Differences between the U.S. and the EU
in Antitrust Review of Intellectual Property:
A Comparative Analysis of the Essential Facilities Doctrine

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1. INTRODUCTION

Recently, the U.S. and the EU have taken different views of the essential facilities doctrine. The right of access a monopolist's essential facility is a controversial subject in antitrust law; Increasingly, the monopolist's dominance depends on intellectual property, which makes the essential facilities doctrine particularly important. Recent developments show some growing divergence between the approach of the U.S. and EU antitrust enforcers to the application of antitrust rules to intellectual property rights, especially when it comes to the essential facilities doctrine. Whereas the scope of antitrust laws has been shrinking in the U.S., EU competition law has continuously been used to regulate issues that are considered to be outside the scope of U.S. law.

This paper will examine such divergences between the U.S. and the EU antitrust laws and aim at understanding how American and European antitrust enforcers approach competition concerns resulting from the combination of market power and intellectual property. Moreover, this paper will analyze the application of the essential facilities doctrine under U.S. and EU antitrust law through a comparative approach and examine what is the rationale for these differences.

The paper begins with a brief discussion of the main elements of the relationship between antitrust law and intellectual property. Before diving into the more detailed analysis of the application and enforcement of the essential facilities doctrine in the U.S. and the EU, a summary of the main differences between the two jurisdictions is provided in the second part of the paper. The third part of the paper examines the essential facilities doctrine under U.S. antitrust law, followed by a discussion on the doctrine as applied and enforced in the EU. The possible rational for the differences between the two jurisdictions is the subject of the fifth part of the paper. Conclusions follow.

2. INTERFACE BETWEEN ANTITRUST LAW AND INTELLECTUAL PROPERTY

Historically, antitrust law and intellectual property have been treated as complementary regimes, both designed to encourage innovation within appropriate limits.[160] Nevertheless, striking the balance between antitrust law and intellectual property is sometimes difficult and the issue of what role antitrust enforcement should play when it comes to intellectual property based market power has been much debated on both sides of the Atlantic. However, antitrust does play a role in assessing market power based on intellectual property.[161] The interplay between the two policies is becoming even more

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[160] Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 Antitrust Law Journal 919 (2001). Missing pin cite.

[161] See e.g. Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 Berkeley Technology Law Journal 536 (2001)("it is [also] rather naïve to conclude, as

significant, products and services that are embodiments of ideas represent an increasing part of the economy, which makes dominant market positions based on intellectual property more important.[162] The difficult question that follows, is how big a role should antitrust play? Courts and commentators have tried to define what can be a legitimate exercise of intellectual property rights and what kind of behavior - involving intellectual property - amounts to illegal conduct under antitrust laws. The fundamental rationale for the protection of intellectual property is to foster innovation. Some commentators argue that this protection should be provided whether or not a market advantage, or even market power, is created for the lawful duration of the right.[163] Otherwise the basic rights of intellectual property holders would be undermined. However, it is clear that antitrust law certainly values innovation as a policy goal. Thus intellectual property and antitrust rules have the common objective of fostering innovation and growth.[164] Despite this notion that intellectual property and antitrust law do not have conflicting aims,[165] and should work in unison to maximize wealth by promoting innovation and economic progress, they do, however, strive to achieve their goals by different and sometimes conflicting means. Thus the conflict between intellectual property and antitrust law is more focused on the means that the two policies use to promote the goals. Whereas antitrust law aims to promote competition by constraining the way monopoly power is created and maintained, intellectual property may permit or even encourage monopoly to create incentives to innovate.

The historic background of the debate concerning the intersection between antitrust and intellectual property is found in the classic contributions of Joseph Schumpeter and Kenneth Arrow. These commentators have significantly influenced and formed the debate on the scope of antitrust intervention in the intellectual property field. Schumpeter emphasized the role played by market concentration in promoting innovation. In contrast, Arrow, assuming the existence of intellectual property rights, showed that a competitive environment may be better for that purpose.[166]

Abuse of dominance is an area where there is little convergence between U.S. and EU law. This is even more the case when it comes to the area of antitrust review of

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some have urged, that antitrust enforcement has little or no role to play when it comes to market power based on intellectual property").

162 Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 444 (2003). Missing a pin cite, if author want to point to article in generally she should use signals

163 Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 848 (2003). Missing pin cite or signal

164 Antitrust, by protecting competition, and intellectual property, by rewarding innovation, both create incentives to introduce new products. *See e.g.* Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 Antitrust Law Journal 917 (2001).

165 See Herbert Hovenkamp, Mark D. Janis and Mark A. Lemley, *Unilateral Refusals to License in the US, in* Antitrust, Patents and Copyright – EU and US Perspectives 12 (François Lévêque and Howard Shelanski ed., 2005)("The antitrust and intellectual property laws are not necessarily in conflict. For the most part they serve complementary goals, though each must limit the scope of the other").

166 This paper does not allow for a further discussion on the historic background of the debate concerning the intersection between antitrust and intellectual property. However, for further reading on this subject, see, Joseph A. Schumpeter, Capitalism, Socialism and Democracy (1950); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources to Invention*, The Rate and Direction of Inventive Activity (R.R. Nelson ed., 1962). Also, see genrally, Herbert Hovenkamp, *Schumpetarian Competition and Antitrust*, 4 Competition Policy International 273 (2008) and Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust Law Journal 575 (2007).

intellectual property rights. However, it is clear in both jurisdictions, that the mere existence of a patent, trademark, or copyright is not sufficient to establish a dominant position; nor is the exercise of an intellectual property right by a dominant company in itself an abuse. In general it seems to be accepted on both sides of the Atlantic that intellectual property and antitrust rules have the common objective of fostering innovation and growth, and that intellectual property rights need to be treated with some level of deference so that antitrust enforcement does not undermine the objectives of intellectual property policy.[167] Nevertheless, there are divergences between the approach taken in the two jurisdictions with regard to the interaction between antitrust laws and intellectual property, which also mirrors on the approach taken on the essential facilities doctrine. In general it seems to be that whereas U.S. antitrust enforcers avoid direct interference with the core of intellectual property rights, EU antitrust enforcers view the role of competition policy as to correct what is considered faulty intellectual property rights.[168] Especially the very different approaches taken by the U.S. Supreme Court ("Supreme Court") in its opinion in *Trinko*[169], in which the court basically dismissed the essential facilities doctrine, and the decision of the General Court[170] in *Microsoft*[171], which affirmed European antitrust activism, go to show the transatlantic differences in the application of antitrust scrutiny to intellectual property and perhaps demonstrate the variations in the underlying philosophy of antitrust enforcement in the two jurisdictions.

3. SUMMARY OF THE MAIN DIFFERENCES BETWEEN THE JURISDICTIONS

Before engaging in a more detailed comparative discussion on the essential facilities doctrine in the U.S. and the EU, it is useful to summarize the main differences that occur between the two jurisdictions.

Most importantly, the legal framework under which the essential facilities doctrine is applied in the U.S. and the EU differs to a significant extent. In the U.S., essential facilities cases are considered exceptions to the general "Colgate defense" principle that companies are under no obligation to deal. Whereas in the EU, dominant firms have a general duty to deal. Moreover, in the EU, dominant firms have a "special responsibility" not to impair competition in the market. It follows that the obligation on dominant firms to deal with competitors and customers under EU law goes beyond that recognized under U.S. law.

Both Section 2 of the Sherman Act ("Section 2") and Article 102 of the Treaty on the Functioning of the European Union[172] ("Article 102")[173] are concerned with regulating market power, but whereas Article 102 focuses on abuse of a dominant position, Section

[167] *See e.g.* Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 36.
[168] *Ibid*.
[169] *Verizon Communications v. Law Offices of Curtis V. Trinko (Trinko),* 540 US 398 (2004).
[170] Formerly named the Court of First Instance.
[171] Case T-201/04, *Microsoft Corp. v. Commission (Microsoft),* [2007] E.C.R. II-3601.
[172] Formerly named the Treaty of Rome. Im not an expert on EU law, but I believe the tray was replaced with the Lisbon treaty not re-named, this appears to denote simply a name in change not a new treaty.
[173] For ease of reference, only the new numbering (brought about by the entering into force of the Treaty of Lisbon) in the Treaty on the Functioning of the European Union (the "Treaty") will be referred to in this paper.

2 focuses on the manner in which a firm acquires, expands or maintains a monopoly power.[174] Article 102 has a broader application than Section 2, since companies may be charged with an abuse of dominance when they have less market power than would be required under Section 2. On the other hand, under U.S. antitrust law, transactions intended to create or maintain monopoly power are prohibited. Thus U.S. antitrust law focuses on the role of intent when assessing anticompetitive behavior, whereas EU antitrust law prevents abuse of dominance without consideration of intent.

In addition to the role of intent, another significant difference between the jurisdictions is the so called *new product* condition, applied in the EU. Generally the test for establishing antitrust liability in essential facilities cases in the U.S. and the EU is quite alike. However, in *Magill*[175] the Court of Justice brought in a new element to be considered as part of the essential facilities test when imposing antitrust liability; the creation of a new product. There is no equivalent in U.S. law.

Further, when it comes to intellectual property, as exemplified by the decisions in *Trinko* and *Microsoft* there are significant differences in the enforcement levels in the U.S. and in the EU. The approach to the relation between antitrust law and regulation also differs between the two jurisdictions; whereas EU competition rules have been applied to national regulatory measures disrupting competition and to address externalities in regulated markets. In contrast, U.S. antitrust authorities avoid interfering with regulated markets, as they do also with intellectual property regulations.

In conclusion, whereas European antitrust enforcers subject the acquisition and enforcement of intellectual property rights to greater antitrust scrutiny, Americans are doing the opposite. This development also mirrors the approach to the essential facilities doctrine in the two jurisdictions.

4. THE ESSENTIAL FACILITIES DOCTRINE IN THE U.S.

The relevant legal framework for the essential facilities doctrine in the U.S. is Section 2 of the Sherman Act, which is designed to protect competition by prohibiting the acquisition or maintenance of monopoly power. For the purpose of applying Section 2, a monopolist is a company which has power over prices and can engage in exclusionary conduct.[176] Whereas Section 2 addresses monopolies, the creation or maintenance of monopoly power, the corresponding legal framework in the EU, i.e. Article 102, aims to control the conduct of firms that are in a dominant position.[177] This constitutes a significant difference between the two jurisdictions and also goes to explain, to a certain

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[174] *See e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841, 846-847 [1989-1990].

[175] Joined Cases C-241/91 P & C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v. Commission (Magill)*, [1995] E.C.R. I-743.

[176] *See e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 481 (1992); *United States v. Microsoft Corporation*, 253 F.3d 34,51 (D.C. Cir. 2001); *see also*, William E. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harvard Law Review 937, 956-957 (1981).

[177] Advocate General Jacobs has pointed out that Section 2 of the Sherman Act and Article [102] protect competition in different ways: "[u]nder US law the freedom to deal or not to deal is regarded as a fundamental aspect of freedom of trade. US antitrust law, embodied in Section 2 of the Sherman Act 1890, essentially aims to protect competition by prohibiting the acquisition or maintenance of monopoly power, rather than by regulating the actions of companies in dominant positions." Opinion of Advocate General Jacobs in Case C-7/97, *Oscar Bronner v. Mediaprint Zeitungs (Bronner)*, [1998] E.C.R. I-7791, at 46.

extent, the reason for divergence between U.S and EU antitrust enforcers' approach to the application of the essential facilities doctrine.[178]

4.1 The Colgate principle

The general rule in U.S. antitrust law is that a firm has no obligation to deal with its competitors. This basic principle was set out in *U.S. v. Colgate & Co*., where the court held that "[i]n the absence of any purpose to create or maintain a monopoly," even a monopolist can "exercise his own independent discretion as to the parties with whom he will deal."[179] U.S. courts have emphasized that the antitrust laws are for the benefit of competition, not competitors.[180] However, U.S. courts have recognized that the *Colgate* rule is subject to certain exceptions.[181] According to the court, "it is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[182] To put it simply; the right to refuse to deal is "neither absolute nor exempt from regulation."[183] Thus forced sharing is the exception to the general rule, a firm even a monopolist, is not obliged to cooperate with its competitors. The decision of the Supreme Court in 1985, *Aspen Skiing, to be discussed below,* is the leading U.S. case upholding liability for refusing to cooperate with a competitor.[184]

4.2 United States v. Terminal Railroad Association and beyond

The essential facilities doctrine originates in the Supreme Court's decision in *United States v. Terminal Railroad Association* in 1912.[185] In this case a group of railroads controlled all railway bridges and switching yards in and out of St. Louis, an important railroad junction. The group of railroads prevented competing railroad services from offering transportation to and through St. Louis. The court found that this was both an illegal restraint on trade and an attempt to monopolize.[186] Since its decision in *United States v. Terminal Railroad Association*, the Supreme Court has in a line of cases established that a unilateral refusal to deal is subject to potential liability as a monopolization violation of Section 2. However, critics of the essential facilities

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[178] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 434-435 (2006).
[179] *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919)..
[180] *See*, *Ball Mem'l Hosat, Inc. v. Mutual Hosat Ins., Inc.*, 784 F.2d 1325,1338 (7th Cir. 1986)(where the court held that "[c]ompetition is a ruthless process. A firm that reduces cost and expands sales injures rivals sometimes fatally. […] These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors"); *see also*; *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993), (where the court noted that the purpose of the antitrust laws "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest").
[181] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law*, paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 1, *available at*, www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf.
[182] *Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 483 n32 (1992).
[183] *Lorain Journal Co. v. United States (Lorain Journal)*, 342 U.S. 143, 155 (1951).
[184] "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen Skiing)*, 472 U.S. 585, 601 (1985).
[185] 224 U.S. 383 (1912).
[186] *United States v. Terminal Railroad Association*, 224 U.S. 383, 409-410 (1912).

doctrine have emphasized that the Supreme Court has never actually invoked the doctrine in refusal to deal cases.[187] The first explicit mention of the doctrine by the Supreme Court was in *Aspen Skiing*, and the most comprehensive pronouncement on the essential facilities doctrine can be found in the Seventh Circuit's decision in *MCI Communications,*[188] where the court set forth a leading formulation of the doctrine, to be discussed further below.

In the landmark essential facilities case *Associated Press v. United States,*[189] the court found that the by-laws of the Associated Press violated the Sherman Act, as they limited membership in the organization and thereby access to the copyrighted news services. The court held that while it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[190] In another Supreme Court case, *Lorain Journal,* it was examined whether the defendant newspaper, which was the only local business circulating news and advertisements in the town, violated the Sherman Act by refusing to accept advertising from businesses that placed advertisements with a small radio station.[191] The court held that the conduct of the defendant newspaper was an attempt to monopolize interstate commerce in violation of Section 2 and the court found expressly that the purpose and intent of this procedure was to destroy the radio station.[192] The court pointed out that the right claimed by the newspaper publisher is neither absolute nor exempt from regulation: *"[i]n the absence of any purpose to create or maintain a monopoly*, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[193] In the case of *Otter Tail Power Co. v. United States,* an electric power company, Otter Tail, refused to sell energy at wholesale prices and to wield power from other suppliers of wholesale energy to municipalities.[194] The Supreme Court found that the company violated the Sherman Act, as it preserved its monopolistic position by preventing the municipalities from establishing their own power supply system when its retail franchises expired.[195]

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[187] *See e.g.* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841 (1989-1990); Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 849 (2003). *contrast*, see Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 445 (2003) ("[T]he essential facilities doctrine has a long and respected history as part of U.S. antitrust law. […] the Supreme Court and lower courts consistently have applied the essential facilities doctrine throughout this century in appropriate, though limited, circumstances.")

[188] *MCI Communications Corp. v. American Tel. & Tel. Co. (MCI Communications)*, 708 F.2d need reporter page number (7th Cir. 1983).

[189] 326 U.S. 1 (1945).

[190] The court made reference to *United States v. Bausch & Lomb. Co*, 321 U.S. 707, 722 (1944)(*quoting* Robert Pitofsky, Harvey J. Goldschmid, Diane AT Wood, Trade Regulation – Cases and Materials 366 (6th ed., 2010).

[191] *Lorain Journal Co. v. United States (Lorain Journal)*, 342 U.S. 143, 146-149 (1951).

[192] The court described this as "bold, relentless, and predatory commercial behavior". See Robert Pitofsky, Harvey J. Goldschmid, Diane AT Wood, Trade Regulation – Cases and Materials 811-813 (6th ed., 2010),.

[193] Quoting *United States v. Colgate Co*., 250 U.S. 300, 307 (1919) (emphasis added).

[194] *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

[195] *Ibid*., at 377-379. *see* also, *Fishman v. Estate of Wirtz,* 807 F.2d need reporter page (7th Cir. 1986) (which concerned an entity controlling a stadium having to provide access to potential competitors and owners of sporting teams).

In an often-cited refusal to deal case, *Aspen Skiing,* the Supreme Court ruled that the monopolist ski resort, owner of the three flagship ski mountains in Aspen, violated the Sherman Act, because it terminated its long-standing participation with a smaller competitor ski resort in providing a four-mountain ticket. The court described the four-mountain ticket as an essential facility to which the monopolist ski resort was denying access, with the intent to monopolize by putting the competitor ski resort out of business.[196] The decision in *Aspen Skiing* is regarded as the leading case upholding liability for refusing to cooperate with a competitor.

Another widely-cited decision, and probably the most significant lower court decision on essential facilities, is *MCI Communications*, in which the essential facilities doctrine was applied to require the monopolist telecommunications provider to grant access to its local service network to rivals in long-distance services.[197] The decision in *MCI Communications* set forth the most frequently cited list of elements of an essential facilities claim.[198] Before the court will require a monopolist to grant its competitors access to an essential facility, a party must prove the following four factors:

1) control of the essential facility by a monopolist
2) a competitor's inability practically or reasonably to duplicate the essential facility
3) the denial of the use of the facility to a competitor, and
4) the feasibility of providing the facility to competitors".[199]

If these conditions are satisfied, access to an essential facility may be ordered on reasonable and non-discriminatory terms. However, the requirements set forth by the Seventh Circuit are rather stringent. Thus U.S. courts only rarely find antitrust liability under the essential facilities doctrine. The essential facilities doctrine is applied cautiously and usually in exceptional circumstances that meet these strict requirements.[200]

One of the reasons for the essential facilities doctrine only rarely giving rise to antitrust liability is that the courts require a showing that the facility controlled by the monopolist is truly *essential* to competition, meaning that it constitutes an input without which a company cannot compete with the monopolist. An essential facility is one which is not merely helpful but vital to the claimant's competitive viability.[201] Further, it has been held that a facility controlled by a single firm is truly essential only if control

[196] *Aspen Skiing*, *supra* at 611.
[197] 708 F.2d 1081 (7th Cir. 1983).
[198] See Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 448-449 (2003)("This test for antitrust liability has been adopted by virtually every court to consider an essential facilities claim").
[199] *MCI Communications*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983)
[200] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law,* paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 5.
[201] *Cyber Promotions, Inc. v. America Online, Inc*. 948 F. Supp. 456, 463 (E.D. Pa. 1996).

of the facility carries with it the power to eliminate competition.[202] This does not, however mean that the party denied access or supply need to have gone out of business as a result of the refusal.[203] The courts have emphasized that a facility will not be regarded as essential if it is available from other sources, nor if it is capable of being duplicated by the company seeking access to it. Further, the courts have held that the word essential indicates that "the plaintiff must show more than inconvenience, or even some economic loss: he must show that an alternative to the facility is not feasible."[204] The condition regarding the feasibility of providing access to competitors, emphasized in *MCI Communications*, delimits the application of the essential facilities doctrine. The doctrine does not impose liability if the defendant monopolist can show a legitimate business or technological justification for refusing access to the disputed assets to its competitor; "[t]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."[205] The attitude to legitimate business justifications in the EU differs from the one in the U.S. As mentioned, whereas Article 102 imposes broad duties to deal on dominant companies, in the U.S. there is a broad general rule that allows companies to deal with whom they choose, even if that choice limits competition, provided that their choice has some business justification.[206]

Several U.S. court decisions show that anticompetitive intent is relevant to the application of the essential facilities doctrine. Antitrust liability is often found when the denial of access is motivated by an anticompetitive intent. This can come out as a change in existing business practices with a specific animus to harm rivals, for example. In *Aspen Skiing*, the Supreme Court focused on the anticompetitive intent, which was demonstrated by the "decision by a monopolist to make an important change in the character of the market".[207] It was held that there existed no valid business justification for the termination of a long-standing profitable arrangement with a competitor; "the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."[208]

In the case of *Intergraph Corp. v. Intel Corp.*, the Federal Circuit noted that "[a] refusal to deal may raise antitrust concerns when the refusal is directed against competition and the purpose is to create, maintain, or enlarge a monopoly."[209] However, as regards the notion of intent, academic commentators have argued that intent does not meaningfully distinguish anticompetitive conduct, because intentionally striving to acquire a legitimate advantage over rivals is the essence of competition and intent is present in

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[202] *Alaska Airlines, Inc. v. United Airlines, Inc*., 948 F.2d 536, 544 (9th Cir. 1991); *City of Anaheim v. S. Cal. Edison Co*., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992).
[203] *Aspen Skiing*, 472 U.S.at 594-595.
[204] *Twin Labs. v. Weider Health & Fitness*, 900 F.2d need reported page ,570 (2nd Cir. 1990).
[205] *Hecht v. Pro-Football, Inc*., 570 F.2d 982, 992-993 (D.C.Cir. 1977).
[206] James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 333 (1994).
[207] *Aspen Skiing*, 472 U.S. at 604.
[208] *Ibid.*, at 603; see also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973)(, where the Supreme Court noted that the utility's "refusals to sell at wholesale [or otherwise provide access to the essential facility] were solely to prevent municipal power systems from eroding its monopolistic position").
[209] *Intergraph Corat v. Intel Corat*, 195 F.3d 1346, 1358 (Fed. Cir. 1999).

every refusal to license an innovation conferring market power.[210] Merely referring to the intention of the right holder to injure competitors is not a reliable method of distinguishing unlawful from lawful use of an intellectual property right.[211] Interestingly, in the EU, there is no equivalent focus on anticompetitive intent, as intent is not an element of Article 102. EU competition law seeks to prevent the abuse of a dominant position, when acquired, regardless of any intent.[212] Moreover, the Court of Justice has often held that the concept of abuse is an objective one.[213] However, in its decision in *Clearstream*, the Commission noted that although intent is not as such a prerequisite to establish an abuse, if present, it is a factor in showing "objectively abusive behavior."[214] Thus there is perhaps certain influence of the American approach to intent in assessing anticompetitive behavior in Europe.

4.3 Essential facilities in intellectual property cases

Traditionally the essential facilities doctrine has been applied to natural monopolies, but U.S. antitrust enforcement policy shows that the doctrine applies to intellectual property as well.[215] However, enforcement levels are different when it comes to intellectual property, as U.S. courts are hesitant to put intellectual property rights under strict antitrust scrutiny. The main concern is that limiting intellectual property protections may lessen incentive for innovation.[216] This is somewhat similar to the approach in the EU, where the special nature of intellectual property rights have generally been seen as meriting a stricter test for applying the essential facilities doctrine.[217] There is, however, a growing divergence between the antitrust enforcers in the two jurisdictions with regard to the attitude to the application of antitrust rules to intellectual property rights, as will be discussed further below.

The essential facilities doctrine was applied to intellectual property in the case of *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, where the court examined a claim applying the doctrine to telephone directory listings in which the defendant, the local telephone company and a publisher of telephone directories,

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[210] *See e.g.* Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 857 (2003).

[211] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 518.

[212] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review there is probably a page number missing, all we have is pin cite 434-435 (2006).

[213] *See e.g.* Case 85/76, *Hoffmann La-Roche v. Commission*, [1979] E.C.R. 461.

[214] Case COMP/38.096, *PO/Clearstream*, has this case been cited before, there is not short cite or supra? at 218.

[215] Robert Pitofsky, *The Essential Facilities Doctrine under United States Antitrust Law,* paper submitted to the European Commission in support of National Data Corporation in its essential facilities case against IMS, at 11-19.

[216] This concern about preserving monopolist's incentives to innovate was clearly seen in *Aldridge v. Microsoft Corp*, 995 F. Supp. 728 (S.D. Tex. 1998)(where the court warned against punishing Microsoft for improving its product: "[s]uch a result would inhibit, not promote, competition in the market. The antitrust laws do not require a competitor to maintain archaic or outdated technology; even monopolists may improve their products").

[217] Ivo Van Bael & Jean-François Bellis, Competition Law of the European Community at 837 (5th ed., 2010).

claimed copyright protection.[218] The court addressed the fact that the facility in question was information, and noted that "[a]lthough the doctrine of essential facilities has been applied predominantly to tangible assets, there is no reason why it could not apply, as in this case, to information wrongfully withheld. The effect in both situations is the same: a party is prevented from sharing in something essential to compete."[219] The essential facilities doctrine has also been applied to other intangible assets such as copyrighted real estate listing services[220] and health care referral services.[221]

Another case where the doctrine was applied is *Data General*, which concerned a claim in which a competitor service provider needed access to the copyrighted diagnostic software produced by the system manufacturer.[222] In this case the court showed some restrictions in applying the essential facilities doctrine by adopting the following presumption: "while exclusionary conduct can include a monopolist's refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers."[223] The court, however, went on to add that "[w]e do not hold that an antitrust plaintiff can never rebut this presumption, for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act."[224] In *Image Technical Servs., Inc. v. Eastman Kodak Co*. the court held that abuse of intellectual property rights, such as patent protection, can give rise to antitrust liability.[225] The case was about an alleged illegal monopolization by Kodak, a manufacturer and servicer for copiers, of the latter market for service of its copiers by refusing to deal in its patented replacement parts needed for repair of the copiers. The court adopted the approach taken in the *Data General* decision and noted that intellectual property protection provides only a "presumptively valid business justification" for a unilateral refusal to deal.[226] Thus a company could be held liable for refusal to deal in protected intellectual property where the presumption of a valid reason not to license is rebutted by evidence of anticompetitive intent.[227] In the case of *Intergraph Corp. v. Intel Corp*., the U.S. Court of Appeals for the Federal Circuit concluded that certain cases might justify mandated access to intellectual property, and that such mandatory access may be imposed where the defendant's refusal to license demonstrates anticompetitive intent.[228]

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[218] *BellSouth Adver. & Publ'g Corat v. Donnelley Info. Publ'g, Inc.,* 719 F. Supp. 1551 (S.D. Fla. 1988), *rev'd on other grounds*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 520 U.S. 401 (1994).
[219] *Ibid.,* at 1566.
[220] *Montgomery County Assoc. of Realtors, Inc. v. Realty Photo Master Corp*, 878 F. Supp. Page number is missing, also no pin cite (D. Md. 1995), *aff'd*, 91 F.3d 132 (4th Cir. 1996).
[221] *American Health Sys. Inv. V. Visiting Nurse Association of Greater Philadelphia*, No. CIV. A. 93-542, 1994 WL 314313, (E.D. Pa. June 29, 1994); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d not page number, (4th Cir. 1990). See also *Tri-Tech Machine Sales Ltd. v. Artos Eng'g Co*., 928 F. Supp. 836, 839 (E.D. Wis. 1996). (where the court held that "[t]he term facility can apply to tangibles such as sports or entertainment, venues, means of transportation, the transmission of energy or the transmission of information and to intangibles such as information itself")
[222] *Data General Corp. v. Grumman Sys. Support Corp. (Data General)*, 36 F.3d no page number again (1st Cir. 1994).
[223] *Ibid*., at 1183-1184.
[224] *Ibid*.
[225] *Image Technical Servs., Inc. v. Eastman Kodak Co. (Eastman Kodak),* 125 F.3d 1216 (9th Cir. 1997).
[226] *Eastman Kodak,* 125 F.3d at 1218.
[227] *Eastman Kodak,* 125 F.3d at 1219; see Robert Pitofsky, Donna Patterson, Jonathan Hooks, *The Essential Facilities Doctrine under U.S. Antitrust Law*, 70 Antitrust Law Journal 455 (2003).
[228] *Intergraph Corp. v. Intel Corp,* 195 F.3d 1346, 1356, 1363 (Fed. Cir. 1999); *see also Aldridge v. Microsoft Corp*, 995 F. Supp 728 (S.D. Tex. 1998)(where the court examined the case under the four-part test established in MCI and concluded that the plaintiff failed to meet several elements of the test)

The most far-reaching position on unilateral refusals to license was expressed in *In re Independent Service Organizations Antitrust Litigation,* where the D.C. Circuit held that there is no prohibition from lawfully using a patent to acquire a monopoly in more than one relevant antitrust market.[229] According to the court's reasoning, although intellectual property rights are not immune from antitrust scrutiny, they do not negate the patentee's right to exclude others from patented property.[230]

One of the most widely noted antitrust enforcement actions involving intellectual property is the complaint against Intel Corporation issued by the Federal Trade Commission in 1998.[231] The complaint alleged that Intel was a monopolist in the microprocessor market and that it had tried to maintain its dominance by denying essential technical information and product samples of new microprocessors to companies that, because of intellectual property disputes, had initiated litigation against Intel or the customers of Intel. The case was settled by Intel agreeing not to withhold or threaten to withhold product or technical information for reasons relating to an intellectual property dispute.[232]

As shown by the discussed case law, U.S. courts show some reluctance to condemn unconditional unilateral refusals to license intellectual property rights. The essential facilities doctrine in U.S. law has inspired a mass of academic commentary and there are divergent views regarding the utility of the doctrine, in particular when it comes to intellectual property rights. The doctrine has raised controversy also in the EU.[233] Some leading commentators suggest that all unilateral refusals to deal should be treated as legal,[234] whereas others hold that "the essential facility doctrine is both harmful and unnecessary and should be abandoned."[235] The Supreme Court seems to have joined this criticism of the doctrine in its *Trinko* decision, where the court held that unilateral refusals to deal are rarely, if ever, anticompetitive.[236] Many American commentators

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[229] 203 F.3d 1322, 1325 (Fed. Cir. 2000)
[230] *Ibid*.
[231] *In Re Intel Corp*, No. 9288, 1999 F.T.C. LEXIS 145 (Aug. 3, 1999).
[232] Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 Berkeley Technology Law Journal missing page number 549-550 (2001).
[233] "[I]t is in cases involving intellectual property rights that there is the greatest danger of misuse of the essential facility doctrine". Simon Bishop and Mike Walker, The Economics of EC Competition Law (1999), at 119. See also Van den Bergh and Camesasca, European Competition Law and Economics: a comparative perspective (2001), at 272-277; Valentine Korah, *Access to Essential Facilities under the Commerce Act in Light of Experience in Australia, the European Union and the United States*, 31 Victoria University of Wellington Law Review (2000) 252-253.
[234] *See* Richard Posner, Antitrust Law (2nd ed., 2001), 242-244. Another leading antitrust scholar held that unilateral refusals to deal should be treated as per se legal except, maybe, as regards natural monopolies. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 841 (1989-1990).
[235] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 846-847 (1989-1990). Hovenkamp argues that the "so called essential facilities doctrine is one of the most troublesome, incoherent and unmanageable bases for Sherman Section 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of the monopolist's duty to deal to fill in the resulting gaps". See Herbert Hovenkamp, Federal Antitrust Policy (1994), at 273.
[236] *Trinko,* 540 US 398 (2004).

consider this is the most important antitrust decision in the last twenty years.[237] The decision clearly placed limits on a monopolist's duty to deal with competitors.

4.4 *Trinko* - the end of the essential facilities doctrine?

Trinko, a New York City law firm, was a local telephone service customer of AT&T. In its complaint, Trinko alleged that Verizon had provided interconnection access to its local exchange network on a discriminatory basis as part of an anticompetitive scheme to prevent AT&T and other competitors from encroaching on its historical local exchange monopoly. The Supreme Court held that the plaintiff's refusal to deal claim failed to state a cause of action under Section 2. The Supreme Court questioned the merits of forcing monopolists to share their assets with competitors. Writing for the majority, Justice Scalia referred to the *Colgate* decision and emphasized that the antitrust laws impose no generalized duty upon firms, even firms in a monopoly position, to deal with their rivals. According to the court, "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing–a role for which they are ill-suited."[238] The court further noted that the refusal to deal in *Trinko* did not fit within the limited exception recognized in *Aspen Skiing,* because there was no allegation that Verizon had voluntarily engaged in a prior course of dealings with its rivals, or that it had refused to provide any product that it already sold at the retail level to any other customers. Notably, the court gave *Aspen Skiing* a very narrow reading by stating that *Aspen Skiing* "is at or near the outer boundary of [Section] 2 liability."[239] The court used even stronger language when discussing the essential facilities doctrine by noting that the doctrine had been "crafted by some lower courts." Furthermore, the court emphasized that the doctrine has never been recognized by the Supreme Court, and the court found "no need to either recognize it or to repudiate it here."[240] Thus it seems that the Supreme Court, by taking a very hostile attitude towards the essential facilities doctrine, aimed to limit the scope for antitrust scrutiny over unilateral refusals to deal. In the post-*Trinko* era, cases raising essential facilities claims have survived only where there has been a change in behavior by the dominant firm in an unregulated market.[241] Commentators argue whether the *Trinko* decision actually put an end to the existence of the essential facilities doctrine in the U.S.[242]

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237 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?*, 41 Common Market Law Review 1519 (2004). See also Jonathan Rubin, *The Truth About Trinko*, 50 Antitrust Bulletin (2005); George Hay, *Trinko: Going All the Way*, 50 Antitrust Bulletin (2005); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 147 University of Chicago Law Review (2005); Eleanor Fox, *Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 Antitrust Law Journal (2005).

238 *Trinko,* 540 US 398 (2004), at 408.

239 *Ibid.*, at 408-409.

240 *Ibid.*, at 411.

241 See *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo 2004), at 1112-1114. In *NYMEX*, also a case decided after *Trinko*, the trial court followed the Supreme Court's approach in *Trinko* and dismissed the application of the essential facilities doctrine. *New York Mercantile Exch. v. Intercontinental Exch. (NYMEX)*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

242 "Whether the essential facilities doctrine will survive at all is not clear; *Trinko* says that Section 2 will not go further than *Aspen Skiing*, but the Court did not state whether *Aspen Skiing* already went too far".

The hostile approach to the essential facilities doctrine adopted by the Supreme Court in *Trinko* seems to be relied upon in the report of the Antitrust Modernization Commission in 2007[243] and in the disavowed and withdrawn report on Section 2 enforcement by the Department of Justice in 2008.[244] In its report, the Department of Justice held, among other, that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement" and that the agency agrees that "the essential facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition."[245]

With regard to the above described *Trinko* decision and the approach of the Antitrust Modernization Commission and Department of Justice in its report on Section 2 enforcement, combined with the academic hostility for the essential facilities doctrine, it seems like there is a growing consensus in the U.S. that antitrust intervention in unilateral, unconditional refusals to deal is unwanted. These developments show some increasing divergence between U.S. and EU antitrust enforcers over the approach to the application of antitrust rules to intellectual property rights and the use of the essential facilities doctrine. Whereas in the U.S. there seems to be a growing reluctance towards regulating future conduct of companies enjoying market power, EU competition law continues to regulate the activities of dominant companies, also in the field of intellectual property, as will be discussed in the next part.

5. ESSENTIAL FACILITIES AND REFUSALS TO DEAL IN THE EU

The EU was the first jurisdiction outside the U.S. to rely on the essential facilities doctrine to impose liability for refusal to deal.[246] The EU applies its version of the essential facilities doctrine as part of the broader provision of Article 102, which is used to regulate actions of companies in dominant positions. It prohibits the abuse of a

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Opinion of J. B. MacDonald, Deputy Assistant Attorney-General for Regulatory Matters, Department of Justice, available at: www.abanet.org/antitrust/source/Jul04-MacDonaldIntrvw7=23.prdf. Assistant Attorney General R. H. Pate argued that *Trinko* "clarified that there is no basis in U.S. antitrust law for a stand-alone essential facilities doctrine", opinion available at: www.usdoj.gov/atr/public/speeches/205389.htm (quoting Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 437 (2006)).

[243] According to the recommendations of the Antitrust Modernization Commission, "[r]efusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist". Antitrust Modernization Commission, Report and Recommendations, at 101-104, available at: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[244] Department of Justice, Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act, available at: http://www.usdoj.gov/atr/public/reports/236681.pdf. The report was the outcome of what were originally joint hearings on single firm conduct by the Antitrust Division of the Department of Justice and the Federal Trade Commission. The Federal Trade Commission refused to sign onto the report and following its release the report was subsequently disavowed by the head of the Antitrust Division of the Department of Justice. See Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 744-745 (2010).

[245] *Ibid*, at 127, 129. The agency referred to Professor Areeda's thesis that essential facilities "is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are." In its conclusions, the agency stated that it believes that "there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties."

[246] Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 745 (2010).

dominant position and also covers a variety of practices that would not fall within the scope of Section 2. It has been held that whereas U.S. law prevents the creation or maintenance of monopolies, EU law seeks to police the conduct of dominant firms.[247] It follows that the obligation under Article 102 on dominant firms to deal with customers goes beyond that recognized under Section 2.

The definition of dominance elaborated by the European Court of Justice ("Court of Justice") makes reference to the possession of economic power in a relevant market "which enables [a company] to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[248] This definition comes close to the above discussed U.S. definition of monopoly power as excessive power over prices or the ability to exclude competition. However, although both Section 2 and Article 102 prohibit anticompetitive conduct by companies possessing market power, there are significant divergences between the two jurisdictions when it comes to the required degree of market power. This also has an implication on how refusals to deal and essential facilities are treated on the two sides of the Atlantic.

The conventional proxy for assessing market power is by means of market shares, and this is where significant differences between the U.S. and the EU arise. Contrary to Section 2, Article 102 does not distinguish between monopolization and an attempt to monopolize. Article 102 only captures behavior by companies which dominate a relevant market at the time when the alleged abuse started. Nevertheless, Article 102 has a broader application than Section 2, since companies may be charged with an abuse of dominance when they have less market power than would be required under Section 2. In *United Brands*[249], a market share between 40 and 45 percent was held sufficient to establish dominance, and even a company holding less than 40 percent of the relevant market can be found dominant.[250] Moreover, the Court of Justice has held that a market share of 50 percent, absent exceptional circumstances, creates a presumption of dominance.[251] This is very different to the approach taken in the U.S., where market shares need to be in the range of 70 to 90 percent, and held over a significant period of time, in order to be sufficient to establish a prima facie case of monopoly power.[252]

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[247] J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen*, Speech at Article 82 Second Annual Conference, Brussels, Belgium (16-17 June 2005).

[248] *United Brands v. Commission (United Brands)*, [1978] E.C.R. 207, at 65; *Hoffmann-La Roche v. Commission*, [1979] E.C.R. 461, at 38-39.

[249] *United Brands*, [1978] E.C.R. 207.

[250] See C-250/92, *Gøttrup-Klim and others v. Dansk Landbrugs Grovvareselskab*, [1994] E.C.R. I-5641.

[251] Case C-62/86, *AKZO v. Commission*, [1991] E.C.R. I-3359. However, in its *Article 82 Guidance*, the Commission suggests a more flexible approach, by noting that "[e]xperience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article [102]. However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behavior of the undertaking." Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02 *(Article 82 Guidance)*, at 15, available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF.

[252] See e.g. *United States v. Aluminium Co. of America*, 148 F.2d 416, 424 (2nd. Cir. 1945), in which it was held that a market share of 90 percent was enough to constitute a monopoly, and it was doubtful whether 60 or 64 percent would be enough and certainly 33 percent is not.

5.1 Special responsibility of dominant firms

As mentioned, in the U.S. the essential facilities doctrine is an exception to a broad general rule allowing firms to deal with whom they choose, even in the case where that choice limits competition, provided that their choice has some business justification.[253] Although the European Commission ("Commission") and the European courts, similarly to the U.S. antitrust enforcers, have recognized that dominant companies, as a general rule, are free to choose their business partners, they have nevertheless imposed an obligation to supply products and license intellectual property rights in certain circumstances. Thus Article 102, in contrast to Section 2, imposes a broad duty to deal on dominant firms.[254] In the EU, dominant firms are said to have a "special responsibility" not to impair competition in the market and they are prohibited to use their market power to unfairly exclude rivals.[255] As the General Court has put it: "[w]hilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, [the dominant undertaking] has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market."[256]

5.2 Essential facilities in EU case law

Although the Court of Justice has never made an explicit reference to the essential facilities doctrine, it has long recognized the doctrine.[257] In a series of cases beginning with *Commercial Solvents* in 1974, the Court of Justice recognized that there are circumstances where the refusal by a dominant company to supply competitors with an essential input may amount to an abuse of dominance under Article 102.[258] The Commission in the beginning used the essential facilities doctrine only in cases regarding physical infrastructure and networks, where owners of harbors, ports, tunnels and related facilities used their control of that facility to prevent the emergence of downstream competition.[259] The first case in which the Commission explicitly articulated an essential facility theory was *Sea Containers v. Stena Sealink*.[260] The

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[253] See e.g. James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 333 (1994).

[254] It can be argued that this duty is controversial, since it interferes with freedom of contract and basic property rights, which are fundamental to a free market economy. See further Robert O'Donoghue and A. Jorge Padilla, The Law and Economics of Article 82 EC (2006), at 407.

[255] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, [1983] E.C.R. 3461.

[256] Case T-219/99, *British Airways plc v. Commission*, [2003] E.C.R. II-5917, at 242.

[257] See e.g. John Temple Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, *in* Antitrust, Patents and Copyright – EU and US Perspectives, 58 (François Lévêque and Howard Shelanski ed., 2005).

[258] Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission (Commercial Solvents)*, [1974] E.C.R. 223n.

[259] *See e.g.* Case IV/34.174 *B&I Line PLC v. Sealink Harbours Ltd. & Sealink Stena Ltd*., 5 C.M.L.R. 255, 1992; Case COMP/94/119/EC *Port of Rodby*, Commission Decision, 1994 O.J. L55/52; Case COMP/IV/34.689 *Sea Containers v. Stena Sealink – Interim measure*, 1994 O.J. L15/8; Case COMP/IV/32.490 *Eurotunnel*, Commission Decision, 1994 O.J. L354/66. *See also*,*London European/Sabena*, O.J. 1988 L 317/47, *British Midland v. Aaer Lingus*, O.J. 1992 L 96/34; *FAG-Flughafen Frankfurt/Main AG*, O.J. 1998 L 72/30.

[260] Case COMP/IV/34.689 *Sea Containers v. Stena Sealink – Interim measure*, 1994 O.J. L15/8. *See also*, James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 330 (1994).

Commission has defined the concept of essential facilities as follows: "[a]n undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives its own services, infringes Article [102] if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favor of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favorable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article [102]."[261]

Advocate General Jacobs discussed the concept of essential facilities in his much-noted opinion in *Bronner*.[262] The Advocate General pointed out that the concept is broader than only facilities such as harbors, and held that "[a]n essential facility can be a product such as a raw material or a service, including provision of access to a place such as a harbor or airport or to a distribution system such as a telecommunications network."[263] The European antitrust enforcers have found liability for refusals to supply both in cases regarding refusals to supply existing as well as new customers. The first case to deal with a dominant company's refusal to supply existing customers was *Commercial Solvents*.[264] The reasoning of the Court of Justice suggested that a dominant company's refusal to supply can amount to an abuse when the dominant company ceases to supply a product or service to an existing customer in an effort to eliminate all competition in a downstream market.[265] In *United Brands* the court dealt with another kind of refusal to supply, as *United Brands* was not active in the market in which its customers were operating.[266] The court held that "an undertaking in a dominant position […] cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary."[267] This far-reaching interpretation of Article 102 and the duty to supply has been confirmed by the Court of Justice some thirty years later in *GlaxoSmithKline*, which concerned parallel trade in the field of pharmaceuticals.[268]

In *Bronner*, the Court of Justice considered if a dominant company can be required to supply new customers seeking access to its products or services.[269] Bronner was seeking access to Mediaprint's home delivery services for its newspapers, and argued that Mediaprint operated the only economically viable home-delivery scheme in Austria.

[261] *Sea Containers v. Stena Sealink – Interim measure*, O.J. 1994 L15/8, at recital 66.
[262] Opinion of Advocate General Jacobs in Case C-7/97, *BronneR*, [1998] E.C.R. I-7791.
[263] *Ibid*., at 50.
[264] *Commercial Solvents*, [1974] E.C.R. 223n.
[265] *Ibid*., at 25.
[266] *United Brands*, [1978] E.C.R. 207.
[267] *Ibid*., at 182.
[268] Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proionton, formerly Glaxowellcome AEVE (GlaxoSmithKline)*, [2008] E.C.R. I-7139 (In this case the Court of Justice strongly emphasized the special characteristics of the pharmaceutical markets, and hence it is uncertain whether the ruling can be applied more broadly to other market segments).
[269] Case C-7/97, *Bronner*, [1998] E.C.R. I-7791.

The Court of Justice held that the indispensability of the requested product for competitors is a critical element of any duty to deal, and that Bronner needed to prove that the home-delivery scheme was indispensable in the meaning that “it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme.”[270]

5.3 Application of the doctrine in intellectual property cases

The Court of Justice extended the use of the essential facilities doctrine to exclusive privileges based on intellectual property rights in “exceptional circumstances” in its landmark decision in *Magill*.[271] Thus when it comes to the interface between antitrust intervention and intellectual property rights in Europe, the special nature of intellectual property rights have generally been seen as meriting a stricter test for applying the essential facilities doctrine.[272] There is established case law where refusals to license have been found to constitute an abuse of a dominant position under Article 102. Early case law includes decisions such as *Volvo v. Erik Veng (UK)*[273] and *Maxicar v. Renault*[274], where the Court of Justice held that a refusal to license a registered design, even in return for reasonable royalties, did not in itself constitute an abuse. Nevertheless, the Court of Justice recognized the potential for an abuse in such cases.[275] In *Magill,* three television broadcasting companies refused to grant a license to the Magill TV Guide to reprint their respective advance weekly program listings, which meant that no comprehensive TV guide existed in Ireland or the U.K. The court found that the television broadcasting companies had abused their dominant position in preventing the introduction of a new product to the market. In its judgment, the Court of Justice cited *Volvo v. Erik Veng (UK)* and held that “in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author' s rights, so that refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position.”[276] The court went on to add, however, that it is also clear that “the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.”[277]

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[270] *Ibid*., at 46. For commentary on *Bronner*, *see e.g.* John Temple Lang, *The Principles of Essential Facilities in European Community Competition Law – The Position Since Bronner*, 1 Journal of Network Industries 375 (2000).

[271] Joined Cases C-241/91 P & C-242/91 P; *Magill*, 1995 E.C.R. I-743, at 50.

[272] Ivo Van Bael & Jean-François Bellis; Competition Law of the European Community; (5th ed., 2010); at 837; John Temple Lang; *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, *in* Antitrust, Patents and Copyright – EU and US Perspectives 62 (François Lévêque and Howard Shelanski ed., 2005): “Compulsory licensing of intellectual property rights has been regarded as a special example of the essential facility principles”. Is this two citations or one,? The author needs to split up.

[273] *Volvo. V. Erik Veng (UK)*, [1998] E.C.R. 6211.

[274] *CICRA & Maxicar v. Régie Nationale des Usines Renault (Maxicar v. Renault)*, [1998] E.C.R. 6039.

[275] *See*, *Volvo. V Erik Veng (UK)*, [1998] E.C.R. 6211, at 9. *See also*, Case T-51/89, *Tetra Pak,* [1990] E.C.R. II-309(where it was held that the acquisition by a dominant company of an exclusive licensee of the principal alternative technology was contrary to Article [102]).

[276] Joined Cases C-241/91 P & C-242/91 P, *Magill*, [1995] E.C.R. I-743, at 49.

[277] *Ibid.*, at 50.

The reference to "exceptional circumstances" by the Court of Justice can be seen as ensuring that exceptions under Article 102 are limited to certain special cases.[278]

In *Magill*, the Court of Justice introduced a new condition to be considered when imposing antitrust liability; the creation of a new product. The court held that the refusal to provide basic information by relying on national copyright provisions prevented the appearance of a new product, a comprehensive weekly guide to television programs, which the copyright holders did not offer and for which there was a potential consumer demand. The court found that such refusal constituted an abuse under Article 102.[279] The new product condition was further developed in *IMS*, in which the court, twelve years after *Magill,* revisited the issue of unilateral refusals to license.[280] The issue at stake was the scope of a copyright protected data analysis structure in Germany, dividing the German territory into geographic "bricks". The court held that this brick structure had become a *de facto* industry standard for wholesaler pharmaceutical data presentation in Germany, which made the structure and essential facility that had to be made available for competing services. The judgment in *IMS* is the most comprehensive pronouncement by the Court of Justice on unilateral refusals to license and has also been regarded as one of the most controversial applications of the duty to license under Article 102.[281] The court repeated its language in *Magill* that a refusal to license cannot in itself constitute an abuse, but that the exercise of an exclusive right may, in exceptional circumstances, amount to abusive conduct.[282] The court continued by stating that "[i]t is clear from that case law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market."[283]

The court also confirmed the narrow definition of indispensability adopted in *Bronner.* The court held that the notion of indispensability requires a determination whether, "there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. According to […] *Bronner*, in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a

[278] Ivo Van Bael & Jean-François Bellis; Competition Law of the European Community; (5th ed., 2010); at 847.
[279] Joined Cases C-241/91 P & C-242/91 P, *Magill*, [1995] E.C.R. I-743, at 54.
[280] Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (IMS),* [2004] E.C.R. I-5039.
[281] *See e.g.*, Robert O'Donoghue and A. Jorge Padilla; The Law and Economics of Article 82 EC; (2006); 428-429.
[282] Case C-418/01, *IMS,* [2004] E.C.R. I-5039, at 34-35.
[283] *Ibid*., at 38. With regard to the likelihood of excluding competition on a secondary market, the court noted that "it is sufficient that a potential market or even hypothetical market can be identified" and "accordingly, it is determinative, that two different stages of production may be identified and that they are interconnected." *See* Id. at 44,45 of the decision.

scale comparable to that of the undertaking which controls the existing product or service.[284]

With regard to the condition concerning the emergence of a new product, the Court of Justice held that

> "*in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers. Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.*"[285]

This new product condition has been criticized to fail to specify what should precisely be understood by the concept of a "new product."[286] What the Court of Justice left unclear in *IMS* is especially the notion of how "different" a product should be from the product already sold on the secondary market to be considered as "new."[287] The new product criterion was somewhat refined by the General Court in its *Microsoft* decision, where the court held that the circumstances relating to the appearance of a new product, as envisaged in *Magill* and *IMS*, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of harming consumers within the meaning of Article [102].[288] As a result of this, the President of the General Court at the time of the *Microsoft* judgment commented that "[t]he new product criterion now also covers technical development, a criterion which is perhaps of a complex technical character and therefore also leaves the authorities a margin of

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[284] *Ibid*., at 28. The court has also analyzed the issue of indispensability in *Tiercé Ladbroke*, in which Ladbroke claimed that the French racecourses were acting abusively in refusing to grant it to license to transmit sound and pictures of French races for use in its betting shops in Belgium. The court held that such televised broadcasting of horse races was not indispensable for bookmakers. Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] E.C.R. II-923, at 131. *See also*, Christopher Bellamy & Graham Child; European Community Law of Competition; (2001); at 746.

[285] Case C-418/01, *IMS,* [2004] E.C.R. I-5039, at 48-49.

[286] The term is not subject to any well received legal or economic definition. *See*, 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?*; 41 Common Market Law Review 1531; (2004).

[287] The Advocate General in his opinion in *IMS* held that the company requesting a license must intend to produce goods or services which have "different characteristics" which respond to specific needs of consumers which are not satisfied by existing goods or services. However, the proposed test was not dealt with by the Court of Justice. *See*, Opinion of A.G. Antonio Tizzano in Case C-418/01, *IMS,* [2004] E.C.R. I-5039.

[288] Case T-201/04, *Microsoft,* [2007] E.C.R. II-3601, at 647.

appreciation subject to limited control by the judiciary".[289] Hence the Commission is given a wide margin of discretion when assessing the new product criterion. The future application of the test lacks legal certainty and possibly runs the risk of enabling over-application of the essential facilities doctrine, raising the problem of "free-riding."[290] There is no similar new product prerequisite in U.S. antitrust law. Hence this condition constitutes a significant difference in the application of the essential facilities doctrine in the two jurisdictions. Further judicial elaboration of the test in the EU would be welcomed to create legal certainty.

The duty to license third parties was extended most broadly in the judgment of the General Court in *Microsoft,* in which it was held that unless Microsoft's competitors had access to the technology in question, there was a sufficient risk that viable competition could not remain. The General Court affirmed the decision of the Commission, holding that the Commission had sufficiently established the existence of exceptional circumstances for justifying the compulsory license of intellectual property that were involved. With regard to the indispensability condition, the court rejected Microsoft's arguments that the existence of competitors was sufficient to show the absence of indispensability.[291] The court also concluded that it was sufficient to demonstrate that the refusal to license was capable of excluding *effective* competition. The court subjected the Commission's findings about the existence of competition to only limited review, concluding that Microsoft had not established that the Commission manifestly erred in its assessment.[292]

It is interesting to compare the divergent approaches of the U.S. and the EU antitrust enforcers in the *Microsoft* case and the strikingly different conclusions that were reached by the authorities. The decision in the EU was preceded by a settlement of the U.S case against Microsoft. Whereas the U.S. antitrust enforcers focused on the possible adverse effects on Microsoft's incentives to innovate and the D.C. Circuit Court was persuaded to apply the rule of reason to the tying offense at issue,[293] the Commission and the General Court focused on the effect of Microsoft's refusal to license on innovation, and obliged Microsoft to share its interoperability information with its competitors.[294] It is notable that the General Court placed a high burden of proof on Microsoft, as it rejected the proposition that the existence of an intellectual property right or the innovative or original character of the protected subject matter can constitute, in itself, a sufficient justification for a refusal to license.[295] This burden of proof placed on a dominant company in a compulsory licensing case is very high as the compulsory licensing could be presumed to have a negative effect on the company's incentives to innovate. Indeed, in the U.S., some commentators argue that intellectual

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[289] Bo Vesterdorf;*Article 82 EC: Where do we stand after the Microsoft judgment?* 1 Global Antitrust Review (2008).
[290] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 440 (2006). *See also*, 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?*, 41 Common Market Law Review 1530-1532 (2004).
[291] Case T-201/04, *Microsoft*, [2007] E.C.R. II-3601, at 332-333.
[292] *Ibid*., at 273.
[293] *United States v. Microsoft Corp.*, 253 F.3d 34, 89-95 (D.C. Cir. 2001).
[294] The Commission was not satisfied with the disclosures made by Microsoft under the U.S. settlement, and concluded that Microsoft's refusal to provide interoperability information was abusive. Case COMP/C-3/37.792 – *Microsoft*; Case T-201/04, *Microsoft,* [2007] E.C.R. II-3601.
[295] *Ibid*., at 690, 693.

property rights in themselves are sufficient justification for a refusal to license.[296] Thus *Microsoft* serves as a good example of the different attitudes to legitimate business justifications in the U.S. and the EU.

5.4 Commission's Guidance Paper

The Commission's approach in its *Article 82 Discussion Paper*[297] and *Article 82 Guidance* is largely based on the General Court's *Microsoft* decision. The Commission published its *Article 82 Discussion Paper* a year after the Supreme Court's *Trinko* decision. The *Article 82 Discussion Paper* and *Article 82 Guidance,* which constituted a response to criticism that the EU rules on abuse of dominance lacked consistency and economic rigor,[298] restated the antitrust rules applicable to dominant companies and promoted a broad scope of antitrust regulation of unilateral conduct of dominant companies. The *Article 82 Guidance* uses a broad definition of when access is required:

> "*[t]he concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license intellectual property rights, including when the license is necessary to provide interface information, or refusal to grant access to an essential facility or a network.*"[299]

Further, the *Article 82 Guidance* sets forth that the Commission will consider refusal to supply practices as an enforcement priority when the following circumstances are present: (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market, (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (iii) the refusal is likely to lead to consumer harm.[300] It is interesting to note that whereas the Commission in its *Article 82 Guidance* clearly states that refusal to supply practices will be seen as one of the enforcement priorities under Article 102, the Department of Justice in its report on Section 2 enforcement took an almost completely opposite view, by holding that "antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement."[301]

The aforementioned goes to show in a very clear way the different approaches of the American and the European antitrust enforcers to the essential facilities doctrine. Moreover, the language relating to the essential facilities doctrine in the *Article 82 Guidance* stands in direct contrast to the treatment by the Supreme Court of the doctrine

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[296] Paul D. Marquardt and Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson and Hooks*, 70 Antitrust Law Journal 847, 859-863 (2003).
[297] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (*Article 82 Discussion Paper*), available at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.
[298] *See e.g.* John Temple Lang, *Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law,* Fordham Corporate Law Institute 235 (Barry Hawk ed., 2003); 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?*, 41 Common Market Law Review need page number (2004).
[299] *Article 82 Guidance*, at 78.
[300] *Ibid.*, at 81.
[301] Department of Justice, Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act, at 127.

in the above discussed *Trinko* opinion.[302] In *Trinko*, the court held that the refusal to deal alleged by *Trinko* did not fit within the limited duty to deal exception recognized in *Aspen Skiing* since there was no allegation that Verizon had voluntarily engaged in a prior course of dealings with its rivals or that it had refused to provide any product that it already sold at the retail level to any other customers.[303] In the *Article 82 Guidance* the Commission states that liability for refusal to supply can "apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply)."[304] Thus the decision of the Supreme Court in *Trinko* and the Commission's *Article 82 Guidance* taken together with the General Court's *Microsoft* judgment are representative of the significant divergences relating to the antitrust approach to intellectual property in the U.S. and the EU.

6. REGULATION AND ANTITRUST RULES

In addition to the divergent attitudes in the U.S. and the EU concerning the interface between antitrust and intellectual property, there seems to be fundamental differences between the two jurisdictions in their application of antitrust laws in cases where the source of competition concern is regulation. The Supreme Court's decision in *Trinko* addressed the issue concerning the interface between antitrust law and sector-specific regulation. The ruling clearly reduced the scope for antitrust intervention in regulated industries by stating that where anticompetitive concerns can be addressed by industry-specific regulation, antitrust intervention is unnecessary and possibly harmful.[305] This reasoning was echoed in the *Billing* ruling in 2007, where the court held that the need for antitrust enforcement was "unusually small," given that there were other laws and regulatory structures specifically designed to deter and remedy the anticompetitive conduct in question.[306] In the U.S. there is hence a reluctance to apply antitrust rules when this may interfere with regulation. This has profoundly influenced the views on the application of antitrust rules to intellectual property rights, including the application of essential facilities doctrine.[307]

In the EU, however, the antitrust enforcers seem to have taken a very different approach to the U.S. This is perhaps best exemplified in the *Deutsche Telekom* decision,[308] in

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[302] See Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 746 (2010).

[303] *Trinko,* 540 US 398, 409 (2004).

[304] *Article 82 Guidance*, at 84. The Commission in its *Article 82 Guidance* does go on to say that "the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply", but it is still remarkable how the language of the *Article 82 Guidance* takes a very different view that the one expressed by the Supreme Court in *Trinko*.

[305] *Trinko,* 540 US 398, 410-412 (2004). The Supreme Court took a favorable approach to regulation to the detriment of antitrust law, when holding that where "a regulatory structure designed to deter and remedy competition harm" exists, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."

[306] *Credit Suisse Sec. (USA) LLC v. Billing*, wrong reporter (2007), at 2396 (quoting Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 23).

[307] Katarzyna Czapracka, Intellectual Property and the Limits of Antitrust: A Comparative Study of US and EU Approaches (2009), at 24.

[308] Commission Decision No 2003/707/EC of 21 May 2003, *Deutsche Telekom AG*, O.J. 2003, L 263/9-41.

which the Commission adopted almost the opposite view to the Supreme Court in *Trinko* by applying Article 102 despite sector-specific regulation. The Commission noted that "competition rules may apply where the sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous conduct that prevents, restricts or distorts competition."[309] Thus it seems like there are significant differences in the U.S. and the EU approach to the relation between antitrust law and regulation.

7. RATIONAL FOR TRANSATLANTIC DIFFERENCES?

When examining the application and enforcement of the essential facilities doctrine in the U.S. and in the EU through comparative analysis of the relevant case law and the antitrust enforcers' attitudes, it becomes clear that there are significant differences in this area of law between the two jurisdictions. The question that arises is: what is the rational for these differences?

The different language and aims of the Sherman Act and the Treaty go to explain to some extent the differences between the two jurisdictions. Although both the U.S. and the EU antitrust system fundamentally have the same goal of promoting consumer welfare by eliminating exclusionary or anti-competitive behavior, EU antitrust law also concentrates on the integration of its member states' markets and on the prevention of national restraints.[310] Moreover, the Treaty has been interpreted in ways that have served this goal of integration of the common market (the single market imperative).[311] In addition, other fundamental aims laid down in the Treaty, such as the prohibition of discrimination on grounds of nationality, have also come to influence some court decisions.[312]

Since the entering into force of the Treaty, national intellectual property rights have been regarded as restricting the free movement of goods and competition within the EU internal market. The Court of Justice has often, when considering the potential conflict between the promotion of the EU single market and the protection of nationally based intellectual property rights, favored the free trade.[313] Intellectual property laws in the EU are still to a significant extent regulated at national level. It has been argued that EU compulsory licensing decisions sometime constitute means to deal with what is considered faulty national intellectual property rights and that competition concerns are too easily given priority over the need to effectively protect national intellectual

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[309] *Ibid*., at 54.
[310] Richard Whish, Competition Law (5th., 2003), at 20-21.
[311] Eleanor M. Fox, *Abuse of a Dominant Position Under the Treaty of Rome – A Comparison With U.S. Law*, *in* Annual Proceedings of the Fordham Corporate Law Institute, Antitrust and Trade Policies of the European Economic Community 368 (1983). *See also*, Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? Is this a pg number? 504 ("It is difficult to overestimate the preoccupation with market integration, which colored ECJ case law affecting free movement, competition, primacy and other doctrines").
[312] *See e.g.* Case 7/82, *GVL v. Commission* [1983] E.C.R. 1513.
[313] *See e.g*. Cases 56/64 and 58/64, *Consten & Grundig v. Commission*, [1966] E.C.R. 299 (where the Court of Justice held that even thought the Treaty does not affect the grant of rights recognized by national intellectual property legislation, the exercise of those rights may nevertheless come within the Treaty prohibitions).

property rights.[314] Further, European law has been criticized for making significant encroachments on the entitlements of intellectual property right holders in the cause of free movement of goods, and these encroachments on that ground have been more significant than on the ground of competition law.[315] There is probably some merit in this criticism. In addition, this development also goes to explain the more aggressive antitrust scrutiny of intellectual property in Europe in comparison to the U.S.

It has been suggested by one U.S. official that whereas the Americans support "cowboy capitalism," allowing a monopolist to compete aggressively on the merits even if it includes harming its rivals, the European system requires dominant firms to "compete like gentlemen."[316] In other words, in the EU, dominant companies have a special responsibility and must keep an eye on maintaining competition by rivals. There is a significant difference in the nature of the conduct of a dominant company that may violate the law under the Treaty and the Sherman Act, respectively. Although both describe the forbidden conduct as exclusionary, the threshold for what sort of conduct qualifies as exclusionary is lower in Europe, where EU law requires only that the Commission establishes that the conduct in question prevents rivals from competing by means other than *normal competition* or *competition on the merits*, or that it otherwise violates the special responsibilities of dominant firms.[317] Further, in both jurisdictions, a company dominant or monopolist is liable for refusing to deal only if it has a negative effect in the market. As to this negative effect, in the EU, at least in the past, the focus has been on the likely and sometimes presumed impact on the *effective competition structure* and on competitors, and only indirectly on any impact on consumers. The European policy has been based on the premise that consumers are best served by protecting the competitive process, and therefore in the EU it is not necessary to show direct consumer harm. Where companies holding market power engage in conduct determined, sometimes presumed, to be anticompetitive, consumer harm has been presumed to take place. In the U.S., more attention is given to evidence of actual or likely price or output effects, and consumer harm is more directly implicated because the prohibition is against monopolies, not just abuse of dominance.[318] Thus, although the two jurisdictions share the same purpose of ultimately promoting consumer welfare, the U.S. is more concerned with an *efficient market*, whereas EU competition law is sometimes applied with competitors in mind, especially in the early Article 102 cases.[319] Although the Chicago School economic analysis has gradually come to dominate EU law, there are still instances where protecting competitors is within the scope of EU competition law as a means of preserving the competitive structure of the market. [320]

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[314] *See e.g.*, Karen Banks & Giuliano Marenco, *Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed*, 15 European Law Review 224-230 (1990).

[315] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 505-505.

[316] J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen*, Speech at Article 82 Second Annual Conference, Brussels, Belgium (June 16-17, 2005).

[317] *Ibid*.

[318] *Ibid*.

[319] Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 20 Antitrust Law Journal 392 (2002-2003).

[320] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 434 (2006).

Consequently, a number of decisions taken by European antitrust enforcers have been subject to serious criticism in the U.S. A senior U.S. antitrust official commented on the Commission's *Microsoft* decision that it was "protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it".[321] Advocate General Jacobs in his opinion in *Bronner* focused on this issue by holding that "[i]t is important not to lose sight of the fact that the primary purpose of Article [102] is to prevent distortion of competition – and, in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors."[322]

However, when looking at the other side of the coin, U.S. antitrust enforcers are being criticized for their overly cautious protection of intellectual property rights to the detriment of the application of antitrust rules. For example, it has been argued that "American antitrust analysis wrongly assumes a copyright is a copyright regardless of where and how it is claimed."[323] Moreover, with regard to the essential facilities doctrine, some commentators are of the opinion that "the United States' current position is out of step with international practice" and that "the U.S. Supreme Court [in *Trinko*] has questioned a doctrine that the rest of the world has embraced."[324] Thus it seems like whereas the Americans think that the Europeans are overeager in enforcing antitrust rules in intellectual property cases (to the detriment of innovation), the Europeans see the American under-enforcement of antitrust rules as blindly favoring intellectual property to the detriment of antitrust enforcement.

As to the transatlantic differences in the application of antitrust laws in cases where the source of competition concern is regulation, the divergence can to some part be explained by the different institutional and regulatory contexts. The hierarchy of legislative norms is different in the EU as the competition rules are for the most part written in the Treaty. It is unlikely that the Commission, as the guardian of the Treaty, or the European courts, would hold that Article 102 should not apply when a matter is regulated by sector-specific rules. In addition, whereas U.S. antitrust law is essentially a court-based system, EU competition law has essentially relied on an administrative based system.[325] Further, it is held that there is greater need for intervention on the basis of antitrust rules in Europe than in the U.S. because the applicable (sector-specific)

[321] Press Release, Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in its Microsoft Investigation, *available at*, http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm. The EU faced similar criticism in the aftermath of *GE/Honeywell*, a merger cleared by the American authorities and prohibited by the European authorities. "A chorus of American critics said of the European Commission: You protect competitors; we protect competition." Eleanor Fox, *Abuse of Dominance and Monopolization: How to Protect Competition Without Protecting the Competitors*, European Competition Law Annual 2003: What is Abuse of Dominant Position? at 71.

[322] Opinion of Advocate General Jacobs in Case C-7/97, *Bronner*, [1998] E.C.R. I-7791, at 58.

[323] Ian S. Forrester, *EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?* European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? 517-520. (Forrester emphasizes that not every intellectual property right is equally precious, equally sacrosanct, equally deserving of immunity or tolerant treatment under the competition rules).

[324] Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 759, 767 (2010).

[325] The Commission instructs cases, decides on the validity of the conduct in question, and decides the penalty to be imposed on the parties violating the EU competition rules. 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?*, 41 Common Market Law Review 1548 (2004).

regulatory regime in the EU imposes fewer obligations on operators with market power, thus leaving greater space for antitrust intervention.[326]

In addition, the potential for enforcement activity is greater in the EU as it takes place also at national level in the various member states. After the modernization of EU competition law, the EU member states apply both Article 102 and their own national competition laws. Further, the member states may apply their national abuse of dominance provisions even more strictly than Article 102. As a result of this, there is significantly more potential for the future application of the essential facilities doctrine in Europe than in the U.S. In fact, recent cases on unilateral refusals to deal have come out of the courts or competition authorities of at least twenty of the member states.[327] However, this enforcement activity on national level also comes with the risk of creating different interpretations of the essential facilities doctrine and even allowing for over-enforcement of the doctrine. Thus there is the danger of legal uncertainty and greater complexity arising from an active enforcement of the essential facilities doctrine in the member states.[328] This could have an anticompetitive effect, because the uncertainty discourages companies from pro-competitive behavior in the fear of it being regarded as illegal, which could result in decreasing incentives to innovate. However, these concerns are perhaps exaggerated when looking at the unilateral refusals to deal cases that have come out of the member state courts and competition authorities.[329]

Some commentators argue that because the U.S. and the EU have taken markedly different views on the essential facilities doctrine, this area of law should be harmonized.[330] For example, it has been suggested that harmonization could be carried out through the International Competition Network by drafting best practices for unilateral refusals to deal.[331] However, with reference to the current hostile approach that the essential facilities doctrine is faced with in the U.S., as exemplified in this paper by the Supreme Court's *Trinko* decision, the Department of Justice's negative attitude in its report on Section 2 enforcement, and the abundance of academic criticism, it is unlikely that the U.S. would be willing to adopt a more "European" approach to the essential facilities doctrine, or that the European antitrust enforcers would consider refraining from their aggressive antitrust enforcement in intellectual property cases.

[326] *Ibid*.
[327] For a useful overview of the application and enforcement of the essential facilities doctrine in the national laws of the EU member states, see Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 747-752 (2010).
[328] In the lacking of unclear rules, there is a risk that competition authorities will adopt decisions in intellectual property cases which perhaps increase competition in the short term, but reduce it in the long term by discouraging innovation. If there is no clear general principle, the case law is likely to develop through a series of short-term decisions which will erode the value of intellectual property rights. *See*, John Temple Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, Antitrust, Patents and Copyright – EU and US Perspectives 76-77 (François Lévêque and Howard Shelanski ed., 2005).
[329] *See*, Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal 745-752 (2010)(where it is held that for the most part, the essential facilities doctrine has been applied sensibly in Europe. However, it is also noted that the new EU member states have applied the doctrine "with different degrees of sophistication").
[330] *See e.g.* Spencer Weber Waller and William Tasch, *Harmonizing Essential Facilities*, 76 Antitrust Law Journal no page number? (2010).
[331] *Ibid*., at 759-766.

Thus there is little hope that there will be global consensus on this issue.[332] In fact, it seems that there are increasingly divergent approaches to the essential facilities doctrine on the two sides of the Atlantic. This is not necessarily a completely negative development. As one leading American antitrust scholar has put it; "healthy diversity tends to sharpen the dialogue and facilitate adjustment and readjustment to whatever the context demands."[333]

8. CONCLUSION

It has been argued that an essential facility-type analysis is not appropriate in the case of intellectual property rights because such an analysis would automatically override the essential nature of the property right in favor of competing antitrust law claims, and thereby disregard or limit the scope of the property right and the monopoly that it confers.[334] Indeed, there is a difficulty in using the essential facilities doctrine to justify application of antitrust laws to intellectual property, as it requires a balancing of interests at the interface of antitrust law and intellectual property. This difficulty, or rather challenge, was stated by Advocate General Jacobs in his opinion in *Bronner*: "incursions on the fundamental right to choose one's own trading partners requires a "careful balancing of conflicting considerations".[335] Cases at the intersection between intellectual property and antitrust should be analyzed by examining the impact on economic incentives to innovate and balancing them against anticompetitive effects. Although this balance should be accomplished with great respect for and concern about protecting incentives to innovate, the analysis should not overly diminish the role of antitrust law, as seems to be the situation in the U.S.

As discussed in this paper, recent developments show some growing divergence between the U.S. and EU approach to the application of antitrust rules to intellectual property rights, in particular as regards the essential facilities doctrine. However, I think the doctrine should continue to have a play a role as an effective remedy in limited and strictly defined circumstances in antitrust law enforcement in intellectual property right cases on both sides of the Atlantic. Denying the use of the doctrine altogether because of fears of its possible over-application would remove a useful tool from the arsenal of antitrust law.[336]

There is no denying that the Supreme Court's opinion in *Trinko* together with the academic hostility against the essential facilities doctrine might limit the scope for antitrust intervention in cases involving unilateral refusals to deal in the U.S. However, there is nothing hindering lower U.S. courts from continuing to apply the doctrine even

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[332] There is also the question whether there is actually a need for harmonizing the essential facilities doctrine and whether harmonization in all cases is a good function. This discussion is, however, beyond the scope of this paper.

[333] Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 20 Antitrust Law Journal page number? All we have is a pin cite 410-411 (2002-2003).

[334] James S. Venit, John J. Kallaugher, *Essential Facilities: A Comparative Law Approach*, Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy 337 (1994). See also the opinion of Advocate General Gulmann in *Magill*, where the Advocate General noted that it is exactly the ability to exclude rivals and gain a competitive advantage that is the essence of the intellectual property right protected by the Treaty. Opinion of Advocate General Gulmann, Joined Cases C-241/91 P & C-242/91 P, *Magill,* delivered on 1 June 1994.

[335] Opinion of Advocate General Jacobs in Case C-7/97, *Bronner*, [1998] E.C.R. I-7791, at 57.

[336] Alexandros Stratakis, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, 8 European Competition Law Review 442 (2006).

though the Supreme Court has not explicitly recognized it. In fact, this is what some lower courts have done.[337] Thus the implication of *Trinko* is not necessarily the end of the essential facilities doctrine in the U.S.

On the other side of the Atlantic, antitrust enforcers do not shy away from referring to the doctrine when considering the scope of the various duties to deal under Article 102. Although the European approach to the essential facilities doctrine seems more coherent and clear than the American one, there might be a danger of overconfidence when using antitrust laws in addressing market failures and correcting imperfections in intellectual property laws in the EU, which creates a risk of over-enforcement and deterring investment in innovation. Thus it seems like neither the EU nor the U.S. has found equilibrium between antitrust law and intellectual property. In the pursuit thereof, there should be transatlantic discussion and exchange of ideas and attitudes, as both jurisdictions could probably learn something from each other.

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[337] See e.g. *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc*., 311 F. Supp. 2d. 1048 (D. Colo. 2004); *NYMEX*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004).