

EU Copyright and Competition Law

“Under which conditions may a refusal to license
copyright-protected content constitute an abuse of a
dominant position?”

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Abbreviations

AG	Advocate General
BBC	British Broadcasting Company
CFI	Court of First Instance
ECJ	European Court of Justice
EU	European Union
GC	General Court
IBA	Independent Broadcasting Authority
IMS	IMS Health GmbH
IP	Intellectual Property
IPR	Intellectual Property Rights
ITP	Independent Television Publications Limited
NDC	NDC Health GmbH & Co.
R&D	Research and Development
RTE	Raidió Teilifís Éireann
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty

Abstract

The topic that this thesis aims to investigate is that of the intersection of intellectual property rights (more specifically copyright) and EU competition law. The research is carried out with the purpose of exploring the following two questions; namely to what extent the interest of further competition is reflected internally within the scope of copyright protection, as well as, under what conditions a refusal to license a copyright-protected work constitutes an abuse of a dominant position according to Article 102 TFEU. By accounting for the elements and the general background of copyright as well as reporting on such cases of *Magill* and *IMS Health* this thesis will be able to answer the aforementioned questions.

What has been discerned in the thesis is that the ECJ, in general, have discretion and so tends to favor the right holders and their IPRs whilst deprioritizing competition. Given the vague definition regarding 'exceptional circumstances' the Court is allowed flexibility wherein the onus is on the Court to decide on how to interpret the term as well as apply it in a given case. Besides this, the ECJ has put emphasis on exclusive rights for intellectual property, making it evidently clear that even if an undertaking refuses to license their IPRs to a third party that this in and of itself does not constitute abuse.

1. Introduction

1.1 Background

The intersection between intellectual property law and competition law has become progressively crucial in the current global economy. At the same time, it has created difficulties for decision-makers to find a workable balance in reconciling these separate law fields. The purpose of intellectual property rights is to give the innovator an exclusive right to the object of his innovative or creative efforts, but, depending on the circumstances, this may run counter to the purpose of competition law, which is to preserve the structures of the competitive market. The right holders of intellectual property may pursue and use the fruits of their intellectual labor by referencing both the intellectual property laws of their countries and the rules on competition law. One provision that is especially relevant is Article 102 (1) in The Treaty on the Functioning of the European Union, hereinafter TFEU, which prohibits dominant establishments from taking part in such commercial conduct that is injurious relative to their market power.¹ These fields of law reach a potentially delicate intersection when an establishment that holds a dominant position refuses to provide a license for its creation to a third party. This particular scenario raises sensitive policy issues and requires that businesses are not discouraged from investing in research and development while at the same time preserving efficient and undistorted competition in the internal market. The question of whether a third party can use Article 102 TFEU to obtain a license for intellectual property rights is especially vital in technology industries, where innovation is essential to successfully operate and compete on the market. The European Court of Justice, hereinafter ECJ, advanced the so-called doctrine on ‘exceptional circumstances’ in the *Magill* case to provide a legal framework that allows for room for maneuver,² which in turn resulted in compulsory licensing. This jurisprudence has been developed through different cases that involve dominant businesses’ refusal to license their intellectual property.³ Adopting an approach that seeks to intervene in such cases disproportionately could result in interference with the encouragement of progress in innovation, while failure to respond to

¹ The consolidated version of the Treaty on the Functioning of the European Union (TFEU), Official Journal (OJ) 2012, C 326/89.

² Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. 1-743, EU:C:1995:98.

³ *Ibid.*

anti-competitive denial to license could inhibit technological advancement as well as hinder the growth of the variety of services and products offered on the market. It is thus crucial that the assessment of the purported anti-competitive rejection of license is carried out in a manner that protects the interests of both individual businesses to voluntarily dispose of their intellectual property, hereinafter IP, and the public interest in retaining free and undistorted competition for the welfare of society at large.⁴

It is observed that there is a discrepancy between IP and Competition law - especially in regards to the exclusive economic rights that are afforded by copyright to a rights-holder and that of abuse of dominant position under Article 102 TFEU.⁵ Competition law seeks to promote and stimulate fair competition, leaving it undistorted by prohibiting undertakings from abusing their dominant positions by refusing to license their IPRs. Whereas copyright and other IP rights seek to protect the rights-holders by rewarding them exclusive economic rights.⁶ The internal balance between the two fields has in certain exceptional circumstances not been sufficient, given that the ECJ has been reluctant to consider a refusal to license IPRs as being necessarily abusive and as a result, sided with the owners/holders of IPRs to the detriment of competition on the internal market.

1.2 Purpose and research question

The purpose of this thesis is to investigate the intersection between EU Copyright law and the prohibition in Article 102 TFEU on abuse of a dominant position, especially under which conditions a refusal to license a copyright-protected work could constitute an abuse of a dominant position under Article 102 TFEU. In addition to this, the interest in competition and how it is reflected internally within the content and scope of copyright protection will also further be explored.

1. To what extent is the interest of further competition reflected internally within the scope of copyright protection?
2. Under what conditions does a refusal to license a copyright-protected work constitute an abuse of a dominant position according to Article 102 TFEU?

⁴ Ibid.

⁵ Per Jonas Nordell, *Rätten till det visuella*, 1st edition, (Jure Publishers, 1997), p. 400-410.

⁶ Marianne Levin, *Lärobok i immaterialrätt*, 12th edition, (Norstedts Juridik, 2019), p. 69-75.

1.3 Materials and Method

The methodology used throughout this thesis is a legal scientific (“dogmatic”) method as reflected in the EU legal method. When applying the EU legal method, the relevant materials include primary and secondary EU law as well as case law from the ECJ, such as the *Magill* case and the *IMS Health* case. References will also be made to relevant Commission decisions in the area of competition law and refusal to license and intellectual property right, including the Commission decisions in the above-mentioned cases. In addition, references will be made to the opinions of Advocate Generals as well as relevant law journals and articles, and literature on the topic.

The legal scientific method

This method is not without its controversies since the opinions of legal scholars are divided on what this method entails. However, the predominant view on the legal scientific method is that - at its core - it is meant to be applied to interpret and present the law as it stands right now, known in Latin as *de lege lata*.⁷ This method can be described as research that aims to address the principles, rules, and concepts that govern legal fields or institutions in a systematic way. Furthermore, this method is utilized in analyzing the relationship between said rules, concepts, and principles in order to solve any unclearness and disparities in the current legal framework.⁸ There are three elements to the definition of the legal scientific method, first of all, it is understandable on its own, allowing legal scholars to address official lawmakers on their terms and communicate as if they are legislators or judges. When reviewing the present state of the law, it is of distinct significance that the sources used, follow the system of the internal hierarchy. The EU judicial order is seen as an independent and systematic normative system, and therefore it is relevant to apply a legal dogmatic method to this thesis.⁹ The ranking of norms in the EU law is multifaceted and comprises primary law (the treaties and its articles), secondary law (the regulations, directives, decisions, recommendations, and opinions), the standard legal principles, and finally the non-binding normative documents.¹⁰ Besides the primary and secondary law, the EU’s case law is a significant source of law that makes up a necessary part of interpreting the otherwise

⁷ Aleksander Peczenik, *Juridikens metodproblem: rättskällelära och lagtolkning*, 1st edition, (Norstedts Juridik AB, 1980), p. 8-10.

⁸ Jan M Smits, ‘What is legal doctrine? On the aims and methods of legal-dogmatic research’ (2015) Maastricht European Private Law Institute Working Paper No. 2015/06, p. 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088>, accessed 2 April 2023.

⁹ Ulf Bernitz & Anders Kjellgren, *Europarättens grunder*, 7th edition, (Norstedts Juridik, 2022), p. 35-40.

¹⁰ Jörgen Hettne & Ida Otken Eriksson, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, 2nd edition, (Norstedts Juridik, 2011), p. 39-45.

abstract terminology of both the treaties and the secondary law. In order to understand the European Court of Justice's case law, one has to consider the different methods of interpretation when approaching a case. The ECJ does not rely solely on a literal interpretation when interpreting a provision, the court instead tries to explain the meaning of a legal rule by determining its purpose, a so-called teleological interpretation, and it also takes note of the context in which the rule exists, a so-called systematic-contextual interpretation.¹¹ The Court relies heavily on legal reasoning that is contextual and teleological which as a result has contributed to a dynamic interpretation of the EU law, this in turn however has garnered criticism accusing the Court of intervening and inhabiting the role of making laws and performing judicial activism.¹² Furthermore, a ruling needs to be read and observed in light of and in relation to previous and future judgments. The ECJ may not be officially bound by its preceding judgments, however, it does still rely on its earlier case law and it continues on to further develop already established rules and principles in its ensuing rulings.¹³

The EU legal method

The legislative process of the EU consists of differing interests and of negotiations and compromises of a political nature which may make it more obscure to distinguish the European legislature's intentions.¹⁴ Regardless of the limited use of the preparatory work in the legal reasoning of the EU, the preambles and the recitals of a directive or regulation may in fact address the objectives of the jurisprudence and contribute with guidance on how different articles are meant to be interpreted and applied by the EU Courts. Furthermore, the communications, guidelines, and discussion papers including other formal documents that have been issued by EU institutions, namely the Commission, are helpful in deciphering the aim and purpose of the European legislature. Although the legitimacy of these non-binding documents of a legal nature, also known as soft law, is not an explicit source of law, their importance, however, has over time increased steadily.¹⁵ The European Courts are not legally obligated by communications, official documents, or guidelines that have been enacted by the Commission. However, they may use the following as a helpful reference point that will

¹¹ Case C-283/81, *CILFIT* [1982] E.C.R. 3415, EU:C:1982:335, para. 20-21; Koen Lenaerts & José A. Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the ECJ", (2014), *Columbia Journal of European Law*, p. 5-10.

¹² Ulf Bernitz & Anders Kjellgren, *Europarättens grunder*, 7th edition, (Norstedts Juridik, 2022), p. 35-40.

¹³ Jörgen Hettne & Ida Otken Eriksson, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, 2nd edition, (Norstedts Juridik, 2011), p. 37-38 and 49-50.

¹⁴ *Ibid.*, 110-115.

¹⁵ Alison Jones and others, *EU Competition Law: Text, Cases, and Materials*, 7th edition, (Oxford University Press, 2019), p. 115-120.

guide the interpretative framework¹⁶, so long as it does not deviate from the Treaties provisions nor change or come in conflict with either EU Courts case law or the secondary law.¹⁷ According to the ECJ, the approval of such soft law instruments by the Commission dictates certain responsibilities on the manner in which it may act on the rules of practice and constricts the Commission and its ability to exercise its authority as granted by the Treaties.¹⁸

The thesis is based on the legal foundation of the EU primary law, specifically Article 102 TFEU. This article is however vague in its wording and as such requires and needs to be better understood through for example case law from the GC and the ECJ as well as the Commission's decision are of significance in order to explain the way in which the article has been interpreted in both practical and specific cases. The assessment of a refusal to license being of an abusive nature has been defined and documented by a series of cases from both the ECJ and the GC, but this thesis will focus specifically on the copyright aspect of said case law. Therefore the *Magill* case and the *IMS Health* case will be of importance for this thesis in particular. The Commission's authority in enforcing the rules on competition is also of interest since their notices, communications, publication of guidelines, and decisions in individual cases provide relevant guidance on the interpretation of the competition rules. Moreover, different articles and literature that have been written by legal scholars and practitioners including the opinions of Advocate Generals constitute an essential piece of the thesis and provide differing opinions on the juridical issues.¹⁹ The opinion of the Advocate General is used to provide guidance regarding the interpretation and content of the EU law, it is also used in this paper to further deepen and nuance the criteria of the term exceptional circumstances. The literature used in this thesis will provide an in-depth view of the intersection between that of Copyright Law and EU Competition Law and how these two go together. The literature will also provide for and fill gaps that may occur and give an overall context of the jurisprudence as it stands.

1.4 Current research

The research conducted on the intersection of copyright law and EU competition law centers on a few select literary works, such as Dan Eklöfs dissertation from 2004 by the name of

¹⁶ Case C-310/99, *Italy v. Commission* [2002] E.C.R. I-2289, EU:C:2002:143, para. 50-52.

¹⁷ Case C-309/94, *Nissan France and Others* [1996] E.C.R. I-0677, EU:C:1996:57, para. 21-22; Case T-114/02, *BaByliss v. Commission* [2003] E.C.R. II-1279, EU:T:2003:100, para. 143-144.

¹⁸ Case C-51/92 P, *Hercules Chemicals v. Commission* [1999] E.C.R. I-4235, EU:C:1999:357.

¹⁹ Jörgen Hettne & Ida Otken Eriksson, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, 2nd edition, (Norstedts Juridik, 2011), p. 115-120.

*Upphovsrätt i konkurrens - särskilt om tvångslicensiering*²⁰ that is still relevant to this day. Other influential books in this legal area are Jonathan D.C. Turners' book *Intellectual Property and EU Competition Law* from 2015, Steven Anderman and Hedvig Schmidts' book *EU Competition Law and Intellectual Property Rights - The Regulation of Innovation* from 2011, and the book on *Intellectual Property and Competition Law* edited by Steven Anderman and Ariel Ezrachi from 2011. These works are primarily referred to and contribute significant importance throughout the thesis.

1.5 Structure

The thesis outline consists of the following chapters. The first chapter, i.e. this chapter, is an introduction to the thesis and the topic that will be covered. Chapter two explains the different elements of copyright as it stands. Chapter three consists of an account of the two relevant cases of *Magill* and *IMS Health* regarding situations where undertakings can rightfully refuse to license their IPRs. Chapter four deals with the intersection between Copyright Law and EU Competition Law. Chapter five is the final chapter of the thesis and is devoted to the discussion and analysis of the findings throughout the paper. This chapter links back to the thesis's purpose and answers the questions raised in the thesis's opening chapter.

²⁰ The English translation of the book title = "Copyright in competition - especially on compulsory licensing".

2. Copyright and its different elements

2.1 Introduction

The following chapter highlights the relevant aspects of copyright protection and its different elements. The chapter will provide a description of the copyright that includes the following: the originality requirement, the construction of the exclusive right with the right of reproduction and the right of communication to the public, as well as adaptations and new and independent works, exceptions and limitations and finally the term of protection. These aspects make up the fundamentals of copyright and provide a foundation for the subsequent chapters in which copyright will be discussed and analyzed in relation to competition law.

2.2 The originality requirement

The originality requirement is one of the requirements placed on a phenomenon in order for it to enjoy copyright.²¹ The use of the term in this narrow sense does not sit well with the general use of the word, where different phenomena can have different degrees of originality. This also applies to works that vary greatly in terms of the level of originality. To characterize the concept of originality, the terms individuality, peculiarity, or distinctiveness are often used.²²

The requirement of originality is an absolute concept in the sense that a court has to decide in each individual case whether copyright protection exists or not. Unlike the assessment of the scope of protection, which can vary, originality is either present or not. However, the requirement of originality is relative in the sense that it is influenced by actual market conditions when interpreted and applied in practice.²³ The copyright considerations must be weighed against the interest of a functioning competition.²⁴ In markets of a tangible industrial nature, such as computer software and applied arts, completely different considerations apply

²¹ Jan Rosén, *Medie- och immaterialrätt*, 1st edition, (Iustus, 2003), p. 20-25.

²² *Ibid.*

²³ Per Jonas Nordell, *Rätten till det visuella*, 1st edition, (Jure Publishers, 1997), p. 400-410.

²⁴ Marianne Levin, *Lärobok i immaterialrätt*, 12th edition, (Norstedts Juridik, 2019), p. 69-75.

to that, in for example the realm of “pure art”.²⁵ Even in markets of an industrial nature in and of themselves, there can be various motivations that can influence the requirement of originality in either a tightening or easing direction. Especially if the possibilities for variation are limited, a stricter requirement may be required from a competitive point of view. On the other hand, not only can variation possibilities be taken into account, but an overall analysis including the actual market conditions must be considered. In this context, the possibilities for other forms of protection for IPRs or rules on unfair competition probably play a significant role.²⁶

Especially in those markets where competitive conditions are conditioned by opportunities for actors to obtain a reasonable return on investment, it may be appropriate to have a lower requirement for originality. This applies especially in markets where systematic imitation is a fact. In the field of applied arts, for example, it can be said, somewhat pointedly, that copyright easily tends to be transformed into the protection of the kind we know from the doctrine of unfair competition. The originality requirement is lower in order for a functioning market to be established.²⁷ On the other hand, the need for freedom sometimes has to be decided. In the field of applied arts, for example, three-dimensional objects, such as furniture, are contrasted with two-dimensional ones, such as fabrics and wallpaper. The possibilities for variation are considerably greater in the latter case, which is why the requirement of originality may be applied with different yardsticks.²⁸

Protection can hardly be granted to products where an exclusive right, as a result of a lack of originality that gives expression to free and creative choices, would lead to strong monopoly situations. The originality requirement can be made more distinct in order to facilitate a functioning market. An individualized assessment must therefore be made. Regardless of the broad scope of copyright and regardless of the low requirements for copyright protection, it is not always so easy to determine whether something qualifies for exclusive rights.²⁹ The legal text does not provide much guidance for the assessment in the concrete case... And it may be noted that the delineation need not be the same for the entire area. This balancing of scales is, for example, very different depending on whether you are in the purely artistic field or whether it is about phenomena of a more industrial nature, including applied arts and computer programs. Industrial phenomena are essential for business and legal protection and

²⁵ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 32-35.

²⁶ *Ibid.*, p. 32-35.

²⁷ *Ibid.*, p. 32-34.

²⁸ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 32-35.

²⁹ Marianne Levin, *Lärobok i immaterialrätt*, 12th edition, (Norstedts Juridik, 2019), p. 69-74.

therefore affect competitive conditions, which should be taken into account. The fact that the law seems to set the same requirement - originality - on all types of work should not lead to the misconception that everything can be judged in a similar way.³⁰

The inherently elastic requirement for originality is generally not strict. Within EU law, the criterion used is that the work must be “the author’s own intellectual creation”. The wording is found in a series of directives issued by the EU institutions and refers to computer programs, databases, and photographic works.³¹ No international uniform standard in the area is explicitly formulated in any of the international instruments.³² Possibly, the regulations in the Agreement on Trade-related Aspects of Intellectual Property Rights, hereinafter TRIPS, and the WIPO Copyright Treaty, hereinafter WCT, can be said to constitute a harmonization or mandate a minimum standard in relation to database structures. It provides that “*compilations... which by reason of the selection or arrangements of their contents constitute intellectual creations, are protected as such*”.³³ At first glance, the EU legal criterion seems to imply a primarily subjective requirement. Practice from the ECJ states that there is a two-stage test requirement for identifying an authorial work³⁴; namely, if there is an exercise of free and creative choices in the creation of a work and if it bears a ‘personal mark’ of the creator.³⁵

Such an objective interpretation also does not conflict with the wording of the criterion, which assumes that a creation from an intellectual point of view originates from the creator. Phenomena that are intellectually a part of the public domain, even in the way of expression, can hardly originate from a certain author unless they have lived a completely isolated life without any impressions from the outside world. This should not be understood as meaning that the requirement of originality should include any provision of objective novelty, but only that there is a wide-ranging field that is too trivial or generally covered and used to be protected by copyright; a *domain public* if you will. However, uncertainty must be considered

³⁰ Ibid.

³¹ see Directive 2009/24/EC on the legal protection of computer programs Art. 1(3), Directive 2006/116/EC on the term of protection of copyright and certain related rights Art. 6 (see also the amended version in Directive 2011/77/EU), and Directive 96/9/EC on the legal protection of databases Art. 3(1).

³² Jane C. Ginsburg, “International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?” (2000), Columbia Law School, p. 275-278.

³³ WCT Art. 5, TRIPS Art. 10, see also the Berne Convention Art. 2(5).

³⁴ Such works include any combination of words, sounds, movement, color, etc. even if it is part of a larger work. Photographs, whether simple or realistic, as well as portraits. Databases, for example collections of independent works, data or other materials that are arranged in a systematic or methodical way and is individually accessible by electronic or other means, and so on and so forth.

³⁵ Pila & Torremans, *European Intellectual Property Law*, 2nd edition, (Oxford University Press, 2019), p. 253-266.

as to what is to be considered “the author’s own intellectual creation”. The criterion’s more detailed meaning may be worked out in the EU Court’s future interpretation.³⁶

During the time of the Magill case, the thresholds in copyright protection differed between common law jurisdictions and civil law.³⁷ These differences were found by the Commission to have negative effects on the free movement of database products - hence giving rise to a uniform threshold where the harmonized standard of originality and thus copyright protection has been elevated and strongly reinforced through the use of the author’s own intellectual creation.³⁸ This, in turn, explains why the case of Magill and the copyright protection given to the television program listings can never be redone in the present day since it would demand the same TV tableaux to be more creative.

2.3 The construction of the exclusive right

The authors have historically had limited rights to their works. The term of protection has been short and they have had limited legal possibilities to influence how their works are used and exploited by the public. As technological developments have led to the public’s ability to use and utilize works increased, the author has received increasingly greater protection in the legislation. Article 2 of Directive 2001/29/EC, also known as the Copyright Directive or InfoSoc Directive, stipulates the author’s exclusive rights which describe the economic rights in which the author owns his work. It states that the author has the exclusive right in making copies of their own work as well as making the work available to the public.

The authors must be provided with sufficiently strong protection for their achievements and have an opportunity to get paid for their work and earn a living from their creation of work. Copyright, therefore, gives the authors an exclusive right to dispose of their work in a number of respects. The author’s right to dispose of his work is mainly stipulated in section 2 of the InfoSoc Directive.³⁹

In Article 3.1 § of the InfoSoc Directive it is stipulated that copyright includes, with the limitations found in chapter 2 of the same act, the exclusive right to dispose of the work by making copies of it and by making it available to the public. It can take place in an original or changed condition, in translation or adaptation, in another form of literature or art, or in

³⁶ Ibid.

³⁷ Terence Prime, *European Intellectual Property Law*, 1st edition, (Ashgate Publishing, 2000), p. 259-261.

³⁸ Catherine Seville, *EU Intellectual Property Law and Policy*, 2nd edition (Edward Elgar Publishing, 2018), p. 41-42.

³⁹ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 80-82.

another technique. The material things you own can be disposed of by selling, giving, or throwing them away, but when something is intangible, such as the right to one's own work, the implication is that you can hand over the right to dispose of the work, but you retain the non-material right at all times. Copyright thus has both a non-profit and an economic side to it.⁴⁰ The economic rights to a work give the author exclusive rights to dispose of their work.⁴¹ No one other than the author may use their work to make money from it, except in cases where the author has given their permission. It is the author who decides whether the work will be made public, who will be allowed to use the work, and how the work may be used. More specifically the ECJ has in its case law made a point that copyright is a right to prohibit others from using the creator's work for reproduction or distribution to the public.⁴²

The fact that copyright and other IPRs provide exclusive rights and not just a compensation or remuneration right has been emphasized as an important starting point in cases concerning compulsory licenses. The ECJ already explained in the *Volvo v. Veng* case that:

“It must... be emphasized that the right of the 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. It follows that an obligation imposed upon the proprietor of a protected design to grant to incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right and that a refusal to grant such a license cannot in itself constitute an abuse of a dominant position.”⁴³

The IPR in question, the design right, was declared to be of a traditional intellectual property nature, i.e. an exclusive right and not only a compensation right. Converting the institute from exclusivity to only a compensation claim would deprive the copyright holder of the “substance” of the right, the court explained.⁴⁴

The EU Court's description in the quoted statement may have good reasons for it, but at the same time is something of an obvious statement. It really only reflects the characteristic principle that runs through the entire intellectual property field: exclusivity is the starting point and the basis of the IP figure. In its basic legal construction, IPRs are an exclusive right. Although the right is worded negatively, the purpose is to pave the way for it to also be

⁴⁰ Kerstin Ahlberg, *Din upphovsrätt och andras*, 4th edition, (Norstedts Academic Publishing, 2008), p. 15-18.

⁴¹ Ibid.

⁴² C-301/15 *Soulier and Doke* [2016] EU:C:2016:878, para. 29.

⁴³ C-238/87 *Volvo v Veng* [1988] E.C.R I-6211, EU:C:1988:477, para. 9.

⁴⁴ Ibid.

exercised positively and exploited through licensing, etc.⁴⁵ The right holder has the opportunity to prosecute infringements and can thus limit the freedom of action of other actors. Strictly speaking, there is neither a positive right nor an obligation to commercialize the right. In practice, however, the owner receives compensation by transferring his rights or disposing of the work himself on the market. Furthermore, the exclusivity entails a strong control over the forms of commercialization and not just the size of the compensation. As such, on a closer inspection, the *raison d'être*⁴⁶ of Copyright is not only an opportunity for the author to obtain compensation for the exploitation of his work. The construction of the InfoSoc Directive also aims to ensure that the author can in a certain way control the market for his work by preventing or deciding if, when, where, and how his work may be used.⁴⁷

The commercial control and freedom of action that comes from exclusivity are key elements. The power that results from the ownership of rights forms the basis for the owner's negotiations and transactions with other parties. The exclusivity also serves as the basis for the business ideas and market strategies that the holder seeks to implement, which in itself is synonymous with competition.⁴⁸ This fundamental control function is overturned in the event of a transformation from exclusive rights to compensation rights. Basic market conditions are disrupted to the owner's disadvantage. Compulsory licensing is a very far-reaching intervention, especially if compulsory licensing takes place in favor of direct competitors but also in other cases.⁴⁹

In this context, the public utility function of exclusivity should not be overlooked, something the Court of First Instance, hereinafter CFI, did not do in the case of *IMS Health* either:

*“The fundamental rationale of copyright is that it affords the creator of inventive and original works the exclusive right to exploit such works... thereby ensuring that there is a ‘reward for the creative effort’. Copyright is of fundamental importance both for the individual owner of the right and for society generally... To reduce it to a purely economic right to receive royalties dilutes the essence of the right and is, in principle, likely to cause potentially serious and irreparable harm to the right holder.”*⁵⁰

⁴⁵ C-262/81 *Coditel v Ciné-Vog Films* [1982] E.C.R. I-3381, EU:C:1982:334, para. 8.

⁴⁶ *raison d'être* = the right to exist.

⁴⁷ Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743, EU:C:1995:98, Opinion of AG Gulmann, para. 58.

⁴⁸ Case C-481/01, *IMS Health* [2002] E.C.R. I-5039, EU:C:2002:223, para. 130.

⁴⁹ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 264-266.

⁵⁰ Case C-481/01, *IMS Health* [2002] E.C.R. I-5039, EU:C:2002:223, para. 125.

Regarding the distinction between exclusive rights and compensation rights, the CFI in *IMS Health* formulated the matter in a similar way as the European Court of Justice did in the case of *Volvo v. Veng*. A clarification of the statement of the principle in *Volvo v. Veng* is that the public utility element of exclusivity in *IMS Health* was highlighted in parallel with the owner's interests; implicitly, such an assumption was behind the statement in *Volvo v. Veng*. The principle of exclusivity was contrasted with a pure right of compensation, whereby it was emphasized that a transformation into a right of compensation would fundamentally change and erode the way the IP system functions and the value of the rights. The EU courts' repeated markings that IPRs are a construction of exclusive rights and not only a compensation right - to the benefit of both the individual and society - can be seen as a recommendation about restrictiveness, but not necessarily about immunity. Even in such circumstances where the author has not made full use of his work, for example by not disseminating it commercially to the public, it does not change the author's exclusive right to either permit or prohibit reproduction or transmission to the public of the work.⁵¹

2.3.1 The right of reproduction

In Article 2 of the InfoSoc Directive it is stipulated that the right of reproduction includes any direct or indirect as well as temporary or permanent production of copies, regardless of the form or by which method it takes place and regardless of whether it takes place in whole or in part.

The author's right of reproduction means that the author alone can decide whether they want to lay down or fix their work in an object that in turn makes it possible for others to share the work. The right to make copies means that the author has an exclusive right to produce copies of the work. The concept of exemplar means every object in which the work is laid down or fixed, regardless of what technique has been used. For example, a literary or musical work can be found in manuscripts, prints, gramophone, film, or tape recordings or stored in a database. Copies can also be printing sets, molds, and other templates that can be used to produce copies of the work.⁵² A copy of a work of art can exist both as an original and a copy. If a work is stored in a computer it also includes making copies of the work. The right of the author is applicable to the disposable work in either its original or altered state. By that it meant that the author still has exclusive rights to the work even though the work has been

⁵¹ Case C-301/15, *Soulier and doke*, EU:C:2016:878, para. 43.

⁵² Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 83-85.

changed for different reasons, for example, to fit in with teaching purposes.⁵³ An example of a work that has received a changed condition is different kinds of images. Images may differ significantly from the original but still counts as a copy of the work. A photograph of a building is thus one copy of the construction work and thus covered by the author's right to multiply their work.⁵⁴

The right of reproduction can take place with any technique or in any form. It makes it possible to include technologies that exist today, but also technologies that may be invented in the future are also covered by the provision. There are no minimum or maximum requirements for the number of produced copies of the work.⁵⁵ A part of a work is also one copy, such as a quote from a book, and is thus covered by reproduction rights.⁵⁶

2.3.2 The right of communication to the public

In Article 2.3 of the InfoSoc Directive, it is stipulated that the work is made available to the public when the work is transferred to the public, when the work is performed in public, when copies of the work are shown publicly and when copies of the work are offered for sale, rental, lending or distribution to the public. In point 1 of the same paragraph, it is stipulated that the work is transferred to the public when the work on a wired or wireless path is made available to the public from a location other than where the public can take part in the work. Transfer to the public includes transfer that takes place in such a way that individuals can access the work from a place and at a time that they themselves choose.

The concept of transmission to the public was introduced in Art. 3 of the InfoSoc Directive. The term refers to the making available of works to the public that takes place remotely. Only distance transfers are covered by the transfer right. The making available takes remotely when the work is made available to the public via wired or wireless means from a place other than the one where the public can partake in the work.⁵⁷ Transmission to the public includes transmission that takes place in such a way that individuals can access the work from a place and at a time of their choosing. The right to transfer works to the public includes all types of works. If the work is made available to the public in the same place as the one where the

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Jan Rosén, *Upphovsrättens avtal - Regler för upphovsmän, artisters, fonogram-, film- och databasproducenters, radio- och Tv-bolags samt fotografers avtal*, 3rd edition, (Norstedts Juridik), p. 120-123.

⁵⁶ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 83-85.

⁵⁷ Marianne Levin, *Lärobok i immaterialrätt*, 12th edition, (Norstedts Juridik, 2019), p. 55-56.

public is, there is no question of transfer to the public. An example of this is when a play is performed in front of an audience present or playing music in a public place.⁵⁸

A transfer includes any distance transfer of works from one location to another. A transfer to the public can be, for example, music, film, or a painting. The concept is technology neutral. This means that all existing and future technical methods will be covered by the concept of transmission to the public. The transfer can take place both wirelessly or wired and be both digital or analog.⁵⁹ The typical cases of a transfer to the public are if one musical work or a film work is broadcast on radio or television or if a literary work is posted on a web page on the internet. If a person expressly requests access to the work, it means also transmission to the public. A typical example of such a situation is when a work is located posted on the internet and the public can choose to take part in the work there.⁶⁰ Transfer to the general public also includes situations that occur on demand. On-demand situations involve that the work is made available at the request of the public from a place and at a time that they themselves choose.⁶¹

In order to determine what is to be considered an “other place”, an overall assessment must be made if the place where the work is made available and the place where the work is received are managed by the same natural or legal person or not. In the latter case, it is considered a question of “other place”. This means that transfers that take place between different apartments in the same building or works that have been made available between different hotel rooms are considered to be distance transmissions.⁶²

2.4 Adaptations and new and independent works

Art. 2.6 of the Berne Convention statutes that whoever translated or adapted a work or transferred it to other literature- or art has copyright to the work in this form, but he does not have access to it beyond that in violation of the copyright of the original work. If someone in free association with a work has created a new and independent work, is his copyright not dependent on the right to the original work.⁶³

⁵⁸ Ibid, p. 77-80.

⁵⁹ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 90.

⁶⁰ Ibid.

⁶¹ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 90.

⁶² Jan Rosén, *Upphovsrättens avtal - Regler för upphovsmän, artisters, fonogram-, film- och databasproducenters, radio- och Tv-bolags samt fotografers avtal*, 3rd edition, (Norstedts Juridik), p. 125-130.

⁶³ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 91.

Three types of so-called second-hand works are covered in the article. Common is that the works retain their appearance after having been adapted, meaning they retain that of the original author's original creation but transfers it to another form of expression. An adaptation is when a work is kept in the same form but reworked, for example by simplifying a book or performing a musical piece with instruments other than the original work.⁶⁴ One transfer to another literature or art can be exemplified by a book being recorded in a film version or vice versa.⁶⁵

In order for a work to achieve protection according to the article, it is required that it achieves a level of personal creation. For a work to achieve personal creation, the work must be the result of the author's own intellectual creation and must be so distinctive that it can be distinguished from other works.⁶⁶ Important to point out regarding the level of personal creation is that it is not about the artistic quality of the work but only its individual quality. In the case of new works, there is also a requirement for independence, but this can be waived because natural reasons are not subject to revisions.⁶⁷

The author of a revision has protection for the work in its new form, i.e. if a person were to translate a book from one language to another, that author is entitled to the wording and choice of words in their translation, and the same can be said about a person who transfers the contents of a book to a film has the right to the film's production. Their right is, however, still dependent on the original creator. Permission is still required from the original author in order to publish or reproduce the work.⁶⁸ If a third person wants to publish one translation of a work, they require permission from both the original author, as well as the author of the translation. In order for protection to be achieved according to the article, it is further required that the original work which was the basis for the adaptation achieves a level of personal creation. However, it is not required that the earlier work is still protected, either adaptation of works whose term of protection has expired can achieve protection. The disposal of the adaptation will then not be dependent on permission from the author of the original work.⁶⁹

⁶⁴ Ibid, p. 95-100.

⁶⁵ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 95-100.

⁶⁶ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 66-70.

⁶⁷ Ibid, p. 67-68.

⁶⁸ Henry Olsson, *Copyright - svensk och internationell upphovsrätt*, 10th edition, (Norstedts Juridik, 2018), p. 97-100.

⁶⁹ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 63-66.

2.5 Exceptions and limitations

In the EU directive on the information society, InfoSoc, it is expressly determined for several exceptions that a prerequisite is that the use is neither directly nor indirectly commercial or for profit. Examples include research and library and archive operations.⁷⁰ In cases where it is not explicitly stipulated that the practice must be non-commercial, it is a matter of exploitation where the commercial element is typically less prominent or non-existent. For example, the production of copies may be done in legal proceedings. Even in certain cases where the use may not be of a commercial nature, it is also stipulated that reasonable compensation must be paid. Examples include reproduction for individual use and for use in hospitals. With regard to the exception for the reproduction of technical copies, it is stipulated that the creation of the copy must have no independent economic significance.⁷¹

There is another exception/limitation brought up by the InfoSoc Directive, namely the three-step rule that involves a balancing act between individuals, the public, and the authors. It means that there are three criteria or three “steps”, that must be met before a restriction can be made that is justified under national law.⁷² The three-step rule is included both in Art. 9.2 of the Berne Convention and in Art. 5.5 of the InfoSoc Directive. The purpose of the three-step rule is to constitute a guarantee for the authors, to give them a certain minimum of rights, and prevent these from being restricted to an excessive extent.⁷³

When the member states legislate on exceptions or restrictions, they should take into account the increasing economic effects that the exceptions or restrictions that one wants to introduce may have in the new electronic environment. The first criterion is “certain special cases” which means that a limitation of the exclusive right must be clearly defined. By that, it meant that the rule may not be too generally written.⁷⁴ The second criterion of the three-step test is that the restriction should not contravene the normal use of the work. The intended restriction must not be included to conflict with or compete with the author’s right to economically exploit his work.⁷⁵ This means that there may arise new opportunities to exploit rights that may have economic or practical importance, which means that the restrictions that exist today can be considered to go against the three-step rule. These then need to be changed to agree

⁷⁰ Art. 5.2 in the InfoSoc Directive.

⁷¹ Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 82-84.

⁷² Dan Eklöf, *Upphovsrätt i konkurrens - särskilt om tvångslicensiering*, 1st edition, (Jure Publishers, 2004), p. 94.

⁷³ Paulien Wymeersch, “EU Copyright Exceptions and Limitations and the Three-Step Test: One Step Forward, Two Steps Back”, (2023), GRUR International Journal of European and International IP Law, p. 25-30.

⁷⁴ Christophe Geiger and others, “The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law”, (2014), vol. 29, issue 3, American University International Law Review, p. 591-600.

⁷⁵ Ibid.

with the second step of the three-step rule. The third criterion of the three-step rule is that the restriction must not unreasonably interfere with the legitimate interests of the right-holder. The legitimate interests must therefore be justifiable and the restrictions must not harm the author.⁷⁶

2.6 Term of protection

The term of protection of copyright and related rights are as follows in accordance with Directive 2006/116/EC and as amended in Directive 2011/77/EU:⁷⁷

- Article 1 in Directive 2006/116/EC (as amended) states that such works that are literary and artistic shall be protected for the duration of the author's life and an additional 70 years after their death;
- Article 3(1) in the Directive 2006/116/EC (as amended) states that the rights of performers shall be protected for 50 years from the date of the performance, and regarding the publishing or communication of a recording to the public within this time period, an additional 70 years for sound recordings and 50 years for other recordings;
- Article 3(2) in the Directive 2006/116/EC (as amended) states that sound recordings shall be protected for 50 years from when it was first made and if it is published or lawfully communicated to the public within that same time period an added 70 years of protection can be applied;
- Article 3(3) in the Directive 2006/116/EC (as amended) states that a fixation of a film shall be protected for 50 years from its first publication. If the fixation of such a film is published or lawfully communicated to the public within this time period, then another 50 years of protection is applicable;
- Article 3(4) in the Directive 2006/116/EC (as amended) states that broadcasting rights shall be protected for 50 years from when it was first transmitted;

⁷⁶ Christophe Geiger and others, "The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law", (2014), vol. 29, issue 3, American University International Law Review, p. 591-600.

⁷⁷ see Directive 2006/116/EC for all the relevant articles, and Directive 2011/77/EU for any potential amendments.

- Article 4 in the Directive 2006/116/EC (as amended) states that previously unpublished works shall be protected for 25 years from the time when it was first published.⁷⁸

⁷⁸ Jonathan D.C. Turner, *Intellectual Property and EU Competition Law*, 2nd edition, (Oxford University Press, 2015), p. 319.

3. Article 102 TFEU in situations of refusal to license and IPR

3.1 Introduction

The following chapter highlights two significant legal cases, namely *Magill* and *IMS Health* on the topic of refusals to license IPRs - more specifically on copyright. The chapter will provide a background to the two cases and the judgments by the ECJ in each of the cases. The cases provided in this chapter will treat Article 102 TFEU and investigate the conditions on 'exceptional circumstances' and 'new product'. There will be references made to cases such as *Bronner*, *Volvo v. Veng*, and *Microsoft* - however, these will not be delved into deeper since the case on *Bronner* does not necessarily concern IPRs, whereas the *Volvo v. Veng* case concerns the design aspect of IP law, and *Microsoft* focuses on interoperability, which the thesis does not take into consideration. To conclude the chapter there will be an analysis of the two cases.

3.2 C-241/91 P and C-242/91 P - The Magill case

The *Magill* case is about Irish and British television companies that refuse to license their television program schedules that were copyright protected. The UK and Irish legislation respectively protected not only such copyrightable inventions that are artistic and literary works that result from intellectual effort, but the legal framework also protects information compilations, for example, listings of TV-broadcasted programs.⁷⁹

The television broadcasting company Raidió Teilifís Éireann, hereinafter RTE, had a lawful monopoly in Ireland, whereas their English equivalence, the British Broadcasting Company, hereinafter BBC, and the Independent Broadcasting Authority, hereinafter IBA, had a legal duopoly in the UK as well as Northern Ireland. Many viewers located in Ireland and Northern Ireland could access the channels of the aforementioned television broadcasters. BBC and RTE had copyright ownership of their program schedules respectively, whereas Independent Television Publications Limited, hereinafter ITP, owned the copyright in IBA's TV listings. The broadcasting companies consisting of ITP, RTE, and BBC published TV guides on a

⁷⁹ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98.

weekly basis with content that only displayed their individual program schedules. The television audiences were therefore bound to purchase separate TV guides in order to consume the TV content that they wanted. Besides this, the broadcasting companies also provide free newspapers and magazines daily when requested with listings information that is published with strict licensing conditions. *Magill*, the Irish publisher began publishing extensive TV guides every week that contained details on the television programs that are being transmitted by the broadcasting companies in order to placate consumer demands. The three television companies stated that the TV guides produced by *Magill* impose their individual copyrights on the program listings. The companies launched legal proceedings in their respective national courts to prevent *Magill* from creating and broadcasting its listings magazine.⁸⁰ The broadcasting companies ultimately obtained injunctions against *Magill* for their transgression on the companies' copyright protection. *Magill* on the other hand lodged a complaint to the Commission, stating that the television broadcasting companies had, due to their dominant position, violated Article 102 TFEU since they refused to grant a license for the publication of the weekly TV guide.⁸¹

As a result, the Commission concluded that the television companies' conduct infringed on Article 102 TFEU and therefore ordered the companies to grant the weekly program listings to *Magill* as well as concede to the reproduction of such information in a non-discriminatory way.⁸² The decision was appealed to the General Court, hereinafter GC, and afterward to the ECJ.

3.2.1 The Judgment by the ECJ

In regards to a dominant position the Court has stated that the ownership of an IPR cannot in and of itself create such a position.⁸³ The ECJ has further stated that the information for the program listings was a necessary part of programming by the television stations to which the broadcasting companies had exclusive and sole access.⁸⁴ The Court, therefore, concluded that the broadcasters had a monopoly in the case, on the information that was used to compile the

⁸⁰ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 1-10.

⁸¹ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 11.

⁸² *Magill TV Guide/ITP, BBC, and RTE* (C-241/91 P and C-242/91 P) Commission Decision 89/205/EEC [1988] OJ 1989, L 78/43, para. 25-28.

⁸³ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 46.

⁸⁴ *Ibid*, para. 47.

television programming schedules and that they consequently held a dominant position in the market regarding the weekly television magazines.⁸⁵

The ECJ clarified the issue regarding abusive conduct, stating that the broadcasting companies' reasoning was incorrect when they presupposed that such behavior consisting of the exercise of an IPR could not be reviewed in connection to Article 102 TFEU.⁸⁶ The Court held the position it had concluded in the case of *Volvo v. Veng*, echoing the sentiment that a dominant company's refusal to bestow a license to others does not as such constitute abuse of Article 102 TFEU.⁸⁷ The ECJ, therefore, decided to use an approach that is circumstance-based, meaning that a dominant undertaking's refusal to license may constitute abuse only in such circumstances that are exceptional.⁸⁸ The Court then went on to assess if such circumstances were present in this case, which it affirmed. It identified four separate arguments that contributed to the discovery of such exceptional circumstances, namely;

1. First of all, the refusal to license interfered with the immersion of the new product, being the comprehensive weekly TV guide, that the broadcasting companies did not provide even though there was probable consumer demand.⁸⁹ The Court found that there were no existing or possible substitutions for a weekly TV guide that offered program information for the upcoming week. The alternatives daily or weekend guides were not sufficient compared to that of the weekly TV guides, given that the consumers would have to buy the individual guides separately.⁹⁰
2. Secondly, the Court noted that there was not an impartial justification for either the activity of the publishing television magazines or the television broadcasting companies.⁹¹

⁸⁵ Ibid.

⁸⁶ Ibid, para. 48.

⁸⁷ Ibid, para. 49; C-238/87 *Volvo v Veng* [1988] ECR 6211, EU:C:1988:477.

⁸⁸ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 50.

⁸⁹ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 51.

⁹⁰ Ibid, paras 52-53.

⁹¹ Ibid, para 55.

3. Thirdly, the television broadcasting companies had exercised their exclusive rights by securing the secondary market⁹² of weekly TV guides for themselves and subsequently excluding the rest of the competition from accessing that market.⁹³
4. Finally, Magill was denied access to the information by the broadcasting companies that were in this case essential in order to create the compilation of the complete weekly TV guide.⁹⁴

In conclusion, the ECJ reaffirmed the Commission's decision on the matter, stating that the broadcasting companies had adopted behaviors and policies that constituted an abuse of their dominant position, and that was therefore in clear violation of Article 102 TFEU. As a final remedy to the issue at hand, the Court issued a mandatory license to stop the infringement and it also required that the broadcasting companies provide *Magill* with the necessary information that the television program listing consisted of for *Magill* to create its weekly TV guides.

3.2.2 Comments and analysis on the case in the literature

It can be observed in the foregoing case that the ECJ maintained that while it is inaccurate that the exercise of IPRs cannot be examined under Article 102 TFEU, a refusal, on the other hand, to provide a third party with a license does not constitute abuse of dominant position. The Court likewise disregarded what had already been established previously in the case law on the concept of 'existence and exercise' and instead confirmed that any exercise of IPRs may extend and fall within the scope of Article 102 TFEU. With the cases of *Magill* and *Volvo v. Veng*, the ECJ decided to omit including the distinction between the exercise and existence of IPRs and the subject matter in the rulings, and the Court, therefore, chose to distance itself from the preceding case law instead to go down in a new direction. The evaluation of whether a refusal to license IPRs is in agreement with or in conflict with Article 102 TFEU will rather be based on the circumstances in any given case and such practices can constitute abuse solely in such circumstances that are exceptional.

⁹² Secondary market = also known as the aftermarket or the follow-on public offering. The secondary market is the market where a good or financial instrument has been sold into the market from once having been bought on the primary market in the eyes of the everyday consumer. Whereas for professionals it is a market where investors buy and sell securities from other investors (such as stock exchanges).

⁹³ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v. Commission (Magill)* [1995] ECR I-743, EU:C:1995:98 para. 56.

⁹⁴ *Ibid.*

The ECJ identified the following four from the *Magill* case as being such exceptional circumstances: (1) not allowing to license of the copyright-protected television listings interfered with the development of a new product that had considerable consumer demand, (2) the broadcasting companies had excluded the competition on the secondary market for weekly TV guides so as to reserve this market for themselves, (3) there was no fair or impartial justification in regards to the license refusal, and finally (4) the information that the broadcasting companies had denied *Magill* admission to was crucial for compiling the complete weekly TV guides. The judgment and its subsequent list of exceptional circumstances gained great importance but were also viewed as being quite controversial among legal practitioners and scholars.⁹⁵ The list of the four circumstances described above remains ambiguous as of yet in regards to whether or not they are alternative or cumulative conditions in being considered ‘exceptional circumstances’. It was especially unclear whether the requirement of hindering the development of a new product comprised an essential or an isolated and adequate ground for creating a refusal to license as prohibited abusive behavior.⁹⁶ As the authors of the book, EU Competition Law have noted, if the broadcasting companies had compiled a complete TV guide by cross-licensing themselves and each other program listings, then a third party such as *Magill* would not be able to present a new product.⁹⁷ Nonetheless, the television companies would still be able to reserve their unique spot on the secondary market for said assorted TV guides. The criteria regarding the ‘new product’ raises questions on whether and to what extent a product needs to be of novelty or distinctness in order to be compared with current products to be considered as ‘new’. It is quite apparent that the complete weekly TV guide that *Magill* aimed to provide TV audiences would compete against the separate weekly TV guides that the broadcasting companies produced. A hotly contested issue was whether or not hindering a new product release was a crucial criterion in determining its refusal to license to be abusive. This debated question is reflected by ensuing case law on this matter.

The Court has underscored in its judgments in *Volvo v. Veng* as well as in *Magill* that a refusal to bestow a license to its IPRs by an undertaking with a dominant position in the market does not in and of itself constitute an abuse of dominance. For a refusal to license to be defined as abuse and therefore be arbitrary to that of Article 102 TFEU, it has to be connected with both

⁹⁵ Luca Prete, “From *Magill* to *IMS*: Dominant Firm’s Duty to License Competitors”, (2004), *European Business Law Review*, p. 1075-1077; Rosa Greaves, “*Magill* Est Arrive... RTE and ITP v. Commission of the European Communities” (1995), vol. 16 issue 4, *European Competition Law Review*, p. 244-247.

⁹⁶ Alison Jones and others, *EU Competition Law: Text, Cases, and Materials*, 7th edition, (Oxford University Press, 2019), p. 529-531.

⁹⁷ *Ibid.*

a supplementary and exceptional circumstance. What can be derived from the Court in its statements is that the rule in EU competition law after the verdict on *Magill*, is thus that dominant undertakings are not, in general, responsible for licensing their IPs to other companies or third parties. However, an exception is that a duty may ensue in exceptional circumstances. Nonetheless, it was unclear to what extent the criteria that had been developed in *Magill* would be suitable in other cases that involved refusals to license IPRs, considering the outcome was to a great extent affected by the particular circumstances of the case. Besides, several legal scholars and commentators have called attention to the aftermath of the *Magill* case, stating that it additionally could have been formed by the fact that listings of TV programs are granted copyright protection under designated sovereign law.⁹⁸ It may be argued that copyright protection is merited for television program schedules, but it does not however follow explicitly by the reasoning in the judgments by the ECJ or in the decision from the Commission. Nonetheless, it is clear from examining the following cases that involve the refusal to license IPRs on behalf of dominant undertakings, that the *Magill* criteria have set an authoritative example in the case law of the European courts, where the concept of ‘exceptional circumstances’ has been further advanced.

Another significant observation concerning the obstruction of the new product requirement was that the Court applied Article 102(2)(b) TFEU as the judicial basis, specifically that abuse may, in particular, reside in production, markets, or technical development that is limiting and therefore prejudicial to consumers. The list of abusive practices that can be found in Article 102(2) TFEU is not comprehensive and the authorities that reinforce the rules on EU competition may dispute such practices that are not inevitably encompassed by one of the points in the said provision. Still, the Court has depended on Article 102(2)(b) TFEU as the judicial basis in *Magill* as it has had considerable importance and ramifications in subsequent cases, specifically in the case of *Microsoft*, where the GC used an extensive interpretation of the doctrine on exceptional circumstances by constructing its line of reasoning about Article 102(2)(b) TFEU.⁹⁹

⁹⁸ Richard Whish & David Bailey, *Competition Law*, 10th edition, (Oxford University Press, 2021), p. 840-844; Sergio Baches Opi, “The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the EU and the US: Are Intellectual Property Rights Still Sacrosanct?”, (2001), *Fordham Intellectual Property Media and Entertainment Law Journal*, vol. 11 issue 2, p. 459-461.

⁹⁹ *Ibid.*

3.3 C-418/01 - IMS Health

In regards to the case of the company IMS Health GmbH, hereinafter IMS, both IMS and NDC Health GmbH & Co., hereinafter NDC, were taking part in the German market where they contributed data-related services to pharmaceutical companies.¹⁰⁰ IMS had built a database structure called the ‘1860 brick structure’, a system that made available the pharmaceutical sales data in the different regions of Germany.¹⁰¹ The structure of this database employed a process wherein the German territory was split up into small geographical sections - the bricks - that was based on such factors as zip codes, population sizes, and the different political and administrative borders along with the districts where hospitals and pharmacies are operated at. IMS compiled the information on pharmaceutical sales from wholesalers to construct it in conformity with the brick structure, hence allowing it to be investigated in numerous ways for it to provide the customers, being the pharmaceutical companies, with the sales reports. The development of the brick structure by IMS had been done so in cooperation with the pharmaceutical industry for an extended period of time. This structure also became the actual market standard to which the clientele of IMS used to accommodate their distribution and information systems. IMS competitors pursued creating an identical brick structure, but IMS went on to allege that these were an infringement on its copyright-protected creation and managed to receive interim injunctions in the national case proceedings. NDC proceeded to lodge a complaint to the Commission stating that IMS’s refusal to license their ‘1860 brick structure’ that was copyright-protected was an abuse of a dominant position and as a result violated Article 102 TFEU. The Commission reiterated in its decision on this case, the principles of the ‘exceptional circumstances’ which had been developed in *Magill* and *Bronner*.¹⁰² The Commission established that this case indeed fulfilled the test in regards to the exceptional circumstances, given that the IMS creation being the 1860 brick structure, was first and foremost necessary for NDC in order for them to be able to carry out their business, since developing a structure of their own would pose too heavy of a burden¹⁰³ given the judicial and technical constraints in place and second of all there was no objective justification for IMS refusal to license to NDC.¹⁰⁴ As a result of its findings, the Commission ordered an interim measure demanding that IMS bestow NDC with

¹⁰⁰ Case C-481/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2002:223.

¹⁰¹ *Ibid.*

¹⁰² *NDC Health/IMS Health: Interim Measures* (Case COMP D3/38.044) Commission Decision 2001/165/EC [2001] OJ 2002, L 59/18, para. 65-70.

¹⁰³ *Ibid.*, para. 127-131.

¹⁰⁴ *NDC Health/IMS Health: Interim Measures* (Case COMP D3/38.044) Commission Decision 2001/165/EC [2001] OJ 2002, L 59/18, para. 165-175.

a license to their copyright-protected brick structure on fair and equitable terms.¹⁰⁵ IMS brought forth an annulment action of the decision, the execution of said decision was later deferred impeding the appeal.¹⁰⁶

Parallel to this, the national court proceedings were developing and the court in Germany referred for an initial ruling to the ECJ asking about how to go about interpreting Article 102 TFEU in the context of IMS refusing to license their copyright-protected creation. The Commission as a result decided not to accept a concluding decision on the matter and retracted the decision for the interim measures.¹⁰⁷ Consecutively, the Court went ahead and gave a verdict on the preliminary reference.¹⁰⁸

3.3.1 The Judgment by the ECJ

The ECJ has in a similar vein to the principles that were set out in the cases of *Magill* and *Volvo v. Veng* restated, from the foregoing case law, that the exclusive right of reproduction constitutes the rights of the owner of an IPR. Furthermore, it is settled that a dominant business's refusal to license its IPs does not necessarily constitute abuse of a dominant position. The Court has stated and reiterated, based on previous case law, that the exercise of an exclusive right can however become abusive in such circumstances that are exceptional.¹⁰⁹ The Court then proceeded next in its judgment to account for the four different elements that make up exceptional circumstances that were established in the cases of *Magill* and *Bronner*.¹¹⁰ The ECJ made an effort to try to integrate the rulings in both *Magill* and *Bronner* by determining that these two separate cases established that, for an undertaking with a dominant position in the market to be seen as having abusive behavior towards other competitors in refusing to license its IPRs, it was adequate if the following four cumulative conditions were fulfilled: (i) the access to such a material that is protected by IPRs is essential in order for a company to be able to run their business, (ii) refusing to license the IPR could prevent the creation and development of a new product if there is a probable consumer demand for such a product, (iii) the refusal to license the IPR is not motivated by fair and

¹⁰⁵ Ibid, para. 210-215.

¹⁰⁶ Case T-184/01 R, *IMS Health v. Commission* [2005] E.C.R. II-3193, EU:T:2005:95, para. 124-126.

¹⁰⁷ *NDC Health/IMS Health: Interim Measures* (Case COMP D3/38.044) Commission Decision 2003/741/EC [2003] OJ 2003, L 268/69.

¹⁰⁸ Ibid.

¹⁰⁹ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 33-36.

¹¹⁰ Ibid, para. 35-37.

impartial considerations and (iv) such a refusal is possible of excluding competitors from entering or competing on the secondary market.¹¹¹

Regarding the first criterion (i), that of the essential condition, the Court stated that it was decisive to establish whether there are such services or products that could be used as a substitute solution to the original one, even if it is less favorable in comparison. In addition to this, it is also essential to discern whether there are any legal, economic, or technological obstacles that are making it impractical or irrationally challenging for a company to enter into the market in order to develop such substitutable products or services.¹¹² Likewise, with the assessment of the case by Advocate General Tizzano, hereinafter AG, the ECJ stated that one must consider the fact that the high level of cooperation by the different pharmaceutical companies to advance the 1860 brick structure had created a reliance by the consumers relative to that structure. Proceeding with this reasoning, the Court believed that the laboratories would have to engage in notable commercial and organizational efforts in order to obtain reports of the pharmaceutical sales data from a different structure than that of the IMS' brick structure and that the supplier who provided another structure would be mandated to present contractual terms which would probably exclude any financial growth of a business on a comparable scale to that of IMS.¹¹³

The Court explained when conferring on the interpretation of prerequisite (ii) regarding the creation of a new product that the company that inquires the access to the essential material may not expect to considerably restrict itself to replicate the goods or services that have previously been offered by the owner of the IPR on the secondary market, but plans to produce and offer up new goods or services not provided by the right holder and for which there is a probable interest by the customers.¹¹⁴ The main focus here is the interest in protecting the customers. The ECJ states that the interest in protecting free competition can only prevail in one context or situation over that of the interest in protecting IPRs and the financial freedom of their owner, and that is when a refusal to bestow a license hinders the advancement of the secondary market to the disadvantage of the consumers.¹¹⁵

The Court was careful to expand further on requirement (iii), on the existence of fair and impartial justification. The ECJ held, while maintaining conscientious wording, that given the

¹¹¹ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 38.

¹¹² *Ibid.*, para. 28.

¹¹³ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 29.

¹¹⁴ *Ibid.*, para. 49.

¹¹⁵ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 47-48.

circumstances of the case at hand, it had to be decided whether the refusal to license could indeed be justified by fair and impartial considerations.¹¹⁶

With reference to the last condition (iv), regarding the likelihood of the refusal to license to exclude all of the competition on the secondary market - the Court recalled its approach in the *Bronner* case and maintained that it is significant to differentiate between a so-called upstream market, which is comprised by the essential product or service, to that of a secondary market, wherein the product or service is utilized in the creation of other products or in supplying another service.¹¹⁷ When making this differentiation and creating a basic (upstream) market, it is acceptable that a probable or theoretical market can be established. The Court has stated that that is the case where the services and/or products are essential for operating a specific business and where there is a certain request for these on behalf of undertakings that do seek to run their operation where such products and services are essential.¹¹⁸ For this purpose, it is conclusive that two separate stages of production may be detected and complementary to one another, in view of the fact that the upstream product is essential in providing the downstream product.¹¹⁹ Employing such considerations to the conditions of a case, the Court declared that the relevant question for the referring Court to question itself regarding whether the criterion (iv) is fulfilled is whether the 1860 brick structure created by IMS does in fact create (upstream) an essential component in the downstream reserve of goods of regional sales data for that of pharmaceutical products.

3.3.2 Comments and analysis on the case in the literature

The case *IMS Health* may have referenced Article 267 TFEU and wasn't necessarily ruled upon by the Court on the basis of its merits, it did nevertheless provide insight into how to comprehend the doctrine on 'exceptional circumstances' that has been established previously. It further gave guidance on how to go about interpreting the four prerequisites. The Court stated that it was adequate if the four cumulative conditions were satisfied for the refusal to license an IPR to constitute abuse, that is;

(i) the access to material that is protected by an IPR is 'essential' for a company to be able to run its business,

¹¹⁶ Ibid, para. 41-43.

¹¹⁷ Ibid, para. 42-43.

¹¹⁸ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 44.

¹¹⁹ Ibid, para. 45.

(ii) the refusal to license such a right inhibits the creation and/or development of a ‘new product’ for which there may, in fact, be a consumer demand,

(iii) the refusal is not justified fairly or impartially, and

(iv) the refusal is expected to prohibit competition on the secondary market.

In the given circumstances, the choice word of adequacy should be noted.¹²⁰ The terminology used displays that the cumulative four sub-conditions must be fulfilled in order for abuse to be constituted as established by Article 102 TFEU, by way of refusing to license an IPR. Nonetheless, this also allows for the possibility of the doctrine on ‘exceptional circumstances’ to be applicable in situations other than those already established from the above examples. As a result, it can be contested that the list of exceptional circumstances may in fact not be exhaustive, but simply an assortment of one of many ‘exceptional circumstances’ available. This can be read implicitly by the judgments of the Court through a constant interpretation of the text and of the wording all throughout the excerpt from the case document. As anticipated, the vagueness of the terminology leaves many questions yet to be answered and that has still to be decided upon by the Court in the upcoming jurisprudence.¹²¹

In the principles established by the Court in the cases of *Volvo v. Veng* and *Magill*, the ECJ widely recognized the owner/holder of the IPR and their exclusive right of reproduction. Consequently, emphasis was placed on the fact that a refusal to bestow a license to a third party does not in and of itself constitute abuse. A compulsory license in connection with Article 102 TFEU may come into being in ‘exceptional circumstances’. The expression ‘exceptional’ as used by the Court reflects the limiting view in which the refusal to license is seen as conduct that is abusive. It can be assumed that there is an initial likelihood against issuing the countermeasure of a compulsory license, however, it can be strongly argued against in narrow and definitive circumstances. The Court’s reluctance to clearly regard a refusal to bestow a third party a license, as abuse, suggests that it decided to side with owners/holders of IPRs. This news was certainly much appreciated by the industries that make up the ‘new economy’.¹²²

Regarding the clarification of the condition of the ‘new product’, the ECJ held that the assessment of the requirement was an issue of whether the undertaking in question would

¹²⁰ Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, EU:C:2004:257, para. 38.

¹²¹ Joost Houdijk, “The IMS Health Ruling: Some Thoughts on its Significance for Legal Practice and its Consequences for Future Cases such as Microsoft”, (2005), vol. 6, issue 3, *European Business Organization Law Review* (EBOR), p. 477-482.

¹²² *Ibid.*

actually, replicate the product of the rights holders' creation or if it would seek to create a new product to introduce to the market. The outcome from this portion of the judgment implies that a refusal to license to a third party cannot be considered as abuse when the objective of the potential licensee is to simply develop a product that is a reproduction or a carbon copy of the product that is already available on the market by the expected licensor. Thus, it can be contested that the Court is by indirection supporting the idea of competition by substituting products rather than by imitating products. Furthermore, it can be stated that other third parties or competitors will not be able to make use of competition law as a tool in an effort to free-ride on the right-holders' creative invention. The use of competition law as an intervention in the context of refusal to license is according to the Court allowed simply when such a refusal impedes the development of a secondary market to the disadvantage of consumers. The justification for this line of reasoning was to protect the interest of the well-being of the consumers and not necessarily the interests of particular competitors.¹²³

Even though the Court did not make a decision on the substance of the case on IMS Health, it should be further investigated whether NDC in fact had the objective of creating and putting a new product on the market. NDC was a competitor against IMS in the market where they both provided regional sales data regarding pharmaceutical products. The circumstances in the case seemingly display that the reason for NDC's inquiry into accessing the brick structure created by IMS was to develop their own reports on the regional sales based on that particular format. The pertinent element to consider in this aspect is the degree of originality of the sales reports as compared to the reports that have been provided by IMS. The circumstances in the preliminary ruling do not determine the specific characteristics of the new sales reports by NDC, however, it is evident that both of the companies did offer an indistinguishable service to their clients, that is to say, the arrangement of the regional sales reports on the pharmaceutical products. The significance of the requirement regarding the 'new product', as it was initially introduced, and considered in the case of *Magill*, was the unfulfilled demand by the consumers for something not being accessible on the market.¹²⁴

Considering IMS was already at this time in the relevant market and produced a service that was appealing to its clients, and which NDC intended on competing with through gaining access to the regulated brick structure, there is barely any persuasion in trying to contend that

¹²³ Estelle Derclaye, "The IMS Health Decision: A Triple Victory", (2004), vol. 27, issue 3, World Competition Law and Economics Review, p. 397-405.

¹²⁴ Ibid.

the NDC's sales reports were in any way original or different in an adequate amount compared to those that were already advertised by IMS.¹²⁵

¹²⁵ Ibid.

4. The Relationship between EU Copyright Law and Competition Law

4.1 Introduction

This chapter deals with the interaction of copyright and competition law from an EU legal perspective. More specifically, the chapter provides an analysis whereby an argument is made for the two different legal fields being complementary, in that they create a modern policy for which technological and financial growth can be achieved for the betterment of consumers and society as a whole. The chapter also makes a case for whether the rights-holders exploitation of an exclusive right is warranted or not and to what extent.

4.2 Are IPRs and Competition Law compatible?

The purpose of granting intellectual property rights, hereinafter IPRs, is to stimulate innovation and provide exclusive protection for the innovator and their accomplishments.¹²⁶ The main aim of legislation on intellectual property is therefore to award innovators with the exclusivity of their rights to their intellectual creation.¹²⁷ The different intellectual property regimes prohibit third parties from exploiting a protected work, either commercially or through copying said work without the right holder's consent. Third parties being able to access such innovative works will jeopardize any investments being done by companies or other actors in developing new technologies if there is a viable risk of remuneration loss.¹²⁸ Thus, it can be presumed that the following mechanisms constitute protection for intellectual property, namely preventing third parties from undue advantages of the innovator's investments as well as encouraging competitors to create substitute creations rather than imitate the same innovation.¹²⁹

¹²⁶ Kelvin Hiu Fai Kwok, "A New Approach to Resolving Refusal to License Intellectual Property Rights Disputes" (2011), vol.34, World Competition Law & Economics Review, p. 261-264, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1903690, accessed 26th of March 2023.

¹²⁷ Steven D. Anderman, "Intellectual property rights and competition law in the major trading blocks", in Steven D. Andermans (ed), *Intellectual Property Rights and Competition Policy*, (Cambridge University Press, 2007).

¹²⁸ Luc Peepkorn, "IP Licenses and Competition Rules: Striking the Right Balance" (2003), vol. 26, issue 4, World Competition, p. 525-530, <https://doi.org/10.54648/woco2003027>, accessed 27th of March 2023.

¹²⁹ Thorsten Käseberg, *Intellectual Property, Antitrust, and Cumulative Innovation in the EU and the US*, 1st edition, (Bloomsbury Publishing, 2012), p. 45-48.

The objectives of the European Union competition policy must be understood against the background of the role of the competition rules and its function within the European Union, hereinafter EU, as a whole. As set out by article 3(3) on The Treaty of European Union, hereinafter TEU, a fundamental aspect of the EU is the establishment of the integrated single market in which the free movement of persons, services, capital, and goods is guaranteed.¹³⁰ Therefore, one of the primary principles endorsed by the EU competition policy is the integration of the common market within the Union.¹³¹ One of the main concerns that the EU has is that private actors can recreate obstacles in the market that had previously been imposed by protectionist government measures, such as tariffs, quotas, and other import constraints.¹³² The ECJ has underlined the importance of the provisions on competition in achieving and maintaining a functioning single market and in combating anti-competitive conduct that creates barriers to the internal market.¹³³ Correspondingly, the EU competition law can be assumed to have both a negative and positive role in the EU system: it has been ordered on the one hand to ward off any such measures that would isolate individual markets from one another, and on the other hand, it has a corroborate role where it stimulates cross border trade and in forming a level playing field for businesses.¹³⁴ In this context, an additional legislative objective of competition law is to provide and sustain competitive market structures.¹³⁵ This is interconnected with providing firms of smaller size access to enter the market and assuring that the markets are not exclusive to businesses holding a dominant position or establishments that implement a strategy to impede or hinder any new market players.¹³⁶ It is highly relevant concerning market dominance since it is assumed that businesses with considerable market power can change the market structures and thus carry a particular obligation not to implement measures that are detrimental to the advancement of the market or impose any restrictions on the market participants freedom of maneuver.¹³⁷ Therein also lies the aspect of retaining fairness in the market structure, so that smaller-sized participants are not ostracized or expelled from the market due to disproportionate or unfair

¹³⁰ Consolidated version of the Treaty on European Union (TEU), OJ 2012, C 326/17.

¹³¹ Giorgio Monti, *EC Competition Law*, 1st edition, (Cambridge University Press, 2007), p. 18-20.

¹³² *Ibid.*

¹³³ Case C-453/99, *Courage and Crehan* [2001] E.C.R. I-6297, EU:C:2001:465, para. 19-21; Case C-126/97, *Eco Swiss* [1999] E.C.R. I-3055, EU:C:1999:269, para. 35-36.

¹³⁴ Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, 1st edition, (Bloomsbury Publishing, 2012), p. 50-53.

¹³⁵ Case C-501/06 P, *GlaxoSmithKline Services Unlimited and Others v. Commission and Others* [2009] E.C.R. I-9291, EU:C:2009:610, para. 63; Case C-6/72, *Europemballage Corporation and Continental Can Company v. Commission (Continental Can)* [1973] E.C.R. 215, EU:C:1973:22, para. 12.

¹³⁶ Ariel Ezrachi, *Article 82 EC: Reflections on its Recent Evolution*, 1st edition, (Bloomsbury Publishing, 2009), p. 125-130.

¹³⁷ Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, 1st edition, (Bloomsbury Publishing, 2012), p. 50-53.

methods or exaggerated force enforced by undertakings that hold a dominant position.¹³⁸ It is asserted that this competition policy objective is expected to create a free interaction of the competitive forces that occur in the market, which in turn expand on the technological and entrepreneurial development, as well as increase the quality of products and generate product differentiation, resulting in enhanced consumer welfare. Consumer welfare has been recognized on a large scale among legal scholars as an objective of competition law, however, the European courts tend to have a far more varied perception of this concept. The ECJ has in its legal practice maintained that the competition rules are intended to protect the interests of consumers and competitors, as well as to ensure the market structure and competition.¹³⁹ In the *Hoechst case*, the ECJ applied a similar line of reasoning stating that the function of the EU competition rules is to prevent the distortion of competition to the detriment of consumers as well as the public interest and undertakings.¹⁴⁰ The remarks of the Court seem to indicate that the purpose of the protection of the competitive structure is to comprise that of the public interest, specifically the preclusion of one-sided or coordinated practices by establishments to distort competition and the competitive market structures.¹⁴¹ The Commission is setting a consumer standard for its enforcement priorities, but the European courts do not acknowledge or preface the consumer interest in the same way. The right holders' exclusive rights, when awarded the IPRs, are sometimes regarded as innately incongruous with competition policy.¹⁴² The exclusivity of the intellectual property that is given to the right holder will also provide them an economic right that is limited in time to control the exploitation of their invention and as a result, preclude any third parties from using said creation commercially.¹⁴³ Such constraints may deprive the competition in the markets for technology, products, and innovation.¹⁴⁴ Subsequently, it has been said that the use of competition provisions in an extensive radical manner and in a punitive way against the commercial exploitation of IPRs that is anti-competitive will result in obstacles to undertakings' ex-ante incentives to invent in research and development, hereinafter R&D.¹⁴⁵ After all, both competition law and intellectual property law complement one another in creating a modern industrial policy that

¹³⁸ Steven Anderman & Hedvig Schmidt, *EU Competition Law, and Intellectual Property Rights: The Regulation of Innovation*, 2nd edition, (Oxford University Press, 2011), p. 25-27.

¹³⁹ Case C-68/12, *Slovenská sporiteľňa v. Protimonopolný úrad Slovenskej republiky*, EU:C:2013:71, para. 62-63; Case C-8/08, *T-Mobile Netherlands and Others* [2009] E.C.R. I-4529, EU:C:2009:343, para. 38.

¹⁴⁰ Joined Cases C-46/87 and C-227/88, *Hoechst v. Commission* [1989] E.C.R. 2859, EU:C:1989:337, para. 24-25.

¹⁴¹ Case C-52/09, *TeliaSonera Sverige* [2011] E.C.R. I-527, EU:C:2011:83, para. 22.

¹⁴² Jonathan D.C. Turner, *Intellectual Property and EU Competition Law*, 2nd edition, (Oxford University Press, 2015), p. 1-5.

¹⁴³ Kelvin Hiu Fai Kwok, "A New Approach to Resolving Refusal to License Intellectual Property Rights Disputes" (2011), vol. 34, *World Competition Law & Economics Review*, p. 261-264.

¹⁴⁴ Thorsten Käseberg, *Intellectual Property, Antitrust, and Cumulative Innovation in the EU and the US*, 1st edition, (Bloomsbury Publishing, 2012), p. 11-13.

¹⁴⁵ *Ibid.*

promotes technological progress and financial growth such as ideal prices, quality goods, and services that benefit consumers and society as a whole.¹⁴⁶ IP law attains its objective by limiting the accessibility of IP during a specific time period to stimulate investments and innovation in developing new products and technology.¹⁴⁷ IP law, therefore, constitutes an incitement for stimulating substitutable products and for producing new competitors that expedite new markets. Hence, the competition law tries to safeguard the competitive market structures as momentum for innovation by sustaining access to markets and averting measures that prohibit market entrance.¹⁴⁸ Such principles and deliberations are underscored by the following quote:

“It can certainly be argued that this fencing off of intangible subject matter fulfills an economic function equivalent to that of ownership of the physical property because otherwise the incentive to optimize the value of the information will be impaired or destroyed. Those who would have generated new ideas will disappear; in the end, there will be little or nothing different to imitate.”¹⁴⁹

Both IP law and competition law may have an adverse effect. Wherein competition law impedes such practices like abusive market power exercises and inconsistent exclusion of competitors, the IPRs bestow the inventors a juridical monopoly and consequently the exclusive rights to prohibit third parties from accessing the innovation.¹⁵⁰ Exploiting exclusive rights that arbitrarily come with IPRs, may in fact as a consequence disturb the competitive market structure as well as escalate businesses' behavior in becoming more monopolistic.

Nonetheless, there is a common acceptance that the lawful monopoly that comes with an IPR does not undoubtedly create a dominant position in the way that Article 102 TFEU has been interpreted by the Commission and the EU courts respectively.¹⁵¹ It has been acknowledged

¹⁴⁶ Amedeo Arena, Bettina Bergmann & Jay L Himes, “Two Bodies of Law Separated by a Common Mission: Unilateral Conduct by Dominant Firms at the IP/Antitrust Intersection in the EU and the US”, (2013), vol. 9, issue 3, *European Competition Journal*, p. 623-625.

¹⁴⁷ Ariel Ezrachi & Mariateresa Maggolino, “European Competition Law, Compulsory Licensing, and Innovation”, (2012), vol 8 (3), *Journal of Competition Law and Economics*, p. 595-597.

¹⁴⁸ Luc Peepkorn, “IP Licenses and Competition Rules: Striking the Right Balance” (2003), vol. 26, issue 4, *World Competition*, p. 525-530; Steven D. Anderman, “Intellectual property rights and competition law in the major trading blocks”, in Steven D. Andermans (ed), *Intellectual Property Rights and Competition Policy*, (Cambridge University Press, 2007), p. 36-39.

¹⁴⁹ Tanya France Aplin & David Llewelyn, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights*, 8th edition, (Sweet & Maxwell, 2013), p. 35-40.

¹⁵⁰ Robert O’Donoghue and others, “Are Article 82 EC and Intellectual Property Interoperable? The State of the Law Pending the Judgment in *Microsoft v. Commission*”, (2007), vol. 3, no. 1, *Competition Policy International*, p. 107-111.

¹⁵¹ Cyril Ritter, “Refusal to Deal and Essential Facilities: Does Intellectual Property Require Special Deference Compared to Tangible Property?” (2005), *World Competition*, p. 290-293.

that an exorbitant regulatory burden that has been placed on the exercise of IPRs may, in fact, have effects that dissuade innovators. EU competition law as a result makes a reservation to constrict the free exercise of IPRs and interfere in cases where rights-holders exploitation of their exclusive rights for instance precludes competitors, hinders or impedes any innovation that follows on from the invention, or that otherwise is capricious or anti-competitive. The evaluation of finding a balance between the adverse effects of reducing businesses' incentives ex-ante to invent and the inability ex-post from abusive exercise of dominance in the market calls for a cautious balancing and a case-by-case assessment.¹⁵²

¹⁵² Christian Ahlborn and others, "The Logic & Limits of the "Exceptional Circumstances Test" in Magill and IMS Health", (2004), vol. 28, issue 4, Fordham International Law Journal, p. 1109-1112.

5. Analysis and conclusion

To what extent is the interest of further competition reflected internally within the scope of copyright protection?

The intersection between copyright law and EU competition law is not clear-cut. The purpose of copyright as well as other intellectual property right is on the one hand to stimulate the creation of new inventions and on the other hand, to provide exclusive rights in the form of an extended term of protection, that being said 70 years for copyright-holders and an economic right wherein third parties cannot commercially make use of the inventions if they have not been granted the right to do so by the right-holder. These mechanisms are in place in which one can only assume to protect the right-holder and their intellectual property right. The objective with however competition is for competitors to compete on free and equal terms in goods and services on a single market. The single market is an integrated market where the purpose of competition in the said market is to minimize the occurrence of individual markets that could give rise to undertakings dominating a certain market share as well as creating monopolies and essentially outcompeting smaller businesses and their products/services. The point of a single market is therefore to create equal and fair conditions between competitors. Competition is important for the development of products and services for consumers and the public interest as well as for the betterment of society at large.

One point that can be extracted from the thesis is that the concept of consumer welfare is not considered to the same extent as that of the right-holders and their exclusive rights to their innovation. While the Commission is trying to change this, the courts to a greater extent favor upholding the IPRs to a greater standard than that of the consumer interests. As stated earlier in the thesis, providing right-holders with an exclusive right is not necessarily compatible with competition policy. However, being able to restrict competition on the internal market to favor an undertaking that has provided for or created a particular innovation can in many ways be viewed as anti-competitive and result in the disturbance of the market as well as dividing the market further by creating monopolies. The crux with any IPR and not only that of copyright is that it in many aspects can be viewed as a necessary evil. Without it, or more specifically without prioritizing this over free competition will result in the attenuation of

further innovation and creation which in turn will result in a society that is technologically stagnating.

One argument that could be made against IPRs in favor of competition is that while IPRs (including that of copyright protection) are important they are in my opinion not necessarily comparable to that of competition. This is due to the fact that competition is covered by the free movement within the internal market of the EU. This is clearly stated by Article 3(3) of the TEU which makes up the primary law of the EU and as such should take precedence over copyright. However, the interest of competition as being reflected internally in the scope of copyright protection has a greater claim than one might think since the exclusive right that comes with copyright or other IPRs also comes with the right of prohibition. As seen from the *Magill* case the right holders of the TV guides had due to the exceptional circumstances in the case created and abused their dominant position on the market. In cases such as this one the right holder has no right to refuse license - and instead, as a result, are obliged to give out compulsory licensing of their IPR. These criteria on exceptional circumstances however arise only in situations where an undertaking has a dominant position - and even then, depending on the case the ECJ has the discretion to favor the protection of IPRs to the detriment of competition. Given that there is a rule in place, that of Article 102 TFEU to deter undertakings/businesses from abusing their market power and dominance in the single market, one can only speculate that the same should be applicable to other right holders - right holders that are not necessarily a legal person, but a physical one. As has been stated in chapter 2 of this thesis, even in those circumstances where an author has not made full use of his work, for example by disseminating it and making it public, it in fact does not change the author's exclusive right. This in many ways can be perceived as an immunity, wherein the rights holders are given all the benefits that come with their IPRs with little to no problems - and as such there are no restrictions placed on the rights holders' IPRs.

In the same way that there is a restriction placed on undertakings through Article 102 TFEU, which creates the possibility of applying compulsory licensing to third parties that have been left out of the competitive market - a similar rule should be in place within copyright law. Therefore minimizing the risk of a rights holder having an exclusive right wherein the creation/innovation is not put to use for the benefit of consumers and society.

Under what circumstances does a refusal to license copyright constitute an abuse of a dominant position according to Article 102 TFEU?

As established by the case law at the European courts that have dealt with refusal to license IPRs - a dominant undertaking can refuse to share its intellectual creation with third parties since this does not constitute behavior that is abusive or otherwise goes against Article 102 TFEU. The ECJ has on numerous occasions stated that a company with a dominant position that simply refuses to license could therefore not amount to abuse. However, for the refusal in a case to be regarded as indeed abusive, there needs to be 'exceptional circumstances'. In regards to the doctrine of 'exceptional circumstances,' there are two things that need to be illustrated. First of all, the use of the legal term 'exceptional' indicates a restriction when applied in actual situations. This terminology used by the ECJ displays that EU competition law does not require or in any way demand that a dominant undertaking share its IPRs with other competitors or third parties. There is nevertheless a possibility to order a compulsory license in such specific situations where the refusal prohibits competitors from being able to access the secondary market and in cases where a restriction is placed on follow-on creations or in the development of different products. Second of all, through the use of such a vague standard as that of the 'exceptional circumstances' doctrine, the ECJ has been able to use it in a flexible way when dealing with cases that involve the refusal to license IPRs. This has resulted in for example the European courts examining cases at its own rate and it also allows them to consider the specific circumstances regarding a particular situation when it comes to a refusal to license. It has also resulted in businesses being unable to know sooner what specific circumstances might actually constitute abusive behavior when refusing to license an IPR when the Court is allowed to practice discretion in the interpretation of the doctrine and use a case-by-case approach. In order to ensure predictability and legal certainty and enable businesses to optimize their strategies through the establishment of compliance programs, it is important that the EU policy-makers, namely the Commission and the Courts provide legal agendas that are certain as well as give clear guidance to the industries. The case law from the ECJ establishes that the four cumulative conditions are adequate in finding whether a refusal to license constitutes an abuse of dominant position, namely:

- (1) refusing to bestow a license results in the third party being restricted access to a product or service that is necessary (or indispensable) for them to be able to conduct business on the secondary market;

- (2) refusing to bestow a license hinders a ‘new product’ being created in which there is probable consumer demand;
- (3) the refusal to license is such that it is a possibility that it could exclude any competition from taking place on the secondary market, and;
- (4) the lack of fair and impartial considerations is able to substantiate the refusal to license.

The ECJ did clearly state in the case of *IMS Health* that the conditions are adequate in establishing the existence of ‘exceptional circumstances’, and therefore above mentioned catalog (1)-(4) does most likely not demonstrate a comprehensive record of circumstances that are exceptional in character. The way in which the EU courts have phrased their decisions in the different relevant case law, strongly indicates that there can very well be other circumstances that may factor into the calculation. This viewpoint is also held by legal practitioners and academics in different articles and doctrines. Nevertheless, to date, the jurisprudence and solely the existence of the circumstances as mentioned in the conditions above, have rendered a refusal to license as an abuse of dominant position. The other institutions of the EU have not further illuminated what different characteristics are required for other circumstances to be recognized as ‘exceptional’. Before any decision is made on subsequent antitrust litigations and rulings that may provide us with some conclusive feedback, one can merely hypothesize on what other circumstances the Commission and the EU courts may consider and include in the ‘exceptional circumstances’ doctrine.

In the case of the *IMS Health*, the ECJ did affirm that the creation of the 1860 brick structure by the pharmaceutical industry was indeed a relative aspect when deciding on the criterion for indispensability. This was due to the fact that this creation had come to constitute the market standard and as such also created a reliance on it among the clientele of IMS Health.

The condition of indispensability and the way it is applied varies in the EU courts' case law. For example in the case of *Magill*, there is not much room for critiquing the condition of indispensability. In fact, in the case, Magill did seek a copyright license from three broadcasting companies that had a dominant position on the market for their TV program schedules in order to compile a complete weekly TV guide, but the TV companies declined. The undertakings with such a dominant position on the market were therefore rejecting Magill from accessing their basic information by depending on the copyright laws of their

states, while at the same time being the singular source of supply for the raw material. As a consequence, the restraint on the competition constituted by Magill likely entering into the market for complete weekly TV guides was precluded. By applying the criteria from the *Bronner* and *IMS Health* cases to the situation in the *Magill* case, it can be settled that *Magill* did not have different sources of supply to attain admission to the TV listings.

In conclusion, one can definitely state that there are indeed few circumstances in which a refusal to license copyright or other IPRs does not, in fact, constitute an abuse of an undertaking's dominant position. Since the ECJ has widely recognized the rights holders IPR and their exclusive rights - the emphasis has been placed on the fact that refusing to bestow a license to a third party does not constitute abuse. A compulsory license can on the other hand only come into question when there are exceptional circumstances, making it evident that there is a greater likelihood of an undertaking being allowed and to some extent maybe even encouraged to refuse to license their IPRs. Whereas compulsory licensing is necessitated in such cases where the circumstances are narrow and decisive.

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