Neo-Schumpeterian concepts are unlikely to gain favour, for two reasons: first, a lot of optimistic speculation about future market developments is required; second, neo-Schumpeterians take a narrower view about the aims of competition law—damage that dominant firms can do to other undertakings is irrelevant unless it can be shown that there will be loss to consumer welfare in the long run as a result of the acts of the dominant firm. However, current competition law is concerned with the elimination of competitors per se, observing that this carries the risk of the dominant firm being alone on the market or deterring new entrants. Thus, neo-Schumpeterian ideas do not fit easily within the current competition law culture, and their theories do not fit within the analytical framework of Article 82 EC. The task for neo-Schumpeterians is to translate their economic theories into workable legal models. One suggestion which this chapter has made which might facilitate the integration of neo-Schumpeterian concepts in competition law analysis is to develop an innovation defence which would force the courts to consider the impact of Article 82 decisions on the incentives to innovate more openly than is done at present.

In spite of the authorities’ aggressive stance, firms have escaped with little financial sanctions. Microsoft for example escaped liability in spite of committing flagrant breaches of the Sherman Act, but may yet face private lawsuits. Instead, the authorities have focused on ex post behavioural remedies and ex ante divestitures. As some authorities have recognised, these types of remedies turn competition law into a market regulator, a task for which it is not well equipped.

These developments suggest that the focus on neo-structuralism by the authorities aims to regulate the new economy to afford market access for all participants, rather than to deter dominant firms with large fines. Competition law here is forward looking in seeking remedies that remove dominance by facilitating the entry of others. Whether or not this goal should be achieved through Article 82, a more pressing question is whether this policy will eliminate incentives to innovate, frustrating the dynamism of new economy markets.

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135 AOL is reported to be seeking damages. Financial Times (24 January 2002).
The chapter is divided into three sections. After a short review of the conditions under which Article 82 applies, section one addresses the various decisions of the ECJ and CFI dealing with refusals to license by holders of IPRs preceding the IMS case. The facts will be first described, then the rulings. The analysis will show the existing confusion as to the circumstances in which there is abuse by an IPR holder. Section two discusses the IMS case. The case serves to illustrate further the confusion identified in section one. First, the facts of the case will be summarised. Then the rulings of the Commission and the President of the CFI will be explained, commented upon and contrasted. Section two concludes with remarks on the consequences that the conflict between the decisions entails. Section three suggests a way of reconciling the cases. It first develops the argument and then draws some consequences, including a preferred way of deciding the IMS case. A few arguments corroboration suggesting interpretation of the case law are finally given. In conclusion, it is hoped that the IMS case will be a catalyst for the court to clarify the conditions at which an IPR holder should be forced to grant a license.

1. CONCLUSION IN THE CASE LAW

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

Article 82 lists a few examples of abuses. These examples do not form an exhaustive list. Abuses such as refusals to deal with a competitor are not listed, but the ECJ has since the 1970s included them within the scope of Article 82. There are at least two types of refusal to deal: refusals to supply and refusals to license. Refusals to supply seem to be connected to tangible property while refusals to license, to intellectual property. As refusal to deal are not listed in Article 82, the conditions under which such refusals will be abusive similarly are not listed. Thus a fortiori the conditions under which a refusal to license by the holder of an IPR is abusive are not mentioned either. However, the Community courts have decided that Article 82's scope encompasses refusals to license and have, in a number of decisions, laid down conditions at which such a refusal is abusive. The remedy for an abusive refusal to license an IPR is to impose a compulsory license onto the holder of the IPR.

A. Factual Background to the Case

There are four cases in which the ECJ and the CFI have elaborated conditions or circumstances in which an IPR holder will be forced, under Article 82, to grant a license to its competitors. In chronological order, these are: Renault, Volvo, Magill and EC Treaty and Intellectual Property Rights' (1998) European Intellectual Property Review 380 S Weatherill and P Beaumont, EU Law 3rd edn (London, Penguin Books, 1999) 845 R Whish, Competition law 4th edn (London, Butterworths, 2001) 150.

5 P Roth QC (ed), Bellamy & Child, European Community Law of Competition 5th edn (London, Sweet & Maxwell, 2001) n 9, 99-110 do not make the distinction exactly as such but make an attempt to distinguish refusals to supply and refusals to license. The structure in which they discuss this area of the law is as follows: (i) refusal to supply (including (a) refusals to supply existing customers; (b) access to essential facilities; (c) refusals to supply in other circumstances and (d) abuses of IPR. Which above n 4, 111 ff only speaks of refusals to supply and classifies them in several headings similar to those of Bellamy & Child and also discusses abuses of IPR within a separate category (698).
Ladbroke.10 In addition, even if it does not deal with an IPR, the Bronner11 case is relevant to the analysis for at least two reasons. First, the court, to reach its decision in Bronner relied upon the above cited cases. Second, the Commission has heavily relied on that ruling to decide the IMS case.12

The facts of the cases can be summarised briefly as follows. In the Renault and Volvo cases,13 Renault and Volvo had design rights on their models for car body panels. They refused to grant a license of their design rights to independent repairers thereby preventing them from supplying spare parts. In the Magill case, the Irish and British broadcasters BBC, RTE and ITP,14 each respectively holders of copyright on their weekly television listings, denied Magill, an Irish publisher of comprehensive weekly television guides, a license to reproduce them. In Ladbroke, the French sociétés de courses, held copyright in the pictures and sound of horse races. They refused to grant to Ladbroke, a Belgian bookmaker, a license to rebroadcast French horse races live. Finally, in Bronner, Mediaprint, an Austrian newspaper publisher, refused to distribute the daily newspaper of another


13 The facts and rulings of the two cases are substantially the same; thus the cases will be discussed together.
14 If TP was not strictly speaking a broadcaster but ITP and Channel 4 had granted it their copyright in their television programmes. NR: copyright will be used throughout this article in its broad meaning, ie encompassing both civil law author’s right and common law copyright.

B. Conditions Required to Establish the Abuse

When is a refusal to license by the holder of an IPR an abuse? In other words, in what circumstances can a compulsory license be imposed on an IPR holder?

First of all, it is well established that the mere ownership and mere exercise of an intellectual property right (here, the mere refusal to grant a license) cannot in itself confer a dominant position nor consist in an abuse of such a position.15 Thus there will only be an abuse when the IPR is exercised in certain—exceptional—circumstances. These circumstances in which an abuse may be found have been laid down in the five cases.

In the Renault and Volvo cases, the court did not set our circumstances in which a refusal to license is abusive, but merely gave non-exhaustive examples of abusive conduct resulting from the exercise of an IPR, namely: the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level and the decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.16 As can be seen, the refusal to license was not even listed, but only the refusal to supply,17 and it was only cited as one example. No conditions were given at which such refusal was abusive. Thus, Renault and Volvo only set the scene for the more detailed ruling in Magill.

Magill constitutes the first case in which the Court addressed in detail the conditions under which a refusal to license18 will be abusive. It stated that

15 Se e.g Parke Davis & Co v Pradel, Case 24/67 [1968] ECR 55. The CJG recalls this principle in each of the above mentioned decisions whereas in Ladbroke, the CFI omits to do so.
16 Paras 9 of the Volvo decision and 15 of the Renault decision.
17 F Sirinainen, ‘Droit d’auteur contre droit de la concurrence: versus “droit de la reglementation” ’ (2001) Revue Internationale de Droit Economique 422 thinks that Volvo and Renault were not really concerned with a refusal to license but rather with a refusal to supply. However, it can be said that in effect, the car manufacturers’ refusal to supply amounted to a refusal to license, as it was not possible to make spare parts without having a proper license.
18 Some think that Magill is actually a case of refusal to supply raw materials (see here information), not a refusal to license the reproduction of works protected by copyright, probably due to the fact that the copyright held by the broadcasters was on basic information. See M Van Kessel, ‘Magill: A Refusal to License or a Refusal to Supply?’ (1995) 1 Copyright World 26. However, it is to be noted that despite that fact, one cannot deny that there was copyright in the television listings and that strictly speaking it was a refusal to license (ie not to allow a third party to reproduce a copyright work).
these conditions must remain exceptional. These are: (1) the prevention of the appearance of a new product which the IPR holder did not offer and for which there was a potential consumer demand, (2) the refusal is not justified and/or (3) the IPR holder reserves to himself a secondary market by excluding all competition on that market.19

In Ladbroke the CFI refined one of the conditions in Magill: a refusal to license will infringe Article 82 if it is a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers.20 However, it added a new alternative condition: a refusal to license will infringe Article 82 if it concerns a product or service which is essential for the exercise of the activity in question, in that there was no real or potential substitute.21

Finally the Court in Bronner set a tripartite test which combines conditions of Magill and Ladbroke: (1) the refusal of the service comprised in the home delivery must be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (2) such refusal cannot be objectively justified;22 and (3) the service itself must be indispensable to carrying on that person's business, as much as there is no actual or potential substitute in existence for that home delivery scheme.23

As it transpires from this brief summary, it is difficult to know exactly under which conditions a refusal will be abusive and which conditions should be applied in subsequent cases.24 First, the conditions set down in the cases differ: some are restated in the same terms, others with a change in the wording, some are withdrawn, some are added. Second, there is uncertainty as regards whether the conditions should be applied in a cumulative or alternative way (and if so which ones). Indeed from the wording of the Magill ruling, it is impossible to know whether the Court intended the circumstances to be alternative or concurrent.25 In Ladbroke, the CFI sets two alternative conditions. Ladbroke thus broadens the Magill ruling.26 Finally, in Bronner, the court takes the opposite stance and opt for a cumulative test.

What happened in the IMS case? Not too surprisingly, the Commission on the one hand and the Presidents of the CFI and of the Court, on the other, made two different, and conflicting, interpretations of the case law.

2. AN ILLUSTRATION OF THE CONFUSION: THE IMS CASE

A. The Factual Background of the Case

In Germany, IMS27 provides reports informing pharmaceutical companies of regional sales of their pharmaceutical products. To provide this data, any provider must comply with the German data protection law and thus ensure that individual sales by any given pharmacy cannot be identified (at least three pharmacies must be grouped in a geographical zone also called 'brick' or 'module', for which the data on the sales is given). In order to abide by German law, IMS has created a structure which divides Germany into 1860 modules. On the basis of its structure, IMS reports on sales of pharmaceutical products and provided them to pharmaceutical companies. IMS claimed it had copyright on its structure as the President of the CFI, as cumulative. V Korah (2002a), above n 2, 810, 811 and 814, see the Magill conditions as cumulative even if subsequent case law has suggested that they are alternative. Anderson above n 9, 209-10 and H Lugard, 'ECJ Upholds Magill: Is Sounds No in Theory, But How Does it Work in Practice?' (1995) European Business Law Review 233 also wonder whether some of the Magill conditions are cumulative. F Fine, 'NDI/IMS: Is Response to Professor Korah' (2002a) 70 Antitrust Law Journal 247, 251 believes that the conditions are alternative: 'The President therefore read the factors listed in Magill as being cumulative, contrary to what subsequent case-law—as even Korah confirms—tells us'.

20V Korah (2002a) above n 2, 814.

database. In 1999, National Data Corporation Health Information Services (NDC) and Azyx Deutschland GmbH Geopharma Information Services (Azyx) entered the German market by creating a structure which was compatible with that of IMSs. IMS sued NDC for infringement of copyright in its structure in Germany and won. NDC then brought a complaint to the European Commission against IMS for abuse of dominant position because IMS denied NDC a license to use its structure. The Commission decided to oblige IMS to grant a license to all undertakings already present in the market. On IMS’s appeal (application for interim relief), the President of the CFI suspended the decision and the President of the ECJ confirmed the suspension.

B. The Decision of the Commission

First, the Commission established the relevant product and geographic market as being the market for services of data provision on regional sales of pharmaceutical products in Germany alone. Second, the Commission established that IMS has a dominant position. IMS is in a situation of quasi-monopoly because before NDC and Azyx’s entry on the market, it was the sole player on the market. The respective positions of NDC and Azyx were negligible. In addition, there was an effect on the commerce between Member States.

As to the question of abuse, the Commission briefly summarised the case law relating to refusals to deal (namely Commercial Solvents, United Brands, Volvo, Magill, Ladbroke, Bronner). The way in which the Commission reviews the decisions indicates that it reads them as reflecting a trend towards the adoption of the essential facilities doctrine by the Community courts. In the Commission’s view, the case law is to be seen in an evolutionary way where Commercial Solvents reflects the implicit adoption of the essential facilities doctrine and Bronner confirms it. The Commission puts all the cases together in a straight line as constituting some sort of proof of the same, single trend. Thus for the Commission, the applicable conditions for judging any abuse of a dominant position under Article 82 (including abuses of IPR) are the three cumulative ones now laid down in Bronner.

To justify this interpretation, the Commission reasoned (albeit perhaps implicitly) in the following three-stage way. First, it set out Magill’s exceptional circumstances. Second, it recalled that in the Ladbroke case, the CFI implied that it is not necessary for a refusal to prevent the appearance of a new product in order for it to be considered an abuse. In other words, Ladbroke allows Magill’s conditions to be read in an alternative fashion. Third, the Commission found that the Bronner ruling confirms the Ladbroke approach. The reasoning is as follows. The condition of the prevention of a new product, first set out in Magill and restated but in a clear alternative fashion in Ladbroke, is omitted in Bronner. Thus, for the Commission, it is not to be tested anymore.

In sum, the Commission’s interpretation of the cases seems to be that Bronner is the definitive test to apply in cases involving refusals to deal, including refusals to license. In other words, for the Commission, Bronner lays down the definitive exceptional circumstances or contains the decisive reinterpretation of the notion of exceptional circumstances as first set in Magill. This is why the Commission based its decision in the IMS case exclusively on the Bronner tripartite test.

Applying the Bronner test to IMS’s facts, the Commission came to the conclusion that IMS had abused its dominant position since the three cumulative conditions were fulfilled: first, IMS’s refusal was unjustified; second, it eliminated all competition in the market of the provision of regional data because the structure was indispensable for NDC and Azyx to continue their activities, and third, there was no actual or potential substitute to this structure. As a result, the Commission imposed a compulsory license on IMS.

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28 As the situations of NDC and Azyx are very similar, reference will be made exclusively to those of NDC.
29 The Commission was bound by the German decision in this regard as it cannot decide upon the validity of national copyrights. This issue is left to the national courts.
32 IMS Health Inc v NDC Health Corp, Case C-481/01, 11 April 2002 [2002] 5 CMLR 1 (ECJ). As this order merely confirms the two orders of the President of the CFI and does not contain a further analysis of the substance of the issues, it will not be discussed.
33 Paras 45 ff of the Commission’s decision.
34 Ibid paras 57 ff.
36 Above n 5.
37 Ibid.
38 Paras 63–74 of the decision of the Commission.
39 Even if the Commission acknowledges that neither the CFI nor the ECJ has ever referred expressly to the essential facilities doctrine in their judgments (para 64). The doctrine is briefly defined and explained at above n 3.
40 Which above n 4, at 611, 613 and 615, shares this opinion as well.
41 Paras 68 and 180 of the decision of the Commission.
42 These exceptional circumstances meet the test set out in Bronner for a refusal to supply to be considered an abuse of a dominant position. (Ibid para 181). For a criticism of this finding by the Commission, see Delcaye above n 3, 47 and 52.
C. The Orders of the President of the Court of First Instance

The President of the CFI was not convinced that the Commission's view was the only interpretation that can be given to the case law. In his first order, the President put emphasis on the Magill case. It seems implicit from the rather short reasoning that what should be stressed is the facts of the cases. In substance, his reasoning can be put in the form of a syllogism: (1) the approach underlying the Commission's decision seems to depend on the notion of exceptional circumstances as elaborated in Magill; (2) there are potentially important differences between the facts of Magill and those of IMS; (3) the facts of IMS and Magill are different, but nevertheless the Commission imposes a compulsory license on IMS despite the difference in their facts, IMS has made a prima facie case that the Commission misapplies Magill.43

In his second order, the President recalled that there are differences between the facts of the Magill and IMS cases and added that the Commission's interpretation of the Magill ruling (ie as setting alternative conditions) 'constitutes at first sight an extensive interpretation of the Magill case'.44 The President concluded that while the Commission's reading of the case law might be correct, there were reasonable grounds to conclude that there may be another interpretation of the case law, such as seeing the Magill conditions as cumulative.45 Thus the order seems to suggest that there may be two interpretations of the Magill case: the conditions for imposing a license are cumulative, or, on the contrary, they are alternative. Given the existence of a serious dispute as to the legal reasoning that must be applied to decide the IMS case, the President, having found that all other conditions to grant interim relief (urgency, balance of interests, etc) were fulfilled, suspended the decision of the Commission. In conclusion, he found that there was clearly a problem of interpretation and only a final decision on the merits could clarify it.

D. Comments

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

The different interpretations of the case law reached by the Commission and the President of the CFI lead to different results. If, on the one hand, the conditions in Magill are applied in a cumulative fashion, the number of cases where an abuse will be found will probably be small. If, on the other hand, the Bronner test is solely applicable, it should lead to the opposite result (as the important condition of the prevention of the appearance of a new product is not required). Thus the choice as to which of those interpretations should prevail will have extremely important consequences on the determination of future cases relating to refusals to license.

In conclusion, the IMS case raises once again the fundamental question underlying the application of Article 82 to the exercise of an IPR: what are the exceptional circumstances in which there will be abuse of an IPR? And, more generally, what should they be? While this second question is beyond the scope of the discussion as it involves a deeper legal and philosophical analysis of the relationship between IPR and competition law, the following section will attempt to answer the first, namely make sense of the case law as it stands. It will include a discussion of why the Community courts should make a distinction in their treatment of intellectual property compared to other forms of property.

3. HOW TO SOLVE THE DILEMMA: A SUGGESTION

As illustrated by the abundant literature on the topic and by the IMS case, it appears to be difficult to reconcile the rulings of Magill, Ladbroke and Bronner.46 The root of the problem seems to be the uncertainty over whether the conditions in Magill are cumulative or not. The question is: are the cases irreconcilable? Is there a problem of interpretation of the case law and if so, how can it be solved? If there is no problem, how can the cases be explained? The short answer to this is that there is no dilemma. In other words, the case law is reconcilable. The argument is as follows.

43President's order of 10 August 2001, para 24.
44Para 100 and 102 of the President's second order, referring to para 67 of Commission's decision.
45Para 104 of the second order.
46For the literature, see above n 25.
A. Argument

The answer lies at the heart of the *Bronner* ruling. As *Bronner* is the most recent case on refusals to supply a downstream competitor decided by the ECJ, not surprisingly, the Court reassesses its previous case law. If one reads the decision carefully, the ECJ seems to give the answer to the apparent problem. In paragraph 40, the Court restates the *Magill* conditions, but clearly interprets them as cumulative. It even reinterprets the third condition in stating that the refusal must be objectively justified. Whether this is inevitable or not is left to the appreciation of the reader. However, in view of the confusion the *Magill* decision created as far as the interpretation of the exceptional circumstances is concerned and of the amount of literature it has generated commenting on this imprecise language, one might well take the view that this (re)wording is not innocent. This is reinforced by the language of paragraph 41 which reads:

Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question, not only that...

In this paragraph, the ECJ suggests one thing: as regards the application of Article 82, or at least in the case of one type of abuse, refusals to deal, intellectual property rights have to be treated differently from other property rights. In paragraph 41, the Court’s opinion is that it is far from clear that the case law relating to abuses of IPR applies to abuses of other forms of property.

The finding that IPR should be treated differently from other types of property has two consequences. First, it is certain that in similar situations to the facts of *Bronner*—or if it can be extrapolated further, in cases involving other property rights—other conditions must be met (ie the three conditions the court sets forth in paragraph 41 as further characterized in paragraphs 44 and 46). At the risk of stretching the Court’s wording or intention too much, the Court in *Magill* is the authority dealing with IPR and does not in itself have direct application as it stands in other property fields.

Second, this suggests therefore, implicitly and a contrario, that in situations dissimilar to those of *Bronner*, ie in cases involving refusals to license IPR, it is *Magill* which is to be relied upon. At least it is far from clear that the *Bronner* conditions should apply. In other words, the ECJ seems to warn that it may not be self-evident that the same conditions should apply to cases involving refusals to license (involving intellectual property) and refusals to supply (involving other types of property (mainly tangible)).

Thus the interpretation of this important part of the *Bronner* judgment, which is passed over in silence by the Commission, but interestingly pointed to by the President of the CFI in his second order, seems to strongly suggest that only *Magill* should apply to intellectual property rights and not *Bronner*. It could be argued therefore that the *Bronner* judgment makes a distinction between cases involving refusals to supply and refusals to license. In the first set of situations, only the tripartite test set out in *Bronner* applies whereas in the second set, only the cumulative conditions of *Magill* (as reformulated in paragraph 40 of *Bronner*) apply. In conclusion, there is no conflict between the several rulings.

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

47 In *Magill*, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (para 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (para 55), and that it was likely to exclude all competition in the secondary market of television guides (para 56) (emphasis added). Schmid above n 2, 215 suggests that ‘*Bronner* clearly emphasizes the ruling in *Magill* that all the “exceptional circumstances” should be present before Article 82 can apply to confine the ambit of an IPR’, however without giving the reasons or making a demonstration of his argument.

48 Para 55 of the *Magill* ruling only states: ‘Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines...’

49 Emphasis added.

50 In its para 104, the President seems to hint at the solution by recalling paras 40 and 41 of *Bronner*. Perhaps this is further evidence of the approach advocated in this article.
copyright and other forms of property. The result is that it is still uncertain whether copyright can really be said to be a type of property. The author's aim is not to determine once and for all that copyright is property or that it is not. Rather, even if it is accepted that copyright is (a type of) property, it is submitted that it is so dissimilar from other forms of property that refusal to license copyright should be treated differently from refusals to supply other forms of property.

There seems to be broad agreement among scholars that property rights have two essential characteristics. They are rights against the world (in other words, the owner has the right to prevent anyone from interfering with the use and enjoyment of the property) and they are transmissible (inter vivos and upon death). In addition, property rights are generally perpetual (or durable) and absolute. It will be seen that copyright lacks all of these crucial characteristics (at least in their full extent). In addition, at least three specific features of copyright can be identified that other forms of property do not have (copyright includes moral rights, the same copyright can be licensed to several persons simultaneously and copyright has an ethical element) which further estrange it from the remainder of property.

Copyright is a bundle of economic and moral prerogatives. While economic rights can be alienated, moral rights cannot and are thus

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55 In other words, property rights are universal or erga omnes. A Bell, Modern Law of Personal Property in England and Ireland (London, Butterworths, 1989) 6. (Who defines this characteristic in terms of property being both a defensive and assertive right (7-9); a property right is a defensive right in the sense that no one may interfere with my ownership of a thing without my permission. A property right is also 'against the world' in the sense that it can be asserted against anyone into whose hands the property comes; W Murphy and S Roberts, Understanding Property Law 2nd edn (London, Harper Collins Publishers, 1994) 46-47; M Bridge, Personal Property Law (London, Blackstone Press, 1996) 8.)

56 In other words, property rights are alienable, assignable or transferable. Bell above n 55, 6; Murphy and Roberts above n 55, 46-47; F Lawson and B Rudden above n 51, 39-40.

57 Murphy and Roberts, above n 55, 47.

58 See eg French and Belgian Civil Code, Art 544: 'Property is the right to enjoy and dispose of things in the most absolute manner, as long as one does not use it in a way that is prohibited by statute and regulations' (translation by the author). See also the discussion below.

59 The economic aspects of copyright cannot be severed from their moral counterparts. The Court of Justice has itself declared that the specific subject matter of copyright is to protect the economic and moral rights of right holders (Collins (Phib) v Instat Handelsgesellschaft Mith [1993] ECR 543) and that the essential function of copyright law is to protect the moral rights in the work and to ensure a reward for the creative efforts, while respecting the aims of, in particular Art 80 (CPI) rulings in Magill. Cases T-699/89 Radio Televisiab Lettera Creazione v Commission and T-76/89 ITP v Commission above n 9. One cannot thus see copyright amputated from a part of its true nature (ie its moral rights).

60 In some countries, notably Germany, copyright (Urheberrecht) is seen as a unified, unique concept, where moral and economic prerogatives are inseparable. Hence copyright (thus as a whole, comprising both its economic or moral prerogatives) cannot be alienated but only licensed. In this sense, the whole German bundle of copyright rights lacks the important property characteristic of transmissibility.

61 Like other national copyright acts, the UK Copyright Act expressly states that copyright is transferable (s 90(1)). However s 94 states that moral rights are not assignable. JAL Sterling,
not property. Moral rights protect the personality (name, honour, reputation, integrity) of the author and are therefore classified as personality rights. Unlike other forms of property, the copyright holder can license his/her rights to several people, i.e. he/she can choose between granting one exclusive license or several non-exclusive licenses. Copyright is moral. Copyright has an ethical component that other forms of property do not have: courts will not enforce immoral copyrights, because if they did, they would legitimise immorality. Copyright is also territorial. It only forbids unauthorised acts done within the borders of the state in question. Even if international conventions tend to make copyright 'truly international', there are still countries not party to them, so there is still a difference between copyright and other forms of property. In other words, copyright is not strictly a universal right. As soon as the Berne Convention (or the TRIPS Agreement which incorporates it) is applicable in all countries of the world, copyright will be truly a universal right.

In addition, copyright is not absolute: intrinsically, by nature, it is limited. Copyright statutes contain in themselves a generally well-thought through and carefully tailored internal balance. Three limitations to copyright's scope readily exist in the statute. Copyright law is first limited by protection requirements that need to be fulfilled in order to attract protection (as ideas are not protected but only their original expression). Once the rights are acquired, they are further limited by exceptions which exist to the benefit of users. Finally, copyright does not last perpetually. The limited duration, characteristic of copyright, is totally contrary to the durable quality of other forms of property. It does not make sense that a car, land or money ever "dies", i.e. that it is not be owned by someone. It makes sense that a person always owns the object, even if it is not bought by a subsequent owner but is appropriated because it has been abandoned by its original owner. On the contrary, this finding does not make sense in relation to original expressions of thought (be they literary, musical, artistic or other copyright protected works). As a matter of policy, the public should be able to use them freely once the author has recouped his/her investment. Hence the rationale for the limited duration of copyright. This entails an important consequence: since copyright is not perpetual, the monopoly or dominant position it can create will never last for ever, contrary to other forms of property.

There are no such limitations on other forms of property law. To become the object of property, a thing does not have to fit in a category nor fulfil certain conditions. As regards rights, copyright is much more limited than other property rights. For instance rights in land. Landowners' rights are indefeasible, comprising every possible use of land: a complete list of them cannot be made. The same can be said of personal property. In contrast, copyright rights are well defined in the statute. Unlike copyright law, which provides for exceptions to rights, the law relating to other forms of property does not further oblige the owner to let anyone use it once certain conditions are fulfilled.

In sum, unlike other forms of property, copyright can be adequately envisioned as (primarily) creators' rights but also as users' rights. Thus, although there may be rules against abuses or misuses of other forms of property, overall these forms are much more absolute, or at least less limited, than copyright.

The reasons for these limitations to copyright are briefly as follows. Copyright works are information goods. The nature of information goods is that they are public goods. Like other public goods, they possess a universal service characteristic of copyright, is totally contrary to the durable quality of other forms of property. It does not make sense that a car, land or money ever "dies", i.e. that it is not be owned by someone. It makes sense that a person always owns the object, even if it is not bought by a subsequent owner but is appropriated because it has been abandoned by its original owner. On the contrary, this finding does not make sense in relation to original expressions of thought (be they literary, musical, artistic or other copyright protected works). As a matter of policy, the public should be able to use them freely once the author has recouped his/her investment. Hence the rationale for the limited duration of copyright. This entails an important consequence: since copyright is not perpetual, the monopoly or dominant position it can create will never last for ever, contrary to other forms of property.

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'non-rival' quality. Non-rivalry means that the consumption possibilities of one individual do not depend on the quantities consumed by others. In other words, if one person consumes the good, s/he will not reduce the consumption opportunities of others in the good. Thus there is a potential for collective consumption of the same good (eg the showing of a film). Pure public goods are also non-excludable.\textsuperscript{73} This means that it is very costly to exclude anyone from enjoying them. In other words, one person cannot exclude another person from consuming the good in question. Copyright works are also generally non-excludable. This non-excludability arises because reproduction costs are generally very low for anybody other than the creator of the good. Because creation costs (for the creator) are high and reproduction costs (for the free rider) are low, if the creator does not have a means to stop the free riders, he will not have the chance to recoup his investment. Therefore a market failure is generated (no one will create as it is not profitable). To remedy this market failure and encourage creation, the state enacts a copyright law which grants an exclusive right to the creator (s/he is the only one to prevent or authorise the use of the work). This right enables him/her to have a chance to recoup his/her investment.

At least two out of the above discussed features of copyright plead for a specific treatment by competition law. First, contrary to other forms of property, copyright arises from an individual's intellectual creation. The author has moral rights in his/her creation. A compulsory licence on something so personal should be imposed with extra care. One might object that many creations are now made collectively or under the supervision of a legal entity and that moral rights are less important for certain functional creations.\textsuperscript{74} Nonetheless, there is a second very important distinctive feature of copyright, which other forms of property do not share: its 'limitedness'.

Copyright is not a complete property right because its scope is restricted in many ways. Copyright law is a legal remedy to the market failure which is the consequence of the non-excludability of works. Parts of these public goods (ie not ideas, but only original expressions of them) are thus artificially privatised for a limited amount of time. The rationale for this is that the privatisation of these public goods is economically efficient (if copyright did not exist, no works or too few would be created, hence the public would be worse off). Copyright is thus in essence fragile and is inherently balanced;\textsuperscript{75} it is a compromise between the natural free use of original expressions by everyone\textsuperscript{76} and the just (and economical efficient) reward for the creator's labour. Consequently, more caution must be exercised when further limiting these rights. In other words, the are reasons to be more prudent in imposing compulsory licenses on copyright holders than on owners of other types of property. A difference in treatment, most probably in the direction of a lower incursion of competition law into copyright's scope than into the scope of other forms of property, is justified.

B. A Few Other Corroborating Arguments

The first argument which confirms the suggested construction of the copyright law is the following. It is true that strictly speaking, there is no rule precedent within the Community courts. The ECJ, and the CFI, are in bound by their own previous decisions and thus in theory, the ECJ is in bound to continue following its Magill ruling. But it is also true that the ECJ, and the CFI, in practice do not often depart from their previous decisions.\textsuperscript{77} The Bromner case could be said to be an example of this practice. The Court, in Bromner, does not depart from its case law, but refines it. Simply does not overrule Magill but distinguishes between two decision Magill and Bromner apply in two different types of situations. Both decisions are equally good law.

Second, it can hardly be denied that the Court, if it is consistent, will interpret its ruling in Bromner as being one which already warned litigants that it will be cautious in applying or extending the Bromner ruling (or some call it, the essential facilities doctrine) to intellectual property situations such as Magill-type situations. This view is at least confirmed by the President of the ECJ in the IMS case.

Finally, it is worth noting that this interpretation is in line with other arguments and general policy reasons which plead against too active an incursion of this part of competition law into the realm of intellectual property. It is beyond the scope of this discussion to develop them all here. Instead, the most important one will be mentioned. The Bromner case is see

\textsuperscript{73}On all these notions see, eg R Cooter and T Ulen, \textit{Law and Economics} 2nd edn (London, Harper Collins Publishers, 1997) 100 ff.

\textsuperscript{74}As a matter of fact, in some countries, notably the UK, eg computer programmers do not have moral rights (as ss 79(2) and 81(2)).

\textsuperscript{75}On this balance see eg T Cooter, 'Intellectual Property and the Essential Facilities Doctrine' (1999) Antitrust Bulletin 211.

\textsuperscript{76}For maximum efficiency, public goods should normally be owned publicly, see Cooter and Ulen above n 73, 102.

\textsuperscript{77}A Arnulf, \textit{The European Union and its Court of Justice} (Oxford, Oxford University Press 1999) 529; Weatherill and Beaumont above n 4, 202. In addition, even if the CFI is not bound by decisions of the ECJ (except in a few cases: \textit{res judicata} and Art 54 of the Statute of the Court, see eg Case T-162/94 NMB France & Others v Commission [1996] ECR II-427, par 36), when the precedents of the ECJ are clear, the CFI should follow the ECJ's decisions. See Arnulf, 533 citing Brown and Kennedy, Brown and Jacobs 'the Court of Justice of the European Communities 4th edn (London, Sweet and Maxwell, 1994), 351 and Weatherill and Beaumont above n 4, 207.
by the Commission and some commentators as the confirmation of the incorporation of the doctrine of essential facilities in European law. However, besides the fact that the court has never referred to the doctrine in any of its judgments, legal journals and reviews in Europe and across the Atlantic are literally flooded with academic literature heavily criticising the doctrine. In addition, the judiciary has expressed strong reservation about its adoption in the European legal order. The argument is that the essential facilities doctrine should not be applicable in competition law or at least should be applied with great care because of its many negative effects. These considerations favour an interpretation of the Bronner decision as either not confirming the doctrine at all or—at most—as adopting it but with extreme prudence and only as regards property rights other than IPR.

4. CONCLUSION

The interpretation suggested in this chapter is one way to solve the apparent conflict in the case law. This interpretation is based on the wording used in the cases themselves, with some policy reflections on the justification to differentiate between different types of property in their interface with competition law. Perhaps the Community courts are clear on the construction to be given to their cases. However, as shown by the divergent opinions of commentators over the interpretation to give to the cases, confusion still remains in the legal community as regards the exact conditions under which the holder of an IPR abuses it.

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

Even if the suggested construction is not embraced, adopting the conditions set out in Magill and applying them in a cumulative manner would ensure, better than an application of the Bronner tripartite test or of the essential facilities doctrine, that the cases in which there will be an abuse of an IPR remain truly exceptional. The case law should preferably evolve accordingly in order to maintain the fragile balance between competition and intellectual property laws.

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80 See Opinion of Advocate-General Jacobs in Bronner above n 78, at paras 56-58 (the doctrine goes against freedom of contract, it stimulates competition on the short-term stimulation but not on the long-term; para 62 (if the doctrine is to be applied at all, it should be applied with even more caution in cases dealing with IPR) and para 69 (difficulty to decide on the compensation to be paid for access); see also Whish above n 4, at 617 and 700; Treaty above n 11, 502.