Abuses of dominant position and intellectual property rights: a suggestion to reconcile the Community courts case law

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Summary
This article reviews the conditions under which there will be an abuse of an intellectual property right under EC competition law in light of the IMS case.

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

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

The article is divided into three sections. After a short review of the conditions under which article 82 applies, section one addresses the various decisions of the E.C.J. and C.F.I. dealing with refusals to licence by holders of IPRs preceding the IMS case.\(^3\) The facts will be first described (1.1.), then the rulings (1.2.). The analysis will show the existing confusion as to the circumstances in which there is abuse by an IPR holder. Section two relates the IMS case. The case serves to illustrate further the confusion identified in section one. First, the facts of the case will be summarised (2.1). Then the rulings of the Commission (2.2) and the President of the C.F.I. (2.3) will be explained, commented upon and contrasted. Section two will conclude with remarks on the consequences that the conflict between the decisions entails (2.4.). Section three suggests a way of reconciling the cases. It first develops the argument and then draws some consequences, including a preferred way of deciding the IMS case (3.1.). A few arguments corroborating the suggested interpretation of the case law are finally given (3.2.) In conclusion, it is hoped that the IMS case will be a catalyst for the court to clarify the conditions at which an IPR holder should be forced to grant a licence.

\(^2\) Abbreviation of Intercontinental Marketing Services Health Inc. The shorter version (‘IMS’) will be used throughout the article.

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

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

Article 82 lists a few examples of abuses. These examples do not form an exhaustive list.4 Abuses such as refusals to deal with a competitor are not listed but the E.C.J. has since the 1970’s included them within the scope of article 82.5 There are at least two types of refusal to deal: refusals to supply and refusals to licence.6 Refusals to supply seem to be connected to tangible property while refusals to licence, to intellectual property. As refusals to deal are not listed in article 82, the conditions under which such refusals will be abusive are not listed in article 82. Thus a fortiori the conditions under which a refusal to licence by the holder of an IPR is abusive are not mentioned either. However, the Community courts have decided that article 82’s scope encompasses refusals to licence and have, in a number of decisions, laid down conditions at which such a refusal is abusive. The remedy for an abusive refusal to licence an IPR is to impose a compulsory licence onto the holder of the IPR.

1.1. The factual background of each case

There are four cases in which the E.C.J. and the C.F.I. have elaborated conditions or circumstances in which an IPR holder will be forced, under article 82, to grant a licence to its competitors. In chronological order, these are: Renault7, Volvo8, Magill9

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6 P. Roth Q.C. (ed.), Bellamy & Child, European Community Law of Competition, 5th ed, London, Sweet & Maxwell, 2001, n. 9-092 – 9-110 do not make the distinction exactly as such but make an attempt to distinguish refusals to supply and refusals to licence. The structure in which they discuss this area of the law is as follows: (v) refusals to supply; including (a) refusals to supply existing customers; (b) access to essential facilities; (c) refusals to supply in other circumstances and (vi) abuses of IPR. R. Whish (2001), supra note 4, at p. 611 ff. only speaks of refusals to supply and classifies them in several headings similar to those of Bellamy & Child and also discusses abuses of IPR within a separate category (p. 698).
and Ladbroke. In addition, even if it does not deal with an IPR, the Bronner 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.

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

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

First of all, it is well-established that the mere ownership and mere exercise of an intellectual property right (here, the mere refusal to grant a licence) cannot in itself confer a dominant position nor consist in an abuse of such a position. 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 out circumstances in which a refusal to licence is abusive, but merely gave non exhaustive examples of abusive conducts resulting from the exercise of an IPR, namely: the arbitrary refusal to supply spare parts to independent repairers, the 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. As can be seen the refusal to licence was not even listed, but only the refusal to supply, 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 licence will be abusive. It stated that 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.

In *Ladbroke*, on the one hand, the C.F.I. refined one of the conditions in *Magill*: a refusal to licence will infringe article 82 if it is a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers. On the other hand, it added a new, alternative, condition: a

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16 Paras. 9 of the *Volvo* decision and 15 of the *Renault* decision.

17 F. Siiriainen, ““Droit d’auteur” contra “droit de la concurrence”: versus “droit de la régulation””, (2001) Revue Int. de Droit Economique, p. 422 thinks that *Volvo* and *Renault* were not really concerned with a refusal to licence but rather with a refusal to supply. However, it can be said that in effect, the car manufacturers’ refusal to supply amounted to a refusal to licence as it was not possible to make spare parts without having a proper licence.

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

19 See paras. 54-56 of the *Magill* decision.

20 Para. 131 of the *Ladbroke* decision (emphasis added). This wording already appeared in its judgments RTE (para. 62) and ITP (para. 48) which were appealed to the E.C.J. in the *Magill* case.
refusal to licence will infringe article 82 if it concerns a product or service which is essential for the exercise of the activity in question, in that there was no real or potential substitute.\textsuperscript{21}

Finally the Court in\textsuperscript{22}\textit{Bronner} set a tripartite test which combines conditions from\textit{Magill} and\textit{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\textsuperscript{22} objectively justified and (3) the service in itself must be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.\textsuperscript{23}

As it transpires from this brief summary, there seems to be quite some difficulty in knowing exactly under which conditions a refusal will be abusive and which ones should be applied in subsequent cases.\textsuperscript{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\textit{Magill} ruling, it is impossible to know whether the Court intended the circumstances to be alternative or concurrent.\textsuperscript{25} In\textit{Ladbroke}, the C.F.I. sets two alternative conditions.\textit{Ladbroke} thus broadens the\textit{Magill} ruling.\textsuperscript{26} Finally, in\textit{Bronner}, the Court takes the opposite stance and opts for a cumulative test.

What happened in the\textit{IMS} case? Not too surprisingly, the Commission on the one hand and the Presidents of the C.F.I. and of the Court, on the other, made two different, and conflicting, interpretations of the case law.

\textbf{2. An illustration of the confusion: the IMS case}

\textsuperscript{21} Para. 131 of the\textit{Ladbroke} decision.
\textsuperscript{22} Emphasis added. The court here adds to the\textit{Magill} ruling by further qualifying the refusal.
\textsuperscript{23} Para. 41 of the\textit{Bronner} decision.
\textsuperscript{24} See e.g. P. Landolt & J. Ysewyn, “Intellectual property rights and EC Competition law”, (2001) 111 Copyright World, p. 19-21, at p. 19 note that the cases decided by the E.C.J. and the C.F.I. display a lack of finality.
\textsuperscript{25} The court’s wording in paras. 54-56 is unclear. Upon reading para. 54, it seems that the condition set out there is sufficient to establish abuse. However, the Court goes on to enumerate other conditions in paras. 55 and 56 without using the term “and” to connect them. Finally, it concludes, in para. 57: “in light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants’ conduct was an abuse of a dominant position within the meaning of Article 86 of the Treaty”. This final statement seems to infer that the conditions are cumulative but this is only speculation. The Commission sees the conditions as alternative, the President of the C.F.I., as cumulative. V. Korah (2002, a), supra note 2 at p. 810, 811, 814, sees the Magill conditions as cumulative even if subsequent case law has suggested that they are alternative. S. Anderman (1998), supra note 9, at p. 209-210 & H. Lugard, « E.C.J. upholds\textit{Magill}: it sounds nice in theory, but how does it work in practice? », (1995) EBLR, p. 233, also wonder whether some of the\textit{Magill} conditions are cumulative. F. Fine, “NDC/IMS: In Response to Professor Korah”, (2002, a) 70 Antitrust L.J. 247, at p. 251 believes that the conditions are alternative: “The President therefore read the factors listed in\textit{Magill} as being cumulative, contrary to what subsequent case law--as even Korah confirms--tells us.”
\textsuperscript{26} V. Korah (2002, a), supra note 2, at p. 814.
2.1. The factual background of the case

IMS provides, among other countries, in Germany, reports informing pharmaceutical companies on regional sales of their pharmaceutical products. To provide this data, any provider must comply with the German data protection law and thus ensure that individual sales by any given pharmacy cannot be identified (at least three pharmacies must be grouped in a geographical zone, also called “brick” or “module”, for which the data on the sales is given). In order to abide by German law, IMS has created a structure which divides Germany into 1860 modules. On the basis of its structure, IMS writes reports on sales of pharmaceutical products and provides them to pharmaceutical companies. IMS claims that it has copyright on its structure as a database. In 1999, National Data Corporation Health Information Services (“NDC”) and Azyx Deutschland GmbH Geopharma Information Services (“Azyx”) entered the German market by creating a structure which was compatible with IMS’s. IMS sued NDC for infringement of copyright in its structure in Germany and won. NDC then introduced a complaint to the European Commission against IMS for abuse of dominant position because IMS denied NDC a licence to use its structure. The Commission decided to oblige IMS to grant a licence to all undertakings already present in the market. On IMS’s appeal (application for interim relief), the President of the C.F.I. suspended the decision and the President of the E.C.J. confirmed the suspension. The Commission has now withdrawn its decision of 3 July 2001, the result being that it does no longer consider necessary that IMS opens the market to its competitors. However this leaves unaffected the reference for a preliminary ruling which the Landgericht Frankfurt am Main asked the E.C.J. on the interpretation of

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28 As the situations of NDC and Azyx are very similar, reference will be made exclusively to NDC’s.

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 C.M.L.R. 1 (E.C.J.). As this order merely confirms the two orders of the President of the C.F.I. and does not contain a further analysis of the substance of the issues, it will not be discussed.

article 82 in the context of the action for copyright infringement of IMS’s structure.  

On 2 October 2003, the Advocate General delivered his opinion in this regard.

2.2. 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 as, before the entry on the market by NDC and Azyx, it was the sole player on the market. The respective positions of NDC and Azyx are negligible. Additionally, there was an effect on the commerce between Member States.

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 reading of the case law, 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 C.F.I. 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

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35 Opinion of Advocate General Tizzano in case C-418/01, available on www.curia.eu.int. At time of writing, the opinion has not yet been translated and published in English.
36 Paras. 45 & ff of the Commission’s decision.
37 Ibid., paras. 57 & ff.
38 Ibid., paras. 175-178. It is generally quite easy to find such an effect because it has been interpreted broadly, see e.g. R. Greaves, “The Herchel Smith Lecture 1998: Article 86 of the E.C. Treaty and intellectual property rights”, (1998) EIPR, p. 380; D. Paemen et C. Norall (2001), supra note 27, at p. 63.
39 Supra note 5.
40 Supra note 5.
41 Paras. 63-74 of the decision of the Commission.
42 Even if the Commission acknowledges that neither the C.F.I. nor the E.C.J. has ever referred expressly to the essential facilities doctrine in their judgments (para 64). The doctrine is briefly defined and explained at supra note 3.
43 R. Whish (2001), supra note 4, at p. 611, 613, 615, shares this opinion as well.
44 Paras. 68 and 180 of the decision of the Commission.
confirms the Ladbroke approach. The reasoning is as follows. The condition of the prevention of a new product, first set 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 licence. 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 licence on IMS.

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

The President of the C.F.I., on the other hand, 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) as the facts of IMS and Magill are different but nevertheless the Commission imposes a compulsory licence on IMS despite the difference in their facts, IMS has made a prima facie case that the Commission misapplies Magill.

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 (i.e. as setting alternative conditions) “constitutes at first sight an extensive interpretation of the Magill case”. The President thus concluded that while on the one hand, the Commission’s reading of the case law might be correct, on the other, there are reasonable grounds to conclude that there may be another interpretation of the case law such as seeing the Magill conditions as cumulative. Thus the order seems to suggest that there may be two interpretations of the Magill conditions.
case: the conditions for imposing a licence 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.

2.4. Comments

As the IMS case illustrates, there are - at least - two possible ways of interpreting the case law. None of them is clearly untenable. It is true that the Commission in its interpretation of the case law has 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 clearly set two alternative conditions. The Bronner case, while cumulating conditions deriving from the previous cases, has omitted (or at least considered as non applicable) the condition of 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 chronological and in the end rather logical construction of the case law. In addition, such a construction is hardly surprising. The Commission is naturally bound to prefer such a view as its prime role in competition matters is to be the guardian of any potential abuses of dominant firms.

The different interpretations of the case-law reached by the Commission and the President of the C.F.I. 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 licence.

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 paper 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. The root of the problem seems to be the uncertainty as regards whether the conditions in Magill are cumulative or not. The question is: are the cases really irreconcilable? Is there really 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.

3.1. 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 E.C.J., not surprisingly, the court reassesses its previous case law. If one reads the decision carefully, the E.C.J. seems to give the answer to the apparent problem. In paragraph 40, the E.C.J. restates the Magill conditions but clearly re-interprets them as cumulative. It even re-interprets the third condition in stating that the refusal must be objectively justified. Whether this is intentional or not is left to the appreciation of the reader. However, in view of the confusion the Magill decision had created as far as the interpretation of its exceptional circumstances is concerned and of the amount of literature it has generated commenting on this imprecise language, one might well take the view that this (re)wording is not innocent. This is reinforced by the language of para. 41 which reads:

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

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

49 For the literature, see supra note 25.
50 "In Magill, the Court found such exceptional circumstances in the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the appearance of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and that it was likely to exclude all competition in the secondary market of television guides (paragraph 56)." (Emphasis added). H. Schmidt (2002), supra note 2, at p. 215 suggests that “Bronner clearly emphasises the ruling in Magill that all the "exceptional circumstances" should be present before Article 82 can apply to confine the ambit of an IPR”, however without giving the reasons or making a demonstration of his argument.
51 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…”
52 Emphasis added.
This 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 (i.e. the three conditions the court sets forth in para. 41 as further characterized in paras. 44 and 46). At the risk of stretching the Court’s wording or intention too much, *Magill* is the authority dealing with IPR and does not in itself have direct application as it stands in other property fields.

Second, this suggests therefore, implicitly and *a contrario*, that in situations dissimilar to those of *Bronner*, i.e. in cases involving refusals to licence IPR, it is *Magill* which is to be relied upon. At least it is far from clear that the *Bronner* conditions should apply. In other words, the E.C.J. seems to warn that it may not be self-evident that the same conditions should apply to cases involving refusals to licence (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 C.F.I. in his second order, seems to strongly suggest that only *Magill* should apply to intellectual property rights and not *Bronner*. In sum, it could be said that the *Bronner* judgment makes a distinction between cases involving refusals to supply and refusals to licence. In the first set of situations, only the tripartite test set out in *Bronner* applies whereas in the second set, only the cumulative conditions of *Magill* (as reformulated in para. 40 of *Bronner*) apply. In conclusion, there is no conflict between the several rulings.

The important consequence that can be drawn from this interpretation is that the circumstances under which a refusal to grant a licence is abusive are cumulative, so they will rarely all be fulfilled. As a result, abuses of IPRs should remain scarce. The *IMS* case readily illustrates this point. As a result of the suggested interpretation of the case law, it is clear now that IMS should win its case. The first condition set forth in *Magill* is 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 reports on regional sales of pharmaceutical products; their only desire is to use IMS’s structure in order to provide similar or identical services to those of IMS. There is no potential demand from consumers (i.e. the pharmaceutical companies) for another new hypothetical product. Therefore the condition is not fulfilled, IMS’s refusal is not abusive and so it will not be forced to grant a licence. As suggested by the President of the C.F.I., the facts of *Magill* are different from those of *IMS*.

The paragraphs above sought to bring out a coherent legal interpretation of the reasoning of the Community courts in order to understand their case law. The analysis was confined to interpreting the wording of the courts’ judgments. It has been seen that the courts seemingly wish to make a distinction between intellectual property and other forms of property (tangible (such as land, living creatures and goods) and

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53 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.
intangible (such as stocks, shares, capital and money). However they do not state the reasons for this. The question then is whether a distinction should indeed be made, as a matter of policy, in the treatment of abuses of dominant positions related to intellectual property and related to the other forms of property.

This issue is no doubt extremely important but it would require a long and elaborate discussion, which could constitute a whole new article in itself. Within the framework of this article, the author will only concentrate on the specific features of copyright (since most of the cases which came before the Community courts involved copyright). The discussion will list the differences between copyright and other forms of property, and highlight those which point towards justifying a difference in the treatment by competition law of abuses of dominant positions through refusals to grant licenses by copyright holders and holders of other forms of property (namely that copyright has a creative element, expressed through the author’s moral rights and that copyright is not absolute). This analysis is meant to attract the courts’ attention to the special character of copyright and advise them to reflect carefully before applying a common test, which is identical in both copyright cases and other forms of property cases. Due to limited space, the adequate condition(s) - i.e. conforming to policy - under which a compulsory licence could be imposed to a copyright holder will not be discussed. This will be the subject of a future article by the author.

Copyright is generally categorised as a type of intangible property. However the nature of copyright is far from obvious and it is still uncertain whether it is a property right or not. The author’s aim is not to determine once and for all whether or not copyright constitutes property. 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 refusals to grant licences with regard to copyrights should be treated differently from refusals to supply other forms of property.

There seems to be broad agreement among property law 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).

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54 For a classification of types of property, see F. Lawson & B. Rudden, *The Law of Property*, 3rd ed., Oxford University Press, 2002, p. 19 ff. In this article, these categories will be referred to jointly under the terms “other forms of property”.

55 This article will focus on UK property law. The comparison will particularly be made between copyright and other forms of personal property right because copyright’s characteristics are closer to this than to property rights in land law. Indeed s. 90(1) of the UK Copyright Act classifies it as personal or moveable property.

56 There has, for a long time, been controversy in the literature over the exact legal nature of copyright in both common law and civil law jurisdictions (although it has been more of an issue in civil law countries). And the debate is still ongoing. For a detailed account, see A. Strowel, *Copyright et droit d’auteur, Divergences et convergences*, Bruxelles, Bruylant, 1993, p. 80-171. French modern authors generally think that it is useless to try and find a unique nature to author’s rights. It is a combination of property and personality rights. Its nature is hybrid. See C. Colombet, *Propriété littéraire et artistique et droits voisins*, 9th ed., Paris, Dalloz, 1999, paras. 13-14 and A. Bertrand, *Le droit d’auteur et les droits voisins*, 2nd ed., Paris, Dalloz, 1999, n. 1.54, p. 76.

57 In other words, property rights are universal or *erga omnes*. A. Bell, *Modern law of Personal Property in England and Ireland*, Butterworths, 1989, p. 6 (who defines this characteristic in terms of property being both a defensive and assertive right (p. 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
addition, property rights are generally perpetual (or durable)\textsuperscript{59} and absolute.\textsuperscript{60} 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\textsuperscript{61} and copyright has an ethical element\textsuperscript{62}) which further estrange it from the remainder of property.

Copyright is territorial. It only forbids unauthorised acts done within the borders of the state in question.\textsuperscript{63} In addition, contrary to other forms of property and to patent, copyright is not a proper monopoly, it is an anti-copying right. The copyright holder cannot prevent someone from creating the same work independently. It is thus not strictly speaking a right \textit{erga omnes}.

Copyright is a bundle of economic and moral prerogatives.\textsuperscript{64} While economic rights can be alienated\textsuperscript{65}, moral rights cannot\textsuperscript{66} and are thus not forms of property.\textsuperscript{67} Moral is also “against the world” in the sense that it can be asserted against anyone into whose hands the property comes; W. Murphy & S. Roberts, \textit{Understanding Property Law}, 2\textsuperscript{nd} ed., Harper Collins Publishers, 1994, p. 46-47; M. Bridge, \textit{Personal property law}, Blackstone Press, 1996, p. 8.\textsuperscript{58} In other words, property rights are alienable, assignable or transferable. A. Bell, supra note 57, p. 6; W. Murphy & S. Roberts, supra note 57, p. 46-47; F. Lawson & B. Rudden, supra note 54, p. 39-40.\textsuperscript{59} W. Murphy & S. Roberts, supra note 57, p. 47.

See e.g. 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.

F. Lawson & B. Rudden, supra note 54, p. 123. See also P. Roubier, \textit{Le droit de la propriété intellectuelle}, Paris, Sirey, 1952, Tome I, p. 97-98 cited by A. Strowel, supra note 56, p. 104. Indeed, there can only be one lessee of a car, an animal or a house. This is due to the fact that unlike other forms of property, copyright is a public good: it is essentially information and thus infinitely reproducible.\textsuperscript{62} Courts will not enforce immoral copyrights, because if they did, they would legitimise immorality. J. Phillips & A. Firth, \textit{Introduction to Intellectual Property}, 4\textsuperscript{th} ed., Butterworths, 2001, n. 10.13, p. 136: “Neither real nor personal property depends for their continued existence upon criteria of inherent or functional morality”.

In other words, the work of author X, national of country X, or who has published his work in country X, will not automatically be protected in country Y. Even if international conventions attempt to make copyright “truly international”, there are still countries that are not parties to them so there is still a difference between copyright and other forms of property. Once the Berne convention for the Protection of Literary and Artistic Works of 1886, last amended in Paris in 1971 (or the TRIPs Agreement of 1994 which incorporates it) becomes applicable to all the countries of the world, copyright will become a truly universal right. See also F. Lawson & B. Rudden, supra note 54, p. 40.\textsuperscript{64} 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 (\textit{Collins (Phil) v. Imrat Handelsgesellschaft MbH} [1993] E.C.R. 545) 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. 86 (C.F.I. rulings in \textit{Magill}, cases T-69/89 \textit{Radio Telefis Eireann v. Commission} and T-76/89 \textit{ITP v. Commission} [1991], supra note 9. One cannot thus see copyright amputated from a part of its true nature (i.e. its moral rights).

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61 F. Lawson & B. Rudden, supra note 54, p. 123. See also P. Roubier, \textit{Le droit de la propriété intellectuelle}, Paris, Sirey, 1952, Tome I, p. 97-98 cited by A. Strowel, supra note 56, p. 104. Indeed, there can only be one lessee of a car, an animal or a house. This is due to the fact that unlike other forms of property, copyright is a public good: it is essentially information and thus infinitely reproducible.

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65 In some countries, notably Germany, copyright (\textit{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 lack the important property characteristic of transmissibility.

66 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.

67 F. Lawson & B. Rudden, supra note 54, p. 40. Already at the end of the 19\textsuperscript{th} century, commentators criticised the classification of copyright into property because, among other things, it disregards the
rights protect the personality (name, honour, reputation, integrity) of the author and are therefore classified as personality rights. Thus contrary to other forms of property, not all aspects of copyright are transferable.

Copyright is not absolute. Intrinsically, by nature, copyright 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 statutes. Copyright law is first limited by protection requirements that need to be fulfilled in order to attract protection (ideas are not protected but their original expression is). Once the rights have been 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 someone 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 in other forms of property law. To become 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 over land. Land owners’ rights are indefinable, 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 by 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) the creators’ rights but also as the 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 on 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 have the quality of being "non-rival". 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 a good, s/he will not reduce the consumption opportunities of others in relation to the good. Thus there is the potential for collective consumption of the same good (e.g. the showing of a film). Pure public goods are also non-excludable. 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 free-riders, he will not have the chance to recoup his investment. Therefore a market failure is generated (no one will create goods as it will no longer be profitable). To remedy this market failure and encourage creation, the state has put in place a copyright law which grants exclusive rights to the creator (s/he is the only one to prevent or authorise the use of the work). These rights enable him/her to have a chance to recoup his/her investment.

At least two out of the above discussed features of copyright support the view that it needs to be treated uniquely by competition law. First, contrary to other forms of property, copyright arises from an individual’s intellectual creation. The author has moral rights over 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 factual and functional creations. For example, in Magill the works in issue were factual (the television listings were mere information) and this quality of the works is believed to have been one of the main reasons why the E.C.J. imposed the compulsory licence. However the E.C.J. could not state expressly that it considered those works not to be “proper copyright” since it would have unduly touched the existence of copyright; besides, the aggravating fact that the television companies were sole owners of the information surely also plaid a major part in the E.C.J.’s decision. It is tempting to argue that the level of creativity should be a factor that the Community courts should take into consideration when imposing compulsory licences, in the sense that the lesser the degree of creativity, the more vigorous should

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73 This is especially true of personal property. As regards land, there can be easements on real estates such as grazing rights for instance, but unlike exceptions in copyright law, there are not automatic (i.e. not every piece of land has them) and their extent is generally less far-reaching than exceptions (or “users rights”) in copyright law.


75 As a matter of fact, in some countries, notably the UK, e.g. computer programmers do not have moral rights (s. 79(2) and 81(2)).
the incursion of competition law inside copyright law be. However, the issue is very much open to question. It depends how much weight one wants to give respectively to copyright and competition laws in the scale. By definition, a work, in order to be copyright protected, will always need to be creative in some way. Since every work needs to meet that standard to be protected, however small its level of creativity is, should a distinction nevertheless be made between low and high creativity works for the purpose of judging abuses of dominant position? The point is that other forms of property do not include the creativity required for protection in copyright law. Therefore, even if a work displays low creativity, the question is: should it still be treated differently from other forms of property (since it is still creative, even if very little) or not (since it is barely creative and thus close in nature to other forms of property)?

Nonetheless, there is a second very important distinctive feature of copyright, which other forms of property do not share: the fact that it is "limited". Copyright is not a complete, full-blown property right because its scope is restricted in many ways. Copyright law is a legal remedy to market failure which is the consequence of the non-excludability of works. Parts of these public goods (i.e. not ideas, but only the original expressions of them) are thus artificially privatised for a limited amount of time. In addition, certain uses of these expressions are free. 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 works would be created, hence the public would be worse off). Copyright is thus in essence fragile and is inherently balanced: it is a compromise between the natural free use of original expressions by everyone and the just (and economically efficient) reward for the creator’s labour. Consequently, more caution must be exercised when further limiting these rights. In other words, there are reasons to be more prudent when imposing compulsory licences on copyright holders rather 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 therefore justified. Some might argue that the length of modern copyright being so long, making copyright for certain quasi-perpetual, does not justify this approach. It is submitted however that of the three copyright self-limiting devices (protection requirements, exceptions to rights and length) the least consequential might be its length. As a matter of fact, it is more damageable that ideas be copyright protected and that there would be no exceptions or fewer exceptions to copyright rather than copyright’s length be extended. Second, the decision as to the adequate length of copyright is best left to the legislator and courts should be wary of taking away through the application of competition law, a right which has been lawfully granted by the legislator. This is not to say that the current length of copyright is perfect, but if it needs to be curtailed, the proper way is by a modification of the copyright law. Third, copyright is still limited in two of its most important respects (protection requirements and exceptions) and still makes it very different in this regard from other forms of property such as to maintain the justification of the difference of treatment suggested.

77 For maximum efficiency, public goods should normally be owned publicly, see R. Cooter & T. Ulen, supra note 74, p. 102.
3.2. A few other corroborating arguments

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

Second, it can hardly be denied that the Court, if it is consistent, will interpret its ruling in Bronner as being one which already warned litigants that it will be cautious in applying or extending the Bronner ruling (or as 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 E.C.J. 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 article to develop them all here. Instead, the most important one will be mentioned. The Bronner case is seen 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

81 See Opinion of Advocate General Jacobs in Bronner, supra note 79, at para. 56 – 58 (the doctrine goes against freedom of contract, it stimulates competition on the short-term stimulation but not on the long-term; para. 62 (if the doctrine is to be applied at all, it should be applied with even more caution in cases dealing with IPR) and para. 69 (difficulty to decide on the compensation to be paid for access); see also R. Whish (2001), supra note 4, at p. 617 and 700; P. Treacy, supra note 11, at p. 502.
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.

On 2 October 2003, the Advocate General’s opinion replying to the questions asked by the German court in the reference for a preliminary ruling came out. The main part of the reply to the first question, which concerns this article’s submissions, will be commented upon.\(^{82}\)

It must first be noted that in essence, Advocate General Tizzano confirms the Magill ruling. The main part of the reasoning is at paras. 57-66. The AG, relying on the essential facilities doctrine, lays down what in his view the conditions of abuse as regards refusals to contract should be: (1) by refusing unjustifiably (2) to grant access to an (indispensable) facility, the owner of the facility abuses his dominant position on the primary market (3) to the extent that his behaviour eliminates practically all competition in the derivative market.\(^{83}\) The AG devotes quite some time to the question of the definition of the markets (primary and derivative). Based on his analysis of the definition of markets and of the conditions described above, the AG implies (although he does not draw the conclusion) that IMS would abuse its dominant position.

However, he continues and makes an exception for IPR. In other words, he considers that it is not sufficient that the intangible good which is the subject matter of the IPR, be indispensable to operate on a given market and that as a result, through the refusal, the IPR holder is able to eliminate all competition in the derivative market.\(^{84}\) There must be something more. He refers to the balance between the two competing interests: the protection of IPR (and thereby the freedom of economic initiative of its holder) and the protection of competition. He considers that the latter interest can only prevail when the refusal to grant the licence prevents the development of the derivative market to the prejudice of consumers. The reply to the first question therefore lays out the conditions under which a refusal to licence by an IPR holder will be abusive.

“Article 82 should be interpreted in the sense that the refusal to grant a licence to use an intangible good protected by copyright is an abuse of a dominant position if a) there are no objective justifications to this refusal; b) the use of the intangible good is indispensable to operate on a derivative market and as a result of the refusal the IPR holder would in the end eliminate all competition in this market. This is however subject to the condition that the undertaking which asks for the licence does not intend

\(^{82}\) The first question asks in substance whether an undertaking abuses its dominant position under article 82 when it refuses to grant a licence to use its structure to persons who wish to use it to operate on the same (geographical and product) market as the market on which it has a dominant position and exploits the structure in question. The second and third questions ask in substance whether, to appreciate when a structure protected by copyright is indispensable to market reports on regional sales of pharmaceutical products in a given country the following elements are important: 1) the degree of participation of the representatives of the pharmaceutical companies to the development of the structure; 2) the effort or cost that the pharmaceutical companies would have to bear in order to purchase reports made on the basis of another structure other than the structure protected by copyright.

\(^{83}\) See paragraph 58 of the Opinion.

\(^{84}\) See paragraph 61 of the Opinion.
to limit itself to reproduce the goods or services already offered on the derivative market by the IPR holder, but intends to produce goods or services which have different characteristics (even if they compete with the IPR’s holder goods or services) which meet specific needs of consumers which are not satisfied by the existing goods and services”\(^85\). He expressly mentions that those conditions go in the direction of the \textit{Magill case}\(^86\).

Three essential comments can be made at this stage. Firstly, the AG’s opinion confirms and slightly reformulates the three conditions set out in \textit{Magill}. In addition, it confirms the application of the essential facilities doctrine’s in the realm of Article 82 and includes a clear delimitation of primary and derivative markets, as well as how they affect the application of the doctrine. Secondly, the opinion makes sure that the three conditions are cumulative. Thirdly, it implicitly makes a difference between IPR and other property rights.

Hence the opinion goes in the direction advocated in this article, in the sense at least that it confirms the cumulative character of \textit{Magill’s conditions} (although it does not refer to the author’s submission that this does actually spring from the \textit{Bronner} ruling). Second, it implicitly, but still too timidly to the author’s taste, makes a distinction between IPR and other forms of property for the purpose of the application of Article 82. Indeed, while intuitively going in the (right) direction (the incursion of competition law inside IPR’s realm should be more prudent), the AG does not provide for reasons why there should be a difference between those two forms of property. Also, it is not crystal clear from his answer to the question whether those conditions apply to all IPR or only to copyright. It is arguable that they should only apply to copyright since the question asked by the national court only refers to copyright and so does the AG in the first part of his answer to it. It is recalled that these conditions might not be suitable for all IPR since some IPR might not all have the same characteristics as copyright. It is submitted that the E.C.J. should carefully draft its final judgment so as to make these conditions applicable only to copyright, unless it delves in more deeply into the very characteristics of different IPR, which is unlikely at this stage.

It can be said that the AG has somehow tried to perform a balancing act in the sense that he does not reject the application of the essential facilities doctrine but on the one hand, clarifies its scope and conditions of application in general and on the other, further restrains its application to IPR, by adding one condition for its application. In conclusion, in his opinion, the AG paves the way for a clearer confirmation by the Court of its fine \textit{Magill} and \textit{Bronner} rulings.

**Conclusion**

The interpretation suggested in this article 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

\(^{85}\) Translation by the author- see paragraph 66 of the Opinion.

\(^{86}\) See paragraph 63 of the Opinion.
courts are clear on the construction to be given to their cases. However, as shown by
the divergent opinions of commentators as to the interpretation to give to the cases,
confusion still remains in the legal community as regards the exact conditions under
which the holder of an IPR abuses it.

The *IMS* case offers a unique opportunity for the European courts to clarify their case
law and provide a transparent test to help IPR holders in a dominant position know
when they are likely to breach competition law. It is hoped that the Court will, one
way or the other, clarify the circumstances in which the refusal to licence by a holder
of an IPR is abusive. It would be interesting if the reading of the case law suggested in
this article 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 paras. 40 and 41 of the
*Bronner* case. It could also go further and state whether the conditions under which a
refusal is abusive are similar for all property rights or whether they should be different
for intellectual property rights. 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 adopted, 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. As the AG’s opinion seems to
suggest, there are reasons to believe that this approach is set to succeed.