

# An economic approach to what the conditions of abuse of a dominant position of copyright should be

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## Summary

This article reviews the conditions under which there will be an abuse of an intellectual property right under EC competition law in light of the *IMS* case and attempts to determine, under an economic analysis of intellectual property, what the conditions of abuse should be.

## Abstract

This article is concerned with the application of article 82 of the EC Treaty to intellectual property rights and especially copyright. It attempts to find, under an economic analysis of copyright, what the conditions of abuse of a dominant position through a refusal to licence copyright should be. The paper argues that the conditions set out by the Court of Justice and Court of First Instance to determine whether the holder of an intellectual property right abuses its dominant position are unclear. The relevant decisions of the Community courts (namely *Volvo*, *Renault*, *Magill*, *Ladbroke*, *Bronner*, *IMS*) are summarised and explained. Particular emphasis is put on the *IMS* case. The case serves to illustrate the confusion existing in this area of the law. The purpose of the article is to give a suggested way of reconciling the case law and clarify under which circumstances the holder of an intellectual property right abuses its dominant position. It also gives a preferred way of deciding the *IMS* case based upon this suggestion.

## Introduction

This article concerns the application of article 82 of the EC Treaty to intellectual property rights ('IPR'). The conditions<sup>1</sup> under which the refusal by the holder of an IPR to licence it would be abusive are obscure. As a matter of fact, the actual rulings by the European Court of Justice ('E.C.J.') and the Court of First Instance ('C.F.I.') on the application of article 82 to IPR are difficult to reconcile. Is there abuse at only one condition or at several conditions? If the latter, are the conditions cumulative or alternative? Do they apply indistinctively both to tangible property and intellectual property? The recent *IMS*<sup>2</sup> case has shed a bright light on the confusion that currently exists as regards the way the relations between article 82 and IPR must be regulated and provides an excellent illustration of the problem. The purpose of the article is to give a suggested way of reconciling the case law and thus clarify under which circumstances the holder of an IPR abuses its dominant position under article 82.

The article is divided into four sections. Section zero sets the general framework of inquiry and approach of the article. The article's argumentation is based on economics of copyright. Section zero first reminds why copyright is necessary in a free market economy by summarising the basic economics of copyright (0.1.). It then addresses the respective roles of copyright and competition laws (0.2). Finally, the topic of the paper and its link with economics of copyright are further explained and stressed (0.3.). After a short review of the conditions under which article 82 applies, section one addresses the various decisions of the E.C.J. and C.F.I. dealing with refusals to licence by holders of IPRs preceding the *IMS* case.<sup>3</sup> The facts will be first described (1.1.), then the rulings (1.2.). The analysis will show the existing confusion as to the circumstances in which there is abuse by an IPR holder. Section two relates the *IMS*

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<sup>1</sup> The words "conditions" and "circumstances" will be used as synonyms. The European Court of Justice in the *Magill* case originally used the term "circumstances". However, the headings of the cases generally use the term "conditions of abuse" and the literature refers to conditions and circumstances interchangeably, see e.g. V. Korah, "The Interface Between Intellectual Property and Antitrust: The European Experience", (2002, a) *Antitrust L.J.*, p. 801-839, at p. 814; H. Schmidt, "Article 82's "Exceptional Circumstances" That Restrict Intellectual Property Rights", (2002) *ECLR*, p. 210-216, at p. 214.

<sup>2</sup> Abbreviation of Intercontinental Marketing Services Health Inc. The shorter version ('IMS') will be used throughout the article.

<sup>3</sup> Constraints of place prevent us to make a detailed analysis of those cases. Therefore basic knowledge of the decisions will be assumed. For such an account, see e.g. E. Derclaye, "Abus de position dominante et droits de propriété intellectuelle dans la jurisprudence de la Communauté européenne: *IMS* survivra-t-elle au monstre du Dr. Frankenstein ? », (2002) *Les Cahiers de propriété intellectuelle*, Vol. 15, n°1, p. 21-55, at 26 ff. and the comparative table p. 54-55. For similar reasons, this article will not review the essential facilities doctrine nor criticise it. The substance of the doctrine can be summarised as follows: "An essential facility means one to which undertakings require access in order to produce goods or provide services for their customers, but which they could not reproduce themselves without prohibitive expense or inordinate delay" (F. Wooldridge, "The essential facilities doctrine and *Magill* II: The decision of the E.C.J. in *Oscar Bronner*", (1999) *IPQ*, p. 256). As a consequence, the dominant firm which refuses to supply an essential good or grant access to an essential facility to its downstream competitor(s) will be forced to do so by the competition authorities at a non-discriminatory price.

case. The case serves to illustrate further the confusion identified in section one. First, the facts of the case will be summarised (2.1). Then the rulings of the Commission (2.2) and the President of the C.F.I. (2.3) will be explained, commented and contrasted. Section two will conclude with remarks on the consequences that the conflict between the decisions entails (2.4.). Section three suggests a way of reconciling the cases. It first develops the argument and then draws some consequences, including a preferred way of deciding the *IMS* case (3.1.). A few arguments corroborating the suggested interpretation of the case law are given (3.2.) Some of these arguments, mainly the economic ones, are developed in section 3.3. in an attempt to determine what the conditions of a copyright abuse should be. In conclusion, it is hoped that the *IMS* case will be a catalyst for the court to clarify the conditions at which an IPR holder should be forced to grant a licence.

## ***0. Copyright and competition law: a short economic explanation of their relationship***

### **0.1. Is copyright necessary in the market economy? The basic economics of copyright**

We need copyright; Landes & Posner<sup>4</sup>, in their (or even ‘the’) landmark article on the economics of copyright, prove that copyright is necessary to avoid free riding and thus essential for a free competitive market economy to function properly. I will not delve in detail into the basic economics of free riding and market failure here and will thus assume this as known. Suffice it here to remind very briefly the basic economics of copyright.<sup>5</sup>

Copyright protects works which embody information. Information is intangible, generally costly to create, but cheap to copy. Information is a public good. Public goods are nonrivalrous. “Nonrivalness in consumption is usually defined by saying that the consumption possibilities of one individual do not depend on the quantities consumed by others.”<sup>6</sup> To illustrate this quality of intangible goods in order to compare them with tangible ones, the following example can be taken: the use (i.e. eating) of my apple will prevent anyone from consuming it too. It disappears once consumed. On the contrary, my use (i.e. reading) of a book will not deprive a second reader from reading it. The information does not disappear once used, unlike the apple. Being non-rivalrous, intangible goods are also generally non-excludable; this means that one person cannot exclude other persons from consuming the good in question. This non-excludability arises because reproduction costs are also generally very low for anybody other than the creator of the good. Because creation costs (for the creator) are high and reproduction costs (for the free rider) are low, if the creator does not have a means to stop the free riders, he will not have the chance to recoup his investment. Therefore a market failure is generated (no one will create as it is not

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<sup>4</sup> W. Landes & R. Posner, “An economic analysis of copyright law”, (1989) 18 *Journal of Legal Studies* 325-363.

<sup>5</sup> For an excellent summary of the economics of intellectual property, see A. Quaedvlieg, “The Economic Analysis of Intellectual Property Law”, in W. Korthals Altes, E. Dommering & alii (ed.), *Information Law Towards the 21st Century*, Deventer-Boston, Kluwer, 1992, p. 379-393.

<sup>6</sup> See P. Belleflamme, “Pricing information goods in the presence of copying”, (2002) paper presented at the SERCIAC Madrid, p. 2.

profitable), which the state must remedy by the creation of copyright law which grants a property right for the creator in order for him to be the only one to prevent or authorise the use of his work. This enables him to have a chance to recoup his investment.

How much copyright is needed is another story. In short, Landes & Posner<sup>7</sup> argue a certain amount is needed but not too much, if not the cost of further creations by authors, as well as of course the cost for the consumer, increases and the pool of free expressions (the public domain) in which everyone is free to fish to create new works evaporates. They however do not say, in practical terms, what the scope (except they agree that ideas and principles should not be protected), nor the length of copyright should be, nor how broad the exceptions should be etc.

There are extremely few empirical studies made on the need for copyright. In general economic studies are based on models and calculations and discuss the economic need for copyright only in theory. However, a few recent studies have started to emerge.<sup>8</sup> Further research is definitely needed in this regard. SERCI is committed to this extremely important aim, which has become even more crucial in an era of plethora of intellectual property rights - some adding to copyright (the most striking example being the database sui generis right<sup>9</sup>) - and of increased scope of copyright and of increased means to enforce it (1996 WIPO Internet treaties<sup>10</sup>, DMCA<sup>11</sup>, Copyright Directive<sup>12</sup>, Enforcement Directive Proposal<sup>13</sup> to name a few).

Thus we have to assume that at least in sound economic theory, copyright is needed, until more empirical results confirm or infirm this statement. The whole paper is therefore based on this assumption. In addition, it is worth noting that economics of copyright are in essence based on utilitarian considerations.<sup>14</sup> Other justifications for copyright (natural law, fairness argument etc.<sup>15</sup>) will not be discussed here and will not underpin the arguments made in this article.

## **0.2. Copyright and competition law: their roles and their relationship – should competition law intervene in the realm of copyright and other IPR at all?**

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<sup>7</sup> Ibid.

<sup>8</sup> See R. Watt, *Copyright and Economic Theory: Friends or Foes?*, Edward Elgar, 2000 and R. Towse, *Creativity, Incentive, and Reward: An Economic Analysis of Copyright and Culture in the Information Age*, Cheltenham, UK, Edward Elgar, 2002. There are also however, attempted empirical studies on piracy, e.g. K. Hui, I. Png & Y. Cui (2001), "Copying and the legitimate demand for recorded music", Mimeo, National University of Singapore, available at <http://www.comp.nus.edu.sg/~ipng/research/copying\ text\ 2.pdf>

<sup>9</sup> Council Directive 96/9/EEC on the legal protection of databases [1996] OJ L 77/20.

<sup>10</sup> WIPO Copyright Treaty (WCT) & WIPO Performances and Phonograms Treaty (WPPT).

<sup>11</sup> Digital Millennium Copyright Act, 1998.

<sup>12</sup> Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10.

<sup>13</sup> COM (2003) 46 final.

<sup>14</sup> L. Guibault, *Copyright limitations and contracts, An analysis of the contractual overridability of limitations on copyright*, Kluwer Law international, 2002, p. 12 ff.

<sup>15</sup> For such arguments, see e.g. J. A.L. Sterling, *World copyright law*, Sweet & Maxwell, 1998, p. 55 ff. (second ed. forthcoming 2003).

As we all know, monopolies are viewed unfavourably by economists because of the power they create in the hands of the monopolist, who is always tempted to reduce input and increase price thereby harming the consumer and wasting resources. Perfect competition (which however never exists in reality but towards which all markets should tend) is the preferred model. In economic theory, competition's aim is to maximise consumer welfare by the most efficient allocation of resources possible and by a production of goods and services at the lower possible cost.<sup>16</sup> Competition law's aim is to promote or preserve competition and more generally to promote society's welfare in general. It is not to protect competitors or consumers in particular. Neither interests must be privileged but society's interest as a whole, which can be seen as a compromise between both these interests. As shall be seen in more detail later, copyright also has as a general goal the public's interest, or in other words also aims at consumer welfare.

It needs to be reminded that IPR, and thus copyright, do not automatically create monopolies.<sup>17</sup> It all depends on the substitutability of goods in the relevant market. Thus if there is sufficient substitutability a monopoly situation will not arise.

However, a dominant position, or even a monopoly on the part of the IPR holder, and thus the copyright holder, is normal and is even expected. This is because the good, if protected by patent, is new, thus no other good identical to it exists on the market and it cannot be put on the market without the patent holder's permission. As for copyright, it is because the original expression of the idea in the work cannot be copied without permission of the copyright holder. However, everyone is free to copy ideas and creative ways around the copyright in a work are generally easy to find. Thus monopolies are bound to arise quite rarely in copyright law. Namely in cases where the original expression is minimal but still protected (as in the case of informational goods such as telephone directories, television listings, event schedules, and in the recent *IMS* case, a structure dividing Germany in a number of geographical zones and which respects privacy legislation). As has been put very rightly, IPR are property rights granted by the state, as restrictions on competition but in furtherance of competition.<sup>18</sup> So in short they do restrict competition, but for a good reason: the product created deserves protection because it is either inventive (patent) or creative (copyright). And it is sound that the inventor or creator, to be encouraged to create, be the only one for a short time to benefit from its own invention or creation.

Therefore the relationship between IPR and competition law is an inevitably natural one. Some have argued that competition law should not be used to curb intellectual property rights, i.e. IPR are sacrosanct.<sup>19</sup> In my view, this should not be so. This relates in part to the finding derived from a reading of Landes & Posner's article<sup>20</sup> as regards the accurate scope of copyright: how can one be 100 % sure that the legislator gets it right each time he legislates on IPR? How can one say with total certitude and

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<sup>16</sup> Voy. par ex. R. Whish, *Competition law*, Fourth ed., 2001, Butterworths, p. 2-3.

<sup>17</sup> E. Kitch, "Patents: monopolies or property rights?", (1987) 8 *Research in Law and Economics* 31.

<sup>18</sup> M. Lehmann, "Property and Intellectual Property - Property rights as Restrictions on Competition in Furtherance of Competition", (1989) *IIC* 1.

<sup>19</sup> As C. Stothers, "The end of exclusivity? Abuse of intellectual property rights in the E.U.", (2002) *EIPR*, at p. 91 seems to argue when he states "There is no reason why intellectual property must be subject to the confines of competition law."

<sup>20</sup> *Supra* note 4.

confidence that the current scope of copyright is the right one? I think we can all agree that all academics, practitioners, and even government officials and the like would if not laugh, at least smile at such a statement. It cannot even be said in all logic, since it already varies from country to country... This is proof that competition law should play its role even in the area of IPR. It should be there to regulate abuses of dominant position by IPR holders, which copyright law can generate and does not already address.

### **0.3. The topic of this paper and its link with economics of copyright**

We have seen that a dominant position or even a monopoly is (or rather: can be) a natural consequence of the grant of a copyright. The problem competition law addresses is the prevention of *abuses* of those economic positions. The issue the paper analyses is therefore: what is an abuse of an IPR? This question is so far left unresolved at European level. As a matter of fact, the Community courts' case law is unclear as to what is an abuse of an IPR at least under the situation of *refusals to licence* an IPR. The paper will first focus on trying to find a *legal* solution to reconcile the courts' case law. As will be seen, this legal argumentation sustains the economic argument behind the economic justification of copyright and the role of competition law. Thus the paper further discusses under an economic approach what should the conditions under which an abuse of copyright has been committed be.

## **1. Confusion in the case law**

The five conditions which trigger the application of article 82 are as follows: there must be (1) any type of abuse (2) by one or more undertakings (3) in a dominant position (4) within the common market or a substantial part of it and (5) the abuse must have the possibility to affect trade between Member States. The area where most of the confusion lies in the case law as regards the relationship between IPR and article 82 is the first condition (abuse). The only requirement on which the article focuses is thus the notion of abuse. The other requirements (dominant position etc.) will not be reviewed here.

Article 82 lists a few examples of abuses. These examples do not form an exhaustive list.<sup>21</sup> Abuses such as refusals to deal with a competitor are not listed but the E.C.J. has since the 1970's included them within the scope of article 82.<sup>22</sup> There are at least two types of refusals to deal: refusals to supply and refusals to licence.<sup>23</sup> Refusals to

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<sup>21</sup> Case C-6/72 *Europemballage Corp. and Continental Can Co. Inc. v Commission* [1973] C.M.L.R. 199, para. 26. See also e.g. R. Greaves, "The Herchel Smith Lecture 1998: Article 86 of the E.C. Treaty and intellectual property rights", (1998) EIPR, p. 380; S. Weatherill & P. Beaumont, *EU Law*, 3<sup>rd</sup> ed., Penguin Books, 1999, p. 845; R. Whish, *supra* note 16, p. 150.

<sup>22</sup> Cases C - 6 & 7/73 *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corporation v. Commission* [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309, C.M.R. 8209; case C-27/76 *United Brands Continentaal BV v Commission* [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429.

<sup>23</sup> P. Roth Q.C. (ed.), *Bellamy & Child, European Community Law of Competition*, 5<sup>th</sup> ed, London, Sweet & Maxwell, 2001, n. 9-092 – 9-110 do not make the distinction exactly as such but make an attempt to distinguish refusals to supply and refusals to licence. The structure in which they discuss this area of the

supply seem to be connected to tangible property while refusals to licence, to intellectual property. As refusals to deal are not listed in article 82, the conditions at which such refusals will be abusive are not listed in article 82. Thus *a fortiori* the conditions at which a refusal to licence by the holder of an IPR is abusive are not mentioned either. However, the Community courts have decided that article 82's scope encompassed refusals to licence and have, in a number of decisions, laid down conditions at which such a refusal is abusive. The remedy to an abusive refusal to licence an IPR is to impose a compulsory licence onto the holder of the IPR.

## 1.1. The factual background of each case

There are four cases in which the E.C.J. and the C.F.I. have elaborated conditions or circumstances in which an IPR holder will be forced, under article 82, to grant a licence to its competitors. In chronological order, these are: *Renault*<sup>24</sup>, *Volvo*<sup>25</sup>, *Magill*<sup>26</sup> and *Ladbroke*<sup>27</sup>. In addition, even if it does not deal with an IPR, the *Bronner*<sup>28</sup> case is relevant to the analysis for at least two reasons. First, the Court, to

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law is as follows: (v) refusals to supply; including (a) refusals to supply existing customers; (b) access to essential facilities; (c) refusals to supply in other circumstances and (vi) abuses of IPR. R. Whish, *supra* note 16, at p. 611 ff. only speaks of refusals to supply and classifies them in several headings similar to those of Bellamy & Child and also discusses abuses of IPR within a separate category (p. 698).

<sup>24</sup> Case C-53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli & Maxicar v. Régie nationale des usines Renault* [1988] E.C.R. 6039.

<sup>25</sup> Case C-238/87 *AB Volvo c. Erik Veng (UK) Ltd* [1988] E.C.R. 6211; [1989] 4 C.M.L.R. 122; C.M.R. 14498. On the *Renault* and *Volvo* decisions, see e.g. I. Govaere, *The use and abuse of intellectual property rights in EC law: including a case study of the EC spare parts debate*, London, Sweet and Maxwell, 1996, p. 195 ff.; V. Korah, "No duty to licence independent repairers to make spare parts: the Renault, Volvo and Bayer & Hennecke cases", (1988) EIPR, p. 381; P. Groves, "The use of registered designs to protect car body panels", (1989) BLR, p. 117.

<sup>26</sup> Case T-69/89 *Radio Telefis Eireann v. Commission* [1991] E.C.R. II-485; [1991] 4 C.M.L.R. 586; [1991] 2 C.E.C. 114 and case T-76/89 *ITP v. Commission* [1991] E.C.R. II-575 (both C.F.I.'s judgments carry the same substance); cases C-241/91 P & C-242/91 P *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd (ITP) v. Commission* [1995] E.C.R. I-743, [1995] 4 C.M.L.R. 718, [1995] 1 C.E.C. 400 (E.C.J.). The literature abounds in comments on the decisions of the Commission, the C.F.I. and the Court, of which only a few will be mentioned here. B. Sufrin, "Comment on The *Magill* Case", (1992) Ent. LR, p. 67; A. Reindl, "The magic of *Magill*: TV program guides as a limit to copyright law?", (1993) IIC, p. 60; C. Miller, "*Magill*: time to abandon the 'specific subject matter' concept", (1994) EIPR, p. 417; R. Thompson, "*Magill*: E.C.J. upholds use of article 86 to control conduct of copyright holders on ancillary markets", (1995) Ent. LR, p. 143; R. Greaves, "*Magill* est arrivé", (1995) ECLR, p. 244; S. Taylor, "Copyright versus right to compete: the judgment of the E.C.J. in *Magill*", (1995) CTLR, p. 99; T. Vinje, "The Final Word on *Magill*. The Judgment of the E.C.J.", (1995) EIPR, p. 297; H. Calvet & T. Desurmont, "*L'arrêt Magill*: une décision d'espèce?", (1996) RIDA, n. 167, p. 3; I. Govaere, *supra* note 25, at p. 135-150, n° 5.47-5.67; S. Anderman, *EC Competition law and intellectual property rights: the regulation of innovation*, Clarendon, Oxford, 1998, p. 204 ff.

<sup>27</sup> Case T-504/93 *Tiercé Ladbroke SA v Commission of the European Communities* [1997] E.C.R. II-923; [1997] 5 C.M.L.R. 309 (C.F.I.). See e.g. D. Fitzgerald, "*Magill* Revisited", (1998) EIPR, p. 154-161; V. Korah, "The *Ladbroke* saga", (1998) ECLR, p. 169-176.

<sup>28</sup> Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG & Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] E.C.R. 7791 (E.C.J.). For comments on the *Bronner* case, see e.g. P. Treacy, "Essential facilities – is the tide turning", (1998) ECLR, p. 501; F. Wooldridge, "The essential facilities doctrine and *Magill* II: The decision of the E.C.J. in *Oscar Bronner*", (1999) IPQ, p. 256; M. Bergman, "The *Bronner* case, a turning point for the essential facilities doctrine", (2000) ECLR, p. 59.

reach its decision in *Bronner* relied upon the above cited cases. Second, the Commission has heavily relied on its ruling to decide the *IMS* case.<sup>29</sup>

The facts of the cases can be summarised briefly as follows. In the *Renault* and *Volvo* cases<sup>30</sup>, Renault and Volvo had design rights on their models for car body panels. They refused to grant a licence of their design rights to independent repairers thereby preventing them to supply spare parts. In the *Magill* case, the Irish and British broadcasters BBC, RTE and ITP<sup>31</sup>, each respectively holders of copyright law on their weekly television listings, denied Magill, an Irish publisher of comprehensive weekly television guides, a licence to reproduce them. In *Ladbroke*, the French sociétés de courses held copyright in the pictures and sound of horse races. They refused to grant to Ladbroke, a Belgian bookmaker, a licence to rebroadcast French horse races live. Finally, in *Bronner*, Mediaprint, an Austrian newspaper publisher, refused to distribute the daily newspaper of another smaller Austrian publisher, Oscar Bronner, through its national newspaper home-delivery scheme. Only the broadcasters saw themselves compelled to give a licence. In all the other cases, no compulsory licence was forced onto the right holders. All cases have been decided by the E.C.J. except the *Ladbroke* case which was decided by the C.F.I..

## 1.2. Conditions required to establish the abuse

When is a refusal to licence by the holder of an IPR an abuse? In other words, under which conditions a compulsory licence can be imposed onto an IPR holder?

First of all, it is well-established that the mere ownership and mere exercise of an intellectual property right (here, the mere refusal to grant a licence) cannot in itself confer a dominant position nor consist in an abuse of such a position.<sup>32</sup> Thus there will only be an abuse when the IPR is exercised in certain - exceptional - circumstances. These circumstances at which an abuse can be found have been laid down in the five cases.

In the *Renault* and *Volvo* cases, the court did not set out circumstances in which a refusal to licence is abusive, but merely gave non exhaustive *examples* of abusive conducts resulting from the exercise of an IPR, namely: the arbitrary refusal to supply spare parts to independent repairers, the fixation of prices for spare parts at an unfair level and the decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.<sup>33</sup> As can be seen the refusal to licence was not even listed, but only the refusal to supply<sup>34</sup>, and it was only cited as

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<sup>29</sup> See Commission's decision, analysed below under 2.2. and also C. Stothers, (2002) EIPR, p. 88, supra note 19.

<sup>30</sup> The facts and rulings of the two cases are substantially the same; thus the cases will be discussed together.

<sup>31</sup> ITP was not strictly speaking a broadcaster but ITV and Channel 4 had granted it their copyright in their television programmes.

<sup>32</sup> See e.g. *Parke Davis & Co v Probel*, case 24/67 [1968] E.C.R. 55; [1968] C.M.L.R. 47. The E.C.J. recalls this principle in each of the above mentioned decisions whereas in *Ladbroke*, the C.F.I. omits to do so.

<sup>33</sup> Paras. 9 of the *Volvo* decision and 15 of the *Renault* decision.

<sup>34</sup> F. Siiriainen, ““Droit d’auteur” *contra* “droit de la concurrence”: *versus* “droit de la régulation””, (2001) *Revue Int. de Droit Economique*, p. 422 thinks that *Volvo* and *Renault* were not really

one example. No conditions were given at which such refusal was abusive. Thus, *Renault* and *Volvo* only set the scene for the more elaborated ruling in *Magill*.

*Magill* constitutes the first case in which the Court elaborates circumstances, conditions or requirements, at which a refusal to licence<sup>35</sup> will be abusive. It stated that these circumstances must remain exceptional. These are: (1) the prevention of the appearance of a new product which the IPR holder did not offer and for which there was a potential consumer demand, (2) the refusal is not justified and/or (3) the IPR holder reserves to himself a secondary market by excluding all competition on that market.<sup>36</sup>

In *Ladbroke*, on the one hand, the C.F.I. chooses and even refines a condition of *Magill*: a refusal to licence will infringe article 82 if it is a new product whose introduction might be prevented, despite *specific, constant and regular* potential demand on the part of consumers.<sup>37</sup> On the other hand, it adds a new condition, which is alternative: a refusal to licence will infringe article 82 if it concerns a product or service which is essential for the exercise of the activity in question, in that there was no real or potential substitute.<sup>38</sup>

Finally the Court in *Bronner* sets a tripartite test which combines conditions from *Magill* and *Ladbroke*: (1) the refusal of the service comprised in the home delivery must be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service, (2) such refusal cannot be *objectively* justified<sup>39</sup> and (3) the service in itself must be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.<sup>40</sup>

As it transpires from this brief summary, there seems to be quite some difficulty to know exactly under which conditions a refusal will be abusive and which ones should be applied in subsequent cases.<sup>41</sup> First, the conditions set in the cases differ: some are restated as such or with a change in the wording, some are withdrawn, some are added. Second, there is uncertainty as regards whether the conditions should be applied in a cumulative or alternative way (and if so which ones). Indeed from the

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concerned with a refusal to licence but rather with a refusal to supply. However, it can be said that in effect, the car manufacturers' refusal to supply amounted to a refusal to licence as it was not possible to make spare parts without having a proper licence.

<sup>35</sup> Some think that *Magill* is actually a case of refusal to supply raw materials (i.e. here information), not a refusal to licence the reproduction of works protected by copyright, probably due to the fact that the copyright held by the broadcasters was on basic information. See M. Van Kerckhove, "Magill: a refusal to licence or a refusal to supply?", (1995) 51 Copyright World, p. 26-29. However, it is to be noted that despite that fact, one cannot deny that there was copyright in the television listings and that strictly speaking it was a refusal to licence (i.e. not to allow a third party to reproduce a copyright work).

<sup>36</sup> See paras. 54-56 of the *Magill* decision.

<sup>37</sup> Para. 131 of the *Ladbroke* decision (emphasis added). This wording already appeared in its judgments RTE (para. 62) and ITP (para. 48) which were appealed to the E.C.J. in the *Magill* case.

<sup>38</sup> Para. 131 of the *Ladbroke* decision.

<sup>39</sup> Emphasis added. The court here adds to the *Magill* ruling by further qualifying the refusal.

<sup>40</sup> Para. 41 of the *Bronner* decision.

<sup>41</sup> See e.g. P. Landolt & J. Ysewyn, "Intellectual property rights and EC Competition law", (2001) 111 Copyright World, p. 19-21, at p. 19 note that the cases decided by the E.C.J. and the C.F.I. display a lack of finality.

wording of the *Magill* ruling, it is impossible to know whether the Court intended the circumstances to be alternative or concurrent.<sup>42</sup> In *Ladbroke*, the C.F.I. sets two alternative conditions. *Ladbroke* thus broadens the *Magill* ruling.<sup>43</sup> Finally, in *Bronner*, the Court takes the opposite stance and opts for a cumulative test.

What happens in the *IMS* case? Not too surprisingly, the Commission on the one hand and the Presidents of the C.F.I. and of the Court, on the other, make two different, and conflicting, interpretations of the case law.

## **2. An illustration of the confusion: the IMS case**

### **2.1. The factual background of the case**

IMS<sup>44</sup> provides, among other countries, in Germany, reports informing pharmaceutical companies on regional sales of their pharmaceutical products. To provide this data, any provider must comply with the German data protection law and thus ensure that individual sales by any given pharmacy cannot be identified (at least three pharmacies must be grouped in a geographical zone, also called “brick” or “module”, for which the data on the sales is given). In order to abide by German law, IMS has created a structure which divides Germany into 1860 modules. On the basis of its structure, IMS writes reports on sales of pharmaceutical products and provides them to pharmaceutical companies. IMS claims that it has copyright on its structure as a database. In 1999, National Data Corporation Health Information Services

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<sup>42</sup> The court’s wording in paras. 54-56 is unclear. Upon reading para. 54, it seems that the condition set out there is sufficient to establish abuse. However, the Court goes on to enumerate other conditions in paras. 55 and 56 without using the term “and” to connect them. Finally, it concludes, in para. 57: “in light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants’ conduct was an abuse of a dominant position within the meaning of Article 86 of the Treaty”. This final statement seems to infer that the conditions are cumulative but this is only speculation. The Commission sees the conditions as alternative, the President of the C.F.I., as cumulative. V. Korah (2002, a), supra note 1 at p. 810, 811, 814, sees the *Magill* conditions as cumulative even if subsequent case law has suggested that they are alternative. S. Anderman (1998), supra note 6, at p. 209-210 & H. Lugard, « E.C.J. upholds *Magill*: it sounds nice in theory, but how does it work in practice ? », (1995) EBLR, p. 233, also wonder whether some of the *Magill* conditions are cumulative. F. Fine, “NDC/IMS: In Response to Professor Korah”, (2002, a) 70 Antitrust L.J. 247, at p. 251 believes that the conditions are alternative: “The President therefore read the factors listed in *Magill* as being cumulative, contrary to what subsequent case law--as even Korah confirms--tells us.”

<sup>43</sup> V. Korah (2002, a), supra note 1, at p. 814.

<sup>44</sup> On the *IMS* case see e.g. P. Landolt & J. Ysewyn (2001), supra note 41; D. Paemen & C. Norall, “IMS Health reveals EC’s steel resolve”, (2001) *Managing IP*, September, p. 60; C. Stothers, (2002), supra note 19; D. Hull, J. Atwood & J. Perrine, “Intellectual property and compulsory licensing”, (2002) *European Antitrust Review*, p. 97-100; J. Ratliff, “Major events and policy issues in E.C. Competition law, 2001: Part 2”, (2002) *ICCLR*, p. 64-65; R. O’Donoghue & D. Ilan, “Court halts Commission Shake-up of compulsory licensing rules for intellectual property”, (2002) 118 *Copyright World*, p. 8-9; V. Korah (2002, a), supra note 1; F. Fine (2002, a), supra note 42; V. Korah, “Essential facilities and a duty to licence - IMS”, (2002, b) paper given at the Fordham Intellectual Property Conference, New York, 4-5 April 2002; J. Temple Lang, « Comment on Professor Korah’s paper: « Essential facilities and a duty to licence – IMS » », (2002) paper given at the Fordham Intellectual Property Conference, 4-5 April 2002; F. Fine, “NDC/IMS: what is the real subject matter?”, (2002, b) 121 *Copyright World*, p. 19-21; S. Anderman, “Microsoft in Europe”, (2002) paper presented at the 2002 Fordham conference; E. Derclaye (2002), supra note 3, at p. 21-55 (detailed account of the facts and of the several rulings in the case at p. 36 ff).

(«NDC») and Azyx Deutschland GmbH Geopharma Information Services (“Azyx”)<sup>45</sup> entered the German market by creating a structure which was compatible with IMS’s. IMS sued NDC for infringement of copyright in its structure in Germany and won.<sup>46</sup> NDC then introduced a complaint to the European Commission against IMS for abuse of dominant position because IMS denied NDC a licence to use its structure. The Commission decided to oblige IMS to grant a licence to all undertakings already present in the market.<sup>47</sup> On IMS’s appeal (application for interim relief), the President of the C.F.I. suspended the decision<sup>48</sup> and the President of the E.C.J. confirmed the suspension.<sup>49</sup>

## 2.2. The decision of the Commission

First, the Commission establishes the relevant product and geographic market: it is the market for services of data provision on regional sales of pharmaceutical products in Germany only.<sup>50</sup> Second, the Commission establishes that IMS has a dominant position.<sup>51</sup> IMS is in a situation of quasi-monopoly as before the entry on the market by NDC and Azyx, it was the sole player on the market. The respective positions of NDC and Azyx are negligible. Additionally, there was an effect on the commerce between Member States.<sup>52</sup>

As to the question of abuse, the Commission briefly summarises the case law relating to refusals to deal (namely *Commercial Solvents*<sup>53</sup>, *United Brands*<sup>54</sup>, *Volvo*, *Magill*, *Ladbroke*, *Bronner*).<sup>55</sup> By the way the Commission reviews the decisions, it seems that it reads them as if they were reflecting a trend towards the adoption of the essential facilities doctrine by the Community courts.<sup>56</sup> In the Commission’s view, the case law is to be seen in an evolutionary way where *Commercial Solvents* would reflect the implicit adoption of the essential facilities doctrine<sup>57</sup> and *Bronner* would ratify it. The Commission puts all the cases together in a straight line as some sorts of

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<sup>45</sup> As the situations of NDC and Azyx are very similar, reference will be made exclusively to NDC’s.

<sup>46</sup> The Commission was bound by the German decision in this regard as it cannot decide upon the validity of national copyrights. This issue is left to the national courts.

<sup>47</sup> Commission’s decision 2002/165/CE of 3 July 2001, case COMP D3/38.044, *NDC Health/IMS Health*: interim measures [2002] O.J. L 59/18.

<sup>48</sup> First order (provisional stay) of 10 August 2001, Case T-184/01 R, *IMS Health Inc. v. Commission* [2001] E.C.R. II-2349; [2002] 4 C.M.L.R. 1 [2002] E.C.D.R. 16. Second order of 26 October 2001, Case T-184/01 R, *IMS Health Inc. v. Commission* [2001] E.C.R. II-3193; [2002] 4 C.M.L.R. 2.

<sup>49</sup> *IMS Health Inc. v. NDC Health Corp.*, Case C-481/01, 11 April 2002 [2002] 5 C.M.L.R. 1 (E.C.J.). As this order merely confirms the two orders of the President of the C.F.I. and does not contain a further analysis of the substance of the issues, it will not be discussed.

<sup>50</sup> Paras. 45 & ff of the Commission’s decision.

<sup>51</sup> *Ibid.*, paras. 57 & ff.

<sup>52</sup> *Ibid.*, paras. 175-178. It is generally quite easy to find such an effect because it has been interpreted broadly, see e.g. R. Greaves, “The Herchel Smith Lecture 1998: Article 86 of the E.C. Treaty and intellectual property rights”, (1998) EIPR, p. 380; D. Paemen et C. Norall (2001), *supra* note 44, at p. 63.

<sup>53</sup> *Supra* note 22.

<sup>54</sup> *Supra* note 22.

<sup>55</sup> Paras. 63-74 of the decision of the Commission.

<sup>56</sup> Even if the Commission acknowledges that neither the C.F.I. nor the E.C.J. has ever referred expressly to the essential facilities doctrine in their judgments (para 64). The doctrine is briefly defined and explained at *supra* note 3.

<sup>57</sup> R. Whish, *supra* note 16, at p. 611, 613, 615, shares this opinion as well.

proofs of the same and single trend. Thus for the Commission, the applicable conditions to judge of any abuses of a dominant position under article 82 (including abuses of IPR) are the three cumulative ones now set in *Bronner*.

To justify this reading of the case law, the Commission reasons (albeit perhaps implicitly) as follows in a three-stage way. First it exposes *Magill*'s exceptional circumstances. Second, it recalls that in the *Ladbroke* case, the C.F.I. implied that it is not necessary that a refusal prevents the appearance of a new product in order for it to be considered as an abuse.<sup>58</sup> In other words, *Ladbroke* allows a reading of *Magill*'s conditions in an alternative fashion. Third, the *Bronner* ruling ratifies the *Ladbroke* approach. Indeed, this condition first set in *Magill*, restated but in a clear alternative fashion in *Ladbroke*, and not restated in *Bronner*, is not to be tested anymore.

In sum, the Commission's interpretation of the cases seems to be that *Bronner* is the ultimate test to apply in cases involving refusals to deal, including refusals to licence. In other words, for the Commission, *Bronner* sets the ultimate exceptional circumstances or is the definite reinterpretation of the notion of exceptional circumstances as first set in *Magill*. This is why the Commission bases its decision in the *IMS* case exclusively on the *Bronner* tripartite test.

Applying the *Bronner* test to *IMS*'s facts, the Commission comes to the conclusion that *IMS* abuses its dominant position since the three cumulative conditions are fulfilled<sup>59</sup>: first, *IMS*'s refusal is unjustified; second, it eliminates all competition in the market of the provision of regional data, because the structure is indispensable for *NDC* and *Azyx* to continue their activities, and third, there is no actual or potential substitute to this structure. As a result, the Commission imposes a compulsory licence on *IMS*.

### 2.3. The orders of the President of the Court of First Instance

The President of the C.F.I., on the other hand, is not convinced that the Commission's view is the only interpretation that can be given to the case law. In its first order, the President puts the emphasis on the *Magill* case. It seems implicit from its rather short reasoning that what should be stressed is the facts of the cases. In substance his reasoning can be put in the form of a syllogism: (1) the approach underlying the Commission's decision seems to depend on the notion of exceptional circumstances as elaborated in *Magill*; (2) there are potentially important differences between the facts of *Magill* and those of *IMS*; (3) as the facts of *IMS* and *Magill* are different but nevertheless the Commission imposes a compulsory licence on *IMS* despite the difference in their facts, *IMS* has made a prima facie case that the Commission misapplies *Magill*.<sup>60</sup>

In its second order, the President recalls that there are differences between the facts of the *Magill* and *IMS* cases and adds that the Commission's interpretation of the *Magill*

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<sup>58</sup> Paras. 68 and 180 of the decision of the Commission.

<sup>59</sup> "These exceptional circumstances meet the test set out in *Bronner* for a refusal to supply to be considered an abuse of a dominant position." (Ibid., para. 181). For a criticism of this finding by the Commission, see E. Derclaye (2002), supra note 3, at p. 47; 52.

<sup>60</sup> President's order of 10 August 2001, para. 24.

ruling (i.e. as setting alternative conditions) “constitutes at first sight an extensive interpretation of the *Magill* case”.<sup>61</sup> The President thus concludes that while on the one hand, the Commission’s reading of the case law might be correct, on the other, there are reasonable grounds to conclude that there may be another interpretation of the case law such as seeing the *Magill* conditions as cumulative.<sup>62</sup> Thus the order seems to suggest that there may be two interpretations of the *Magill* case: the conditions for imposing a licence are cumulative or on the contrary, they are alternative. As there is a serious dispute as to the legal reasoning that must be applied to decide the *IMS* case, the President, having found that all other conditions to grant interim relief (urgency, balance of interests, etc.) are fulfilled, suspends the decision of the Commission. In conclusion, there is clearly a problem of interpretation and only a final decision on the merits could clarify it.

## 2.4. Comments

As the *IMS* case illustrates, there are - at least - two possible ways of interpreting the case law. None of them is clearly excludable or untenable. It is true that the Commission in its interpretation of the case law has eluded the application of the first condition set in *Magill*. But can one reprove this approach in view of the rather confusing state of the case law? The *Magill* decision is abstruse as to the nature of the circumstances it sets forth (alternative or cumulative). The *Ladbroke* ruling has clearly set two alternative conditions. The *Bronner* case, while cumulating conditions deriving from the previous cases, has omitted or at least considered as non applicable the condition of preventing the appearance of a new product despite the potential consumer demand. Thus it seems difficult at first sight to reproach the Commission’s chronological and in the end rather logical construction of the case law. In addition, such a construction is hardly surprising. The Commission is naturally bound to prefer such a view as its prime role in competition matters is to be the guardian of any potential abuses of dominant firms.

As the divergence of views of the Commission and of the President of the C.F.I. suggests, it appears quite plainly that the application of one or the other interpretation of the decisions has different results. If, on the one hand, *Magill*’s circumstances are applied in a cumulative fashion, the number of cases where an abuse will be found will probably be small. If, on the other hand, the *Bronner* test is solely applicable, it should lead to the opposite result (as the important condition of the prevention of the appearance of a new product is not required). Thus the choice as to which of those interpretations should prevail will have extremely important consequences on the decision of future cases relating to refusals to licence.

In conclusion, the *IMS* case raises once again the fundamental question at the basis of the application of article 82 to exercises of IPR: what are the exceptional circumstances in which there will be abuse of an IPR? And, more generally, what should they be? While this second question is beyond the scope of the paper as it involves a deeper legal and philosophical analysis of the relationships between IPR

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<sup>61</sup> Para. 100 and 102 of the President’s second order, referring to para. 67 of Commission’s decision.

<sup>62</sup> Para. 104 of the second order.

and competition law, the following section will attempt to answer the first, namely make sense of the case law as it stands.

### **3. How to solve the dilemma – a suggestion**

As illustrated by the abundant literature on the topic and as recently illustrated in the *IMS* case, it appears to be difficult to reconcile the rulings of *Magill*, *Ladbroke* and *Bronner*.<sup>63</sup> The root of the problem seems to be the uncertainty as regards whether *Magill*'s circumstances are cumulative or not. The question is: are the cases really irreconcilable? Is there really a problem of interpretation of the cases and if so, how can it be solved? If there is no problem, which explanation can be given? The short answer to this is that there is no dilemma. In other words, the case law is reconcilable. The argument is as follows.

#### **3.1. Argument**

The answer lies at the heart of the *Bronner* ruling. As *Bronner* is the last E.C.J. case on refusals to supply a downstream competitor decided by the E.C.J., not surprisingly, the court reassesses its previous case law. If one reads the decision with the utmost care, the E.C.J. seems to give the answer to the apparent problem. In paragraph 40, the E.C.J. restates the *Magill* circumstances but clearly re-interprets them as cumulative.<sup>64</sup> It even re-interprets the third condition in stating that the refusal must be *objectively* justified.<sup>65</sup> Whether this is intentional or not is left to the appreciation of the reader. However, in view of the confusion the *Magill* decision had created as far as the interpretation of its exceptional circumstances is concerned and of the amount of literature it has generated commenting on this imprecise language, one is allowed to believe that this (re)wording is not innocent. This is reinforced by the language of para. 41 which reads:

“Therefore, *even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever*, it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of

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<sup>63</sup> For the literature, see *supra* note 25 ff.

<sup>64</sup> “In *Magill*, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not *justified by objective considerations* (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56).” (Emphasis added). H. Schmidt (2002), *supra* note 1, at p. 215 suggests that “Bronner clearly emphasises the ruling in *Magill* that all the “exceptional circumstances” should be present before Article 82 can apply to confine the ambit of an IPR”, however without giving the reasons or making a demonstration of his argument.

<sup>65</sup> Para. 55 of the *Magill* ruling only states: “Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines...”

the Treaty in a situation such as that which forms the subject-matter of the first question, not only that...”.<sup>66</sup>

In this paragraph, the E.C.J. suggests one thing: as regards the application of article 82, or at least in the case of one type of abuse - refusals to deal - intellectual property rights have to be treated differently from tangible property rights. In para. 41, the Court's opinion is that it is far from clear that the case law relating to abuses of IPR applies to abuses of tangible property.

This finding that IPR and tangible property should be treated differently has two consequences. First, it is certain that in similar situations to the facts of *Bronner* - or if it can be extrapolated further, in cases involving tangible property - other conditions must be met (i.e. the three conditions the court sets forth in para. 41 as further characterized in paras. 44 and 46). With the risk of stretching the Court's wording or intention too much, *Magill* is the authority dealing with IPR and does not in itself have direct application as such, in all its conditions say, in the field of tangible property.

Second, this suggests therefore, implicitly and *a contrario*, that in situations dissimilar to those of *Bronner*, i.e. in cases involving refusals to licence IPR, it is *Magill* which is to be relied upon. At least it is far from clear that the *Bronner* conditions should apply. In other words, the E.C.J. seems to warn that it may not be straightforward that the same conditions should apply to cases involving refusals to licence (involving intellectual property) and refusals to supply (involving tangible property). Thus the interpretation of this important part of the *Bronner* judgment, which is passed over in silence by the Commission, but interestingly pointed at by the President of the C.F.I. in its second order,<sup>67</sup> seems to strongly suggest that only *Magill* should apply to intellectual property rights and not *Bronner*. In sum, it could be said that the *Bronner* judgment makes a distinction between cases involving refusals to supply and refusals to licence. In the first set of situations, only the tripartite test set out in *Bronner* applies whereas in the second set, only the cumulative conditions of *Magill* (as reformulated in para. 40 of *Bronner*) apply. In conclusion, there is no conflict between the several rulings.

The important consequence that can be drawn from this interpretation is that the circumstances under which a refusal to licence will be abusive being concurrent, it will be rare that they will all be fulfilled. As a result, abuses of IPRs should remain scarce. The *IMS* case readily illustrates this point. As a result of the suggested interpretation of the case law, it is clear now that *IMS* should win its case. The first condition set forth in *Magill* is constituted by the prevention, by the holder of the IPR, from the appearance on the market of a new product for which there is potential consumer demand. *IMS*'s refusal does not prevent the appearance of a new product. On the contrary, *NDC* and *Azyx* do not wish to either change or improve the structure, nor create new types of reports on regional sales of pharmaceutical products; their only desire is to use *IMS*'s structure in order to provide similar or identical services to those of *IMS*. There is no potential demand from consumers (i.e. the pharmaceutical companies) for another new hypothetical product. Therefore the

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<sup>66</sup> Emphasis added.

<sup>67</sup> In its para. 104, the President seems to hint at the solution by recalling paras. 40 and 41 of *Bronner*. Perhaps this is further evidence of the approach advocated in this article.

condition is not fulfilled, IMS's refusal is not abusive and it will not be forced to grant a licence. As suggested by the President of the C.F.I., the facts of *Magill* are different from those of *IMS*.

### 3.2. A few other corroborating arguments

A first argument confirms the suggested construction of the case law. It is true that strictly speaking, there is no rule of precedent within the Community courts. The E.C.J., and the C.F.I., are not bound by their own previous decisions and thus in theory, the E.C.J. is not bound to continue following its *Magill* ruling. But it is also true that the E.C.J., and the C.F.I., in practice do not often depart from their previous decisions.<sup>68</sup> The *Bronner* case could be said to be an example of this practice. The Court, in *Bronner*, does not depart from its case law but refines it. It simply does not overrule *Magill* but distinguishes, as in the common law system, between two decisions. *Magill* and *Bronner* apply in two different types of situations. Both decisions are equally good law.

Second, at any rate, even if the interpretation hereby suggested should not lead to such a clear-cut finding, it can hardly be denied that the Court, if it is consistent, will interpret its ruling in *Bronner* as being one which already warned litigants that it will be prudent in applying or extending the *Bronner* ruling (or as certain call it, the essential facilities doctrine) to intellectual property situations such as *Magill*-type situations. This view is at least confirmed by the President of the E.C.J. in the *IMS* case.

Third, it is worth noting that this interpretation is in line with other arguments and general policy reasons which plead against a too incisive incursion of this part of competition law inside the realm of intellectual property. The two main important ones will be mentioned here, with further developments in the next section. The *Bronner* case is seen by the Commission and some commentators as the consecration of the doctrine of essential facilities in European law. However, besides the fact that the Court has never referred to the doctrine in any of its judgments<sup>69</sup>, legal journals and reviews in Europe and across the Atlantic are literally flooded of academic literature<sup>70</sup> heavily criticising the doctrine. In addition, the judiciary has expressed

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<sup>68</sup> A. Arnulf, *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 529; S. Weatherill & P. Beaumont, *supra* note 21, at p. 202. In addition, even if the C.F.I. is not bound by decisions of the E.C.J. (except in a few cases: *res judicata* and article 54 of the Statute of the Court, see e.g. Case T-162/94 *NMB France & others v. Commission* [1996] E.C.R. II-427, para. 36), when the precedents of the E.C.J. are clear, the C.F.I. should follow the E.C.J.'S decisions. See A. Arnulf (1999), p. 533 citing Brown & Kennedy, *Brown and Jacobs' the Court of Justice of the European communities*, 4<sup>th</sup> ed., 1994, p. 351 and S. Weatherill & P. Beaumont, *supra* note 21, at p. 207.

<sup>69</sup> Case C-7/97 *Oscar Bronner v Mediaprint* [1998] E.C.R. I-7791, [1999] 4 C.M.L.R. 112, per Adv. Gen Jacobs, para. 35; Commission's decision 2002/165/CE of 3 July 2001, para. 64, *supra* note 47.

<sup>70</sup> Among others, see P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles", (1989) *Antitrust Law Journal*, p. 841; J. Temple Lang, "Defining legitimate competition: companies' duties to supply competitors and access to essential facilities", (1994) 18 *Fordham International Law Journal*, p. 439; D. Ridyard, "Essential facilities and the obligation to supply competitors under UK and EC competition law", (1996) *ECLR*, p. 438; A. Overd & B. Bishop, "Essential facilities: the rising tide", (1998) *ECLR*, p. 183. See also for strong criticism, H. Hovenkamp, *Federal Antitrust Policy*, 2<sup>nd</sup> ed., West, 1999, p. 305-311. For other references on criticism of the essential facilities doctrine, see E.

strong reservation about its adoption in the European legal order.<sup>71</sup> The argument is that the essential facilities doctrine should not be applicable in competition law or at least should be applied with great care because of its many negative effects. These considerations favour an interpretation of the *Bronner* decision as either not consecrating the doctrine at all or at the most, as adopting it but with extreme caution, and then again exclusively as regards tangible property. A second powerful argument is that intellectual property law holds in itself a generally well-thought through and carefully tailored internal balance. The rights granted under intellectual property regimes are already by nature limited. This balance is constituted on the one hand, by the scope of the protection granted (which is limited both by the requirements to fulfil in order to attract protection and once protection acquired, by the exceptions to the exclusive rights given) and on the other, by the limited duration of these rights. Thus competition law should merely act as an external safeguard curtailing excesses only in strictly exceptional cases, since as a rule, the balance already exists within intellectual property law itself.<sup>72</sup>

### **3.3. Development of some corroborating arguments and their link with economic theory**

#### **3.3.1. Intellectual/intangible property and personal/tangible property are not the same**

The *Bronner* court at para. 41, as stated in the legal argumentation above, seems to point at the fact that tangible and intangible property are not of an identical or even similar nature and thus deserve different, separate treatments. This seems to mean that (only) the case law relating to intellectual property rights, namely *Magill* - since the *Bronner* court seems to refer to it if not exclusively, at least in priority or primarily - applies to intellectual property rights. *A contrario*, for other property rights, the *Bronner* tripartite test seems to be required as well, in addition to the *Magill* test.

This special treatment of intellectual property rights seems to be implicitly confirmed in the President of the Court of First Instance's ruling of 26 October 2001 at para. 143<sup>73</sup>, in which the Court states that intellectual property is the general interest.

Let us move on to the differences between copyright and tangible property. While copyright, an intangible, intellectual, property, shares some attributes with tangible property (e.g. right to exclude someone from something, possibility to transfer *inter vivos* and upon death), it also has some different attributes. First and foremost, it is intangible. Second, copyright is a public good which has the quality of being non-rivalrous. Third, it has a limited length.<sup>74</sup> Fourth, additionally to granting economic

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Sheehan, "Unilateral refusals to deal and the role of the essential facility doctrine, A US/EC comparative analysis", (1999) W. Comp., p. 73, fn. 26 & 28.

<sup>71</sup> See Opinion of Advocate General Jacobs in *Bronner*, supra note 69, at para. 56 – 58 (the doctrine goes against freedom of contract, it stimulates competition on the short-term stimulation but not on the long-term; para. 62 (if the doctrine is to be applied at all, it should be applied with even more caution in cases dealing with IPR) and para. 69 (difficulty to decide on the compensation to be paid for access); see also R. Whish, supra note 16, at p. 617 and 700; P. Treacy, supra note 28, at p. 502.

<sup>72</sup> On this see e.g. T. Cotter, "Intellectual property and the essential facilities doctrine", (1999) Antitrust Bulletin, p. 211.

<sup>73</sup> This is reminded in para. 82 of the Court of Justice's 11 April 2002 decision.

<sup>74</sup> C. Stothers, p. 91, supra note 19.

rights to the creator, copyright also grants him/her moral rights, which are closer to personality rights than property rights.<sup>75</sup>

Perhaps the most important quality of copyright which allows it to deserve a different treatment to tangible property is the fact that it is non-rivalrous. In short, intangible property deserves more protection because it is inherently fragile, in other words, subject to free-riding.<sup>76</sup> This is why a legal framework (copyright) has been set up to protect creations in order to basically allow their existence. Works would not be created if there was no legal protection by copyright for them, as no one would be encouraged to create any work since anyone else could copy the work with impunity, thereby eliminating the possibility for the creator to recoup his/her investment in creating the work in the first place. This is in one sentence the basis for the economic justification of copyright. Such a dilemma does not arise in the world of tangible goods. If a tangible good is marketed, the price is paid for it, unlike an intangible, it cannot be replicated at a very small cost and a market failure does not exist.

In conclusion, if copyright is granted, it is for a good reason: allow the creation of works. Promoting the creation of works is in the general, public interest. If there were no copyright, no works (or extremely few, too few) would be created and therefore the public would be worse off. The only trouble is what is the right amount of copyright? This comes back to the problem sketched out above in section 0.1. that there are so far no empirical studies on what would be the exact amount of copyright needed to remedy the market failure while maintaining a healthy competition (i.e. avoiding abuses of copyright). It seems to me that the definite answer to the copyright/competition dilemma will come from these empirical studies. The 'only' trouble is that it is difficult to envisage such studies since in order to evaluate the merits of having copyright, one needs to compare the present situation (i.e. a world where copyright exists) with a situation without copyright, which does not exist in the world. Or one would have to compare the present situation (which dates roughly from the 'invention' of copyright in 1709 with the Statute of Anne in the UK<sup>77</sup>) and the situation which existed previously where no copyright existed. This therefore would be a historical study which would have to rely on, most certainly, imperfect statistics, in view of their age and the approximate and scarce data recording techniques of the time. Alternatively or additionally, one could take the example of countries which have a copyright law but do not enforce it at all. These abound and it would therefore be an idea to investigate in this direction. As a third alternative, one could study whether the creation of works has increased each time the copyright length was extended. These studies are of course beyond the scope of our study.

In the meantime the dilemma has to be solved without those future potential empirical studies. In this author's view, since copyright is created to remedy a problem in the public interest, copyright is prevalent in comparison to competition. Not only the potential dominant position or monopoly which a copyright can generate is justified by the public interest but also because copyright is of limited length, the dominant

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<sup>75</sup> For more developments on these different attributes, see e.g., R. Cooter & T. Ulen (1997), *Law and economics*, Harper Collins Publishers, 2<sup>nd</sup> ed., p. 1-8; 114-128; P. Y. Gautier (1991), *Propriété littéraire et artistique*, Presses Universitaires de France, p. 26 et s.; C. Colombet (1992), *Propriété littéraire et artistique et droits voisins*, Dalloz, 6<sup>ème</sup> ed., p. 11 et s.

<sup>76</sup> See the explanation under 0.1.

<sup>77</sup> 8 Anne, c. 19 (1709).

position or monopoly is by nature limited in time. There will only be an abuse if the dominant position made possible by copyright is used against the public interest. So what is the public interest? Under economics of copyright, it is the maximisation of the public's welfare. The public's welfare is fulfilled when there are as many works as possible in the market. Thus, abuses will be situations when the copyright holder restricts the availability of new works on the market. This brings us to what the conditions of abuse of copyright, and, even any IPR, should be.

### 3.3.2. What the conditions of an abuse of copyright should be

The above legal demonstration (3.1.) has shown that the conditions of abuse should be those established in *Magill* and should be cumulative. However, on economic grounds, it is submitted that only one condition is sufficient to curb a copyright owner's attempts to abuse its copyright. This condition simultaneously re-establishes a healthy competition, which is unconditionally needed in a free market economy, and preserves the strength of copyright, in other words it respects its specific subject-matter (which is to encourage, in the general interest, the creation of works by granting to the creator an exclusive right to prevent or authorise the use of his/her works). This sole condition is the first condition set out in *Magill* under which the IPR holder's refusal to licence prevents the appearance on the market of a new product for which there is a potential consumer demand. The two other conditions set out in *Magill* are not necessary for the following reasons.

The third condition set out in *Magill*, under which the refusal allows the IPR holder to reserve to himself a secondary market by excluding all competition on that market is in this author's view reducing the copyright to its simplest expression. It does not allow the copyright holder to manage his/her copyright as he/she wishes, whereas the very specific matter of copyright is the exclusive right to prevent or authorise the use of the copyright work. Thus the possibility to block competition in the derivative market is included in the specific subject-matter of copyright. Copyright should provide the copyright holder to prevent any commercial exploitation of its work within the scope of its right. This copyright holder's possibility will not prevent users to benefit from exceptions to copyright, i.e. using the work under one of the exceptions in another market. For example, in most countries, someone can copy a substantial part of or even the whole of a work to criticise it without encountering the wrath of the copyright holder. And under US law and a majority of civil law countries<sup>78</sup>, this applies similarly to parodies. Thus the general interest underlying copyright is already respected.

*Magill's* second condition is that the copyright's holder refusal cannot be objectively justified. Again this condition is not appropriate since the refusal is part of the copyright holder's exclusive right, or in other words of the very specific matter of copyright.<sup>79</sup> If a refusal needs to be justified, again, it amounts to reducing copyright to its simplest expression.

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<sup>78</sup> But not in the UK, see e.g. *Schweppes Ltd v Wellingtons Ltd* [1984] FSR 210; *Williamson Music Ltd v Pearson Partnership* [1987] FSR 97.

<sup>79</sup> R. Thompson (1995), supra note 26; O. Régnier (1996), « Propriété intellectuelle et concurrence dans l'affaire *Magill*: vrai malaise ou faux conflit ? », *A&M*, p. 29.

Let us go back to the condition under which the IPR holder's refusal to licence prevents the appearance on the market of a new product for which there is a potential consumer demand. This is in this author's view the only condition necessary to thwart abuses of copyright. And in passing, this is the only one that was really of importance in the *Magill* case.<sup>80</sup> Indeed, when the copyright holder prevents the appearance of a new product he/she is acting against the public's interest. The public demands the product but the copyright holder refuses either to create it or to licence his/her copyright to a third party who will in turn create this new product. The idea of imposing a compulsory licence in such a case is not a new idea. Compulsory licences of this kind already exist in patent law, when the copyright holder does not "work his invention" after a certain period (e.g. in UK law, three years<sup>81</sup>). There are also compulsory licences for "patent improvements". When an inventor improves a patented technology within the 20 years term, the original inventor is obliged to grant a licence to the new inventor to allow him to market his better invention. In return, the new inventor is obliged to grant a licence to the previous inventor in order for the latter to be able to survive on the market, since his own invention has been surpassed by his successor's. These compulsory licences are statutory. Such a system could very well function in the relationship between competition and copyright law. However, this system and the condition itself should be adopted only with the following additional precisions.

The work proposed by the future licensee must not exist on the market (condition of novelty) and it must also be (substantially) better (condition of improvement)<sup>82</sup>. In addition, one must add the 'time' factor in the equation. There must be time for the copyright holder to recuperate his investment. Thus the compulsory licence can only be admitted after a certain period has elapsed. Finally, the condition that there must be a potential, substantial, constant and specific demand of the public is not a suitable condition. Indeed how can this potential demand be measured? It is submitted that it can be implied: since the product will be better, obviously there will be such a demand. Economically speaking, the demand can reasonably be assumed since in all likelihood the reasonable consumers always want to increase their welfare.

In conclusion, the condition at which a compulsory licence can be imposed on the copyright holder should be rephrased as follows: the copyright (and even IPR) holder's refusal to licence prevents the appearance on the market of a new and (substantially) better product (work) and a certain period (to be defined) has elapsed since the creation of the original work. This condition can be written down in a statute, as it can very well be applied at court level only. This is a choice to be left to the legislature.

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<sup>80</sup> Note the language of para. 54 of the *Magill* case: "The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. *Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 86 of the Treaty.*" (Emphasis added).

<sup>81</sup> S. 48(1) Patent Act 1977.

<sup>82</sup> For example, in the Belgian Patent Act (art. 31 § 1er, 2°) and in art. 31 (l) of TRIPs, it is stated that it implies an "important technical progress of a considerable economic interest" compared to the previous invention. A similar sort of wording (adapted to copyright) could be used in our solution.

### 3.3.3. Why the essential facilities doctrine should not apply to copyright

The *Bronner* case has been seen by the Commission and some commentators as the consecration of the doctrine of essential facilities in European law. Although the E.C.J. has never mentioned the essential facilities doctrine in any of its judgments, it is claimed by most of the literature to originate from the *Commercial solvents* case.<sup>83</sup>

The reason why the essential facilities doctrine should not apply to copyright and any IPR derives from the developments made above under the distinction between tangible and intangible property and under what the conditions of an abuse of copyright should be. The essential facilities doctrine has principally been applied to tangible property. It has attracted abundant and harsh criticism both from the academia<sup>84</sup> and from the judiciary.<sup>85</sup> They both criticise even more an extension of the doctrine to copyright. Copyright has been established in the general interest. The essential facilities doctrine basically takes copyright away from the copyright holder just because the work protected has become an essential facility. It is submitted that inevitably in some cases, the work protected by copyright will become essential because it is so good that it is irreplaceable. Again as this situation will be temporary, since copyright lapses after some time, this limited length being in the general interest, copyright cannot be taken away from the creator before the term has expired. This would go against the general interest. It cannot only be taken away when there is abuse.

The three cumulative conditions which trigger the abuse in *Bronner*, it is submitted, are not sufficient by themselves to take the copyright away from the copyright holder, i.e. to constitute an abuse of copyright. They are not even adequate at all. The two first conditions have already been discussed and dismissed above under 3.3.2.<sup>86</sup> The third is that the service in itself must be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme. The fact that there is no actual or potential substitute derives naturally from the fact that there is a monopoly in the relevant market. This condition (there must be a dominant position in the relevant geographic and product market), necessary to trigger the application of article 82, must have been fulfilled upstream, before even looking at the abuse. Taken by itself the third *Bronner* condition is very dangerous, as it is the same as saying that a monopoly held by the copyright holder in itself amounts to abuse. This, the court has many times repeated, is not enough to constitute an abuse. Supposedly this is the reason why the *Bronner* court ruled that the three conditions must be all present in order to find an abuse.

In conclusion, this demonstration proves that the *Bronner* test, or if one wants to call it that way, the essential facilities doctrine, does not apply to intangible property, *a fortiori* to copyright.

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<sup>83</sup> Cases C - 6 & 7/73 *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corporation v. Commission* [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309, C.M.R. 8209.

<sup>84</sup> See esp. P. Areeda, *supra* note 70.

<sup>85</sup> See Opinion of Advocate General Jacobs in *Bronner*, *supra* note 69.

<sup>86</sup> The first condition in *Bronner* (which is the same as in *Magill* but adapted to the *Bronner* facts) is that the refusal of the service comprised in the home delivery must be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service. The second is that the refusal is not objectively justified.

The above findings under 3.3.1, 3.3.2 and 3.3.3. are of course valid in the case copyright legislation is in itself well-balanced, i.e. respects or promotes the public interest.

### **3.3.4. Copyright is already well-balanced or... is it?**

Copyright law generally embodies a well-thought through and carefully tailored internal balance. This balance is constituted on the one hand, by the scope of the protection granted (which is limited both by the requirements to fulfil in order to attract protection (expression and originality) and once protection is acquired, by the exceptions to the exclusive rights given) and on the other hand, by the limited duration of these rights. However, as stated above in section zero, unless empirical studies show what the exact amount of copyright should be, the internal balance remains theoretical. Since whether this internal balance is right is unsure, competition law has a role to play, since there will be cases when copyright power is abused. As regards the evaluation of the internal balance, one can however assess the degree of its achievement in several countries (and therefore what the degree of competition law's encroachment should be) with the help of the measure or standard of the general interest.

In the USA, copyright is firmly grounded with the aim of favouring the general public interest. This is evidenced at the highest legal level in Article I, § 8, Cl. 8 of the American Constitution: "The Congress shall have power (...) to promote the progress of science and useful arts by securing for limited times to authors (...) the exclusive right to their respective writings". The general interest (promote the progress of the arts, not (just) reward or protect the author) is really present at the core of the copyright rationale. In other words, the US Copyright Act can be said to be the most "economics of copyright theory"-oriented of the world. The general interest generally transpires from the Copyright Act's provisions. Provisions such as fair use are directly inspired from this trade-off between protection and the public's interest. The relatively high creativity requirement<sup>87</sup> also witnesses a focus towards the general public interest.

Conversely, in the UK and therefore most Commonwealth countries, where copyright is based on the protection of investment and not really on the promotion of science and the arts (even if originally it was the case, as the Statute of Anne's title shows<sup>88</sup>) and especially where a law of unfair competition is inexistent, therefore creating a lack of protection, copyright's provisions are generally relatively protective (see e.g. low originality requirement (skill, judgement and labour), unclear recognition of the idea/expression dichotomy (see *Ibcos*<sup>89</sup> and *Designers Guild*<sup>90</sup> cases), fair dealing less broad than the US fair use).

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<sup>87</sup> Which derives from the Constitution (namely from the word "author") as stated in *Feist Publications, Inc. v. Rural Telephone Service Co.*, (1991) 111 S. Ct 1282.

<sup>88</sup> "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times herein mentioned".

<sup>89</sup> *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd* [1994] F.S.R. 275 (Ch.D.) in which Jacob J. stated that a detailed idea could be protected by copyright.

<sup>90</sup> *Designer's Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 113 (HL) in which the House of Lords confirmed this statement.

Finally, in civil law countries, whose copyright laws are based on natural law and the sacrosanct notion of author and ‘the work of his/her mind’, copyright protection is generally the strongest (except for the relatively high requirement of originality, rights are broad and exceptions are generally numerous but very narrow). Thus abuses of copyright are more likely to arise in civil law countries (such as France) and even more in the UK.<sup>91</sup> In this case, the case can be made that there should be a deeper incursion of competition law into copyright when a case arises. However, it is always preferred for reasons of legal security that the legislator remedies to excesses of copyright protection rather than the courts. As far as this author is aware of, there are no compulsory licence provisions akin to the above discussed patent provisions in any copyright laws. This is perhaps why all the cases (except *Volvo* and *Renault* which concerned design rights) which came in front of the Community courts involved copyright and not patents. A internal balance “closer to the public interest” could be achieved by enacting such a provision as proposed under 3.3.2. inside copyright acts, or at least in adopting it court level when competition law is to apply to copyright.

## Conclusion

The legal interpretation suggested in this article is one way to solve the apparent conflict between the decisions. This interpretation is only based on the wording of the cases themselves. Perhaps the Community courts are clear on the construction to be given to their cases. However, as shown by the divergent opinions of commentators as to the interpretation to give to the cases, confusion still remains in the legal community as regards the exact conditions under which the holder of an IPR abuses it.

The *IMS* case offers a unique opportunity for the European courts to clarify their case law and provide a transparent test to help IPR holders in a dominant position know when they are likely to breach competition law. It is hoped the Court one way or the other makes clearer under what circumstances the refusal to licence by a holder of an IPR is abusive. It would be interesting if the proposed reading of the case law were to be adopted while deciding the *IMS* case on the merits. Thus the Court would clarify or confirm what it meant in paras. 40 and 41 of the *Bronner* case. It could also go further and state whether the conditions under which a refusal is abusive are similar for all property rights or whether they should be different for intellectual property rights as opposed to tangible property. If it decides that the conditions are different for the two types of rights, only the *Magill* case should be relied upon for abuses by holders of IPRs and its conditions should be applied concurrently.

Regardless, even if the suggested construction is not adopted, choosing the exceptional circumstances set out in *Magill* and cumulating them seems to secure, better than an application of the *Bronner* tripartite test or of the essential facilities doctrine, that the cases in which there will be an abuse of an IPR will remain truly exceptional. The case law should preferably evolve accordingly in order to maintain the fragile balance between competition and intellectual property laws.

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<sup>91</sup> As the *Magill* case demonstrates. See also the *Volvo* and *Renault* cases relating to design rights.

However, the author hopes that the E.C.J. goes further and follows the economic arguments developed in this article. The Court would then set the only and clearly formulated condition at which there will be a copyright abuse. The condition at which a compulsory licence can be granted by courts is when the copyright (and even any IPR) holder's refusal to licence prevents the appearance on the market of a new and (substantially) better product (work) and a certain reasonable period (to be defined) has elapsed since the creation of the original work.

Beside the opportunity granted by *IMS* case to the Court to clarify its case law, there is another way to achieve economic sense in the relationship between copyright and competition laws: modify the copyright acts. This can be envisaged in two alternative ways. The first one is through a provision specifically accommodating the relationships between copyright and competition. This means the enactment of this very condition (compulsory licence) inside the copyright acts. The second is to review the whole of the copyright acts themselves and lower the copyright scope so as to avoid the easy creation of dominant positions, for example, by reducing the definition of the subject-matter, raising the requirement of originality, reducing the length or broadening the exceptions to the rights. This author's favoured solution is the first one: the application of the condition advocated above, written down in the copyright statutes, as it is, for legal certainty, always better to legislate. Watering down copyright laws' scope can be a tricky business and may endanger copyright's aim. The first solution is legally more certain and more respectful of the respective roles and aims of copyright and competition laws.

In this way, the concurrent roles of competition law and copyright are fulfilled in harmonious way: copyright is still allowed to exist to its full extent, and this, in the public's interest, while competition is allowed to take over, "re-step in", when this public's interest is not respected by the copyright holder. In this scenario, the economics of competition law and of copyright law are both respected and the agitated relationship between both areas of the law is set to a peaceful mutual understanding.

The attitude taken by the presidents of the C.F.I. and E.C.J. in the *IMS* case seems to prove somehow that either the judges have done their homework on the rationales and respective roles of copyright and competition law and on their relationship, i.e. they are aware of recent economic studies on copyright and competition law, or that they have an innate intuition in this regard... Therefore it is hoped that the E.C.J., in its final judgment in the *IMS* case, will espouse the economic approach advocated in this paper. It is further hoped that the Member States lawmakers enact the proposed compulsory licence provision in their copyright acts.

[13,850 words inc. footnotes, excl. summary and abstract]