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Restricting the Use of an Intellectual Property Right

The Cross-Atlantic View on Compulsory Licensing

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Summary

Intellectual Property Rights gives an inventor an exclusive right of exploitation and its objective is to create an incentive for companies to improve existing products or develop entirely new products. However, even if a firm is granted an IPR there is a possibility, that while enjoying them, the use may be in conflict with competition law. Accordingly, competition law may limit the scope of an IPR, working as a "second tier". The interface between the two systems of law actualizes on the one hand, the necessity to preserve the incentive for innovators to develop new products; on the other hand, it actualizes the importance of free competition, which may be restricted by the use of an IPR. Both EU and US law acknowledge IPRs as an important incentive for investment and innovation and a common objective for EU and US competition law is to achieve consumer welfare. Nonetheless, the EU approach also has to take in consideration the realization of an internal market, which is an objective not shared with the US. Although compulsory licensing of an IPR could amount to excessive interference with a firm's proprietary rights, both the Supreme Court and the CJEU have found situations, in which a firm has been compelled to license its IPR and where the refusal to license has been seen as an abusive conduct in contrast to competition law. Additionally, EU law presumes that an abusive conduct is in contrast to competition law, with possibilities to exempt or justify such conduct either under block exemption regulations or Article 101.3 TFEU; US law instead distinguishes between conduct either prohibited per se or treated under the rule of reason and seeing to whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh anticompetitive effects. In conclusion, the approach of the two systems of law differ, where the CJEU has went with a more formalistic approach rather than the rule of reason applied by the Supreme Court.

Sammanfattning

En immaterialrätt ger en upphovsman en exklusiv rätt att utnyttja sin uppfinning. Syftet är att skapa incitament för företag att förbättra befintliga produkter eller att skapa helt nya produkter. En sådan rättighet innebär emellertid inte att upphovsmannen åtnjuter ett totalt skydd att ensam få utnyttja sin exklusiva rättighet och utövandet kan i vissa fall anses stå i strid med konkurrensrättslig lagstiftning. Följaktligen kan konkurrensrätten innebära en begränsning av en beviljad intellektuell rättighet. Relationen mellan immaterialrätt och konkurrensrätt aktualiserar, å ena sidan, nödvändigheten av att bevara incitament for upphovsmän att fortsätta utveckla nya produkter, å andra sidan, betydelsen av fri konkurrens, vilken kan begränsas av ett utövande av en immaterialrätt. Både EU och USA erkänner immaterialrätter som ett viktigt incitament för innovation och investering och ett gemensamt syfte för europeisk och amerikansk konkurrensrätt är att säkerställa konsumenters välfärd. Även om tvångslicensering skulle kunna innebära ett orimligt intrång i en immaterialrätt förvärvad av ett företag, har både europeisk och amerikansk praxis konstaterat situationer där ett företag har blivit tvunget att licensera sina immaterialrätter. Vidare förutsätter EU-rätten som utgångspunkt att ett missbruk av en dominerande ställning strider mot konkurrensrätten, oavsett eventuella postiva effekterna av ett sådant agerande. Till detta finns möjligheter att tillåta agerandet, antingen genom blockundantagsregler eller genom att rättfärdiga agerandet enligt Artikel 101.3 FEUF. Sammanfattningsvis, har de båda lagstiftningarna kommit att utvecklas i två olika riktningar där EU-domstolens praxis antyder ett mer formellt synsätt i jämförelse med USA:s högsta domstol som snarare använder sig av ett "Rule of Reason-test".

Abbreviations

EAGCP	Economic Advisory Group on Competition Policy
EU	European Union
CJEU	Court of Justice of the European Union
CFI	Court of First Instance
IPR	Intellectual Property Right
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 General Introduction

Globalization is an inevitable and indispensable economic, cultural and political process, which has global integration as its objective and to bring the world's different countries closer together. With that in regard, certain efforts are required in order to facilitate the adaption to a more globalized world. This means, not least, that different areas of law will be subject to international harmonization while firms are trying to acquire an international position on the global market. Since the USA constitutes more than half of what is called the worldwide market,[1] it is attractive for firms, which are trying to establish an international position, to also be present on the American market. This has recently resulted the EU and the US to initiate negotiations for a potential Trans-Atlantic Trade and Investment Partnership (TTIP). The TTIP would aim at increasing growth and create jobs, while at the same time boost world economy.[2] A comparative perspective between the EU and the US is thus relevant, not only, due to the influence the US holds on the world market, but also due to the fact that IPRs and competition law are two bodies of law, where the US has had more experience in dealing with issues concerning this subject.

One of the toughest issues to handle, where EU and US legislation differs, is the barrier behind custom borders and an important legal area where they have been shown to have two different approaches is the interface between IPRs and competition law. The research and investment leading up to a product, for which there is a consumer demand, generally equal extensive work and money by a firm, before an IPR is granted. When a firm has been granted an IPR, it allows the owner to prevent third parties from unauthorized use and exploit the IPR by, *inter alia*, licensing. However,

[1] Möschel, Wernhard, *US versus EU Antitrust Law*, p. 3
[2] http://ec.europa.eu/trade/policy/in-focus/ttip/

such research and investment may be lost if the use of the IPR is considered to be in contrast to competition law. Nevertheless, the two areas of law share the same objective, i.e. promoting innovation and economic growth. Provided a firm has been granted an IPR, should it not be reasonable to assume that the product in question is protected and that all the hard work and money will result in a freedom of conduct for the firm to exploit the IPR in whichever way it wants?

1.2 Purpose and Presentation of Questions

The EU and the US approach the interface between IPRs and competition law from two different perspectives, although recent European development implies a proximity to the American point of view. The purpose of this bachelor thesis is to investigate how the EU and the US have chosen to approach the interface between IPRs and competition law, with focus on when compulsory licensing may constitute an abuse of a dominant position within the scope of Article 102 TFEU. In my presentation the following questions will be investigated:

I. How do the two bodies of law, i.e. IPRs and competition law interact under EU law and US law?
II. What are the preconditions for compulsory licensing under EU law?
III. How do the two sides of the Atlantic approach the relationship between IPRs and competition law, with regards to compulsory licensing?
IV. What problems may arise from the different approaches?

1.3 Method and Material

Customary legal dogmatic method is a definition, for which it has been found difficult to establish a homogenous factual content.[3] Therefore, the method and material used will instead be described as a scientific

[3] Sandgren, Claes, *Är rättsdogmatiken dogmatisk?*, p. 649

reconstruction of legal systems.[4] In writing this bachelor thesis, primary and secondary legislation, case law, guidelines and doctrine will be studied. This will constitute an effort to systematize and structure relevant legislation in order to dissect the chosen subject and in the analysis illustrate the similarities and differences between the EU and US legal situation. Given the purpose of answering the questions from a comparative perspective, the main focus will be EU law whereas US law foremost will work as an abstract to provide the reader with an understanding of its approach to the subject. The material used for the investigation of the relationship between IPRs and competition law has mainly constituted guidelines used by authorities and case law in order to reflect actual situations where the use of an IPR have been subject to competition scrutiny and how EU authorities and US agencies would assess such conduct.

1.4 Delimitations

The interface between IPRs and competition law is a complex area of law. This bachelor thesis has therefore been delimited to focus on when the use of an IPR may be considered as an abuse of a dominant position within the meaning of Article 102 TFEU. The Article sets out three criteria for its application. The thesis will however only focus on the two first criteria, only briefly commenting on the third criteria, which states that trade between Member States, must be affected. Moreover, the possibilities of compulsory licensing under the TRIPS agreement and Paris convention and the preconditions to force a license of a firm's IPR as set out by these agreements, will not be investigated. The thesis has also been delimited to consider relevant case law concerning refusals to *license*. Compulsory licensing has raised questions of whether the CJEU has tried to integrate the essential facilities doctrine into the field of IPRs. This is an issue, which will not be investigated by this thesis. Moreover, an IPR is an exclusive right, which also requires economical aspects to be considered. However, given the scope of this thesis, these will only be commented on as far as

[4] Jareskog, Nils, *Rättsdogmatik som vetenskap*, SvJT 2004 p. 4

necessary. It has also been presupposed that the reader is familiar with the fundamental principles of EU law.

1.5 Outline

To give the reader a complete understanding of the chosen subject it is important to understand the interface between IPR and competition law. Chapter 2 will provide the reader with a general introduction of what constitutes an IPR in combination with relevant EU legislation, followed by a review of competition law under both EU and US law, which will illustrate the circumstances under which the two bodies of law overlap. The investigation will then continue with an introduction to the EU and the US system of competition law and with a study of the cross-Atlantic development of IPR in relation to competition law. This will give the reader a comprehensive overview of the subject. Chapter 3 will investigate the preconditions for compulsory licensing under EU law. This will be followed by a case study, which will illustrate the circumstances under which the EU and the US have chosen to compel an undertaking to license its protected IPR. Finally, Chapter 4 will summarize the findings of the investigation and address the similarities and differences between the EU and US approach in order to conclude what the reasons for the different development may be, as well as to reflect on what problems might arise from the different approaches.

2 The Relationship between IPR and Competition Law

Intellectual property legislation offers a possibility for an inventor to acquire a right of exclusive use and exploitation, which operates both as an incentive to other innovators, stimulated by the spread of information and to put knowledge into the public domain that might otherwise remain a trade secret.[5] Competition law, on the other hand, is designed to stimulate innovation and economic growth by fostering effective competition in markets, creating an environment where allocative and productive efficiencies are produced. Allocative efficiencies presuppose that the price mechanism will ensure that producers manufacture the products that consumers want, while productive efficiencies will result producers to price their products closer to its costs due to the pressure of price competition.[6] Historically, IPR and competition law has passed as two separate systems of law but as seen above, there is a considerable overlap between their objectives both aiming to promote innovation and economic growth.[7] Nevertheless, there is also an inherent conflict between IPR and competition law. While IPR protects the interest of the inventor, competition law instead protects the necessity of a free market, which might be limited by an IPR.[8]

2.1 Intellectual Property Rights

Intellectual Property is a generic term, which covers both industrial and artistic forms of property right, such as patents, trademarks, copyright, trade names and indications of origin.[9] Furthermore, Intellectual Property is an intangible property, which means that any number of people simultaneously

[5] Anderman, Steven, *The competition law/IP 'interface': an introductory note*, p. 1
[6] Anderman, Steven, Schmidt, Hedvig, *EU Competition Law and Intellectual Property Rights*, p. 14
[7] Anderman, Steven, *The competition law/IP 'interface': an introductory note*, pp. 1 f.
[8] Myers, Gary, *Principles of Intellectual Property Law*, p. 7
[9] Craig, Paul, De Búrca, Gráinne, *EC Law, Text, Cases and Materials*, p. 1027

can use such property without stopping anyone else's use.[10] Article 36 and 345 TFEU jointly provide that it is the Member States, which govern the system of property ownership and that EU rules on competition do not preclude prohibitions or restrictions affecting the internal market when such actions are justified by the protection of industrial and commercial property. The CJEU later established in *Consten & Grundig*[11] that such property also included intellectual property. The ultimate aim for IPR according to US law is to stimulate artistic creativity for the general good, where IPR is regarded as a private mean to accomplish a public end.[12]

2.2 EU Competition Law and the Internal Market

EU competition law has been interpreted to have three main objectives, which are the maintenance of effective competition, the application of a fair competition, in particular in the form of protection for small and medium-sized firms, and the use of competition rules for the realization of an internal market.[13] The European approach to abusive conduct by a dominant undertaking is found in Article 102 TFEU, which is an outright prohibition with possibilities to exempt or justify the abuse through either block exemption regulations or Article 101.3 TFEU. Accordingly, there is a presumption of competition liability within EU competition law, with possibilities to exempt or justify certain conduct on the market.

Furthermore, Article 3.3 TEU provides that one of the objectives of the EU is to establish an internal market. According to Article 26 TFEU, this shall comprise an area without internal frontiers to ensure the free movement of goods, persons, services and capital. Consequently, market integration has been one of the major influences on the application of EU competition

[10] Peritz, Rudolph, *Competition Policy and IPRs in the USA*, pp. 126 f.
[11] Joined cases C-56/64 and C-58/64, *Consten & Grundig v Commission,* [1966] ECR 299
[12] Peritz, Rudolph, p. 127
[13] Anderman, Steven, Schmidt, Hedvig, p. 25

laws.[14] As a mean to accomplish an internal market, Article 3.1(b) TFEU sets out that the EU has exclusive competence for the establishment of necessary competition rules for the functioning of the internal market. It has also been laid down by Protocol 27 of the Treaty that the internal market includes a system, which will ensure that competition is not distorted. However, according to Article 118 TFEU, it is the Member States who have been given the competence to regulate IPR, which leaves IPR to remain a national concern. But even if IPR mainly is a national concern, the Article also sets out that the European authorities have an obligation to establish a uniform protection for IPRs throughout the internal market in accordance with national legislation. When carrying out activities for the purposes set out in Article 3 TEU, both European authorities and Member States are required to adopt an economic policy, which involves conduct in accordance with the principle of an open market with free competition according to Article 119 TFEU.

2.3 US Antitrust Law and its Objective

The US antitrust laws aim to ensure a competitive environment, and in 1958 the Supreme Court stated that,

> "[the] Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[15]

[14] Korah, Valentine, *Competition Law of the European Union*, Section 3-7
[15] See *Northern Pacific Railway Co v United States,* 356 US 1 (1958)

The US agencies and courts have, after this judgment, applied antitrust law as a mean to achieve consumer welfare as the overachieving goal. A competitive environment is held to result in a market where competitors are driven to improve existing products or introduce new products in order to keep their market share. In that sense, the antitrust laws foster competition by, *inter alia,* prohibit exclusionary uses of monopoly power.[16]

Just as Article 102 TFEU, Section 2 of the Sherman Act targets unilateral practice of one or several firms, which already have acquired monopoly power or, hold a dominant position or, attempt to obtain monopoly power. However, a lawfully acquired monopoly position is not considered to be in contrast to US antitrust laws.[17] The US competition law is structured, *inter alia*, through "per se" prohibitions based on case law experience, which has demonstrated harmful consequences on the market. These activities normally do not require any in-depth investigation concerning effects on the relevant market.[18] Such activities which are considered to go beyond acceptable includes, predatory pricing, acquisition of direct rivals, long-term lease arrangements with penalty clauses if loyalty is breached, and refusals to deal for no business purpose other than to injure a competitor.[19] Cases concerning IPRs will however, in the vast majority of cases, be evaluated under the rule of reason.[20] For a unilateral conduct to be in contrast to Section 2 of the Sherman Act, it is necessary to establish a specific intent to control prices or destroy competition, predatory or anticompetitive conduct directed at accomplishing that purpose, a dangerous probability of achieving monopoly power and casual antitrust injury.[21]

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[16] U.S. Department of Justice and the Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, p. 1
[17] See *Verizon Communications Inc. v Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004)
[18] Lidgard, Hans-Henrik, *Competition Classics,* p. 16
[19] Ibid.
[20] U.S. DoJ, FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*, p. 16
[21] *Image Technical Services Inc. v Eastman Kodak Co.,* 125 F. 3d 1195 (9th Cir. 1997)

2.4 The Cross-Atlantic Development of IPR in relation to Competition Law

In recent decades both the US and the EU have acknowledged the role of IPRs in information goods, increasing the awareness of IPR as a significant source of creation of wealth and a foundation for success in international competition.[22]

2.4.1 The European Development

From a European point of view IPR is primarily a concern for national legislation but as EU case law has shown, the Commission "*cannot refrain from all action when the scope of a patent is relevant for the purposes of determining whether there has been an infringement of Article 85 or 86 of the Treaty.*"[23] Accordingly, this also applies to other IPRs, which results in competition law to operate as a "second tier" of regulation of IPR.[24]

In 2005, the Commission undertook a review of Article 102 TFEU, which resulted in a discussion paper,[25] which sets out possible principles for the Commission's application of Article 102 TFEU to exclusionary abuses.[26] It was concluded that the Commission would adopt an approach based on the likely effects on the market.[27] Furthermore, a refusal to license IPRs might be classified as an exclusionary abuse, provided the abuse had likely anticompetitive effect on the market, which was detrimental to consumer welfare. [28] With regards to such abuses, the objective of Article 102 TFEU was acknowledged to be the protection of competition on the market for the

[22] Anderman, Steven, *The competition law/IP 'interface': an introductory note,* p. 8
[23] C-193/83, *Windsurfing International Inc. v Commission*, at para 26
[24] Anderman, Steven, *The competition law/IP 'interface': an introductory note,* p. 7
[25] European Commission, DG Competition, *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*
[26] Ibid, at para 1
[27] Ibid, at para 4
[28] European Commission, DG Competition, *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, at paras 207-210

enhancement of consumer welfare and the insurance of an efficient allocation of resources.

There has also been an investigation concerning the possibility for the EU to implement an economic approach concerning Article 102 TFEU made by the EAGCP. In the report, it was concluded that an economics-based approach was a step in the right direction, and that the focus should be on important competitive harms, while at the same time preserving and encouraging efficiency. Such approach was held to provide a flexible framework, which fostered increased productivity and growth to the benefit of consumers.[29] The approach was also contended to provide a more consistent treatment of practices, where a conduct should be evaluated on the basis of its effects rather than the conduct itself.[30] An economics-based approach would consequently take in consideration the different circumstances in a dynamic market.[31]

2.4.2 The American Development

Historically, the American courts have found an unacceptable conduct to constitute almost any type, which had an exclusionary effect on actual or potential competitors, whereas nowadays, firms are generally allowed to achieve or defend a legally acquired monopoly position, using aggressive competitive behavior. Current case law and regulatory practice in the US may be considered as a reaction against earlier presumptions of unlawfulness, which consequently treated any kind of exercise of IPRs with suspicion and even hostility.[32]

The American approach to competition law is generally considered as less interventionist than the European approach, only subjecting demonstrably harmful activities. If this is not upheld, the American view is that this could threaten to discourage the competitive enthusiasm that the US antitrust laws

[29] EAGCP, *An economic approach to Article 82 TFEU*, p. 3
[30] Ibid, p. 2
[31] Ibid, p. 3
[32] Eagles, Ian, Longdin, Louise, *Refusals to License Intellectual Property*, p. 125

aim to promote. A competitor should thus not be turned upon if he runs a successful business. US case law has stressed that it may sometimes be difficult to distinguish competition from conduct with long-term anticompetitive effects. Accordingly, US agencies have acknowledged that even though IPR typically are welfare enhancing and procompetitive, antitrust concerns may nonetheless arise. In such cases the US agencies will focus on the actual effects from a firm's conduct.[33] Accordingly, the American approach is based on objective economic evidence, and the effects in question will be evaluated under the rule of reason. This approach considers "[…]*whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.*" However, the Supreme Court has found knowledge of intent helpful in interpreting facts and predicting consequences.[34]

In the Guidelines[35] three important principles are embodied:

> "[Firstly]for the purpose antitrust analysis, the Agencies regard [IPRs] as being essentially comparable to any other form of property, [secondly] the Agencies do not presume that [IPRs] creates market power in the antitrust context; and [thirdly] the Agencies recognize that [IP] licensing allows firms to combine complementary factors of production and is generally procompetitive."[36]

The Supreme Court applied this approach e.g. in *Federal Trade Commission v Indiana Federation of Dentists*,[37] which concerned a horizontal agreement, in which the parties agreed to withhold dental x rays from third parties. The Supreme Court refused to classify such boycott as a per se violation, and concluded the restraint be evaluated under the Rule of Reason.

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[33] U.S. DoJ, FTC, *Antitrust Guidelines for the Licensing of Intellectual Property,* p. 7
[34] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)
[35] U.S. DoJ, FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*
[36]Ibid*,* pp. 2 f.
[37] *Federal Trade Commission v Indiana Federation of Dentists*, 476 U.S. 447 (1986)

In any case, American Courts of general jurisdiction have been found to be ill suited to identify proper prices, quantity and other terms of dealing regarding conduct, which is subject to antitrust scrutiny.[38] Just as any other actor on the market, a monopolist is permitted and encouraged to compete aggressively on its merits. Such aggressive competition has been held to be precisely the sort of competition, which promotes the consumer interests the Sherman Act is intended to foster.[39]

[38] Lidgard, Hans-Henrik, *Application of Article 82 EC to Abusive Exclusionary Conduct – Refusal to Supply or License*, p. 700
[39] Ibid, p. 701

3 Compulsory Licensing

Licensing concerns the situation where the IP holder may not have the resources, know-how, or desire to produce or distribute the invented product. In such cases, the IP holder has a possibility to license its IPR to another party. The starting point is that each firm, which owns an IPR, has an original freedom of conduct to enter into licensing agreements with whomever they want. Accordingly, such freedom may amount to a refusal to license. However, Article 102 TFEU provides certain conditions, which must be fulfilled for a refusal to license not to be considered as an abuse. Such refusal could otherwise fall within the scope of Article 102(b) TFEU if it equates to an imposition of unfair trading conditions or the limitation of production, markets or technical development to the prejudice of consumers.

3.1 Article 102 TFEU and Refusals to License

As mentioned above, one of the main competition rules, working as a mean to achieve an internal market, is found in Article 102 TFEU. The article targets abusive conduct by one or more dominant undertakings, as incompatible with the internal market, provided that trade between Member States is affected. For the application of the article it is thus necessary to establish a dominant position within the relevant market, an abusive conduct and, that there is no objective justification for the conduct in question. It is the precondition of a dominant undertaking and an abusive conduct, which will be investigated in the following.

Firstly, when determining whether a firm holds a dominant position, it is necessary to define the relevant market. This requires a definition of the

relevant product or service market, and its geographic dimension.[40] In *The European Commission's Notice on the Definition of the Relevant Market*,[41] it is stated that the relevant product or service market should "*comprise all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*"[42] The definition of the relevant product market is particularly important for IP holders, as a narrow definition will limit a legitimate exploitation of an IPR.[43] When defining the relevant product market, the Commission in general uses narrow definitions and it has, *inter alia*, found new spare parts to constitute its own product market.[44] The geographic market is then identified in relation to the area in which the product in question is marketed. This comprises an area in which, "*the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.*"[45] This view was from the beginning established by the CJEU in the *United Brands* case.[46] While assessing a firm's dominance within the relevant market, the CJEU stressed the importance of market shares, and held that large market shares are in themselves evidence of the existence of a dominant position, save in exceptional circumstances.[47] In the judgment, the Court confirmed a dominant position solely on the grounds of market percentages in the eighties. When the market share was no more than in the forties, the Court stated that further indications were necessary to establish a dominant position. The latter has also been held in the Guidance paper, stating that market shares under 40 % provides a fairly safe harbor for undertakings

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[40] Anderman, Steven, *EC Competition Law and Intellectual Property Rights: The Regulation of Innovation,* pp. 149 f.
[41] *Commission Notice on the definition of the relevant market for the purpose of Community Competition Law,* [1997] OJ C372/5, [1998] 4 CMLR 177
[42] Ibid, at para 7
[43] Anderman, Steven, *EC Competition Law and Intellectual Property Rights: The Regulation of Innovation,* pp. 149 f.
[44] See C-22/78, *Hugin v Commission*, [1979] ECR 1869
[45] Ibid, at para 8
[46] C-27/76, *United Brands v Commission*, [1978] ECR 207-315
[47] *C-85/76, Hoffman-La Roche v Commission,* [1979] ECR 461, at para 47

when assessing a potential dominant position.[48] The CJEU developed the theory of market shares further in *AKZO*,[49] stating that a stable market share of 50 % or more was to be considered as a rebuttable presumption of dominance.[50]

Secondly, the conduct of the firm must be abusive. The requirement of an abusive conduct states that an achievement of dominance not in itself is unlawful. However, once an undertaking holds a position of dominance on the market it has a special obligation *"not to allow its conduct to impair genuine undistorted competition on the common market*".[51] Such special obligation for a firm may amount to not engaging in exclusionary practice on the market.[52] Article 102 TFEU gives four examples of what is considered to constitute an abuse, which suggest a limitation to a dominant firm's opportunities to exploit customers or consumers. The list is not an exhaustive enumeration and the Article has also been interpreted in a wider sense as it has been found to apply in situations of exclusionary abuses directed at competitors.[53] Such exclusionary practice may, *inter alia*, constitute in unilateral or concerted refusals to license, or strategies, which may impede dynamic competition in the form of research and marketing of follow-on innovation.[54] Of relevance for refusals to license is Article 102 (b), which holds limiting of production, market or technical development to the prejudice of consumers as an abuse. However, regarding refusals to license, it is important to remember that the Article intends to protect consumers and that behavior by a dominant undertaking, which injure competitors, will not necessarily injure consumers.[55]

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[48] *The Commission's Guidance on the Commission's Enforcement Priorities in Applying Article 82 E.C. Treaty to Abusive Exclusionary Conduct by Dominant undertakings,* para 14
[49] C-62/86, *AKZO v Commission,* [1991] ECR I-3359, paras 59-61
[50] Ibid, at para 60
[51] C-322/81, *Michelin v Commission*, [1983] ECR 3461, at para 57
[52] Käseberg, Thorsten, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*, p. 21
[53] Anderman, Steven, Schmidt, Hedvig, p. 74
[54] Käseberg, Thorsten, p. 22
[55] Craig, Paul, De Búrca, Gráinne, p. 1025

3.2 Compulsory Licensing within the EU

In the Discussion Paper,[56] it was concluded that there is no general obligation to license an IPR, and that the aim of an IPR is the possibility for the IP holder to prevent third parties from using its IPR without consent. If the IP holder is imposed an obligation to license such right, the holder would be deprived of the very substance of the exclusive right. However, the danger of an IP holder gaining a dominant position without the EU being able to take actions was not considered to be in line with EU law. Thus, the CJEU drew a distinction between the existence and the exercise of an IPR. The former would enjoy protection of the Treaty whereas the exercise could be subject for EU competition rules.[57]

Another key feature in the development of compulsory licensing is the definition of the relevant market. EU authorities usually make a distinction between primary markets, i.e. the relevant market for the protected IPR and secondary markets, i.e. those markets for which the IPR is an indispensable input.[58] The concept of an indispensable input has also been discussed under the essential facilities doctrine.[59] In principle, the exclusive exploitation of an IPR is acceptable when the firm is not trying to extend the scope of the granted IPR. An abuse of a dominant position may be at hand if the refusal to license means that alternative sources of supply are precluded. Hence, exclusive exploitation may constitute legitimate competition on the merits in the primary market but may be considered abusive in a secondary market.[60] With that in regard, EU case law has shown that a refusal to license cannot in itself constitute an abuse but it is required additional circumstances.[61]

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[56] DG Competition, *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*
[57] Anderman, Steven, Schmidt, Hedvig pp. 21 f.
[58] Anderman, Steven, Schmidt, Hedvig, p. 95
[59] The essential facilities doctrine targets products or services which are "[…]*either essential for the exercise of the activity in question, in that there was no real or potential substitute.*", *Tiercé Ladbroke SA v Commission*, [1997] ECR II-923 at para 131
[60] Anderman, Steven, Schmidt, Hedvig, p. 85
[61] Ibid, paras 238-239

This was the case in *Volvo v Veng*,[62] which concerned whether a refusal of licensing a registered design for body panels for motor vehicles for the import and sales of such products, under special circumstances could be considered an abuse of a dominant position within the meaning of Article 86 of the Treaty. The background to the case was that Volvo was the sole proprietor in the UK of a registered design of front wings of Volvo cars. Veng, however, had imported the same body panels, without consent from Volvo, and marketed them in the UK. As a result, Volvo claimed an infringement of its sole and exclusive rights. The CJEU emphasized that the use of an exclusive right, which prevented third parties from manufacturing and selling, or importing, products was the very core of such exclusive right.[63] Consequently, a refusal to license could not in itself be considered to constitute an abuse of a dominant position. Nevertheless, Article 86 might prohibit the exercise of an exclusive right by an undertaking holding a dominant position if there was some kind of additional conduct included.[64] This could be the case when the conduct involved constituted an arbitrary refusal to supply spare parts to independent repairers, price-fixing of spare parts at an unfair level or a decision to no longer produce spare parts for a certain model in widespread use.[65] The conduct by Volvo meant an exclusion of existing competitors while at the same time, denying access to new entrants.[66]

The Discussion Paper also contended that in the assessment of situations where a refusal to license might be considered abusive, it must be acknowledged that an IPR often is a result of substantial investments, which entails significant risks. Consequently, to maintain incentives to invest and innovate, the dominant undertaking must not be excessively restricted in the exploitation of an IPR. In cases of compulsory licensing, an undertaking should thus be free to seek sufficient compensation in order to keep

[62] C-238/87, *Volvo v Veng*, [1988] ECR 6211
[63] Ibid, at para 8
[64] Ibid, at para 9
[65] Ibid.
[66] Anderman, Steven, Schmidt, Hedvig, p. 97

incentives.[67] In situations where a firm has refused to license an IPR, the Commission will consider such practice an enforcement priority if; the refusal concerns a product which is objectively necessary for an effective competition on the downstream market, the refusal likely will lead to elimination of effective competition on the downstream market, or the refusal is likely to lead to consumer harm.[68]

3.2.1 Refusal to License as an Exclusionary Conduct

As mentioned above, refusals to license are only abusive under additional circumstances. In *Magill,*[69] which regarded a refusal to license TV-program information, three television companies in Ireland and the UK, each published weekly program magazines, in which they listed their own programs. Magill, an independent company, was prevented from publishing a comprehensive TV magazine due to infringement of the TV companies' exclusive rights. As a consequence Magill claimed the conduct of the TV companies to be in contrast to Article 86 of the Treaty. In the judgment, the CJEU held that only in exceptional circumstances could an exercise of an IPR be in contrast to the Articles of the Treaty.[70] It was concluded that the information needed by Magill was indispensable for the production of a comprehensive TV program guide, which also was a new product on the market for which there was a clear and unsatisfied consumer demand. Additionally, the TV companies reserved for themselves a secondary market of weekly television guides by their refusal to license. Lastly, there was no objective justification for the refusal.[71] With that in regard, the Court ordered the companies to license the information, stating that their conduct was in contrast to Article 82 of the Treaty. It did not however clarify whether the preconditions were cumulative or alternative.

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[67] C-238/87, *Volvo v Veng*, at para 238
[68] Communication from the Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, at para 81
[69] C-241-242/91P, *Radio Telefis Eireann v Commission (Magill)*, [1995] ECR I-743, [1995] 4 CLMR 718
[70] Ibid, at para 50
[71] Ibid, at paras 53-55

Regardless, the circumstances in *Magill* were later upheld in other cases such as, *Ladbroke.*[72] In the case the CJEU dealt with the question of a refused license by the *Sociétés de course* to a Belgian company, which operated in the business of taking bets on horse races run abroad. The alleged abuse constituted a refusal to license a transmittance of live pictures and sound by the racecourse operators' association. Such rights had previously been licensed to outlets in France, Germany and Austria. The two entities clearly operated on distinct markets. However, Tiercé Ladbroke argued with regards to Magill that access must be granted since they introduced a new product on the Belgian market.[73] CFI took the view that licensing entities in neighboring markets did not equate to partitioning the market.[74] Consequently, the arbitrary refusal to license or the technical possibilities of supplying the service in Belgium could not be scrutinized by considering policies, which followed in other geographically distinct market.[75] Since neither *Sociétés de course* nor Ladbroke were present on the Belgian market in which the copyright was to be used, the reference to Magill was according to CFI not in point.[76] In any case, the CFI concluded that Article 82 would not have prohibited the refusal to license:

> "Unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers."[77]

The next case to address the exceptional circumstances test set out in *Magill* was *Oscar Bronner,*[78] which regarded the question of the possibility for a

[72] T-504/93, *Tiercé Ladbroke v Commission*, [1997] ECR II 923
[73] Ibid, at para 13
[74] Ibid, at para 118
[75] Ibid, at para 126
[76] Ibid, at para 130
[77] Ibid, at para. 131
[78] C-7/97 *Oscar Bronner GMbH & CO KG v. Mediaprint Zeitungs- und Zeitschriftverlag GMbH & Co. KG*, [1998], ECR I-7791

leading national supplier of daily newspaper to deny a competitor access to the use of its nationwide home-delivery system distribution service, which was the only one in the Member State concerned. The CJEU used the conditions laid down by *Magill* and stated that, whether or not IPRs are involved, it is upon the newcomer to establish that access is necessary for its business and it is not enough that access merely is desirable.[79] Consequently, access to the home delivery system had to be indispensable for the competitor in the daily newspaper market. In the case, the CJEU concluded that there were other ways of distributing newspapers and even though they were not as advantageous, they were still fully functioning.[80] The Court implied in the case that the conditions laid down by the exceptional circumstances test were cumulative as it did not go on to assess whether the product in question was to be considered a new product.

In the *IMS Health case,*[81] which regarded a refusal to license access to a system called the 1860 brick system, a system containing collected data on pharmaceutical sales in Germany. The system had become industry standard and was protected by copyright. NDC, a competitor, which had developed its own system called the 2201 brick system without success, was refused access to IMS Health's 1860 brick system. In the case, the CJEU affirmed the conditions set out in *Magill,* as well as clarified that they were cumulative.[82] Accordingly, a refusal to license was to be considered as abusive only if the conduct:

I. Prevented the entrance of a new product on the market for which there was a potential consumer demand,
II. Resulted in foreclosure of all competition in a secondary market, and
III. There was no objective justification for the refusal.

[79] Ibid, at para 41, 45
[80] Ibid, at para 43
[81] C-418/01, *IMS Health GmbH v NDC Health GmbH*, [2004] ECR I-5069
[82] Ibid, at para 38

According to case law, there had been a development of an exceptional circumstances test, which set out three cumulative conditions under which a firm may be compelled to license its IPR. However, in *Microsoft,*[83] where the firm had made Microsoft Media Player an integrated part of the operating system rather than application software, the General Court approached the alleged abuse by Microsoft with a proactive methodology and proceeded on the basis that the *Magill/IMS* factors in fact were not exhaustive, only investigating whether the circumstances at hand fitted the exceptional circumstances test. The answer was affirmative after a comprehensive analysis of the total factual background to Microsoft's refusal to license.[84] Microsoft did however make commitments, which were accepted by the Commission's decision.[85] Consequently, no further investigation was made whether the integration constituted an abusive tying.

3.3 Compulsory Licensing within the US

As a starting point, the US antitrust laws do not impose on a firm, to do business with anyone, even if a firm holds a dominant position or a monopoly. Departure from this principle has not been made solely on grounds of ownership of IPR but has required an additional exclusionary conduct.[86] In general, there is an absolute immunity from antitrust scrutiny for dealings or refusal to deal within the scope of the IP grant. There is also an evidentiary presumption of virtue that the exercise of an exclusive right to prevent others from free-riding on the innovation would be considered as a legitimate business reason without inquiry to the motive of a refusal to deal, i.e. refusal to license.[87] Historically, up to the late 1970s, there had been judicial and governmental agency hostility to IPRs and the commercialization of it, which amounted to a policy be issued by the Department of Justice, stating that certain clauses in patent licenses were unlawful, *per se*, under the antitrust or property misuse doctrine. These

[83] T-201/04, *Microsoft Corporation v Commission,* [2007] ECR II-03601
[84] Eagles, Ian, Longdin, Louise, pp. 170 f.
[85] Commission Decision COMP/C-3/39.530
[86] Peritz, Rudolph, p. 200
[87] Eagles, Ian, Longdin, Louise, pp. 148 f.

included the so-called "Nine No-No's". A common thread in the list was the use of an exclusive right outside of the scope that had been granted.[88]

In *Kodak*,[89] the Supreme Court touched the subject of a refusal to sell or license a patented or copyrighted product in the context of Section 2 of the Sherman Act. In the case, Kodak was alleged to have used its monopoly in the market for Kodak photocopier and micrographic parts, and by its conduct created a second monopoly in the equipment service markets. The Supreme Court stated that an IP holder is not immune from antitrust liability, and that an IP holder may refuse to license its protected product. Since Section 2 of the Sherman Act condemns exclusionary conduct that extends monopolies into separate markets, much depended on the definition of the patent grant and the relevant market. The Supreme Court concluded in the case, that there was no reported case where the Supreme Court had imposed antitrust liability for a refusal to license a patent or copyright as courts generally do not consider this refusal as an "exclusionary conduct" within the meaning of the Sherman Act. However, a right of exclusiveness was held to have limits. For instance, a patent did not offer protection if it was unlawfully acquired, nor did an IPR protect an attempt to extend lawful monopoly beyond the grant of the IPR. Consequently, Section 2 of the Sherman Act condemns exclusionary conduct that extends natural monopolies into separate markets. The Supreme Court also held that the fact that Kodak had refused to license both patented and unpatented parts demonstrated that Kodak in fact had not justified its refusal based on its IPR in the first place. With that in regard, the Supreme Court imposed antitrust liability for Kodak, based on the defendant's subjective intentions. However, in most cases defendants seem to have prevailed against antitrust claims involving refusal to license, since US courts generally rely on the non-existence of a secondary market as the basis of rejecting a plaintiff's antitrust claim, i.e. the US courts identify the primary and secondary markets as being part of the same relevant market, rather than give

[88] Nimmer, Raymond T., p. 607
[89] *Image Technical Services Inc. v Eastman Kodak Co.,* 125 F. 3d 1195 (9th Cir. 1997)

relevance to the lack of market power in the relevant secondary market. Since Kodak, there has not been any alleged monopolization of a single-brand secondary market based upon Section 2 Sherman Act.[90]

In *ISO v Xerox*[91], the Supreme Court concluded that antitrust laws could not be imposed on a patent owner even if the enforcement of such right may have anticompetitive effects. According to the Supreme Court, Xerox could not be compelled to license its protected products with regards to Section 271 (d) Patent Act, 35 § U.S.C. 271 (d) (1999), which stated that a patent owner shall not be denied relief, deemed guilty of misuse or illegal extension when the conduct constitutes a refusal to license a patent. Consequently, the Supreme Court declined to consider whether the refusal to license was subjectively motivated, making the presumption that a refusal to license was a legitimate business justification.

[90] Hendrik, Bourgeois, *How to treat aftermarkets under Article 102 TFEU*, pp. 352 f.
[91] *Independent Service Organizations v Xerox Corporation,* 203 F.3d 1322 (Fed. Cir. 2000)

4 Analysis

The investigation has demonstrated that both EU and US law acknowledge IPR as an important incentive for investment and innovation. Although compulsory licensing of an IPR could amount to excessive interference with a firm's proprietary rights, both the Supreme Court and the CJEU have found situations, in which a firm has been compelled to license. However, the approach of the two systems of law differ, where the CJEU has went with a more formalistic approach rather than the rule of reason applied by the Supreme Court. Additionally, EU competition law presumes that an abusive conduct is in contrast to competition law, with possibilities to exempt or justify such conduct either under block exemption regulations or Article 101.3 TFEU, whereas US antitrust law distinguishes between conduct either prohibited per se or treated under the rule of reason.

4.1 The Definition of the Relevant Market

One fundamental aspect to why EU and US law approach compulsory licensing from different perspectives, is the definition of the relevant market. Both EU law and US law have shown intolerance towards conduct by a firm trying to leverage its dominant position on the primary market into the secondary market. Hence, a firm is not allowed to extend the scope of an IPR into a secondary market. Even though the cross-Atlantic perspectives seem to coincide, there is a difference between how the relevant market is defined. EU authorities generally define the secondary market to constitute its own relevant market whereas US agencies generally do not separate the primary and secondary market, but rather regard them as being part of the same market. This has as an effect that conduct by a firm, which might be considered as an abuse under EU competition law, US antitrust law would instead consider the conduct to fall within the primary market of a protected IPR, not subjecting the conduct to antitrust scrutiny. The EU approach is in some ways questionable. When defining the relevant market, one aspect is

to consider the interchangeability between products. The question is however if it is reasonable or even possible to separate primary and secondary markets, as the EU has done, because of a potential consumer demand. I do believe that the answer is more complex than the formalistic reasoning applied by the CJEU. Since an IPR is a product, which has derived from substantial investments and significant risks, it is in my opinion somewhat ignorant to only consider legal aspects when dealing with compulsory licensing of an IPR.

A distinction between the primary and secondary market also results in the fact that firms active on the European market will have easier to be considered to have acquired a dominant position. With this as a starting point, it may be argued that a refusal to license equates to an abuse of a dominant position within the meaning of Article 102(b) TFEU. Since the American definition of the relevant market is interpreted wider than the European definition, it is more difficult for American firms to acquire a dominant position than it is for European firms. As a matter of fact, the conduct, i.e. the use of an IPR, of an American firm will not be subject to antitrust scrutiny.

4.2 The Assessment of Exclusionary Conduct

Both EU and US case law have shown that the mere ownership of an IPR does not confer market power upon its proprietor and that this is not considered to be in contrast to competition law. Consequently, a refusal to license within the scope of the protected IPR is as a starting point not considered as an exclusionary conduct. However, when a firm tries to leverage its dominant position in the primary market on the secondary market, both the EU and the US have recognized such conduct to be in contrast to competition law. Hence, a firm is not allowed to extend the scope of its IPR into a secondary market.

EU case law has shown that a refusal of licensing an IPR could be considered as an exclusionary practice within the scope of Article 102 TFEU under exceptional circumstances. The exceptional circumstances test as set out by *Magill/IMS* in some ways leaves it hard for firms to assess whether their conduct may be in contrast to EU competition rules. Since EU enforcement is based on the likely effects on the market, foreseeability is affected and it is somewhat unclear whether it is sufficient for a firm to merely reserve a secondary market for itself, or if it is necessary to also leverage its dominant position on the secondary market. Adding more complicity to an already complex area, *the Microsoft case*, deterred from the preconditions laid down by *Magill/IMS* and instead applied a new test of balance similar to the rule of reason approach. US case law has shown similarities to EU case law where the boiling plate for compulsory licensing under US antitrust law is considered to be whether the firm in question has tried to reserve a secondary market for itself, which is not covered by the granted IPR. This was the case in *Kodak*, where the refusal to license was considered as an exclusionary conduct only because the refusal occurred on a secondary market. However, in this judgment the Supreme Court based its judgment on the subjective intent of Kodak's refusal to license. Hence, the modern focus of an objective economic analysis of a conduct, which is subject to antitrust scrutiny, was disregarded. Much implies therefore that the reasoning in *Kodak* was not in line with modern focus for antitrust liability. This is more or less affirmed in *ISO v Xerox*, where the refusal to license in itself was considered as a legitimate business justification.

When a firm holds a dominant position within the relevant market, its conduct may be subject to antitrust scrutiny. In order for antitrust liability, the EU and the US look for exclusionary practices, which, *inter alia,* may constitute a refusal to license. Such refusal has not been regarded as an abuse in itself and EU and US case law have shown that an additional exclusionary conduct is required in order to hold a firm liable under competition law. However, the approach when assessing such conducts differs. European authorities base their decisions on likely effects on the

market whereas the American agencies base their decisions on the actual effects on the market under the rule of reason test.

One common objective for EU and US competition law is to achieve consumer welfare. Nonetheless, the EU approach also has to take in consideration the realization of an internal market, which is an objective not shared with the US. This has led the EU to apply a more permissive attitude towards limiting IPR in order to protect consumers and especially for the realization of an internal market. Regarding EU, compulsory licensing and the objective of protecting consumer welfare, I do not believe that an IPR necessarily equates to harm for consumer welfare. If EU authorities were to base their decisions on actual effects on the market just as US agencies do, this could lead to positive effects for consumers while at the same time give firms a freedom of conduct to use its IPR in whichever way it wants. Compulsory licensing has been used as a mean to realize objectives of competition and consumer welfare but it also comes with a risk that such licensing will only protect competitors. Just as the EAGCP report pointed out, an economics-based approach would consider all the different circumstances in a dynamic market and by this reflect the actual market situation. Consequently, a firm would be able to assess its future conduct on the market, by weighing in not only legal aspects but also economical ones.

4.3 The Cross-Atlantic View on Compulsory Licensing

To summarize, the view on IPRs in relation to competition law on the two sides of the Atlantic have many similarities. However, the history of the two systems of law differs, where the EU has derived from an idea of an internal market and the principle of free movement of goods. This has, *inter alia,* resulted in efforts trying to preserve opportunities for small and medium-sized firms as well as trying to protect consumer interest. The US has instead applied a more casual approach to bigger firms and encourages such firms to compete aggressively on their merits.

Case law has shown that the EU approach has been less technical and more formalistic than the US approach and in some ways the later approach might be preferable in order to keep incentives for firms to continue to invest and innovate. When challenging refusals to license with competition law, it has to be considered that this might have potential negative effects on innovation, which is the very aim for granting an IPR. Compelling a firm to license its IPR means that the time, effort and money put into the development or improvement of a product might not be worth it in the long run. If a compulsory license results in loosing the incentive for innovation, it is questionable whether this is an appropriate remedy for competition violation.

In my opinion, when arguments put forward, like the EU approach, constantly are based on a hypothetical basis, they also come with a risk of arguments not being a true reflection of reality. There may not be a practical difference between the two systems of law in the results of the application of competition law in relation to IPRs but the approach in the arguments is of fundamental value. Provided that both competition law and IPRs will increase innovation and economic growth, it is important that both bodies of law are protected and given a margin of interpretation in order to create a well functioning market. Since EU case law has been shown to be somewhat ambiguous of when the use of an IPR may be in contrast to competition rules, it will be hard for a firm to assess whether if its future business strategy involving an IPR will be in line with competition law. An uncertainty, which I believe, cannot be considered positive for innovation and economic growth.

However, just because a firm has acquired an IPR it should not, as case law on both sides of the Atlantic has pointed out, be completely protected by its granted IPR and thus immune to antitrust scrutiny. When a firm is trying to extend the scope of its IPR it is reasonable that competition rules may limit the IPR for the protection of competition objectives. For this purpose, a compulsory license may work as enforcement for such protection, as long as

it is well motivated. Additionally, it can also be argued that a rule of reason approach makes it difficult to adopt any general rules, which possibly could decrease foreseeability for actors on the market. It is however my belief that if a firm achieves to realize the main objective of consumer welfare, the means of achievement, at least regarding refusals to license, should not be the main focus but instead the positive effects for consumers. Consequently, it would be preferable if the EU applied a more economics-based approach as this could open up doors for a conduct not to be considered as an abusive conduct within the meaning of Article 102 TFEU, when the conduct in fact has positive effects.

In conclusion, where EU law is formalistic, US law is open for the possibility that even aggressive competitive behavior may amount to beneficial consequences for competition objectives and it is important to remember that compulsory licensing does not necessarily equate to being beneficial for consumer welfare. Compulsory licensing may in some cases be an efficient enforcement of competition law, but just as well, it might be just as good a solution to let dominant firms compete aggressively on their merits, by using IPRs, if the conduct results in consumer welfare.

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