

***IMS Health* or the Question Whether Intellectual Property
Still Deserves a Specific Approach in a Free Market Economy.**

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I. Introduction

The ongoing IMS Health saga, which builds substantially on the principles established in the *Magill* line of cases, has yet again highlighted the apparent clash between intellectual property law in general and copyright more specifically on the one hand and competition law and its essential facilities doctrine on the other hand. At some stage this paper will need to address the detailed issues that arise in the *IMS Health* case and the focus will then inevitably also turn to the essential facilities doctrine, but these detailed issues need to be seen against the background of the apparent clash between intellectual property and specifically copyright and competition law.¹

II. Intellectual property and copyright v. competition law

1. Intellectual property and copyright

1.1 The starting points

Two leading studies on the economic analysis of copyright come to the conclusion that the continued existence of copyright makes economic sense. The starting point seems to indicate therefore that the debate should not develop along the lines intellectual property and copyright or competition law, but should rather focus on the role played by both sets of rules in a free market economy. From a preliminary point of view, one way or the other the two sets of rules

¹ See in general the Speech delivered by Judge Bo Vesterdorf, President of the Court of First Instance, at the “European Copyright Revisited” Conference, held in Santiago de Compostela, 16-18 June 2002: “The Role of Copyright and Related Rights as a Policy as Compared to Other Policies”, available on line at europa.eu.int/comm/internal_market/en/intprop/news/2002-06-conference-speech-vesterdorf_en.htm.

seem obliged to work together. We will need to develop a deeper understanding of each of them in order to analyse if and how such co-operation is possible in practice.²

The two studies referred to above highlight the conundrum we are trying to solve and the solution of which should underpin any detailed ruling in cases such as *IMS Health* as follows. In their study on *Law and Economics* Cooter and Ulen summarise it as “[p]ut succinctly, the dilemma is that without a legal monopoly too little of the information will be produced, but with the legal monopoly too little of the information will be used”³. Landes and Posner, in their seminal study “An Economic Analysis of Copyright Law” emphasise the matter in even clearer terms when they state that “Copyright protection – the right of the copyright’s owner to prevent others from making copies – trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.”⁴

Historically copyright is concerned with the protection of literary and artistic works. Examples such as books, paintings and sculptures come to mind. It is important to note in this respect that copyright never set out to protect, let alone grant any exclusivity in relation to ideas. Ideas were to remain in the public domain and therefore freely available for use by anyone. What was protected was the way in which the individual author used these ideas creatively and the resulting expression of his creativity. Only that expression, the individual non-copied expression by the author of a certain idea was protected. A lot of emphasis was therefore put on the link between the author and his work.⁵

² Lemarchand, Fréget and Sardain, “Biens informationnels: entre droits intellectuels et droit de la concurrence”, [2003] *Propriétés Intellectuelles* 11 at 17.

³ R. Cooter and T. Ulen, *Law and Economics*, Glenview (1988) at 145.

⁴ Landes and Posner, “An Economic Analysis of Copyright Law”, 18 (1989) *Journal of Legal Studies* 325 at 326.

1.2 *Justifying copyright*

This approach can in part be justified by means of the labour theory, as originally formulated by John Locke.⁶ In essence the labour theory is the combination of two concepts. According to the first concept everyone has a property right in the labour of his own body and brain and the second concept builds on that by adding that the application of human labour to an unowned object gives whoever applies that labour to it a property right in the previously unowned object. If one applies this to copyright,⁷ one can see why the starting point of any copyright law is that the author gets the copyright in the book, painting or sculpture. However, the labour theory may not go a lot further than the issue of the allocation of the (copy-)right. It does not necessarily explain why an immaterial right needs to be created and why such an immaterial right is necessarily an object for the purposes of the labour theory. The latter is indeed only obviously applicable to real material objects and property. There is therefore a need for an additional element that justifies the existence of copyright and that explains in other words why an immaterial rights in the author's individual expression of an idea needs to be created⁸.

That other element is purely economic in nature.⁹ In an efficient free market structure competition takes place at at least three levels and at each level an optimum level of competition needs to be achieved. A balance may therefore have to be struck, as one hundred per cent or perfect competition at one level may effectively rule out competition at the next level. At the bottom of the scale is the consumption level, which interacts with the production

⁵ See P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Butterworths (3rd ed, 2001), at 176.

⁶ John Locke, 'The Second Treatise' Section 27 in *Two Treatises of Government* edited by Peter Laslett, Cambridge University Press (1970).

⁷ See Robert Nozick, *Anarchy, State and Utopia*, Basil Blackwell (1974) at 181-182.

⁸ Spector, 'An Outline of a Theory Justifying Intellectual and Industrial Property Rights', [1989] 8 EIPR 270 at 273.

⁹ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Butterworths (3rd ed, 2001), at 14-21.

level. Perfect competition at the consumption level, i.e. the absence of any barriers or restrictions to consumption such as price and scarcity of goods, would create a situation where everyone was free to take anything they fancied free of charge to use or consume it. In such a situation it is arguable that there would be little or no competition at the production level, as there is no reward or anything else to be gained from the production of goods or services that can be consumed, i.e. taken away from the producer without anything being given in exchange. It is in these circumstances a much more logical approach to focus on the consumption side and let others produce the goods or services, even if the whole market system could grind to a halt if everyone adopted this approach. These problems are overcome by the introduction of property rights in the goods or services that are produced. The producer's first *de facto* possession of the goods or services receives legal recognition by means of a property right, which in turn allows him or her to charge for the transfer of the goods or the supply of the services. As such, property rights are used to stimulate competition at the production level, even if this necessarily involves a reduction of competition at the consumption level, as nobody has the unrestricted means to pay for all goods or services. It is important though to keep in mind that the property right in the goods (or services) is not entirely an artificial legal creation. It is rather a form of legal recognition and legal consequences that are given to the *de facto* possession of the goods (or services). Hence the presumption in most legal systems that possession gives rise to title.¹⁰

The third level is the innovation and creation level and this level interacts in turn with the production level. As was argued above, in the copyright sphere we are dealing with works that are the expression of ideas. Starting from these ideas, one has to recognise that they are by their nature public goods and can therefore freely be accessed and used by anyone. The way

¹⁰ Lehmann, "Property and Intellectual Property – Property Rights as Restrictions on Competition in Furtherance of Competition", [1989] IIC 1 at 12.

in which these ideas enter the public domain is through their expression by an individual author, as such expression is required for the transmission of the idea. From an economic point of view it is also important to keep in mind that such access is non-exhaustive in nature. The consumption of the expression does not necessarily make the expression and its material support unsuitable or unavailable for further consumption. It is also the case that in the light of modern (digital) technological advances the cost of reproduction and distribution of the expression of the idea have become marginal and that such reproduction and distribution is easily achievable and can be done in a minimum amount of time. There is therefore plenty of room for free-riders.¹¹ Additionally, one should distinguish carefully between the expression of the idea on the one hand and its material support on the other hand. The latter, e.g. the ink and paper in the case of a literary work published in bookform, is a material object or good and can be subject to a property right and the protection it provides for the person in possession of the object or good, but the former is as such not included in the scope of that protection. The situation with which we are presented is therefore entirely in favour of competition at the production level. Copying the expression of the idea is easy and cheap and it seems to be free. At the innovation and creation level there is very little in terms of incentive to create. The creator may not be able to recoup the cost of production, as the cost of copying is lower and there is no tool to reap any substantial benefit from such creative activity. In economic terms there is therefore no efficient market of the authors' expression of ideas.¹² In a society that sees progress and change as a goal and that believes that creative activity can contribute to the achievement of that goal through the means of the free market such a situation is undesirable, as it will inhibit the achievement of that goal. Copyright is the

¹¹ On the issue of free-riders in relation to intellectual property see R. Benko, *Protecting Intellectual Property Rights: Issues and Controversies*, American Enterprise Institute for Public Policy Research (AEI Studies 453) (1987) at 17.

¹² Ramello, "Copyright and Antitrust Issues", Research paper available from the SERCI website at www.serci.org at 8; for a more detailed analysis of the economics of copyright see also R. Watt, *Copyright and Economic Theory: Friends or Foes?*, Edward Elgar (2000).

tool that is created to remedy this imbalance and to give authors a right in their expression of ideas, hence securing appropriate profits deriving from the act of creation for them.¹³ Copyright will lead to the creation of an immaterial property right in the expression of an idea by the author, a right which the author can use to secure appropriate profit from his or her act of creation on the market.¹⁴ This will enhance creation by providing an incentive and therefore competition on the innovation and creation level will be stimulated, whilst any such right will inevitably to some extent limit competition at the production level as competitors (and former free-riders with them) are no longer free to copy the copyright work. Yet again a restriction on competition (at the production level) is put in place in furtherance of competition (at the innovation and creation level).¹⁵

Copyright fulfils here the pro-competitive regulating role filled by the property right when it comes to the consumption and the production level. An important distinction needs however to be drawn between property rights on the one hand and intellectual property rights and copyright on the other hand. Property rights are a legal recognition of a situation, i.e. the physical possession of and control over the goods, whereas copyright is not based on a de facto situation at all. It is rather an artifice, an artificially created right, put in place by the legislator to regulate competition at the innovation and creation level and to provide the much needed incentive to create. This difference gives copyright a different standing. It was created specifically as a tool to enhance competition by the legislator. Needless to add that the exact content of copyright law must reflect the attempt to provide an adequate level of competition both at the innovation and creation and at the production level. Whilst copyright is a good tool

¹³ On the issue of inappropriability see Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau for Economic Research, *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton University Press (1962) at 609–625 and Lunn, 'The Roles of Property Rights and Market Power in Appropriating Innovative Output', [1985] *Journal of Legal Studies* 423 at 425.

¹⁴ K. Maskus, *Intellectual Property Rights in the Global Economy*, Institute for International Economics (2000), 28-32.

in theory, it cannot be taken for granted that the legislator on each occasion and for each set of facts got it exactly right when determining the content of copyright law in an attempt to strike the right balance between the different levels at which competition takes place.

1.3 *Recent Developments*

Up to now we have looked at “traditional” copyright in literary and artistic works such as books, paintings and sculptures. It is however necessary to add that copyright has developed in two ways in recent years which may have influenced the position.¹⁶ On the one hand copyright has been expanded to protect the results of technological evolutions. Sound recording, films, but also computer software and databases have been brought within the scope of copyright protection. On the other hand we have seen an increasing emphasis on the economic interests of those who exploit copyright works, such as producers and publishers. It may lead too far to discuss all implications of this evolution, but it is important to note that as a result copyright is increasingly used to protect information goods and the investment needed for the creation of these goods. This is clearly visible in the area of databases for example where we have even seen the creation in the EU of a *sui generis* database right to supplement copyright in order to achieve this aim.¹⁷ It is clear that the level of originality involved in the creation of such information goods is lower and that the link with the author and his creativity that makes the work his own individual creation is weaker in these circumstances. This must also weaken the justification for strong copyright protection for these information works as

¹⁵ Lehmann, “Property and Intellectual Property – Property Rights as Restrictions on Competition in Furtherance of Competition”, [1989] IIC 1 at 12.

¹⁶ See also Mackaay, “Economic and philosophical aspects of intellectual property rights”, in M. Van Hoecke (ed.), *The Socio-Economic Role of Intellectual Property Rights*, Story-Scientia (1991), 1-30.

¹⁷ Directive of the European Parliament and of the Council on the protection of databases [1996] OJ L77/20.

these elements were described above as the basis for the economic justification of copyright.¹⁸ Another important element is the fact that by their nature information goods have a poor substitutability.¹⁹ This applies to some extent to all copyright works, for example we are interested in a novel because of the way in which the author has expressed the idea and therefore the novel cannot be easily substituted by another novel in which another author expresses the same idea in his or her different own way, but this factor is more strongly present in relation to information goods. A database of dentists in Scotland cannot easily be substituted by another database of dentists in Scotland, since we really are after the data, i.e. we want a complete list of all such dentists, for example. This may well have an impact from a competition law perspective and we will therefore have to return to this point at a later stage. It is therefore now appropriate to have a closer look at the relevant principles of competition law from a theoretical perspective.

2. Competition law

Competition law has as its stated aim to maximise social welfare by avoiding or correcting specific market failures. Consumer welfare should as a result be enhanced and innovation should be encouraged.²⁰ Competition law attempts to achieve this aim through the elimination of competition restricting practices and forms of behaviour, as these lead to inefficient outcomes.²¹ This kind of activity may well fall into the legal field, but it is clear that the legal

¹⁸ Lemarchand, Fréget and Sardain, “Biens informationnels: entre droits intellectuels et droit de la concurrence”, [2003] *Propriétés Intellectuelles* 11 at 18 and A. and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Litec (2nd ed, 2001) at 37.

¹⁹ Ramello, “Copyright and Antitrust Issues”, Research paper available from the SERCI website at www.serci.org at 8.

²⁰ See also S. Anderman, *EC Competition Law and Intellectual Property Rights: the Regulation of Innovation*, Oxford University Press (1998), at 5-7 and the OECD report referred to there: OECD, *Report on Competition Policy and Intellectual Property Rights*, OECD (1989).

²¹ S. Anderman, *EC Competition Law and Intellectual Property Rights: the Regulation of Innovation*, Oxford University Press (1998), at 5-6.

rules on competition need to be based on and supported by economic theory if they are to work well and achieve the aims that have been set out.

The agreement between lawyers and economist in this area clearly covers the point that competition law is an instrument to combat monopolistic behaviour which has as an effect to exclude a segment of consumers from the market, relative to the competitive context. But when it comes to the practical application of these principles to the facts of a specific case economic theory is not exactly capable of providing the legal community and the courts with specific tests to detect and correct such anti-competitive behaviour.²² This is all the more so in relation to the new information economy. Economic theory is indeed still to a large extent focused on static efficiency and the dynamics of the manufacturing industries. The information economy has quite different dynamic processes, resulting in part from the importance of the rapid technological change to which it is subjected. Since copyright operates increasingly in such an information economy when it is used to protect information goods it is clear to see that the application of competition law in such cases may not be clear-cut and lead to difficulties.

These difficulties are further compounded by the fact that in the markets for information goods there is a different mode of competition from that found in the market for producers of tangible goods. Whilst price competition is a major element in respect of the latter one, it is far less important in respect of the market for information goods. On the market for information goods one finds non-price competition as a dominant factor. The sunk cost component seems effectively to play the dual role of consolidating on the one hand and of increasing demand and/or creating barriers to entry for potential competitors on the other hand. As a result one sees leapfrogging by competitors in the innovation race when it comes

to the market for new tangible products, whilst on the market for information products one sees the emergence of pockets of monopoly power, the creation of which is facilitated by the presence of copyright, and which are used to secure or to reinforce monopolistic positions.²³ In these latter markets one finds indeed a pattern of progressive concentration, both at national and international level. Information goods are increasingly created and exploited by ever larger groups on a market with a shrinking number of significant competitors.²⁴

It is therefore clear that competition law's role is a broad one. There is as such no reason to exclude competition law from playing its role in the information goods market or in the copyright or intellectual property market as a whole. However, on each occasion competition law and its operation in a specific market needs to be underpinned by sound economic principle.²⁵ As has been shown above, there may therefore be specific elements that need to be taken into account when the competition authorities apply competition law in the area of intellectual property and copyright.

3. Copyright v Competition Law

As copyright confers an exclusive right there is almost by definition also a possibility that such an exclusive right will be used in one way or another to restrict competition. There may therefore be a conflict between competition law on the one hand and copyright law on the other hand in a given situation.²⁶

²² See for more details M. Neumann, *Competition Policy. History, Theory and Practice*, Edward Elgar (2001).

²³ Shapiro, "Competition Policy in the Information Age", in *Foundations of Competition Policy*, Routledge (2000).

²⁴ For a clear example see Silva and Ramello, "Sound Recording Market: the Ambiguous Case of Copyright and Piracy", [2000] *Industrial and Corporate Change*, 9, 415-442.

²⁵ S. Anderman, *EC Competition Law and Intellectual Property Rights: the Regulation of Innovation*, Oxford University Press (1998), at 5.

In order to understand the nature of such a potential conflict better one needs to see how both regulatory systems, i.e. copyright and competition law, operate. Copyright operates at a structural level. It puts in place a rewards and incentives structure that applies to all relevant cases and that aims to enhance competition at creation and innovation level by granting an exclusive right in the copyright work that restricts to some extent competition at the production level. In doing so copyright defines (intellectual) property rights. Competition law on the other hand operates in an entirely different way. It operates at the behavioural level and it does so almost on a case by case basis. It is therefore not the case that there is a conflict between two sets of rules that operate in the same way and at the same level.²⁷ Copyright and competition law share the same objective, but they have way of achieving it and they operate at a different level.²⁸

Competition law does not operate at the structural level and as such it does not interfere with the structure created by copyright to enhance creation and innovation at competition at that stage. What is true though is that it may wish to interfere at a later stage with some of the behaviour that flows from the grant of copyright. In more down to earth terms, copyright may be used or exercised in an improper way and such behaviour is then regulated and addressed by means of competition law. The factor which complicates matters is that it is to a fair extent the incentives and exclusive rights created at the structural level by copyright that facilitate or at least make possible the emergence of inefficient behaviour that might infringe competition law rules. What can be derived at this early stage is that a system that is designed to regulate behaviour should not operate in a way to undue the structural system put in place by a system such as copyright. The legislator has made a policy decision to put a structure such as

²⁶ See M. Furse, *Competition Law of the UK and the EC*, Oxford University Press (3rd ed, 2002), at 205 and 214.

²⁷ Ramello, "Copyright and Antitrust Issues", Research paper available from the SERCI website at www.serci.org at 28.

copyright in place to enhance and reward creativity and innovation and that decision should be respected. In other words, competition law should restrict itself to its proper role which is to address anti-competitive behaviour, such as any use of copyright that is not pro-competitive as was envisaged when the structural system was set up.²⁹ This conclusion should not surprise anyone, as it should be kept in mind that it is competition law itself that allows for the grant of exclusive rights if on the one hand they are necessary and unavoidable to obtain the benefits which the rightholder brings about for the consumer and if on the other hand they do not lead to a complete elimination of competition.³⁰

Should the analysis of the *IMS Health* case result in a scenario in which in relation to the information goods market competition law needs to interfere on a regular basis with the structural system put in place by copyright, then this must be seen as an indication that something is going fundamentally wrong. In that sense the tool that should operate in special cases to address certain forms of behaviour would in practice be undoing the structure put in place for sound policy reasons by the legislator. As a result that structural system would be destroyed and replaced by a different one. That is a consequence that should never flow from a set of rules that is designed to operate at the behavioural level. It should be up to the legislator that has put in place the structural system to make changes to the structural system itself if there is a fundamental problem with that structural system.³¹

Depending on the outcome of our analysis three scenarios could therefore emerge. In a first scenario one could arrive at the conclusion that what is proposed in cases such as *IMS Health*

²⁸ Lemarchand, Fréget and Sardain, “Biens informationnels: entre droits intellectuels et droit de la concurrence”, [2003] *Propriétés Intellectuelles* 11 at 17-19.

²⁹ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Butterworths (3rd ed, 2001), at 302-309; see also the introductory comments in R. Whish, *Competition Law*, Butterworths (4th ed, 2001), at 676.

³⁰ Lemarchand, Fréget and Sardain, “Biens informationnels: entre droits intellectuels et droit de la concurrence”, [2003] *Propriétés Intellectuelles* 11 at 19.

is an exceptional measure that will only need to be brought into operation infrequently in exceptional sets of circumstances in which inefficient and anti-competitive behaviour occurs. In a second scenario one could find that there is really a structural problem with the operation of copyright and its use in the information goods market. In that case there could be a need to make structural changes to copyright and its operation, at least on this market. These two scenarios are acceptable for the very simple reason that they fit in with the fundamental analysis of the roles of copyright and competition law set out above. The third scenario, which is not acceptable in the light of that analysis, would involve the competition law mechanisms proposed in the *IMS Health* case interfering with the operation of copyright in the information goods market on a frequent and regular basis. That would undermine the structural system put in place by means of copyright and in a certain sense this would show an abuse of competition law rather than an abuse of copyright and intellectual property law. A more detailed analysis of the *IMS Health* case and its background is therefore the next step that needs to be taken.

³¹ See Ramello, “Copyright and Antitrust Issues”, Research paper available from the SERCI website at www.serci.org at 28-29 for economics analysis based suggestions as to how this could be done.

III. *IMS Health* or the question whether intellectual property still deserves a specific approach in a free market economy?

1. Background to the case

The *IMS Health* case is a complex saga, that is still unfolding. The story is still not concluded, as the case is still pending before the Court of Justice. It is an intriguing case concerning copyright and its hate-love relationship with European competition law and therefore highly relevant for our present purposes.

IMS Health is developing along two parallel tracks on the basis of the following facts. *IMS Health* is a major supplier of marketing data to pharmaceutical and other healthcare companies. In the German market it has established a structure of local geographic segments, 1860 in total, called bricks, each containing a comparable number of pharmacies in order to collect standardised data without violating data protection laws that do not allow for the identification of individual pharmacies' data. That structure is protected by copyright under German copyright law. That point as such is not in dispute. However, there is more to it than pure copyright. From the user or consumer side there is a high demand for the data collected through use of the brick structure, which has become an impressive success on the market. The brick structure has de facto become the industry standard and its competitors asked for it to be licensed to them in order for them to be able to compete. The user is indeed only interested in data that are presented in a comparable fashion. The grant of a licence was refused and that resulted in a complaint to the European Commission for abuse of dominant position. In due course the Commission issued its decision, in which in a first stage interim

measures were imposed. That Commission decision was appealed and as a result followed the two Orders of the President of the Court of First Instance³² and one Order from the President of the Court of Justice³³ that suspended those interim measures.

At the same time though IMS Health's competitors had decided to make use of the brick structure anyway, without waiting for the grant of the licence. IMS Health therefore brought copyright proceedings against them in the German courts. In the course of these copyright proceedings the German court referred the case to the Court of Justice for a preliminary ruling.³⁴ At present these parallel proceedings, based on the Commission's competition inquiry and decision and on the German copyright proceedings respectively are ongoing and no final decision has been reached in either of them.

We will start by analysing the Commission's decision first. From it the approach the Commission takes to the wider issue under investigation will become clear. That will then be followed by an analysis of the views expressed in the Rulings by the President of the Court of First Instance and by the President of the Court of Justice. The basis for this examination will be an economic analysis, but in doing so we will also need to comment on the essential facilities doctrine and the previous cases in which the Commission and the Court dealt with the conflict between copyright and competition law. Reference will therefore be made to cases such as *Magill*³⁵, *Oscar Bronner*³⁶, *Ladbroke*³⁷ and *Volvo v Veng*³⁸.

³² Order of the President of the Court of First Instance of 10 August 2001 in case T-184/01 R and Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R both available at Curia.eu.int.

³³ Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R), available at Curia.eu.int.

³⁴ Case C-481/01 *IMS Health v NDC Health*, pending.

³⁵ Case T-69/89 *Radio Telefis Eireann v Commission (Magill TV Guide Ltd intervening)* [1991] 4 CMLR 586; case T-70/89 *British Broadcasting Corporation and BBC Enterprises Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] 4 CMLR 669 and case T-76/89 *Independent Television Publications Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] ECR II-575, [1991] 4 CMLR 745.

³⁶ Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791; [1999] 4 CMLR 112.

2. The Commission decision in *IMS Health*: which justifications for the compulsory licence?

2.1 *General points*

When IMS Health's competitors NDC Health and AzyX Deutschland GmbH Geopharma Information Services applied for a licence covering the brick structure at various stages during the complex timeline and developments of the case, the details of which are not necessary for our present purposes, the grant of such a licence was refused by IMS Health and that resulted in the end in a complaint by NDC and AzyX to the European Commission for abuse of dominant position.

The Commission issued a decision³⁹ in which it argued that there was indeed an abuse of a dominant position under Article 82 and the urgent nature of the matter required the imposition of interim measures to avoid irreparable damage being done to IMS Health's competitors and their business prospects for success.⁴⁰

Let us have a look at the process followed by the Commission in giving this decision and let us try to find the justifications (if any) for the need to introduce interim measures to address the abuse of dominant position by IMS Health. Following the standard provisions for

³⁷ Case T-504/93 *Tiercé Ladbroke SA v Commission (Société d'Encouragement et des Steeple-Chases de France intervening)* [1997] ECR II-923, [1997] 5 CMLR 309.

³⁸ Case 238/87 *Volvo AB v Erik Veng* [1988] ECR 6211, [1989] 4 CMLR 122.

³⁹ Commission Decision 2001/165/EC of 3 July 2001 in Case COMP D3/38.044 – NDC Health / IMS Health: Interim Measures [2002] OJ L59/18.

⁴⁰ The Commission refers in paragraph 38 of its decision 2001/165/EC to the judgement of the Court in Case T-44/90 *La Cinq* [1992] ECR II-1, where at paragraph 28 the power of the Commission to impose interim measures finds its justification on the basis that "...protective measures may be granted only where the practices of certain undertakings are prima facie such as to constitute a breach of the Community rules on competition...".

any case in which the abuse of a dominant position is alleged the Commission first of all identifies the relevant geographical market. In its view that relevant geographical market is Germany,⁴¹ whereas the relevant product market is the regional sales data services.⁴²

As regards the position of dominance IMS Health is found to be dominant after examining several factors, but the Commission primarily refers to the fact that IMS Health holds a high market share not only in Germany but also in Europe⁴³, Germany being the Country that has “the largest market for regional sales data services in Europe”⁴⁴ it may therefore be regarded as a “substantial part of the common market” in this respect.⁴⁵

Let us now return to the relevant market for German regional sales data services. In order to understand the background to the case we need to know what these services are in this case and why they are needed. Pharmaceutical companies need the brick system and in particular the system put in place by IMS because this system enables them to gather data in which they can record sales of a particular drug, comparing the sales figures for each of their products with those for the products of their competitors and it also offers them a tool to measure the performance of their sales representatives.⁴⁶ In the brick structure these data are collected in each brick for a small number of pharmacies in a local area. This allows the pharmaceutical companies to obtain a detailed picture showing possible local differences, without at the same time infringing German Data Protection laws. The use of data relating to individual doctors or pharmacies would cause problems under these laws.

⁴¹ At paragraph. 55 of Commission Decision 2001/165/EC.

⁴² At paragraph 51 of Commission Decision 2001/165/EC.

⁴³ At paragraph 59 of Commission Decision 2001/165/EC, where the Commission refers on this point to the Court of Justice’s judgment in Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

⁴⁴ At paragraph 60 of Commission Decision 2001/165/EC.

⁴⁵ At paragraph 60 of Commission Decision 2001/165/EC.

⁴⁶ At paragraph 93 of Commission Decision 2001/165/EC.

The Commission adopts the conclusion that IMS Health occupies a position of quasi monopoly⁴⁷ and this is, according to the Commission, due to the fact that IMS Health owns the copyright in unique structure for recording sales data for pharmaceutical products and services and that in the relevant market there was simply no competition before the arrival on the market of NDC and AzyX. The Commission argues that IMS obtained this quasi-monopoly position through a close collaboration with the German pharmaceutical industry which lead them to the creation of a brick structure⁴⁸, in the form of the 1860 brick structure which is segmenting the German market in several sectors in which many data are collected including those of names of sales representatives, customers, doctors etc. The exact shape of the brick structure is therefore to a large part the outcome of that collaborative effort. That involvement of the primary customer in the establishment of the structure also helps to explain why this structure seems to be indispensable for other competitors that made enormous investment to enter into that market and that found it impossible to build a new structure due primarily to the unwillingness⁴⁹ of the pharmaceutical industry to switch to another structure, a process in which the industry would incur important additional costs.⁵⁰

The Commission is further sustaining that the IMS brick structure is becoming a ‘de facto’ industry standard or a ‘common language’ as defined by the Commission⁵¹ in the sense that the common language of that structure is well known and it is commonly used. For the

⁴⁷ Paragraph 58 of Commission Decision 2001/165/EC.

⁴⁸ See the first sentence of paragraph 83 and the first sentence of paragraph 86 of Commission Decision 2001/165/EC. See also paragraph 87 of the Decision and the opinion expressed by some pharmaceutical companies. See also paragraph 185 of the Decision.

⁴⁹ See final sentence of paragraph 86 of Commission Decision 2001/165/EC.

⁵⁰ Especially it has been argued by the competitors of IMS that a change to the brick structure involves a change in working conditions under German labour law and that the additional costs therefore include the fact that the contract of service of the sales representatives has to be renegotiated using the German system of co-determination and that any such change to the brick structure used will therefore mean a long and costly procedure due to the involving the workers’ council in the renegotiation procedure. See paragraph 115 of Commission Decision 2001/165/EC.

⁵¹ In paragraph 123 of Commission Decision 2001/165/EC and in paragraphs 86 and 89 in response to the defence of IMS Health (in paragraph 88) regarding the legal requirements for something to be considered an industry standard.

Commission the ‘1860 brick structure is becoming a common language for communicating the information’⁵² and all the pharmaceutical companies which assisted with its creation are in the end effectively ‘locked in’ that structure, even if one needs to add that they are locked in on a voluntarily basis. Everything turns around that structure⁵³ and the situation in Germany does not offer so much space for a substitution. The 1860 brick structure is especially a great and unique source of information.⁵⁴ And here the Commission sees parallels with the *Magill* case, as this is what it happened in *Magill* where the information concerned was contained in the TV listings on the basis of which the broadcasters had indeed a unique source of information.⁵⁵

The possibility to change the system for the collection of data exists, but despite the fact that competing companies tried it⁵⁶ this did not bring to a structure very different to the one put in place by IMS Health. But changing that structure will also mean changing other data⁵⁷ linked to that structure and therefore this will increase the costs and that will work as a deterrent for any such change. Also the relationship of the companies using the (new) structure with their sales representatives will be harmed, since also this relationship has been shaped around the 1860 brick structure.⁵⁸ The Commission’s analysis, despite the fact that in its defence IMS

⁵² At paragraph 89 of Commission Decision 2001/165/EC.

⁵³ Also marketing campaigns and market research are organised according to the data in this structure.

⁵⁴ Paragraphs 102, 103, 104 of Commission Decision 2001/165/EC. Also data companies as well as software companies make use of the brick structure and deliver their products in it. All the other data effectively follow the 1860 brick structure.

⁵⁵ The crucial fact in *Magill* is that the monopoly was a monopoly over information and that information happened to be the raw material required by a third party. Therefore *Magill* is now not any longer the only case to be remembered for its unusual facts: the unusual protection of copyright of factual information.

⁵⁶ See the comments in paragraphs 124 and 128 of Commission Decision 2001/165/EC.

⁵⁷ At paragraph 100 of Commission Decision 2001/165/EC.

⁵⁸ At paragraphs 107 and 108 of Commission Decision 2001/165/EC. Pharmacia also stated that ‘each restructuring of sales force destroys customers’ relationships with our reps, which means that we would lose significant numbers of sales at the end of the day’, as reported in paragraph 107 of Commission Decision 2001/165/EC. See also paragraph 114 of Commission Decision 2001/165/EC where the loss of the special relationship between doctors and sales representatives in case of a change of the brick structure is highlighted.

Health accuses the Commission on more than one occasion of not being precise enough⁵⁹, has shown that IMS Health's brick structure became indispensable and the overall standard.

Moreover, there are 'technical and legal constraints'⁶⁰ which make it even more difficult and in the Commission's view even impossible for other companies to create a new structure for regional sales data in Germany that is able to compete with the 1860 brick structure. The Commission concluded therefore that IMS Health should grant all its competitors a licence upon payment of a reasonable royalty for the use of its copyright work. The Commission justifies its conclusion as follows. There is an abuse that is due to the dominant position occupied by IMS Health and moreover IMS Health owns an essential facility that is impossible to substitute.

2.2 *Reliance on the Oscar Bronner case*

In its decision the Commission refers repeatedly to the essential facility doctrine, especially in the sense in which it was set out by the Court of Justice in the *Oscar Bronner*⁶¹ case.

Bronner was not a case concerned with intellectual property rights, but *Bronner* may be important because it is clearly a case about essential facilities. *Bronner* could therefore shed light on the correct interpretation of the essential facilities doctrine in European competition law. *Bronner* dealt with a system for the house to house distribution of newspapers in Austria set up by the major national newspaper. A smaller competitor argued that it should be allowed to make use of the system in order to be able to compete. In its view the system had become

⁵⁹ At paragraph 122 of Commission Decision 2001/165/EC.

⁶⁰ At paragraph 124 of Commission Decision 2001/165/EC.

⁶¹ Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791, [1999] 4 CMLR 112.

an essential facility. The Court of Justice followed the suggestion of its Advocate General Francis Jacobs to interpret the essential facilities doctrine restrictively and then ruled that it did not apply here. Important for our current purposes is the establishment of a test that a firm violates Article 82 where:

- “the refusal of access to the facility is likely to eliminate all competition in the relevant market;”
- “such refusal is not capable of being objectively justified; and”
- “the facility itself is indispensable to carry on business, inasmuch as there is no actual or potential substitute in existence for that facility”.⁶²

However, the Commission forgets to mention that *Bronner* is a case that can only show how the essential facilities doctrine can be applied in a European competition law context in general, being a case of pure competition rules application. It is indeed vital to recall that in a normal situation competition rules are the only set of rules used to regulate market behaviour. That is also so in the *Bronner* case. However, as we have demonstrated above, in intellectual property cases in general and particularly in copyright cases there is not just one set of rules that affects the market behaviour regulation point. Both intellectual property and copyright rules on the one hand and competition rules on the other hand set out to regulate competition conditions on the market and to steer certain forms of behaviour on the market. The presence of such a second set of rules must have an impact on the test that is used, otherwise its vital role is completely ignored. It is therefore submitted that it is not possible to transfer the test set out in the *Oscar Bronner*⁶³ case to intellectual property and copyright related cases

⁶² *Ibidem*.

⁶³ For a complete analysis of the case see Treacy, “Essential Facilities – Is the Tide Turning”, [1999] IPQ 501 and Stothers, “Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union”, [2001] Eur. Competition L. Rev. 256.

without modifying it. This must mean that any strict reliance by the Commission on the *Bronner* case in its IMS Health decision must be misguided. The decision cannot be based solely and straightforwardly on the Court's judgment in the *Oscar Bronner* case.

2.3 *Reliance on the Magill case*

To be fair to the Commission, it also argues that its decision follows from the judgments in *Magill*⁶⁴ and *Ladbroke*⁶⁵. It may therefore be advisable to look more carefully at these judgments and the way in which they can apply in the IMS Health context.

It is by now well known that the *Magill* saga started when Magill set out to publish the programme listings of the BBC, ITV and RTE in a single weekly publication. The three broadcasters refused to supply those listings and based their refusal to licence on their copyright in the listings. When Magill's subsequent complaint to the Commission resulted in an investigation and a decision the Commission⁶⁶ ruled that the broadcasters had abused their dominant position in exercising the exclusive right awarded to them by copyright in the way they did. By way of sanction the Commission ordered that advance programme listings information be supplied to Magill. The broadcasters then took the case to Court of First Instance, but they were disappointed.⁶⁷ The Court of First Instance did indeed uphold the

⁶⁴ Case T-69/89 *Radio Telefis Eireann v Commission (Magill TV Guide Ltd intervening)* [1991] 4 CMLR 586; case T-70/89 *British Broadcasting Corporation and BBC Enterprises Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] 4 CMLR 669 and case T-76/89 *Independent Television Publications Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] ECR II-575, [1991] 4 CMLR 745.

⁶⁵ Case T-504/93 *Tiercé Ladbroke SA v Commission (Société d'Encouragement et des Steeple-Chases de France intervening)* [1997] ECR II-923, [1997] 5 CMLR 309.

⁶⁶ *Magill TV Guide/ITP, BBC and RTE decision* [1989] OJ L78/43.

⁶⁷ Case T-69/89 *Radio Telefis Eireann v Commission (Magill TV Guide Ltd intervening)* [1991] ECR II-485, [1991] 4 CMLR 586; Case T-70/89 *BBC and BBC Enterprises Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] ECR II-535, [1991] 4 CMLR 669 and Case T-76/89 *Independent Television Publications Ltd v Commission (Magill TV Guide Ltd intervening)* [1991] ECR II-575, [1991] 4 CMLR 745.

Commission's decision⁶⁸ on the basis of the following two stage analysis. On the one hand it was clear in the Court of First Instance's view that 'Conduct of that type [...] clearly goes beyond what is necessary to fulfil the essential function of the copyright as permitted in Community law'. In a second stage the Court could not identify any objective and specific justification for this conduct and concluded therefore that:

'[...] the aim and effect of the applicant's exclusive reproduction of its programme listings was to exclude any potential competition [...] in order to maintain the monopoly enjoyed [...] by the applicant on that market. From the point of view of outside undertakings interested in publishing a television magazine, the applicant's refusal to authorise, on request and on a non-discriminatory basis, any third party to publish its programme listings is therefore comparable [...] to an arbitrary refusal by a car manufacturer to supply spare parts [...] to an independent repairer.'⁶⁹

On this point the Court of First Instance sees clear parallelisms with the *Volvo v Veng*⁷⁰ case and the rule set out in it by the Court of Justice. The broadcasters' behaviour does however come under the exceptions in the latter case rather than under the main rule and this means that there was a breach of competition rules and that by way of sanction they could be obliged to grant a licence.

By then the case had become one of principal and the fight which seemed to oppose copyright and competition law in the extreme was subsequently brought before the Court of Justice on

⁶⁸ See R. Whish, *Competition Law*, Butterworths (4th ed, 2001), at 612.

⁶⁹ Case T-69/89 *Radio Telefis Eireann v Commission (Magill TV Guide Limited intervening)* [1991] ECR II-485, [1991] 4 CMLR 586 at 618.

⁷⁰ Case 238/87 *Volvo AB v Erik Veng* [1988] ECR 6211, [1989] 4 CMLR 122.

appeal.⁷¹ The Court's judgment did however not change a great deal, as the Court reached the same conclusion as that reached by the Court of First Instance. Moreover, the wording of the judgment was oriented almost exclusively towards competition law principles and the resemblance with the *ICI and Commercial Solvents v Commission*⁷² approach which relies on elements of the US essential facilities doctrine. Moving away from the detail of the facts in *Magill*, which are not relevant for our present purposes, it needs to be reminded though, as does the Commission in paragraph 67 of its *IMS Health* decision that in *Magill* the Court first of all confirmed that the mere ownership of an intellectual property right, such as the copyright in the programme listings, does not as such confer a dominant position⁷³ and that even an undertaking holding a dominant position can refuse to grant a licence, without such a refusal as such constituting an abuse of the dominant position. The Court then went on to say that in exceptional circumstances the exercise of an exclusive intellectual property right by a proprietor, e.g. a refusal to grant a licence, can involve abusive conduct that is prohibited by Article 82 of the Treaty.⁷⁴ Such a prohibition can be enforced by the Commission through the imposition of an obligation to grant a licence.⁷⁵

The exceptional circumstances referred to by the Court in relation to the broadcasters' refusal to licence the programme listings in *Magill* come down to two elements. By refusing to make programme listings available to Magill under licence the broadcasters prevented the appearance of a new product that they did not offer, but for which there was a clear demand from the side of the consumer. It is important to add in relation to this first element that as a

⁷¹ Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR I-743, [1995] 4 CMLR 718.

⁷² *ICI and Commercial Solvents v Commission* [1974] ECR 223, see also S. Anderman, *EC Competition Law and Intellectual Property Rights: the Regulation of Innovation*, Oxford University Press (1998), at 209.

⁷³ See also *Philips Electronics NV v Ingman Ltd and the Video Duplicating Company Ltd* [1999] FSR 112, where Laddie J. applied the *Magill* approach in a UK case.

⁷⁴ Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR I-743, [1995] 4 CMLR 718, at paragraphs 46, 49, 50 and 54.

⁷⁵ *Ibidem*.

result of their exclusive copyright in the listings the broadcasters were the only source for any such information that is vital for anyone wishing to publish a weekly TV guide. The second element is that by denying access to that vital material without which the new product could not see the light of day, the broadcasters were effectively reserving the secondary market for weekly TV guides to themselves. The Court clearly emphasises the secondary market point by indicating that the broadcasters' main activity is broadcasting and that the prohibited activity therefore did not affect that primary activity but only the TV guides market that is only a secondary market for them. The refusal could not be justified by virtue of the broadcasters' normal activities.⁷⁶

At this stage one clearly sees the appearance of the essential facilities doctrine. As the broadcasters are the only source of the necessary copyright material and as that material is essential, i.e. the TV guide cannot be produced without it, the copyright protected information concerning programme listings has become an essential facility for any company that wishes to operate on the relevant market. *Magill* can therefore be seen as an application of the essential facilities doctrine in a copyright case, whereas *Bronner* applies the same doctrine to a 'normal' non-intellectual property related case, as discussed above.⁷⁷ This dual track aspect of the application of the essential facilities doctrine by the Court of Justice will require further analysis at a later stage. It is also important to highlight the fact that the Court emphasised that there was a clear and unmet demand on the consumers' side. Like all US essential facilities cases *Magill* also links the essential facilities doctrine to the benefit that arises for the consumer from its application.⁷⁸

⁷⁶ See W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell (4th ed, 1999), at 766-767.

⁷⁷ See Woolridge, "The Essential Facilities Doctrine and *Magill* II: The Decision of the ECJ in *Oscar Bronner*", [1999] IPQ 256, Treacy, "Essential Facilities – Is the Tide Turning", [1999] IPQ 501 and Stothers, "Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union", [2001] Eur. Competition L. Rev. 256.

⁷⁸ See Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles", [1989] 58 ATLJ 84.

When the Commission refers to the Court's judgment in *Magill*, it summarises the position adopted by the Court as follows:

“The Court therefore recognised that in exceptional circumstances the exercise of an exclusive right deriving from an intellectual copyright may be abusive even in the absence of additional abusive conduct when, *inter alia*, it prevents the appearance of a new product.”⁷⁹

This summary is causing problems in as far as the use of the term ‘inter alia’ is possibly a misrepresentation of the Court's judgment in *Magill*. Indeed, the Commission seems to suggest that the appearance of a new product is not a necessary element and that other elements might replace it. In the Commission's view the appearance of a new product is just one of the exceptional circumstances to which the Court refers. It is submitted that it is wrong to use the term ‘inter alia’ in this way and to give this interpretation to the judgment of the Court. Instead, it is submitted that the ‘inter alia’ type of exceptional circumstances which the Court withheld in *Magill* amount to the fact that the information concerned had become an essential facility for the publishers of TV guides.⁸⁰ The judgment in *Magill* supports the point of view that the application of the essential facilities doctrine in relation to intellectual property, i.e. for there to be an abuse of the dominant position the possession of which is not an abuse per se, requires the presence of all element set out above. The prevention of the emergence of a new product is therefore a necessary component and not just an optional element as suggested by the Commission.

⁷⁹ Paragraph 67 of Commission Decision 2001/165/EC.

⁸⁰ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Butterworths (3rd ed , 2001), at 307.

2.4 *Reliance on the Ladbroke case*

The Commission also argues that its point of view is supported by the judgment of the Court of First Instance in *Ladbroke*.⁸¹ This case dealt with the question whether or not a refusal by PMU, the French copyright owners, to license sound and pictures of French horse races to a Ladbroke's Belgian betting shops amounted to an abuse of a dominant position to which the approach adopted in *Magill* should be applied.

The Court of First Instance came to the conclusion that the facts of the *Ladbroke* case did not warrant the application of the rules set out in *Magill*. That conclusion was based almost entirely on the fact that the images of the horse races were not an essential element for Ladbroke. Ladbroke did not need the images to enter the market. On the contrary, the market concerned was that for betting shops and Ladbroke was already a major player on that market. Despite the fact that PMU copyright controlled the only access to the images, the essential facilities doctrine did not operate here. PMU could also not be accused of reserving any market for themselves, as they were not even active on the betting shop market. The real issue was that Ladbroke rather wanted to offer its clients these images as an additional service in its shops in relation to its main betting activity.

One could argue that the main reason for the Court of First Instance not to examine the point of the emergence of a new product is the fact that if one condition is not met the case was bound to fail as the conditions apply cumulatively. But one could go further, as the Commission seems to be doing in its *IMS Health* decision, and highlight the Court of First Instances statement that the "refusal to supply the applicant could not fall within the

prohibition laid down by Article [82] 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 the part of the consumer”.⁸² Taken on its own this quote could suggest that there is no need to establish that the abuse takes place on a downstream market before *Magill* can be applied and even more importantly that the conditions found in *Magill* might be alternatives, which excludes the need for their cumulative application. It is submitted though that this is not a correct approach. The whole approach hinges on the literal interpretation out of context of the single word ‘or’. If one puts in the context that interpretation becomes difficult. The Court of First Instance felt hardly any need to investigate the second point.⁸³ They dismissed the case on the first ground. Anything they said about the second point is therefore obiter. If they had seen the requirements as real alternatives, as the Commission suggests, they would have needed to deal with the second point in much more depth even if the truth is probably that the emergence of a new product was not blocked and that in any case the sound and pictures were not the essential ingredient of any such product.

The Commission’s interpretation which dismisses the new product requirement that seemed so prominent in *Magill* is therefore based on flimsy grounds and reliance on the passage from the judgment of the lower European court in *Ladbroke* to achieve this is precarious.⁸⁴ This is even more so since it disregards the economic analysis set out above. The approach may well work in a non-intellectual property context. The *Bronner* case which we discussed above

⁸¹ Case T-504/93 *Tiercé Ladbroke SA v European Commission (Société d’Encouragement et des Steeple-Chases de France intervening)* [1997] 5 CMLR 309. For a complete overview of the case see Fitzgerald ‘*Magill Revisited: Tiercé Ladbroke SA v The Commission*’ [1998] EIPR 154.

⁸² Paragraph 68 of Commission Decision 2001/165/EC.

⁸³ Hull, Atwood and Perrine, “Intellectual Property – Compulsory Licensing”, [2002] *The European Antitrust Review* 36, at 37 (A Global Competition Review Special Report).

⁸⁴ *Ibidem*.

showed how the essential facilities doctrine could work in this context. Similarly the *Commercial Solvents*⁸⁵ judgment leads one to the conclusion that there is an abuse of a dominant position on the sole ground of the monopolisation of a secondary market. In non-intellectual property cases that is an abuse as such even if a new product is not prevented from appearing on the market. Here the requirements do not need to be applied cumulatively. But we already explained that the presence of intellectual property rights and their competition regulative function change the picture dramatically. It is therefore submitted that the Commission is misguided in its reliance on *Ladbroke* for its views in the *IMS Health* decision.⁸⁶

The Commission's overall conclusion in its *IMS Health* decision that there was indeed an abuse of a dominant position, based on the fact that it saw the brick structure as an essential facility before applying its liberal interpretation of *Magill* to this case must therefore become open to serious doubts as to its correctness. Apart from *Ladbroke* the Commission essentially relied on *Bronner* and seemed to apply a combination of step one and three of the essential facilities test in that case when it ruled that "use of the 1860 brick structure is indispensable to carrying on business on the relevant market; there is no actual or potential substitute for it".⁸⁷

⁸⁵ See *ICI and Commercial Solvents v Commission* [1974] ECR 223

⁸⁶ Hull, Atwood and Perrine, "Intellectual Property – Compulsory Licensing", [2002] *The European Antitrust Review* 36, at 37 (A Global Competition Review Special Report).

⁸⁷ Paragraph 71 of Commission Decision 2001/165/EC.

3. IMS Health before the President of the Court of First Instance and of the Court of Justice

The proceedings before the president of the Court of First Instance and before the President of the Court of Justice in the *IMS Health* case⁸⁸ were up to now primarily concerned with the interim measures issue. No decision has therefore emerged on the substantive issues

From the discussion above it has become clear that it is at least arguable that *Magill* had left open several issues.⁸⁹ These issues were primarily open to argument because it was not clear whether the decision on that point in *Magill* depended entirely on the facts of the case, i.e. other facts could receive a different treatment, or whether they were necessary element from a legal point of view. In fairness to the Commission, all it was trying to do was to fill in the gaps and clarify the matter, albeit be it in a somewhat peculiar way.

One of the issues left open is the question whether a finding of exceptional circumstances required cumulatively the fact that the intellectual property right was linked to essential inputs for secondary markets on the one hand and that a new product had to be introduced in that market for which there was significant and unmet demand on the other hand. The commission answers that question clearly in the negative, widening the application of Article 82

⁸⁸ Order of the president of the court of First Instance of 10 August 2001 in case T-184/01 R, Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R and Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R), all available at www.Curia.eu.int.

⁸⁹ See the discussion in paragraphs 88-105 and the conclusion in paragraph 106 that there is 'a very serious dispute' concerning these in the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R. This Order was upheld by the Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R).

significantly.⁹⁰ The Commission flatly stated in addition that “there is no requirement for a refusal to supply to prevent the emergence of a new product in order to be abusive”.⁹¹ Similarly the Commission dismisses the requirement that the dominant firm’s refusal to licence and grant access to the copyright work must enable it to restrict competition on a second (downstream) market.⁹² The only factor which moves away from this extreme interpretation which heavily favours competition law over intellectual property law is the fact that the Commission sees this as an extreme case because the brick structure had become an industry standard.⁹³

IMS Health counters these arguments with references to other aspects of the Courts case law. It points out that in order for the use of intellectual property rights to become an abuse there have to be exceptional circumstances. These can be found where the refusal to licence is combined with other unlawful behaviour or where there is an essential facility at stake.⁹⁴ The notion of essential facilities can however in its view only apply “where two distinct markets are involved and the product or service supplied in one (usually an 'upstream) market is a necessary input for the production of goods or services in the second (usually 'downstream) market. The previous case-law where the Community judicature and, before the adoption of the contested decision, the Commission have considered refusals to supply by a dominant undertaking in such circumstances to be abusive has always involved two different markets: it cites, in particular, *Commercial Solvents v Commission* ([...] separate markets for a raw

⁹⁰ Paragraph 100 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R and paragraph 17 of the Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R).

⁹¹ Paragraph 180 of Commission Decision 2001/165/EC.

⁹² Paragraphs 85, 86 and 102 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

⁹³ Paragraph 101 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

⁹⁴ Paragraph 79 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

material and derivatives of the raw material)⁹⁵; *CBEM v CLT and IPB* ([...] separate markets for television broadcasting and telemarketing)⁹⁶; *GB-Inno-BM* ([...] separate markets for the establishment and operation of the public telecommunications network, and for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the said network)⁹⁷; *Magill* (separate markets for television programme listings and guides); *Tiercé Ladbroke v Commission* ([...] separate markets for broadcasting coverage of horse races and the operation of betting shops [...])⁹⁸; *Bronner v Mediaprint* ([...] separate markets for the distribution of newspapers and the publication and sale of newspapers [...])⁹⁹ »¹⁰⁰.

In his Order of 26th October 2001 the President of the Court of First Instance summarises IMS Health's argument further as follows. "There are two essential aspects to the claim advanced by the applicant on the basis of this case-law. First, it contends that the 'essential facility doctrine presupposes the use by a dominant undertaking of its market power on the market where it is dominant in order to preclude or undermine competition on a downstream or neighbouring market where it already operates or wishes to operate, or which it wishes simply to prevent, as in *Magill*, from emerging as a new market. Secondly and referring specifically to *Magill*, which it stresses is the only case before the contested decision where the Commission sought to apply the approach underlying the 'essential facilities doctrine to the exercise of intellectual property rights, IMS contends that it was the rightholders' use of the copyright acquired as a result of their activities on the market where they were dominant (broadcasting) in order to extend that dominance into a downstream market (weekly television

⁹⁵ Joined Cases 6/73 and 7/73 [1974] ECR 223.

⁹⁶ Case 311/84 [1985] ECR 3261.

⁹⁷ Case C-18/88 [1991] ECR I-5941.

⁹⁸ Case T-504/93 [1997] ECR II-923.

⁹⁹ Case C-7/97 [1998] ECR I-7791.

¹⁰⁰ Paragraph 80 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

guides) that amounted to the 'exceptional circumstances justifying the characterisation of their refusal to license as an abuse. IMS Health's refusal, in this case, to license its competitors to use the 1 860 brick structure is justified because it is not seeking to exploit its market power in a separate market. It cannot be abusive, the applicant insists, for a copyright holder to refuse to license competitors who wish to have access to its right in order to compete against it on the very market where the exclusivity granted by that right is used as the central feature of the rightholder's business and where its dominance may, at least potentially turn, on the maintenance of its exclusive right. The mere fact that that protected feature has itself become the subject of a strong customer preference, such that the product or service incorporating it dominates the market, does not suffice to require the rightholder to license those who wish to compete against it on that market.”¹⁰¹ This is indeed important. In *Magill* the broadcasters were the sole suppliers of the information on the TV programmes, as only they knew what they were going to broadcast. *Magill* could not develop alternative listings. In *IMS Health* however competitors in the data services market can develop other formats, even if copying an existing one may make more sense from a business point of view. Here too the Commission's approach would not simply be an application of *Magill*, but a massive extension of it.

Additionally the Commission is unable to point towards any new product for which there was a significant unmet demand on the side of the consumer. The President of the Court of Justice approved in this respect of the ruling by his counterpart in the Court of First Instance that IMS Health's view that the existing case law required that the refusal to licence must prevent the emergence of a new product on a market that is separate from the one on which the dominant

¹⁰¹ Paragraph 81 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

undertaking that refuses to grant the licence is operating deserves serious consideration.¹⁰² There may therefore after all be a need for a potential new product on a separate market.

This must mean that doubts still surround the Commission's ultra-liberal interpretation of *Magill*, *Ladbroke* and *Bronner* in relation to copyright. These doubts are re-enforced by the fact that the President of the Court of First Instance confirms the importance of copyright, which points towards the conclusion that they may deserve and require some form of special treatment. In the words of the President the "protection of intellectual property rights is in the public interest".¹⁰³ The Commission's heavy reliance on Oscar Bronner may therefore not be the best way forward.

Sticking with the latter case for a second, one can also raise doubts as to whether the Commission interpreted it correctly on another point. The President of the Court of First Instance ruled that "[i]t cannot [...] be excluded that the balance of interests effected in the contested decision by the Commission, which seems to equate the interests of NDC and AzyX with the interests of competition [...] ignores the primary purpose of Article 82 EC, which is to prevent the distortion of competition, and especially to safeguard the interests of consumers, rather than protect the position of particular competitors (Opinion of Advocate General Jacobs in *Bronner*, paragraph 58)"¹⁰⁴. The Commission fails to show adequately how the consumers are affected by the behaviour against which they act in their decision, they simply seem to act to protect the direct competitors, i.e. those that are subject to a restriction as a result of the exclusive (copy-)right. Such an approach leads to a sterile debate which

¹⁰² Paragraph 17 of the Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R) with reference to paragraph 105 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

¹⁰³ Paragraph 82 of the Order of the President of the Court of Justice of 11 April 2002 in case C-481/01 P(R).

¹⁰⁴ Paragraph 145 of the Order of the President of the Court of First Instance of 26 October 2001 in case T-184/01 R.

directly opposes the exclusive right and competition law. One must take account of the interest of the consumers, as that may provide the key to solving the debate.¹⁰⁵

IV. Conclusion: What should be the way forward?

Where does all this lead us and what should be the way forward? It is hard to say where the Court of First Instance and the Court of Justice will eventually take European Law when they render their judgments in the IMS Health Saga. All that is known at present is that the Court of Justice's diary mentions that a hearing in Case C-481/01 will take place on 6th March 2003. This conclusion will therefore focus on the theoretical approach that should underpin any decision in the case.

Personally I feel a lot of sympathy for the approach taken and defended by IMS Health. This is in my view not just a personal preference though. It is also based on sound economic arguments. Intellectual property rights have a positive role to play in a modern free market society. Just as competition law they serve the purpose of promoting innovation and enhancing consumer welfare. It is therefore only fair that the presence of an exclusive right, such as copyright or any other intellectual property right, are taken into account as an additional factor when cases such as *Magill* and *IMS Health* are examined. The arguments set out in the sections above have already given a clear indication as to how this is to be achieved.

How is that to be achieved? It is submitted that the approach in *Bronner* can not be applied unreservedly, as it only looks at competition law when establishing a test for essential

¹⁰⁵ Lemarchand, Fréget and Sardain, "Biens informationnels: entre droits intellectuels et droit de la concurrence", [2003] *Propriétés Intellectuelles* 11 at 23.

facilities cases. Intellectual property rights as exclusive rights justify a degree of monopolisation of a primary market. After all it is their role to protect intellectual creations embodied in certain articles. Such articles, such as books, CD's, computer software and databases should be protected in relation to their commercial exploitation on the primary market, as copyright is given to the works contained in them to reward the creative activity of the author. That reward does not come as a lump sum, but as a chance to market any such articles on their normal market. Things are different when downstream markets are also affected. The reward for the positive contribution made through the creation of intellectual property is situated on the primary market and does not justify its abusive use for other purposes on a secondary market. Monopolisation of a secondary market must therefore be required to apply the essential facilities doctrine. This is particularly true in relation to information market goods. The copyright in them is weak, as the level of intellectual creation involved is low and as copyright in them protects primarily the financial and commercial investment in their creation.¹⁰⁶ That investment and its protection against piracy and straightforward copying does not require or justify any activity that would involve copyright and would make it effectively impossible for competitors to develop a downstream market.¹⁰⁷

But that is not all, an abuse in market terms also involves the fact that another positive development is stopped. This means that stopping the emergence of a new product for which there is an unmet demand is also required in a cumulative way. Otherwise there is no justifiable need to curtail an intellectual property right that in general fulfils a positive role.¹⁰⁸

On the other hand copyright exists to protect the article in which the copyright work is

¹⁰⁶ See W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell (4th ed, 1999), at 766-767.

¹⁰⁷ Lemarchand, Fréget and Sardain, "Biens informationnels: entre droits intellectuels et droit de la concurrence", [2003] *Propriétés Intellectuelles* 11 at 22 and A. and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Litec (2nd ed, 2001) at 1033

¹⁰⁸ Compare the conclusion reached by Hull, Atwood and Perrine, "Intellectual Property – Compulsory Licensing", [2002] *The European Antitrust Review* 36 (A Global Competition Review Special Report).

included. That protection is not served and does not include therefore the blocking of the emergence of a new product or article that is not in direct competition with the first article, especially not if there is no alternative for the producer of the new product due to the dominant position that is occupied by the copyright holder.¹⁰⁹

By adopting this stricter approach in applying competition law and the essential facilities doctrine¹¹⁰ both areas of law can fulfil their proper role and serve their common purpose even better. One should also insist on the blocking of a new product for which there is a demand and on the opposition to the monopolisation of a secondary market if the President and his reference to Advocate General Jacobs' conclusion in *Bronner* which were mentioned earlier are to be followed and the consumer needs to benefit as well if the essential facilities doctrine is to be put into operation.

Finally, the choice between the three scenarios that could therefore emerge needs to be revisited.¹¹¹ In the first scenario it was argued that one could arrive at the conclusion that what is proposed in cases such as *IMS Health* is an exceptional measure that will only need to be brought into operation infrequently in exceptional sets of circumstances in which inefficient and anti-competitive behaviour occurs. In a second scenario it was argued that one could find that there is really a structural problem with the operation of copyright and its use in the information goods market. In that case there could be a need to make structural changes to copyright and its operation, at least on this market. These two scenarios are acceptable for the very simple reason that they fit in with the fundamental analysis of the roles of copyright and competition law set out above. The third scenario would involve the competition law

¹⁰⁹ See on this point Stothers, "The End of Exclusivity?: Abuse of Intellectual Property Rights in the E.U.," [2002] EIPR 86 at 93.

¹¹⁰ See R. Whish, *Competition Law*, Butterworths (4th ed, 2001), at 612-613.

¹¹¹ See the end of section II above.

mechanisms interfering with the operation of copyright in the information goods market on a frequent and regular basis. That would undermine the structural system put in place by means of copyright and in a certain sense this would show an abuse of competition law rather than an abuse of copyright and intellectual property law. It has already been seen above that the Commission's approach to the IMS Health case needs to be rejected on this basis. The stricter approach which has been proposed above is designed to stick as much as possible to scenario one, but it needs to be admitted that the increasing presence of weak non-original works in copyright may see an increase in the number of exceptional cases, such as *Magill*. The exceptional circumstances in that case should not become the norm. The conditions on which and the level at which copyright offers protection for information market goods should then be revised to get the balance right¹¹². But that is a job for the legislator, who will have to balance delicately the interests of all parties concerned, such as rightholders and users but also the consumers of the goods and services that eventually emerge, as the interests of the latter are easily overlooked¹¹³.

¹¹² Ramello, "Copyright and Antitrust Issues", Research paper available from the SERCI website at www.serci.org at 29-31.

¹¹³ See the references above in note 104 in the context of the *IMS Health* case.