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

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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 Commissioner’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 goods, 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 task; 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. 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.

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’ by eliminating the harmful effects of monopolies. In this respect, the application of the Treaty on the Functioning of the European Union (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 a supplement to in-telepho-nial 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 in-ternal balancing of IP rights 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 CRUCIAL 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.” 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 can be seen that “resources–the ideas and information–are not scarce and can be replicated without any direct detriment to the original possessors of the intangibles”. 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.”

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4 Alison Jones and Brenda Sufrin, EC Competition Law: Text, Cases, Materials 3rd edn Oxford University Press, United States 2009), p.15


6 Ibid, p.4


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.

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. For my assessment based on IPRs' contemporary 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 creator's 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. 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". 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. This is also supported by notion of fairness, 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." 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. This assessment of value is contingent on the ability of IPRs to serve desirable beneficial functions for the general good of the society.

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. 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 those particular works is traded off with the "benefit of providing incentives to create the work in the first place." Once they are created, the benefits to the society will come to light in the short and long terms even though some limitations exists 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. 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 developments 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.

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. This is evidently a reflection of the fear against IPRs' monopolistic character, but the structure of the IP system provides a countervail in order to achieve a balance which shall be ex-aminied 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. However, it is found to be very "narrow-minded or naive" to suggest that without any sup-port to incentives the same results would eventually occur. 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 IPRs protection does not have a positive impact on creators' willingness to be engaged in the time consuming and costly research processes.
II. 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”.

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.

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. The term of copyright is either 50 or 70 years, depending on the jurisdiction, with the most common duration being 20 years 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.

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 exceptions to copyright and the possibility of compulsory licensing of patents clearly aim to fine-tune the balance between private and public interests.

In my opinion, the interests on the two ends of the spectrum are creator’s incentive and public’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 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.” 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.”

33 MacQueen, Waelde and Laurie, p.10
34 Dreier, p.304
35 May, p.7-8
36 http://www.wipo.int/copyright/en/faq/faq.htm#rights
37 MacQueen, Waelde and Laurie, p.14
38 Dreier, p.304-309
39 Gillin, p.1
40 May, p.13
42 Anderman, 2002, p.308
43 Dreier, p.100-312
44 Ibid, p.12
45 Ibid, p.17
46 Ibid, p.19
47 Barton, p.443
48 Kate, p.333-334
49 May, p.68
51 Anderman, 2002, p.308
52 Dreier, p.100-312
53 Gollin, p.12
54 Ibid, p.17
55 Ibid, p.19
56 Barton, p.443
57 Kate, p.333-334
58 May, p.68
60 Anderman, 2002, p.308
61 Dreier, p.100-312
62 Ibid, p.17
63 Ibid, p.19
64 Barton, p.443
65 Kate, p.333-334
66 May, p.68
68 Anderman, 2002, p.308
69 Dreier, p.100-312
70 Ibid, p.17
71 Ibid, p.19
72 Barton, p.443
73 Kate, p.333-334
74 May, p.68
76 Anderman, 2002, p.308
77 Dreier, p.100-312
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 maximize consumer welfare”.

The main objective of competition law is to achieve economic efficiency through effective competition which establishes benefits to the society. These benefits are witnessed as lower prices, variety in products and services, more encouragement in market and economic integration. The aforementioned efficiency is divided into types like allocative, productive and dynamic efficiency; with the last one merit further exploration 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. 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. 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 Euro-Pean Union is especially unique and one which imposes further objectives on competition policy. Since its foundations, the most fundamental of many goals for the whole of the EU mentioned in the EC Treaty is that of a single market and economic integration. 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”. 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. If it is established, it is necessary to examine whether this particular undertaking is involved in behaviour which constitutes abuse. Finally, this abusive behaviour is required to affect trade between member 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 developments.

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.

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 rules 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”. 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 com-petition that makes the exclusivity attractive as an incentive. 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 goals of promoting overall consumer welfare”. 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”. 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 immuni-sation of IPRs from competition law. However, it has its own checks and balances and 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 those rights in the public interest.”. In addition to this, IPRs are regarded as part of private law whereas competition law rules constitute public law. Moreover, at the European Union level, most of the IPR laws are issued 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 core-lation between competition and IP law. At the other end of the spectrum, it is suggested that IPRs...
do not differ from other rights and therefore do not deserve any specific treatment. 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. 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.” 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” 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. 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 exceptional circumstances where IP law’s own mechanisms no longer serve their purpose. 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. Therefore, these defects should ideally 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

64 Dreier, p.312
65 Ibid., p.298
66 Korah, 2006, p.135
67 Whish, p.691
68 Stothers, 2002, p.92
69 Anderman, 2002, p.288
70 Dreier, p.312
72 Anderson, 2002, p.288

73 Whish, p.691
74 Korah, 2006, p.135
75 Case 238/87, AB Volvo v Erik Thunberg (UK) Ltd [1989] ECR 6211
76 Ibid., para. 5
77 Ibid., para. 7

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 1980s Community Courts became more concerned 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. Before examining these, the question of IPRs in relation to article 102 deserves a more detailed analysis.

As mentioned above, the application of article 102 requires the fulfilment of three criteria. First, concerning dominance, it is well established in case law that only the existence of IPRs do not automatically make undertakings dominant. However, 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. 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 existence of IPRs can be an abuse 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. Recently, there has been a tendency to also consider some of the intellectual property rights as essential facilities and the refusal to licence them has been found to be an abuse according to article 102. Yet, it is still uncertain whether essential facilities and exceptional circumstances are the same or not.

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, and at this point, it is crucial to take all these IP justifications, the possibility that in the absence of community standardisation or harmonisation of laws, the rules for granting rights are a matter for member states to define. 71

1. The Volvo Case

Volvo® is commonly known as the first case of the refusal to licence IP doctrine under article 102. In this particular case, the proprietor of a registered design for the front wings of one of a series of cars prevented other manufacturers from producing these front wings as it would be an infringement of its sole and exclusive design right. 72 Volvo 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. 73

72 Stothers, 2002, p.92
73 Korah, 2006, p.135
74 Case 238/87, AB Volvo v Erik Thunberg (UK) Ltd [1989] ECR 6211
75 Ibid., para. 5
76 Ibid., para. 7

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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 behaviours.79 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 examples,82 Magill83 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.85

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.86 However, the broadcasting companies were found to enjoy a “de facto monopoly over the information used to compile listings.”87 The finding of dominance over the particular information created many un-ananswered 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 substi-tutability test because of its nature.88

As to the abuse of this position, the judgement “eschewed extended discussion about the na-ture of IPRs and their relationship to the competition rules”89 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.90 However, at that time it was not clear whether these conditions were cumulative or not for the assessment.91 A further de-tailed explanation of these factors shall be made below, as they have been taken into account in the following judgements.92

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.93 This point has not been mentioned in the decision but only the influence of this argument can be seen from the Commis-sion’s submissions at the CH.94 Firstly, this cannot be accepted since the property ownership is subject-jecture 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.95 Still, it has been argued that the copyright protection granted to Magill is beyond IP justifications, especially in the case of copy-right which aims to reward the creator.96 Even though it can be argued that this particular IPR is “unusual”97, the decision concerned arguments 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.98 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 mereitious copyright”.99 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 com-pulsory licence by the dominant IP owner; this specific IP instrument becomes general by broaden-ing 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.100 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.

3. The Tierce Ladbroke Case

Tierce Ladbroke101 is another refusal to licence an IPR case and a reflection of the applica-tion 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 IPR licensing case resulted in ambiguity. The significant point of Ladbroke is that CH 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 ac-vitiy in another market is sought or the prevention of the emergence of a new product existed.102 Since these exceptional circumstances did not exist, there was no abuse in this case.
An External Method for Establishing the Balance in Intellectual Property Rights' Scope: Article 102 of the TFEU

The EMS Health case relates to a “180x 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 pro-cedural background of EMS 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 decision that ordered IMS to license its brick structure. On the other hand, the national proceedings between these two 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. However, 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. It is quite hard, however, to see two different markets and products in IMS, where the 180x brick structure is suggested to be the upstream market and supply of German regional sales data for pharmaceutical pro-ducts is considered as the downstream market. This raises concerns about the reliance of hypo-thetical markets terms being very wide, especially in the case of IPRs. 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.”

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 “clones” and “me too” products which would complete conflict with the rationale of IP. 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 pro-moting innovation. Also, as was explained above, IPRs do not aim to stop further and follow-on innovations but they still have to take IP’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. 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.” It is suggested that this re-requirement should be interpreted as drawing a difference between IP and physical property cases.

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. 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. 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.”

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. 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 exceptions to the generally accepted right dispose of one’s property”.

He has been criticising for the supposition that the time limit 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. 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 “180x 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 pro-cedural 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 decision that ordered IMS to license its brick structure. On the other hand, the national proceedings between these two 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, paras 41
104 Korah, 2006, p.143
106 Ibid, paras 62-64
107 Reiter, p.293
108 Case C-481/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004] ECR I-5039
109 Korah, 2006, p.144
110 Case C-481/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004] ECR I-5039, para 38
111 Ibid, paras 44-45
112 Ibid, para 66
114 Ibid, para 53
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, paras 44-45
116 Ibid, paras 62-64
117 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, paras 44-45
118 Derclaye, p.695
119 Geradin, p.1527
120 Case C-481/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004] ECR I-5039, para 53
121 Derclaye, p.694; Geradin, p.1527
Although this decision had been regarded as shedding light on the court's "murky" case law113, 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 102.123 Other reasons exists 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 uncontested, with almost more than 90% of the market share.124 Moreover it is clear that Microsoft has a very unique position in this specific high technology market. One reason for this dominance is sag-ged to be the network effects which arise in technology markets.125 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,126 or in Orwellian terms: "Some dominant firms are more dominant than others".127 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.128 Although this doctrine has not been explicitly accepted, the outcome of the decision should 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.129

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

114 Dorky, p.867
115 Geradin, p.1533
117 Jones and Sutin, p.54-55
118 COM/CP/C-3/37.792 Microsoft, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.415
120 Sheehy, p.185
121 Case T-201/04 Microsoft Corp. v Commission of the European Communities [2007] ECR II-3601, para.775

123COMP/C-3/37.792 Microsoft, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.415
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135 Sheehy, p.185
136 Case T-201/04 Microsoft Corp. v Commission of the European Communities [2007] ECR II-3601, para.775

138 Ibid, Article 6
139 Both, p.141
140 Burton, p.442
142 The Microsoft decision is a real reflection of this criticism, because this element, which was thought to observe IP specific require-mnts, was put into a different position by the interpretation of the Commission and the Court.

133 Ibid, Article 6
134 Both, p.141
135 Burton, p.442
137 Directive 2009/24/EC, recital 17
138 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
139 Case T-201/04, Microsoft Corp. v Commission of the European Communities [2007] ECR II-3601, para.340
140 Howarth and McMahon, p.120 | Bill Batchelor, "The fallout from Microsoft: the Court of First Instance leaves comp-IT industry issues unaddressed" [2008] 14(1) C.T.L.R. 17, p.17
141 Dorky, p.693

elements of software and hardware in order to provide communication and proper operation with other components of computer systems and users. In fact, the Software Directive recognises that necessity to provide 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. It is suggested that the provision about the interoperability information 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 IP rights, and, on the other hand, the importance of competition and access to information". It was identified that, from another point of view, the possibility of decoupling 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. 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. 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. Still, if Microsoft’s rivals cannot obtain interoperability information according to decoupling 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.

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 indigena-hility 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 differ-ent impact on the requirement by the hypothetical markets approach and the two different stages of production. By following these, the first 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 Microsoft and also pointed out by some authors, any technology in this 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. The Microsoft decision is a real reflection of this criticism, because this element, which was thought to observe IP specific require-ments, was put into a different position by the interpretation of the Commission and the Court.
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.\footref{[2007] ECR II-3601, para.647} In previous cases, the emphasis was made on the competitors' need to produce new products which require the protected material as an indispensable input, instead of a mere duplication. However, in Microsoft this approach has not made the basis of the decision. The CH refused to consider new products as the only criterion and broadened the understanding by interpreting it as a "prejudice to technical development to the prejudice of consumers" under article 102(b).\footref{[2007] ECR II-3601, para.650} 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 con-sumers will occur.\footref{2006] 12(1) C.T.L.R. 22} Therefore, the Commission relied on the evidence from consumer surveys which shows that the applicant's working group servers had better technical features compared to Microsoft's in order to find abusive behaviour on Microsoft's side.\footref{[2007] ECR II-3601, para.698} However, this data is not considered to be the most reliable evidence because of the networks effects in the market.\footref{2008, p.399} 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.\footref{2008, p.18}

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 refuse to licence interoperability information has become a subject of discussion. Microsoft claimed that the information requested by Sun Microsystems was protected by in- ntellectual 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 fur-ther innovation in software and other technologies.\footref{2008, p.1553} 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 Commission.\footref{T-201/04} 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 con-sumers will occur.\footref{2008, p.399} Therefore, the Commission relied on the evidence from consumer surveys which shows that the applicant's working group servers had better technical features compared to Microsoft's in order to find abusive behaviour on Microsoft's side.\footref{[2007] ECR II-3601, para.698} However, this data is not considered to be the most reliable evidence because of the networks effects in the market.\footref{2008, p.399} 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.\footref{2008, p.18}

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.\footref{2008, p.1553} 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 CH.\footref{T-201/04} However, it was added that Microsoft was not successful in benefiting from this claim since it put forward "vague, general and theoretical arguments".\footref{Guradin, p.1538} Consequently, it is likely that the court may deal with these arguments more in subsequent cases under the objective justification assessment\footref{2008, p.1553} 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 assessment of the aforementioned 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 from essential facilities doctrine to a new "con-venient facilities doctrine" that leaves the Commission a great amount of discretion.\footref{[2007] ECR II-3601, para.650} The Commission has already rejected the possibility of the existence of an exhaustive 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.\footref{2008, p.330} Although the positive aspect of this balancing test has been valued since it takes into account the incentives 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\footref{[2007] ECR II-3601, para.650} 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 un-predictability instead.\footref{2008, p.399}
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 unreasonable. 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. In this case it would be extremely difficult to claim that a result in favour of Microsoft is compatible with IPRs 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. Thus, this incentives balance test "would seem to be in line with the most recent economic thinking on IPRs." 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.

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 form of encryption and similar access controls. The Information Society Directive expressed the need to establish compatibility and interoperability between these systems which might be different each other. Although the requirement is not more than a wish for this requirement, this thought is 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. Yet, even considered and 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.

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. 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, case law or legislation exists to solve this question. 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.

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 France. In 2004, the French competition authority was involved in a case with an IP related issue concerning technological protection measures on music files, as an-other 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. 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. As explained before, these measures which are protected by the Information Society Directive easily carry a beneficial role in the prevention of unauthorised sharing of IP protected materials expecially with today's problems concerning online music and file sharing. 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 raise demand for interoperability.

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. 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 difficult. However, Apple is found to be dominant in the market for portable music players. Although dominance was not found for digital rights management technologies market, the previous case law conditions were met in this case. Yet, even considered and 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.

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The relationship between technological protection measures and competition law in the EU

Nevertheless, 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 cre-ates it and the other being the restriction brought by the Directive for the removal and circumvent-ion of the 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
same principles applied for IPRs under competition law should apply to digital rights management systems. Therefore, it is obvious that these systems “cannot enjoy any kind of per se immunity from competition law assessment”. 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.

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. 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. Because of this, an adequate interoperability of intellectual property rights is examined the elements of the applied tests do not provide a good enough picture.

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”. Consequently, it is obvious that these systems 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 laws”. For instance in the Microsoft case, “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 called upon even more rarely”. 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. 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”.

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 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 short-comings of intellectual property law rules. Present EU case law, as discussed in the third part, re-seals 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.