practise is permissive except for the hardcore restraints e.g. example price fixing and territorial division.²⁷

Art. 81(2) set out sanctions of infringements of art. 81(1); the agreement is void when it conflicts with art. 81(1).²⁸ Agreements, decisions or concerted practises can despite the prohibition in art. 81(2) be found lawful according to 81(3) if it contributes to improve the production or distribution of goods or if it promotes technical or economic progress, while allowing consumers a fair share of the resulting benefit.²⁹ Article 81 ECT is a system of prohibition and exemptions.³⁰ Undertakings do no longer have the

²¹ Art. 81 and 82 ECT, Steiner & Woods, p. 290

²² The article in full is attached in Supplement A

²³ Alternatively “all” depending on the number of undertakings involved.

²⁴ Greaves, p 13

²⁵ The word is to be read disjunctively according to *Société Minère v Mashinenbaum Ulm*

²⁶ Craig & de Burca, paragraph 893-896

²⁷ Commission Notice, OJ C 368, 22 December 2001.

²⁸ In addition the participants often have to pay high damages.

²⁹ Some modifications must be met in 81 (3) a and b.

³⁰ Craig & de Burca, p. 892.

possibility to notify their agreements to the Commission and thereafter be protected against infringements. They are obliged to do an assessment whether their agreement is unlawful according to art. 81.³¹ Agreements permissive under 81 (3) can be accepted on individual basis or be accepted due to a block exemption. The purpose of block exemptions is to exclude the generic types of agreements from the ambit of 81(1) and thereby avoid the need for individual exceptions. There are a number of block exemptions e.g. for technology transfer³², research & development.³³ The benefits of block exemptions have to a large extent been lost due to the fact that there is no longer an opportunity to notify the Commission of a possible anti-competitive concentration. Now the Commission only give more detailed information on what is considered a permissive agreement.³⁴

It is important to remember that agreements to assign or licence industrial or commercial property rights do not in themselves infringe Art. 81 ECT any more than does conferring distribution and manufacturing rights. However, the exercise of an IPR in accordance with limitations or restrictions can be caught by art. 81 .

Although art. 82 is the most important piece of law to control anti-competitive behaviour in general³⁵, it is of even more practical importance in the “control” of intellectual property rights. The articles complement each other and aims for different practises. It is therefore important to have knowledge of Art. 81 ECT as well as Art 82 ECT.

2.3 Article 82- Abuse of dominant position

If an undertaking has a dominant position on the market on which it acts, that undertaking has an obligation not to abuse such dominant position through unfair competition. Article 82³⁶ ECT sets put the prerequisites when a dominant undertaking is considered to have abused its position. The article is generally applicable on all economic activities of an undertaking.³⁷ The four cumulative prerequisites that have to be at hand are:

- one or more undertakings
- with dominance within the common market or a substantial part of it
- abusing its dominance
- which effects the trade between Member States³⁸

The list in the second part of the provision gives examples on what may be considered as abuse of a dominant position. The list is not exhaustive.

³¹ Council Regulation (EC) No 1/2003 of 16 December 2002

³² Council Regulation (EC) No 240/1996 of 31 January 1996

³³ Council Regulation (EC) No 2659/2000 of 29 November 2000

³⁴ Greaves, p 22

³⁵ Craig & de Burca, EU Law, p 892

³⁶ The article in whole can be found in Supplement A

³⁷ Eklöf, p.121

³⁸ Art. 82 ECT

Both art. 81 and 82 ECT have direct effect and are aimed at private undertakings. In opposite of art. 81 ECT there are no possibilities to be exempted from the application of Art. 82. It is worth mentioning that the exemption under 81(3) does not effect the application of Art 82 independent of it is an individual or block exemption.³⁹

The practise by the Commission, endorsed by the European Community Courts, have been to firstly identify “the relevant market” and then to assess the undertakings position on that market.⁴⁰

In order to create a consistent, realistic and systematic approach to determining the relevant market the Commission has issued a Notice on the subject in 1997.⁴¹ In the Notice, the Commission identifies three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition.⁴² The Commission defines “the relevant product market” as a market comprising of “*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products characteristics, their price and their intended use*”.⁴³ In addition the relevant geographical market is describes as comprising of “*the area in which the undertakings concerned are involved in the supply and the demand of products or services, in which the conditions of conditions are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciable different in those areas.*”⁴⁴

The definition of the product market is of particular interest when dealing with intellectual property since a narrow defined product market can give the impression that an IPR is a strong contributing cause to establish dominance since the possibilities of substitution naturally is reduced.⁴⁵

Art. 82 do not attempt to provide a definition of abuse, but gives a number of non-exhaustive examples. Instead, abuse is decided on case-to-case basis. The most relevant cases concerning compulsory licensing are dealt with in chapter 5.

It is always important to remember that it is not the dominant position in itself that is prohibited in art. 82 but the *abuse* of the dominant position. “Normal” exercise of intellectual property rights will therefore not violate EC Law and only under exceptional circumstances will the provision be applied on Intellectual Property Rights. In Europe, it was early established that the holder of a patent or other Intellectual Property Right does not necessarily enjoy a dominant position: there may be substitutes on either the demand or supply side of the market.⁴⁶ The US Supreme Court used to

³⁹ Devroe, p. 21

⁴⁰ Jones & Sufrin, p. 255

⁴¹ EU Commission’s Notice OJ C 372 of 9 December 1997.

⁴² Ritter & Braun, p. 26

⁴³ Council Regulation (EC) No 2659/2000 of 29 November 2000, paragraph 7

⁴⁴ Council Regulation (EC) No 2659/2000 of 29 November 2000, paragraph 8

⁴⁵ Jones & Sufrin, p. 256

⁴⁶ Korah, p 133, Parke, Davies & CO v. Probel, Deutsche Grammophon v. Metro, Radio Telefis Eireann and Others v. Commission.

assume dominant position from the existence of exclusive rights. This situation can soon be revised when The Supreme Court tries a case from the Court of Appeals⁴⁷ where the rule of reason was used instead of the presumption of dominance. It seems as the US and the EC are converging in the field of competition.⁴⁸

⁴⁷ Illinois Tool Works Inc v Independent Ink.

⁴⁸ Korah, p. 134

3 Intellectual Property Rules

This chapter aims to provide an overview of the basic functioning of Intellectual Property Rights. The area is complicated, mainly because of the division of competences. Intellectual Property Rights are within Member States' competence as long as there has been no harmonisation on a European level. There is an ongoing process of harmonising Intellectual Property Rights in the Union. However, it is proceeding slowly and the Member States are eager to keep their competence in the area. Still, there will be a harmonised Intellectual Property Regime in the future considering the goal of a fully integrated market.

3.1 General Purpose

Intellectual Property is a generic term, which covers both industrial and artistic forms of Property Rights. The more common species of rights included within this generic term are patents, trademarks, copyright, trade names, and indication of origin.⁴⁹ When looking at IPR from a Competition Law perspective, European Institutions do not separate between the different rights in principle.⁵⁰ Therefore, it does not matter if copyright, patent or another right protects the object. However, some differences can be found in practise.

Intellectual Property Rights' main purpose is to protect inventions and creativity.⁵¹ If an artist cannot prevent others to make copies of his artistic work, how could he charge the price needed to feed him. If a pharmaceutical company cannot get returns on its investments in developing new pharmaceuticals, it would have no initiative to do so and neither would it have funds for development. If the creators cannot profit from their work they would not be able to create.

3.2 National legislation

The European Court of Justice has constantly held⁵² that, in the absent of harmonization by the Community institutions, it is for national law to determine the procedures and conditions governing the grant of intellectual property laws.⁵³ Intellectual property rights are rights given according to domestic law and no supremacy is given to the Community in the area.⁵⁴ This is not to be understood as the Member States can create exclusive rights on whatever conditions they find appropriate. That would be to

⁴⁹ Craig, de Burca, p. 1088

⁵⁰ The Commission, the CFI and the ECJ

⁵¹ Levin, p. 11

⁵² For example was *Keurkoop v. Nancy Kean Gifts*, the first case in which the Court established the principle that national laws prevail in the absent of harmonization.

⁵³ Keeling, p. 30

⁵⁴ Keeling, p. 30

endow them with powers to erect barriers to inter-state trade for which there may be no objective justification.⁵⁵

The Treaty safeguards the national IPR's in article 295 ECT; "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership". The European Institutions have, as will be discussed in chapter 4.2, seen this rule as a hindering interference with the existence of IPR's. Still, the exercise of it can under certain circumstances be found incompatible with the Treaty provisions.⁵⁶ In the IMS Health Case⁵⁷, the CFI⁵⁸ found that respect for national IPR is a general principle, reflected by, not set out in art. 295 ECT. Thereby, the CFI circumvented the hindering effect of the article. This distinction might have little relevance in practise but it is interesting from a legal perspective. Furthermore, it is an established and fundamental rule in EC Law that it is up to Member States, in the absence of harmonization, to determine the scope and form of Intellectual Property Rights. This is not to say that the IPR's are to have absolute immunity or are unimpeachable.⁵⁹ The article exhorts the Court to act with restraints when inflicting on intellectual property rights.⁶⁰

Some new intellectual property rights have been introduced through the EC legislative process. Some areas have also been harmonized within the Member States.⁶¹ In the future, national rules will undoubtedly remain relevant in some context. Nevertheless, within a few years, the EC is likely to attain its goal of achieving a strong and broad harmonized European Union-wide Intellectual Property Right regime.⁶²

3.3 European legislation

The term "Intellectual Property Right" is not mentioned in the Treaty specifically; instead, it is phrased "industrial and commercial property" in art. 30. Art. 295 refers to "property ownership", hence the article does not separate between tangible and intangible property.

3.3.1 General Provision

Art. 295, states that the Treaty shall in no way prejudice the rules governing the system of property ownership in Member States, reinforces the message of art. 30 ECT, discussed below.⁶³ Taken together, these articles seem to

⁵⁵ Keeling, p 30, The Keurkoop case can in fact be read as Member States having complete discretion, that would though not be reasonable.

⁵⁶ The existence/exercise doctrine

⁵⁷ T-184/01 R, Decision of the 26 October 2001, IMS Health v. NDC Health

⁵⁸ Court of First Instance

⁵⁹ Eklöf, p. 247 f.

⁶⁰ Eklöf, p. 248

⁶¹ E.g. trademarks, databases, the term of protection for copyrights and certain related rights.

⁶² Vintje, p. 377

⁶³ Craig & de Burca, p 1088

leave limited room for manoeuvre for the Community Institutions to control the usage of Intellectual Property Rights. Therefore, it seems as is up to the Member States, due to their competence in the area, to resolve the issues at hand. However, this is only to a certain extent true. The judicial solution found by the ECJ was to draw a distinction between the existence and the exercise of an intellectual property right.⁶⁴

Why could then not the regulation of Intellectual Property Rights stay national without the interference of the European Community? The answer lies in the function of the internal market and the core and main purpose of the Union. A Common Market with 28 systems of IP protection cannot function properly in the end. It will create practical problems and prevent efficient trade within the European market. In addition, IPR's can be used to illegally partition the Internal Market. In addition, there is a consensus that there has to be a system for protecting intellectual property rights to encourage research and development. All Member States have developed patent, copyright and trademark protection systems, although not harmonized. Until such harmonization has taken place, some "IPR shopping" will take place in the Union, although this will probably benefit the market.

3.3.2 Free movement of goods

There are mainly two Treaty provisions, which are central when it comes to intellectual property law, art. 30 ECT and art. 295 ECT. Art. 30 ECT deals with the free movement of goods and has the same basic goal as the competition rules, a fully functional internal market. The two systems can both control and curtail the use of intellectual property law and work complementary.

Article 28 and 29⁶⁵ prohibits quantitative restrictions on imports and exports and all measures have equivalent effect. The prohibition does not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; 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 States⁶⁶. The Court has on several occasions⁶⁷, repeated that art. 30, as it constitutes derogation from the basic rules that all obstacles to the free movement of goods between Member States shall be eliminated, must be interpreted strictly.⁶⁸ IPR's should never hinder the integration of the internal market by enabling the right holder to partition the market.⁶⁹

⁶⁴ Craig and de Burca, p 1090

⁶⁵ Art. 28 and 29 ECT

⁶⁶ Art. 30 ECT

⁶⁷ For example; *Bauhuis v Netherlands* (1977) and *EC Commission v Italy* (1986)

⁶⁸ Tritton, Guy, p. 461

⁶⁹ Faull, Nikpay, s 584-589

One of the most significant cases where IPR's were under scrutiny as a barrier to free movement of goods was in the Deutsche Grammophon Gesellschaft case.⁷⁰ The case deals with copyright but the same basic approach as to patents and trademarks applies.⁷¹ In short the circumstances was the following; DGG distributed gramophone records directly or through subsidiaries in several Member States. The records were sold directly through retail or wholesale booksellers for the price of 19 DM. In other countries, the records were distributed under exclusive licensing agreements. One German retailer, Metro, refused to sell at the fixed price and imported records from France which he sold at a lower cost in Germany. DGG brought an action against Metro before national court claiming Metro had infringed their right of exclusive distribution in the Federal Republic of Germany.⁷² The Court started by pointing out that although art. 36 only expressly refers to industrial and commercial property rights, it also applies to copyright. It was also established that the existence/exercise doctrine is not limited to competition rules but can also be applied on all Treaty provisions.⁷³ The ECJ based its decision on the notion of consent. DGG had placed the records on the market through a licensee in France and could therefore not complain when Metro sought to import them to Germany. National rules that allowed a firm such as DGG to do this would be contrary to the principle of free movement of goods.⁷⁴ The Court thus introduced the principle of exhaustion of intellectual property rights upon first marketing with consent to curtail the effect of the principle of territoriality⁷⁵ Any other conclusion by the Court would lead to a loophole to hinder parallel import as long as intellectual property rights are involved. This would impair the principle of parallel import, which is developed by the ECJ through a number of cases.⁷⁶

Concurrent with the principle of exhaustion the Court also gave a restrictive interpretation, specifically in relation to intellectual property law, of the scope of art. 36 in the DGG case. The Court established that derogations from free movement of goods are only admissible to the extent to which they are justified for safeguarding rights, which constitute the specific subject matter of such property.⁷⁷ This concept has gradually been elaborated upon in subsequent case law.⁷⁸

⁷⁰ Deutche Grammophone Gesellschaft GmbH v. Metro SB Grossmärkte GmbH & Co (1971)

⁷¹ Craig and de Burca, p 1097

⁷² Govaere, p 71 f.

⁷³ Govaere, p 72; The Court thus expanded the Park, Davies judgment to apply on all Treaty provisions.

⁷⁴ Craig & de Burca, p 1098

⁷⁵ Govaere, p. 73; The Principle of Territoriality gives legal authority for a state to exercise jurisdiction in a case, due to location of the crime. This principle also bars states from exercising jurisdiction beyond its borders.

⁷⁶ Hoffmann-La Roche & Co. AG v. Centrafarm (1978), Zino Davidoff v. G Imports Ltd. (2001), Silhouette International GmbH v. Hartlauer (1998)

⁷⁷ Govaere, p 74

⁷⁸ What is considered the subject-matter differs between the intellectual property laws. The most relevant cases regarding the issue are; Centrafarm BV v. Sterling Drug Inc. (1974)

3.4 International outlook⁷⁹

It is important to understand that neither European, nor national, legislation function without consideration the rest of the world.

In the mid 19th century, the industrialisation and communication era took off in what is now called the industrial world⁸⁰. National systems of protecting intellectual property law had already been created, but the need for borderless protection grew. Although creating a worldwide system seemed like the ideal solution, it was not possible to accomplish. Instead, two principles became the foundation for the creation of “unions” for IPR. “National treatment” is the basis for the conventions later signed, but creates non-discrimination without demanding a levelled protection in all member states. As a complement, the second principle of minimum protection was decided on. This gives a minimum level of protection on the basic features or citizens of other convention states.

The two principles became the basis for the Paris Convention from 1883⁸¹ and the Berne Convention from 1886⁸². In the past 30 years, the levels between the Member States have been so diverse that no improvements have been possible, instead sub conventions have been created. Because of these difficulties, the US suggested to include Intellectual Property in the international trade agreement GATT, now WTO. TRIPS⁸³ takes ground from the level of protection in PC and BC but also adds additional obligations. An important difference in practise is the possibility to enforce the obligations in TRIPS through the Dispute Settlement System.⁸⁴ WIPO⁸⁵, a specialised agency under the UN, is also one of the most influential actors working to promote adequate levels of protection for intellectual property law.

3.5 Ownership of intellectual property law

In order to understand the problems with intellectual property rights it is useful to examine the ownership of intellectual property rights. What does such ownership contain? Is it as far reaching as the ownership of tangible property? And how do you transfer the ownership of intangible property?

(patents), *Centrafarm BV v. Winthrop BV* (1974)(trade marks), *Musik-Vertrieb Membran GmbH v. Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte (GEMA)* (1981) (copyright)

⁷⁹ Levin, p. 21 ff.

⁸⁰ Also called the West; Europe and the US.

⁸¹ Paris Convention for the Protection of Industrial Property

⁸² Berne Convention for the Protection of Literary and Artistic Works

⁸³ Agreement on Trade-related Aspects of Intellectual Property Rights, Annex 1C of the Marrakech Agreement establishing the World Trade Organization.

⁸⁴ Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the Marrakech Agreement.

⁸⁵ World Intellectual Property Organization, www.wipo.int

This section is deliberately held very general. How an intellectual property right is defined and what it in detail contains is, at least currently, up to the Member States to decide and therefore not in the ambit of this thesis.

3.5.1 The nature of Intellectual Property Rights

In order to understand what the ownership of an Intellectual Property Right contains we have to look at the nature of Intellectual Property Rights. The protection by national law of different intellectual property is common to all Member States. However, the range of legislation and the classification of the rights protected, vary considerably between them.⁸⁶ The industrial rights are protected only through registration after a more or less rigorous process of screening for acceptance⁸⁷. Other rights can simply be acquired as the result of publication (and creation?), as with artistic or literary copyright protected by Community Directives, by national legislation and by a number of international conventions.⁸⁸

Intellectual property rights function in many aspects just as tangible property. The right holder is in principle free to dispose of his exclusive right in the way he pleases and the right can be transferred permanently or be put at another's disposal.⁸⁹ A property is seen as a bundle of rights, containing powers, privileges and duties.⁹⁰ This bundle, as mentioned, is put together differently depending on the IPR in question. With the exclusive right the right holder can hinder others that without permission, produce, sell, rent out or import what falls under the protection.⁹¹ Nevertheless, an IPR is not an absolute protection. In certain exceptional circumstances, the law can and will intervene, forcing an IPR owner to license the right⁹² without the IP owners' permission.⁹³ The basis for such actions varies, as do the conditions which the law permits IP owners' wishes to be overridden.⁹⁴ Provisions of this nature have as their purpose to function as an important safety valve, hindering the possible abuse of the exclusiveness of an IPR.⁹⁵

3.5.2 Transfer of ownership

Regarding the transfer of ownership of intellectual property rights, the same rules apply as to tangible property. How to transfer an IPR is thus subject to national legislation. In Europe two different principles is used determining when the ownership has transferred between the seller and the buyer, tradition and contract. To make a generalization southern Europe uses the principle of contract while northern Europe uses tradition as the moment of

⁸⁶ Goyder, p. 219

⁸⁷ Patents, trade marks, registered designs

⁸⁸ Goyder, p. 219

⁸⁹ Bernitz and others, p. 327

⁹⁰ Craig & de Burca, p. 1089

⁹¹ Levin, p. 13

⁹² Requiring the licensee to pay a fee

⁹³ Joyce, Leaffe, Jazzi, & Ochoa., p. 487

⁹⁴ Bently, Lionel, & Sherman, Brad; Intellectual Property Law, p. 262

⁹⁵ Kottvergaard & Levin, p. 33

ownership transfer. According to French law the ownership transfers when the seller and buyer has agreed on the object and price, even if the object is not paid for or delivered.⁹⁶ A similar rule can be found in the British Sales of Goods Act 1979, but exceptions from the provision are made in the Bills of Sales Act 1952 and the Bankruptcy Act 1966. In German Law the principle rule is tradition according to § 929 BGB⁹⁷, but according to §930 BGB the parties of a contract can decide when the ownership transfers, such an agreement is valid towards third parties⁹⁸. Tradition means that the buyer must take the property in possession or at least out of the seller's possession. Thus, the Seller shall loose control of the property in question.⁹⁹ None of the principles function in their "pure" form, they must be modified to give a fair outcome. IPR's can with advantage, which are not possible regarding tangible goods, be used simultaneously; because of their immaterial character they are divisible. It is for example possible to grant manufacturing licenses for patents, pattern designs or copyrights to different producers in different countries.¹⁰⁰ In addition the right holder can keep the right to produce himself.

⁹⁶ La Code Civil, Art. 1583

⁹⁷ BGB, Art. 939, Eigentumswerb durch Einigung und Übergabe

⁹⁸ BGB, Art. 930, Ersatz der Übergabe durch Besitzkonstitut

⁹⁹ Millqvist, p. 103

¹⁰⁰ Levin, p. 13

4 The relationship between Intellectual Property Law and Competition Law

This chapter aims at giving a more comprehensive picture of how Intellectual Property relates to Competition Law. The European Court of Justice has tried to reconcile the areas through the doctrine of existence/exercise. This doctrine will be explained further in the second part of this chapter.

4.1 Common and diverse goals

The very purpose of commercial and industrial property rights is to give the right holder protection against competition. By giving exclusive rights for a certain period, the right holder is rewarded for his creative endeavour or investment in research and development.¹⁰¹ In short, Intellectual Property Rights creates actual monopolies limited in time. Competition law on the other hand, protects competition from excessive restraints and is concerned with maintaining free and open markets.¹⁰² Thus, the exercise of Intellectual Property Rights must inevitably hinder Competition Policy goals, if IPR's do not have any limitations.¹⁰³ There is always a risk of the right holder acting in an anticompetitive manner, using the exclusiveness to, for example, partition the market.¹⁰⁴

The Competition Policy and the Intellectual Property Policy are usually seen as two conflicting bodies of law, others tend to see them as complementary. In their own way, they both encourage innovation and promote research and development.¹⁰⁵ Competition ensures technologic development and efficiency improvement amongst competing undertakings. Intellectual property rights ensure research and development through securing return on investments for creators and investors. Both can be said to, in the end, enhance consumer welfare.

It is clear that the parallel application of competition law and intellectual property requires careful evaluation and balancing of their underlying functions in order to minimise the potential conflicts and to avoid frustrating the essential objectives of these laws.¹⁰⁶ The task for competition policy today therefore, is to ensure that it uses an appropriate balancing mechanism

¹⁰¹ Steiner & Woods, p 489

¹⁰² Lane, p. 7

¹⁰³ Steiner & Woods, p 489

¹⁰⁴ Ritter & Braun, p 721

¹⁰⁵ Whish p.734

¹⁰⁶ Ritter & Braun, p 721

in drawing the line between the two interests. The rules of Competition Policy must not be designed so tightly in the effort to protect effective competition in markets that it unnecessarily reduces the incentives to invest in R&D¹⁰⁷

4.2 The Existence/Exercise Doctrine

This section aims at explaining the basics of the Existence/Exercise Doctrine that has been developed by the European Court of Justice. The doctrine is fully developed by the judicial system. Thus, the doctrine has not been mentioned in legislative acts.

As mentioned before, the provisions in the Treaty seem to curtail the Community institutions from applying competition rules on IPR's. Nevertheless, fully excluding IPR from competition rules could lead to the distortion of the internal market. There have to be a balance between the protection of intellectual property in order to promote economic growth and the interest of protecting the internal market from distortion. Due to the wide writing in the relevant provisions of the Treaty, it is up to the ECJ to establish the necessary limits and boundaries. This they have chosen to do on a case-to case basis without establishing clear and general principles.

The solution the ECJ found appropriate is what today is called the doctrine of existence/exercise. The doctrine was first established in the Consten and Grundig case of 1964¹⁰⁸ and was thereafter further developed in latter case law. The doctrine, which is the oldest principle established by the Court, is based on a rather puzzling dichotomy between the existence of an intellectual property right and the exercise of the right. According to the principle, the Treaty guarantees the existence of the rights¹⁰⁹, but the exercise of the right may be limited by the prohibitions laid down in the Treaty.¹¹⁰ Notable is that the Court used the notion "grant", "existence" was not used until the Parke, Davies Judgement.¹¹¹ The exercise of IPR's can be scrutinised both under the rules on Free Movement of Goods and under Competition Rules.

There are some uncertainties which provision is the legal ground for the distinction between existence and exercise, art. 295 or art. 30 ECT. In Consten & Grundig,¹¹² the Court seemed to rely on art. 295 ECT. Art. 30 ECT systematically belongs to the rules on free movement of goods on the internal market and could not be the legal basis. In Parke, Davies judgment¹¹³ neither of the provisions were relied on in the legal

¹⁰⁷ Andermann, p. 7

¹⁰⁸ Consten & Grundig v. Commission (1966)

¹⁰⁹ Art. 295 ECT

¹¹⁰ Keeling, p.51

¹¹¹ Parke, Davies v Probel (1968)

¹¹² Consten & Grundig v. Commission (1966)

¹¹³ Parke, Davies v. Probel (1968)

argumentation. In the following case, *Sirena v Eda*¹¹⁴, the Court explained that art. 30 ECT is an expression for a general principle, which applies equally on Competition Law. The involvement of Art 30 ECT and free movement might be explained by the facts of the cases, the defendants where all trying to hinder parallel importation. The confusion was further amplified in *Deutsche Grammophon*¹¹⁵, where the rules on free movement of goods and the rules on competition were mixed in an evidently intransparent way.¹¹⁶ This confusion shows the strong link between the rules on free movement and competition, both regarding IPR's in general. The ECJ does not always separate clearly between the two, which leads to some confusion regarding the application.

Some may argue that Art. 295 ECT hinder national intellectual property rights to be called into question under community law. Such an interpretation would lead to strange situations where the ECT safeguards the existence of exclusive rights for which there may not be any objective justification. Therefore, it is recognised that how broadly the fundamental right to property is construed, it cannot be invoked in favour of spurious IPR's or any other exclusive right granted arbitrarily.¹¹⁷

To put the European solution in a perspective, a comparison can be made with the US antitrust law, the Sherman Act. The US and the EU antitrust laws are remarkably similar in both what they seek to ensure and how they go about it. Both recognise the importance of intellectual property in an ever more globalised economy; EU and the US both have large industries based on intangible products. Both also share the problem of "patents thickets"¹¹⁸ which hinders innovation.

The US Department of Justice and the Federal Trade Commission has jointly issued "The Antitrust Guidelines for the Licensing of Intellectual Property"¹¹⁹ to clarify how to handle the interface between antitrust and IP. The guidelines embody three basic principles:

1. IP are like any other form of property and the same general antitrust principles are applied;
2. There is no presumption by the agencies that IP necessarily confer market power on its owner;

¹¹⁴ *Sirena v. Eda* (1971)

¹¹⁵ *Deutsche Grammophon Gesellschaft v. Metro* (1971)

¹¹⁶ Ekelöf, p. 247

¹¹⁷ Keeling, p 57

¹¹⁸ Economist Carl Shapiro re-introduced the term in academic discourse in 2000. Shapiro defines a patent thicket as to the intellectual property portfolios of several companies that form "a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology," and he points out that "with cumulative innovation and multiple blocking patents, ... patent rights can have the perverse effect of stifling, not encouraging, innovation".

Shapiro, p. 120.

¹¹⁹ IP Guidelines, <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>, available on the 16 of March 2007

3. IP licensing is generally seen as pro-competitive. IR allows firms to integrate their complementary factors of production, increasing efficiency.

US authorities have taken decisions mostly based on economic considerations under the so called “essential facility doctrine”. This in short means that compulsory licensing can only be given if the exclusive right is based on a natural necessity, e.g. a harbour¹²⁰. Still there are no clear limits on what is considered prohibited use of IPR’s in the US, which indicates that such clear limits are not wanted or feasible considering the nature of the issue.¹²¹ One of the most important differences between the US and the EC is that the US was already an integrated market when the Sherman Act passed. Market integration has always been very important in the EC and all means have been used in order to promote it, not the least competition rules, sometime on the expense of the IPR protection.¹²² However, politics have influence competition law also in the US, for example has the number of cases where antitrust is applied on IPR decreased lately, most possibly because of the possibility for victims to bring treble damage actions.¹²³

In practice however, the European Court of Justice has not consistently based its reasoning upon the existence/exercise doctrine and specific subject-matter doctrines¹²⁴, relying instead upon a standard economic analysis of the type used in non-IPR cases.¹²⁵ This practice is becoming ever more common and is also supported by the Commission which has called for a more economic based approach.¹²⁶ The movement towards a more economic based approach will hopefully encourage companies to place more of their R&D in Europe instead of the more economical “safer” US. Notable is that the ECJ at times also refers to an “essential facility” doctrine, e.g. in the Bronner case. In the eyes of the ECJ the essential facility doctrine relates to the question whether the access to a protected product or service is necessary or not to penetrate a new market.

The limitations on competition which right holder can carry through are in a large extent depending on the extent of the protection.¹²⁷ The fundamental balance between Competition law and Intellectual Property law is to some extent solved through setting a narrow field of protection.¹²⁸ This solution

¹²⁰ Korah (1), p. 170

¹²¹ <http://www.jftc.com/news&publications/Publications/PDF%20DOCUMENTS/09Economic%20Criteria%20of%20the%20Essential%20facility%20doc.pdf>, available on the 16 of March 2007

¹²² Korah (1), p. 169.

¹²³ Korah (1), p. 170

¹²⁴ The doctrine of the subject matter of IPR is not that widely applied. It constitutes that Competition Law can never infringe on the core of the IPR. The core is what the IPR are primarily to protect.

¹²⁵ UNCTAD Report, 25 September 2000,

<http://www.unctad.org/en/docs/tdrbpconf5d6.en.pdf>

¹²⁶ Commission Report on Competition Policy 2006

¹²⁷ Eklöf, p. 58. The section deals specifically with copyright but can be applied on all IPR’s.

¹²⁸ Eklöf, p. 58

would though likely impair the Intellectual Property System and in the long-run be negative for consumers and the market in general.

The legal distinction between exercise and existence has been criticized by a number of authors¹²⁹ on the ground that it is vague, artificial, unhelpful and unworkable. It has been pointed out that the case-by-case approach applied gives the Commission the means to arbitrarily limit the national IPR's to carry out their political agenda.¹³⁰ An intellectual property right is only valuable if the right holder can use it, an IPR exist to be exercised. A distinction is therefore not logical.¹³¹ In the EC Law "bible" by Craig and de Burca, the authors state that "The bundle of rights"¹³² is what constitutes the very meaning of property. Therefore, to say that the Treaty serves to protect only the existence of a property right and not its exercise should not delude us into thinking that the bundle of rights, etc., which would normally comprise this type of property has survived unscathed."¹³³

Some authors argues that the Court should look at the function of the IPR in question and from that make an assessment whether the right is given and exercised in accordance with the function.¹³⁴

The criticism seems to have been taken to heart, the distinction has not been recited by the ECJ as commonly recently as between 1971 and 1982.¹³⁵ The doctrine is still valid but the status is not undisputed.

¹²⁹ e.g. Korah (2), p. 190, D. Wyatt and Dashwood, , p. 574.

¹³⁰ Faull & Nikpay, p. 518 ff.; Tritton, p. 466 f.

¹³¹ Korah (2), p. 34 f.

¹³² Powers, privileges and duties

¹³³ Craig & de Burca,, p 1089

¹³⁴ Govaere , p 312 f.

¹³⁵ Keeling, p 55

5 Case law

In the field of application of competition rules, the Commission for decades followed a strict legalistic approach. This approach led from time to time to an overwhelming burden on the Commission and the Courts, but the predictability for the potential infringer was good. Over time, the Commission has realised the need for a more economic-based assessment regarding competition and the use of IPR's. Thus, the Commission focused on the agreements involving parties with significant market power, avoiding spending resources to fight practices, which in reality did not affect the market.¹³⁶ Instead, the undertakings now have an obligation of self-assessment whether their actions might be infringing the competition rules.

The goal of the case law relating to compulsory licensing is not to undermine intellectual property rights *per se*, but to prohibit the use of IPR as an instrument of abuse.¹³⁷ The Member States of OECD¹³⁸ have identified the following areas where competition agencies seem most prepared to take action against employing IPR in an anticompetitive fashion;

- Using IPR to create or co-ordinate a cartel.
- Leveraging IPR to create an advantage outside of the market where the innovation took place.¹³⁹
- Prohibiting post-termination use if a licensed technology or requiring royalty payments for a term exceeding the life of a patent.
- Prohibiting a licensee from challenging the validity of a patent.¹⁴⁰

This compilation demonstrates ways in which IPR can be used in order to distort competition.

The case law focuses on the problem of compulsory licensing. The issue is an excellent example of the tension between competition rules and IPR's. Furthermore, it is also the issue, which concerns the largest amount of money. Some of the cases concern refusal to supply and these cases are handled in the same manner as refusal to license by the ECJ. Refusal to supply will thus hereafter be treated as the same thing.

5.1 Commercial Solvents

The first case where the discrepancy between competition rules and Intellectual Property Rights were addressed was *Consten and Grundig*¹⁴¹.

¹³⁶ Steiner, Wood p. 399

¹³⁷ Tritton, p 32

¹³⁸ Organization for Economic Co-operation and Development

¹³⁹ An example is the *Windsurfing* case, *Windsurfing International Inc v. Commission*, (1986)

¹⁴⁰ OECD, Competition policy and intellectual property rights

¹⁴¹ *Consten & Grundig v. Commission* (1966)

The ECJ found that the exploitation of industrial or commercial rights would be improper if these rights are used to circumvent Community law on restrictive practises. The first case that dealt with compulsory licensing specifically under Art. 82 were Commercial Solvents¹⁴².

5.1.1 Background

Commercial Solvents was a producer of certain chemicals, which was necessary as raw material to produce the drug Ethambutol. Ethambutol was used to treat tuberculosis. Zoja, a large producer of the drug, bought the raw materials from Commercial Solvents. As did all the substantial producers of Ethambutol; Instituto, American Cyanamid, Zoja and Commercial Solvents itself.¹⁴³ After a raise of prices of the raw material, Zoja discovered that they could buy the material it needed from another supplier and therefore ended the contract with Commercial Solvents. At one point, the alternative sources dried up principally because Commercial Solvents instructed those who to whom it sold raw material not to sell to firms such as Zoja.¹⁴⁴ Zoja then again turned to Commercial Solvents and asked them to start supplying again. Commercial solvents refused to deliver. It had started a joint venture that was making Ethambutol and was supplying its raw material only to themselves and Instituto.¹⁴⁵

Zoja complained before the Commission claiming that Commercial Solvents was abusing its dominant position in accordance with art. 82 ECT. The Commission found Commercial Solvents abused its dominant position and required Commercial Solvents to supply on the terms as to price and quantity previously agreed.¹⁴⁶ Commercial Solvents and Instituto appeal to the ECJ.

Instituto, an Italian daughter company to Commercial Solvents, was functioning as the re-seller on the European market.¹⁴⁷ The ECJ found that the two companies, regarding the raw material of Ethambutol, were to be considered an economic unit.¹⁴⁸

¹⁴² *Isituto Chemioterapico Italiano SpA and Commercial Solvents Corperation v. Commission* (1974)

¹⁴³ *Isituto Chemioterapico Italiano SpA and Commercial Solvents Corperation v. Commission* (1974), paragraph 16

¹⁴⁴ Craig & de Burca, p. 1011; to note is that Instituto, which was controlled by Commercial Solvents, tried to buy Zoja. When failing to do so, they raised the prices leading Zoja to look for alternative sources of supply.

¹⁴⁵ Korah (1), p. 136

¹⁴⁶ Korah (1), p. 136

¹⁴⁷ *Isituto Chemioterapico Italiano SpA and Commercial Solvents Corperation v. Commission* (1974), paragraph 7

¹⁴⁸ *Isituto Chemioterapico Italiano SpA and Commercial Solvents Corperation v. Commission* (1974), paragraph 41

5.1.2 Decision

The ECJ found Commercial Solvents to have a dominant position, being the only source of supply in the world of the raw material for Ethambutol production. They had defended themselves claiming a number of other ways and undertakings producing the necessary raw material. None of those could though produce the amounts needed, most of them was only producing experimentally. Commercial Solvents also argued that the market was wrongly determined. There are a number of alternative substances to Ethambutol for treating tuberculosis. Commercial Solvents argued that the raw material for those substances should be considered the same market as their products. The ECJ found the market to be limited to raw material for Ethambutol.¹⁴⁹

The ECJ thereafter examined if Commercial Solvents had abused its dominating position. By Commercial Solvents behaviour, it was hindering competition in the down-stream market, which was detriment to consumers.¹⁵⁰ There was nothing hindering Commercial Solvents from entering the down-stream market. What was forbidden was to use its dominance in the raw material market to gain an advantage in the Ethambutol market.

As usual, the ECJ had no problem finding that the abuse affected the trade between Member States.¹⁵¹ The ECJ has in practise never failed to find such an effect. Thus, the ECJ confirmed the interim decision taken by the Commission.

5.1.3 Analysis

The Commercial Solvents case was the first case, which the ECJ dealt with this specific issue, still the Court, made a well-balanced and structured judgment. The ECJ took no notice of the fact that Zoja originally ended the initial contract themselves.¹⁵² Usually one cannot expect a supplier to re-start to supply when one party on fair grounds has ended the contract. The ECJ though found that Commercial Solvents would end the contract at a later point anyway. Therefore, ECJ did not consider that circumstance in their judgement. The result might have been different if Commercial Solvents was reorganizing because of the loss of Zoja as customer.

¹⁴⁹ *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission* (1974), paragraph 19

¹⁵⁰ *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission* (1974), paragraph 23-29

¹⁵¹ *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission* (1974), paragraph 30-35

¹⁵² *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission* (1974), paragraph 25

One of the main considerations is whether Art. 82 are aimed to protect the consumer or the competition on the market. Sometimes the goals converge, but there are also situations where they diverge. A rational firm will enter a down-stream market only if it believes that it can produce more efficiently than its competitors. If their beliefs are correct, the consumer will benefit from a cheaper product. On the other hand, if the assumption is false the consumer will suffer accordingly. It might very well be that the dominant undertaking is not capable to supply both to its own production and to its competitors. The Commercial Solvents case indicates that the ECJ primarily, when forced to choose, will opt to protect the consumers.¹⁵³

5.2 Volvo v. Veng

The case concerned the interpretation of Article 86 of the EEC Treaty¹⁵⁴, now Art. 82 ECT. The ECJ considered whether refusal to license a protected design could be considered to amount to an abusive behavior, thereby falling within the framework of Art. 86 EEC Treaty.

5.2.1 Background

The case was brought to the Court by the High Court of Justice of England and Wales which asked for a preliminary ruling on three questions. The questions aimed to determine whether the refusal by the proprietor of a registered design in respect of body panels for motor vehicles to grant a license for the import and sale of such panels may, in certain circumstances, be regarded as an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.¹⁵⁵

The question had been raised in proceedings before the national Court between AB Volvo and Eric Veng Ltd. Volvo, the proprietor of a registered design for the front wings of Volvo series 200 cars, instituted proceedings against Veng for an infringement of its sole and exclusive rights. Veng imported the same body panels, manufactured without authority from Volvo, and marketed them in the UK. In defense, Veng claimed that the assertion of right constituted an abuse of dominant position contrary to Article 86 EEC Treaty.¹⁵⁶

The questions raised were¹⁵⁷,

1. If a substantial car manufacturer holds a registered design which confers on it the sole and exclusive right to make and import replacement body panels required to effect repair of the body of the

¹⁵³ Craig & de Burca, p. 1012

¹⁵⁴ now Art. 82 ECT

¹⁵⁵ Volvo v. Veng, paragraph 1

¹⁵⁶ Cornish, William, Cases and materials on Intellectual Property, 5th edition, Thomson, Sweet & Maxwell.

¹⁵⁷ Volvo v. Veng, paragraph 4

car of its manufacture, is such a manufacture in a dominant position within the meaning of Article 86 of the EEC Treaty with respect to such replacement parts?¹⁵⁸

2. Is it prima facie an abuse of such dominant position for such a manufacturer to refuse to license others to supply such body panels, even where they are willing to pay a reasonable royalty for all articles sold under the license?¹⁵⁹
3. Is such abuse likely to effect trade between Member States within the meaning of Article 86 by reason of the fact that the intending licensee is thereby prevented from importing the body panels from a second Member State?¹⁶⁰

5.2.2 Decision

The Court started by pointing out that there is no Community standardization or harmonisation in the area of IPR's, the determination of conditions and procedure under which protection of designs and models are granted is a matter under national rules. It is thus for the national legislator to determine which products are to benefit from protection, even when they form a part of a unit which is already protected as such.¹⁶¹

The right for a proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. Thus the Court found that to force a proprietor to license, even in return for a reasonable royalty, would deprive him of the substance of his exclusive right, and that a refusal to grant such a license cannot in itself constitute an abuse of dominant position.¹⁶²

The Court continued by pointing out that in certain circumstances the exercise of a registered design in respect of car body panels may be prohibited by Article 82 if it involves certain abusive conducts such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices of spare parts at an unfair level or a decision no longer to produce spare parts for a particular model although many cars of that model are still in circulation.¹⁶³ To be able to refer to Article 86, trade between Member States must be affected.¹⁶⁴

No such conduct had been mentioned by the national court thus a refusal to license could not itself constitute an abuse of dominant position. No answer

¹⁵⁸ Volvo v. Veng, paragraph 4 (1)

¹⁵⁹ Volvo v. Veng, paragraph 4 (2)

¹⁶⁰ Volvo v. Veng, paragraph 4 (3)

¹⁶¹ Volvo v. Veng, paragraph 7

¹⁶² Volvo v. Veng, paragraph 8

¹⁶³ Volvo v. Veng, paragraph 9

¹⁶⁴ Volvo v. Veng, paragraph 9

was given on the first and third question, the ECJ found it unnecessary considering the answer given on the second question.¹⁶⁵

Notable is that the defendant claimed before the national Court that the higher price for the panels charged by the plaintiff constituted an abuse of dominant position. This contention was abandoned in the request for a preliminary ruling. The Court had settled the issue in *CICRA v Renault*¹⁶⁶, where it was found that “the fact that the price of the component sold by the car manufacturer was higher than those sold by independent producers did not constitute an abuse”.¹⁶⁷

5.2.3 Analysis

The Court has all through its judgment kept the language very precise, which might be interpreted as wanting to keep the application of the case as narrow as possible and not be opened for wide analogies.

At the same time the Court took a step forward, building on its earlier judgments¹⁶⁸, declared that a refusal to grant an intellectual property right license cannot in itself constitute an abuse of a dominant position. The case does not however give any guidance to determine the limit between permitted and prohibited exercise of IPR.¹⁶⁹

Looking at the examples given by the Court on what might be abusive behavior they seem to imply limits to the scope of exclusive exploitation in secondary markets such as maintenance markets. Unfortunately the examples were not interpreted, at the time of the decision, as qualifications of the rights of normal exercises of the IPR effectively curbing their specific subject-matter or substance.¹⁷⁰ In *Magill*¹⁷¹ however, the Court made it clear that the exceptions mentioned in *Volvo* were to be given considerable weight.¹⁷² *Volvo* was a very important judgment, despite its shortness. The Court for the first time opened up for applying Article 86 on compulsory licensing, although strictly limited. To summarize the judgment, *Volvo v. Veng* established the principle that a mere refusal to license an IPR to a third party was not to be seen as an abuse of dominant position, *Magill* soon demonstrated that this principle was by no means absolute.

¹⁶⁵ *Volvo v. Veng*, paragraph 10

¹⁶⁶ *CICRA v Renault* (1988)

¹⁶⁷ *Cornish* (2) p. 45

¹⁶⁸ E.g. *Parke, Davis and Co v. Probel, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co.*

¹⁶⁹ *Andermann*, p. 12

¹⁷⁰ *Frieden*, p. 210

¹⁷¹ *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* (1995)

¹⁷² *Andermann*, p. 15

5.3 Magill

The Magill¹⁷³ case concerns copyright in the compilation of weekly radio and television schedules. Though the circumstances in this case were very special, indicating a narrow field of application, the Magill judgment has become the leading¹⁷⁴ case in the area of compulsory licensing.

5.3.1 Background

RTE¹⁷⁵ was a statutory authority providing broadcasting services. Almost all households in Ireland and 30% to 40% of the households in North Ireland could receive television programmes broadcasted by RTE, ITV and BBC. At the time, each television station published a guide covering exclusively its own programmes and claimed, under Irish and UK legislation, copyright protection for its own weekly programme listings in order to prevent their reproduction by third parties.¹⁷⁶ Ireland and UK are the only Member States where such listings can be protected by copyright. Magill TV Guide Ltd. attempted to publish a comprehensive weekly television guide covering all channels. The appellants and the BBC, which obtained injunctions prohibiting publications of weekly television listings, prevented them from doing so. Thus, consumer had to buy three separate TV Guides to obtain comprehensive information on the programmes aired. The stations provided their programmes listings free of charge, on request, to daily and periodical newspapers. Complete daily listings could therefore be published in the press, subject to certain conditions relating to the format of publication.¹⁷⁷

Magill turned to the EC Commission, alleging that the TV stations were abusing their dominant position when refusing to license their copyright protected material.¹⁷⁸ The Commission found the stations were abusing their dominance on the relevant market, thereby falling within the framework of Art. 82 ECT. On appeal, the CFI came to the same conclusion, but the exercise of the exclusive right to reproduce was not an abuse in itself. Although *“In the event, the copyright is no longer exercised in a manner which correspond to its essential function... which is to protect the moral rights of the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86”*.¹⁷⁹

¹⁷³ Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (1995)

¹⁷⁴ Borrowing a Common Law expression

¹⁷⁵ Supported in the Case by ITV and BBC

¹⁷⁶ RTE v. Commission, paragraph 7

¹⁷⁷ RTE v. Commission, paragraph 9

¹⁷⁸ RTE v. Commission, paragraph 11

¹⁷⁹ Case T-76/89 Independent Television Publications Ltd. V. Commission, paragraph 56

5.3.2 Decision

The Television Stations appealed to the European Court of Justice. For the Channels it was argued;

1. There were available substitutes for the intended product.¹⁸⁰
2. The mere exercise of an intellectual property right, in particular refusal to grant a license cannot in itself be regarded as an abuse of dominant position.¹⁸¹
3. Copyright is by its nature beneficial to competition, thus it is restricted to the protection of expression and not the idea.
4. The conduct of RTE and the other Channels did not in any case had appreciable effect on trade between Member States, principally a finding based of the very small sales of RTE's current magazine in Northern Ireland.¹⁸²

The Advocate General emphasized the importance that compulsory licensing is handled with care by the European Institutions.¹⁸³ A balance must be struck between the "essential function" of IPR and the interests of free competition. This does not mean the balance cannot be struck in the favour of IPR's.¹⁸⁴ He recommended the ECJ to annul the decisions of the Commission and the CFI on the ground that the product Magill wanted to create could not be considered new.¹⁸⁵ The AG was of the opinion that the existing separate guides sufficed to meet consumer needs and therefore the protection of copyright must be held higher than a need for an enhanced product.¹⁸⁶

The ECJ started by determining whether the appellants had a dominant position on the market. Mere ownership of an Intellectual Property Right cannot confer a dominant position. However, the basic information of programmes is the necessary result of the programming by television stations, which are thus the only source of information for an undertaking like Magill.¹⁸⁷ The appellant was found to be in a position to prevent effective competition on the market in weekly television magazines and thus holding a dominant position.¹⁸⁸

Next, the Court examined if RTE and the other appellants' exercise of their IPR has constituted an abuse. The ECJ dismissed the RTE first argument, that Art. 82 ECT cannot be applied on IPR's, as simply wrong.¹⁸⁹ A refusal to license by the proprietor of an IPR cannot in itself constitute an abuse. The exclusive right of reproduction forms a part of the author's rights.¹⁹⁰

¹⁸⁰ RTE v. Commission, paragraph 53

¹⁸¹ Relying on *Volvo v. Veng*

¹⁸² Cornish (2), p. 680

¹⁸³ Opinion of the Advocate General, RTE v. Commission, paragraph 12-14

¹⁸⁴ Goyder, p. 357

¹⁸⁵ RTE v. Commission, paragraph 98

¹⁸⁶ RTE v. Commission, paragraph 97

¹⁸⁷ RTE v. Commission, paragraph 46-47

¹⁸⁸ RTE v. Commission, paragraph 47

¹⁸⁹ RTE v. Commission paragraph 48

¹⁹⁰ ECJ referred to the *Volvo v. Veng* Case

However, the ECJ found that the exercise of an exclusive right by the proprietor might in exceptional circumstances involve abusive conduct.¹⁹¹ Such exceptional circumstances were found on the basis of;

1. The refusal to license prevented the appearance of a new product, which the appellant did not offer, and for which there was a potential consumer demand.¹⁹²
2. There was no justification for refusal either in the activity of television broadcasting or in that of publishing television magazines.¹⁹³
3. The appellants, by refusing to grant Magill a license, reserved themselves the secondary market for weekly television guides by excluding all competition on that market since they denied access to the basic information, which is the raw material indispensable for the compilation of such a guide.¹⁹⁴

Concerning the requirement that trade between Member States must be affected, the Court repeated established case law¹⁹⁵ that it is sufficient to establish that the conduct is capable of having such an effect. The applicant had through their behaviour modified the structure of competition on the market, thereby affecting potential commercial exchanges between Ireland and the United Kingdom.¹⁹⁶

The Court also pointed out that the principle of supremacy of Community law, particular concerning such fundamental principles as free movement of goods and competition, normally prevailed over any rule of national intellectual property law contrary to those principles.¹⁹⁷

5.3.3 Analysis

The circumstances surrounding Magill is somewhat different from those in *Volvo v. Veng*. Magill concerned a “weak” copyright; the information protected was created naturally from the programming of the stations and required neither extra effort nor investment. It was not possible to get copyright protection of such listing in the other Member States, except for UK. The *Volvo* judgement concerned registered design, which required considerable investment and creativity. Considering one of the main purposes of intellectual property is to ensure return on investments in research and development the different outcomes can be considered fair.

Magill wanted to introduce a new product on the market for which there was an identified demand by the consumers; Veng was making exact copies of

¹⁹¹ RTE v. Commission, paragraph 50

¹⁹² RTE v. Commission, paragraph 54

¹⁹³ Ibid, paragraph 55

¹⁹⁴ RTE v. Commission, paragraph 56; The Court referred to the judgment *Commercial Solvents v. Commission*.

¹⁹⁵ *Michelin v. Commission, Höfner and Elser v. Macrotron* (1991)

¹⁹⁶ RTE v. Commission, paragraph 70.

¹⁹⁷ Goyder, p. 356

the protected design. The ECJ emphasized that if an IPR owner prevents emerge of a new product it may constitute such circumstance that obliges the owner to licence. The concept of “newness” was not discussed in *Volvo v. Veng*.

In the judgment, the Court stressed that the material sought was essential “information” rather than intellectual property.¹⁹⁸ This statement diminished the value of the *Magill* Case, the applicability of the case is therefore not easily assessed. To some extent this also calmed down those who feared licence would be forced as soon as a new party entering the market could show that its product was different from the one offered by the IP-owner.¹⁹⁹ *Magill* established that exercising an IPR could in *certain exceptional circumstances* infringe Art. 82. The Court gave examples of such exceptional circumstances but gave no indication whether the list was cumulative or not, nor whether the list was exhaustive.²⁰⁰

5.4 Ladbroke²⁰¹

As *Magill*, *Ladbroke* concerned refusal to supply, but in this case the contested material was broadcastings of French horse races.

5.4.1 Background

Tiercé Ladbroke was a Belgian bookmaking company. In order to get the interest for betting on French horse racing up, they wanted the right to broadcast the French races in Belgium. The French right holders PMU²⁰² and PMI²⁰³ refused to license the broadcasts to Ladbroke. Ladbroke then answered by filing a complaint to the Commission claiming PMU and PMI was infringing Art. 82 by abusing their dominant position on market for French horse race broadcasts.²⁰⁴

The Commission determined the relevant product market to be retransmission of sound and pictures for horses in general. The geographical market was confined to Belgium.²⁰⁵ According to the Commission, Ladbroke already occupied a dominant position in the market on which the French sound and pictures are offered to consumers, namely the horse-betting market, whereas PMU and PMU were not even present on the market. Moreover, the broadcasts did not constitute a service that genuinely

¹⁹⁸ Goyder, p. 357

¹⁹⁹ Keeling, p. 385

²⁰⁰ Jones & Sufrin, p.499

²⁰¹ Judgment of the Court of First Instance of 12 June 1997, *Tiercé Ladbroke SA v. Commission of the European Communities*.

²⁰² *Pari Mutual Francais*

²⁰³ *Pari Mutual International Ltd.*

²⁰⁴ *Tiercé Ladbroke v. Commission*, paragraph 12-13

²⁰⁵ *Tiercé Ladbroke v. Commission*, paragraph 21

differed from what was already provided to the bettors, namely the taking of bets.²⁰⁶ Ladbroke appealed to the CFI, claiming the Commission had misinterpreted the relevant market which led to a misapplication of Art. 81 and 82. The Commission's decision should therefore be annulled according to Ladbroke's opinion.²⁰⁷

5.4.2 Decision

The CFI started by confirming the Commission's definition of both the relevant product and geographical market.²⁰⁸ The Court skipped examining whether PMU and PMI had a dominant position, finding such dominant position would not be the basis for an annulment if abuse could not be found. They therefore looked at the abuse first.²⁰⁹ No licenses to broadcast the French horse races had before been granted on the Belgian market. The mere fact that, according to the applicant, PMU and PMI had offered to supply French sound and pictures to Belgian outlets does not suffice to, for the purpose of Art. 82, for them to be treated as having already exploited their intellectual property in a discriminatory manner in Belgium.²¹⁰ Ladbroke argued that without access to the broadcasts they would not be able to compete on the horse racing betting market.²¹¹ The argument was rejected by the Court. They found Ladbroke was already a big actor in the market and the refusal to license could therefore not be found to be hindering Ladbroke from entering the market.²¹² The relevant market was betting, not broadcasts. The Court found no basis for the allegation that the defendant was trying to partition the common market through their licensing policy.²¹³

5.4.3 Analysis

The Ladbroke case clarified in which cases the principle set out in Magill can be applied. As the Court clearly states "*The refusal to supply to the applicant could not fall within the prohibition laid down in Article 82 unless it concerns a product or service which was 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 the part of consumers.*"²¹⁴. The CFI thus made it clear that an action for refusal to supply would only be plausible if the product or service being sought was essential for the exercise

²⁰⁶ Tiercé Ladbroke v. Commission, paragraph 22

²⁰⁷ Tiercé Ladbroke v. Commission, paragraph 12-13

²⁰⁸ Tiercé Ladbroke v. Commission, paragraph 58-108

²⁰⁹ Tiercé Ladbroke v. Commission, paragraph 109-111

²¹⁰ Tiercé Ladbroke v. Commission, paragraph 124

²¹¹ Tiercé Ladbroke v. Commission, paragraph

²¹² Tiercé Ladbroke v. Commission, paragraph 130

²¹³ Tiercé Ladbroke v. Commission, paragraph 125

²¹⁴ Tiercé Ladbroke v. Commission, paragraph 13

of the relevant activity.²¹⁵ To have access to broadcast of the races on which Ladbroke business was to run betting, was not found to be essential for that business.²¹⁶ Those concerned after the Magill case was comforted by the outcome of Ladbroke.

The Courts systematic exposition of the requirements set out in Magill indicated that they are supposed to be applied cumulative. If an abuse were found, the Court would have been forced to examine whether PMU and PMI held a dominant position as well.

5.5 Oscar Bronner

The next case to deal with the interpretation and application of the Magill judgment was Oscar Bronner case²¹⁷, only this case dealt with refusal to supply. The Court found that the access to the distribution system of a competitor holding a dominant position was not essential for the relevant activity of selling newspapers.

5.5.1 Background

Mediaprint was an Austrian newspaper group which had a nationwide home-delivery scheme provided for their costumers. The scheme consisted of delivering newspapers directly to subscribers in the early morning.²¹⁸

Oscar Bronner owned a competing newspaper, Der Standard, and wanted Mediaprint to include it in their scheme. Mediaprint refused. Bronner replied by bringing an action before the National Court. Bronner sought an order requiring Mediaprint to cease abusing its alleged dominant position on the market by including Der Standard in its scheme for against payment of reasonable remuneration.²¹⁹ Bronner argued that the postal-service is not an option, considering the later time of delivery. Considering the small number of subscribers of Der Standard, it would not be profitable to organize its own home-delivery service.²²⁰ After the National Court decided found that the case concerned trade between Member States they decided to stop the proceedings and refer the issue, whether Mediaprint was abusing its dominant position by refusing to grant license, to the ECJ.²²¹

²¹⁵ Craig & de Burca, p. 1016

²¹⁶ Craig & de Burca, In the Case Night Services Ltd. (ENS) v. Commission (1998), the CFI elaborated on which products could be considered necessary and essential.

²¹⁷ Case 7/97 Oscar Bronner GmbH & CO KG v. Mediaprint Zeitungs- und Zeitschriftverlag GmbH & Co. KG, 7/97, ECR I-7791

²¹⁸ Oscar Bronner v. Mediaprint, paragraph 4-7

²¹⁹ Oscar Bronner v. Mediaprint, paragraph 8

²²⁰ Oscar Bronner v. Mediaprint, paragraph 8

²²¹ Oscar Bronner v. Mediaprint, paragraph 11

5.5.2 Decision

The Advocate-General in the Bronner case was the renowned Jacobs. In his opinion he stated three points relating to compulsory licensing and the ratio behind it.

1. Incursions in the right to freely choose trading partners and to dispose one's property require careful justifications.²²²
2. To use competition policy to interfere with an undertakings freedom to contract require careful balancing of conflicting interests. Thus the mere fact that a dominant undertaking retains an advantage over the competitors by retaining a facility for its own use cannot justify requiring access to it.²²³
3. In assessing the situation it important not to loose sight of the fact that the primary function of Art. 82 are to prevent distortion of competition, and in particular to safeguard the interests of the consumers. Thus not to protect the interest of particular competitors.²²⁴

AG Jacobs came to the conclusion that the essential facility doctrine²²⁵ was justified only where there was a genuine stranglehold on the related market'.²²⁶ He found there to be such a stranglehold in this case, basing his opinion on the costs of duplicating the scheme especially considering the original scheme had been made under non-competitive conditions.²²⁷

The ECJ was not as elaborate as the AG in its judgment. As usual the Court started by declaring that a mere refusal to license cannot in itself be considerate abusive.²²⁸ However, the exercise of an exclusive right might be found abusive under exceptional circumstances. The same three step test was used as in the Magill case and later in the IMS Health case²²⁹, though in reversed order. The ECJ stated that, whether or not IPR's are involved, it is not enough for the newcomer to show that access is desirable; it must establish that it is necessary.²³⁰

To find Mediaprint's behavior to be abusive, access to the home-delivery scheme had to be indispensable for doing business in the daily newspaper market. The ECJ did not state when access was required in general, it sufficed to indicate there was other ways of distributing newspapers.²³¹ Examples given were distribution by post or trough sale in shops and kiosks,

²²² Opinion of Mr Advocate General Jacobs, Oscar Bronner v. Mediaprint, paragraph 56

²²³ Opinion of Mr Advocate General Jacobs, Oscar Bronner v. Mediaprint, paragraph 57

²²⁴ Oscar Bronner v. Mediaprint, paragraph 58

²²⁵ The "essential facility doctrine" corresponds to the question whether the refusal excludes any competition on the secondary market. The doctrine is not to be confused with the American doctrine of essential facilities.

²²⁶ Korah, p. 141

²²⁷ Opinion of Mr. Advocate-General Jacobs, Oscar Bronner v. Mediaprint paragraph 65

²²⁸ Oscar Bronner v. Mediaprint, paragraph 34

²²⁹ See next sub chapter, 5.4

²³⁰ Oscar Bronner v. Mediaprint, paragraph 41, 45

²³¹ Oscar Bronner v. Mediaprint, paragraph 43

even though they may be less advantageous they are fully functional.²³² The ECJ not found any technical, legal or even economical obstacles capable of making it impossible or even unreasonable difficult to establish a new nationwide home-delivery scheme.²³³ The criteria are cumulative, therefore the ECJ did not need to assess whether the product was to be considered a new product.

5.5.3 Analysis

In *Bronner*, the ECJ indicated for the first time that they also considered policy issues of compulsory licensing when giving judgments. The Court emphasized that each case before the court required a careful examination of the legal and economical effects as well as balancing the act of individual and public interests.²³⁴ The ECJ also clarified that all the criteria mentioned in *Magill* were to be present if compulsory license were to be ordered. Thus, the criteria were cumulative. In addition, the case is interesting because the Court discussed the concept of essential facility thoroughly.²³⁵ If a facility is essential or not depends on whether a competitor could develop, obtain or get access to an alternative facility. The test is objective and therefore not based on the particular undertaking requesting access.²³⁶ Therefore, the fact that the competitor seeks access is small, inefficient, especially vulnerable or well-financed should not alter the legal assessment. A difficulty arises in cases where the area used to be state regulated. The product or service might be developed with help from public funding. AG Jacobs was of the opinion that such circumstances should be in favor of compulsory license. The ECJ did not discuss the matter in their judgment. Interesting to note is that the ECJ went back to the old test, requiring only that the dominant undertakings behavior excluded a particular firm, and not every competitor, to be found abusive.²³⁷

The ECJ again took a restrictive view on compulsory licensing. As explained by the AG the right for an undertaking to choose who to deal with is a fundamental right in all democratic countries. Any intrusion on that right must be made only when it is absolutely necessary and considered “fair”. To force access, the refusal to license must be likely to eliminate all competition from the relevant market.²³⁸

²³² Oscar Bronner v. Mediaprint, paragraph 43

²³³ Oscar Bronner v. Mediaprint, paragraph 44

²³⁴ Ritter & Braun, p. 266

²³⁵ Oscar Bronner v. Mediaprint, paragraph 44-46

²³⁶ Oscar Bronner v. Mediaprint, paragraph 44-46

²³⁷ Korah, p 145

²³⁸ Oscar Bronner v. Mediaprint, paragraph 41

5.6 IMS Health

The IMS Health²³⁹ case dealt with whether a refusal to license was considered an abuse of dominant position. In the case the CFI, and later also the ECJ, emphasized that a refusal to license would only constitute an abuse if there are exceptional circumstances in public interest which require that a license be granted.²⁴⁰

5.6.1 Background

IMS Health collected data on pharmaceutical sales in Germany. To facilitate the work, IMS Health had developed a system called the 1860 brick system which divided the country into 1860 geographical areas. The system was protected by copyright. The IMS brick system soon became well-established as an industry standard. When the break-away competitor NDC tried to use a 2201 brick system it made no headway because the customers were not prepared to depart from the 1860 system.²⁴¹ NDC asked IMS Health to grant them a license to use the 1860 system. IMS refused to license NDC and instead sued them before national Court for infringing their copyright.²⁴²

The German Court asked for a preliminary ruling from the ECJ on three questions;

1. Had IMS Health infringed Art. 82 by refusing to license NDC?
2. Is it of any importance to the assessment that the customers have assisted in creating the protected system?
3. Are the costs the customers changing service supplier inevitable would encounter of any importance in the assessment.²⁴³

The same issue was simultaneously examined by the Commission²⁴⁴ on complaint by NDC Health. The Commission adopted an interim decision, ordering IMS to allow access to the 1860 system to competitors. The CFI suspended the interim decision on appeal, a decision later confirmed by the ECJ.²⁴⁵ By that time parallel proceeding on the preliminary ruling had already been initiated.²⁴⁶

5.6.2 Decision

Once again the ECJ confirmed what is now an established principle that a mere refusal to license by a dominant party cannot in itself be considered

²³⁹ Case C-418/01 IMS Health GmbH v. NDC Health GmbH (2004) CMRL 28

²⁴⁰ Steiner, Woods, p. 491

²⁴¹ Cornish, p. 680

²⁴² IMS Health v. NDC, paragraph 3-8

²⁴³ IMS Health v. NDC Health, paragraph 17

²⁴⁴ Commission Decision of 3 July 2001, 2002/165/EC

²⁴⁵ Case T-184/01 R, IMS Health v. Commission (2001)

²⁴⁶ IMS Health v. NDC Health, paragraph 18-22

abusive, if not exceptional circumstances is at hand.²⁴⁷ The Court followed its judgment in *Magill*²⁴⁸ closely without reference to any policy considerations.²⁴⁹ In earlier case law it was hinted that the conditions set out in *Magill* was cumulative and exhaustive, this was once again confirmed in the case at hand.²⁵⁰ The conditions were;

1. The refusal prevents the emerge of a new product for which there is a potential consumer demand.
2. The refusal is unjustified.
3. The refusal excludes any competition on the secondary market.²⁵¹

The Court stressed that the National Courts need to examine each of these conditions in order to determine whether there are abusive behavior by the dominant undertaking. This confirmed the narrow view on the applicability of Art. 82 which were displayed in paragraph 54 of the *Magill* judgment.²⁵²

Regarding the issue whether there had to be two existing markets in order to fulfill the first requirement; the Court found that it is enough to identify a potential or hypothetical market.²⁵³ However, there has to be two different stages of production which are interconnected. In addition the upstream product must be indispensable for the supply of the downstream product.²⁵⁴ To meet the condition it is essential that the intended product is new and not in direct competition with the product of the licensing undertaking.²⁵⁵ *Korah*²⁵⁶ questioned whether it necessarily has to be a new product; is it not enough with a modified one? “New” is in itself a vague notion which leads to complicated assessments for national Courts, authorities and undertakings which deal with the issue. Presumably, the ECJ will have to work out how different and superior to the product demanded is from that already supplied from the dominant undertaking.²⁵⁷

The Court left it to the national courts to decide which refusals are unjustified according to the second criteria on a case-by-case basis. Thus, no specific observations were made by the Court.²⁵⁸

Last but not least, the Court repeated that for the refusal to amount to abuse, access must be essential. Thus, a refusal from a dominant undertaking would eliminate all competition on the secondary market. Before the *IMS Health*, many cases referred to eliminating all competition on the part of the party requesting the service or license.²⁵⁹ In *Magill* the Court took the first

²⁴⁷ *IMS Health v. NDC Health*, paragraph 34-35

²⁴⁸ see 5.3

²⁴⁹ *Korah*, p. 144

²⁵⁰ Confirmed in *Oscar Bronner v. Mediaprint*

²⁵¹ *IMS Health v. NDC Health*, paragraph 38

²⁵² *Korah*, p. 145

²⁵³ *IMS Health v. NDC Health*, paragraph 44

²⁵⁴ *IMS Health v. NDC Health*, paragraph 44-45

²⁵⁵ *IMS Health v. NDC Health*, paragraph 48-49

²⁵⁶ *Korah* (1)

²⁵⁷ *Korah* (1), p. 145

²⁵⁸ *IMS Health v. NDC Health*, paragraph 51

²⁵⁹ *Korah*, p. 146. This is true in the earlier cases on refusal to supply as *Volvo* and *Centre Belge D'Etudes du Maché-Télémarketing SA v. Compagnie Luxembourgeoise de Télédiffusion*, but also in *Oscar Bronner*.

step to modifying this standpoint, when referring to a dominant company reserving the market to itself or its subsidiaries. Many hoped that the IMS Health judgment would clarify the situation but the Court left the question hanging. Korah fears that a development towards the Magill reasoning will create a loophole by licensing only competitors which are not likely to act very aggressive.²⁶⁰

Regarding the second question asked by the German Court; whether it is of any importance that potential customers have assisted in developing the protected service or product; The Court found that such assistance should be taken into consideration when assessing whether it is possible to penetrate the market without the product or service of the dominant position. No further was said about to what extent such circumstances should be taken into consideration.²⁶¹

5.6.3 Analysis

As before mentioned the IMS Health judgment closely follow previous case law. Thus, the case failed to resolve some of the questions which it was anticipated to answer. No guidance was given how the notion “new” should be interpreted. It is clearly, as discussed above, unclear which products should be considered a mere modifications or duplications of an existing product and which are truly new products. The distinction is in many cases not easy to draw.

To obtain a compulsory license, there does not need to been an actual offer off a new product. According to the Court the undertaking only need to have intent to offer such products.²⁶² It would be unreasonable to demand an actual ready product; such would naturally not be possible without the license sought. On the other hand the notion “intend” creates some difficulties. How serious must such intent be and how should it be shown. How strong must the costumers’ demand be; must it be proved in any way or is it up to the Court alone to make such assessments. There are a large amount of notions and assessments that are not discussed and clarified in case law so far.

Because of the lack of clarity, both in IMS Health and in earlier case law, it is likely that we will see several future cases clarifying these issues. The IMS Health case can be interpreted as giving large room for maneuvers regarding compulsory licensing. To hinder unwanted exploitation of protected products and services the ECJ need to define the notions used, especially “new”. This is especially true regarding software and digital products where small modifications can easily change the appearance of a product but still have the same content.

²⁶⁰ Korah, p. 146

²⁶¹ IMS Health v. NDC Health, paragraph 28-30

²⁶² IMS Health v. NDC Health, paragraph 49

5.7 Microsoft case

The Microsoft case²⁶³ is the most recent case dealing with compulsory licensing. The case regards access to software and computer programs, which according to European law are protected by copyright.²⁶⁴ Copyright is an Intellectual Property Right primarily aimed at protecting the creator's moral rights.²⁶⁵ Furthermore, it is not the idea, but the expression of the idea that are protected.²⁶⁶

The Commission's decision, which is discussed under this section, is currently appealed to the CFI and their judgment is expected shortly. A later appeal to the ECJ is likely considering the large amounts and the principle value of the case. The outcome of the appeal is highly anticipated, the decision of the Commission, as will be shown, to some extent went against the previous case law on compulsory licensing.

5.7.1 Background

In 2000, Sun Microsystems filed a complaint to the European Commission against Microsoft. Sun, one of Microsoft's main competitors in the market of work group servers, accused Microsoft for abusing its monopoly in operator systems to obtain advantages in the market for work group servers. Sun claimed that Microsoft provided them with non-sufficient interface code information, information needed to make Sun's servers interoperate with Microsoft's Windows, its Office suit and work group server operating systems.²⁶⁷ According to Sun, Microsoft's refusal to disclose the requested integration feature prevented Sun from offering non-Microsoft services to users of Windows Operating System.²⁶⁸

The issue is quite technical and the Commission spent some time defining the notions. Operating systems are system software products that control the basic functioning of a computer and enable the user to make use of a computer and run application software on it.²⁶⁹ The present case focuses on "work group services", which are basic structure services that are used by office workers in their day-to-day work, namely sharing files stored on servers, sharing printers, and the "administration" of how users and groups of users can access these services and other services of the network.²⁷⁰ When Microsoft first entered the server market, it supplied full interface information. Its software was at that time inferior to its competitions. As

²⁶³ Commission Decision, COMP/C-3/37.792 of 24 March 2004, Microsoft Corp

²⁶⁴ Council Directive 91/250/EEC of 14 May 1991

²⁶⁵ Andreasson, p. 441

²⁶⁶ Ahlstedt, H, p. 87

²⁶⁷ Case COMP/c-3/37.792 Microsoft, paragraph 3

²⁶⁸ Microsoft case, paragraph 3

²⁶⁹ Microsoft case, paragraph 37

²⁷⁰ Microsoft case, paragraph 57

their market share increased the information given decreased leading to difficulties for the competitors trying to compete with Microsoft.²⁷¹

The Commission considered two issues:

1. Whether the refusal to supply interoperability information to the competitors constituted abuse in accordance with Art. 82.²⁷²
2. Whether Microsoft was abusing its dominant position by tying Windows Media Player to the Windows operating system.²⁷³

The Commission decided Microsoft abused its dominance when tying Windows Media Player to the Windows operating system. Microsoft was thereby excluding competitors on the Media Player market²⁷⁴. The Commission forced Microsoft to, besides paying a fee, provide a version of the Windows operating system without Windows Media Player.²⁷⁵ The part of the decision relating to tying will not be further discussed, due to the focus of this thesis is on compulsory licensing.

5.7.2 Decision

The Commission started by determining whether Microsoft had a dominant position. In the light of Microsoft's very high market shares and the high barriers to entry in the market, the Commission found that Microsoft has a dominant position, within the meaning of Article 82, on the market for operating systems for client PCs. Microsoft has since 1996 had over 90 % of the market.²⁷⁶ Microsoft was also found to be dominant in the market for servers, a dominance that probably was a consequence of the dominance in the operating system market.²⁷⁷ The Commission did not only look at market shares when concluding that Microsoft was a dominant undertaking. Also, barriers to entry due to network effects²⁷⁸, the applications barrier to entry and switching costs and other factors were taken into consideration.²⁷⁹ Microsoft begun by arguing that the competition in the market for information technology is special. The technology is developing in such tempo that the first who markets a product or service is often the one who will dominate the market. I.e., competition is for the market rather than in

²⁷¹ Microsoft case, paragraph 587-588, Korah, p 156

²⁷² Microsoft case, Article 2 (a)); The Commissions definition of interoperability information is as follows: *"The complete and accurate specifications for all protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Servers to deliver file and print services and group and user administration services..."*

²⁷³ Microsoft case, Article 1 (1)

²⁷⁴ Especially considering that form of distribution was possible exclusively through Microsoft and its Windows operating system.

²⁷⁵ Microsoft case, paragraph 6

²⁷⁶ Microsoft case, paragraph 471-472

²⁷⁷ Microsoft case, paragraph 541

²⁷⁸ A market with strong network effects is one where customers want the product more intensely the greater the number of other customers there are. The usual example given is that your phone is more useful the greater the number of other people have one too.; Korah p. 152

²⁷⁹ Korah, p. 154

the market.²⁸⁰ Korah to some extent agreed with Microsoft reasoning, unfortunately for Microsoft the Commission did not. Microsoft later acknowledged their dominant position.

The Commission found the refusal to license Sun was part of a broader conduct of not supplying vendors of work group server's information necessary to achieve interoperability.²⁸¹ It also stated that the examples of special circumstances given in the Magill judgment were not exhaustive.²⁸² The following is based on the three criteria²⁸³ set out in previous case-law when examining whether there are special circumstances that justify compulsory licenses. To note is that the Commission did not approach the problem in this manner.

The Commission neglected to discuss whether the refusal by Microsoft to supply information hindered the appearance of a new product or service that was new and for which there was an unmet demand from consumers. The Commission did in a small passage discuss whether the refusal "limited technical development to the prejudice of consumers".²⁸⁴ This notion seems far vaguer than the criteria of a new product set out in earlier case law. Thus, this must be seen as a deviation from earlier case law. The term used is vague and indistinct and it will be very difficult, if this is to be seen as a modification of "new", for undertakings to foresee the application of this approach in upcoming cases. Both the Magill and the IMS Health case clearly state that a refusal to license must hinder a new product to emerge to be considered abusive. Nowhere in the Microsoft case is a new product identified neither an unmet consumer demand. On the contrary, the decision seems to indicate that competing producers need the interface information to compete directly with Microsoft.²⁸⁵

Microsoft had two main arguments when claiming that their refusal to supply information was justified;

1. If they were forced to disclose such information, the incentive for innovating and improving existing products would diminish.²⁸⁶
2. If Microsoft was forced to license; "it would make it relatively easy for competitors to clone new features in the Windows family of operating systems".²⁸⁷
3. Large sums had been invested in research and development; amounts that Microsoft intended to get in return for the sales.²⁸⁸

²⁸⁰ Microsoft case, paragraph 465-468

²⁸¹ Microsoft case, paragraph 573-577

²⁸² Microsoft case, paragraph 555

²⁸³ Does the refusal prevent the emergence of a new product for which there is a potential consumer demand? Is the refusal justified? Does the refusal exclude competition on the secondary market, thus reserving it for the undertaking holding the IPR?

²⁸⁴ Microsoft case, paragraph 692

²⁸⁵ Microsoft case, paragraph 1003

²⁸⁶ Microsoft case, paragraph 709

²⁸⁷ Microsoft case, paragraph 713

²⁸⁸ Microsoft case, paragraph 709 and 783

The Commission did not find any of the arguments convincing, thus finding no justification for Microsoft's refusal to license. Instead it introduced a new test to balance the contradictory interests. If the negative impact on Microsoft's incentive to innovate is outweighed by the positive impact on the level of innovation on the market in general.²⁸⁹ The Commission stated that refusal to license stifled the competition on the affected market and diminished consumer's choices by locking them in a homogenous Microsoft solution.²⁹⁰ It is unclear what the Commission intended with this test. Is it to replace the criteria of unjustified refusal or the criteria of "newness"? Most probably the Commission aims to loosen up the "newness" criteria. This is though no point in replacing an already vague writing with another. With this way of reasoning a new product is not required for granting a compulsory license, it is enough that competitors in the same market are highly impaired to compete without access to the protected product.

The third criteria set up in earlier case law²⁹¹ is whether undertakings refusal to supply or license its protected product excludes all competition on a secondary market, thus reserving it for itself. In earlier case law, the refusal had an instant effect hindering competitors from entering the market. In Microsoft there was already competition in both operating systems and in work group services. There has even been an increase in competition on the market after the Commission's decision, especially with the introduction of the Linux system.²⁹² Still the Commission found these criteria to be fulfilled. This indicates that the Commission had a less stringent approach to compulsory licensing than the ECJ has taken in previous case law.

5.7.3 Analysis

The Commission's decision in the Microsoft case is highly controversial. It diverges in many ways from the previous case law. The Commission did not refer to any of the earlier cases on refusal to supply in its decision. Neither did it provide any economic reasoning what so ever for its findings that innovation would generally increase on the market if one undertaking were stripped of its exclusive Intellectual Property Rights.²⁹³ In addition, it is difficult to analyse the effects of the new test of balance. Hopefully the CFI and, if appealed further, the ECJ will clarify the situation. In the following, the writer of this essay will highlight some of the differences between settled case law and the Microsoft decision.

In some of the earlier cases relating to compulsory licensing, the IPR in question has been of a "weaker" nature. In *Magill*, the IPR at issue was sort of a copyright that could only be obtained in Ireland and UK. It required no

²⁸⁹ Microsoft case, paragraph 783

²⁹⁰ Microsoft Case, paragraph 782

²⁹¹ ultimately established in *IMS Health*

²⁹² For statistics see e.g. www.itfacts.biz

²⁹³ *Korah*, p, 166

investment on the part of the right holder because they emerged naturally from their core business. Microsoft's IPR's belonged to the core business, costing huge amounts in R&D. Still, software products are protected by copyright and not by the "stronger" patent. Microsoft is obligated by the decision to disclose a wide range of capabilities in Microsoft's Window products. Microsoft holds several patents on those capabilities.²⁹⁴

In the Microsoft Decision, the Commission did not limit the possibility for compulsory licensing to a secondary market. This means that Microsoft was forced to license competitors on the primary market. One might argue that the Commission considers the primary market for Microsoft to be operating systems, therefore considering "work group services" to be the secondary market. The Commission have in that case failed to consider that a company of Microsoft's size does not only have one core market. The Commission found that Microsoft was dominant on both the operating system and the "work group services", the second dominance did not necessarily flow from the first one. Thus, the "work group services" market could just as well be the primary market.

In both Magill case and IMS Health case, the protected information sought was essential to conduct business. In Magill, it was impossible to put together a TV-guide without the programme listings. In IMS Health case, the newcomer tried to penetrate the intended market without access to the distribution system developed by IMS Health; but it had developed to a market standard, which was used by all potential costumers, which was not willing to change. Such circumstances was not present in the Microsoft decision, there were already functional competitors on the market. This kind of competition was further strengthening after the Commission's decision especially considering the introduction of Linux.

The new balance test which was introduced is likely to lead to legal uncertainty, a principle that are of fundamental importance in all States based on rule of law.²⁹⁵ Overall, the Commission seem to have lowered its benchmark when finding that Microsoft was abusing its dominant position.

²⁹⁴ Lévêque, Francois,

²⁹⁵ For examples, Denmark v. Commission (1998), paragraph 38

6 Analysis

This chapter aims to draw conclusions and analyze the findings of the previous chapters. The author will try to answer the questions set out in the beginning of this thesis. As the thesis itself, this chapter is divided into three parts one relating to the first section of the thesis which dealt with the legal framework, one relating to the second section which dealt with case law relating to compulsory licensing. The last section sums up the thesis and discusses what the future might hold.

6.1 The legal framework

The legislative basis for determining the appropriate balance between Competition Law and Intellectual Property Rights are scarce. The basis is set out in the ECT, but only reading the provisions of the Treaty would probably falsely lead one to consider IPR's as a protected island, unreachable by Competition Law. Especially art. 295 indicate such an interpretation. If this interpretation were correct, we would see some problem arise.

Competition Law aims at ensuring the functioning of the internal market and optimizing it for the benefit of the European consumer. This is one of the fundamental areas in the Treaty and in the Union in general. Intellectual Property Rights have, in some aspects, the same goals as the Competition Rules. The consumer shall benefit from giving creators incentive to enhance and create new products and services for a limited period of time which will legally protect their exclusivity.²⁹⁶ If IPR's were left completely untouchable, they could be used to circumvent Competition Law for the detriment of consumers. On the other hand, if not properly respected innovation will stagnate, both economically and creatively. An artist might be able to live only on his skills, but advanced scientific research requires large investments of money and time. It is vital to be able to get return on such investments.

It is not clear if the legislator has even considered this balance, the Treaty does not indicate that the issue was up for discussion when writing it. Instead the ECJ have embraced the task of balancing the interests. They have done so by developing the doctrine of existence/exercise in a number of cases. In a State ruled by law it is of fundamental importance that undertakings know laws, rules and limits which they are to respect and follow. To be able to properly run a business, undertakings must be able to calculate the risks in businesses. Applied on Intellectual Property Rights the right holder must know under which circumstances his rights can be restricted. Thus, the writer believes that the undertakings first concern is to

²⁹⁶ the period of protection varies considerable depending on the IPR

have a clear set of rules, independently of whether it is created and interpreted by legislation or case law. Today, such a clear set of rules does not exist and it is not certain under which circumstances IPR's can be restricted. This is certainly detrimental to undertakings and must be solved. Preferably through legislation, but considering the complexity and nature of the problem it is possibly better to set out the limitations and balance the issue in case law where a more modulated approach can be reached. Legislation can never be sufficiently explicit, or flexible enough, and will therefore require further interpretation in case law. Thus, the ECJ could straight away clarify the situation in a dense future case. A solution with clearer limits would be a rather blunt tool to use, but in the authors opinion the benefits of the undertakings ability to plan their risks is worth it.

It is though certain today, as established in a number of cases, that Art. 82 ECT can be applied on Intellectual Property Rights. The Community Courts have, on several occasions, clarified that the list of abusive practices given in Art. 82 ECT is merely examples and should not be seen as exhaustive. Thus, the ECJ will not set any boundaries or limits as to what could be considered abusive use of IPR's. The Court keeps the Competition Law safety valve open for all sorts of behavior, instead restricting the application by high thresholds to find abusive behavior. If applied correctly this approach may prove to be flexible enough to catch the undertakings deliberately abusing its IPR's. If applied incorrectly, as the writer of this essay believe it was in the Microsoft case, undertakings could no longer safely exploit their IPR's, which would stifle the market.

The Community Institutions has used their new economic based approach to justify greater uncertainty than before. The economic approach as such is positive but could be used as a justification to clear the dense fog. What the author is searching for is not a new system of reporting ones behavior to the Commission but instead knowledge of the limits and restrictions of ones IPR's to such extent that absolute surety will not be needed. What is needed is the legal basis for an undertaking to calculate the risks of its actions and behavior. One can claim that the Court has not had the time develop the issue fully and the doctrine is "under construction". This is though not a strong argument. Although the case law has not been overly extensive it has not either been a lack of judgments over the years.²⁹⁷ The problem is rather that the ECJ has kept its case-by-case approach and only considered the practical circumstances of the present cases. Thus, it has kept away from discussing the underlying principles which would give a greater possibility to foresee their reasoning in a future case. Still, one underlying consideration can be seen, the ECJ always look to the welfare of the consumer when assessing a situation.

The Court has in the earlier case law been very careful when balancing the interests between competition and Intellectual Property Rights, looking at what would be "fair" in the specific situation. As example, it seems wrong

²⁹⁷ Only the most important has been covered in this thesis.

that Magill could be hindered from the market of comprehensive TV-Guides because of a copyright which cost nothing, neither in creativity nor in money. The Court has in these cases been restrictive when granting access to protected products and services. This careful approach seems to have been changed in the latest cases.²⁹⁸ The ECJ is tilting the balance, putting the Competition Law before Intellectual Property.

To speculate what might be the reason for the switch the writer of this thesis can identify two principle justifications, although not saying it is right, why Competition should be put above Intellectual Property:

1. In the short time frame, Competition Law benefits the public; a monopoly leads to higher price and lower quality, even if it is limited in time. Intellectual Property Rights are, on the other hand, benefits private persons or undertakings. It would thus seem to the ECJ to be better to put the public interest before the interest of private undertakings.²⁹⁹
2. Competition Law is today, in principle, fully harmonized in the European Union. Because of its status as one of the most important areas in Community legislation, it is generally thoroughly interpreted and developed in case law. Intellectual Property on the other hand is in the beginning of the harmonization process. With the proper functioning of the internal market closest to heart, it is not odd that the European Institutions is favoring Competition Law.

Hopefully the Courts will find a proper balance in the upcoming Microsoft verdict. The two areas of laws function, as the legal system in whole, in a symbiosis where none should have an automatic superiority, especially not based on who the legislator might be, the European Union or the Member States.

In many aspects the tensions between Competition Law and IPR's are the same as those between the rules on free movement and IPR's. The areas of law are intertwined to the extent that they will not function independently from each other. Therefore, to simply state in the ECT that IPR's should not be affected by the provision in the Treaty seems naïve by the legislator. As before mentioned, solving the issue solely by new legislation would not be the ultimate solution considering the nature of the problem, instead the writer would like to see a solution with a strong legal basis in the Treaty³⁰⁰, complemented by the flexibility of case law interpretation. Most important is the undertakings ability to predict the consequences of their actions.

6.2 The case law on compulsory licensing

When examining the case law regarding compulsory licensing, we see a rather straightforward line of thinking by the Community Courts. At least up

²⁹⁸ First and foremost Microsoft

²⁹⁹ There is nothing hindering public authorities and institutions to seek IPR's. But as today, it is mostly private parties seeking protection.

³⁰⁰ Preferably a wording which doesn't seem contradictory to the real situation.

to the most recent cases. There has been a constant development on the issue although it has been going in very small steps. There are still, after 30 years of case law, many questions left. When summarizing and analysing, not overly much attention will be given to the Microsoft case. Though important it is, in opposite of the others, not an ECJ verdict but mere a decision taken by the Commission, in addition the decision is appealed to the CFI.

The Court has never failed to point out that it is only under the rarest and most extraordinary circumstances the exercise of an Intellectual Property Right will be found to be an abuse of a dominant position. It seems as if the ECJ wants to emphasize their fully respect for Intellectual Property Rights and have no intention to undermine the national systems. Therefore, the legal implications of the statement should not be overestimated, it should rather been seen more as a principle statement. The author of this essay would not suffice as defence, if accused for abusing a dominant position gained through a IPR, to simply say that the circumstances was not special enough.

To examine the current benchmarks of what constitutes an abusive behaviour, the writer would take her starting point in the three cumulative criteria set out in the case law examined in Chapter 5. All the criteria are in a way set out to determine whether the object or service, which the undertaking is refusing to license, is in the subject matter of the Intellectual Property Right. If that is the case, no compulsory licensing should be granted.³⁰¹

The first criteria demand, that the refusal prevents the appearance of a new product for which there is a potential consumer demand. In the Magill judgement, the ECJ found that a comprehensive TV-guide was a new product compared with the daily listings in the newspapers. After the Magill judgments, the requirement has lost some of its glory. It has not been directly addressed in the later judgements. In Microsoft, the Court does not even discuss the matter of “newness”. Looking at cases before the Magill judgment, such as Commercial Solvents and Volvo v. Veng, we see that none of these cases the ECJ discusses the criteria of newness. In Commercial Solvents, there seem to be no need for a new product. Zoja was producing the same thing as they had done before; still Commercial Solvents was forced by the Court to supply the raw material. Still, Commercial Solvents concerned refusal to license, the criteria of “newness” had primarily been applied on refusal to license. However, Volvo v. Veng concerned compulsory licensing; still the ECJ did not consider whether Veng intended to introduce a new product.³⁰²

³⁰¹ Case 53/87, CICRA and Maxicar v. Régie Nationale des Usines Renault (1988) ECR 6039

³⁰² Which Veng obviously did not intend to do, they made replicas of the protected front wing.

It seems the criteria is not the one, which holds most weight, to say it is no longer applied, would though to take it to far. As discussed before, “new” is a vague notion to determine, which makes it difficult to balance. Still, if the product is not new compared to the “dominant“ product. It is infringing on the subject- matter of the IPR and for that reason alone should not be licensed. One might wonder if the criteria were in fact created only to justify the Magill judgment and after the Court continue to apply the criteria to keep up appearance. However, the criteria emphasises that assessments of a case should be done with primarily consideration the welfare of consumers. In the IMS Health, the Court stated that licensing could only be considered if it was in the public interest. This must be interpreted as the ECJ again expressed its commitment to the consumers. Thus, public interest should not be interpreted as meaning products and services which is commonly supplied by the public, as medical care and infrastructure

Secondly, there must not be any justification of the refusal to license. Nowhere in the case law examined has a compulsory license been hindered on the ground of justification. This could flow naturally from there being a very limited number of circumstances, which would constitute such justification. Another reason for the scarce examples can be the lack of cases actually leading to compulsory licensing or forced supply of information. With all probability, the ECJ will use these criteria as an extra safety valve in a case where a compulsory license would be improper despite the other prerequisites being fulfilled.

Thirdly, the dominant undertaking should by the refusal to license reserve itself the secondary market of the product or service, which is intended to be introduced. The secondary market is thus dependent on the protected product or service. In case law it has been established that it suffice with a hypothetical secondary market. In many cases, the secondary market cannot be established without the protected service or product, to demand that such a market already exist would create a “catch 22” in those cases. Despite this, there are some risks with a hypothetical market. How well developed must the idea be? What happens if the newcomer uses the compulsory licensed product to penetrate the original market as a direct competitor to the dominant undertaking? To be an effective criterion these questions must be taken into consideration.

If the dominant undertaking reserves the secondary market for itself by abusing its dominance in an upstream market, does it need to exclude all competition or is it enough to exclude only the complainant for Art. 82 to apply? The answer to that question is unclear, the case law points at different directions. Korah claims that the Court should only consider the complainant when assessing a case; otherwise, a smart undertaking would license a competitor not very likely to be aggressive. Considering that there are different rules to apply on discrimination, there are not in practise a huge differences in the approaches. Under some circumstances, there are justified reasons not to license an undertaking but granting another access.

Interesting to note is that the ECJ never considers the intent of the undertakings which behaviour is being evaluated. The process is strictly objective. Again, considering the nature of competition law, it might not be very hard to examine whether one can find a malevolent intention of the undertaking. If such could be shown, it would be a strong indication that the abusive behaviour actually took place. Still, involving subjective criteria does usually increase the legal uncertainty, which should be kept to an absolute minimum. On the other hand, an undertaking is well aware of whether they have intentionally violated the rules or not, the problem would rather be how to verify it.

6.3 Concluding discussion

Generally, the ECJ has in the past swung a bit between a very strict approach to compulsory licensing and a rather strict approach. It has always been its line of reasoning that the possibility of compulsory licensing of Intellectual Property Rights should only be used as a safety valve. If no such possibility was at hand, an IPR could not be hindered if abused by a dominant undertaking.³⁰³ Still, Intellectual Property Rights gives a strong protection and are not easily put aside. As always, there is a risk that the possibility to circumvent an IPR can be abused. Nevertheless, even if the political Commission would use such an “opportunity”, we must have faith in the fairness of the objective Courts. One always has to keep in mind that no system is perfect, and a system under construction is certainly not. A legal system takes a considerable time to develop and the Community Law is only in its cradle. It is very important that the undertakings, especially companies dealing with advanced technology, can rely on the protection granted through Intellectual Property Law. Not only because of the harm of research and development which will in the end affect consumers, but also because of the risk of companies choosing other ways to protect their product, ways less controllable and even more harmful to the market.

The existence/exercise doctrine has been criticized for being an artificial creation, created as a justification for the Community Institutions to, when necessary, limit the use of Intellectual Property Rights. The mere existence of an Intellectual Property Right is useless, it is its exploitation that creates revenue. As discussed before, the doctrine is a solution created by the ECJ to solve a factual problem. It has no basis in legislation. The criticism is probably correct; still there are no better solutions at hand at this point.

So where does all this leave the uncertain undertaking? Should it exercise its Intellectual Property Rights with a constant fear of being demanded of high fees for abuse? Excluding Microsoft, case law is in general rather strict on granting access to protected products and services. In the seven cases examined, access was granted in four of these cases. This number may seem

³⁰³ Not through case law, but the behavior can still be reached by the rules on free movement if IPR's is used to partition the internal market.

high, but one has to remember that only parties who believe they have a very strong case appeal to the ECJ. Besides only two of the cases where access was granted concerned products protected by Intellectual Property Rights, one of which was a “weak” IPR, the other, Microsoft, is so far only a Commission decision. So even if the ECJ has been reluctant to set up clear thresholds and general principles as to when it is possible to restraint the exploitation of an Intellectual Property Right, undertakings can still rely on their protection and should be able to do so. Otherwise, the Community has a far worse situation ahead of it.

To conclude, in the authors opinion there is definitely friction between the system of Competition Law and Intellectual Property law, the areas clearly contradict each other. Competition Law and Intellectual Property Law are two equally important systems of law in the Union. Both are needed to ensure a functioning internal market and a positive business climate for the European Companies and other players on the Community Market.

Whether this tension is positive or negative is a different issue, which will not be considered in this thesis. In law, there is always different interest, which has to be balanced to create a workable rule. It takes time and effort to create such balance. The present solution might be workable, but far from good. To ensure a good business climate, clarifications must be made. Preferable a future solution will be based on better legislation a more consistent case law. At least the last can be achieved by a clear judgment from the CFI, and probably later from the ECJ, in the Microsoft case.

Supplement A

Article 81 ECT

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82 ECT

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

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

(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.

Article 295 ECT

This Treaty in no way prejudice the rules in Member States governing the system of property ownership.

Supplement B

Article 28 ECT

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29 ECT

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30 ECT

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or 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.

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