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# Tvångslicens av immateri- alrättigheter

Särskilt om Europeiska Kommissionens Beslut Avseende COMP/C-  
3/37.792 Microsoft

Magisteruppsats inom EG-Konkurrensrätt

Författare: Fredric Kilander

Handledare: Göran Wahlgren

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# **Compulsory Licensing of Intellectual Property Rights**

With emphasis on the EC Commission's Decision COMP/C-3/37.792  
Microsoft.

Master's thesis within EC Competition Law

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### Sammanfattning

Den potentiella konflikten mellan immaterialrätt och konkurrensrätt inom Europeiska Unionen är idag ett politiskt mycket laddat ämne då många av medlemsländerna ser vägen till ekonomisk framgång genom den nya så kallade kunskapsekonomin, en ekonomi till vilken immaterialrätten onekligen anses vara kopplad.

Huvudregeln inom gällande EG-rätt är att ägaren av en immaterialrätt i normalfallet inte är tvingad till att dela med sig av denna ensamrätt till konkurrenter och andra men, under vissa särskilda omständigheter kan den EG-rättsliga konkurrensrätten inkräkta på ägarens rätt och därmed framtvinga en licens. En åtgärd av detta slag kallas tvångslicens och har som syfte att fungera som en säkerhetsventil, hindrandes ett möjligt missbruk av den exklusivitet som följer på ägandet av en immaterialrätt.

En analys av Europeiska Kommissionens nyligen tagna beslut i målet mot Microsoft visar att detta, på ett flertal punkter, skiljer sig från EG-domstolens prejudicerande domar avseende tvångslicenser. Beslutet är oklart och det kommer att bli svårt, näst intill omöjligt att förutse hur detta tillvägagångssätt kommer att tillämpas i kommande fall.

Avgörandet anför en ny juridisk och ekonomisk policy för Europa, en paradigm innebärandes en ny legal standard avseende i vilka sammanhang en tvångslicens kan beordras. Analysen visar att kraven på sakförhållanden har minskat och att beslutet introducerar en betydande grad av legal oförutserbarhet avseende tvångslicenser av immaterialrättigheter vilket i förlängningen kan ha en negativ effekt av vikt avseende forskning och utveckling bland marknadsledande företag runt hela världen vilka marknadsför sina produkter i Europa.

## Master's Thesis within European Community Competition Law

Title: Compulsory licensing of intellectual property rights  
Author: Fredric Kilander  
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### Summary

Recently, the potential conflict between intellectual property law and competition law within the European Union has become political as many of the Member States see the economic Holy Grail through the so called knowledge economy, an economy to which intellectual property is inextricable linked.

The general rule in EC-law is that a holder of an intellectual property right is not obliged to license the use of that right to others. However, the law can intervene in certain specific circumstances, forcing an owner to license his right. Remedies of this kind are called compulsory licenses and have as their purpose to work as a safety valve, hindering the possible abuse of the exclusiveness following an IPR.

An analysis of the EC Commission's Microsoft Decision reveals that the Decision is inconsistent with settled case law from the European Court of Justice in a number of respects. The Decision is unclear and it will be difficult, close to impossible to predict how this approach will be applied in future cases.

The Decision taken by the Commission in *Microsoft* states a new legal and economic policy for Europe, a paradigm applying a new standard on when a compulsory license could be ordered. The analysis show that this paradigm represent a considerable loosening of the circumstances when a remedy of a compulsory license could be ordered and, as a consequence, introduces a considerable degree of legal uncertainty. This uncertainty can have a substantial effect on innovations by market leaders around the whole world who market their products in Europe.

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## Abbreviations

BBC	British Broadcasting Corporation
CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECT	Treaty of the European Community
EU	European Union
i.e.	id est, in other words
IMS Health	Intercontinental Marketing Service Health
IP	Intellectual property
IPO	Intellectual Property Owners Association
IPR	Intellectual property right
ITP	Independent Television Publications Ltd.
NDC Health	National Data Corporation Health
p.	page
PC	Personal Computer
PMI	Pari Mutuel International Ltd.
PMU	Pari Mutuel Francais
RTE	Radio Telefis Eireann
Sun	Sun Microsystems Inc.
UK	The United Kingdom
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

## 1. Introduction

This Master's Thesis deals with the current European Community policy on compulsory licensing of intellectual property rights (IPRs). The established rule of law is that an owner of an IPR is not obliged to license the use of this right to others; exclusiveness is the very essence of intellectual property rights. However, in certain exceptional circumstances EC law can, and will, interfere by forcing IP-owners to license their intellectual property without permission. Requirements of this kind are called compulsory licenses and have as their general purpose to function as an important safety valve, a regulator which hinders possible abuse of the exclusiveness following an intellectual property right.

### 1.1 Background

In which circumstances, if any, might a dominant company be forced to license its intellectual property rights to competitors and others? This question is probably one of the most challenging and controversial the European Community Institutions has ever had to answer. Unfortunately, the lack of clarity in settled case law has led owners of IPRs to express concerns that EC Competition law might require them to license their intellectual property, undermining the exclusiveness of their rights.

It is not uncommon that intellectual property rights are seen as a threat to one of the European Community's most fundamental goals, namely the goal of integration.<sup>1</sup> This view has its origins from the anxiety that IPRs have a possibility to partition the common market of the EC, preventing free movement between Member States.<sup>2</sup> Intellectual property laws are (in general) the product of, as well as being protected by, national systems of law (though the increasing growth of international commerce has resulted in an increased level of international cooperation).<sup>3</sup> The existence of different national intellectual property laws present obvious difficulties to the integration goal of the European Community.

Intellectual property rights have the possibility, if not supervised and kept within limits, to provide for an effective tool of dominance. Dominance, although not being prohibited in itself might lead to an abuse of dominance and as such infringing an important condition in the European Community's competition policy.<sup>4</sup> Therefore, EC-law must have the ability to interfere and to strike a balance between the interests of the property right owners', exclusivity, and the Community's goal of a common market, integration. EC competition law provides for a set of outer limits to the ex-

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<sup>1</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 5.

<sup>2</sup> The term "common market" is defined in Article 14 EC as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

<sup>3</sup> Cornish, W.R. *Intellectual Property*, p. 25-31.

<sup>4</sup> Article 82 EC.

exploitation of IPRs and defines the boarder between permitted and prohibited conduct. Thus creating a framework of rules which regulates the exercise of intellectual property rights.<sup>5</sup>

Over time, the balance between competition law and intellectual property law has varied, a process forcing legislators to reassess the situation from time to time. Recently this issue has become political as many of the Member States in the European Community see the economic Holy Grail through the exploitation of ideas, the so called “knowledge economy”. Intellectual property rights are inextricable linked to the knowledge economy and explain, to some extent, their recent politicisation. In addition, this recent change in emphasis explains the increasing importance of economics to the debate and why the study of the economic impact as well as justifications for intellectual property is important.

## 1.2 Purpose

Last year, 2004, saw the emergence of the highly anticipated Decision of the EC Commission in its case against Microsoft.<sup>6</sup> The purpose of this Master’s Thesis is to examine if the EC Commission’s approach in this Decision is consistent with settled case law from the European Court of Justice, the highest source of judicial authority in the European Community.

I found the subject of this Master’s Thesis, compulsory licensing, to be of great interest as well as an important issue to examine. Intellectual property is literary all around us today and IPRs are unquestionable growing in importance for every day that passes by, as does the European Community, a community that to this date has as many as 25 Member States (with more to come). This dual expansion, the increasing importance of both intellectual property rights and the European Community, makes my choice of subject for this Master’s Thesis a very delicate one to discuss.

## 1.3 Method

In the process of writing this Master’s Thesis it has been an ambition of mine that neither the perspective of EC competition law, nor intellectual property law should have precedence over the other. I recognise the importance of them both. I have strived for an examination and comparison that covers an overall view, an approach I find important because the two bodies of law share some fundamental purposes. Though, the fact that they share some common purposes does not mean that I do try to make the two areas of law come together as one in any way. On the contrary, it is a general acceptance that they are, and should be separated.

This Master’s Thesis is primarily based on the policy of the European Community’s development on the issue of compulsory licensing of intellectual property rights. The

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<sup>5</sup> Anderman, D. Steven *EC Competition Law and Intellectual Property Rights*, p. 4.

<sup>6</sup> Case COMP/C-3/37.792 *Microsoft*.

This thesis examines the policy of the European Court of Justice, the Court of First Instance and the European Commission in this process. I have consulted both primary and secondary legislation as well as doctrine consisting of textbooks and articles. There are relatively few cases dealing with compulsory licensing on an EC level and therefore, the case law that actually exists has to be examined thoroughly.

### 1.3.1 European Community legislation

If there is a conflict arising between national law and Community law, the latter will prevail.<sup>7</sup> The Member States have all ratified the EC Treaty thereby limiting their sovereignty in certain areas and left the right to make decisions to the Community Institutions.

The European Community legislation is usually divided into primary and secondary legislation.<sup>8</sup> The primary legislation consists of the Treaties<sup>9</sup> while the secondary legislation consists of Regulations, Directives, Decisions, Recommendations and opinions.<sup>10</sup>

Regulations are binding in their entirety and directly applicable in all Member States. Directives are binding as to the result to be achieved but allow to national authorities of each Member State to decide as to the form and method of implementation. A Decision is binding in its entirety upon those to whom it addresses while Recommendations and Opinions have no binding force at all.<sup>11</sup> But even so, Recommendations and Opinions clearly have a persuasive authority and are important when interpreting EC-law.<sup>12</sup> It is very important to understand and to bear this judicial hierarchy in mind when studying Community Law.

When examining the material from the European Communities I have mainly used the English version of the texts. I acknowledge that I thereby might not discover nuances between the different language versions of the texts. A complete examination of all the versions however, would take up considerable amount of time and would fall outside my purpose with this Thesis.

### 1.3.2 Case law

The EC Treaty is formed as a framework, setting out the broad and general principles, outlining the aims to be achieved and leaving it to its Institutions, among them

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<sup>7</sup> Case 6/64 *Costa v. Enel*.

<sup>8</sup> Steiner, Josephine & Wods, Lorna *Textbook on EC Law*, p. 48.

<sup>9</sup> The Treaties establishing the European Community and the European Union.

<sup>10</sup> Article 249 EC.

<sup>11</sup> Article 249 EC.

<sup>12</sup> Steiner, Josephine & Wods, Lorna *Textbook on EC Law*, p. 46.

the ECJ, to fill the gaps.<sup>13</sup> The European Court of Justice has the task to ensure that the law is observed in interpretation and application of the Treaty<sup>14</sup> and the Court is the supreme authority on all matters of Community law.<sup>15</sup> Although the Court tries to achieve consistency in its judgements, it does not consider its rulings to be of a binding nature; the result being that the Court always remains free to depart from previous decisions.<sup>16</sup>

### 1.3.3 Doctrine

The doctrine used to fulfil the purpose of this Master's Thesis consists of literature and articles. This kind of doctrine is neither binding nor is recognised as a legal source of higher authority and therein lays an obvious difficulty. Nevertheless, doctrine can be a very useful guide in clarifying complex issues and to get opinions by experts in a particular field. The doctrine used has to a large part been limited to foreign literature and articles as there are few Swedish sources analysing the relationship between intellectual property law and EC competition law.

## 1.4 Delimitations

This Master's Thesis deals with the relationship between intellectual property law and European Community competition law with focus on compulsory licensing under Article 82 EC. This relationship is examined from an EC-law perspective, not from a national level. But, that does not mean that other sources of law, such as national ones, have been left out completely during this research of mine. Other sources than EC-law have been examined and mentioned if I have considered them to be of direct importance but there has never been neither an intention, nor an ambition of mine, to present different national laws or to make a comparison of some kind between them.

In writing this Master's Thesis I have assumed that the reader has at least some basic knowledge of European Community law, competition law as well as intellectual property law. To explain these concepts in detail would take up considerable time and space and would also be far beyond the scope of my purpose with this Thesis.

Finally, I would like to stress once again that this Thesis does not try to cover the whole area of either intellectual property law or EC competition law. Instead, focus is on the concept of compulsory licensing of intellectual property rights from a European Community level with emphasis on the EC Commission's Microsoft Decision. This approach of mine narrows the issue considerably and leads to the much sought after precision.

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<sup>13</sup> Steiner, Josephine & Wods, Lorna *Textbook on EC Law*, p. 32.

<sup>14</sup> Article 220 EC.

<sup>15</sup> Steiner, Josephine & Wods, Lorna *Textbook on EC Law*, p. 26.

<sup>16</sup> Steiner, Josephine & Wods, Lorna *Textbook on EC Law*, p. 25.

## **1.5 Outline**

The second and third chapters of this Master's Thesis explain the general purposes of intellectual property law and EC Competition law. These two chapters are followed by chapter four where I explain the complicated relationship between these two bodies of law. Chapter five clarifies the concept of compulsory licensing at an EC level as well as giving a brief introduction to Article 82 EC. Next chapter, chapter six, analyses the relevant case law established by the EC Institutions and chapter seven, the main chapter of this Thesis, examines and analyses the European Commission's Microsoft Decision in detail and compares it to the settled case law that was presented in chapter six. Chapter eight ends this Master's Thesis with some concluding remarks.

## 2. The general purpose of intellectual property law

Creations of the mind, innovations, cannot as objects of a more physical nature be protected against others' use by the sheer possession of the object in question. As soon as the creation is made accessible to the wider community, its creator can no longer exercise control over the use made possible by the innovation. This fact, the lack of ability to protect something by the mere possession of an object underlies the whole concept of intellectual property laws, laws that essentially have as their purpose to regulate the creation, use and exploitation of mental and creative labour.<sup>17</sup>

Intellectual property rights are usually separated into two major areas. The first one being copyright plus rights related to copyright while the other area often is referred to as industrial property. Copyright can be said to protect literary and artistic work as well as the right of performers and broadcasting organisations whereas industrial property can be characterised as the protection of distinctive signs (trademarks), geographical indications as well as the design and the creation of technology (patents, industrial design and trade secrets).<sup>18</sup>

The reasons for establishing laws with the intention to protect intellectual property are numerous but, two main motives can be crystallised. The first reason being an expression of fairness (both a moral and an economic one) with the IP-owners in the centre.<sup>19</sup> The idea is that someone expends time and energy in developing an invention; it is no more than right that he or she should be allowed to make money out of the invention, at least for a limited period of time. This economic reward is said to stimulate research and it would be unjust if someone else was allowed to steal the fruits of the effort made by the inventor.<sup>20</sup> The second reason why countries have established intellectual property laws is to promote creativity, the distribution and application of its results.<sup>21</sup> An adequate formed intellectual property law serves the purpose to encourage inventors to spread their inventions to the community instead of attempting to protect them in the form of secret know-how. In other words, the contribution of intellectual property rights work as an incitement for others to invent as the creation of intellectual property is the result by personal creative work but has to a large extent already been inspired by existing work. Existing innovations thereby work as a catalyst for new inventions as they inspire and work as a fundament for even more inventions.<sup>22</sup> Hence, intellectual property rights generate creativity as well

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<sup>17</sup> Bently, Lioner & Sherman, Brad *Intellectual Property Law*, p. 1.

<sup>18</sup> WTO, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel1\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm). Available 13/5/5.

<sup>19</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 2.

<sup>20</sup> Bently, Lioner & Sherman, Brad *Intellectual Property Law*, p. 1.

<sup>21</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 2.

<sup>22</sup> Eklöf, Dan *Upphovsrätt i konkurrens*, p. 25.

## The general purpose of intellectual property law

as inventions, thereby contributing to our society's economic and social development.<sup>23</sup>

Without adequate protection for new products and services the results would be that both personal and economic incitements of creation would diminish. The risk of quick and systematic copying would have the effect of hindering the development of new products and services. Ultimately, the progression of society would perish and stagnation would be the result.<sup>24</sup>

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<sup>23</sup> World Intellectual Property Organization (WIPO) *Introduction to Intellectual Property*, p. 3.

<sup>24</sup> Eklöf, Dan *Upphovsrätt i konkurrens*, p. 25.

### 3. The general purpose of EC competition law

The goal of EC competition law, as well as for competition law in general, is to establish and to protect an efficient competition on a market; meaning that competition law should prevent market power from being used in a way that wastes limited resources in both the short and the long term.<sup>25</sup> Efficient competition is considered to lead to a better use of our society's resources and as a result, companies will become more efficient, encouraged to innovate, invest in new technologies leading to more and improved products as well as lower prices.<sup>26</sup> Consequently, competition law will benefit consumers by forcing down prices, lead to better quality; extend their choice of brands and products which will encourage even further competition among brand owners.<sup>27</sup>

In the European Community though, competition law must also, besides from maintaining an efficient competition on the common market, serve the goal of integration.<sup>28</sup> This goal can be defined as the removal of any present economic barriers between two or more economies and where neither Member States nor companies may engage in practices that can be considered to be in conflict with the objective of unification of the common market.<sup>29</sup> The former should not maintain or issue regulations that hinder the free movement of goods, services, persons or capital. The latter should not agree to restrictive business practices that could equally form barriers against competition. Article 2 EC makes it clear that market integration is seen as a fundamental goal of the European Community, a goal whose importance is likely to increase even more in coming years as the Community most likely will continue to expand beyond its current borders.<sup>30</sup>

*"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities... a high degree of competitiveness and convergence of economic performance..., the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."*<sup>31</sup>

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<sup>25</sup> Van den Bergh, J. Roger & Camesasca, D. Peter *European Competition Law and Economics*, p. 5.

<sup>26</sup> The Swedish Competition Authority, [http://www.konkurrensverket.se/om/om\\_konkurrensverket.shtm](http://www.konkurrensverket.se/om/om_konkurrensverket.shtm). Available 13/5/5.

<sup>27</sup> Davies, Isabel & Hoyng, Willem & Wood, David & Simon, Howrey & Arnold & White *The effect of competition law on the value of IP*, <http://www.howrey.com/docs/Effectcomplaw.pdf>. Available 13/5/5.

<sup>28</sup> Van den Bergh, J. Roger & Camesasca, D. Peter *European Competition Law and Economics*, p. 1.

<sup>29</sup> Van den Bergh, J. Roger & Camesasca, D. Peter *European Competition Law and Economics*, p. 2.

<sup>30</sup> Bishop, Simon & Walker, Mike *The Economics of EC competition law*, p. 3.

<sup>31</sup> Article 2 of the EC Treaty.

## The general purpose of EC competition law

EC competition law serves an important role in this processes, the processes of integration and the creation of a common market. Due to the structure and mission of the European Community, significant differences remain between the competition policies pursued on a national and a supranational level.<sup>32</sup> EC competition law has from the beginning been, above all, a policy of fostering economic integration. The fact that EC competition law fulfils both an economic function while at the same time carrying out the fundamental Community objective of safe-guarding the integration of the Member States' economies has to be kept in mind when studying EC competition law and when trying to understand decisions taken by the EC institutions.<sup>33</sup> While the market integration of EC competition law might in practice take precedent over the economic goal, this does not imply that no attention to economic efficiency should be given even where an agreement clearly seeks to restrict cross boarder trade.<sup>34</sup>

It is important to understand that competition policy does not exist in a state of vacuum. Competition policy is an expression of the current values of our society and is as open to change as political thinking generally. Views and insights change over time and that is one of the reasons why competition law is infused with tension.<sup>35</sup>

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<sup>32</sup> EC-law is an independent body of law, not part of national law. At the same time however, EC-Law is a part of every Member States law.

<sup>33</sup> Joelson, R. Mark *An international Antitrust Primer*, p. 200.

<sup>34</sup> Bishop, Simon & Walker, Mike *The Economics of EC competition law*, p. 5.

<sup>35</sup> Whish, Richard *Competition Law*, p. 17.

## 4. The relationship between intellectual property law and competition law

To fully understand the concept of compulsory licensing it is of utmost importance to examine and recognize the relationship between intellectual property law and competition law, a relationship which always has been a difficult one. Conflicts between these two bodies of law do occur, particularly in the field of compulsory licensing.

### 4.1 Different goals

Intellectual property law and competition law pursue different goals, goals that sometimes are difficult to bring together. Competition law protects competition from excessive restraints and is concerned with maintaining free and open markets.<sup>36</sup> In contrast, IP-law confer to the inventor of a new product or service the exclusive right to prevent others from exploiting the protected invention without its creators consent.<sup>37</sup> This exclusiveness may on one hand provide for a competitive incentive for innovation but, on the other hand, there is also a possibility that the owner of the exclusive right will act in an anticompetitive manner. The risk of such abusive behaviour is at the greatest if the IPR gives the right holder a substantial market power, or even a monopoly, for a particular type of product or service. Therefore, the parallel application of competition law and intellectual property law requires careful evaluation and balancing of their underlying functions in order to minimise the potential conflicts and to avoid frustrating the essential objectives of these laws.<sup>38</sup>

### 4.2 Common goals

Though intellectual property law and competition law currently are seen as two conflicting bodies of law by some, others tend to see them as complementary rather than conflicting. For instance, they can both be said to be closely linked, contributing to promote research and development as well as encourage innovation;<sup>39</sup> competition law in protecting competition, a key ingredient to ensure technological process; intellectual property law in granting exclusive property rights to inventors and creators securing their return on investments. Competition law can be said to enhance consumer welfare by promoting competitive markets and consumer choice. Intellectual property law is also intended to enhance consumer welfare as business are encouraged to innovate and invest in new technologies leading to improved products and lower prices. Brands enable consumers to choose the product they value, which encourages competition among brand owners.

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<sup>36</sup> Lane, Robert *EC Competition Law*, p. 7.

<sup>37</sup> Ritter, Lennart & Braun W. David *European Competition Law: A Practitioner's Guide*, p. 721.

<sup>38</sup> Ritter, Lennart & Braun W. David *European Competition Law: A Practitioner's Guide*, p. 721.

<sup>39</sup> Whish, Richard *Competition Law*, p. 734.

### 4.3 National rights

Intellectual property rights within the European Community are still distinguished as national rights, although a Community legislation and harmonisation process is slowly building towards a Community wide legislative framework for intellectual property rights.<sup>40</sup> There is an obvious tension between the exclusive rights valid for the territory of a single Member State and the concept of a common market.<sup>41</sup> The predominately national character of intellectual property rights may come into conflict with the EC goal of a common, single market since intellectual property rights can be used to uphold or create barriers between different Member States.<sup>42</sup>

### 4.4 Inevitable conflicts

Although exclusive, intellectual property rights do not automatically confer economic market power and consequently do not *prima facie* enter into conflict with competition law. But, it is an unquestionable fact that IPRs have the potential to have harmful market effects, particularly if a proper balance is not struck between the particular interests of the intellectual property owner and the general interest of society.<sup>43</sup>

There is a demand, if intellectual property rights are to work as a catalyst for a broader choice of products and services on the market that the protection given is not to wide. Intellectual property rights cannot, if they are going to work in harmony with competition law, be allowed to be a hard to pass “artificial barrier” to enter a market. The purpose of intellectual property law is not to create monopolies and the possibility to enter is critical for competition. Therefore, by obvious reasons, it is crucial that if IP-law is going to work it cannot at the same time be a barrier to enter into a market.<sup>44</sup> Compulsory licenses may become necessary once innovative activity is seriously hampered by existing monopolies.<sup>45</sup>

In the past, the need for protection of intellectual property has given rise to controversies but today, the need for adequate protection is no longer seriously contested and instead, the main concern has become where to draw the line between what constitutes a lawful use or an abuse of intellectual property protection.<sup>46</sup> The task of supervising this situation and to make sure that the tension between these two bodies of

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<sup>40</sup> Wish, Richard *Competition Law*, p. 764.

<sup>41</sup> Goyder, D. F. *ECC Competition Law*, p. 286.

<sup>42</sup> Whish, Richard *Competition Law*, p. 734.

<sup>43</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 3.

<sup>44</sup> Eklöf, Dan *Upphovsrätt i konkurrens*, p. 27.

<sup>45</sup> Chao, Yang. Ching & San, Gee & Lo, Changfa & Ho, Jimming *International and Comparative Competition Law and Policies*, p. 294.

<sup>46</sup> Goavaere, Inge *The Use and Abuse of Intellectual Property Rights in E.C. Law*, p. 1.

## The relationship between intellectual property law and competition law

law do not destroy neither the common market nor the IPRs of those who act within the common market has fallen largely on the European Commission and the Courts of the European Community.<sup>47</sup> While there are some provisions in the EC Treaty, recognising the importance of protecting intellectual property rights<sup>48</sup>, setting out the limits of intellectual property rights within the Community has been a matter for the EC Institutions, interpreting the broad conditions of the Treaty provisions on a case-by-case basis. As today, the system of intellectual property rights is not completely prepared to meet the potential conflicts that arises in the relationship to competition law and that is one of the reasons why there is a necessity for competition law's prohibition of an abuse of a dominant position.<sup>49</sup>

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<sup>47</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 3.

<sup>48</sup> For example Article 295 EC.

<sup>49</sup> Eklöf, Dan *Upphovsrätt i konkurrens*, p. 14.

## 5. Compulsory licensing in EC law

### 5.1 Background

The general rule in EC law is that a holder of an intellectual property right is not obliged to license the use of his rights.<sup>50</sup> The very essence of an IPR is exclusivity (which is how the owners gets their just reward) and market conditions, as well as the bargaining position of the parties, will determine the terms of a possible licensing agreement. However, in certain exceptional circumstances, the law can and will intervene, forcing an IPR owner to license the right (requiring the licensee to pay a fee) without the IP owners' permission.<sup>51</sup> The basis for such actions varies, as do the conditions which the law permits IP owners' wishes to be overridden.<sup>52</sup> Provisions of this nature are called compulsory licenses and have as their purpose to function as an important safety valve, hindering the possible abuse of the exclusiveness following from the ownership of an IPR.<sup>53</sup>

Exclusive rights, such as intellectual property rights, can lead to the creation of monopoly situations on a market.<sup>54</sup> The owner of an IPR owns the knowledge and usually decides by himself if and to who he wants to licence. The exclusiveness following the ownership of an IPR can be abused, used in a less good way for society, which justifies why there sometimes are reasons to infringe the usage of exclusivity by compulsory licenses thereby giving a third person the right to use the intellectual property.<sup>55</sup> If granted, a compulsory license has to function as an act of balance between the inventors' right to exploit (or not to exploit) their IPRs and society's concern of giving its citizens their needs as effective as possible. Though compulsory licensing is an extreme action, it has become a powerful (although controversial) tool allowing governments and the Community to intervene in private markets and for the courts to implement remedies in cases concerning competition law.<sup>56</sup>

Not surprisingly, the European Court of Justice has generally held the line that EC-law does not require the owner of an intellectual property right to grant licenses to others who wish to use the intellectual property. For example, in *Volvo*, the Court stated in clearest possible terms that Article 82 EC is not to be looked upon as a ve-

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<sup>50</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 381.

<sup>51</sup> Joyce, Craig & Leaffer, Marschall & Jazzi, Peter & Ochoa, Tyler *Copyright Law*, p. 487.

<sup>52</sup> Bently, Lionel & Sherman, Brad *Intellectual Property Law*, p. 262.

<sup>53</sup> Koktverdgaard, Mogens & Levin, Marianne *Lärobok i immaterialrätt*, p. 33.

<sup>54</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 4.

<sup>55</sup> Eklöf, Dan *Upphovsrätt i konkurrens*, p. 14.

<sup>56</sup> Port, L. Kenneth & McMannis, R.. Charles & McElwee, P. Terence & Hammersley, M. Faye *Licensing intellectual property*, p. 196.

hicle to force compulsory licenses on a dominant company.<sup>57</sup> To hold otherwise would be contrary to the principle that the Treaty safeguards the existence of the right and does not all in question the substance of the specific matter of the rights.<sup>58</sup> Compulsory licensing serves the purpose of assuring society's call for for inventions, but it has to be kept in mind that remedies of this kind is only to be used in exceptional cases and not if there are substitutes available or if the absence of the invention does not lead to unacceptable matters. Consequently, compulsory licensing is not to be seen by potential licensees as an alternative to reaching an agreement with the owner of an intellectual property right. If so, there would be a danger that IP the owners' own plans for the right in question would be overthrown.<sup>59</sup>

### 5.2 Article 82 EC

Article 82 EC regulates the conduct of companies, which already have achieved a position of market dominance, to ensure that they are not abusing the rules of fair competition during their period of market power. Achieving dominance is not in itself unlawful but once a company achieves dominance in a market it has a "special responsibility" not to act abusively towards its competitors or to its customers, i.e. "*not to allow its conduct to impair genuine undistorted competition on the common market*".<sup>60</sup> This statement is one often repeated by the Court in its judgements.

Article 82 EC prohibits a range of different abuses of dominant market positions (such as tie-ins, predatory and discriminatory pricing and refusal to supply) and is highly relevant in relation to owners of intellectual property rights. A finding of an abuse such as a refusal to supply or license or refusing to provide information (abuses which are particularly applicable to IPR holders) can be based on Article 82 (b) EC which declares it to be an abuse to limit "*production, markets or technical development to the prejudice of consumers*".<sup>61</sup> A finding of abuse can also be based on Article 82 (c) EC which provides that it can be an abuse to apply "*dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage*".<sup>62</sup> However, Article 82 does not contain an exhaustive list of provisions.<sup>63</sup>

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<sup>57</sup> Case 238/87 *AB Volvo v. Veng (UK) Ltd.*

<sup>58</sup> Article 295 EC.

<sup>59</sup> Domeij, Bengt *Patentavtalsrätt*, p. 32.

<sup>60</sup> Case 322/81 *Michelin v. Commission*, paragraph 57.

<sup>61</sup> Article 82 (b) EC.

<sup>62</sup> Article 82 (c) EC.

<sup>63</sup> Case 6/72 *Continental Can v. Commission*, paragraph 26.

## 5. Compulsory licensing in EC law

Although the ECJ has made clear that the mere ownership of intellectual property rights cannot be attacked under Article 82 EC<sup>64</sup>, it may however apply to an unacceptable exercise of the right in question.

In every case concerning Article 82 EC, the Court has first of all to decide whether the company has a dominant position in the defined product market as well as in the relevant geographical market<sup>65</sup>, definitions that are notorious difficult to make.<sup>66</sup> As explained, Article 82 EC do not prohibit dominance *per se*, but once an undertaking has been found to have a dominant position “*the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market*”.<sup>67</sup> Second, after the finding of dominance, the dominant company’s conduct must also be found to be abusive and third, it must affect intra community trade. All three of these circumstances (dominance, abusive behaviour and effect on intra community trade) must all be fulfilled in order for Article 82 EC to apply. The practice by the EC Commission, endorsed by the European Community Courts, has been to first identify the relevant market and then to assess the undertakings position on that market.<sup>68</sup>

It is important to keep in mind that the normal exercise of an intellectual property right will not infringe EC-law and therefore ordinary use will not be affected by Article 82 EC. Article 82 EC will only be applied in exceptional circumstances and the European Court of Justice has, on several occasions, explained that to merely own an intellectual property right does not, as such, give rise to market dominance or even a presumption of dominance.<sup>69</sup>

### 5.2.1 The relevant market

It is necessary, in the process of determining whether an owner of an intellectual property right does in fact have a dominant position or not, to first of all decide the relevant market.<sup>70</sup> As explained, the relevant market consists of both a product and a geographical market which both have to be considered under the provisions of Article 82 EC.<sup>71</sup> The definition of the product market is of particular importance when

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<sup>64</sup> Case 78/70 *Deutsche Grammophon v. Metro*, paragraph 16.

<sup>65</sup> Commission’s notice on the definition of the relevant market for the purposes of Community competition law, paragraph 2.

<sup>66</sup> Jones, Alison & Sufrin, Brenda *EC Competition Law*, p. 297.

<sup>67</sup> Case 322/81 *Michelin v. Commission*, paragraph 57.

<sup>68</sup> Jones, Alison & Sufrin, Brenda *EC Competition Law*, p. 255.

<sup>69</sup> For example, Case 322/81 *Michelin v. Commission*, paragraph 57.

<sup>70</sup> Jones, Alison & Sufrin, Brenda *EC Competition Law*, p. 255.

<sup>71</sup> Commission’s notice on the definition of the relevant market for the purpose of Community competition law, paragraph 2.

dealing with intellectual property since a narrowly defined product market can give the impression that an IPR is a strong contributing cause to establish dominance since the possibilities of substitution might be reduced.<sup>72</sup> A third market aspect, a temporal one, might be considered in some cases (though often seen as a part of the product aspect).<sup>73</sup>

The Commission has defined the relevant product market as a market comprising “*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use*”.<sup>74</sup> In addition to defining the relevant product market, the geographical market has to be decided and the Commission has identified the relevant geographical market as comprising “*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciable different in those areas*”.<sup>75</sup>

### 5.2.2 Dominant position

Although intellectual property rights do not create a dominant position *per se*, they do give their owner a right of exclusiveness. But even so, to hold a dominant position on a specific market is not considered to be offensive. What is offensive it to abuse that position of dominance.<sup>76</sup>

Whether or not a company holds a dominant position is of central importance to the practice of Article 82 EC. The usage of Article 82 EC is clearly not intended only to apply to a complete monopolist; it is also intended to control the behaviour of companies that have a sufficient amount of market power. True monopoly is an uncommon occurrence and the majority of cases before the ECJ deal with the problem of deciding at what point a company, though not a true monopolist, has sufficient market power to fall within Article 82 EC. The Court has presented the following test when determining which degree of market power that is necessary before Article 82 can be applied:

*“The Dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being*

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<sup>72</sup> Keeling, T. David *Intellectual Property Rights in EU Law*, p. 369.

<sup>73</sup> Jones, Alison & Sufrin, Brenda *EC Competition Law*, p. 256.

<sup>74</sup> Commissions Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, paragraph 7.

<sup>75</sup> Commission’s Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, paragraph 8.

<sup>76</sup> Article 82 EC.

## 5. Compulsory licensing in EC law

*maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*".<sup>77</sup>

It is suggested that the essential issue is the ability to act independently, i.e. the ability to restrict output and increase price on the market.<sup>78</sup>

Market shares are one important aspect when measuring market power, but not to the exclusion of other factors.<sup>79</sup> Although, as far as Article 82 EC is concerned, it is obvious that the larger the market share, the more likely the finding of dominance and the ECJ has held that market shares may indeed, by themselves be evidence of a dominant position.<sup>80</sup> Though, this assertion is qualified in two ways: first by recognising that in exceptional circumstances large market shares may not mean that a company is dominant; and secondly, by referring to the notion that the market share must exist for some time.<sup>81</sup> A large market share held only briefly before the emergence of new competition would suggest that there was never any real market power.<sup>82</sup> In *AKZO v. Commission*, the ECJ held (with reference to *Hoffman-La Roche v. Commission*<sup>83</sup>) that a market share of 50 percent could generally be said to be that large that, in the absence of exceptional circumstances, a company with such a market share would be presumed dominant and the company found dominant will have to bear the burden of establishing that it is not dominant.<sup>84</sup>

When examining a company's market share and assessing market power, it is also highly relevant to examine the largest company's market share relative to its competitors. The smaller the shares of the competitor, the likelier the Commission will be to hold that the largest company is dominant.<sup>85</sup>

Although high market shares are an important factor in examining market power, it is not always enough as other factors may also affect the assessment of dominance. The overall size and strength of the company, high levels of advertising and exclusive rights (as IPRs) and more, are all factors that can make a company be considered to be in a dominant position.<sup>86</sup> What is important is whether or not the undertaking can

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<sup>77</sup> Case C-27/76 *United Brands Company and United Brands Continental BV v. Commission*, paragraph 65.

<sup>78</sup> Whish, Richard *Competition Law*, p. 179.

<sup>79</sup> Whish, Richard *Competition Law*, p. 180.

<sup>80</sup> Case 85/76 *Hoffman LaRoche & Co. AG v. Commission*, paragraph 41.

<sup>81</sup> Case 85/76 *Hoffman LaRoche & Co. AG v. Commission*, paragraph 41.

<sup>82</sup> Whish, Richard *Competition Law*, p. 181.

<sup>83</sup> Case 85/76 *Hoffman LaRoche & Co. AG v. Commission*.

<sup>84</sup> Case 62/86 *AKZO Chemie BV v. Commission*, paragraph 60.

<sup>85</sup> Case 322/81 *Michelin v. Commission*, paragraph 55.

<sup>86</sup> Wish, Richard *Competition Law*, p. 183-188.

create or sustain the ability to act independently without accounting for the behaviour of its competitors and if it has the ability to impede effective competition on the market.<sup>87</sup>

### 5.2.3 Abusive behaviour and effect on intra community trade

Once it has been firmly established that a company has a dominant position in a substantial part of the common market, it is necessary to consider the circumstances that constitute an abuse of a dominant position. Article 82 EC gives some examples of abusive behaviour (charging unfair prices, limiting, production and discrimination) but these examples does not constitute an exhaustive list of abusive activities.<sup>88</sup>

Again, a company having been found to have a dominant position on the relevant market has special responsibilities not to distort competition.<sup>89</sup> A company not following these special responsibilities can be accused of having abused it dominant position. As previously explained, Article 82 EC does not define exactly all conditions that should be considered to be abusive.<sup>90</sup> Article 82 EC mentions unfair purchase or selling prices, or other unfair trading conditions, limiting production, markets or technical development to the prejudice of customers, dissimilar agreements with other trading partners and tie-ins as abusive behaviour. However, it is very important to keep in mind that these examples listed in Article 82 EC is nothing else but examples, not to be seen as an exhaustive list.

Another criterion to consider for Article 82 EC to apply is that there also must be an effect on intra community trade.<sup>91</sup> The term intra community trade does not mean that an abusive behaviour cannot be prohibited if it is taking place solely within the borders of a single Member State. The behaviour of a company can still be abusive and in conflict to Article 82 EC as long as the conduct is capable of having a sustainable effect on intra community trade.<sup>92</sup> The effect on trade does not have to be proven and it does not have to be negative, it is enough to find that a conduct is capable of having an effect of intra community trade.<sup>93</sup>

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<sup>87</sup> Case C-27/76 *United Brands Company and United Brands Continental BV v. Commission*, paragraph 65.

<sup>88</sup> Case C-6/72 *Continental Can v. Commission*, paragraph 26.

<sup>89</sup> Case 322/81 *Michelin v. Commission* paragraph 57.

<sup>90</sup> Case C-6/72 *Continental Can v. Commission*, paragraph 26.

<sup>91</sup> Article 82 EC.

<sup>92</sup> Case 322/81 *Michelin v. Commission* paragraphs 103-104.

<sup>93</sup> Case 322/81 *Michelin v. Commission* paragraphs 103-104.

## 6. Case law

The issue of compulsory licensing of intellectual property rights has arisen seldom before the European Commission and the European Community Courts. That is why, the case law that actually exists has to be examined thoroughly in order to fully understand EC competition law and its policy on compulsory licensing. The first leading case to have appeared is *Volvo*<sup>94</sup> which was to be followed by *Magill*<sup>95</sup>, the television guide case. Following these two cases were the Court of First Instance's ruling in *Ladbroke*<sup>96</sup> and the European Court of Justice's judgment in *Bronner*<sup>97</sup> (*Bronner*, though not a case concerning intellectual property rights but nevertheless of crucial importance to the understanding of the Courts' reasoning when dealing with compulsory licensing).

And April 2004 saw the emergence of, not one but two very important decisions concerning compulsory licensing. First out was the ECJ's ruling in *IMS Health*<sup>98</sup> followed by the highly anticipated Decision taken by the European Commission in *Microsoft*.<sup>99</sup>

The purpose of this chapter is to introduce and analyse the settled case law from the Community Courts on the issue of compulsory licensing while the next chapter, chapter seven, will analyse the EC Commission's Microsoft Decision in detail.

### 6.1 Volvo v. Veng

*Volvo* was the first case before the European Court of Justice where the Court had to consider if a refusal to license an intellectual property right could be considered to amount to an abusive behaviour, thereby falling within the framework of Article 82 EC.

The case was referred to the ECJ by a national court in the United Kingdom (UK) for a preliminary ruling of the interpretation of Article 82 EC and concerned the front wings of the Volvo 200 series car on which Volvo held a registered design in the UK.<sup>100</sup> Erik Veng imported these front wings from Denmark and Italy (produced there without Volvo's authority) an action leading Volvo to start proceedings against Veng alleging him to have infringed Volvo's exclusiveness provided for by its intel-

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<sup>94</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*

<sup>95</sup> Case C-241-242/91P *RTE & ITP v. Commission.*

<sup>96</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission.*

<sup>97</sup> Case C-7/97 *Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG.*

<sup>98</sup> Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG.*

<sup>99</sup> Case COMP/C-3/37.792 *Microsoft.*

<sup>100</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 1.

lectual property right.<sup>101</sup> Veng, relying on the provisions in Article 82 EC, claimed that Volvo's refusal to license<sup>102</sup> its IPR was nothing else than an abuse of the Volvo's dominant position.

Three questions were referred to the ECJ.<sup>103</sup> First, the national court wanted to know if a car manufacturer, owning a registered design was to be considered to be in a dominant position by the mere fact that it was the only source of this design? Second, can it be considered to be an abuse if such a dominant company would refuse to license this intellectual property right to others? Basically, did Volvo abuse its dominant position in refusing to license Veng spare parts for him to market in the UK? Third, is such an abuse likely to affect trade between Member States within the meaning of Article 82 EC by reason of the fact that the intending licensee is thereby prevented from importing the body panels from a second Member State?

The ECJ started its proceedings by reaffirming its already established standpoint<sup>104</sup> that it was up to the different Member States to decide upon the rules that should be used and which products and services that should have the benefit of intellectual property protection in lack of Community wide legislation concerning design protection.<sup>105</sup>

The Court continued by emphasising that the right of the owner of a protected design to stop third parties from manufacturing and selling or importing, without its approval, products incorporating the design constitutes the very core of his exclusive right.<sup>106</sup> Thus, if an owner of a protected design had to grant licenses to others, even in return for a reasonable royalty, would take away the essence of his exclusive right. As a consequence, the Court held that "*a refusal to grant such license cannot in itself constitute an abuse of a dominant position*".<sup>107</sup>

However, the Court also said that the exclusive right following an IPR might be prohibited by Article 82 EC if the dominant company conducted behaviour considered to be of abusive nature, such as; "*the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States*".<sup>108</sup>

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<sup>101</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 3.

<sup>102</sup> Volvo was offered a reasonable royalty but still refused to grant a license.

<sup>103</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 4.

<sup>104</sup> Case 144/81 *Keurkoop BV v. Nancy Kean Gifts BV*.

<sup>105</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 7.

<sup>106</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 8.

<sup>107</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 8.

<sup>108</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd.*, paragraph 9.

These three examples of additional circumstances, mentioned by the Court, going beyond the lawful exercise of intellectual property rights were not in any way meant to be exhaustive.<sup>109</sup> Though, the ECJ did not find any of these examples or any other abusive behaviour to be present in this particular case and therefore concluded that Volvo's refusal to license was not to be seen as being abusive.<sup>110</sup> Therefore the Court said that it was unnecessary to give an answer to the third question referred to it by the national court.<sup>111</sup>

The outcome of *Volvo* has to be interpreted in such a way as that there is no presumption that intellectual property rights lead to neither a state of dominance nor the opposite. This interpretation follows the established principle that a presumption of dominance does not follow from the possession of an IPR.<sup>112</sup> To reach a conclusion that a company holds a dominant position requires a much more intensive investigation of the facts surrounding a case than the mere ownership of an IPR.

The balance established by the ECJ in *Volvo* between the provisions of Article 82 EC and national property rights left unclear the precise circumstances in which compulsory licensing could arise under Article 82 EC. Though, in all events, it was clear that the exercise of an intellectual property right, provided for by national laws, could be overruled by Article 82 EC in certain circumstances and that a refusal to license by a dominant company does not, as such, amount to an abuse of a dominant position. The right to refuse to license lies in the very essence of the right. For a refusal to license intellectual property to amount to an abuse of a dominant position, additional abusive behaviour is required such as the ones exemplified by the ECJ in its judgment: a refusal to supply without objective justification, abusive pricing or the decision to reduce or to stop production.<sup>113</sup>

On one hand, scholars asked themselves if the Court, by its judgment in *Volvo* had intended to close the door, preventing companies from relying on competition law in attacking a refusal to license an intellectual property right. Still, on the other hand, the fact that the Court had expressly stated that an abuse could be present under some circumstances<sup>114</sup>, even though they were not found to be present in *Volvo* led others to believe that the ECJ might have wanted to leave the door open in coming cases after all.

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<sup>109</sup> Anderman, D. Steven *EC Competition Law and Intellectual Property Rights*, p. 197.

<sup>110</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd*, paragraph 10.

<sup>111</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd*, paragraph 10.

<sup>112</sup> Case 78/70 *Deutsche Grammophon v. Metro*, paragraph 16.

<sup>113</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd*, paragraph 9.

<sup>114</sup> Case 238/87 *AB Volvo v. Erik Veng (UK) Ltd*, paragraph 9.

## 6.2 Magill

The circumstances under which the exercise of intellectual property rights could be considered to be of abusive behaviour were further elaborated on in the case of *Magill*. If the previous analysed case, *Volvo*, can be said to have established the principle that a mere refusal to license an IPR to a third party was not to be seen as an abuse of a dominant position, *Magill* soon demonstrated that the principle was by no means absolute.

*Magill* concerned the refusal, by three television stations (RTE, ITV and BBC), to grant copyright licenses to information in their weekly TV and radio program listings to Magill TV Guide Limited (hereinafter Magill). Magill, an independent editor of a comprehensive TV magazine, was refused access to the TV stations' intellectual property because the stations wanted to reserve this right to their own separate publications. As a consequence, the only way for consumers to get comprehensive information about the TV programmes for the upcoming week was for them to buy three separate TV guides, one from each of the three broadcasters.<sup>115</sup>

After have been prevented from offering its comprehensive TV guide by a national court in Ireland, Magill turned to the EC Commission, alleging the TV stations of having abused their dominant position when refusing to license their copyright protected material.<sup>116</sup> The Commission reached the conclusion that the TV stations' refusal to license was in fact an abuse of their dominant position on the relevant market, thereby falling within the framework of Article 82 EC<sup>117</sup>. As a consequence, the TV stations was ordered to end their behaviour and the Commission obliged them to provide their TV programme listings to third parties (to payment of reasonable royalties).<sup>118</sup> The TV stations appealed to the Court of First Instance, seeking an annulment of the Decision taken by the Commission.

The CFI upheld the Decision, dismissing the TV stations application for an annulment.<sup>119</sup> The Court said that the exercise of the exclusive right to reproduce was not an abuse in itself, although that did not apply if it, in a specific case, was apparent that the right was exercised in such a way and under circumstances that it ventured to pursue a goal contrary to the provisions in Article 82 EC: "*In that event, the copyright is no longer exercised in a manner which corresponds to its essential function... which is to protect the moral rights of the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86*".<sup>120</sup>

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<sup>115</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraphs 7 and 9.

<sup>116</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 11.

<sup>117</sup> Commission Decision of 21 December 1988 (OJ 1989 L78/51, paragraph 23.

<sup>118</sup> Commission Decision of 21 December 1988 (OJ 1989 L78/51, Article 2.

<sup>119</sup> Case T-69/89 *RTE v. Commission*, paragraph 100; Case T-70/89 *BBC v. Commission*, paragraph 79; Case T76/89 *ITP v. Commission*, paragraph 83.

<sup>120</sup> Case T-76/89 *Independent Television Publications Ltd v. Commission*, paragraph 56.

On further appeal to the European Court of Justice by RTE and ITP<sup>121</sup>, the TV stations (now supported by IPO, representing software makers internationally) argued that they had the right to refuse to license its intellectual property because exclusivity was the very essence of intellectual property rights.<sup>122</sup> In addition, the appellants also held that if a company, being dominant or not, exercised a copyright granted by a national intellectual property law, that conduct could never be reviewed in relation to Article 82 EC.<sup>123</sup>

The Advocate General started his Opinion by declaring the importance of protecting of protecting intellectual property in the first place and continued by stating that the Member States had dedicated themselves to defend intellectual property rights, rights which give the owner an exclusive right to limit competition.<sup>124</sup> The Advocate General emphasised the importance that care must be taken by the EC Institutions when dealing with the issue of compulsory licensing.<sup>125</sup> Since the Advocate General was unable to find how the product Magill wanted to create, the comprehensive TV guide, could add up to a substantial competition ground he recommended, in accordance with the view of the appellants, the ECJ to annul the Commission's Decision as well as the judgement of the CFI.<sup>126</sup> The fact that Magill wanted to create an enhanced product did not, in the eyes' of the Advocate General, mean that the product could be considered to be new.<sup>127</sup> The Advocate was of the opinion that the consumer need was already met by the separate guides provided for by the TV stations. For that reason, the importance of protecting the copyright ought to carry greater weight than the consumer interest for an enhanced product.<sup>128</sup>

The Advocate General's opinion did not convince the European Court of Justice which upheld the judgment of both the Court of First Instance and the Decision taken by the Commission. With regards to the issue that the exercise of a copyright, granted by a national property law could never be reviewed in relation to Article 82 EC the Court simply held that the appellants were wrong.<sup>129</sup> The Court continued, holding that in the absence of Community wide legislation or a harmonisation of laws it is an issue for national rules to settle on the circumstances and procedures for granting protection of an intellectual property.<sup>130</sup> Further, the exclusive right of re-

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<sup>121</sup> BBC did not appeal to the ECJ.

<sup>122</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 33.

<sup>123</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 37.

<sup>124</sup> Opinion of the Advocate General, joined cases C-241/91 P and 242/91 P, paragraph 11.

<sup>125</sup> Opinion of the Advocate General, joined cases C-241/91 P and 242/91 P, paragraphs 12-14.

<sup>126</sup> Opinion of the Advocate General, joined cases C-241/91 P and 242/91 P, paragraph 208.

<sup>127</sup> Opinion of the Advocate General, joined cases C-241/91 P and 242/91 P, paragraph 98.

<sup>128</sup> Opinion of the Advocate General, joined cases C-241/91 P and 242/91 P, paragraph 97.

<sup>129</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 48.

<sup>130</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 49.

production forms part of the author’s right, so that refusal to grant a license, even if it is the act of a company holding a dominant position, cannot in itself constitute abuse of a dominant position.<sup>131</sup>

However, the Court also said that it was clear from *Volvo* that “*the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct*”.<sup>132</sup> According to the ECJ, such exceptional circumstances were present in this case and the Court presented the following four conditions as constituting an abuse of a dominant position:<sup>133</sup>

- (i) There was no substitute for a comprehensive weekly television guide, for which there was a specific, constant and regular potential demand on part of the consumers;
- (ii) The broadcasters’ refusal to supply prevented the appearance of a new product for which there was a demonstrable and unsatisfied consumer demand;
- (iii) There was no objective justification for such a refusal either in the activity of television broadcasting or in that of publishing television magazines.
- (iv) The broadcasters, by refusing to license *Magill*, reserved to themselves the secondary market for weekly television guides by excluding all competition on the market.

The Court reached the conclusion, based on these four exceptional circumstances, that the TV stations had in fact abused their dominant position when refusing to license their copyright protected material.<sup>134</sup> However, the Court also reaffirmed that a refusal by a company to grant a license, even if it is the act of a dominant company, cannot in itself constitute an abuse of a dominant position.<sup>135</sup> Nevertheless, it insisted on that in exceptional circumstances, the exercise of such an exclusive right by an owner may amount to an abusive conduct.<sup>136</sup>

The circumstances surrounding *Magill* were somewhat different compared to the circumstances at hand in *Volvo* as *Magill* needed the requested license to produce a new product, a new product for which there was an identified demand by consumers. The ECJ held that in such circumstances there might actually be a limited obligation to license. Once again, owners of intellectual property expressed fear that their exclusive-

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<sup>131</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 49.

<sup>132</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 50.

<sup>133</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraphs 52-56.

<sup>134</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 57.

<sup>135</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 49.

<sup>136</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 50.

ness now longer was safe from the long arm of the Commission.<sup>137</sup> If taken literally, the Court's judgment meant that an owner of an intellectual property right would be obliged to issue a license if it was considered to be necessary for a new party entering the market who could show that its product was different from the one offered by the IP-owner. However, if examined thoroughly, there was never any real need for this kind of anxiety of becoming reality. The better view was instead that of other commentators arguing that the doctrine established in *Magill* would be applied restrictively, only when exceptional circumstances were at hand.<sup>138</sup>

*Magill* can be said to have established a principle saying that the exercise of an exclusive intellectual property right might, in certain exceptional circumstances, involve abusive conduct thereby infringing Article 82 EC. However, it was not clear how wide this possibility should be and whether the exceptional circumstances provided for by the ECJ were cumulative or not.<sup>139</sup> Furthermore, it was not clear if there were other exceptional circumstances that could make licensing compulsory or if the list was to be seen as exhaustive.

### 6.3 Ladbroke

Tiercé Ladbroke SA (Ladbroke), a Belgian bookmaking company was trying to get a license to broadcast French horse races in Belgium. When Pari Mutuel Francais (PMU), an economic interest group for French race courses, and Pari Mutuel International Ltd. (PMI) refused to license the right to broadcast French horse races, Ladbroke answered by filing a complaint to the EC Commission alleging PMU and PMI of infringing Article 82 EC by their abusive behaviour of their dominant position. However, the Commission did not find that neither PMU nor PMI had infringed EC competition law.<sup>140</sup>

Ladbroke answered the Commission by bringing it before the Court of First Instance, claiming that the Commission had made a misapplication of Article 82 EC and that the Commission's definition of the relevant geographical market was wrong.<sup>141</sup>

The CFI started by confirming the Commission's definition of both the relevant product and geographical market, thereby rejecting the appellants' argument that the Commission had defined the geographical market wrong.<sup>142</sup> As for the question of abusive behaviour, the Court could not find that the alleged companies had abused their position in the Belgian market since neither PMU nor PMI were present on the

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<sup>137</sup> Keeling, *T. David Intellectual Property Rights in EU Law*, p. 384.

<sup>138</sup> Keeling, *T. David Intellectual Property Rights in EU Law*, p. 385.

<sup>139</sup> Allison, *Jones & Sufrin Brenda EC Competition Law*, p. 499.

<sup>140</sup> Comp /37.428 *Ladbroke*.

<sup>141</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraphs 12-13.

<sup>142</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraphs 81-89 and 102-108.

Belgian market.<sup>143</sup> Consequently, Ladbroke could not demand a license because the markets were separated nationally.

Ladbroke had referred to the outcome of *Magill* arguing that without access to the televised pictures and sound commentaries they were not able to compete on the horserace betting market.<sup>144</sup> The Court rejected this argument stating that PMU's and PMI's refusal to license did not prevent Ladbroke from entering the market. In fact, Ladbroke had not only already entered this market before this case; it was also the largest company on the market.<sup>145</sup>

By its ruling in *Ladbroke*, the Court of First Instance, must have been said to have upheld the outcome of the ECJ's judgement in *Magill*. The CFI explained, whereas in *Magill* the refusal to grant a license stopped a new competitor from entering a market, in *Ladbroke*, the complainant was already present and was even the dominant company.<sup>146</sup> The Court held that the refusal to license could not be abusive and fall within the provisions laid down in Article 82 EC "*unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on part of consumers*".<sup>147</sup> Clearly there was already a possibility to bet on horses in Belgium, a fact indicating that broadcasting of sound and pictures could not be seen as indispensable. Consequently, the Court could not find neither any abuse to have taken place nor that the accused had infringed Article 82 EC.<sup>148</sup>

The outcome of *Ladbroke* indicated that the principle established by the Court in *Magill* most likely would be limited to situations where exceptional circumstances were present, preventing the introduction of new products or services not offered by the owner of the IPR and for which there was a consumer demand.

## 6.4 Oscar Bronner

*Bronner* concerned a refusal by the Austrian newspaper group Mediaprint to grant a competing newspaper, Der Standard, access to its delivery network. Oscar Bronner, the publisher of Der Standard, lodged a complaint to an Austrian court alleging that the refusal to allow access amounted to an abuse of Mediaprints dominant position.

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<sup>143</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraphs 123-124.

<sup>144</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraph 13.

<sup>145</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraph 130.

<sup>146</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraph 130.

<sup>147</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraph 131.

<sup>148</sup> Case T-504/93 *Tiercé Ladbroke SA v. Commission*, paragraph 134.

The court referred the question whether Mediaprint's refusal infringed Article 82 EC or not to the European Court of Justice.<sup>149</sup>

The ECJ turned to its ruling in *Magill*, stating that the refusal by the owner of an IPR to license its right to a third party could amount to an abusive behaviour in exceptional circumstances.<sup>150</sup> In reference to *Magill*, the Court held that for there to be an abusive behaviour it would have to be likely that all competition was eliminated in the daily newspaper market and that the home delivery service was indispensable to do business in the newspaper market.<sup>151</sup>

In the eyes of the ECJ, the use of Mediaprint's home delivery service was not at all indispensable. There were several other means of distribution, such as distribution through shops, kiosks and by post.<sup>152</sup> To continue, there were no technical, legal or economic obstacles making it impossible for Bronner to establish a home delivery system of its own.<sup>153</sup> In the Court's view, there was never any abusive conduct by Mediaprint and its actions did not infringe Article 82 EC because there was no question about it that there were alternative means of distribution of newspapers.<sup>154</sup> Bronner did not manage to show that it would be uneconomic for competitors, acting jointly if necessary, to set up a second delivery system similar to the existing one.<sup>155</sup>

Although a case not dealing with intellectual property, *Bronner* is nevertheless of great importance. By its ruling, the ECJ emphasises the fact that each case before it requires a careful examination of the legal and economic context as well as a balancing act of individual and public interests.<sup>156</sup> In its judgment, the Court took the opportunity to clarify that all four exceptional circumstances mentioned in *Magill* were to be present if a compulsory license was to be ordered. In other words, the circumstances found to be abusive in *Magill* were cumulative.<sup>157</sup> *Bronner* is also of importance since

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<sup>149</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 1.

<sup>150</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 39.

<sup>151</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 41.

<sup>152</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraphs 42-43.

<sup>153</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 44.

<sup>154</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 47.

<sup>155</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraphs 44-46.

<sup>156</sup> *Ritter, Lennart & Braun, W. David Intellectual Property Law*, p. 266.

<sup>157</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 41.

the concept of essential facilities are discussed at length. If a facility is essential or not depends on whether normally efficient competitors could develop, obtain or get access to an alternative facility.<sup>158</sup> The test is an objective one, not based on the needs of the particular company requesting access. In *Bronner*, the Court said that there were no obstacles making it impossible for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme.<sup>159</sup> It would not be sufficient for the plaintiff to demonstrate that it would not be economical viable for anyone to set up a distribution system of equivalent size. The fact that the competitor seeking access is small, inefficient, especially vulnerable or particularly determined or well-financed should not alter the legal duty to grant access

A facility might be considered to be indispensable if no substitutes can be created. Access is not considered indispensable if actual or potential competitors (alone or in combination), could construct their own facility. Even though applying an essential facility principle at all times involves an evaluation of what competitors could do in the future, it does not involve assessing whether or not they will do it. If they could construct a second facility on an economic basis, access will not be ordered.

The ECJ took a somewhat restrictive view of the obligation to grant access in *Bronner*. The Court stressed that the refusal to license must be likely to eliminate all competition from the undertaking requiring access.<sup>160</sup> A business should not lightly be forced to assist its competitors and the fact that competing companies would benefit from being granted licenses is not sufficient for bringing Article 82 EC into play. Access must also be indispensable since there can be no actual or potential alternative for the requiring company.

## 6.5 IMS Health

*IMS Health* concerned a complaint filed by NDC Health (NDC) to the EC Commission against its competitor IMS Health (IMS). NDC, a data collector on pharmaceutical sales, accused IMS, the leading data collector on pharmaceutical sales in Germany, of abusing its dominant position by refusing to license copyright to its 1860 brick structure.<sup>161</sup>

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<sup>158</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraphs 44-46.

<sup>159</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraphs 44-46.

<sup>160</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 41.

<sup>161</sup> The 1860 brick structure divided Germany into 1860 geographical areas, bricks, based on different factors such as postcodes. IMS Health developed this structure, protected under copyright, which had become a national standard in the pharmaceutical industry. IMS Health collected pharmaceutical sales information from wholesalers and formatted it in accordance with the brick structure, enabling

In 2000, NDC began offering services based on IMS's copyright protected brick structure. IMS answered by suing NDC in German courts alleging NDC of infringing their copyright. NDC responded to the accusation by bringing a complaint to the EC Commission, holding IMS to be in violation of Article 82 EC and arguing that it was impossible for NDC to compete effectively on the German market unless it gained access to the 1860 brick structure.

On July 3, 2001, the EC Commission adopted an interim decision, ordering IMS to allow access to the 1860 brick structure to competitors.<sup>162</sup> The interim decision, ordering a compulsory license was suspended by order and by interim relief by the Court of First Instance<sup>163</sup> later confirmed by the ECJ.<sup>164</sup> However, in parallel proceedings, a German court sought a preliminary ruling hearing the copyright infringement dispute between IMS and NDC and the following three questions were referred to the ECJ by the German court:<sup>165</sup>

1. Whether a dominant company's refusal to license an intellectual property, protected by copyright, to another company which seeks to access the same market as the dominant company is active on and if the potential clients reject any product which does not make use of the copyright constitutes an abuse of a dominant position?
2. Is the extent to which a dominant company has had involvement from customers in the development of the copyright protected product relevant to the question of abusive conduct?
3. Is the cost clients would have to bear if they sometime in the future were to go over to an alternative product of a competing undertaking relevant to the question of abusive conduct by an undertaking with a dominant position on the market?

The ECJ started its proceedings by once again confirming the established principle that a mere refusal to license an intellectual property right cannot in itself be considered to be abusive.<sup>166</sup> However, the Court continued by stating that the exercise of an exclusive right might very well be condemned to be abusive if certain exceptional cir-

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it to be analyzed. IMS Health then provided sales reports to its customers, the pharmaceutical companies.

<sup>162</sup> Commission Decision 2002/165/EC

<sup>163</sup> Case T-184/01 *IMS Health v. Commission*.

<sup>164</sup> Case C-481/01 P(R) [2002] ECR I-3401.

<sup>165</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 17.

<sup>166</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 34.

cumstances were at hand.<sup>167</sup> The Court held that, for the refusal to license to be an example of abusive behaviour, three cumulative conditions had to be satisfied:<sup>168</sup>

1. The refusal to provide prevents the emergence of a new product for which there is a potential consumer demand.
2. The refusal is unjustified.
3. The refusal excludes any competition on the secondary market.

The ECJ stressed that it was for national courts to determine whether or not these conditions are fulfilled but the Court, as a guide, elaborated on all three of them starting with the issue if the existence of two markets<sup>169</sup> is a necessary requirement for compulsory licensing of an intellectual property right. The Court answered this question by stating that it is enough to identify a potential or hypothetical market<sup>170</sup> and held that: “*it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product*”.<sup>171</sup> The Court answered, in relation to the first question, that where an intellectual property is indispensable for operating on a downstream market, the refusal by a dominant company to allow access may be regarded as being abusive only when the requesting party intends to create new products not already offered by the IPR owner and for which there is a potential consumer demand.<sup>172</sup> The Court clarified that, on emergence of a new product, that duplication (that is offering the same product or cloning) of the right holder’s product or service is not enough to satisfy this criterion. The party requesting the license must intend to produce a completely new product or service not offered by the owner of the right.<sup>173</sup> Finally, in answer to the question about objective justification where the Court held that the examining of such justifications was relevant or not must be conducted by the national courts on a case-by-case basis.<sup>174</sup>

In accordance with *Bronner*, the Court held that the question of indispensability involves an investigation into whether there are options on the market and if there are any technical, legal or economic obstacles present making it economic unviable to

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<sup>167</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 35.

<sup>168</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 38.

<sup>169</sup> An upstream market for the supply of the IP and a downstream market where the IP is used for the production of another product or service.

<sup>170</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 44.

<sup>171</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 45.

<sup>172</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 49.

<sup>173</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraphs 48-49.

<sup>174</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 51.

create an alternative to the facility in question (the 1860 brick structure).<sup>175</sup> Applying this line of reasoning to *IMS Health* led the ECJ to conclude that the high level of customer involvement in the development of the 1860 brick structure as well as the customer dependence on it were highly relevant circumstances for the investigation of obstacles to create an alternative facility.<sup>176</sup> Although, in so far as NDC could adopt a different structure for its data in order to compete without infringing IMS's copyright, the brick structure was not the only means to process sales data. Under this principle, IMS did not infringe Article 82 EC by refusing to license its copyrighted 1860 brick structure NDC.

The judgment by the European Court of Justice in *IMS Health* follows the previous settled case law, especially the principles derived from *Volvo*, *Magill* and *Bronner*. Once again, the Court explained that the mere refusal to license an intellectual property is not something that, as such, can be considered to be abusive behaviour.<sup>177</sup> However, the Court's judgment leaves a number of questions unanswered. For example, the Court never gave any direction on what would amount to a new product. The Advocate General suggested that the term "new product" included goods or services of a different nature which, although in competition with those of the owner of the right, answer specific customer requirements not satisfied by the existing goods or services.<sup>178</sup> Clearly, there is an evident grey zone between products that are not essentially a duplication of existing products and products that can be said to be of a truly new nature. Unfortunately though, the judgment by the ECJ does not elaborate on this matter and the Court did not give any guidance to the national court on how it should answer the question of whether or not there was a new product in this case. Another uncertainty is the Court's mentioning of "intent" to offer a new product.<sup>179</sup> The Court does not elaborate on this issue either and the question is how serious such intent must be for a company to get access to the dominant company's essential inputs. Furthermore, how strong ought the possible unmet demand be and how important is the amount of the investment made by the IP owner? What weight should be given to the fact that the IP-owner proclaims that he intends to before long offer an equivalent product or service himself?

In view of the lack of clarity in the ECJ's judgment in *IMS Health* and its potential far reaching consequences, it is likely that the judgment may not represent the last word on the subject of compulsory licensing. The language used by the Court will have to be clarified in future cases.

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<sup>175</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 28.

<sup>176</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 30.

<sup>177</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 34.

<sup>178</sup> Opinion of the Advocate General *IMS Health*, paragraph 66.

<sup>179</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 49.

## 6.6 Summary of the case law established by the EC Courts.

To conclude the current EC Competition policy on the issue of compulsory licensing of intellectual property rights, at least before the Commission's Decision in *Microsoft*, the general rule, restated by the Court on several occasions is that there is no presumption that IPRs lead to dominance and IPRs do not, as such, amount to a behaviour of an abusive nature and it is not considered to be unlawful for the owner of an intellectual property right to exclude competitors from the market in which the intellectual property right is granted. Quite to the contrary, it is this exclusiveness that constitutes the very essence of intellectual property rights.

Nevertheless, if certain exceptional circumstances are present, there can actually be an obligation to license. This was the case in for instance *Magill* where the ECJ presented four different circumstances which, if being present had the result of granting a compulsory license, the so called Magill-test: (i) there were no substitutes to the intellectual property, (ii) the refusal to license hindered the emergence of a new product for which there was a potential consumer demand, (iii) there were no objective justifications not to license and finally, (iv) by their refusal to license the owners practically reserved for themselves the secondary market. The Court later elaborated on the Magill-test in *Ladbroke* holding that all four of these exceptional circumstances had to be present.

In *IMS Health*, the most recent judgment by the ECJ on compulsory licensing of intellectual property rights and thereby also the most current guideline, the Court in large followed *Magill* and concluded that a refusal to supply a license to a potential licensee would be an abuse if all three of the following conditions were present:

1. The refusal to license prevents the emergence of a new product (the licensee must intend to offer a new product, not just a copy or a clone of the dominant company's product) for which there is a potential demand;
2. The refusal to license is unjustified;
3. The refusal to license excludes all competition on the secondary market.

As explained, the guidance given by the Court in this most recent case is somewhat limited and so far *Magill* is the only case where the ECJ has ordered a compulsory license of an IPR. Consequently, it is difficult to draw any far reaching conclusions of EC competition policy based on these cases.

It is tempting to downplay the impact of *IMS Health* by emphasising that both *Magill* and *IMS Health* concerned intellectual property rights involving much less creative input and innovation than most intellectual property. However, the Court never suggested in any way that its rulings in these two cases were effected by the existence of "weak" intellectual property rights.

To conclude, there are some uncertainties of the EC competition policy on the issue of compulsory licensing but as mentioned earlier, the general rule is still that the hol-

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der of an intellectual property is not obliged to license its right to other parties except in exceptional circumstances where there might be a requirement to grant a license.

## 7. Analysis of the EC Commission's Microsoft Decision

### 7.1 Background

In 2000, the EC Commission started investigations against Microsoft following a complaint made by Sun Microsystems (Sun). Sun, being one of Microsoft's main competitors in the market of work group servers, accused Microsoft of using its Windows and Office suit monopoly to obtain an even further monopoly on this market. Sun alleged Microsoft for providing them with non-sufficient interface code information, information Sun needed if their servers were to interoperate with Microsoft's Windows, its Office suit and work group server operating system.<sup>180</sup> According to Sun, Microsoft's refusal to disclose the requested integration features prevented Sun from offering non-Microsoft services to users of Windows.<sup>181</sup>

The Commission reached a Decision on 24 Mars 2004 where it found Microsoft of having infringed Article 82 EC, holding that Microsoft had conducted two separate forms of abusive behaviour on the market for supply of client PC operating systems:

1. Refusal to supply interoperability information.<sup>182</sup>

First; the Commission's investigation led it to conclude that Microsoft was abusing its dominant position by its refusal to supply interoperability information of server systems, information the Commission considered to be necessary in order for other companies to compete efficiently with Microsoft.<sup>183</sup> In fact, the Commission considered the information to be of such a great importance that Microsoft's refusal to disclose and supply information had the risk of eliminating all competition on the relevant market.<sup>184</sup>

2. Tying of Windows Media Player to Windows.<sup>185</sup>

Second; according to the Commission, Microsoft was also abusing its dominance in its behaviour of tying the Windows Media Player to the Windows PC operating sy-

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<sup>180</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 3.

<sup>181</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 3.

<sup>182</sup> Case COMP/C-3/37.792 *Microsoft*, Article 2 (a).

<sup>183</sup> The Commission's definition of interoperability information is as follows: "*The complete and accurate specifications for all protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Servers to deliver file and print services and group and user administration services... to Windows Work Group Networks*", Case COMP/C-3/37.792 *Microsoft*, Article 1(1).

<sup>184</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 589.

<sup>185</sup> Case COMP/C-3/37.792 *Microsoft*, Article 2 (b)

## 7. Analysis of the EC Commission's Microsoft Decision

stem. A Windows version, not including the Windows Media Player was not available and the Commission held that Microsoft's distribution system of its Media Player allowed Microsoft to efficiently weaken competition on the relevant market (especially since this form of distribution was available exclusively to Microsoft).

As in this case, where the EC Commission reaches the conclusion that there has been an infringement of Article 82 EC, it has the power to levy a fine up to 10 percent of the abusing company's world wide turn over.<sup>186</sup> Accordingly, Microsoft was fined close to €500 million.<sup>187</sup> In addition, Microsoft was also ordered to disclose specification of protocols to competitors enabling them to compete more efficient with Microsoft's work group operating system products.<sup>188</sup> The information in these protocols must be comparable to the information disclosed by Microsoft to its own employees or contractors charged with developing Microsoft's own group server. The Commission also required Microsoft to update the disclosed information each time it brings to the market new versions of relevant products.<sup>189</sup> The required information may take two forms: IP protected information and non-protected information. However, as the Commission indicated, it will not extend to source code information. The Commission held that it is concerned solely about interoperability by opening up interface information and that it had no desire to use a remedy to force disclosure of source codes to the Windows operating system.<sup>190</sup>

In addition, Microsoft was required to offer a version of Windows that did not include the Windows Media Player and was at the same time prohibited from using technological, commercial, contractual or other means that would have an equivalent effect to the tying abuse.<sup>191</sup> As the purpose of this Master's Thesis is to deal with the concept of compulsory licensing of intellectual property rights, it is only the first of these two alleged abuses that will be further examined and analysed.

Whereas the ECJ's judgment in *IMS Health*, the most recent case before the Court dealing with compulsory licensing of intellectual property rights, tends to confirm key elements from settled case law, the Commission's Decision in *Microsoft* seems to require a new paradigm.

### 7.2 Inconsistency compared to settled case law

The concepts of compulsory licensing of intellectual property rights can be said to have received broad attention throughout Europe ever since the outcome of *Magill*

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<sup>186</sup> Council Regulation 17/62, Article 3 (replaced 1 of April 2004 by Council Regulation 1/2003).

<sup>187</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 1080.

<sup>188</sup> Case COMP/C-3/37.792 *Microsoft*, Articles 4-5.

<sup>189</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 1002.

<sup>190</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 714.

<sup>191</sup> Case COMP/C-3/37.792 *Microsoft*, Article 6.

## 7. Analysis of the EC Commission's Microsoft Decision

where, as explained, owners of intellectual property expressed fear that their exclusiveness were in jeopardy and that they no longer were safe from the long arm of the Commission. However, others took comfort in the Court's outcome because of the somewhat unique circumstances being present in that particular case:

First; the Court explained that it was only in certain exceptional circumstances that a compulsory license could be considered to be an appropriate remedy. The TV-stations' refusal to supply the requested information completely prevented the appearance of a new product (the comprehensive TV guide), in a secondary market which had the effect that the TV-stations' reserved the secondary market for themselves. Further more, the ECJ did not come across any objective reasons which could justify the refusal to supply the information Magill needed to produce its new product, a product for which there was a potential consumer demand.

Second; owners of intellectual property rights also took comfort in the outcome of *Magill* in view of the legitimacy of the intellectual property right in question. The copyright discussed in *Magill*, only possible to apprehend in Ireland and the United Kingdom, was probably too thin to qualify as intellectual property in other countries throughout the European Community. Though, the ECJ did not suggest that its ruling in *Magill*, or in any of the other cases presented in this Thesis, was in any way affected by the existence of some kind of "weak" intellectual property right.

It becomes obvious when examining the Microsoft Decision that the Commission refused to limit its investigation to just repetitively compare if the circumstances amounting to abusive conduct in previous cases, such as *Magill*, were met or not. As explained, *Magill* offered a new procedure, a "safe haven" for the usage of intellectual property rights. The ECJ clarified that it was only in exceptional circumstances where a refusal to license could be held to be contrary to the provisions found in Article 82 EC thereby forcing the owner of the right to be subject to a remedy of compulsory license.<sup>192</sup>

However, as the Decision confirms, the exact boundaries of these exceptional circumstances seem to be far from well established as the Commission discards the approach taken by the ECJ in its settled case law. The path chosen by the Commission calls for a new paradigm; a broader and vaguer standard where the entirety of the circumstances surrounding a specific instance of refusal to supply has to be investigated and analysed.<sup>193</sup>

### 7.2.1 The emergence of a new product

The Commission's Decision in *Microsoft* is contradictory compared to settled case law in a number of respects. The most noticeable dissimilarity is the neglect by the Commission to deal with the question if the refusal to supply information hindered the appearance of a product that was new and for which there was an unmet demand

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<sup>192</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraphs 52-56.

<sup>193</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 558.

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from consumers. Although the Decision have a small part where the Commission discuss if the refusal to license “*limits technical development to the prejudice of consumers*”<sup>194</sup>, it is indistinct and it will be very difficult, close to impossible to forecast the application of this approach in upcoming cases.

It is clear from the outcome of *IMS Health* that a right holder's refusal to license is only considered to be an abuse if a dominant company reserves a secondary market to itself, thereby preventing the emergence of a new product. The Court explained that duplicating products or services, sold by the right holder, was not sufficient and a company wishing to receive a license have got to intend to offer new goods or services not at this time offered by the owner of the right and for which there is potential consumer demand.<sup>195</sup>

Thereby, the outcome of *IMS Health* restates the test set out in *Magill* considering the emergence of a new product for which there is consumer demand.<sup>196</sup> The Microsoft Decision however, does not address this issue and does not demonstrate that, once its request had been acceded to, Sun would have offered a new product or service for which there is an unmet consumer demand. Nor does the Commission show that Sun ever informed Microsoft that it wanted to acquire the license in order to offer a new product. Quite to the contrary, the outcome of the Commission's Decision seems to indicate that competing producers of server operating systems need the interface to compete directly with Microsoft<sup>197</sup>, i.e. they would offer identical products as currently already offered by Microsoft. Instead of looking to products for which there is unmet consumer demand, the Commission bases its analysis on the fact that the refusal to supply would limit technical development to the prejudice of consumers.<sup>198</sup>

The new product in *Magill*, the comprehensive TV guide, was known and it was obvious that there was an unmet consumer demand.<sup>199</sup> In *Microsoft*, the Commission neither identifies a new product, nor does it identify any unmet consumer demand. The Commission does not show that Sun and others would bring new products on the market, merely that they might be able to improve their existing products. That is a test which would be fulfilled in more or less every case when valuable intellectual property is disclosed and supplied to competitors.

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<sup>194</sup> Case COMP/C-3/37.792 *Microsoft*, paragraphs 693-701.

<sup>195</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 49.

<sup>196</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraphs 52-56.

<sup>197</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 1003.

<sup>198</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 692.

<sup>199</sup> Such guides were available in other Member States.

### 7.2.2 Elimination of competition

In addition, the Commission's approach to the condition whether the refusal to supply would eradicate competition is dissimilar to the one taken by the Court in its settled case law. For instance, one of the findings by the Court in *Magill* amounting to abusive behaviour was the conduct by the dominant companies which basically had the effect of eliminating competition.<sup>200</sup> The Court clarified this standpoint in *Bronner* stating that for the case of *Magill* to be relied upon, it was necessary to show that supply was indispensable to carry on business in the market, meaning that there was no real or potential substitute.<sup>201</sup>

In *IMS Health*, the ECJ elaborated on the test set out in *Magill* and *Bronner*, explaining that the test is "elimination of all competition" and not "risk of elimination of competition".<sup>202</sup> While the difference at first glance appears like a question of semantics, the difference is one of substance. This is a fact that becomes clear when one looks at the facts constituting an abuse. In *Magill*, the TV-stations' refusal to license effectively prevented *Magill* from distributing its comprehensive TV guide which, as a consequence, expired almost immediately. All competition was effectively eliminated almost instantaneously. In *IMS Health*, *IMS* refusal to supply the requested structure prevented its competitor *NDC* from providing data in the format customers needed. Thereby, *NDC* was in effect prevented from competing on the relevant market.

Again, the refusal by the dominant party to license its intellectual property had a near instant effect. In clear contrast, Microsoft still continues to face competition more than five years after the day the Commission found the refusal to license to have taken place. Indeed, Linux entered the market after the Commission's finding and has even grown its market share.<sup>203</sup> This indicates that the Decision taken by the Commission in *Microsoft* uses a lower benchmark than the one proposed by the European Court of Justice in *Magill*, a benchmark that was confirmed in *IMS Health*.

On the whole, the Commission implements a different and less strict approach in its Decision compared to the one taken by the Court in earlier cases. The Commission has based its outcome on the finding that the refusal to license leads to a competitive drawback to the extent where there is a risk of elimination of competition. As explained, this seems to be a long-term process, very much to be expected to extend over the course of at least a decade. Consequently, the effect is much less immediate or direct compared to the situation in *Magill* or *IMS Health* where the refusal to supply information forced the competitors of the market in just matter of days.

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<sup>200</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraphs 56.

<sup>201</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 41.

<sup>202</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 47.

<sup>203</sup> See for example IT Facts <http://www.itfacts.biz/index.php?id=P723>. Available 13/5/5.

### 7.2.3 The question of indispensability

In addition to these two illustrated differences, the Commission also appears to have applied a lower standard of indispensability in *Microsoft* compared to settled case law in for instance *IMS Health* and *Bronner* where the ECJ explained that for a party seeking to rely upon the outcome of *Magill*, it was necessary to show that the requested supply was indispensable to carry on business on the market.<sup>204</sup> In *Microsoft*, the Commission assesses the issue of indispensability by evaluating the level of interoperability that exists in the market and admits that it would be possible to achieve some interoperability without the compulsory license. However, the Commission reaches the conclusion that the degree of interoperability that actually can be achieved, considering the level of Microsoft's current disclosures "is insufficient to enable competitors to viably stay in the market".<sup>205</sup>

The approach taken by the Commission is different from the one taken by the ECJ in *IMS Health* where the Court must have been said to have confirmed the test set out in *Bronner*, i.e. that European law does not require optimal access to the market; actual or potential alternatives include those facilities that exist and are used by competitors even though they might be less advantageous.<sup>206</sup> *IMS Health* restated that it was necessary to examine whether there are "alternative solutions, even if they are less advantageous".<sup>207</sup> In *Microsoft*, the Commission admits that alternative solutions do exist, but argues that they are disadvantageous to such an extent as to not in reality constitute alternatives. The Commission requires a near perfect, native level of interoperability.<sup>208</sup> Overall, the fact that competing products today are able to interoperate with Microsoft's products, and in particular that some of them even have increased their market share since the refusal to supply, indicates that the Commission have applied a higher standard of interoperability and, correspondingly, a lower standard of indispensability compared to settled case law.

### 7.2.4 The new test of balance

The Commission also sets forth a new test of balance, a test under which it can order a compulsory license if on balance, the possible negative impact of the order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation in the whole industry (including Microsoft).<sup>209</sup> This is the puzzle the Commission tries to lay down, ultimately rejecting the arguments put forward by

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<sup>204</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 41.

<sup>205</sup> Case COMP/C-3/37.792 *Microsoft*, footnote 712.

<sup>206</sup> Case C-7/97 *Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG*, paragraph 43.

<sup>207</sup> Case C-418/01 *IMS Health GmbH v. NDC Health GmbH*, paragraph 28.

<sup>208</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 1003.

<sup>209</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 783.

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Microsoft that its intellectual property rights, as such, were to be seen as an objective justification for their refusal to supply the information requested by Sun.<sup>210</sup> In the eyes of Microsoft, they were fully justified in their refusal to disclose and provide the sought after information because if so, the result would be that their incentives to innovate would diminish.<sup>211</sup> Additionally, Microsoft also said that if the company would be forced to supply the requested information to Sun and other rival competitors it "would make it relatively easy for competitors to clone new features in the Windows family of operating systems".<sup>212</sup>

Microsoft's arguments in this matter were all to be rejected by the Commission which instead decided to present its new test of balance where the Commission held that it was required to take into account the whole relevant market if Microsoft's anti competitive behaviour was to be permitted to remain unfettered.<sup>213</sup> According to the Commission, a real risk existed that Microsoft would succeed in eliminating all competition on the market for work group server operating systems.<sup>214</sup> As a consequence, the Commission held that: "*on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)*".<sup>215</sup> The Commission continued, stating that the refusal to supply would stifle innovation in the impacted market and diminish consumers' choices by locking them into a homogenous Microsoft solution.<sup>216</sup> As such, it is particularly inconsistent with the provisions found in Article 82 EC.

This new test of balance is by no means a test that can be said to be easy to apply. Newness cannot be explained as a distinct variable, on the contrary it is a rather continuous one and the product itself might not even be a factor of relevance. A product is merely a specified collection of features and the preferences of consumers are not attached to the product as such, they are attached to the special features of the particular product. Apparently, this line of reason leads to the conclusion that what consumers' value is not the new product as such; it is the features that are attached to the product that is of value for consumers

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<sup>210</sup> Case COMP/C-3/37.792 *Microsoft*, paragraphs 709-712.

<sup>211</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 709.

<sup>212</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 713.

<sup>213</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 724.

<sup>214</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 725.

<sup>215</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 783.

<sup>216</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 782.

## 7.3 Conclusions

### 7.3.1 A new paradigm

The Commission's Decision in *Microsoft* provide little explanation, and no economic analysis what so ever for its finding that industry wide innovation will increase in the long-term if one company is stripped of its exclusive intellectual property rights. Considering the far-reaching structure of this new test of balance, it is especially unlucky. Underscoring the far-reaching potential of this new test is the fact that the Commission ordered the compulsory license despite the following:

- (i) Opposite to *Magill*, the IPR of interest in *Microsoft* cannot be said to be of a "weaker" nature.<sup>217</sup> The intellectual property at stake in *Microsoft* must be said to concern the very core of Microsoft's business. Microsoft is obligated, by the Decision, to reveal and to make available more than 100 protocols meaning that the company have to disclose a wide range of capabilities in Microsoft's Window's products. Microsoft holds several patents on these capabilities and have many more waiting for approval.<sup>218</sup> Notable is that the requested protocols do not exist; they will have to be created by Microsoft and will literary contain thousands of pages of data.
- (ii) Opposite to *Magill*<sup>219</sup>, the Commission does not limit the exercise of the IP to a secondary market in its Microsoft Decision. If taken literary, this might involve compulsory licensing of intellectual property in the Windows system which will have the result that they can be integrated in directly competing systems in the same primary market as the one in which Microsoft operates in.
- (iii) Opposite to *Magill*<sup>220</sup>, there are no grounds for the conclusion that the usages of Microsoft's protocols are an essential input for the making of competing systems. On the contrary, several competing system<sup>221</sup> are present on the market and the five year long investigation by the Commission has corresponded with the increasing growth of the popularity of Linux.<sup>222</sup> These products are capable to compete directly with the products developed and supplied by Microsoft. Actually, they are even frequently installed with per-

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<sup>217</sup> The comprehensive TV-guide in *Magill* did not take much intellectual effort and copyright protection of this kind was only avaiable in the UK and Ireland.

<sup>218</sup> *Lévêque, Francois* The Application of Essential Facility and Leveraging Doctrines to Intellectual Property in the EU, p. 1. [http://www.epip.ruc.dk/Papers/Leveque\\_Paper.pdf](http://www.epip.ruc.dk/Papers/Leveque_Paper.pdf). Available 13/5/5.

<sup>219</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 56.

<sup>220</sup> Case C-241-242/91P *RTE & ITP v. Commission*, paragraph 53.

<sup>221</sup> Supplied by such large companies as IBM and HP.

<sup>222</sup> See for example IT Facts <http://www.itfacts.biz/index.php?id=P723>. Available 13/5/5.

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sonal computers and servers equipped with Microsoft's products and it is a fact that customers keep on buying them from various dealers and join them together. Therefore, it is my opinion that there are no grounds for believing that other operating systems should be in any risk of vanishing.

- (iv) Moreover, in my mind, the Commission has used a market classification which is very narrow and which does not resemble the reality. Though companies must have been said to have become more or less accustomed to the Commission trying to enlarge their market shares by classifying markets narrowly<sup>223</sup>, this Decision really must be said to take that approach to a whole new level. The Commission defines and narrows down the market for work group servers to the performance of four separate tasks (basically file and print, network and administration), despite the fact that the Windows operating system support more than three times that number.<sup>224</sup> Additionally, these four recognized tasks are not charged for individually. This line of reasoning could very well have as its consequence that a single copy of Microsoft's operating system can be within the borders of the defined product market in one second, executing one of the four specified tasks, and outside the relevant market the next when carrying out other kinds of tasks.

The Commission continues its narrow market definition by confining the relevant market to operating system computers worth less than €25 000<sup>225</sup>. This is done regardless to the fact that the Windows operating system are installed on computers in a much wider variety of prices and that the price of an operating system is not decided by the price of the computer on which it is installed. This kind of reasoning would be the same as to classify different markets for a car tire based upon variation in value on the cars to which the tire is assembled. This is a way of thinking that obviously could be used to make practically any product or service dominant if desired.

### 7.3.2 Breaking new grounds

The new approach taken by the Commission in the Microsoft case must be said to break new grounds. The Decision balances the negative impact of an order to supply on Microsoft's incentives to innovate against the positive impact of such an order on the level of innovation of the whole industry. The new test of balance is not based on any previous Court proceedings or any earlier Decisions taken by the Commission and according to me there are two grounds why this new test is incorrect as a matter of principle:

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<sup>223</sup> Anderman, D. Steven *EC Competition Law and Intellectual Property Rights*, p. 164.

<sup>224</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 566.

<sup>225</sup> Case COMP/C-3/37.792 *Microsoft*, paragraphs 591-592, 599 & 609.

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- (i) The new balancing test will decrease legal certainty significantly, a principle of fundamental value not only in EC law but in all moderns forms of law.<sup>226</sup> The new test is very difficult for a business to assess in advance, a fact made even worse as the Commission does not give any direction at all on how a company is to evaluate if its incentives to innovate outweigh the positive impact that a compulsory license could have on the relevant market. The lack of legal certainty is especially worrying considering the risk of a huge remedy if the business gets this act of balancing wrong.
- ii) The second reason why I consider that this new test of balance is incorrect as a matter of principle is the fact that intellectual property rights already has a built in structure considering the short and long-term incentives to innovate. This structure is created with both the short term disadvantage of exclusivity and the long term advantage of creativity in mind. IPRs aim at creating incentives to innovate and to produce a long term benefit for the society. The Commission appears to guess this cautious balancing act. Granting access to easily may result in short term benefits in terms of a boost in competition but in the long term however, there could very well be a decrease in competition as there would be less incentives for competitors to develop competing facilities and a chilling effect on investment in R&D by the dominant company as well. The indistinct statement that “the general public good” ought to be authorized to override intellectual property rights<sup>227</sup> raises additional questions of legal certainty. To decide if something might be contrary to the general public good is even more complex than to assess incentives to innovate.

### 7.3.3 A new European legal and economic policy

The approach taken by the Commission in *Microsoft* clearly creates a new legal and economic policy for Europe. By casting aside the test of exceptional circumstances, established in the landmark case of *Magill* (a test which has been confirmed by the Court in later cases), the Commission now forces companies to disclose and supply their technology to rivals and others whenever it reaches the conclusion that reducing a dominant company's incentive to innovate could nonetheless be good for an industry overall. This indistinct test will have substantial negative effect of research and innovation by market leaders around the whole world who are marketing their products in Europe. The new paradigm established by the Commission's Decision applies a new legal standard on when a compulsory license should be ordered. This paradigm differs significantly from the test set out by the ECJ in settled case law and if upheld in future cases would represent a significant loosening of the circumstances when the remedy of a compulsory license could be ordered and consequently bring in a substantial degree of legal uncertainty.

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<sup>226</sup> For example, Case C-233/96 *Denmark v. Commission*, paragraph 38.

<sup>227</sup> Case COMP/C-3/37.792 *Microsoft*, paragraph 711.

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My forgoing analysis of the Microsoft Decision shows that the European Commission did not follow the legal standard established by the European Court of Justice. Unfortunately, it is easier said than done to pin-down the Decision and nowhere does the Commission explain the exact legal test that it has used. Although, a thorough study shows that the Commission has used a lower legal standard compared to the benchmark established by the ECJ (set out in *Magill* and later reaffirmed in *IMS Health*). In addition, the Commission must also be said to have used a lower standard of indispensability in its Decision if compared to settled case law. The Decision will introduce significant problems of legal uncertainty, especially concerning the test applied to decide if the refusal to license was objectively justified or not.

The argument pushed forward by the European Commission concerning Microsoft's will to innovate in the future seems, without doubt, to be circular. Any verdict, forcing a business to disclose and to provide information that gives a competitive benefit will by all means decrease its lead compared to its competitors. Therefore if being obliged to let competitors get closer, the business will (not unexpectedly) have to work even harder to get back to its earlier market position. In technological advanced markets, such as the one where Microsoft operates, this implies that the business in question has to innovate even additionally to compensate for its competitors back packing. As a result, the question if an order to disclose and to provide information to competitors would have / had any negative influence on a dominant business's motivation to innovate can be asked with consideration to a theoretical past situation.

## 8. Concluding chapter

As my analysis of the European Community policy on compulsory licensing illustrates, it is only in the rarest and most extraordinary circumstances where an owner of an intellectual property right, relying on his right, will be accused of abusing a dominant position. The normal usage of an IPR should not be contrary to the provisions set out in Article 82 EC. Although, it has to be kept in mind at all times that there is a real possibility that Article 82 EC actually might infringe the exclusiveness following an intellectual property right if the Institutions of the European Community finds the usage to be of abusive nature. As I have explained, the Community Courts have, on several occasions, clarified that the list of abusive practices given in Article 82 EC is not to be seen as an exhaustive list of examples constituting abusive behaviour.

Taking into account the significance of intellectual property in our modern society of today, it is crucial for companies with valuable IPRs to know where the European Community policy on compulsory licensing leaves them. In examining the cases from the Commission and the Courts of the European Community I have found the following to be the current benchmark: first of all, the mere ownership of an IPR does not by itself confer dominance within the meaning of Article 82 EC. However, there is a possibility that the usage of an IPR will result in, or at least contribute to a dominant position on a market. The key issue though, is if the exercise of the right can be considered to be of an abusive nature or not. Second, the refusal to license has got to lead to some type of harm in relation to consumers. This does not include harm for example, by the fact that there is a lack of price competition but in the sense of unsatisfied consumer demand for a new product. It is clear that this can be a satisfied demand for a new product in the same relevant market as the market where the IP owner is working but vague on how dissimilar the new product is required to be. Third, there has to be an non-existence of competition on the product market in which the owner is operating which will be the grant of the license. Fourth, the IPR owner will be entitled a fair and straight compensation for the grant of the license. Fifth, there are defences, objective reasons available for the owner of an IPR to refuse to license. Sixth, the occurrence where the ECJ has ruled that a refusal to license is amounting to abusive behaviour remains exceedingly rare.

A question that ought to be answered is why the Institutions of the European Community believe it to be acceptable that EC competition law limit the behaviour of IPR owners if their market power equates to that of a standard of a de facto monopoly which is an indispensable input to a secondary market. I believe that there are two different reasons that can clarify the relationship between these two bodies of law in the European Community. The first reason being the fact that competition law has been given a fundamental position in the Treaty establishing the European Community whereas intellectual property legislation within the Community is represented by primarily national law. The second reason that explains why EC competition law is accepted as to restrict intellectual property is fact that competition laws are looked upon as having a public norm while the use of an intellectual property right is seen as an use of a private property right. IPRs are more correctly viewed upon as a form of

license or leasehold granted by the state to innovators for a specific time period. This license has some built in checks and balances but those using the license are still constrained by regulatory legislation such as for example environmental and health and safety laws which restrict the open exercise of intellectual property rights in the interest of the public. It is accurate that there is an important public concern in the incentive effects of the IPR's but this must be reconciled with, and cannot automatically trump, these other public interest concerns.

The relationship between competition law and intellectual property law has always been a difficult one. Competition law aims at optimising market conditions through improvements and intellectual property law protect certain forms of improvements, particularly technical and aesthetic creations against third party competition for a limited period of time. Compulsory licenses may become necessary once innovation activity is seriously hampered by existing monopolies. EC competition policy on compulsory licensing must be discerned from a tiny number of cases. It is not surprising that every new case therefore is controversial. Companies need to be aware of the competition law angel when enforcing and licensing their intellectual property. The question of when and in what circumstances the owner of an asset should be obliged to share it with competitors in the name of competition law has always been controversial, and will by no means continue to be controversial. To conclude, the institutions of the European Community are constrained by the absence of harmonious intellectual property policies. However, as testified in for example *IMS Health* and *Microsoft*, there is a tendency of the EC Commission to put competition law first and intellectual property law second. The process of European integration has further enhanced the importance of competition law. The core of that process has been the creation of a unified common market in Europe, and its success has depended on establishing norms and institutions that market both economically effective and politically desirable. Competition law has without doubts been a major factor in achieving this success, serving as a motor of integration and creating confidence in European Community institutions.

To conclude, it is not going to be easy to wed the bride of innovation to the groom of competition and it is not unlikely that this is a marriage which unavoidably will have a divorce as a result. It remains for future cases to resolve the unanswered questions and to clear the uncertainty still surrounding the concept of compulsory licensing of intellectual property rights in European Community law.

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## **Article 82 EC**

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.