

Fordham International Law Journal

Volume 32, Issue 2

2008

Article 7

The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations

Arthur R. Pinto*

*

Copyright ©2008 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The European Union's Shareholder Voting Rights Directive From an American Perspective: Some Comparisons and Observations

Arthur R. Pinto

Abstract

The European Union ("EU") has recently celebrated its 50th anniversary. This Article is based upon my presentation in the Symposium celebrating the anniversary held at Fordham Law School and sponsored by the Fordham International Law Journal. The Article will look at how the European Union has recently approached company law issues (usually referred to as corporate law in the United States) and particularly shareholder voting rights through the recent EU directive on the exercise of certain rights of shareholders in listed companies ("Voting Rights Directive" or "Directive"). My focus is on company law with regard to the corporate governance of publicly traded corporations as opposed to closely-held corporations. (P) While there are many different forces that influence the development of company law, I will focus on three significant themes that influence the development of company law in the United States. Those influences are the role of ownership, the focus of company law, and federalism. These have also influenced the development of EU company law, but with differences. I will discuss the themes and compare how they have influenced the U.S. and EU's agenda on company law. I will then focus on the Voting Rights Directive as it compares to the United States and reflects on these themes.

THE LIMITATION OF INTELLECTUAL PROPERTY IN THE NAME OF COMPETITION

*Paul Nihoul**

INTRODUCTION

Intellectual property (“IP”) is often credited with providing an incentive for inventors to develop their creativity. Through IP protection, inventors can recoup their investment and make a profit.¹ That idea, which has inspired legislators worldwide,² is currently challenged in the European case law on competition. In the last twenty years, five cases have limited, in the name of competition, the possibility for firms to use IP rights acquired in conformity with applicable laws. These cases are examined in this Article. We analyze the scope of the emerging jurisprudence, and we investigate the arguments articulated, in support of their position, by the European instances involved.

I. CASE LAW

A. *Volvo, Renault*³

The case law on the limitation of IP in the name of competition emerged in the 1980s in two preliminary rulings delivered by the European Court of Justice (“ECJ” or “Court”). These cases involved the car constructors Volvo and Renault, which had set aside demands for licenses concerning body panels

* License in Law (Louvain), LL.M. (Harvard), Doctorate in Law (Louvain), Professor of Law (Louvain, Belgium, and Groningen, the Netherlands).

1. See, e.g., ROBERT P. MERGERS & JANE C. GINSBURG, FOUNDATIONS OF INTELLECTUAL PROPERTY (2004); MICHAEL SPENCE, INTELLECTUAL PROPERTY (2007). With a more critical tone, cf. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003). On the relation between Intellectual Property (“IP”) and competition law, see THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY (Steven D. Andeman ed., 2007); EUROPEAN COMPETITION LAW ANNUAL 2005: THE INTERACTION BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2006); JONATHAN D. C. TURNER, INTELLECTUAL PROPERTY AND EU COMPETITION LAW (2008).

2. For a European perspective, see generally GUY TRITTON, INTELLECTUAL PROPERTY IN EUROPE (2008); TREVOR COOK, EU INTELLECTUAL PROPERTY (2007).

3. AB Volvo v. Erik Veng (UK), Case 238/87, [1988] E.C.R. 6211; Consorzio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Régie Nationale Des Usines Renault, Case 53/87, [1988] E.C.R. 6039 [hereinafter *Renault*]. These judgments contain in substance the same principles. In this Article, we mainly refer to the former.

meant for their cars. If they had accepted these demands, the body panels would have been produced or imported from other Member States by third parties.⁴ The constructors held design protections on these panels. Panels of other designs could not be used.⁵ The case was decided along the following principles:

Principle 1: IP cannot be deemed, as such, incompatible with the rules of competition. Otherwise, the whole system of protection of inventions would fall apart.

Principle 2: Despite the compatibility of IP and the rules of competition in principle, the use made of IP must be scrutinized under Article 82 of the Treaty Establishing the European Community ("EC"), which prohibits abuses committed by dominant firms.⁶

Principle 3: Article 82 EC entails a prohibition, in that context, of IP related behavior, (a) adopted by dominant firms, (b) in exceptional circumstances.⁷

These principles have appeared in all subsequent cases on the subject matter.⁸ In these cases, the ECJ, the Court of First Instance ("CFI"), and the European Commission, systematically started their opinions by stating that their intention was not to challenge IP as such—but to carry out a limited control on behavior adopted by dominant firms in exceptional circumstances.⁹

In *Volvo* and *Renault*, the ECJ provided examples on how

4. *Volvo*, [1988] E.C.R. 6211; *Renault*, [1988] E.C.R. 6039.

5. *Volvo*, [1988] E.C.R. 6211; *Renault*, [1988] E.C.R. 6039.

6. In this Article, we do not consider the application of Article 81 of the Treaty Establishing the European Community ("EC") to licensing agreements. Consolidated Version of the Treaty Establishing the European Community, art. 81 O.J. C 321 E/37 at 73-74 (2006) [hereinafter EC Treaty]. On the application of Article 81(3) EC to categories of technology transfer agreements, see Commission Regulation No. 772/2004, O.J. L 123/11 (2004); Commission Notice, O.J. C 101/2 (2004). On exemptions, see generally J.H.J. Bourgeois and Jan Bocken, *Guidelines on the Application of Article 81(3) of the EC Treaty or How to Restrict a Restriction*, 32 *LEGAL I.E.I.* 111-21 (2005).

7. See generally *Volvo*, [1988] E.C.R. 6211; *Renault*, [1988] E.C.R. 6039.

8. See, e.g., Opinion of Advocate General Sharpston, *The Wellcome Foundation v. Paranova Pharmazeutika Handels GmbH*, Case C-276/05 (ECJ, delivered Oct. 9, 2008) (Court decision not yet issued); *UNION FRANÇAISE DE L'EXPRESS (UFEX) v. COMMISSION*, Case T-60/05, [2007] E.C.R. 3397; *SGL Carbon AG v. Commission*, Case T-68/04 (CFI Oct. 8, 2008) (not yet reported).

9. See, e.g., Opinion of Advocate General Sharpston, *The Wellcome Foundation v. Paranova Pharmazeutika Handels GmbH*, Case C-276/05 (ECJ, delivered Oct. 9, 2008) (Court decision not yet issued); *UNION FRANÇAISE DE L'EXPRESS (UFEX) v. COMMISSION*, Case T-60/05, [2007] E.C.R. 3397; *SGL Carbon AG v. Commission*, Case T-68/04 (CFI Oct. 8, 2008) (not yet reported).

Principle 3 above could be implemented.¹⁰ For the jurisdiction, exceptional circumstances are present where a dominant firm arbitrarily refuses to grant a license, where it imposes unfair royalties or where it discontinues production despite the existence of demand. The ECJ presented these situations as indicative. Other circumstances may thus be found exceptional. Of the circumstances mentioned in the rulings, the first one has come back in all IP/competition cases. These cases typically feature a dominant firm refusing to grant a license demanded by a third party.

B. *Magill*¹¹

In the 1990s, the relationship between IP and competition was discussed again. This time, the problem gave rise to a decision by the European Commission, a CFI judgment and, on appeal, an ECJ ruling.¹² The case featured three broadcasting companies¹³ opposing the publication, by a third party,¹⁴ of listings containing copyright protected information on their television ("TV") programs. Together, they dominated the markets for TV information in Ireland.¹⁵ Their behavior was found abusive under Article 82 EC.¹⁶ No justification was accepted. The Commission, the CFI, and the ECJ reiterated the principles mentioned above: compatibility of IP in principle, control on the use made of it, and prohibition of behavior adopted by dominant firms in exceptional circumstances.¹⁷

10. See generally *Volvo*, [1988] E.C.R. 6211; *Renault*, [1988] E.C.R. 6039.

11. See Commission Decision No. 89/205/EEC, O.J. L 78/43 (1988) [hereinafter *Magill*]; *Radio Telefis Eireann RTE v. Commission*, Case T-69/89, [1991] E.C.R. 485 [hereinafter *RTE*]; *Independent Television Publications Ltd v. Commission*, Case T-76/89, [1991] E.C.R. 575; see also *Radio Telefis Eireann (RTE) v. Commission*, Joined Cases 241-42/91, [1995] E.C.R. 743 [hereinafter *RTE II*]. These cases are similar. *Id.* For that reason, we mainly refer, in this Article, to the *Radio Telefis Eireann RTE v. Commission* ("RTE") judgment. See generally Thomas C. Vinje, *The Final Word on Magill: The Judgment of the ECJ*, E.I.P.R. 1995, 17(6), 297-303; Simon M. Taylor, *Copyright versus Right to Compete: The Judgment of the ECJ in Magill*, C.T.L.R. 1995, 1(3), 99-102.

12. See generally *Magill*, O.J. L. 78/43 (1988), *RTE* [1991] E.C.R. 485, *RTE II*, [1995] E.C.R. 743.

13. The British Broadcasting Corporation ("BBC"), Independent Television Publications Limited ("ITP"), and Radio Telefis Eireann ("RTE").

14. *Magill TV Guide Limited*.

15. The geographic market included the northern part of the island. The product markets deemed relevant in the case are identified *infra*.

16. *Magill*, O.J. L. 78/43, at 23 (1988).

17. See generally Vinje, *supra* note 11.

A striking feature is that, in addition to reiterating these principles, the said institutions further explained and motivated their position. After that case, the principle of an intervention was thus established together with its justifications. Discussions would still arise afterwards—they would remain limited to the content of conditions to satisfy.

Justification 1: The broadcasters infringed Article 82 EC because they dominated the primary markets for TV listings and used that domination to protect derived activities on the market for (weekly) publications.

Justification 2: Article 82 EC was also violated because, with their behavior, the broadcasters prevented the emergence of a new product. Had an authorization been granted, a weekly comprehensive TV guide could have been published.¹⁸

Justification 3: The broadcasters used their dominant position to avoid competition with third parties on the market for weekly, comprehensive TV guides.

Justification 4: With their refusal, the broadcasters created a situation not favorable for consumers.¹⁹

C. *IMS Health*²⁰

In *IMS Health*, a German firm (IMS Health) was selling health related data to pharmacies and doctors' practices in Germany.²¹ To that effect, it had developed a "brick structure"²²

18. The case arose because an independent firm started the publication of a comprehensive guide containing protected information. The broadcasters initiated proceedings before national courts. A complaint was lodged by the independent firm to the European Commission which, in a decision, compelled the broadcasters to authorize the publication. *Magill*, O.J. L. 78/43, at 23 (1988). The validity of the decision was challenged before the Court of First Instance ("CFI"). *RTE*, Case T-69/89, [1991] E.C.R. 485, ¶ 1. The CFI judgment was appealed before the European Court of Justice ("ECJ"). See generally *RTE II*, Joined Cases 241-42/91, [1995] E.C.R. 743.

19. See *Magill*, O.J. L. 78/43, at 23 (1988).

20. *IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039 [hereinafter *IMS Health*]; see also Indigo Brinker, *Essential Facility Doctrine and Intellectual Property law: Where Does Europe Stand in the Aftermath of 'IMS Health' Case?*, in 31 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 137-50 (2004); Henrik Meinberg, *From Magill to IMS Health: The New Product Requirement and the Diversity of Intellectual Property Rights*, E.I.P.R. 2006, 28(7), 398-403; Christopher Stothers, *IMS Health and its Implications for Compulsory Licensing in Europe*, E.I.P.R. 2004, 26(10), 467-72.

21. *IMS Health*, [2004] E.C.R. 5039, ¶¶ 2-6.

22. *Id.* ¶ 4. These bricks were created by taking into account various criteria such as municipality boundaries, postcodes, population density, transport connections, the geographical distribution of pharmacies, and doctors' practices.

which, in the course of time, had become an industry standard. As a result of the common use of that structure, the firm held a de facto monopoly over the relevant market.²³ That position was challenged when a former collaborator started to sell data using the brick structure developed by the dominant firm.²⁴

The case arrived at the ECJ through preliminary questions. In the ruling, the ECJ further delineated two conditions for the application of the legal standard. First, it ruled that Article 82 EC would apply in IP cases if two markets were involved. For the ECJ, access obligations may only be imposed where IP protected products are “indispensable” for the provision of other, related ones.²⁵ Second, the ECJ emphasized that no obligation may be imposed where the third party would “essentially . . . duplicate” products provided by the dominant firm.²⁶ Access orders should be limited to circumstances where “new” products are proposed.²⁷

IMS Health was perceived as an indication of the desire, on the part of the ECJ, to limit the scope of the jurisprudence.²⁸ Henceforth, third parties would have to fulfill an additional condition before the prohibition contained in Article 82 EC could be applied. They would have to establish that, as a result of a behavior adopted by an IP dominant firm, the emergence of a new product meeting an existing demand would be prevented.

D. *Microsoft*

Microsoft is the last case to date where the problem of the relationship between IP and competition was raised. The case

23. *See id.* ¶ 12.

24. *Id.* ¶ 7.

25. *Id.* ¶ 22. On that point, the ECJ refers to its judgment of November 26, 1998 in *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co.*, Case 7/97, [1998] E.C.R. 7791. That case does not concern IP but relates to the distribution of an independent newspaper through a network operated by the owner of a competing newspaper. On that ruling, see Pat Treacy, *Essential Facilities—Is the Tide Turning?*, E.C.L.R. 1998, 19(8) 501-05; Leigh Hancher, *Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co.*, 36 COMMON MKT. L. REV. 1289, 1289-1307 (1999).

26. *IMS Health*, [2004] E.C.R. 5039, ¶ 49.

27. *Id.* ¶ 52.

28. *See generally* Brinker, *supra* note 20; Meinberg, *supra* note 20; Stothers, *supra* note 20; *see also* European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, ¶ 239 (Dec. 2005), available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

arose from complaints made by competitors. First, the U.S. firm Microsoft had refused to divulge information necessary for the development of work group server operating systems.²⁹ That refusal had made it impossible to develop competing operating systems. Second, Microsoft had integrated its multimedia software³⁰ in its client Personal Computer ("PC") operating system Windows. As a result of that integration, other multimedia software producers could not effectively propose their products to final users.

In this Article, we focus on the first allegation. The question was whether and, if so, to what extent a dominant firm may withhold IP protected information indispensable for the development of fully compatible derived products. Microsoft was found dominant on the worldwide market for client PC operating systems.³¹ This resulted from the share held by the firm on that market—more than ninety percent.³² It also derived from the existence of a strong barrier to entry, the "positive feedback loop"—a mechanism whereby firms develop applications by reference to the standard operating system, thereby reinforcing that system even more.³³

Microsoft was also found dominant on the market for work group server ("WGS") operating systems. A WGS delivers collective services to members of communities.³⁴ As with other electronic equipment, they run on an operating system to which applications are added.³⁵ Originally, WGS operating systems were developed by other firms.³⁶ Microsoft took interest in the market. Rapidly, the product made by Microsoft gained importance. This was due, among other things, to interoperability information. First, interoperability information regarding Windows was kept confidential.³⁷ Thus, competitors could not manufacture

29. See Commission Decision of 24 March 2004, Case COMP/C-3/37.792, at 147-209, available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf> [hereinafter *Microsoft Decision*].

30. Windows Multimedia.

31. See *Microsoft Decision*, Case COMP/C-3/37.792, at 118-46.

32. *Id.* at 119-20.

33. *Id.* at 235-36.

34. File sharing, access to collective printers, etc.

35. See *Microsoft Decision*, Case COMP/C-3/37.792, at 18-20.

36. *Id.* at 158.

37. Windows is the client PC operating system manufactured by Microsoft. That operating system is widely used in worldwide markets—with more than a ninety percent market share.

WGS operating systems fully interoperable and compatible with the standard client PC operating system made by Microsoft.³⁸ Second, Microsoft also kept confidential interoperability information on its WGS operating system.³⁹ Competitors could still propose alternative products. But these systems had to be compatible with the WGS made by Microsoft as that product was becoming the reference. This was impossible as essential interoperability information was kept confidential.

These findings were made in a decision adopted by the European Commission.⁴⁰ They were confirmed by the CFI before which the validity of the decision was challenged.⁴¹ No appeal was lodged with the ECJ which, as a result, could not close the debate.⁴²

II. THE SCOPE OF THE JURISPRUDENCE

The cases examined above introduce a control on the use made of IP rights in certain situations. Some formulations used by the European courts may create an impression that control has a marginal importance. On the contrary, our feeling is that jurisprudence may have a significant influence on markets.

A. What Rights?

A first question involves the rights concerned. In that re-

38. Collective equipment only works properly in a community if it can communicate with the PCs held by the members of that community. The adaptation of that collective equipment to client PCs is only possible to the extent developers have access to information on the protocols used by PCs for their communications (this is known as interoperability information).

39. See *Microsoft Decision*, Case COMP/C-3/37.792, at 147-56.

40. See *id.*

41. See generally, *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11; see also David Howarth and Kathryn McMahon, *Windows has Performed an Illegal Operation: the Court of First Instance's Judgment in Microsoft v. Commission*, 29 EUR. COMM. L. REV. 117-34 (2008); Maria Montagnani, *Remedies to Exclusionary Innovation in the High-Tech Sector—Is There a Lesson From the Microsoft Saga*, 30 WORLD COMPETITION: L. & ECON. L. REV. 623-43 (2007).

42. Other decisions were taken by the European Commission in the *Microsoft* case. They concern the implementation of the remedies imposed by the European Commission on Microsoft on the basis of the findings presented here. Orders were also adopted by the President of the Court of First Instance ("CFI") regarding applications made by Microsoft to obtain a suspension of the decisions taken by the Commission during the procedure leading to a judgment on the substance of the case. These decisions and orders can be found on the internet site of the European Commission. European Commission, http://ec.europa.eu/index_en.htm (last visited Nov. 3, 2008).

gard, we must emphasize that the jurisprudence has a general application. The cases feature some IP rights—design protection,⁴³ and copyright.⁴⁴ But all IP regimes are concerned at least potentially. This results from the broad terms used in the jurisprudence. From these terms, one can gather that the jurisprudence affects all regimes under which firms are entitled to oppose the use by third parties of protected items, whatever the name of the regime, the specificity of the rules concerned, or the authority by which these rules were adopted (national or European courts).

B. *What Firms?*

The second question regards the undertakings affected pursuant to the decisions and judgments. The jurisprudence is limited to dominant firms. This may create an impression that a very limited number of undertakings are affected. In our view, that impression would have to be nuanced. Dominance is an empty concept in itself. Its application is not limited to gigantic firms like Microsoft. Depending on market definition, the concept can be used in connection with small undertakings.

Thus, how were relevant markets defined in the jurisprudence analyzed here? In *Volvo*,⁴⁵ different definitions seemed possible. One definition could encompass all vehicles belonging to the category of cars involved. A second definition: the spare parts used in these vehicles. A third possibility: the spare parts used on the specific models involved in the cases. A still narrower approach was finally chosen by the ECJ which, in its judgment, limited the market to the body panels at the very heart of the dispute.⁴⁶ With the market so defined, only one firm was engaged in that activity: the car constructor concerned.⁴⁷

The same occurred in *Magill*, where the broadcasters argued that the market extended to all TV publications and even included broadcasting activities.⁴⁸ But a narrower perspective was adopted. Ultimately, the listings prepared by each broad-

43. See *supra* note 3 and accompanying text.

44. See *supra* notes 11, 20, 29 and accompanying text.

45. The same analysis can be undertaken in the case of *Renault*, Case 53/87, [1988] E.C.R. 6039.

46. See *AB Volvo v. Erik Veng (UK)*, Case 238/87, [1988] E.C.R. 6211, ¶ 9.

47. See *id.*

48. *Magill*, [1991] E.C.R. 575, ¶¶ 15-18.

caster were defined as forming separate, primary markets.⁴⁹ As in *Volvo* and *Renault*, the markets thus corresponded with the IP protected products. On each of these markets, there was, by force of circumstance, one firm only—the author of the listings concerned.

The same analysis can be used for *IMS Health*. A firm had developed a brick structure to commercialize health data. That structure was protected by copyrights.⁵⁰ The market could be defined as covering all health related services—or even all databases used for commercial purposes in the relevant geographic market.⁵¹ Once more, the definition was limited to the specific IP protected product involved in the case: the brick structure.⁵² On that market, there was, again, one participant only.

It appears from this discussion that the European courts define markets narrowly in IP/competition cases. In each case, the definition is limited to the protected product.⁵³ When the market is so defined, IP firms are found dominant. In that context, dominance is not a feature reserved to important firms. Rather, it depends upon the existence of an innovation. With the attitude adopted by the European courts regarding market definition, firms are likely to be found dominant, whatever their size, where they innovate and their innovations are IP-protected.

C. What Behavior?

The third question regards scope: are many practices affected by the jurisprudence? For Article 82 EC⁵⁴ to apply, dominance is not sufficient—an abuse must be committed. How should that second condition be interpreted in our context? Lit-

49. *See id.* ¶ 25.

50. *IMS Health*, [2004] E.C.R. 5039, ¶¶ 9-11.

51. *Id.* ¶¶ 3-4.

52. Before the ECJ, there was an intense debate on that issue. Could the brick structure be dissociated from the sales of data? Could the form be envisaged without the content? A positive answer was necessary to apply the case law. Under the jurisprudence, IP related access obligations are limited to situations involving two markets—one for the primary substance and the other for the derived product. To avoid that positive answer, *IMS Health* contended that the case involved one market only: the competitor, it argued, intended to supply an almost identical product on the same market. *See id.* ¶ 32.

53. *See supra* notes 44-53 and accompanying text.

54. EC Treaty, *supra* note 7, art. 82, O.J. C 321 E/37 at 74-75.

the indication can be found on that issue in *Volvo* or *Renault*. These cases concerned refusals by car constructors to grant licenses. The ECJ ruled that such practices infringe Article 82 EC where they are "abusive"—without explaining under what conditions the practices became abusive.⁵⁵ The cases also involved royalties to be paid in counterpart for licenses. The ECJ ruled that a violation would take place if those royalties were "unfair."⁵⁶ Again, it did not provide any indication as to the circumstances under which royalties may become unfair.

Considering the practices involved in these cases, one has the impression that they would be deemed normal on ordinary markets. Consider a refusal to grant licenses. IP licenses are often granted on exclusive bases. Licensees are granted exclusive rights to exploit innovations in given territories. Suppose an environment where IP firms are compelled to grant licenses to all interested parties. In such an environment, innovations would be exploited in competition. Facing competition, licenses would collect fewer revenues. As they obtain little, they would not invest much in the exploitation. Finally, they would show little interest in the activity. It would become difficult, for innovators, to find licensees. The incentive to innovate would diminish. This would result in less innovation—with negative results for society.⁵⁷

Later cases (*Magill*, *IMS Health*, and *Microsoft*) provide indications on why IP practices apparently normal on ordinary markets transform into abuses in exceptional circumstances. These circumstances correspond to the considerations formulated by the European instances to explain their interventions.⁵⁸ In substance, the justifications focus on the effects produced by challenged practices on secondary markets.

- Creation, on a secondary market, of an environment where firms do not compete on the merits as a result of a dominance acquired by one of them on a primary market.⁵⁹
- In the absence of effective competition on that secondary

55. See *AB Volvo v. Erik Veng (UK)*, Case 238/87, [1988] E.C.R. 6211, ¶ 9.

56. See *id.*

57. See *supra* note 2 and accompanying text.

58. These justifications were presented in Part I, *supra* and are analyzed in Part III, *infra*. See *supra* notes 19-20 and accompanying text.

59. Justification 3.

market, possibility, for the firm dominating the primary market, to extend that domination to the former.⁶⁰

- As a result, creation, on that secondary market, of a situation not favorable for consumers: limitation of technical development,⁶¹ high prices.⁶²

As appears from these terms, IP practices may “turn” abusive whatever they are, where they have undesirable effects, as regards competition, on derived markets. What is prohibited is the extension of dominance where that extension is based on IP practices, independent of the behavior whereby that extension takes places. All IP practices are thus concerned by the jurisprudence—the only condition being that they must have undesirable effects on competition on derived markets.

D. *What Control?*

The fourth question asks: what control is carried out in the name of competition? In their decisions and judgments, the European instances insist that IP is not illegal *per se*. Their intervention is presented as limited to a control on the use made of that property in specific circumstances. Yet, can rights be distinguished from the use that is made of them—and vice versa?

Generally speaking, rights entail a permission to legally accomplish certain acts, the identity of which depends on the rights concerned. Suppose that certain actions normally permissible under these rights fall under a prohibition as a result of the application of another rule. Would the rights be affected in themselves—or only the use that can be made of them? In our view, both would be affected. As a result of the application of the prohibition, the substance of the right would be attained. The object of that right—the type/number of permissible actions—would be more limited than before.

In that context, the substance of the jurisprudence could better be reformulated. In our view, that jurisprudence goes beyond a control on the use made of IP in certain circumstances. It determines conditions under which, for the European instances, the substance of IP should be limited, in the name of competition. These instances consider that, in certain situa-

60. Justification 1: leverage of a dominant position (“LDP”) requirement.

61. Justification 2: new product requirement (“NP”).

62. Justification 4.

tions, innovation would better develop through competition. The cases modify the line established under IP legislation to determine the situations where innovation deserves protection.

E. *What Obligation(s)?*

The last question is how compelling are the obligations imposed on dominant IP firms in the name of competition? On that point, the impression of a limited scope sometimes conveyed by the jurisprudence is in sharp contrast with the reactions formulated by the firms involved.⁶³ In practice, access obligations are experienced as emptying IP rights of their substance. IP is regulated at a national and/or European level. Beyond possible divergences, a common feature, across regimes, is that IP rights entail an exclusivity.⁶⁴ If they so wish, IP owners may remain the only undertakings using a protected item.⁶⁵ Other usages may be authorized—only if IP owners decide so.⁶⁶ Even in that context, IP owners retain a form of exclusivity. They remain the only ones entitled to determine what usages are legitimate. They can also determine the terms and conditions applicable to their licenses.

In most instances, being the only one authorized to use a protected item affects the exercise of activities on the relevant market.⁶⁷ In certain cases, a project may be ruined by the presence of a second firm proposing the same product. In reaction, the jurisprudence emphasizes that fees may be claimed for the usage of protected items.⁶⁸ As the value of the advantage is compensated financially, firms would not be deprived totally of their rights. However, this does not take into account the application of competition law on the terms/conditions applicable to compelled access. The issue was addressed in *Magill*, where the broadcasters were ordered to present to the Commission, for verification, within two months, the terms and conditions pro-

63. In *Microsoft Corp. v. Commission*, the U.S. firm contended that the access ordered by the Commission would deprive its innovations of their value. The firm would lose all incentives to innovate. See *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶¶ 274, 689.

64. *Id.* ¶ 691.

65. *Id.*

66. *Id.* ¶ 691, 696.

67. *Id.* ¶ 691.

68. *Id.* ¶ 117.

posed for access.⁶⁹ It gave rise to substantial developments in *Microsoft*, where a monitoring trustee was appointed to ensure compliance.⁷⁰ In substance, a firm compelled to grant access must apply reasonable terms and conditions. These terms and conditions may not be less favorable than those proposed by the firm, within its own organization, to the department(s) or subsidiary(ies) in charge of the same activity. That idea was expressed in various cases involving the application of Article 82 EC.⁷¹ It has inspired EC public utility regulation, where comparable obligations are imposed on network operators.⁷²

III. JUSTIFICATIONS

A. Leverage of a Dominant Position

We have examined the case law—and analyzed its scope. We turn to the justifications advanced by the European instances to explain their intervention. A first justification is that firms should not be permitted to leverage a domination to support activities on derived markets (Leverage of a Dominant Position, “LDP”). That prohibition is not specific to IP. It was applied in other economic activities.⁷³ The leading case, on that point, is *Commercial Solvents*.⁷⁴ In that case, firms were involved in a business chain for the fabrication of an anti tuberculosis drug.⁷⁵ That chain contained various stages corresponding to the successive transformations of products. On market for product 1

69. *RTE*, Case T-69/89, [1991] E.C.R. 485, ¶ 14.

70. *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶¶ 50, 83, 1235.

71. See generally PAUL NIHOUL & PETER RODFORD, *EU ELECTRONIC COMMUNICATIONS—COMPETITION AND REGULATION IN THE EUROPEAN TELECOMMUNICATIONS MARKET* 343-491 (2004).

72. See *id.* at 175-343.

73. See generally JURIAN LANGER, *TYING AND BUNDLING AS A LEVERAGING CONCERN UNDER EC COMPETITION LAW* (2007); see also IVO VAN BAELE & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 962-68 (4th ed. 2005); François Lévesque, *Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case*, 28 *WORLD COMPETITION* (2005), 71-91; Kai-Uwe Kühn, Robert Stillman & Christina Caffarra, *Economic Theories of Bundling and their Policy Implications in Abuse Cases: An Assessment in the Light of the Microsoft Case*, 85-121 (U. of Mich., Working Paper No. 33, 2004).

74. *Commission Decision No. 72/457/EEC*, O.J. L 299/51 (1972) (*Commercial Solvents*); *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission*, Case 6/73, [1974] E.C.R. 223.

75. *Commercial Solvents*, [1974] E.C.R. 2033, ¶ 19.

("M1"), the U.S. firm Commercial Solvents ("CS") had a monopoly.⁷⁶ On market for product 2 ("M2"), that firm was facing competition.⁷⁷ The firms active on that secondary market obtained their supply from CS. More profit could be made by the dominant firm if these firms were eliminated. To that effect, CS increased the prices on M1.⁷⁸ As a result of that price increase, the cost to carry out an M2 independent activity became progressively unbearable.⁷⁹ Later, CS even discontinued the supply to these firms located on the secondary market—thereby making that M2 independent activity impossible.⁸⁰

The case gave rise to a decision by the European Commission, which was confirmed by the ECJ.⁸¹ These institutions ruled that Article 82 EC was violated.⁸² For them, a firm dominating a market may not extend that domination on derived markets by using to that effect a/the competitive advantage which contributed to the creation of dominance on the primary market.⁸³

The legal standard established in *Commercial Solvents* had a

76. *Id.* ¶¶ 9-12. That monopoly was factual. The firm was the only one able to manufacture the product on an industrial scale. There were significant entry barriers: investments were required for the production and know how was necessary to master the process.

77. *See id.* ¶ 13.

78. *See id.* ¶ 16.

79. *Id.* ¶ 34.

80. *Id.* ¶ 25.

81. At that time, the decisions adopted by the Commission were challenged before the ECJ directly. The situation changed with the creation of the CFI, which was granted the competence to rule on applications by natural and legal persons against acts addressed to them or concerning them directly and individually. The judgments issued by the CFI may be reviewed, on appeal, by the ECJ.

82. *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission*, Case 6/73, [1974] E.C.R. 2033, ¶¶ 44-45.

83. *See id.* ¶ 25.

[A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of [product 2] in the common market. . . . [A]n undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of article [82].

Id.

central role from *Magill* onwards in IP/competition cases.⁸⁴ In principle, it requires two markets. An M1 must be dominated by a firm.⁸⁵ That domination must be used in an unacceptable manner on an M2.⁸⁶ The importance of that two-market structure was emphasized in *IMS Health*, where an independent firm was seeking the right to use a brick structure developed by a dominant undertaking. That brick structure was perceived as necessary to commercialize health related data. The ECJ ruled that “it is determinative⁸⁷ that two different stages of production be identified and that they be interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product.”⁸⁸

That precedent was applied in various cases, including *Magill*⁸⁹ where broadcasting was the basic activity. The firms later found dominant were preparing documents (“listings”) to announce their programs to the public.⁹⁰ These documents were published daily or weekly. Daily: the listings were communicated, the day before, to newspapers, for presentation. Weekly: each broadcaster published every week, on an individual basis, their own programs, for the week to come.⁹¹ A dispute arose because another publisher wanted to propose a weekly, comprehensive, TV guide: an independent TV guide announcing all programs meant for broadcasting during the week in the territories concerned.⁹²

84. See *supra* note 12 and accompanying text.

85. See *Commercial Solvents*, [1974] E.C.R. 2033 ¶ 25.

86. *Id.*

87. See *id.* (for the application of the legal standard established in *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission*).

88. *IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039, ¶ 45 (internal citation added).

89. See Commission Decision No. 89/205/EEC, *O.J. L 78/43* (1988) [hereinafter *Magill Decision*]. In *Magill*, the Commission did not explicitly refer to *Commercial Solvents*. However, it used the terms contained in that case. The CFI adopted the same approach in *RTE*, Case T-69/89, [1991] E.C.R. 485, ¶ 73 and *Independent Television Publications Ltd v. Commission*, Case T-76/89, [1991] E.C.R. 575, ¶ 58. The ECJ was more explicit: the ruling quotes *Commercial Solvents* and confirms, thereby, the importance of that precedent in the solution given to the case. See *RTE II*, Joined Cases 241-42/91, [1995] E.C.R. 743, ¶ 56.

90. Date and hour of broadcasting, presentation of actors, photos etc.

91. The weekly publication was deemed useful because, apparently, viewers often schedule their activities for the week in function of TV programs.

92. There were also daily announcements through newspapers. However, these announcements served different purposes. Possible viewers need to know in advance what

In that case, two markets or ranges of markets were considered:

- The primary markets. These markets corresponded to the production of weekly listings by the broadcasters. The weekly listings prepared by each broadcaster were regarded as forming a separate market. These listings were protected by copyrights.⁹³
- The derived markets. These markets corresponded to the publication of the said listings. In that range of activities, one market was the daily publication of listings. Another was the weekly publication of these documents.⁹⁴

Each broadcaster dominated a primary market: the market corresponding to its own listings.⁹⁵ The broadcasters were also present on a secondary market: the market for the weekly publication of listings. They opposed the publication of these listings in a new, independent and comprehensive weekly guide. Thereby, they protected their activities on the secondary market. Thus, that behavior could be analyzed as an abuse under the standard established in *Commercial Solvents*.⁹⁶

B. *The New Product Requirement*

Another justification formulated by the European instances to explain their intervention is the negative effect produced by illegitimate IP related behavior on the possible emergence of new products (New Product Requirement, NP requirement).⁹⁷ That argument was raised for the first time in *Magill*, where the opposition by broadcasters to the publication of listings resulted in a weekly, comprehensive guide being prevented from emerging.⁹⁸

The emergence of the requirement appeared, originally, as an element susceptible of restoring coherence in the field of

programs are broadcasted during the week. To that effect, they purchase weekly TV guides. The two sorts of products are not substitutable with regards to demand.

93. The copyright was granted by national legislation: UK Copyright Act of 1956 and the Irish Law on Copyright of 1963. *Magill*, O.J. L 78/43, at 8-9 (1988).

94. *Id.* at 20.

95. *Id.*

96. In the next Part, we examine the application of the LDP prohibition to other IP/competition cases, including *Microsoft Corp.*, Case T-201/04, [2007] 5 C.M.L.R. 11.

97. *RTE*, Case T-69/89, [1991] E.C.R. 485, ¶ 48.

98. *Id.* ¶ 73.

IP.⁹⁹ IP is regulated by legislation at national or European levels. As do all pieces of legislation, these instruments seek a certain equilibrium between various, sometimes contradictory, objectives. The equilibrium reached in that context was perceived as being threatened by the emerging jurisprudence, which gave precedence to competition.¹⁰⁰ That threat was deactivated by the emerging principle.¹⁰¹ The reasoning, on that point, was as follows. IP encourages innovation. Under the NP requirement, IP protection may be suspended where its exercise would prevent the emergence of further innovation.¹⁰² In that line of reasoning, competition law appears as a useful complement bringing a legitimate correction to principles enshrined in IP law.

The existence and the importance of the NP requirement were confirmed in *IMS Health*, where the ECJ stressed that no access related obligation could be imposed on IP dominant firms where third parties “essentially . . . intend” on duplicating the products made by that firm.¹⁰³ Pursuant to the judgment, obligations should be confined to situations where “new products or services not offered by the owner of the intellectual property right” would be provided.¹⁰⁴ The interpretation of the relation between IP and competition was confirmed. Under *IMS Health*, competition may not be given priority where a duplication is envisaged.¹⁰⁵ It may be given full effect where the use of IP would impede further innovation. The purpose thus remains, in all situations, the promotion of innovation, with a correction brought by competition to IP protection where necessary.¹⁰⁶

C. Competition on the Derived Market

A third justification present in the jurisprudence is that, where they prevent access to an M1 IP-protected item necessary for an M2 activity, dominant firms do not permit competition to unfold “on the merits” on that derived market. That position is

99. See Taylor, *supra* note 12 at 100-01.

100. *Id.*

101. *RTE*, [1991] E.C.R. 485, ¶ 48.

102. *See id.*

103. *See IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039, ¶ 49.

104. *See id.*

105. *Id.* ¶ 33.

106. In the next Section, we examine the application of the NPR justification in other IP/competition cases, including *Microsoft*.

founded on the idea that, in a competitive process, products should be compared on the basis of intrinsic qualities. Under the jurisprudence, that requirement is not fulfilled where a product is chosen for features not related to it but rather attached to another item(s).

For instance, the Commission and the CFI refer, in *Microsoft*, to independent market surveys demonstrating that, in the perception of clients, the WGS operating system commercialized by Microsoft was inferior, with regards to quality, to competing products.¹⁰⁷ Yet, that operating system was attracting progressively more clients.¹⁰⁸ According to the Commission and the CFI, the product made by Microsoft was not selected, in that situation, for alleged intrinsic qualities.¹⁰⁹ It was chosen because other products were not interoperable.¹¹⁰ In turn, that lack of interoperability was due to the refusal, by Microsoft, to communicate interoperability information.¹¹¹ Thus, the “cause” explaining the success encountered by Microsoft’s product on the relevant market was, for the Commission and the CFI, the refusal, by that dominant firm, to transmit essential information.¹¹²

One reason explaining the “product-per-product” perspective¹¹³ may be a desire to protect consumers. For the European courts, consumers should not be compelled to purchase products which, in their perception, are inferior in quality. They should be granted real choices and have true opportunities to select products corresponding best to their needs. As it appears from the cases examined above, that liberty is impaired, in the

107. *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 3.

108. *See id.* ¶ 1173.

109. *See id.* ¶ 985.

110. *See id.* ¶ 149.

111. *See id.*

112. *See id.* ¶ 407. The Commission and the CFI adopted the same attitude with regards to the second complaint addressed in the *Microsoft* case. In that second complaint, Microsoft was challenged for “bundling” its media software, Windows Multimedia, with its client PC operating system, Windows. The result of that combination was that Windows could not be purchased without Windows Multimedia. As Windows is present on ninety percent of the client PCs worldwide, the market share of Windows Multimedia grew exponentially. For the Commission and the CFI, that growth could not be explained, again, by intrinsic qualities allegedly attached to Windows Multimedia. It was rather due to the worldwide ubiquity of Windows as a client PC operating system. *See id.* ¶ 945.

113. This term is used by the author according to its meaning in trade usage.

perception of these courts, where a domination held on a primary market is used to impose a derived product.

Another perception could be that competition will not lead to efficiency outside a “product-per-product” perspective. Through competition, authorities establish the conditions for a good production at the lowest possible prices. For the European courts, that result cannot be achieved where products are supported by other items on dominated markets.

Another value possibly involved is that competitors should be treated fairly. Where a domination is leveraged, competitors have no real chance of competing successively.¹¹⁴ Does that imply that “weaker” competitors should be assisted? In *Microsoft*, the need to protect competitors was mentioned.¹¹⁵ However, it was not presented as a value legitimate in itself. For the Commission and the CFI, a protection is only legitimate if, and to the extent, absent a fair access, competition would not unfold satisfactorily.¹¹⁶

D. Consumer Welfare

A last justification is that IP should not create situations not favorable to consumers. In *Magill*, the Commission calculated that, to obtain information on all available TV programs, consumers had to pay more in the system created by the broadcasters than if a comprehensive guide had emerged. For the Commission, that situation could not be accepted.¹¹⁷ A specific concern for consumers also appears in *Microsoft* where, on the basis of business surveys, the CFI underlined an alleged difference in quality existing between Microsoft’s products and items proposed by competitors.¹¹⁸ In other passages, that jurisdiction in-

114. See *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶¶ 390, 421.

115. See *id.* ¶ 780.

116. See *id.* ¶ 643.

117. *Magill*, O.J. L 78/43, at 23 (1988); see Tom Skinner, *Magill: Consumer Interests Prevail*, 6 E.B.L. REV. 90, 90-92 (1995). For a critical view, see Josef Drexler, *IMS Health and Trinko—Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases*, 35 IIC: INT’L R. INTELL. PROP. & COMPETITION L. 778, 788-808 (2004).

118. See *Microsoft*, [2007] 5 C.M.L.R. 11, ¶ 652. The Court noted that:

The limitation . . . placed on consumer choice is all the more damaging to consumers because . . . they consider that non-Microsoft work-group server operating systems are better than Windows work-group server operating systems with respect to a series of features to which they attach great importance,

dicates the necessity of a competitive environment where consumers have real choices between competing products.¹¹⁹ For the CFI, this implies an intervention where real choices disappear as a result of dominant firms reserving markets for themselves.¹²⁰

These references to consumers are the object of a controversy in antitrust policy.¹²¹ Should the rules of competition improve the situation of consumers? Or should a more general satisfaction be sought after (general welfare)? This paper is not the place to examine the specific place of consumers in the application of the rules of competition. From a legal point of view, the important matter is the indication, by the European courts, that consumers may—and should—be granted special attention in IP/competition cases.

IV. *PROBLEMS*

We have examined IP/competition cases, we have analyzed their scope and we have investigated the justifications presented by the European Commission and the European courts. We now indicate problems that may need to be solved for the emerging jurisprudence to gain in credibility.

A. *Effect on Innovation*

The first problem is whether the jurisprudence reaches the objective it is supposed to attain. Competition policy is expected to increase efficiency. That objective entails, among others, the promotion of innovation. Is that result achieved with the jurisprudence? Considering the case law, one has the impression that innovative firms are placed in front of an equation: “the better you innovate, the higher the risk you will have to share the results of your innovation.”

such as “reliability/availability of the . . . system” and “security included with the server operating system.”

Id.

119. *See id.* ¶¶ 653, 656, 662.

120. *See* Commission Decision No. COMP/C-3/37.792, O.J. L 32/23, at 25-26 (2004) [hereinafter *Microsoft Decision*] (“[Owing] to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems.”) The previous statement is taken over by the CFI in its judgment. *Id.* ¶ 650.

121. *See, e.g.,* Commission Notice, O.J. C 3/2, at 4 (2001).

Firms are “price-takers” on competitive markets.¹²² In principle, they charge prices corresponding to costs.¹²³ One way for firms to bypass that situation is to innovate. By developing new products or processes,¹²⁴ they acquire a certain autonomy allowing them to recoup investment and make a profit. However, competitive advantages only last the time necessary for competitors to adapt. The latter may react by “copying” the innovation. This is not permissible where products and/or processes are IP protected. Then, competitors must develop alternative products or processes. In the struggle for survival on markets, the best advantages are those which cannot be copied and for which no realistic alternative exists.

On that basis, two scenarios may be envisaged. First scenario: a firm manufactures a product which *cannot* be copied or duplicated. The prohibition on copying and the impossibility of duplication have, as a result, that the market corresponding to that product only sells one item: the product coming out of the innovation. As a consequence, the firm manufacturing the product is dominant under Article 82 EC.¹²⁵ The way is paved for the imposition of access related obligations.

The second possible scenario is that a firm manufactures a product which *can* be copied and/or duplicated. As a result of these possibilities, alternatives are or become available. The firm, thus, is not alone on the relevant market. Absent exceptional circumstances, it will not be found dominant. The consequence is that the firm may exploit freely the fruits of its efforts. No Article 82 EC obligations will be imposed.¹²⁶

122. On competitive markets, firms do not set their prices in full autonomy. Their decisions are constrained by markets. They have no specific influence on the prices charged on these markets.

123. On a competitive market: if a firm charges a higher price then consumers shift to cheaper suppliers. If it charges lower prices, it is selling at a loss. In that context, the right business decision is to set the price at the level of the cost (hoping that competitors have the same costs).

124. Through the improvement of their processes, firms can increase their productivity. They can also improve the quality of their products. *See generally* Commission Notice, O.J. C 3/2 (2001); Commission Notice, O.J. C 101/2 (2004).

125. *See* EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION, DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES 9-15 (2005).

126. That advantage will last a limited period—the time for competitors to copy the innovation or duplicate it. During that period, the firm enjoys the fruit of its innovation. Afterwards, it may conserve the “first mover advantage:” the advantage accruing

As appears from the jurisprudence, firms are encouraged to innovate. However, that encouragement is limited as a result of the limitation imposed in the name of competition. Firms benefit from their investment where their innovations may be copied or duplicated.¹²⁷ If they create non-reproducible products, they run the risk of being submitted to demanding legal obligations. Thus, path-breaking innovations are not really encouraged: innovations which push economic or technical progress so far that duplications are not readily available.¹²⁸

V. INSTITUTIONAL ISSUES

Currently, it is hardly possible, unfortunately, to determine, on a scientific basis, in all circumstances, whether innovation should be promoted through competition or IP protection. To a major extent, the issue is still solved through political compromises. Hence the second problem: who should decide? In most democracies, these compromises are negotiated within Parliaments. Representatives debate whether more freedom and/or protection is needed. Yet, the compromise is made, in the cases analyzed here, by judges (CFI, ECJ), and by an executive body (Commission). Do these organs have the power to do so?

Technically, the jurisprudence is based on the rules of competition. The legal basis is the EC Treaty under which the Commission may apply the rules of competition,¹²⁹ the CFI may rule on individual applications against decisions issued by the Commission in competition matters¹³⁰ and the ECJ may review CFI judgments¹³¹ and/or provide preliminary interpretations or as-

from the fact of being the first undertaking to propose the product or the service concerned.

127. *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 111, 111.

128. See Josef Drexler, *The Relationship Between Legal Exclusivity and Economic Market Power—Links and Limits*, in *INTELLECTUAL PROPERTY, MARKET POWER AND THE PUBLIC INTEREST* 13-33 (Govaere & Ullrich eds., 2008). For the author, IP law provides a protection against unauthorized imitations but does not have as its object to help firms acquire significant market power. That idea is not under critique in this article. In this section, our remark is that, under current EC case law, there is a trend to define IP relevant markets narrowly—so narrowly that virtually all IP firms may be considered dominant. If that trend was confirmed, that European attitude may have an adverse effect on innovation as many—virtually all—innovators could be compelled to share access to their inventions.

129. EC Treaty, *supra* note 7, art. 85, O.J. C 321 E/37, at 76.

130. See *id.* arts. 225, 230, O.J. C 321 E/37, at 143, 146.

131. See *id.* art. 225, O.J. C 321 E/37, at 143.

assessments of validity.¹³² These provisions provide a formal basis for an intervention of these courts in IP matters.

Another perspective may be adopted: a perspective focused on the substance of the intervention. That perspective indicates how far reaching the intervention of the European courts is in the field of IP. It also raises the question whether these interventions are adequate given the institutional architecture of the European Union.

In most courts, IP is regulated at the national level.¹³³ In the cases analyzed above, the firms acted in conformity with these national rules.¹³⁴ By stating that these firms abused a dominant position, the European courts suggested that these laws were not in conformity with the EC Treaty.¹³⁵ The cases are presented as directed against behavior. In fact, they concern legislation—the laws regulating IP at national level.¹³⁶

Does the Commission have the power to rule, in a decision based on the rules of competition, that a national legislation is not compatible with the rules of competition? In our view, the more appropriate procedure would be, in such a situation, the initiation, by that institution, of an Article 226 EC procedure against the Member State(s) concerned.¹³⁷

132. See *id.* art. 234, O.J. C 321 E/37, at 147.

133. See generally TRITTON, *supra* note 2.

134. In *Microsoft*, the question was also asked whether an intervention would comply with EC secondary law. See generally Council Directive 91/250/EEC, O.J. L 122 (1991); *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 227. The compatibility with international law was also envisaged. See, e.g., *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 777.

135. *Microsoft*, [2007] 5 C.M.L.R. 11, ¶¶ 36-50.

136. Traditionally, national IP laws are analyzed under EC internal market rules. In that context, they are normally considered to hinder *prima facie* the free movement of goods. A derogation is explicitly provided in Article 30 of the EC Treaty. EC Treaty, *supra* note 7, art. 30, O.J. C 321 E/37, at 53. The jurisprudence analyzed has given the European Commission and the European courts an opportunity to go beyond the compatibility deriving from that derogation—and declare that, although they comply with the internal market, the use which is made of IP rights may conflict, under exceptional circumstances, with objectives enshrined in competition law. In the jurisprudence, see *Deutsche Grammophon v. Metro*, Case 78/70, [1971] E.C.R. 487. In *Renault* (Consorzio Italiano Della Componentistica Di Ricambio Per Autoveicoli v. Régie Nationale Des Usines Renault), the ECJ first analyzes the compatibility, with internal market rules, of the national legislation on design protection. *Renault*, Case 53/87, [1988] E.C.R. 6039, ¶¶ 9-13. The analysis under EC Treaty Article 82 comes in a second stage. EC Treaty, *supra* note 7, art. 82, O.J. C 321 E/37, at 74-75.

137. On these issues, see generally KOEN LENAERTS, DIRK ARTS AND IGNACE MASELIS, *PROCEDURAL LAW OF THE EUROPEAN UNION* (2d ed. 2006); HENRY G. SCHERMERS AND

How about the European courts? Pursuant to the EC Treaty, the ECJ has the power to decide that a piece of national legislation does not conform with EC law. Normally, these rulings take place in the Article 226 EC procedures mentioned in the previous paragraph.¹³⁸ With the time passing, preliminary procedures in interpretation also provided opportunities to address the compatibility of national legislation. In these procedures, the ECJ is not supposed to take an attitude on compatibility. It is invited to interpret EC provisions in the context described by the national court raising questions—a context which includes the existence of a national legislation.¹³⁹

A related question is whether the ECJ has the power to rule that a national legislation does not conform to the EC rules on competition, particularly Article 82 EC. In other words: does that provision support a finding of incompatibility regarding legislation? That provision is addressed to undertakings, but it has consequences on behavior adopted by authorities. Under the case law, national authorities must refrain from behavior affecting the useful effect of these rules.¹⁴⁰

The same remarks can be made for situations where IP rights are regulated at a European level. The Commission may find that that European regulation is not in conformity with the EC Treaty. What would be the best process to express that position? Probably not the adoption of a decision on the basis of the rules of competition. In application of the EC Treaty, the most appropriate process would be for the Commission to challenge, before the ECJ, the validity of the European regulation, within the timeframe set by the Treaty to that effect.¹⁴¹

DENIS F. WAELEBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 309 (6th ed. 2001).

138. See, e.g., *Commission v. France*, Case C-389/05 (ECJ Oct. 27, 2005) (not yet reported); *Commission v. Italy*, Case C-157/06 (ECJ Oct. 2, 2008) (not yet reported).

139. These procedures involve an intervention by the ECJ at the exclusion of the CFI. Currently, that jurisdiction does not have the power to adopt rulings in Article 226 or Article 234 EC procedures.

140. EC Treaty, *supra* note 7, art. 10, O.J. C 321 E/37, at 47.

141. *Id.* art. 230, O.J. C 321 E/37, at 146. In *Microsoft*, the question arose whether Directive 91/250 is compatible with Article 82 EC. *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 227. The Court held:

[W]hat is at issue in the present case is a decision adopted in application of Art. 82 EC, a provision of higher rank than Directive 91/250. The question in the present case is not so much whether the concept of interoperability in the contested decision is consistent with the concept envisaged in that directive as

A. *Leverage of a Dominant Position ("LDP")*

The third problem is whether the justifications raised by the European courts are acceptable with regards to their technical construction. Among these justifications is the prohibition on leveraging a dominant position. That justification is very dependent upon market definition. Defining markets is never easy—always questionable. Take *Magill* as an example. *Magill* shows how difficult it was for EC courts to define the relevant markets. The issue of market definition was never addressed “head on” in any of the instruments adopted in the case—instruments which, on that point, contain contradictions.¹⁴²

Another difficulty is the apparent necessity of two markets. Yet, several cases involve one market only. For instance, two markets were distinguished in *Microsoft*: the client PC operating systems (M1) and the WGS operating systems (M2).¹⁴³ For the Commission and the CFI, Microsoft withheld information on its client PC operating system (M1).¹⁴⁴ That information was

whether the Commission correctly determined the degree of interoperability that should be attainable in the light of the objectives of Art. 82 EC.

Id. The CFI suggests that one should not verify the consistency between the application given by the Commission to Article 82 EC in the case at issue and the directive adopted by the European Parliament and the Council on software protection. This comes down to asserting that the Commission does not need to take into account EC secondary law where interpreting the rules of competition—the implicit consequence being that these rules may be applied in a way which is not consistent with EC legislation. In the context of trade unions, the ECJ ruled that competition courts and authorities applying the rules of competition must take into account other EC Treaty provisions to avoid results inconsistent with these latter provisions. A possible inconsistency with EC legislation has not been addressed yet. In the passage quoted above, the CFI hints that; in such a situation, it would rule in favor of the instrument applying the rules of competition. For instance: an Article 82 EC decision issued by the Commission would prevail on an harmonization directive adopted by the European Parliament and the Council. That position is not acceptable. A competition law decision does not have the force of the EC Treaty provision it is supposed to implement. The conflict opposes a decision issued by the Commission and a directive adopted by the European Parliament and the Council—that latter instrument also purporting to implement an EC Treaty provision. To our knowledge, there is no certainty as to how a conflict of that nature should be solved. In our view, the intervention of the Parliament implies that, as regards political legitimacy, the directive must be deemed superior.

142. *Magill*, O.J. L 78/43, at ¶ 20 (1988). For instance: the individual listings prepared by each broadcaster constituted, for the ECJ, separate primary markets. By contrast, these listings together formed one secondary market where they were published.

143. *Microsoft Corp.*, [2007] 5 C.M.L.R. 11, ¶ 485.

144. *Id.* ¶ 353.

needed to design interoperable operating systems on M2.¹⁴⁵ In short: the U.S. firm kept secret M1 information to support M2 activities.¹⁴⁶ That analysis complies with the standard established in *Commercial Solvents*. However, Microsoft went further than withholding M1 information. It also kept confidential essential M2 data.¹⁴⁷ Thus, Microsoft withheld M1 and M2 information to protect M2 activities.¹⁴⁸ Does *Commercial Solvents* support a prohibition to leverage a dominant position where the protected activities are located on the same market? Is leveraging compatible with one-market situations?

The issue is also present in *Volvo* and *Renault*, where the ECJ did not refer to *Commercial Solvents*. Would the facts support an application of the legal standard established in that case? The difficulty is that *Volvo* and *Renault* do not feature two markets—only one.¹⁴⁹ As a reminder, a car constructor refused, in these cases, to grant a license for the independent import or fabrication of body panels.¹⁵⁰ There was no vertical division of activities or markets, one being indispensable for the provision of the other.

An intermediate situation is featured in *IMS Health*, where a brick structure was used to sell health-related data. Following *Commercial Solvents*, the ECJ stressed, in that case, that two markets were needed to apply the standard. Could the brick structure be regarded as a separate market? Could it be separated from the health-related data it was meant to contain? For the ECJ, a market can be defined separately where a specific demand exists for the product concerned. In this case, there was a demand for the use of the brick structure on the part of the competitor at the origin of the litigation. That brick structure could thus be considered separately.

IMS Health has in common with *Volvo* and *Renault* that these

145. *Id.*

146. *Id.*

147. *Id.* ¶ 280. As explained above, work group servers ("WGS") operating systems can only work in communities if they can be connected to client PCs and other existing WGS operating systems. Yet, the WGS operating system common at that time was developed by Microsoft. To develop their own systems, independent manufacturers needed interoperability information.

148. *See id.* ¶ 353.

149. *See generally* AB Volvo v. Erik Veng (UK) Ltd., Case 238/87, [1988] E.C.R. 6211; *Renault*, Case 53/87, [1988] E.C.R. 6039.

150. *See generally* *Volvo*, [1988] E.C.R. 6211; *Renault*, [1988] E.C.R. 6039.

cases concern products with a form and a content. A form: a brick structure in *IMS Health*,¹⁵¹ a design in *Volvo* and *Renault*.¹⁵² A content: health-related data in the former,¹⁵³ body panels in the latter.¹⁵⁴ We have seen that, as a result of the position adopted by the ECJ, *IMS Health* could be interpreted as involving two markets: one for the brick structure (form), another one for the health-related data (content). Can *Volvo* and *Renault* be interpreted along the same lines? If so, can these cases be understood as encompassing two markets: one for the design used in connection with the body panels, and one for the body panels themselves.

We would then escape the one market leveraging situation, which makes it difficult to use the LDP doctrine. But what would we have envisaged then, outside showing *ad absurdum* that market definition can often be manipulated? We would also have confirmed the trend that IP/competition markets are limited to IP protected products. In substance, this comes down to stating that each IP right forms a separate market—and that the firm holding that right is dominant.¹⁵⁵

B. *The New Product Requirement* (“NP Requirement”)

Another important justification relates to the New Product Requirement (“NPR”). In section 3 (Justifications), we have explained how that requirement brought relief as it suggested that dominant IP firms would not be compelled to share their rights in all circumstances—only where a refusal would prevent the further development of innovation by third parties.

That idea was challenged in *Microsoft*, where the NPR was analyzed in two stages.¹⁵⁶ In a first stage, the CFI submitted that the requirement is not a general condition to fulfill in all IP/

151. *IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039.

152. See *Volvo*, [1988] E.C.R. 6211, *Renault*, [1988] E.C.R. 6039.

153. See *IMS Health*, [2004] E.C.R. 5039.

154. See *Volvo*, [1988] E.C.R. 6211, *Renault*, [1988] E.C.R. 6039.

155. See *supra* Part II and accompanying text (“The Scope of the Jurisprudence”) for analysis of the scope of the jurisprudence as regards the undertakings concerned.

156. See *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 647. We concentrate on the CFI judgment. The *IMS Health* ruling was issued by the ECJ after the Commission adopted its decision in *Microsoft*. As a result, the Commission could not integrate, in that decision, possible changes introduced in *IMS Health*.

competition cases.¹⁵⁷ For the CFI, the requirement was introduced to address particular problems arising in specific cases.¹⁵⁸ Outside these cases, one would not have to verify whether, in the absence of access, innovation would be curbed.

In a second stage, the CFI examined whether, if the NP requirement was confirmed as a general condition, the circumstances of the case would support a finding that, *in specie*, that condition was fulfilled.¹⁵⁹ In the judgment, these circumstances are analyzed as follows. As appears from available information, third parties could design adequate WGS operating systems if they were communicated interoperability data.¹⁶⁰ Supposing that they would be communicated, these data would be implemented by software developers.¹⁶¹ Thus, the products made by Microsoft would not be merely duplicated.¹⁶²

Would this be sufficient to consider that these products are new under the NP requirement? In *IMS Health*, the ECJ excluded the application of Article 82 EC where the "intention" of third parties is, "essentially," to "duplicate" products made by the dominant firm.¹⁶³ In *Microsoft*, independent software manufac-

157. *Id.*

158. *See id.*

159. *See id.* ¶ 632 (envisaging the two possibilities makes it possible for the CFI to endure a critical analysis by the ECJ—without incurring the risk of an annulment of its judgment. Where the CFI has erred on a point but a rectification would not change the final solution given to a case, the CFI judgment is not annulled in its entirety. Only the paragraphs containing the errors are declared void).

160. *See id.* ¶ 633.

161. *Id.* (the crucial element in the demonstration is thus the difference between specification and implementation). On that point, the demonstration is taken over by the CFI from the decision adopted by the Commission. For the Commission, "[a] specification is a description of what the software product must achieve, whereas the implementation relates to the actual code that will run on the computer." *Id.* ¶ 24.

162. *Id.* ¶ 640. Software developers would have no interest in a mere duplication. Clients would not be attracted by offers proposing implementations identical to those made by Microsoft. Moreover, duplication would not be feasible technically. Specifications do not contain information about how they should be implemented. On the basis of communicated specifications, developers would not be able to identify the codes used by Microsoft for implementation. New implementations would have to be created.

163. *See IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039, ¶ 49. The Court held that:

[T]he refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but in-

turers would develop WGS operating systems “similar” to those made by Microsoft.¹⁶⁴ The implementations would differ—but the operating systems developed with these implementations would have the same function¹⁶⁵ and would thus form part of the same market.

Are the standards established in these two cases compatible with each other or has *Microsoft* altered *IMS Health* (supposing that a CFI judgment may change an ECJ standard)? The answer possibly lies in *IMS Health* itself. In that case, the ECJ ruled, in conclusion to a preliminary question, that access may be compelled, in IP/competition cases, where “new” items would be proposed by third parties “on the market for the supply of the data in question.”¹⁶⁶ This indicates that “new” products can form part of the same market as those made by the dominant firm. In other words: the presence of products made by third parties on the same market as those made by the dominant firm does not impede the qualification of these products as being “new” under the NP requirement.

Thus, products must be new under the NP requirement for access-related obligations to be imposed in an IP/competition context in application of Article 82 EC—but the innovation does not need to be of such a nature that these “new” products should belong to another market. This corresponds to the interpretation proposed by the CFI in *Microsoft* where, as a reminder, the WGS operating systems made by competitors would belong to the same market as those made by Microsoft although their specifications would be implemented differently.¹⁶⁷ The conclusion is that the NP requirement is not interpreted differently in the two cases. Put another way, *IMS Health* may be interpreted in a way compatible with the CFI judgment in *Microsoft*—and vice versa.

tends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.

Id.

164. See *Microsoft Corp. v. Commission*, Case T-201/04, [2007] 5 C.M.L.R. 11, ¶ 129.

165. See *id.* (organization of interactions on community networks).

166. See *IMS Health* [2004] E.C.R. 5039, ¶ 52 (access may be compelled where “the undertaking which requested the license intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand.”).

167. See *Microsoft*, [2007] 5 C.M.L.R. 11, ¶ 129.

Does that suggest that the NP requirement does not raise any difficulty? An already mentioned problem is that, after *Microsoft*, the existence of the requirement is uncertain. Does it still exist as a specific requirement applicable to IP/competition cases? Or does it embody the Article 82 EC condition that technical development may not be limited by dominant firms to the detriment of consumers?

Another problem is how the requirement should be interpreted, supposing that it remains in existence. May products be considered new under the requirement where they are commercialized on the same market as those made by the dominant firm? If so, what is the value of that requirement? As a reminder, that requirement seemed introduced to justify the IP/competition jurisprudence. The justification was that competition should be reintroduced where IP would prevent further innovation. In the interpretation proposed by the CFI, the degree of innovation requested for the application of access obligations is limited.¹⁶⁸ These innovations do not need to affect the function of the product.¹⁶⁹

C. Unstable Construction

So far we have concentrated on technicalities—but have we investigated the solidity of the construction? The IP/competition jurisprudence tells a limited number of cases, five in total: *Volvo*, *Renault*, *Magill*, *IMS Health*, and *Microsoft*. Among these

168. See *id.* ¶¶ 332, 335.

169. *Id.* If the function was affected, the product would belong to another market. Access may be compelled where the product would be sold on the same market. This entails that the innovation likely to be brought by third parties does not need to be significant for Article 82 EC to apply. Final problem. Is the interpretation proposed by the CFI compatible with earlier case law? In *Magill*, the secondary market included all weekly guides. The comprehensive guide contemplated by the independent publisher belonged to the same market as the individual publications supplied by the broadcasters. The presence of these products on the same market was not perceived as an obstacle to the application of the provision. The interpretation seems less compatible with *Volvo* and *Renault*. In these cases, the ECJ prohibited dominant firms from refusing to grant licenses where that refusal was “arbitrary.” There was no mention, whatsoever, in these rulings, of a requirement that the license requested by third parties should be limited to the production of new items. On the contrary: in these cases, the authorization was demanded with, in view, an independent fabrication or import of products identical to those made by the dominant firm. That difficulty disappears if *Volvo* and *Renault* are interpreted as encompassing two markets after *IMS Health* as we have proposed in the LDP context. Then, we have indicated that such analysis would demonstrate little—except that market definitions are never easy and always questionable.

cases, *Microsoft* is exceptional. It involves an undertaking which, by its size and influence, can hardly be compared to any other firm worldwide. These peculiarities are so intense that doubts may be expressed about the possibility, for the European Commission, or for competitors, to use that case in future IP/competition litigation. It would be so easy, for the firm challenged under Article 82 EC, to argue, in defense, that it is in a very different situation.

Three of the remaining cases were decided in preliminary rulings: *Volvo*, *Renault*, and *IMS Health*. The preliminary procedure has specific features which does not make it the ideal context to assess competition issues. In that procedure, in depth factual investigations are difficult. The ECJ must rule on facts provided by the national courts raising the questions. Experience shows that, sometimes, the description and the analysis provided by national courts are not sufficient to permit an excellent examination of the circumstances.¹⁷⁰ Another drawback: the preliminary procedure provides limited opportunities for argument exchanges. Parties may submit written observations. But the debates remain limited compared to those taking place in cases investigated by the Commission with a review by the CFI and the ECJ.

Among these preliminary rulings, *IMS Health* is not easy to interpret. A problem raised by the case is the definition of the brick structure as being a separate market. As we have suggested, that approach may pave the way, in substance, for an application of access obligations to just about all IP firms.¹⁷¹ Moreover, the ruling does not really limit the scope of the jurisprudence although it was probably supposed to do so. The final decision, in that case, was that third parties may access IP products to manufacture items belonging to the same market as the products made by the dominant firm.¹⁷² That conclusion lowers

170. See VAN BAELE AND BELLIS, *supra* note 73, at 1171-74.

171. Competitors demand access to IP products. As a result of that demand, IP products are defined as being separate markets. These IP markets count one firm only: the innovator of the IP products concerned. Being alone on the relevant market, that firm may be found dominant. An abuse is established as undesirable effects are observed on derived markets where the IP products are used. The conditions are satisfied for the imposition of access obligations.

172. *IMS Health & Co. OHG v. NDC Health GmbH & Co. KG*, Case 418/01, [2004] E.C.R. 5039, ¶ 52.

the threshold for the degree of innovation requested for the application of Article 82 EC.

The other preliminary rulings are *Volvo* and *Renault*. As we have indicated, the principle of an IP limitation was affirmed, in these cases, for the first time.¹⁷³ Yet, these cases raise difficulties. Some of these difficulties were noted in the course of this paper. First, the two rulings remain, in their substance, relatively vague.¹⁷⁴ Second, they contain contradictions on important points.¹⁷⁵ Third, they set a demanding standard for IP dominant firms.¹⁷⁶ But, ultimately, they do not apply that standard to the car constructors involved, although the practices adopted by these firms seemed to correspond with those listed in that standard.¹⁷⁷ Finally, the position adopted by the ECJ in *Volvo* and *Renault* may be explained, probably, to a certain extent, by the circumstances of the cases: the IP rights concerned,¹⁷⁸ the prod-

173. They were issued on the same day, they were decided by the same formation and they include the same principles. For these reasons, they may probably be counted as forming one case only. See *supra* notes 4-11 and accompanying text.

174. AB *Volvo v. Erik Veng* (UK), Case 238/87, [1988] E.C.R. 6211, ¶ 9; *Renault*, Case 53/87, [1988] E.C.R. 6039. In these rulings, the ECJ states that a refusal to grant a license may infringe Article 82 EC where it is arbitrary—but it does not indicate under what circumstances a behavior qualifies as arbitrary. Similarly, the rulings do not provide indications on the circumstances under which royalties become unfair.

175. In *Volvo*, the ECJ states that IP holders may not be compelled to grant licenses. This would empty these rights of their substance. Yet, the ruling concludes, to the opposite, that such obligations must sometimes be imposed. In the same vein, the ECJ rules that IP holders may not be compelled to grant licenses even where significant royalties are proposed. Yet, the ruling finally entails a prohibition to set royalties at an unfair level. See *Volvo*, [1988] E.C.R. 6211, ¶¶ 8-9.

176. See *id.* ¶ 9.

177. *Id.* ¶ 10. In those cases, car constructors refused to grant licenses for the independent production of protected body panels concerned. They also charged, for these panels, prices significantly higher than those offered by other firms. In the rulings, the ECJ sets a standard under which IP dominant firms may be compelled to grant licenses at reasonable terms and conditions. The practices adopted by the car constructors seemed to correspond with those aimed at in the standard. We could thus expect the ECJ to rule that, in the cases at issue, the relevant EC provision had to be interpreted as prohibiting such practices. Yet, the ECJ came to a different conclusion. In *Volvo* the court stated "no instance of any such conduct has been mentioned by the national court." *Id.* In *Renault*, as regards the difference in the prices charged by the dominant manufacturer and independent producers the court stated "a higher price for the former than for the latter does not necessarily constitute an abuse, since the proprietor of protective rights in respect of an ornamental design may lawfully call for a return on the amounts which he has invested in order to perfect the protected design." *Renault*, Case 53/87, [1988] E.C.R. 6039, ¶ 17.

178. Design was not protected, at that time, in all Member States. Some States considered that the level of innovation contained in a design was not sufficient to entail

ucts involved¹⁷⁹ and the specific industry¹⁸⁰ in which these facts occurred—an industry which has often given rise to antitrust concerns and where a specific concern exists to protect consumers particularly.¹⁸¹

For these reasons, *Magill* may be, ultimately, the most important case in the IP/competition jurisprudence. In that case, three organs¹⁸² had an opportunity to investigate the issue thoroughly. Yet, we have seen how that promising context produced results not entirely satisfactory. Market definition is essential in competition litigation. In that case, it was not carried out with care. As we have seen, this has consequences on the coherence of the justifications presented by these courts—principally the LDP and the NP requirement.

a protection. *Renault*, Case 53/87, Report of the Hearing, [1988] E.C.R. 6048. This may have been interpreted by the ECJ as implying that the protection granted to design was excessive in the Member States concerned (Italy, the UK)—and that it should be reduced through an application of the rules of competition. Furthermore, most IP regimes contained compulsory licensing schemes whereby IP firms are compelled to provide licenses in various circumstances. Such schemes did not exist in the national rules concerning design protection in the Member States where the cases arose. *AB Volvo v. Erik Veng* (UK), Case 238/87, Report of the Hearing, [1988] E.C.R. 6214, 6219. In the rulings, the ECJ may have been tempted to remedy that lacuna by adding that scheme to these national laws through an application of the rules of competition.

179. Most spare parts used on the vehicles involved in the cases were not subject to protection. They could be duplicated legally. *Volvo*, [1988] E.C.R. 6214; *Renault*, [1988] E.C.R. 6042. In some States, body panels are not protected because the level of innovation present in them is not deemed sufficient to permit a protection. This may have prompted the ECJ to suggest that the protection granted to the car constructor could not go so far as to allow them to refuse a license or to charge unfair prices.

180. The car industry attracts a special attention on the part of antitrust enforcers. In the history of EC competition law, a number of cases were decided against car constructors seeking to partition markets. A typical example is the arrangements of distributors with importers to avoid the sale of cars to purchasers likely to resell them on more expensive markets. The intricacies of the relations among actors in that industry has prompted the adoption of regulations articulating the conditions to satisfy in order to qualify for an exemption under Art. 81(3). EC Treaty, *supra* note 7, art. 81(3), O.J. C 321 E/37, at 73-74. On these regulations, see SIR CHRISTOPHER BELLAMY & GRAHAM CHILD, *EUROPEAN COMMUNITY LAW OF COMPETITION* 475-95 (6th ed. 2008); VAN BAELE & BELLIS, *supra* note 73, at 350-82; Konrad Schwumm and Hubert Gambs, *Motor Vehicles, in THE EC LAW OF COMPETITION* 1649-1701 (Jonathan Faull & Ali Nickpay eds., 2007).

181. A number of arguments raised in the cases against car constructors relate to consumer protection. For instance: the prices charged for protected spare parts were apparently set at a level just inferior to the limit where the consumers would renounce repairing the car. Not only would that strategy lead to higher profits for constructors. It would also compel consumers to purchase new models whereas, with spare parts made by independent manufacturers, the ancient vehicles could have been kept for years. *Renault*, [1988] E.C.R. 6042, 6045.

182. The European Commission, the CFI, and the ECJ.

Five cases in total, an exceptional case unlikely to serve as a precedent or illustration in future IP/competition cases, three cases decided in a procedure not entirely adequate to rule on complex competition issues, one case based on questionable market definitions: are these solid foundations to regulate innovation?

D. Underlying Attitude

Last but not least, we examine whether the position adopted by the European courts finds an echo in other rulings, or other instruments, adopted in other competition law areas, or even other fields of law.

Of course, an association coming to mind is with cases involving “essential facilities.”¹⁸³ These cases are the object of a controversy. The debate is whether a general principle compels firms to give access to facilities placed under their control where these facilities are essential for the provision of derived services. Typically, providers present on secondary markets claim that they were refused access to an infrastructure, that the terms/conditions imposed for access were not reasonable or that these terms/conditions were discriminatory.

That jurisprudence has inspired regulations adopted in network markets—particularly to markets concerning electronic communications.¹⁸⁴ As in essential facility cases, these industries feature infrastructure through which services are provided. In both contexts, the issues are similar: was access provided under reasonable and nondiscriminatory conditions?¹⁸⁵

In these rulings and regulations, courts and authorities grant a special attention to effects produced, on derived mar-

183. Much has been written about essential facilities. See, e.g., Ulf Muller & Anselm Rodenhäuser, *The Rise and Fall of the Essential Facility Doctrine*, 29(5) EUR. COMM. L. REV. 310 (2008); see also John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, in INTERNATIONAL ANTITRUST LAW AND POLICY, 245, 245-99 (Barry Hawk ed., Fordham Corporate Law Institute 1995). For an comparative analysis of latest developments, see Damien Gérardin, *Limiting the Scope of Article 82 EC: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the Wake of Microsoft and Deutsche Telekom?*, 41 COMMON MKT. L. REV. 1519, 1519-23 (2004).

184. PIERRE LAROCHE, COMPETITION LAW AND REGULATION IN EUROPEAN TELECOMMUNICATIONS 1-36 (Hart 2000); see generally NIHOUL & RODFORD, *supra* note 71.

185. See LAROCHE, *supra* note 184 at 218-31.

kets, by operation, or behavior, located on primary markets.¹⁸⁶ These instruments concern activities taking place at various levels in an economic chain. A feature specific to them is that a product resulting from one activity (primary market) is analyzed as being necessary for a second activity.

The attention to “derived effects” is not limited to these specific situations. Often, activities are integrated in economic chains. As a result, competition analysis may not be limited to concerns raised on markets where the operation/practice in question take place. It must extend to negative consequences possibly affecting other markets—which, depending on the situations, may be located downwards, or upwards, along the chain (“spillover effects”).¹⁸⁷

Another association is, within IP law, to the “exhaustion of right” principle. Under that principle, an IP firm may only use its rights once.¹⁸⁸ It is not allowed to oppose the use of an IP product by a third party once that product has been legally put in commerce. In other words: firms may use IP rights once—but may not benefit from these rights a second time.¹⁸⁹

This may be the final word—and the ultimate explanation for the attitude adopted in the IP/competition jurisprudence. In all these situations, successful firms are allowed to enjoy the advantages they derive from property rights: intellectual property, property on infrastructure or essential facilities. But these advantages may only be enjoyed once. The fruit may not be reaped, a second time, on a derived product market¹⁹⁰ or another geographic market.¹⁹¹

CONCLUSION

In this Article, we have examined cases where the European

186. See *id.* at 129-64.

187. See VAN BAELE & BELLIS, *supra* note 73, 906-07.

188. See *id.* at 589-90.

189. In the jurisprudence, see, *Deutsche Grammophon v. Metro*, Case 78/70, [1971] E.C.R. 487 (sound recordings); *Centrafarm v. Sterling Drug*, Case 15/74, [1974] E.C.R. 1147 (patents); *Centrafarm v. Winthrop*, Case 16/74 [1974] E.C.R. 1183 (trademarks); *Keurkoop v. Nancy Kean Gifts*, Case 144/81 [1982] E.C.R. 2853 (design rights). In the literature, see Bellamy & Child, *supra* note 180 at 820-22; Kevin Coates, Lars Kjolbye & Luc Peepkorn, *Intellectual Property*, in *THE EC LAW OF COMPETITION* 10.36-10.57 (Faull and Nickpay eds., 2007); VAN BAELE & BELLIS, *supra* note 73, 589-90.

190. IP/competition cases, essential facility cases, network regulation.

191. Exhaustion of IP rights.

Commission and the European courts envisage two mechanisms to support innovation: competition and IP protection. The question is when, and where, one mechanism should be preferred to the other. For the Commission and the courts, the answer lies in the degree of competition existing on markets. Where competition is effective, IP can be protected.¹⁹² By contrast, it should be limited where competition is not effective.

In that jurisprudence, innovation remains protected. However, the form of that protection differs depending on the degree of competition. On competitive markets, the substance of an IP right remains a prerogative to oppose unauthorized uses. Where competition is not effective, IP becomes a financial right: the right to claim a compensation for the use of the innovation under reasonable and non discriminatory terms and conditions.

Currently, there does not appear to exist any sanctuary against the application of competition. This is a tough lesson for undertakings enjoying a certain protection provided by law. In the last decades, rights traditionally attached to public utilities were dismantled in the name of competition. The next field may be IP: a form of market organization that is not limited to a specific industry but runs across economic boundaries.

192. Firms then compete on the basis of their respective innovations as protected by IP rights.