

An External Method for Establishing the Balance in Intellectual Property Rights' Scope: Article 102 of the TFEU

BURCU GÜREL*

1. INTRODUCTION

The breadth and complexity of legal issues give rise to intersections between different branches of law. The relationship between intellectual property and competition law has been a constant area of controversy which deserves to be scrutinized. More specifically, it has become a contemporary issue in European Union law, as a result of the European Commission's and European Courts' recent decisions which indicate a restrictive approach to the exercise of intellectual property rights.

Intellectual property rights currently provide essential protection for information, innovation and knowledge. The shift from industrial to knowledge societies, based on the flow of information and knowledge instead of material goods¹, have strengthened the importance of these particular rights due to the fact that they have played very critical roles in supporting the increase of creation and innovation. Although the material protected by intellectual property rights are accessible by the public most of the time under some restrictive conditions because of the exclusive nature of these rights, in the long term they still make contributions to public knowledge domain. However, due to this exclusivity there has been a necessity to justify their existence by examining the fundamental reasoning behind them.

In addition to the suggested theories of the justification, the internal balancing of intellectual property rights' scope and their critical position in the innovation cycle shall be taken into account. This balance is crucial because the monopolistic nature of intellectual property rights require some precautions to be taken in order to enable the society to benefit from them the most, but at the same time protecting the interests of the creators as well. This is not an easy task², however; the better this balance is established, the less external intervention would occur in the exercise of intellectual property rights. If not, there may be interference of other fields of law, one of the most common being competition law.

The overlap between these two fields, both of which have very important positions in the EU, is not completely unexpected but on the contrary rather foreseeable. Over the last few decades, there has been a substantial amount of international and European initiatives which have shaped and directed intellectual property law.³ Similarly, the EU has been following a policy in favor of a more harmonized intellectual property law system at the community level, however, the landmark decisions which affect the exercise of these rights under competition law rules raise controversial arguments about the strength of intellectual property protection.

* LL.M. in Intellectual Property Law, Queen Mary University of London (2009). The author is thankful to Anne Flanagan for her valuable comments on the earlier version of this article and is solely responsible for any errors that may remain in this article.

¹ Christopher May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* (Routledge, New York 2000), p.2

² Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?' in Rochelle Dreyfuss, Diane L. Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford 2001), p.316

³ Hector MacQueen, Charlotte Waelde and Graeme Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, United States 2007), p.19

This is not so unpredictable when the fact that the ultimate goal of the Union is to establish a free market without boundaries is taken into consideration. Yet, the monopolistic nature of intellectual property rights inevitably gives rise to further questions, given that their very purpose is to confer rights to exclude competitors. On the contrary, competition law is a set of rules which attempts to "regulate the relations in the markets in order to achieve allocative efficiency and maximize consumer welfare"⁴ by eliminating the harmful effects of monopolies. In this respect, the application of the Treaty on the Functioning of the European Union (the "TFEU")'s internal market and competition rules have great impact on the exercise of intellectual property rights in many ways like the free movement of goods, licensing agreements or the practices of dominant firms which hold these rights. The interference of competition law in intellectual property rights can either be seen as an inappropriate one which distorts the exercise of legally granted rights or as an external tool which supports the balancing of intellectual property right rationales and access to information by the public while also functioning as supplement to intellectual property law.

Below, the application of article 102 of the TFEU (ex article 82 of the EC Treaty, any reference to article 82 in the footnotes and quotations shall be understood as article 102 of the TFEU hereinafter) to intellectual property rights will be examined through a perspective based on the internal balancing of IPRs and competition rules' supplementary function to achieve this particular balance. In order to shed some light on the issue, this study will initially focus on the intellectual property rationales which cannot be underestimated against competition law policies and the importance of balancing them with the needs of the information society. Finally, the reflections of these concerns on the Commission's and the Courts' decisions will be indicated in order to show both the weak and strong points of case law.

II. THE PIVOTAL ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE INNOVATION MARKETS OF INFORMATION SOCIETY

A. Justifications of Intellectual Property Rights

1. The Need to Justify Intellectual Property Rights

"Intellectual property rights establish property protection over intangible things such as ideas, inventions, signs and information".⁵ This type of property right is created by granting exclusivity to the owners which enable them to prevent others from using the subject matter of their rights without permission. Besides this generally accepted monopolistic nature of intellectual property rights (hereinafter referred as "IPR"), there are other unique features belonging to them related to exclusivity. When their nature is taken into account, it is seen that "resources -the ideas and information- are not scarce and can be replicated without any direct detriment to the original possessor of the intangible".⁶ At the same time information products are mostly "expensive to create and cheap to reproduce and distribute". These facts distinguish them from property rights on tangibles, which cannot be exploited by more than one person at the same time without causing detrimental effects on each others use. It is suggested that, this increases the need for justification because as there are no physical obstacles for the use of the protected subject-matter by many people "there are good reasons for fearing the exclusivity".⁸

⁴ Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, Materials* (3rd edn Oxford University Press, United States 2008), p.15

⁵ Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn Oxford University Press, United States 2009), p.2

⁶ *Ibid.*, p.4

⁷ John H. Barton, 'The Balance Between Intellectual Property Rights and Competition: Paradigms in the Information Sector', [1997] 18 ECLR 440, p.443 ; Michael L. Katz, 'Intellectual Property Rights and Antitrust Policy: Four Principles for a Complex World', [2002] 1 J. on Telecomm. & High Tech. L. 325, p.345

⁸ William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (6th edn Sweet & Maxwell, London 2007), p.39

This fear is not groundless because considerable restrictions for the public access to relevant information exist and the scope of those rights, which cover a broad range of intangible things from inventions to artistic creations, make the fear more realistic. Still, the right to control the activities of others shall not be perceived at the extreme, otherwise it has a number of implications often inadequately understood and gave rise to arguments contrary to IPRs which need to be responded.⁹

As we have seen, at first instance, there appear to be some important concerns about basing this exclusivity on well-established and reasonable grounds. There are numerous different theories which are put forward as a reasonable justification, but none of them apply to all types of IPRs without facing difficulties and counter-arguments.¹⁰ For my assessment based on IPRs' contemporaneous position in information societies, the reward, incentive and public interest theories are distinctly relevant among many different theories. Although these theories are common to a certain extent for most types of IPRs, the focus is going to be on their relevance to copyright and patents which are more likely to be the subject of competition intervention in EU law as a result of their more monopolistic nature. Moreover, since a detailed examination of these deep-rooted concepts is beyond the scope of this study, they will be examined under the same heading by emphasizing their common viewpoints.

2. Overview of the Relevant Justification Theories

One of the important theories of justification is based on the necessity to reward the creators with a certain kind of protection. The reward could be given as a control of the created intangibles in exchange for either the efforts exerted in producing it, the investments made in producing it or the contribution that is made to the culture.¹¹ This view does not ignore the labour and endeavor put into the work by its creator and wants to provide control by the grant of legal protection in the form of an IPR. Historically, it emanates from John Locke's famous discussion about the origins of property and how "intellectual property is seen as a suitable reward for intellectual labour"¹². For instance, from the copyright perspective which also applies to other types, the reward provided by copyright is the payment made to the laborer in return for their labour.¹³ This is also supported by notion of fairness¹⁴, since it triggers an desire on society to give the creator what they deserve for their work.

The other major theory is about IPRs' role in promoting the incentives of creators, which appears to suit well with today's economic realities. It is based on the logic that, if the creators are left unprotected and the work becomes open to the use of competitors without any compensation, "there will accordingly be little incentive to invest in the ideas or information and the consumer may be correspondingly the poorer."¹⁵ Since the relationship between the creator and the consumer is pointed out, it is not accurate to consider these assertions without taking IPRs' contribution in favor of public interest into account owing to the fact that it is not clearly intelligible to explain why IPRs have supportive function in terms of creative incentives without clarifying the need to support them. The incentives shall be supported because the products of the subject matter protected by IPRs are recognized to be valuable and in demand, which would make the world a poorer place in their absence.¹⁶ This assessment of value is contingent on the ability of IPRs to serve desirable beneficial functions for the general good of the society.

⁹ *Ibid*, p.6

¹⁰ Michael Spence, *Intellectual Property* (Oxford University Press, United States 2007), p.73

¹¹ *Ibid*, p.47

¹² May, p.7

¹³ J.A.L. Sterling, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (Sweet&Maxwell, London 2008), para. 2.30

¹⁴ Bently and Sherman, p.36

¹⁵ Cornish and Llewelyn, p.41

¹⁶ Bently and Sherman, p.37

The relationship between the creator and the consumer can lead us to a further argument about the nature of the created goods. It is suggested that a division exists amongst public and private goods, which are distinguished from each other depending on whether the third parties can be excluded from the access to the creation or not. There will be an incentive to produce private goods, because they will allow the creator to receive some remuneration through IPRs in order to compensate the labour spent.¹⁷ Since the control given to the creator represents a limitation to the public access to those goods which are said to be beneficial for the general good, there needs to be an adequate balance between these opposite interests. Fortunately, the public's limited access to these particular works is traded off with the "benefit of providing incentives to create the work in the first place".¹⁸ Once they are created, the benefits to the society will come to light in the short and long terms even though some limitations exist for the sake of private interests.

This statement requires further clarification and it is appropriate to illustrate it with some specific examples. For instance, in the case of copyright, although the works are shared by the public in a way that the author wants to exploit them during the term of protection, they are still beneficial for the society. They contribute to the amount of knowledge and cultural products that the society already possesses, even though the free access to them as a part of the public domain takes some time until the expiry of the rights. Moreover, by inspiration, they are capable of triggering other ideas and creations based on the existing works.¹⁹ From a patent law perspective, it is important to identify the point which emphasizes patents' function as a database of a great amount of scientific information about the latest technical developments²⁰ because the public disclosure of substantial information about the invention in exchange of the patent protection will assist the development of further discoveries of substitutable products through any experimental uses.²¹

The justification of IPRs is too deep-rooted and complex and there exist many different theories other than the ones stated above. On the other hand, many objections and criticism of the current theories also exist. Firstly, since the reward is given in a form of exclusivity, the nature of the reward is subject to discussion as it is argued whether the grant of a monopoly is the appropriate one or not and different systems with fewer social and economic costs in particular are suggested for patents.²² This is evidently a reflection of the fear against IPRs' monopolistic character, but the structure of the IP system provides a counterweight in order to achieve a balance which shall be examined below. Secondly, it has been strongly argued that even in the absence of IPRs many works will still be produced because their emergence does not necessarily depend on the existence of IPRs.²³ However, it is found to be very "narrow-minded or naive" to suggest that without any support to incentives the same results would eventually occur.²⁴ It does not seem to be possible to disagree with the counter-argument because the possibility that some creators' incentives would not be effected does not necessarily justify a generalization of the whole system. For instance in the case of patents, "there is no clear evidence" that the existence of legal protection does not have a positive impact on creators' willingness to be engaged in the time consuming and costly research processes.²⁵

¹⁷ Spence, p.63

¹⁸ William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law' [1989] 18 J. Legal Stud. 325, p.326

¹⁹ Sterling, para.2.35

²⁰ Cornish and Llewelyn, p.139 ; Bently and Sherman, p.339

²¹ Hanns Ullrich, 'Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony, and International Harmonization' in Rochelle Dreyfuss, Diane L. Zimmerman and Harry First(eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford 2001), p.367

²² MacQueen, Waelde and Laurie, p.365 ; Bently and Sherman, p.37

²³ Bently and Sherman, p.38

²⁴ Michael A. Gollin, *Driving Innovation: Intellectual Property Strategies For a Dynamic World* (Cambridge University Press, Cambridge 2008), p.14

²⁵ Cornish and Llewelyn, p.135

B. Internal Balancing of the Scope of Intellectual Property Rights

1. Internal Balancing of the Scope

It has been seen that IPRs establish an exclusivity over the protected material and it is re-quired to draw the boundary of their scope. When the aforementioned justification theories are taken into account all together, it is obvious that there is a very fragile relationship between the in-terests of the creator and the society. While trying to promote the creators' willingness to be en-gaged in the production of IP works by providing strong legal protection, arbitrary and excessive restrictions on the public's access to these works should be avoided and it should be made certain that *"these products find their way into the public domain"*.²⁶ One possible method of achieving this goal is by drawing the boundaries of these rights internally through the use of the IP system in order to strike a balance.

Essentially, different types of IPRs have their own instruments to safeguard vital public interests. For instance, the fact that only certain categories of subject matter are protectable, many works which are not worth protecting are already excluded. In addition to this, not every creation is protected purely for the reason that it falls within the scope of protectable subject matter. Even though there may be differences between different jurisdictions, there are always criteria to be ful-filled for the grant of protection, such as originality for copyright and novelty for patent.²⁷ Apart from this, intellectual property rights are granted with restrictions on duration which constitute one of the strongest balancing arguments between private and public interests.²⁸ The term of copyright is either 50 or 70 years²⁹, depending on the jurisdiction, with the most common duration being 20 years³⁰ for patent rights. The significant difference in terms of duration is a result of the balance between short and strong protection and longer and weaker protection.³¹ More importantly, there are limitations on the exploitation of these rights by the right holders which are based on the concerns of allowing the public's access to these works at least up to some point. The limitations and excep-tions to copyright and the possibility of compulsory licensing of patents clearly aim to fine-tune the balance between private and public interests.³²

In my opinion, the interests on the two ends of the spectrum are creator's incentive and pub-lic's access to information. From this point of view, IPRs should be examined in a wider range which includes their position in the innovation cycle.

2. Intellectual Property Rights' Role in Innovation

The fact that the subject matter of IPRs include important intangibles such as inventions of pharmaceuticals and various different technologies; creative film, music, entertainment and litera-ture products and computer programs should be considered when the position of IPRs is assessed in information societies. Primarily, they represent a *"source of hidden wealth worth trillions of dollars and they impose hidden costs on the same scale"*.³³ For all these different interest groups, IPR is a way of guaranteeing the exploitation of the outcomes of their efforts put into the creations as IPRs are the *"key method to assert ownership over knowledge resources"*.³⁴

²⁶ MacQueen, Waelde and Laurie, p.10

²⁷ Dreier, p.304

²⁸ May, p.7-8

²⁹ <http://www.wipo.int/copyright/en/faq/faqs.htm#rights>

³⁰ http://www.wipo.int/patentscope/en/patents_faq.html#role_patents

³¹ MacQueen, Waelde and Laurie, p.14

³² Dreier, p.304-309

³³ Gollin, p.1

³⁴ May, p.13

Therefore, a vital position for IPRs is imposed in the innovation cycle due to the fact that the strongest *"tools available to stimu-late and channel innovation"* are provided. by IPRs.³⁵

It is suggested that the cycle has three steps: creation of the work by individuals, adoption by society and accessibility of knowledge.³⁶ Firstly, IPR shapes the creation stage by promoting the incentives and subsequently granting protection to make the creation known to the public as a means of exploitation. Following this, by the appearance of these creations in the public sphere they become subject to diffusion; and also influence and inspire other members of the society. Finally, a certain time after the creator benefits from their work through an exclusive right, the work becomes a part of the public domain by the expiry of the IPR. Due to this cycle, IPR maintains that the inno-vations are shared by the public instead of being hidden and lost. This cycle shows that the move-ment flows from exclusivity to accessibility, which in the end creates a *"great ocean of knowledge in the accessible domain"*.³⁷

The issue concerning the diffusion of IPRs is one of particular importance which constitutes the *"balance between the incentive for the initial innovation and the benefits of the subsequent innovation"*.³⁸ As one of the purposes of the IP system to provide the disclosure of the IP protected materials, if the protection given is weakened then it is expected for creators to share their ideas to a lesser extent. However, with more IP protection, initial innovators can disclose information more readily as they will have means to stop others from *"simply running off with the idea once it was revealed"*. Therefore, the existence of IPRs is not an obstacle for further research, development and creation of more IPRs; but a proper means to support the follow-on innovation.³⁹ The assessment of the arguments against and in favor of justifications and in addition to this the innovation cycle per-spective, show that a well established IP law system naturally observes the necessary balance be-tween the private and public interests while defining the scope of the rights. Once this balance is established, efficient social use of innovations and maximization of the public good with social wel-fare are ensured.⁴⁰

However, in addition to IPRs' inner structure, competition law has developed a position for itself in order to support the aforementioned diffusion stage externally by controlling the secondary markets.⁴¹ Nevertheless, the scope and manner of this external interference have been found to be unclear and the attack towards them appears to proceed in the same way for an extended period of time ⁴². These grounds will be further analyzed in detail below.

C. External Balancing of Intellectual Property Rights by Competition Law

1. Background

Above we saw the reasons and methods of internal balancing of IPRs. It has generally been accepted that IPRs are balanced by their inner structure, however, the possibility of additional and external competition law interference to ensure this important balance has also been suggested.⁴³ In addition to the theoretical arguments we will see below, the application of competition law in the EU has already started to pursue this goal. Before examining EU case law, it would be appropriate to look at the general objective, position and structure of competition law.

³⁵ Gollin, p.12

³⁶ *Ibid*, p.17

³⁷ *Ibid*, p.19

³⁸ Barton, p.443

³⁹ Katz, p.333-334

⁴⁰ May, p.48

⁴¹ Steve Anderman, 'EC Competition Law and Intellectual Property Rights in the New Economy', Summer-Fall [2002] The Antitrust Bulletin 285, p.307-308

⁴² Anderman, 2002, p.308

⁴³ Dreier, p.300-312

2. Competition Law

Competition law is generally defined as a set of “rules that are intended to protect the process of competition in order to maximise consumer welfare”.⁴⁴

The main objective of competition law is to achieve economic efficiency through effective competition which establishes benefits to the society.⁴⁵ These benefits are witnessed as lower prices, variety in products and services, more encouragement in innovation and development which are supposed to result in the maximisation of consumer welfare. The aforementioned efficiency is divided into types like allocative, productive and dynamic efficiency⁴⁶; with the last one meriting further explanation since it is closely related to IP issues. Its core is based on the argument that “producers will constantly innovate and develop new products as part of the continual battle of striving for consumers’ business” and consequently the aforementioned stimulation of innovation and consumer welfare will be achieved.⁴⁷ While this argument has at its core the establishment of a free market economy, it is also suggested that some degree of market power held by firms might constitute a better incentive to innovate. This implies that the existence of certain monopolies does not always distort effective competition and is not harmful to consumer welfare.⁴⁸ The objective of consumer welfare and the argument on the effects of market power in relation to innovation should be kept in mind for the discussion below. In addition to this, the status of competition law in the European Union is especially unique and one which imposes further objectives on competition policy. Since its foundation, the most fundamental of many goals for the whole of the EU mentioned in the EC Treaty⁴⁹ is that of a single market and economic integration.⁵⁰ In this general structure, the role of EU competition law is to “facilitate the creation of a single European market and to prevent this from being frustrated by the activities of private undertakings”.⁵¹ Therefore, this significant dimension of EU competition law which is a result of the EU organisation should also be kept in mind.

One of the basic two provisions of EU competition law is article 102 of the TFEU, which prohibits the abuse of dominant position within the common market or in a substantial part of it. The application of the rule initially requires an assessment of dominance in a relevant market which consists of the economic power to behave independently of the competitors and consumers.⁵² If it is established, it is necessary to examine whether this particular undertaking is involved in behaviours which constitute abuse. Finally, this abusive behaviour is required to affect trade between members states in order to be subject to EU competition law rules. The application of this article shall be seen in detail below, but intellectual property law dimension.

3. The Correlation Between Intellectual Property Law and Competition Law

We have seen that, competition law has been functioning as one of the essential instruments to achieve the ultimate goals of the Union. Until now, in many different issues competition law had a major impact on the exercise of IPRs. While analysing the relationship between them in the broadest sense, a question arises about whether there is a conflict in terms of their ultimate goals and their instruments used in order to achieve these goals. These questions need to be examined for further assessment.

⁴⁴ Richard Whish, *Competition Law* (6th edn Oxford University Press, United States 2009), p.1

⁴⁵ Jones and Sufrin, p.3

⁴⁶ See for further information, *Ibid* p.3-11

⁴⁷ Whish, p.5

⁴⁸ J.A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper, 1942) cited in Jones and Sufrin, p.15

⁴⁹ EC Treaty (Consolidated Version of the Treaty Establishing the European Community), article 2

⁵⁰ Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (4th edn Oxford University Press, United States 2008) p.604

⁵¹ *Ibid*, p.951

⁵² Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, para.65

Initially, there are two opinions in relation to the correlation concerning their goals. As we have seen above these two branches of law have certain roles and objectives. The most common opinion is that there exists a conflict between them because of their approach to exclusivity, as we have seen above. However, it should be kept in mind that “all the systems of intellectual property rights are based on the premise that a restraint of competition is necessary to ultimately increase competition in the public interest”.⁵³ Therefore, it has recently been suggested that no such conflict exists due to the fact that these two systems are meaningful together since the exclusivity given by IP law converts the subject-matter into an economic good whereas it is only the possibility of competition that makes the exclusivity attractive as an incentive.⁵⁴ Even if there appears to be a prima facie conflict because of this exclusivity approach, they can in fact be “reconciled by emphasising their common goal of promoting overall consumer welfare”.⁵⁵ This has even been regarded as the modern view compared to the traditional perspective of seeing these two disciplines in an irresolvable conflict because of their monopoly-exclusivity approaches and the modern view sees both of them as promoting the same aims mentioned above by “stimulating innovative activities through competition and promising returns to successful innovation”.⁵⁶ When this approach is considered, the first question can be answered by finding no real conflict between them in terms of objectives, however, the following problem is about whether the ways they operate in achieving these goals are reconcilable or not.

The second question needs to be analysed considering especially the application of article 102 of the TFEU over IPRs. As it was explained above, IPRs grant certain type of exclusivity which might lead to monopolies under certain conditions and article 102 tries to eliminate the existence of these conditions if they are harmful. Therefore, when some circumstances arise which seem to be conflicting on the surface, it is important to decide the instruments of which law should be applied. First, a complete immunisation of IPRs from competition law applications could be considered since exclusivity comes from the nature of these rights, yet, there is no legal basis for this immunisation of IPRs from competition law.⁵⁷ Although IP law has its own checks and balances it is still to a certain extent subject to competition law intervention in the same way that it has to comply with some other fields of law like “environmental laws, health and safety laws and drug safety laws that restrict the free exercise of these rights in the public interest”.⁵⁸ In addition to this, IPRs are regarded as part of private law whereas competition law rules constitute public law.⁵⁹ Moreover, at the European Union level, most of the IP law issues are still subject to national legal systems which are guaranteed by article 345 of TFEU (ex Article 295 of the EC Treaty) which is silent about the correlation between competition and IP law.⁶⁰ At the other end of the spectrum, it is suggested that IPRs

⁵³ Inge Govaere, *The use and abuse of intellectual property rights in E.C. law: including a case study of the E.C. spare parts debate* (Sweet & Maxwell, London 1996) , p.29

⁵⁴ Ullrich p.371-373

⁵⁵ Alan S. Gutterman, *Innovation and Competition Policy* (Kluwer Law International, London 1997) p.11; Estelle Der-claye, ‘The IMS Health Decision and the Reconciliation of Copyright and Competition Law’, [2004] 29(5) E.L.Rev. 687, p.694

⁵⁶ Katz, p.325; Whish, p.758

⁵⁷ Cyril Ritter, ‘Refusal to Deal and “Essential Facilities”’: Does Intellectual Property Require Special Defence Compared to Tangible Property?’, [2005] 28(3) World Competition 281, p.291, <http://www.kluwerlawonline.com/document.php?id=WOCO2005018&type=oc&num=2&> accessed on 14 April 2009; Steven Anderman, *EC Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Oxford University Press, United States 1998), p.6

⁵⁸ Steven Anderman, ‘Does the Microsoft Case Offer a New Paradigm for the “Exceptional Circumstances” Test and Compulsory Copyright Licenses Under EC Competition Law?’ [2004] 1(2) CompLRev 7, p.22 <http://www.clasf.org/CompLRev/Issues/Vol1Issue2Article1.pdf> accessed 4 July 2009

⁵⁹ *Ibid*, p.21

⁶⁰ Ulrika Bath, ‘Access to Information v. Intellectual Property Rights’, [2002] 24(3) E.I.P.R. 138, p.138

do not differ from other rights and therefore do not deserve any specific treatment⁶¹. As a result of this, it is argued that the application of competition law for IPRs should be carried out in the same way as with other property rights while the competition law principles should be determinative in the assessment of the exercise of IPRs.⁶² Yet, counter-arguments do not allow the acceptance of this assertion without considering the questions posed below.

These arguments are mainly based on the doubts about the capacity of competition law to oversee the objectives of IP law and its internally balanced system. Firstly, it is suggested that the limitations imposed on the exercise of IPRs by competition rules are questionable on grounds of policy since it is not certain whether the authorities applying these rules are competent or not and whether because of this the results might generate uncertainty and less interest in investing IPRs since “*their validity is subject to so vague a test*”.⁶³ The rationale behind this statement is the fact that competition law does not provide enough means to accommodate the interests protected by IP law because it does not “*concern itself directly with the question of how far the IP monopoly should extend*” since for instance, it is “too heavy-handed”⁶⁴ and “too blunt” as an appropriate instrument to adjust the shortcomings of the IP system. The nature of competition law remedies, shows that they cannot function as the proper means to adjust the IP system, because they are mainly shaped by the facts of a case instead of setting general outcomes applicable in a wider practice.⁶⁵ Although this point could have been turned into an advantage for IPRs since it would be possible to consider IP specific concerns in each case, in practice it is hard to claim this approach has been helpful. Firstly, it does not represent coherent and consistent external interference which aims to create an applicable general set of rules for IPRs. Secondly, IP law theories have rarely been the subject of the consideration when decisions are made on these cases.

Therefore, it is inevitable to put forward that the unique system of IPRs which already establishes an internal control as a result of considerations which, to a large extent, comply with competition law logic, should not be ignored. One way of doing this is to apply competition remedies only in very exceptional circumstances where IP law’s own mechanisms no longer serve their purpose.⁶⁷ Despite having a reasonable dimension, it takes us back to the doubts about the appropriateness of competition law methods that we discussed above. As a result, it is apparent that the use of competition law instead of amending the shortcomings of IP law through IP legislation is not the best possible approach.⁶⁸ Therefore, these defects should initially be corrected by IP law rules and in the worst case, this being impossible, there should be an assessment by application of competition law which takes IPRs’ “rules and functions” into account when their exercise is restricted, in order to strike a balance between these two sets of rules. The rest of this study aims to look at European case law in this field in order to see whether competition law has or has not functioned accurately in this direction until now.

III. CASE LAW OF EUROPEAN COURTS AND THE EUROPEAN COMMISSION

A. Background

⁶¹ See note 57

⁶² Ullrich, p.374

⁶³ Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing, 2006), p.139

⁶⁴ Dreier, p.312

⁶⁵ *Ibid*, p.298

⁶⁶ Ullrich, p.383

⁶⁷ Dreier, p.312

⁶⁸ Christopher Stothers, “The end of exclusivity? Abuse of intellectual property rights in the EU” [2002] 24(2) E.I.P.R.86, p.92

⁶⁹ Anderman, 2002, p.288

Initially, it is important to remember that this study aims to deal with IPRs and the application of article 102 of the TFEU. In this context, the most important issue raised in case law is the refusal to licence IPRs by dominant undertakings. While early case law seems to be less reluctant in finding such abuse, there have been some controversial decisions which gave rise to questions. As we will see below, in the 1980’s Community Courts became compassionate towards IPRs and paid attention to reward and incentive arguments. Subsequently, however, they followed a less favourable approach towards IPRs which reflected a more restrictive understanding.⁷⁰ Before examining these, the position of IPRs in relation to article 102 deserves a more detailed analysis.

As mentioned above, the application of article 102 requires the fulfillment of three criteria. First, concerning dominance, it is well established in case law that only the existence of IPRs do not automatically make undertakings dominant⁷¹, but it can only be established if certain circumstances exist. Therefore, it is clear that not every single IP is subject to the threat of being in a dominant position and the majority of IPRs’ exclusivity does not constitute a monopoly in any relevant market in the sense of competition law.⁷² Second, even if dominance is found, it does not automatically give rise to the finding of abuse. Therefore, the second condition also needs to be assessed. In case law, it is accepted that the exercise of IPRs can be abusive only in exceptional circumstances. In order to define these circumstances, an important theory has been developed called essential facilities which considers the physical infrastructure such as a port, airport, railway or a pipeline belonging to an undertaking, essential for other competitors in order to be able to run their businesses.⁷³ Recently, there has been a tendency to also consider some of the intellectual property rights as essential facilities and the refusal to license them has been found to be abusive behavior according to article 102. Yet, it is still uncertain whether essential facilities and exceptional circumstances are the same or not.⁷⁴

Initially, the three conditions of article 102 (dominance, abuse and effect on the trade between member states) will leave many of the IPRs out of this question. Yet, this does not decrease the necessity of defining the exact conditions when certain behaviour is abusive. In my perspective, at this point, it is crucial to take all these IP justifications, the balance between the protection of incentives and the public access to the information, IPRs role in further innovation and so on, into consideration. Below we will look at related case law with an attempt to discover any implied or explicit discussions reflecting the aforementioned factors and IP related concerns.

B. Refusal to Licence Intellectual Property Rights Cases

1. The Volvo Case

Volvo⁷⁵ is commonly known as the first case of the refusal to licence IPR doctrine under article 102. In this particular case, the proprietor of a registered design for the front wings of one series of cars prevented other manufacturers from producing these front wings as it would be an infringement of its sole and exclusive design right.⁷⁶ It was asked through a preliminary ruling whether this right confers a dominant position within the meaning of article 102 and if it is so whether the refusal to licence by the right holder constitutes a prima facie abuse of such a dominant position. Initially, the Court clearly recognised that in the absence of community standardisation or harmonisation of laws, the rules for granting rights are a matter for member states to define.⁷⁷

⁷⁰ Valentine Korah, ‘Patents and Antitrust’, [1997] 4 I.P.Q. 395, p.400

⁷¹ Case 78/80 Deutsche Grammophon v Metro [1971] ECR 487, para.18

⁷² Stothers, 2002, p.92

⁷³ Whish, p.691

⁷⁴ Korah, 2006, p.135

⁷⁵ Case 238/87, *AB Volvo v Erik Veng(UK) Ltd* [1988] ECR 6211

⁷⁶ *Ibid*, para.3

⁷⁷ *Ibid*, para.7

Following this, it was asserted that as refusing to licence a protected design and preventing others from using it constitutes the “*very subject matter of the exclusive right*”⁷⁸, it can never be in itself an abuse of dominant position. For these reasons, the Court pointed out the requirement of other conditions and gave some examples of possible abusive behaviours⁷⁹. In these cases, the intervention of the competition rules was not found to completely undermine the essence of intellectual property rights.⁸⁰ Other than the recognition of specific subject matter of these rights, the only point that was taken into account as an IP specific issue is about the prices in these cases when the dominant undertaking might charge for the licence more than other competitors in order to recover the re-search and development expenditure in addition to production costs.⁸¹

2. The *Magill* Case

Following this decision, the general attitude towards these cases changed to a further restrictive approach. While Volvo did not clarify when the exercise of these rights would be abusive but gave some unclear examples⁸², *Magill*⁸³ developed a more detailed test which was also applied in the following cases. Yet, this triggered concerns on the IP side of the discussions fearing it could constitute a general attack on the exercise of IPRs and decrease the willingness of firms to invest in IPRs and also to innovation.⁸⁴ Simply put, the decision made by the Commission, which was later upheld by the CFI and the ECJ, required the owners of copyright for television programme listings to licence this information to third parties who wanted to produce a comprehensive weekly television guide.

Initially, as the existence of dominance is the first issue to consider, it is not possible to see the effect of IPRs in finding dominance in detail in the wording of the decision.⁸⁵ However, the broadcasting companies were found to enjoy a “*de facto monopoly over the information used to compile listings*”.⁸⁶ The finding of dominance over the particular information created many un-answered questions, especially the assessment of substitutability which is interesting due to the fact that “*each piece of information is individual and specific*” and mostly not appropriate for a substitutability test because of its nature.⁸⁷

As to the abuse of this position, the judgement “*eschewed extended discussion about the nature of IPRs and their relationship to the competition rules*”⁸⁸ and instead of making an IP specific assessment applied general article 102 rules to the case. The factors which are supposed to be taken into account while deciding whether there are “*exceptional circumstances*” constituting an abuse or not are defined as such: no actual or potential substitute for a comprehensive weekly television guide for which a specific, constant and regular demand exists on the part of the consumers; prevention of the appearance of a new product; no justification for such refusal and reserving a secondary market by excluding all competition on that market by the dominant firm.⁸⁹ However, at that time it

⁷⁸ *Ibid*, para.8

⁷⁹ *Ibid*, para.9

⁸⁰ Korah, 2006, p.137

⁸¹ Opinion of Mr Advocate General Mischo delivered on 21 June 1988, Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211, paras. 32-33

⁸² Jones and Sufrin, p.556

⁸³ Joint Cases C-241/91P and C-242/91P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743

⁸⁴ David Aitman and Alison Jones, ‘Competition Law and Copyright: Has the Copyright Owner Lost the Ability to Control His Copyright?’ [2004] 26(3) E.I.P.R. 137, p.137

⁸⁵ Jones and Sufrin, p.560

⁸⁶ Joint Cases C-241/91P and C-242/91P, *RTE&ITP v Commission of the European Communities* [1995] ECR I-743, para. 47

⁸⁷ Ullrich, p.387

⁸⁸ Jones and Sufrin, p.558

⁸⁹ Joint Cases C-241/91P and C-242/91P, *RTE&ITP v Commission of the European Communities* [1995] ECR I-743, para.50-56

was not clear whether these conditions were cumulative or not for the assessment.⁹⁰ A further de-tailed explanation of these factors shall be made below, as they have been taken into account in the following judgements.

However, there are some points to be noted which make this case more than a classical application of article 102 even though it does not include elaborated discussions about IPRs’ nature. First of all, it has always been considered that, this strict approach of the Court could have primarily been a result of the particular type of subject-matter of the copyright, which would not receive copyright protection in the Member States other than the UK and Ireland.⁹¹ This point has not been mentioned in the decision but only the influence of this argument can be seen from the Commission’s submissions at the CFI.⁹² Firstly, this cannot be accepted since the property ownership is subject to national legislation, not to the Treaty according to article 345 of TFEU. If the Court follows this approach, it “*actually indirectly disqualifies national legislators*”.⁹³ Still, it has been argued that the copyright protection granted to *Magill* is beyond IP justifications, especially in the case of copyright which aims to reward the creator.⁹⁴ Even though it can be argued that this particular IPR is “*unusual*”⁹⁵, the decision generated concerns about the application of this test to less “*unusual*” kinds of IPRs especially in the case of patents, since it was claimed that the Court’s wording suggests the application of this test even to patents which emerge as a result of tremendous investment and research.⁹⁶ It was even expressed as a fear of the danger that the *Magill* test would be applied by the Courts in the subsequent cases about “*patents, designs and meritorious copyright*”.⁹⁷ As we will see below, these fears were not groundless since the later cases reflected the same approach, i.e. for copyright for software. Apart from this, as the remedy to such abuses is the granting of a compulsory licence by the dominant IP owner; this specific IP instrument becomes general by broadening its application sphere. Therefore, it is reasonable to question whether the wider use of this instrument is capable of removing incentives for innovation which are the ultimate goal that IPRs try to achieve.⁹⁸ In addition to these, the decision gave no guidance about the possible defences that an IP holder could assert such as any positive grounds for objective justification.⁹⁹

3. The *Tierce Ladbroke* Case

*Tierce Ladbroke*¹⁰⁰ is another refusal to licence an IPR case and a reflection of the application of previous case law. It deals with the refusal to grant a licence of televised pictures and information about horse races in France to a betting shop in Belgium. As it was pointed out before, the *Magill* decision had left many questions unanswered and the first application of this case-law to an IP licensing case resulted in ambiguity. The significant point of *Ladbroke* is that CFI interpreted *Magill* conditions to be alternative to each other, instead of being cumulative. Therefore, in the case of an IPR an abuse could be found if either the access for product or service that is essential for activity in another market is sought or the prevention of the emergence of a new product existed.¹⁰¹ Since these exceptional circumstances did not exist, there was no abuse in this case.

⁹⁰ Jones and Sufrin, p.560

⁹¹ Jones and Sufrin p.557; Valentine Korah, ‘The Interface Between Intellectual Property And Antitrust: The European Experience’ [2001] 69 Antitrust L.J. 801, p.811

⁹² Case T-69/89, *Radio Telefis Eirann v Commission of the European Communities* [1991] ECR II-485, paras.45-46

⁹³ Bath, p.141

⁹⁴ Christopher Stothers, ‘Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union’ [2001] 22(7) E.C.L.R. 256, p.262

⁹⁵ Aitman and Jones, p.141

⁹⁶ Korah, 1997, p.403

⁹⁷ *Ibid*, p.409

⁹⁸ Jones and Sufrin p.557-558

⁹⁹ Anderman, 2002, p.293-294

¹⁰⁰ Case T-504/93 *Tierce Ladbroke SA v Commission* [1997] ECR II-923

¹⁰¹ *Ibid*, para.131

4. The *Oscar Bronner Case*

Oscar Bronner¹⁰², which is about the refusal to grant access to the only nation wide newspaper home-delivery scheme belonging to one undertaking is clearly not an IP case. But what makes it important in this analysis is the fact that the decision was based on Magill. The Court held that Magill, a case purely involving the exercise of an IPR, is applicable to other types of property right cases but with a more restrictive approach since an additional requirement is introduced requiring the service to be indispensable, which means that there are no actual or potential substitutes for the person asking for access to run a business.¹⁰³ This new element will require firms to show more than a simple desire to have access to certain facilities and therefore it is expected that the Courts will be less willing to find an abuse in these circumstances.¹⁰⁴ In addition to this, Oscar Bronner with its strict test seems to point out “*legal predictability and concern for the stronger firm’s incentives to invest*”.¹⁰⁵

In addition to this, what is more important in Oscar Bronner is AG Jacobs’ comment on the rationales of IPRs and the way they must be treated. He suggests a balance which should be achieved in the case of IPRs since he acknowledged their extraordinary nature. According to the AG, primarily, this line of refusal to supply and license cases are exceptions to the generally accepted right “*to choose one’s trading partners and freely dispose of one’s property*” and different interests need to be very carefully balanced.¹⁰⁶ He emphasizes the need to consider short and long term effects on competition and incentives to innovate which can be damaged if these facilities are easily open to access of competitors. Since he declares these opinions for a broad class of property without distinguishing between them, he specifically draws attention to the case of IPRs which he defines as “*the fruit of substantial investment*”. He points to the internal balancing of IPRs in the form of a limited period of right, between the free competition and incentive for creativity. He does not suggest a complete immunization for IPRs, but it is clear that any interference to the IP system should be made in very exceptional circumstances such as if this limited monopoly granted by an IPR turns into a permanent monopoly.¹⁰⁷ He has been criticized for supposing that the time limitation for the IPRs properly balances the private and public interests mentioned above and against his approach it was suggested that the authorities should rely only on competition law.¹⁰⁸ However, as we shall see in the following cases, the application of competition law could not provide complete answers to the questions related to these issues either. Therefore, in my point of view, it was promising to find this analysis in an official ECJ document, despite this being only the AG’s opinion, due to the fact that it can trigger further consideration in the future.

5. The *IMS Health Case*

The IMS Health case relates to a “*1860 brick structure*” developed by IMS which divides Germany into small geographical areas in grid form (bricks) by taking some specific criteria into account. With this structure, it provides data on regional sales of pharmaceutical products. The procedural background of IMS Health decision is more complicated than other cases. Two proceedings were occurring at the same time, one of which was initiated by the Commission and resulted in an interim decision¹⁰⁹ that ordered IMS to license its brick structure. On the other hand, the national proceedings between these parties tried to resolve the conflict by making a preliminary reference to the ECJ about the interpretation of article 102 in refusal to license intellectual property right

¹⁰² Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint* [1998] ECR I-7791

¹⁰³ *Ibid*, para.41

¹⁰⁴ Korah, 2006, p.145

¹⁰⁵ Mats A. Bergman, ‘The Bronner Case - A Turning Point for the Essential Facilities Doctrine?’, [2000] 21(2) E.C.L.R. 59, p.63

¹⁰⁶ Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint* [1998] ECR I-7791, para.56

¹⁰⁷ *Ibid*, paras.62-64

¹⁰⁸ Ritter, p.293

¹⁰⁹ 2003/741/EC: Commission Decision of 13 August 2003 relating to a proceeding under Article 82 of

¹⁰⁹ EC Treaty(Case COMP D3/28.044 - NDC Health/IMS: Interim Measures) Official Journal L 268, 18/10/2003, p. 69-72

cases¹¹⁰. During these concurrent proceedings, the Commission stepped back and withdrew its decision after it was suspended by the President of the CFI mentioning that “*the obligation to licence went too far*”.¹¹¹

First, as this is a preliminary ruling procedure, the ECJ could not give an exact decision about the problem but left the application of what it suggested to the national court. Initially, in the IMS decision the court emphasised that Magill factors are cumulative and all of them need to be satisfied with addition to Oscar Bronner’s “*indispensability*” requirement.¹¹² Other than this, there are no new elements introduced into this doctrine by IMS, which despite providing more elaborated explanations of these factors, follow Magill. However, in the Commission decision, the emergence of a new product was not required since it followed Ladbroke. Initially, it is clear that in this line with case-law, the Court looks for two different markets where dominance exists in one and tried to be used in the other. Therefore, the existence of two different markets enables the court to restrict the exercise of IPRs. Interestingly, the Court rules that this can be a potential or even a hypothetical market and the finding of two different stages of production which are interconnected and upstream product is indispensable for the downstream product would be sufficient enough.¹¹³ It is quite hard, however, to see two different markets and products in IMS, where the 1860 brick structure is suggested to be the upstream market and supply of German regional sales data for pharmaceutical products is considered as the downstream market.¹¹⁴ This raises concerns about the reliance of hypothetical markets terms being very wide, especially in the case of IPRs.¹¹⁵ This requirement has been interpreted as “*a polite way of rejecting the doctrine that for a duty to supply to arise there must be two markets where transactions are being concluded*”.¹¹⁶

However, the emergence of a new product issue is discussed in depth and I find it compatible with IP issues due to the fact that it at least prevents the possibility of a dominant firm to be forced into sharing its IP protected material with competitors who aim to produce the “*clones*” and “*me too*” products which would be in complete conflict with the rationale of IP.¹¹⁷ Therefore, this particular requirement is seen as the reflection of the need to strike a balance between the interests of copyright and competition since preventing the emergence of a new product would not be compatible with neither copyright nor competition laws because it is beyond copyright’s goal of promoting innovation¹¹⁸. Also, as was explained above, IPRs do not aim to stop further and follow-on innovations but they still have to take IPR’s internal balancing of limited monopoly and access to information by public into consideration. It is suggested that these points are also recognised by the IP system and may lead to compulsory licensing and even the withdrawal of protection, especially in the case of inadequate use of an invention.¹¹⁹ The decision sets the requirement that the refusal “*may be abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods and services already offered on the secondary market by the owner of IPR, but intends to produce new goods or services*”.¹²⁰ It is suggested that this requirement should be interpreted as drawing a difference between IP and physical property cases¹²¹

¹¹⁰ Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039

¹¹¹ Korah, 2006, p.144

¹¹² Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039, para.38

¹¹³ *Ibid*, paras.44-45

¹¹⁴ *Ibid*, para.46

¹¹⁵ Damien Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court’s Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?’ (2004) 41 CML Rev 1519, p.1530

¹¹⁶ Korah, 2006, p.147

¹¹⁷ Anderman, 2004, p.13

¹¹⁸ Derclaye, p.695

¹¹⁹ Ullrich, p.393

¹²⁰ Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039, para.49

¹²¹ Derclaye, p.694; Geradin, p.1527

since it has “no analogue in the essential facilities cases that involve physical property cases”.¹¹² Yet, the requirement has not been defined without leaving any questions unanswered and as we will see below, the first application of the requirement in Microsoft has raised more questions than before.

Although this decision had been regarded as shedding light on the court’s “murky” case law¹²³, it will become evident that Microsoft raised further issues.

C. Refusal to Licence Interoperability Information

1. The Microsoft Case

The Microsoft case is considered to have had the biggest impact in this particular field and attracted broad criticism, primarily due to the €497 million fine the Commission issued for the two breaches of article 102.¹²⁴ Other reasons exist as to why it is important to examine the outcome of this case in order to see how the previous case law has continued to effect and how it might appear to effect the subsequent cases. However, both the Commission and the CFI decisions are rather long and detailed, compared to previous cases in this field, therefore it is not possible to discuss all the issues in detail below. One reason for this is the fact that the case is about two different abuses, one of which is the refusal to supply interoperability information and the other is the tying of two products. Below we will focus on the first issue with a specific look at three points which are related to the particular IP-competition law correlation.

a. Dominance and the Market Structure

As to the finding of dominance, initially two markets were defined: PC operating systems and work group server operating systems. Microsoft’s dominance in the first market was untested, with almost more than 90% of the market share.¹²⁵ Moreover it is clear that Microsoft has a very unique position in this specific high technology market. One reason for this dominance is suggested to be the network effects which arise in technology markets.¹²⁶ The clue for this suggestion also comes from the wording of the decision which mentions that there exists an “overwhelmingly dominant position” in the Microsoft case,¹²⁷ or in Orwellian terms: “Some dominant firms are more dominant than others”.¹²⁸ By using a simple analogy it is thought that while a dominant undertaking has a special responsibility for not abusing its particular position, another undertaking with a more specific dominance might have more responsibility.¹²⁹ Although this doctrine has not been explicitly accepted, the outcome of the decision should also be considered taking this into account, since the judgement reveals that the defendants “had not taken sufficiently into account its special responsibility” for not distorting the competition.¹³⁰

The features of this particular market also merit special attention. These are high technology markets, which emerge as a result of time-consuming and costly investments. Moreover, another particular feature of these markets is the necessity of interoperability information. Interoperability concerning computer programs is the functional interconnection and interaction between the

¹¹² Derek Ridyard, ‘Compulsory Access Under EC Competition Law - A New Doctrine of “Convenient Facilities” and the Case For Price Regulation’ [2004] 25(11) E.C.L.R. 669, p.669

¹²³ Derclaye, p.687

¹²⁴ Geradin, p.1533

¹²⁵ Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601, para.387

¹²⁶ Jones and Sufrin, p.54-55

¹²⁷ COMP/C-3/37.792 *Microsoft*, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.435

¹²⁸ Jochen Appeldoorn, ‘He who spareth his rod, hateth his son? Microsoft, super-dominance and Article 82 EC’ [2005] 26(12) E.C.L.R. 653, p.653

¹²⁹ Whish p.185

¹³⁰ Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.775

elements of software and hardware in order to provide communication and proper operation with other components of computer systems and users.¹³¹ In fact, the Software Directive recognises that necessity and provides an IP law instrument to cope with it by setting the conditions where the legitimate obtaining of the interoperability information does not infringe copyright and at the same time observes the interests of the copyright owner.¹³² It is suggested that the provisions about the interoperability in the Software Directive constitute one of the important attempts made at the Community level in order to “strike a balance between, on the one hand, the importance of IPRs, and, on the other hand, the importance of competition and access to information”.¹³³ It was identified that, from another point of view, the possibility of decompilation might increase the number of firms and products in the software markets and decrease the incentives to create especially for the larger and well established firms.¹³⁴ Thus, it should be observed that in some cases IP law might prefer to leave the creators with less incentives in order to balance the system for the general good of the creators, users and public.¹³⁵ Therefore, the particular article of the Directive is a real example of the means that IP law has in its internal system to balance the interests of different parties. However, the Directive also points out the possible application of article 102 where this interoperability information is held by dominant firms.¹³⁶ Still, if Microsoft’s rivals cannot obtain interoperability information according to decompilation rules under article 6 of the directive, it is very debatable as to whether it is possible to extend its scope by competition law with a claim of being “beneficial for the society as a whole” especially because of the concerns about article 102 as the appropriate means.¹³⁷

One last point related with the markets is the requirement from previous case law which looks for two different markets in this line of cases, upstream and downstream and the indispensability issue. As we saw above, this constituted one of the exceptional circumstances which would make the finding of abuse on the part of IP holders harder. However, IMS had made quite a different impact on the requirement by the hypothetical markets approach and the two different stages of production. By following these, the CFI did not identify two different markets but instead two products in Microsoft which are personal computer operating systems and work group servers. Yet again however, because of the network effects, which has been asserted by Microsoft¹³⁸ and also pointed out by some authors¹³⁹, any technology in these kind of network markets may always be regarded as indispensable.

b. The New Product Requirement

Although the IMS doctrine has been followed in Microsoft to a large extent, the assessment of the new product requirement is controversial due to the fact that it causes the issue to become more extensive. As was explained in IMS, a proper application of this element is capable of protecting some of the IP concerns, however, after the previous cases, it was observed that the decision left the questions about the exact definition of this term unanswered.¹⁴⁰ The Microsoft decision is a real reflection of this criticism, because this element, which was thought to observe IP specific requirements, was put into a different position by the interpretation of the Commission and the Court.

¹³¹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, Recital 10

¹³² *Ibid.*, Article 6

¹³³ Bath, p.141

¹³⁴ Barton, p.442

¹³⁵ Michael Anthony C. Dizon, ‘Decompiling the Software Directive, the Microsoft CFI case and the I2010 strategy: how to reverse engineer an international interoperability regime’, [2008] 14(8) C.T.L.R. 213, p.214

¹³⁶ Directive 2009/24/EC, recital 17

¹³⁷ David Howarth and Kathryn McMahon, ““Windows has performed an illegal operation”: the Court of First Instance’s judgment in *Microsoft v Commission*” [2008] 29(2) E.C.L.R. 117, p.134

¹³⁸ Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.340

¹³⁹ Howarth and McMahon, p.120 ; Bill Batchelor, ‘The fallout from Microsoft: the Court of First Instance leaves critical IT industry issues unanswered’ [2008] 14(1) C.T.L.R. 17, p.17

¹⁴⁰ Derclaye, p.695

First, the criticism focuses on the point that there is not an exact definition of a new product in this case and Microsoft's conduct is regarded as preventing the emergence of "unspecified future new products" which is considered as a failure of the Magill test.¹⁴¹ In previous cases, the emphasis was made on the competitors' need to produce new products which require the IP protected material as an indispensable input, instead of a mere duplication. However, in Microsoft this approach has not been made the basis of the decision. The CFI refused to consider new products as the only criterion and broadened the understanding by interpreting it as a "limitation to technical development to the prejudice of consumers" under article 102(b).¹⁴² So it enables the competitors to access IP protected materials when their intention is to develop some new technical features on the same and existing products if it can be shown that in the case of limiting this development prejudice of consumers will occur.¹⁴³ Therefore, the Commission relied on the evidence from consumer surveys which shows that the applicant's working group servers had better technical futures compared to Microsoft's in order to find abusive behaviour on Microsoft's side.¹⁴⁴ However, this data is not considered to be the most reliable evidence because of the networks effects in the market¹⁴⁵. Further-more, in this specific industry, competitors can almost always be in a position to claim that better technical features exist since it is not very likely that two competing products exist with exactly the same characteristics, a new approach which in the end essentially weakens the balance between IP and competition.¹⁴⁶

c. Objective Justification and the Commission's Effects-Based Approach

The other crucial issue to emphasise in Microsoft decision is the incentive balancing argument which was dealt with under the objective justification heading. Objective justification defence in assessing abuse has never been seriously discussed in this line of cases. Finally, in Microsoft, the defendant's claim about the existence of intellectual property rights as an objective justification to refusal to licence interoperability information has become a subject of discussion.

Microsoft claimed that the information requested by Sun Microsystems was protected by intellectual property rights which should constitute an objective justification since it is the outcome of a large amount of investment while the protection given by the IPRs promotes its incentives for further innovation in software and other technologies.¹⁴⁷ The Commission applied a balancing-test to examine this claim before finding that the existence of IPRs did not constitute an objective justification which was later approved by the CFI.¹⁴⁸ However, it was added that Microsoft was not successful in benefiting from this claim since it put forward "vague, general and theoretical arguments".¹⁴⁹ Consequently, it is likely that the court may deal with these arguments more in subsequent cases under the objective justification assessment¹⁵⁰ if the defendants can successfully support their arguments especially when the facts of the cases are not as unique as Microsoft's.

What is important to look at in relation to objective justification is the Commission's afore-mentioned effects-based approach used to refute Microsoft's points. As Microsoft claimed that this access to its interoperability information would decrease its incentives to innovate, the Commission tried to refute the claim by applying a test which focuses on whether "balance, possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive

¹⁴¹ Geradin, p.1538

¹⁴² T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.647

¹⁴³ Steven Anderman, 'Microsoft v Commission and the interoperability issue' [2008] 30(10) E.I.P.R. 395, p.399

¹⁴⁴ T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.650

¹⁴⁵ Howarth and McMahon, p.123

¹⁴⁶ Batchelor 2008, p.18

¹⁴⁷ COMP/C-3/37.792 *Microsoft*, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.709

¹⁴⁸ T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.690

¹⁴⁹ *Ibid*, para.698

¹⁵⁰ Anderman, 2008, p.399

impact on the level of innovation of the whole industry".¹⁵¹ This approach has been approved by the Court as it was found to be more than just simply refusing the arguments¹⁵², even though Microsoft claimed that this is not appropriate because the test itself is vague and does not provide the under-takings with enough guidance¹⁵³.

The Commission has recently developed this approach as well as issuing the *Guidance on the Commission's enforcement priorities in applying article 22 to abusive exclusionary conduct by dominant undertakings* on 3 December 2008.¹⁵⁴ This is part of the modernisation process of EU competition law which highlights the importance of promoting consumer welfare and efficiency as the main objective of this branch of law.¹⁵⁵ By taking these factors into account, the aforementioned approach focuses on the effects of alleged conducts not for the whole economy but for the consumers.¹⁵⁶ The application of article 102 has always faced criticism since it tends to focus on the "form" of dominant undertakings' behaviours in order to assess the existence of abusive conduct instead of the "effects" of them.¹⁵⁷ In some cases, this formalistic approach tends to find abuses when the tests of infringement are met at first instance however in reality conduct may not be abusive but pro-competitive or neutral, because of the specific facts of the case.¹⁵⁸ Therefore, when this effects-based approach is accepted, it would help to reconcile IPRs and article 102, due to the fact that dominant firms' behaviours, which categorically fall under article 102 but in fact do not produce the effects that competition law tries to eliminate, may be allowed. This approach has been well received, in particular by the IT industry which is closely related to IPRs due to the fact that it is thought that the specific sectorial requirements like the definition of markets will be better met.¹⁵⁹ This would enable more discussion about the effects of the existence of IPRs with long term and short term benefits taken into account.

However, this approach has also faced some criticism as it is suggested that if this particular approach is going to be used more in the future, it will trigger the development of a "more open-ended" approach, one which is regarded as a move from essential facilities doctrine to a new "convenient facilities doctrine" that leaves the Commission a great amount of discretion.¹⁶⁰ The Commission has already rejected the possibility of the existence of an exhaustive check list of exceptional circumstances. Some authors believe that the Commission, at its own discretion, chooses the most convenient element from previous case law as a basis for its decision in order to examine other factors.¹⁶¹ Although the positive aspect of this balancing test has been valued since it takes incentive concerns into account, it is not clear how well the Commission can perform such a difficult task. This is because these kinds of tests are "inherently unreliable and unpredictable" instruments which could carry a prejudice in favour of the access seekers. This effects-based approach could be seen to provide some flexibility; however, since it does not have enough guidance for the dominant firms to know whether they are abusing their position or not, it brings uncertainty and unpredictability instead.¹⁶⁴

¹⁵¹ COMP/C-3/37.792 *Microsoft*, para.783

¹⁵² T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.696

¹⁵³ *Ibid*, para.671

¹⁵⁴ <http://ec.europa.eu/competition/antitrust/art82/index.html>

¹⁵⁵ Jones and Sufrin, p.44

¹⁵⁶ Jones and Sufrin, p.48

¹⁵⁷ *Ibid*, p.330

¹⁵⁸ Whish, 195

¹⁵⁹ See, Sofia Bune and Bill Batchelor, 'Reform of Article 82 EC Treaty: how will it affect the IT industry?', [2006] 12(1) C.T.L.R. 22

¹⁶⁰ Ridyard, p.670

¹⁶¹ COMP/C-3/37.792 *Microsoft*, para.555

¹⁶² Appeldoorn, p.657

¹⁶³ Geradin, p.1542-1543

¹⁶⁴ *Ibid*, p.1553

d. Comment

Nevertheless, if the specific facts of this case, such as the dominance of Microsoft and the structure of the market, are taken into account, the result of this balancing test in favour of free competition may be found to be reasonable. If the decision were in favour of Microsoft, its dominance would be reinforced since it would face little competition and would consequently be hard to find any incentive on Microsoft's side to produce and innovate better.¹⁶⁵ In this case it would be extremely difficult to claim that a result in favour of Microsoft is compatible with IPR's goals since it could go beyond its defined aim. Therefore, it is suggested that the examination must be based on this crucial question, whether the IPR is exercised according to its essential function or not.¹⁶⁶ Thus, this incentives balance test "would seem to be in line with the most recent economic thinking on IPRs".¹⁶⁷ This particular test could be beneficial owing to the fact that the essential function of IPRs is the inability to prevent further innovation, however in this decision the assessment about what constitutes a new product leaves many questions unanswered. Moreover, as discussed above, the amount of certainty and predictability required for the identification of abusive conduct is not satisfied.¹⁶⁸

2. The French Apple Case

a. Interoperability Concerning Technological Protection Measures

Apart from the interoperability between computer programs and components, a further aspect of this topic exists in relation to interoperability between technological protection measures. Technological protection measures are used by copyright owners while exploiting their rights in the forms of encryption and similar access controls.¹⁶⁹ The Information Society Directive expressed the need to establish compatibility and interoperability between these systems which might be different from each other¹⁷⁰. Although the recital indicates nothing more than a wish for this requirement, this is thought to be a result of the current situation in 2001 since at that time the interoperability of technological protection measures did not seem to be an essential and daily issue.¹⁷¹ Yet, even ten years before the enactment of the Information Society Directive, the Software Directive provided a more elaborated approach and guidance to the interoperability issue in software markets because the need of interoperability was observed even at that time.¹⁷²

On the other hand, although the Copyright Directive does not say much about interoperability, it requires that adequate legal protection against the circumvention of any such measures be provided by member states.¹⁷³ These measures also give rise to questions about interoperability, however, the Copyright Directive does not provide further explanation. It has been suggested that these protection measures should be regarded a part of the system components that the Software Directive applies to in terms of interoperability, however no case law or legislation exists to solve this question.¹⁷⁴ Nevertheless, since the Microsoft case constitutes a landmark decision for interoperability at the EU level, the interoperability issue related to these specific protections means may become the subject of further cases in the future.

¹⁶⁵ Simonetta Vezzoso, 'The incentives balance test in the EU Microsoft case: a pro-innovation "economics-based" approach?', [2006] 27(7) E.C.L.R. 382, p.385

¹⁶⁶ Howarth and McMahon, p. 124

¹⁶⁷ Vezzoso, p.386

¹⁶⁸ Howarth and McMahon, p.134

¹⁶⁹ Bently and Sherman, p.318

¹⁷⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, recital 54

¹⁷¹ Mikko Valimäki and Ville Oksanen, 'DRM Interoperability and Intellectual Policy in Europe', [2006] 28(11) E.I.P.R. 562, p.563

¹⁷² *Ibid*, p.563

¹⁷³ Information Society Directive, article 6

¹⁷⁴ Valimäki and Oksanen, p.564

b. A National Application of the EU Doctrine: Apple v Virgin

Although not yet at the community level, a case which is in a way similar to the Microsoft case and which is important to point out briefly in order to observe possible future dimensions of the issue, has been seen in France¹⁷⁵. In 2004, the French competition authority was involved in a case with an IP related issue concerning technological protection measures on music files, as another part of the IP and competition law debate.

Apple is today one of the most important players in the multimedia market. The product in question in this case is its famous portable music player iPod which is the fruit of its innovation success.¹⁷⁶ Apple uses a digital rights management system called FairPlay, which has certain features for restricting the further unauthorised copying of downloaded material which can only be played on Apple's portable music players; a format only obtained through its iTunes software.¹⁷⁷ As explained before, these measures which are protected by the Information Society Directive obviously carry a beneficial role in the prevention of unauthorised sharing of IP protected materials especially with today's problems concerning online music and file sharing.¹⁷⁸ Despite being an IP related area, it can also be subject to competition law assessment as we see in the French case because the difference between formats diminishes other players' ability to play FairPlay formatted songs and constitutes a restriction in the market and raises demand for interoperability.¹⁷⁹

The French authorities applied EU case law on compulsory licensing of IPRs to this case. Essentially, the question here is whether Apple abused its dominance in the portable music player market by leveraging it in the downloaded music market.¹⁸⁰ Initially, while applying the existing doctrine, the finding of dominance in the relevant digital rights management technologies market was left unclear because of the dynamic market features which make the assessment particularly hard. However, Apple is found to be dominant in the market for portable music players.¹⁸¹ Although dominance was not found for digital rights management technologies market, the previous case laws conditions were considered and according to the decision, Apple's digital rights management information was not indispensable, the competition was not eliminated in the music downloads market, no specified new product and consumer demand existed, and Apple managed to assert objective justifications¹⁸², ending the proceedings in favour of Apple.

c. The Relationship Between Technological Protection Measures and Competition Law in the EU

Nonetheless, what is important for the purpose of this study is once again the relationship between IP measures and competition law, since technological measures are important tools for the protection of IP materials and it is legally given a very similar status to IPRs. Moreover, digital rights management systems consist of two aspects, one being the IPR protected software that creates it and the other being the restriction brought by the Directive for the removal and circumvention of this protection measure. This is a status similar to IPRs, but they only differ in that these technological measures are not regarded as property rights. Nevertheless, it is suggested that the

¹⁷⁵ Conseil de la Concurrence, Décision N° 04-D-54 du 9 Novembre 2004 relative à des pratiques mises en œuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numériques, cited in MAZZIOTTI *bunu duzelt* available at: <<http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>>

¹⁷⁶ Ewan Kirk, 'Apple's iTunes digital rights management: "Fairplay" under the essential facilities doctrine', [2006] 11(5) Comms.L. 161, p.161

¹⁷⁷ *Ibid*, p.161

¹⁷⁸ *Ibid*, p.161

¹⁷⁹ Stan J. Liebowitz and Stephen E. Margolis, 'Bundles of joy: the ubiquity and efficiency of bundles in new technology markets' [2009] 5(1) J.C.L. & E. 1, p.21

¹⁸⁰ Giuseppe Mazziotti, 'Did Apple's Refusal to License Proprietary Information enabling Interoperability with its iPod Music Player Constitute an Abuse under Article 82 of the EC Treaty?', [2005] 28(2) World Competition 253, p.263

¹⁸¹ *Ibid*, p.261

¹⁸² *Ibid*, p.270

same principles applied for IPRs under competition law should *apply to digital rights management systems*.¹⁸³ Therefore, it is obvious that these systems “cannot enjoy any kind of *per se* immunity from competition law assessment”.¹⁸⁴ With this in mind, it should be remembered that in this case there exist IP measures which are regulated by EU Directives. Consequently, it is important to consider to what extent these measures help to solve this particular problem and what IP law can do before competition law interference arises. For example, provisions related with the possibility of reverse engineering these measures may be incorporated into the legislation in order to provide compatibility under defined conditions.¹⁸⁵ On the other hand, French legislature tried to enact provisions requiring Apple to open its format to its competitors during the implementation of the Information Society Directive but the proposal was rejected.¹⁸⁶ Although the proposal was not entirely in favour of these measures it would be clearer and more appropriate to impose this requirement by means of legislation instead of an external competition law application because the use of competition law in this way could discourage Apple and also others in the market from creating in the first place.¹⁸⁷ Because of this, an adequate interoperability doctrine could be introduced by individual IP laws.¹⁸⁸ However, it is claimed that the EU does not have a sufficient interoperability policy and the modification of the existing rules is unlikely in the near future.¹⁸⁹ In spite of this absence, it is reasonable to support the necessity to develop a common standard which would eliminate this incompatibility.¹⁹⁰

Although, this national decision left space for the exercise of technological protection measures, the position of Apple and even the position of Microsoft which is pointed out in this decision are very likely to come to the Commission’s attention in the near future which could see the creation of a subsequent part of current case law.¹⁹¹

D. Concluding Remarks

The essential comments and critiques about case law have been discussed above, however it is necessary to sum them up to illustrate our point better. It is obvious that the factors of competition law tests created for IPRs have some pros and cons when they are examined in conjunction with IPR rationales. It is not possible to think of IP exercise without any competition law interference, therefore this interference should definitely include a balancing assessment between incentives to innovate as the core of IPRs and the competition in the market.¹⁹² However, when the available case law is examined the elements of the applied tests do not provide a good enough picture. While some of the aforementioned tests could have been fulfilling IP expectations, like the definition of two different markets, new product requirement and objective justification, their broad interpretation by the court has recently left little in common between competition and IP in terms of reconciliation. The Microsoft decision, being the more recent case, has certainly done “little to clarify the scope of the duty for the refusal to licence IPRs under EC law.”¹⁹³ Therefore, the main question which is clearly still unanswered is whether the solution for this grey area between the laws should be provided by IP law through a method of reforming itself or be left to competition law.¹⁹⁴

¹⁸³ Kirk, p.162

¹⁸⁴ Valimaki and Olsanen, p.566

¹⁸⁵ Mazziotti, p. 272

¹⁸⁶ *Ibid*, p.565

¹⁸⁷ Kirk, p.166

¹⁸⁸ Valimaki and Olsanen, p.568

¹⁸⁹ Valimaki and Olsanen, p.567

¹⁹⁰ Kirk, p.166

¹⁹¹ Mazziotti, p.271

¹⁹² Howarth and McMahon, p.119

¹⁹³ *Ibid*, p.117

¹⁹⁴ Anderman, 2008, p.399

It is not an uncommon idea to suggest that competition law should be used in exceptional circumstances when IP law no longer fulfils the function that it is granted for.¹⁹⁵ Nonetheless, we can see how the application of competition laws have not satisfactorily taken the necessary IP issues into account until now. This also shows that competition law “cannot remedy whatever deficiencies, misconceptions or excesses a given IP system may have” and therefore should not be the method used for modifying the shortcomings of IP laws¹⁹⁶. For instance in the Microsoft case, “if IP law were to take a form of offering a more extensive guarantee of interoperability of interface information for software, then the effect would be that article 82 would be called upon even more rarely”.¹⁹⁷ Due to this fact, IP law should build the necessary safeguards into its internal system since easy reliance on competition law does not help to correct the deficiencies.¹⁹⁸ Moreover, the reform of intellectual property law and more harmonisation at the EU level in order to decrease the amount of external competition law intervention would represent “a more democratic way, using competence transferred by the national parliaments”.¹⁹⁹

IV. CONCLUSION

Intellectual property rights have a significant position in today’s innovation markets since they promote the creation of various desirable works for the establishment of knowledge societies. These works, which are the product of considerable creativity and investment, are protected by intellectual property rights in the form of an exclusivity given for a certain period of time. However, this exclusivity has never been absolute due to the fact that it is desirable for the public to benefit from these assets. In order to establish an equilibrium between the interests of both creators and the public, intellectual property law possesses its own internal checks and balances which define the scope of these rights. Nevertheless, in certain circumstances, the rules which determine the conditions of public access have been shaped by other branches of law and for this purpose the most controversial intervention to the exercise of intellectual property rights has stemmed from the application of competition rules, specifically article 102 of the TFEU in European Union law. In the second part we looked at whether these two branches of law are in conflict or not since intellectual property law promotes the creation of exclusivity whereas competition law tries to eliminate the harmful effects of monopolies. There is no conflict in terms of their objectives because both laws ultimately aim to promote consumer welfare, however, they are incompatible with each other due to the fact that their methods of operation are different. Therefore, it has been concluded that the intervention of competition law is not the best possible approach as a solution to correct the shortcomings of intellectual property law rules. Present EU case law, as discussed in the third part, reveals the fact that competition law is not entirely suitable to safeguard the essence and objectives of intellectual property rights. As a result, for these circumstances where the internal system of intellectual property rights is not sufficient, the possible reform and improvement of intellectual property law should be the focus of discussion instead of leaving it to competition law.

¹⁹⁵ Vezzoso, p.286

¹⁹⁶ Ullrich, p.378 ; Katz, p.351

¹⁹⁷ Anderman, 2004, p.19

¹⁹⁸ Ullrich p.383

¹⁹⁹ Bath, p.146