NDC/IMS: A LOGICAL APPLICATION OF

ESSENTIAL FACILITIES DOCTRINE

By Frank Fine*

I. INTRODUCTION

The existence of an essential facilities doctrine has been acknowledged both in the European Union and the United States. Though there are differences in the way the doctrine is applied on either side of the Atlantic, the basic premise is the same: that where access to a facility is essential in order for a person to operate on a certain market, the owner of the facility may, in certain circumstances, be obliged to grant access to that person.

The essential facilities doctrine has its origin in the US, and in particular in Section 2 of the Sherman Act, which prohibits monopolization and attempts to monopolize. This section has been used in the US to support the development of the essential facilities doctrine. Essential facilities cases are considered exceptions to the general principle that in the US, companies are under no obligation to deal with others. In the EU, on the other hand, the European Court of Justice ("ECJ") has developed a general duty to deal, and the essential facilities doctrine can be seen simply as a particular application of this general duty.[1]

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[1] See generally Temple Lang, "Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities," in Hawk (ed.) 1994 Fordham Corporate Law Institute 245 (1995) (hereinafter cited as "Temple Lang I"); Temple Lang, "The Principle of Essential Facilities in European Community Competition Law--The Position Since Bronner," 1 J OF NETWORK INDUSTRIES 375 (2000) ("hereinafter cited as Temple Lang II"). Each of these articles was written by Temple Lang while he was a senior Commission official.

In recent years, the most controversial aspect of the essential facilities doctrine has been its application to intellectual property rights ("IPRs"). It is established law on both sides of the Atlantic that, in certain circumstances, compulsory licensing of IPRs can be imposed to combat monopoly situations. Case law continues to define exactly when such a remedy can be used. While the goals of intellectual property and competition law (fostering competition and innovation) are often complementary, in rare cases where access to IPRs is essential to competing in a market, a tension between the two legal regimes arises. The question of how to fashion a remedy that properly balances these competing interests in those rare cases where denial of access constitutes a violation of competition law continues to be debated widely. The European institutions have had to overcome an additional difficulty. Whereas in the US intellectual property is federal in nature, Article 295 of the EC Treaty states that the system of property ownership shall continue to be governed by the Member States, and not by the EU. This particular jurisdictional conundrum is considered further below.

This paper will discuss the current state of the law on compulsory licensing of IPRs pursuant to Article 82 of the EC Treaty,[2] with particular reference to the NDC/IMS case (hereafter the "IMS" case),[3] which is currently before the European Commission and EC Courts.

Before proceeding with this discussion, however, it is worth making three points. Firstly, despite the widespread debate among academics concerning the essential facilities doctrine and IP rights, very few such cases have come before the European Commission and

[2] Article 82 of the EC Treaty states that: "Any abuse of by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

[3] NDC Health/IMS Health, Commission Decision of July 3, 2001 (unpublished) (hereinafter cited as "IMS Decision"). The decision can be found via the following weblink: http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/38044/en.pdf.

Courts. Of those that have, compulsory licenses have only been granted in two instances, in the Magill TV Guide case[4] (the Commission and Court cases stemming from this decision are hereinafter cited collectively as "Magill"), and in the interim measures decision by the Commission in the IMS case. Following the Magill decision, many commentators predicted an avalanche of litigation brought by free riders. Such scare mongering has proved unfounded. The Commission's policy of applying Article 82 of the EC Treaty to intellectual property rights ("IPRs") is not only evolving; it is also circumspect. History has shown that while the Commission and the EC Courts do not lightly impose remedies that affect the exercise of IPRs, they also do not view IPRs as insulating intellectual property owners from overriding responsibilities under the EC Treaty.[5] This cautious approach toward IPRs is further reflected in the IMS decision, which, was amply supported by precedents of the Court of First Instance ("CFI") and the ECJ.

Secondly, the existence of an EU essential facilities doctrine is no longer seriously questioned. In the latest ECJ case involving essential facilities, Bronner,[6] the Court clearly applied the essential facilities doctrine to the factual situation presented.

Thirdly, it has been suggested that the IMS decision "clearly extends the law further than the E.C.J.'s and C.F.I.'s case law can support,"[7] and by implication reflects a hostile

[4] Magill TV Guide, OJ L 78/43 (1989), aff'd by the Court of First Instance in RTE v Commission, Case T-69/89 [1991] ECR II-485; ITP v Commission, Case T-76/89 [1991] ECR II-575; BBC v Commission, Case T-70/89 [1991] ECR II-535; aff'd by the Court of Justice in RTE and ITP v Commission, Cases C-241 and 242/91 P [1995] ECR I-743.

[5] See eg: Consten & Grundig, Cases 56 & 58/64 [1966] ECR 299, at 345 (Article 295 of the Treaty does "not exclude any influence whatever of Community law on the exercise of national industrial property rights."); Parke, Davis v Probel, Case 24/67 [1968] ECR 55, at 72 ("Although a patent confers on its holder a special protection at national level," it does not follow that the exercise of the rights thus conferred would be entitled to protection if "the use of the patent were to degenerate into an abuse of the abovementioned protection.").

[6] Bronner v Mediaprint, Case C-7/97 [1998] ECR I-7791.

[7] Korah, "The Interface Between Intellectual Property and Antitrust: The European Experience," 69 ANTITRUST L J 801 (2002), at 829. (hereinafter cited as "Korah").

attitude by the Commission toward intellectual property rights.[8] In fact, as will be shown herein, in the case of De Telegraaf/NOS-HMG,[9] the Dutch antitrust authorities recently held that the Commission decision in IMS is entirely consistent with the applicable EC precedents.

II. ESSENTIAL FACILITIES DOCTRINE UNDER EC ANTITRUST LAW

A. *Refusal to Supply Theory*

The origin of the essential facilities doctrine in EC law is found in cases dealing with refusal to supply. The most prominent of these is Commercial Solvents,[10] which was decided by the ECJ in 1974. Commercial Solvents was the dominant supplier of a raw material used in the production of ethambutol, an anti-tuberculosis drug. The company decided that it was going to commence production of ethambutol itself, and so refused to continue to supply a customer (which had now become a downstream competitor) with the raw material. The customer could not obtain supplies of the raw material from any other source. As a result, the action by the dominant supplier was threatening to improve its position on the downstream market by eliminating its competitor on that market. The ECJ supported the earlier decision of the Commission by finding that Commercial Solvents was in breach of Article 82, and ordered the company to resume supplies:

> "[A]n undertaking which has a dominant position in the market for raw materials and which, with the object of preserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of article [82]."[11]

[8] Id, at 801.
[9] Case number 501/0119. The October 3, 2001 decision can be found on the website of the Dutch competition authority, at www.nma-org.nl.
[10] Commercial Solvents v Commission, Cases 6, 7/73 [1974] ECR 223.
[11] Id, at para 25.

Commercial Solvents involved a classic market leveraging situation. In United Brands,[12] the ECJ dealt with a refusal to deal in the vertical context. UBC was dominant in the supply of bananas to ripeners/distributors. It cut off supplies to a Danish customer when it discovered that the customer had begun promoting a rival brand. The ECJ found that this was a breach of Article 82. In the Court's opinion, the company must have been aware that its actions would make other ripeners more reluctant to stock rival brands, thereby increasing UBC's dominant position. The ECJ also considered the action taken by UBC disproportionate to the commercial threat it faced.

United Brands clearly did not involve market leveraging. It is, rather, an example of a different type of abuse under Article 82, the cessation of supplies to a dependent customer. The important difference between this case and Commercial Solvents is that in this case the dominant supplier and the customer were not in a competitive relationship in the downstream market.

B. First Essential Facilities Doctrine Cases

Once it was clearly established that an abuse could be committed by a dominant supplier in refusing to supply a downstream customer or competitor with a raw material that was essential to that customer's business, it was not a great logical step to conceive that an owner of a facility essential to the production of a product or provision of a service could abuse a dominant position by refusing customers/competitors access to it. This was, nevertheless, a more difficult legal step. Classic refusal to supply decisions involved an interference with a company's contractual rights, by obliging companies to contract with persons with whom they did not wish to contract. The emerging essential facilities doctrine, on the other hand, required interference with a company's *proprietary* rights. This was not an area traditionally regulated by EC competition law.

[12] United Brands v Commission, Case 27/76 [1978] ECR 207.

Two Commission decisions from the early 1990s provide a good example of the development of a specific doctrine relating to essential facilities rather than refusal to supply.[13] Both decisions concerned Holyhead Harbor, a focal point for ferry services between Britain and Ireland. The harbor was managed by Sealink, a company which also operated ferries from the harbor. A rival ferry company which also operated at Holyhead, B&I, complained that Sealink, as manager of the harbor, modified the sailing schedule of its own ferry operator in such a way that it interfered with B&I's loading and unloading of ferries. The Commission concluded that Sealink's behavior breached Article 82, and it granted B&I interim measures. The Commission considered the harbor to be an essential facility, which it defined, for the first time, as "*a facility or infrastructure without access to which competitors cannot provide services to their customers.*"[14] In the Commission's view, Sealink's provision of access to the harbor to B&I on less favorable terms than those accorded to Sealink's own ferry service was a breach of Article 82. Sealink owed a duty not to manage the harbor in such a way as to favor its own ferry services over those of a rival operator. It should be noted that the Commission did not require B&I to be eliminated from the market as such, and there was no evidence that B&I withdrew from it. Rather, what was condemned was Sealink's placing of B&I at a competitive disadvantage by discriminating in favor of Sealink's own ferry service.

In its second decision concerning the harbor,[15] the Commission imposed interim measures against Sealink in order to ensure that it provided reasonable, non-discriminatory access to the harbor to Sea Containers, which sought to introduce a new ferry service at the harbor. The Commission held that the essential facilities doctrine applied equally to established competitors and new entrants to the market.

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[13] B&I/Sealink, [1992] CMLR 255 ; Sea Containers/Stena Sealink, OJ L 15/8 (1994).
[14] B&I/ Sealink, supra note 13, at para 41 (emphasis added).
[15] Sea Containers/Stena Sealink, supra note 13.

C. *A Fiction of Two-Markets*

The origin of the essential facilities doctrine in refusal to supply cases helps explain the confusing "two market" language found in some essential facilities cases. In the classic refusal to supply case, Commercial Solvents, there was an upstream market in the production of the raw material, and a downstream market in the production of ethambutol. These markets were easily identifiable, and had apparently operated smoothly prior to Commercial Solvents' decision to move into the downstream ethambutol market. It was not difficult for the ECJ to decide that Commercial Solvents had abused its dominance in the upstream market by attempting to leverage it into the downstream market. It should be noted that no analysis of the downstream market was undertaken by the ECJ. The ECJ was satisfied that an abuse had taken place simply as a result of Commercial Solvents' dominance on the upstream market, and its subsequent leveraging into the downstream market.

Cases that are more genuinely essential facilities cases, in which the "facility" in question might well be telephone or energy infrastructure in which there is no trade as such or even negotiated access due to monopoly rights, do not fit into the "two markets" paradigm, though the language of "two markets" has been used, inappositely, in such cases, by referring to the essential facility itself as a market (though there may be no actual or potential trade in the facility, thus demonstrating that it is not truly a "market"). In such cases, there is no leveraging of a dominant position from one market into another--there is only prevented access to an essential facility by the party dominating the relevant market in which the facility is used.

Yet, one finds that until IMS, the Commission and even the EC Courts continued to use the "two market" language. Why? Because these institutions have failed to realize that the Commercial Solvents paradigm does not fit all essential facility cases, or conversely, that a close reading of these decisions demonstrates that there was never a requirement that two true two markets be involved in order to support the application of the essential facilities doctrine. Instead, such cases had been, and continue to be decided by application of classic refusal to supply principles. In other words, the case law is clear that the essential facilities doctrine applies equally to "one market" cases in which there is no leveraging from a "facility" to a "downstream" market.

Further, the use of a two-market paradigm in a true one-market case results in unfortunate aberration of the analysis. Rather that appraising dominance in the only market relevant to the case, that is the market in which the refusal to provide access to the facility is experienced, the Commission and EC Courts have been forced by the erroneous two-market straitjacket to appraise dominance only in the "market" occupied by the facility itself.

It is conceivable that cases could arise in which the person owning the facility (and therefore having the only right to license access to it) and the person having a dominant position in the "downstream" market are two different legal entities. Under EC precedent, if the owner of the facility refused to provide access to it to a third party entrant, there would be discriminatory access in favor of the dominant incumbent, which is forbidden under Article 82.[16] The underlying considerations would be virtually the same as when the owner of the facility favored its own operations in the relevant "downstream" market. In either event, the Commission would apply Article 82 in order to prevent consolidation of the relevant market by excluding third party access to an essential facility. Whether the third party is owned or controlled by the owner of the essential facility is actually incidental to this analysis.

The Magill case, which is heavily relied upon by IMS for its "two market" argument, was itself part of a legacy of Commission decisions which have failed to differentiate between two market cases, which may have been decided by the simple application of classic refusal to supply theory, as embodied by Commercial Solvents,[17] and cases in which the essential facility in question cannot properly be viewed as a "market" in any economic sense due to an absence of trade in relation to the so-called facility. This was ironically the situation in

[16] See Tierce Ladbroke v Commission, supra note 24, at para 124.
[17] Commercial Solvents v Commission, supra note 10.

Magill, in which there was no trade by the incumbent broadcasters in their daily TV listings. Rather, the broadcasters concerned allowed newspapers to copy and reprint their daily listings, subject to no license whatever. Just as it seemed more than stretch of the intellect for the Commission to have concluded that there was a market in such listings, it was even more ludicrous for the Commission to have concluded that the three appellants occupied a dominant position in respect of their daily listings, as this conclusion implied that they exercised real market power in respect of those listings, an illusion which was betrayed by the fact that all imputed market power was voluntarily, even gladly, disowned by the broadcasters.[18]

The above facts demonstrate that in Magill, the broadcasters concerned were not "leveraging" their supposed dominant positions in the daily listings "market," into a downstream market in weekly TV guides. As the ECJ itself acknowledged, the broadcasters were simply denying "access to the *basic information* which is the raw material indispensable for the compilation of such a guide."[19] The fact that this information (daily listings) was protected by copyright (and therefore gave the broadcasters a means for excluding Magill from the relevant market in weekly guides) was not indicative of market leveraging, but rather, of selective refusal to provide access to an essential facility, thereby favoring the activities of the incumbents in the market for weekly TV guides. In fact, the ECJ acknowledged that the broadcasters, in refusing to license their daily listings to Magill, "reserved to themselves" the market in weekly TV guides, thereby indicating that they collectively monopolized the latter market even before Magill sought access to it.[20]

[18] Even John Temple Lang, a leading architect of the Commission's policy on essential facilities, had difficulties with the notion that there was a market in daily TV listings in Magill. He goes so far as to deny that the Courts in Magill even found that the market in daily TV listings was the relevant market in that case, suggesting that it was unfortunate that Magill did not require (nor seek) access to the *only* true upstream market in that case, which concerned the appellants' broadcasting activities. Temple Lang II, supra note 1, at fn 21.
[19] RTE and ITP v Commission, supra note 4, [1995] ECR I-743, at para 56 (emphasis added).
[20] Id, at para 56.

Similarly, in Bronner, which IMS has represented as being a "two market" case, the ECJ expressly deferred to the national court on the issue of whether home delivery schemes for newspapers constituted a service market.[21] However, the evidence showed not only that Mediaprint, the newspaper publisher in question, introduced and maintained a home delivery system for its own use,[22] but also that there was no "access market" in the home delivery system created by Mediaprint for the purposes of this case, in that it had not ever licensed access to it, as such, to any newspaper publisher.[23] These facts undercut any credence in IMS's argument that there were two full-fledged markets in Bronner.

Moreover, for the same reasons seen in Magill, even if there were a market in home delivery systems for newspapers, the ECJ in Bronner was not concerned with any leveraging by Mediaprint from that "market" to the market in newspaper publishing. Rather, the ECJ assumed for the purposes of the case that Mediaprint held a dominant position in the Austrian market for daily newspapers even *before* Bronner sought access to its home delivery system.[24] The ECJ's concern was therefore not with leveraging from that system to a market already dominated by Mediaprint, but rather, with whether Bronner (and by implication other smaller newspapers) were being denied access to a facility, which might have been necessary for the distribution of newspapers "with a circulation comparable to that of the daily newspapers distributed by [Mediaprint's] scheme."[25] In other words, the ECJ was concerned about potential market foreclosure by Mediaprint, rather than leveraging from one market in which it exercised power to a secondary market in which such power was absent. As emphasized by Advocate General Jacobs in that case, the ECJ's real concern was whether Mediaprint, the

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[21] Bronner, supra note 6, at para 34.
[22] Opinion of AG Jacobs, Bronner, supra note 6, at para 70.
[23] Mediaprint had contracted with a third party publisher of the *Wirtschaftsblatt* newspaper for the printing and distribution of the latter newspaper, but the latter included the *whole* of distribution, including sale at kiosks, with the result that "home-delivery constituted only part of a package of services." Bronner, supra note 6, at para 9. The Commission therefore considered that Bronner was not discriminated against. In other words, if successful in its complaint, Bronner would have been the first newspaper publisher to have obtained a license to use the home delivery system of Mediaprint. Id, at para 30.
[24] Id, at para 11.
[25] Id, at para 46.

dominant newspaper publisher in Austria, in refusing access to its home delivery system, enabled it to obtain (or maintain) a "genuine stranglehold" on the Austrian newspaper market.[26]

The situation in Magill (and as will be seen below, in the IMS case) was therefore in marked contrast to the classic refusal to supply situation in which the dominant producer's refusal to supply raw materials to competitors in the downstream market for the derivative product enables said producer to obtain market share in the downstream market for the derivative product by eliminating said competitors. This refusal to supply scenario, which is based on Commercial Solvents, involves market leveraging in a real sense by allowing the firm controlling the market in raw materials to use its market power in that market to gain market share on a secondary market on which he is not dominant.[27] This is distinguishable from the Magill and IMS situations (and which was hypothetically posed in Bronner), in which a pre-existing monopoly (or dominant position) in the "downstream" market is preserved by denying access to a facility which is essential for third parties to enter said market.

The problems inherent in the two market/leveraging approach to essential facilities cases was recognized by several commentators as long ago as 1994:

> "The essential facilities doctrine may be of assistance, as a formal matter of antitrust analysis, with respect to cases in which the essential facility comprises something that cannot be characterized as a market. In such cases, invocation of the essential

[26] Opinion of AG Jacobs, Bronner, supra note 6, at para 65.

[27] As noted by several commentators, "Thus, Commercial Solvents and the cases that follow it appear analogous to the Berkey 'monopoly leveraging' line of cases under U.S. law, because they focus on the use of dominance in an upstream market to forge a competitive advantage in a related market without any requirement that there be market power in the downstream market." Venit and Kallaugher, "Essential Facilities: A Comparative Approach," Hawk (ed.), 1994 Fordham Corporate Law Institute 315, at 327.

facilities doctrine can correct an analytical anomaly that has resulted from treatment of these cases as market leveraging cases"[28]

In its decision in the IMS case, the Commission for the first time explicitly rejected the two-markets approach. As will be seen below, the essential facility in the present case is an industry standard structure which provides the basis for the method of presentation of regional pharmaceutical sales data in Germany. It is difficult to argue that this facility itself forms part of a market. There is no trade in the structure, it is simply a tool, access to which is necessary if a company is to be active on the market for the provision of regional pharmaceutical sales data. The Commission recognized this fact in its decision.[29] It argued that neither the CFI nor the ECJ had stated that the existence of two relevant markets was a precondition of the application of the essential facilities doctrine. The bald fact that previous cases have involved two distinct markets did not make the existence of such markets a prerequisite.

In one sense, the Commission's position marks a further step in the development of an essential facilities doctrine independent from classic refusal to supply theory. If endorsed by the EC Courts it will mean the abandonment of the two-market analysis in essential facilities cases, and a clearer focus on more fundamental competition and economic analysis. In another sense, however, the Commission's decision reflects acceptance of the fact that two markets have never been required by EC case law for the application of the essential facilities doctrine. Seen in this light, the Commission decision in IMS should be seen as confirmation of what the law has been all along in one market essential facilities cases.

[28] Id, at 339.
[29] IMS Decision, supra note 3, at para 183-84.

III. APPLICATION OF ESSENTIAL FACILITIES DOCTRINE IN THE INTELLECTUAL PROPERTY CONTEXT

The 1988 Commission decision in Magill was the first occasion in which the Commission imposed a compulsory license, pursuant to Article 82, with regard to any property right, including IPRs. As noted earlier, it remains the only decision in which the Commission has issued such a license by decision, until the IMS interim decision of July 2001. The Magill judgment of the ECJ was greeted with skepticism due to its perceived encroachment upon IPRs.[30] But in fact, the Commission and EC Courts in Magill were strongly supported by a string of landmark ECJ cases, which subjected the exercise of IPRs to the overriding Community interest in ensuring effective competition.[31] Previous Commission decisions clearly identified access to essential facilities as being necessary to ensure that entire product and service markets did not fall into the exclusive hands of a monopolist.[32]

Magill represented an appropriate opportunity for the Commission to apply Article 82 to IPRs. The rights at issue involved simple copyrights in daily listings for television programs. As one commentator has correctly noted, there was no creativity or "sweat of the brow" involved in the creation of these listings.[33] This factor seemed to have weighed to some extent in favor of the Commission's decision to apply Article 82 in that case, although this aspect later disappeared from the holdings of the CFI and ECJ. What appeared to matter much more to the Commission and subsequently, to the CFI and ECJ, was that access to those listings, which were owned by UK and Irish broadcasters, was deemed to be essential for

[30] Korah, supra note 7, at 811 ("The judgment gave rise to heated debate. There was concern that the holder of an improvement patent might be able routinely to require the holder of a basic patent to grant a license under the basic patent. The 'special circumstances' spelled out by the E.C.J. seemed to be satisfied. The patentee of the improvement would want to sell a new product, for which there might well be potential consumer demand and which the holder of the basic patent could not supply without infringing its improvement patent. The holder of the improvement patent could not supply without a license to exploit the basic patent.").

[31] See cases cited supra note 5.

[32] See generally cases cited in Bellamy & Child (ed.) EUROPEAN COMMUNITY LAW OF COMPETITION (5th ed, 2001), at paras 9-098 et seq.

[33] Korah, supra note 7, at 810.

Magill, who wished to publish a comprehensive (all-channels) TV guide covering programs in the Republic of Ireland and Northern Ireland.

The background of the Magill case was somewhat political. It appeared, rather embarrassingly, that the UK and Ireland were the only two Member States of the European Community in which comprehensive TV guides did not exist.[34] In these two Member States, consumers faced the cumbersome task of purchasing daily listings which were reprinted in daily newspapers and in weekly own-channel magazines. Following the Commission decision in favor of Magill, the UK Government decided to implement this decision in the UK generally, by statutorily compelling UK broadcasters to license their daily listings.[35] This was despite the fact that the respondent broadcasters of the Magill decision had meanwhile appealed it to the CFI. This legislative action indicated that the UK Government welcomed the action taken by the Commission and did not consider its decision to be hostile to IPRs. Indeed, the Commission decision afforded the UK Government an opportunity to create, for the first time, a competitive market for weekly TV. As will be shown below, the Commission's action taken in the IMS case was intended to have a similar effect in the relevant German market.

In its 1995 judgment in Magill, the ECJ held that the Commission had correctly identified "exceptional circumstances" in that case which justified the conclusion that the mere exercise of copyright constituted an abuse of dominant position under Article 82, thereby justifying a compulsory license.[36] With the benefit of hindsight afforded by subsequent case law, as will be further explained below, we now know that the most important of the circumstances relied upon by the Commission and the ECJ was the fact that the appellant broadcasters, by refusing to license to Magill their copyrighted television listings, "denied access to the basic information which is the raw material indispensable for

[34] See RTE v Commission, supra note 4, [1991] ECR II-485, at para 62.
[35] See Broadcasting Act 1990. section 176.
[36] RTE and ITP v Commission, supra note 4, [1995] ECR I-743, at paras 54-56.

the compilation of such a guide,"[37] and thereby reserved for themselves the market in weekly television guides (on which they were present with their own-channel guides).

Some commentators would probably ascribe to the IMS position that the ECJ's judgment in Magill relied critically on the language in the judgment that Magill sought to introduce a "new product. . .which the appellants did not offer. .."[38] As will be seen below, subsequent case law of the CFI and ECJ indicates that the applicant for a compulsory license pursuant to Article 82 is not required to prove that he is seeking a license in order to introduce a new product. As will be seen below, the Commission in IMS also placed no importance on the existence of a "new" product, thereby not only ensuring the decision's complete compatibility with post-Magill case law of the EC Courts, but also ensuring that the Commission decision did not run afoul of US essential facilities case law involving intellectual property, which also places no importance whatsoever on this factor.

Even the facts of Magill support the conclusion that the existence of a "new" product was of dubious importance to the Commission and to the EC Courts in that case. As the starting point in its analysis, the Commission was compelled by Article 295 of the EC Treaty to accept that the appellant broadcasters' TV listings, despite a complete absence of creativity or investment, were the legitimate subject of Irish and UK copyrights. This mandatory deference to national copyright would have been doctrinally compromised if copyright-related considerations of novelty became relevant in determining whether an applicant for a compulsory license could rely upon Article 82 on essential facilities grounds. For this reason, the prohibition on the Commission from delving into the validity of the broadcasters' copyrights applied equally to a quasi-copyright analysis of novelty in respect of Magill's product. In other words, what was prohibited by Article 295 in reference to the addressees of a compulsory license could not be tolerated in respect of the applicant for such a license

[37] Id, at para 56.
[38] Id, at para 54.

because Article 295 reserves to the national legislature alone the right to determine all issues of property rights in the absence of Community standardization or harmonization.

The reluctance of the Commission and EC Courts in Magill to intrude upon Article 295 in respect of Magill's product is evidenced by the fact that they did not provide any criteria for determining what constitutes a "new" product. We also know that the Commission and EC Courts in Magill found that Magill's product competed with the incumbent broadcasters in the market for weekly TV guides. This market delineation, by implication, meant that Magill's product constituted nothing more than an improvement to the own-channel guides already being offered by the appellant broadcasters in Ireland and Northern Ireland. In competition terms, there was sufficient demand-side substitutability between Magill's multi-channel guide and the own-channel guides of the incumbent broadcasters for the Commission to conclude that they be included within the same product market. When Magill is seen in this proper light, it is clear that Magill was simply introducing variations of a product which already existed on the relevant geographic markets, and it was only these variations which the appellant broadcasters did not offer. There was potential consumer demand for these variations offered by Magill. Comprehensive TV guides were well-established throughout the Community, but simply had yet to reach consumers of the UK and Ireland. This left Irish and British consumers in the position of having to assemble their own comprehensive guides from an assortment of magazines. Seen in this context, the Magill case can be accurately described as facilitating the cross-border sharing of non-proprietary "technology" in comprehensive TV guides. By preventing Magill from publishing a comprehensive TV guide, the appellant broadcasters were not preventing the advent of a new product, but rather, improvements to their existing products which were already in existence throughout the Community and which could have proved decisive in their ability to control the relevant market.

As the above discussion suggests, reference by the ECJ in Magill to a "new" product was not intended to draw a distinction in essential facilities cases between those instances in which the facilities in question constituted a physical infrastructure or other tangible property, and those instances in which the facility at issue was intangible and potentially subject to intellectual property protection.

One of the common criticisms of Magill was that it was wrongly decided because it purportedly went beyond the ECJ's earlier judgments in Volvo[39] and Renault.[40] In these two cases, which were decided only two months before the Commission decision in Magill, the ECJ faced requests for compulsory licensing of IPRs for the first time. In those earlier cases, however, the issue was simply whether Volvo and Renault could be compelled, pursuant to Article 82, to license their design rights in body panels. The complainants wanted to manufacture and sell those parts under license and nothing more than that. Neither complainant claimed that it was seeking a license which would enable it to operate in a product or service market which was not itself reserved for the exclusive exploitation by Volvo or Renault on the basis of their design rights. If, for example, the complainants sought these licenses because they were essential to their activities in the separate markets for independent auto repair or retail sale of auto parts, Volvo and Renault could not have asserted their design rights in body panels in order to monopolize these separate markets. However, the facts were that the complainants in Volvo-Renault did not claim - let alone prove - that licenses from Volvo and Renault were necessary for their activities in separate markets.

In the above circumstances, where the relevant market was the "market" for the manufacture and sale of Volvo and Renault body panels, and such market was legitimately monopolized by these car manufacturers as falling within the scope of their intellectual property, the ECJ could not have held that the refusal to license by Volvo and Renault, by itself, constituted an abuse of dominant position within the meaning of Article 82. This explains the language of the ECJ in Volvo-Renault requiring additional "abusive" conduct on the part of the complainant. Only the presence of such additional conduct would have

[39] Volvo v Veng, Case 238/87 [1988] ECR 6211.
[40] CICRA v Renault, Case 53/87 [1988] ECR 6039.

prevented the compromise of Volvo and Renault's IPRs, and thereby strike the correct balance between the interests of intellectual property and competition. As the Commission investigation in Magill was already at the stage of a Statement of Objections, one must view the ECJ's judgments in Volvo-Renault as being entirely consistent with the then developing Commission policy on compulsory licensing.

One of the leading architects of Commission policy concerning essential facilities (and current EC counsel for IMS), John Temple Lang, has agreed with the above assessment of Volvo-Renault.[41] Contrary to Volvo-Renault, in which there was no "market" which fell outside the scope of the car manufacturers' design rights,[42] in Magill, the three appellant broadcasters refused to license their copyrights in daily TV listings in order to preserve a monopoly in the relevant product market of weekly TV guides, a market in which the appellant broadcasters did not claim (nor could they have proved) a right to monopolize on the basis of copyright. Under these distinguishing circumstances, there was no need for the ECJ in Magill to find additional abusive conduct apart from the refusal to license. The judgments in Volvo-Renault demonstrate the concern of the ECJ to safeguard IPRs from unnecessary intrusion by competition law, particularly where there is no risk of market foreclosure in a "market" that may exist outside the subject matter of an IPR.

To summarise, contrary to what IMS and some commentators have asserted, the Volvo-Renault judgments were not extended in way by Magill nor by implication, by the Commission in IMS. The ECJ in Volvo-Renault had no opportunity to apply the essential facilities doctrine only because of the absence of a market which was not itself the subject matter of copyright. Had there been a separate market, the situation most likely would have been different. This point was made clear in the Report for the Hearing in Volvo-Renault.[43] In such circumstances, the refusal to license, by itself, could not constitute an abuse of

[41] See Temple Lang I, supra note 1, at 303-4; Temple Lang II, supra note 1, at 389.
[42] See Opinion of AG Mischo in Volvo, supra note 39, [1988] ECR 6211, at 6226 (paras 13-14).
[43] See Renault, supra note 40, Report for the Hearing, [1988] ECR 6039, at 6053-54.

dominant position. However, this crucial impediment to the application of the essential facilities doctrine in Volvo-Renault was not present in Magill or IMS. It is therefore wrong to simplistically dismiss Magill and IMS as extensions of previous ECJ case law, where it is clear that both Volvo-Renault, on the one hand, and Magill and IMS on the other are distinguishable among other reasons because the appellant broadcasters and IMS, in the latter cases, had no right to claim a monopoly in the one and only relevant market.

Contrary to dire predictions from various quarters, Magill did not unleash an avalanche of national litigation and Commission investigations by free riders claiming the benefits of Article 82. Public criticism of Magill has been limited to antitrust lawyers and academics having a strong bias toward intellectual property, rather than by industries or, as shown in the case of the UK, national governments which may have been affected by Magill. The almost complete absence of litigation or investigations in the wake of Magill suggests a blatant hostility by its critics toward any application of Article 82 to IPRs, rather than any hostility or indifference on the part of the Commission and EC Courts toward IPRs. Indeed, it is remarkable that Magill critics have almost universally overlooked the fact that post-Magill, the EC Courts have only been asked to determine the applicability of compulsory licensing in two cases (only one of which involved intellectual property), and that in each of these cases, the EC Courts applied a harsh essential facilities standard in denying that the grounds for a compulsory license existed. The same such standard was applied to the egregious fact situation of IMS. For these reasons, IMS is no more likely than Magill to pose a risk of unjustified Article 82 claims.

In 1997, the CFI decided Ladbroke,[44] which is the only occasion in which an EC Court has dealt with the ECJ judgment in Magill within the context of IPRs. The Ladbroke case arose from an action brought directly in the CFI, pursuant to Article 232(3) of the EC Treaty, alleging that the Commission had breached this Treaty provision by failing to act on a complaint brought by Ladbroke, the leading European betting organization. In this case, the

[44] Tierce Ladbroke, Case T-504/93 [1997] ECR II-923.

CFI proved that a bad essential facilities case can sometimes make good law. This was a fact situation in which Ladbroke claimed that access to broadcasts of French horse races was essential to its Belgian betting activities. Not surprisingly, the CFI found that under the facts of Ladbroke, an essential facility within the meaning of Magill had not been established. The CFI found such broadcasts were not only non-essential, but were virtually irrelevant to the placing of bets on such races (which preceded the broadcasts), and even if relevance could have been established, such broadcasts had nothing to do with Ladbroke's main activity, which was betting. On this basis, the CFI declined to apply Article 82 to compel a copyright license to the broadcasts of French horse races. In essence, the CFI in Ladbroke confirmed the applicability of the essential facilities doctrine to IPRs, but found that broadcasts of French horse races simply did not constitute a facility to which access was essential in order to compete in the Belgian betting market.

Commentators have been almost universal in their facile reading of Ladbroke as a case in which the CFI somehow "limited Magill."[45] (Even if this were true, it has not prevented these same commentators from claiming, at the same time, that these perceived limitations on Magill still reflect the hostility of the Commission and EC Courts toward intellectual property.) It would be more precise to state that the CFI clarified what the Magill Court meant by "exceptional circumstances." In Paragraph 131 of its Ladbroke judgment, the CFI, while not ignoring the language in Magill concerning the existence of a "new" product, correctly subverted its significance to the issue of whether the refusal to license prevented access to an essential facility. As the CFI held:

> *"The refusal to supply the applicant [Ladbroke] could not fall within the prohibition laid down by Article 8[2] unless it concerned a product or service which was essential for the exercise of the activity in question, in that there was no real or*

[45] Korah, supra note 7, at 814.

potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers. . ."[46]

The CFI's language unambiguously holds that either of the above grounds is sufficient for a finding that a refusal to license an IPR constitutes a breach of Article 82. Many observers have mysteriously ignored the first of the above-stated tests provided in Paragraph 131, which was relied upon by the CFI in deciding the case against Ladbroke.[47] The issue in Ladbroke, in other words, was not whether Ladbroke was seeking to introduce a new product into the Belgian market, but whether Ladbroke required access to the broadcasts of French horse races in order to exercise its main activity in betting.

The CFI's approach in Ladbroke was confirmed by the ECJ in its 1998 in Bronner judgment.[48] This case involved a would-be free rider posing as someone deprived of access to an essential facility. A regional newspaper publisher in Austria, Bronner, claimed in a national court that the largest national newspaper in Austria, Mediaprint, abused its dominant position under Article 82 by refusing access to its home delivery scheme. Bronner claimed that access to this scheme, which was implemented for Mediaprint's own use,[49] was necessary for it to compete with Mediaprint at a national level. On a reference pursuant to Article 234 (ex Article 177), the ECJ held that it was not impossible, or even "unreasonably difficult," for any other publisher to establish alone, or with other newspaper publishers, a national home delivery scheme to be used for distribution of their newspapers.[50] Like the CFI in Ladbroke, the ECJ in Bronner confirmed the applicability of the essential facilities doctrine to refusals to license IPRs, but found under the facts in Bronner, which involved property rights of a different kind, that Mediaprint's home delivery system was not an essential facility because

[46] Tierce Ladbroke, supra note 44, [1997] ECR II-923, at para 131 (emphasis added).
[47] Id, at para 132. This nuance was not lost on another EC antitrust commentator. See Temple Lang II, supra note 1, at fn 2 ("It seems from [Ladbroke] that an essential facility might be an alternative to the argument that consumers are deprived of a new product.").
[48] Bronner v Mediaprint, supra note 6.
[49] See Opinion of AG Jacobs in Bronner, supra note 6, [1998] ECR I-7791, at 7815 (para 70).
[50] Id, at para 44.

reasonable alternatives existed by which Bronner could compete effectively in the newspaper market at a national level.

As was the case following Ladbroke, some commentators claimed that the Bronner Court construed Magill narrowly.[51] This is incorrect. The ECJ in Bronner never stated that Magill was an exceptional case; rather, the judgment stated that, "In Magill, the Court found . . . exceptional circumstances."[52] And having affirmed that the relevant test was that of exceptional circumstances, the ECJ in Bronner affirmed the approach of the CFI in Ladbroke:

> "[E]ven 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 8[2] of the Treaty. . .not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market. . *but also that the service in itself 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*."[53]

Bronner, therefore, confirms that the ECJ, since 1998, has consistently and without exception or backtracking deemed the test of "exceptional circumstances," as laid down in Magill, to be satisfied in cases involving intellectual property, in which the rights in question protect an essential facility, and the refusal to license eliminates competition on the relevant market. In such circumstances, the refusal to license constitutes an abuse of dominant position within the meaning of Article 82. Therefore, if anything, Bronner confirms that Magill should be given a robust reading. The unequivocal language of both Ladbroke and Bronner directly refute assertions that these judgments somehow "rein in" Magill.

[51] See eg Korah, supra note 7, at 819.
[52] Bronner, supra note 6, [1998] ECR I-7791, at para 40.
[53] Id, at para 41 (emphasis added).

Prior to IMS, Magill and Ladbroke were the only EU decisions concerning the applicability of Article 82 to IPRs. Although Bronner did not involve IPRs, it is the only other case decided by an EC Court in which Magill has been interpreted. It should be stressed that Ladbroke, Bronner and, more recently, IMS, have had the effect of bringing Magill into a seamless line of earlier EC essential facility cases involving physical infrastructure, whether it concerned, for example, ports,[54] computer reservation systems[55] or ramps at airports.[56]

The fact that, until now, there have only been three EU decision involving the application of Article 82 to IPRs, demonstrates the great sensitivity of the Commission and the EC Courts toward IPRs. Of these three cases, only Magill and IMS resulted in a compulsory license, and these cases involved copyrights which some commentators would argue were not even worthy of such protection. The author only provides such a summation to indicate that if history is any guide, then it is clear that the Commission and the EC Courts are not hostile toward IPRs. The rarity of such cases, in itself, should provide relief for owners of valuable IPRs, who fear the denigration of these rights under EC antitrust policy.

IV. THE IMS CASE

The IMS case involves, in a broad sense, the provision of pharmaceutical information services, in which IMS is the acknowledged global leader. More specifically, the case involves the German market for the provision of regional sales data, in which IMS has enjoyed a monopoly or quasi-monopoly since the 1970's. In fact, IMS faced no competition whatsoever in Germany until PI Pharmaintranet ("PI") and AzyX entered the market in late 1999. Thus, IMS did not simply benefit from a "first mover advantage," as one commentator has opined.[57] IMS's monopoly position was well entrenched over a number of years. IMS

[54] See eg: Porto di Genova I, Case C-179/90 [1991] ECR I-5889; Porto di Genova II, Case C-163/96 [1998] ECR I-533; Sea Containers/Stena Sealink, supra note 13; Port of Rodby; OJ L 55/52 (1993).
[55] London European/Sabena, OJ L 317/47 (1988).
[56] See eg: Flughafen Frankfurt, OJ L 72/30 (1998).
[57] Korah, supra note 7, at 825.

has exploited this position by engaging in various bundling and pricing abuses that are now the subject of a Statement of Objections issued against IMS in October 2000.[58]

National Data Corporation ("NDC") entered the German market in June 2000 by acquiring a controlling interest in PI. NDC filed a complaint with the Commission in December 2000, in which it was alleged that IMS breached Article 82 by refusing to license its alleged copyright in a so-called 1860 brick structure to either NDC or PI. This brick structure is a geographical representation of the territory of Germany, divided into 1860 segments or "bricks," which is an input for the provision of reports on pharmaceutical sales from wholesalers to pharmacies at a regional level (hereinafter "regional sales reports"). The purpose of these reports is mainly to fix the remuneration of field sales representatives of pharmaceutical manufacturers, the primary users of these reports, but also to assist the latter in their marketing efforts. The 1860 brick structure is nothing more than an aggregation of German postal codes in a manner designed to prevent the identification of sales to individual pharmacies, as this would violate German rules on data protection. The German postal code is publicly available and there is no claim by IMS that it is copyrighted. NDC's complaint followed an *ex parte* injunction obtained by IMS in a German regional court a few months earlier, preventing NDC from using the 1860 or derivative brick structures. NDC and IMS are in ongoing German litigation concerning the copyrightability of the 1860 brick structure and, assuming that this structure were copyrightable at all, whether IMS is the legitimate owner of such a copyright.

In accordance with previous case law, the substantive test for the Commission was whether there were exceptional circumstances under Article 82 by which IMS's refusal to license constituted an abuse of dominant position. More specifically, under the circumstances of this case, the question was whether the 1860 brick structure constituted an essential facility and whether, by denying access to this facility, IMS would all eliminate on the German

[58] Statement of Objections against IMS Health in Cases COMP/36816 Source Belgium/IMS and 37055 NDC/IMS (Oct. 19, 2000).

market for regional sales reports. However, there was an important procedural element as well because NDC's complaint was coupled with an application for interim measures, which are seldom granted by the Commission. On the one hand, due to the exigency of such an application, the Commission was only required to establish a *prima facie* case, that is to say, the "probable existence" of an infringement.[59] On the other hand, the Commission also needed to show that such measures were necessary in order to prevent NDC from suffering serious and irreparable harm, and that the balance of interests militated in favor of granting interim measures.

The Commission found that there were a number of factors which compelled the conclusion that the 1860 brick structure constituted an essential facility.[60] The most important of these elements is that the 1860 brick structure was formed and adopted by the German pharmaceutical industry in the spring of 1999 as the sole industry standard in Germany for the provision of regional sales reports.[61] The Commission found that since the early 1970's, the industry has maintained a Working Group ("*Arbeitskreis*"), which meets at least twice per year, for the purpose of adopting brick structures for this purpose. Without the participation of industry, the development of postal code-based brick structures was physically impossible because only German pharmaceutical manufacturers had the detailed knowledge of relationships between physicians and pharmacies which is critical for the attribution of sales, within a single "brick," to a particular field sales representative of the pharmaceutical manufacturer. This locus of physicians and pharmacies was important for both compensation of field representatives and for marketing purposes because prescription filling is triggered by a prescription from the doctor, rather than a simple decision of the consumer to purchase a particular prescribed medication, and those prescription patterns are largely influenced by marketing visits of the field representatives. It was therefore important that each brick pair

[59] La Cinq v Commission, Case T-44/90 [1992] ECR II-1.
[60] See generally IMS Decision, supra note 3, at paras 74-166.
[61] One distinguished commentator has confirmed that, "The practice of the industry and the expectations of buyers or users may make it essential to have access to a facility that in other circumstances might not be essential." See Temple Lang I, supra note 1, at 286.

with the included pharmacies those doctors from whom the pharmacies received their prescriptions.

This factual finding of an industry standard was crucial for the Commission because IMS's assertion of copyright in the 1860 brick structure represented much more than a "first mover advantage." To the contrary, it posed a quasi-permanent barrier to entry when coupled with the fact that the German pharmaceutical industry would not accept regional sales reports in any other brick structure. NDC and AzyX demonstrated, on the basis of their experience in Germany, that alternative brick structures are not acceptable to the industry.

The Commission's findings on the industry standard issue, in itself, indicates the implausibility that IMS, rather than those pharmaceutical companies which developed and adopted it, is the rightful copyright owner in the 1860 brick structure, or even whether it was copyrightable at all. The Frankfurt Court of Appeals, as recently as February 19, 2002, held that IMS failed to establish jurisdiction to assert the infringement of copyright because there was strong evidence suggesting that the German pharmaceutical industry played an extensive role in its development, effectively confirming that particular conclusion reached by the European Commission. This is the highest German court ruling in the German litigation thus far, though the issue will continue to be litigated in parallel actions and appeals for the next few years.

The recent German appellate decision refutes the assertions of commentators who suggest that NDC "had been able to enter the market only by infringing [IMS's] copyright."[62] For several reasons, this was not the Commission's conclusion. First, the Commission decided not to delve into the copyright issues at all, and left these questions to the German courts.[63] This was out of deference to Article 295 of the EC Treaty, which leaves all matters relating to property rights within the EU to the relevant national authorities and institutions, unless the EU has chosen to regulate the field. Second, the Commission decision confirms

[62] Korah, supra note 7, at 828.
[63] IMS Decision, supra note 3, at para 36.

that the company that NDC acquired in Germany for the purpose of launching its German business in regional sales reports, PI Pharmaintranet ("PI"), had first entered the German market with a 2201 brick structure. The Commission found that "this structure was rejected by potential customers who claimed that the [sales] data was not usable unless it could be presented within the format of Germany's industry standard of 1860 segments."[64] It was only then, when it was clear that PI/NDC could not survive commercially in Germany with an alternative structure, that it began using a 3000 brick structure, which could be aggregated to 1860 segments.

Contrary to the views of some commentators, it should be stressed that PI and NDC had substantial justification to believe that the 1860 brick structure and derivative brick structures were not subject to a copyright claim by IMS.

First, as the Commission explained in its decision, the Working Group had developed and adopted another brick structure prior to the 1860 brick structure. This older structure, which came into force in 1993, aggregated German postal codes into 1845 bricks. The Commission pointed out that the 1845 and 1860 brick structures were 92% identical. Their differences only concerned minor changes in the German postal codes on the border of eastern Germany. From the time that the 1845 brick structure was introduced, until it was replaced by the 1860 brick structure in the Spring of 1999, IMS never claimed a copyright in the 1845 brick structure. Pharmaceutical manufacturers, software providers and other third parties all freely used the 1845 brick structure without the slightest innuendo from IMS that it considered this illegal. Even a former competitor of IMS, Source Informatics, freely used the 1845 brick structure in a competing product without fear of violating anyone's copyright.

Second, the founder of PI was the Chairman of IMS Germany from 1995 until April 1998, and he himself did not believe that IMS had a copyright in the 1845 brick structure and did nothing to foster this position. Rather, his view is that the Working Group developed the

[64] Id, at para 20.

1845 brick structure as an open German standard and that it was never the subject of anyone's copyright.

Third, when the former Chairman of IMS Germany launched PI, he remained in touch with former colleagues at IMS and knew from them as well as IMS customers that the Working Group was refining the 1845 brick structure, which would soon become the 1860 industry standard brick structure.

Fourth, PI began doing business in Germany with a 2201 brick structure because PI believed that it was superior to the 1845 brick structure then in use in several minor respects, not because it wished to conceal its use of a brick structure that was similar to the then existing 1845 brick structure which was the industry standard. IMS did not claim that PI was infringing its alleged copyright. IMS must have at least suspected that the 2201 brick structure was very similar to the 1845 brick structure because it was actively promoted to IMS's customers as being "state of the art." In fact, IMS could have easily discovered from its own customers that the 2201 and 1845 brick structures were 90% identical. IMS did nothing.

Fifth, even when PI began using its 3000 brick structure in February 2000, there was no immediate reaction from IMS, even though IMS must have known that PI was in active negotiations for the provision of regional sales reports to 18 of IMS's customers, most of which were large pharmaceutical accounts. Indeed, PI was actively promoting its use of the 3000 brick structure to all potential customers, as this, together with other features of its regional sales report, were considered by PI to be superior to IMS's product. Nevertheless, for approximately the first three months that PI was using the 3000 brick structure, it never received a warning or threat from IMS that it considered PI's actions to be an infringement.

In fact, it was only when PI had entered into discussions with NDC as to an eventual joint venture that IMS suddenly became interested in "legal issues" relating to the 1860 brick structure. When they were toward the end of those negotiations, in May 2000 (the acquisition of PI being concluded in June 2000), IMS obtained an injunction preventing both PI and NDC from using the 1860 brick structure and all derivatives thereof. NDC believed then, and continues to believe, that IMS's legal challenge to the unauthorized use of the 1860 and compatible brick structures is not predicated on any real notion of property ownership, but rather, reflected nothing more than a desperate predatory move to prevent one of its major global rivals from entering the largest national market in Europe, Germany. In fact, IMS had a *subsequent* opportunity to assert an alleged copyright in a brick structure used in the United Kingdom. This opportunity arose in the context of a forced divestiture by the Monopolies and Mergers Commission of IMS's UK subsidiary, Source Dispenser. NDC acquired Source Dispenser, and part of this sale included the brick structure that was used in connection with Source's RSA sales data product. As the Commission noted in its decision, IMS gave NDC "a perpetual, non-exclusive, royalty-free license."[65]

In sum, IMS does not occupy any moral high ground and PI/NDC have been anything but the "deliberate" infringers that some observers in the legal press have portrayed them as being.

There has been criticism that the Commission's fact finding in the IMS case was not as thorough as it could have been, even though the Commission was only required to establish the "probable existence" of an infringement, rather than conclusive proof of it. This is because interim decisions are intended solely provide emergency temporary relief to qualifying applicants. Nevertheless, the Commission's investigation was exhaustive and was more akin to the level of fact finding involved in a second-stage (contested) merger investigation, rather than to a temporary injunction.

Among other things, the Commission sent a request for information to 110 pharmaceutical manufacturers. Of the 85 companies responding, 74 of them considered that the 1860 brick structure and compatible brick structures as the industry standard. By plain

[65] IMS Decision, supra note 3, at para 166.

mathematical calculation, this means that 87% of all those responding agreed with the Commission's preliminary assessment.

Apart from the Commission questionnaire, there were a great number of written affidavits and interview notes from pharmaceutical companies which were introduced into evidence on behalf of NDC. This evidence showed both that the 1860 brick structure constituted the industry standard in Germany and that manufacturers were unwilling to accept regional sales reports in an alternative brick structure. In particular, at the oral hearing of the Commission, NDC invited IMS and NDC customers to provide supporting oral evidence, in addition to the BPI, which represented the interests of more than 260 German pharmaceutical manufacturers. IMS had ample opportunity to rebut all of the evidence presented against it. In particular, at the oral hearing, IMS did not present any of its own customers as friendly witnesses. The President of IMS Europe, Gilles Pajot, went on record as not wishing to disrupt the business day of IMS customers with such an affair.

The German pharmaceutical industry vigorously supported NDC throughout the investigation. This support was provided despite the fact that NDC and AzyX, IMS's *only* competitors in Germany, were blocked by German injunctions from gaining access to an industry standard, access to which was necessary for them to compete with IMS. Pharmaceutical firms, a number of which had already signed, or which were planning to sign, contracts with NDC or AzyX, were intimidated by this evisceration of NDC and AzyX and their forced return to the incumbent monopolist. They were also threatened with retribution by IMS in the form of massive price increases, forced "renegotiation" of existing contract bundles and other coercive tactics. This did not stop, nor has it stopped, the overwhelming majority of German pharmaceutical firms from siding with NDC and AzyX.

It has been suggested that the Commission decision exceeded Magill on the ground that NDC was only seeking to offer a service "similar" to the one already being provided by

IMS.[66] But as demonstrated above through unequivocal language in Bronner, Magill did not impose a "new" product requirement, and if it could be argued that Magill required a new product, then Ladbroke and Bronner unambiguously repudiated any such requirement. Korah is repeating here an argument made by IMS throughout the proceeding. However, the irony is that NDC's product and service are superior to that of IMS. During the short time that it was allowed to compete with IMS, NDC was the innovator, rather than IMS. Certain innovations created by NDC have now been copied by IMS; others are simply deprived to consumers through IMS's unlawful hijacking of the 1860 industry standard brick structure. IMS suddenly invented its unfounded claim of copyright in this structure just as NDC was entering the German market, and IMS did so not to protect any IPRs, but rather, with the purpose and effect of foreclosing competition. The establishment of a level playing field in Germany through access to the industry standard, in which the company that provides the best product at the best price, is unthinkable for IMS because once NDC could compete on the same playing field, IMS would suffer market share slippage.

One commentator recently argued that the Commission decision may have gone further than maintain the *status quo ante.*[67] This argument has been raised by IMS at all phases of the case thus far, but it is based on several makeweight premises. The first erroneous premise is that the Commission, in applying Article 82, cannot override findings of copyright by a Member State's court.[68] The second erroneous premise is that a compulsory license cannot put NDC in the position of having a license to do something "illegal" under national law.[69] This argument assumes that a final judgment on the merits has been reached in the German litigation. It hasn't. In fact, the Frankfurt Court of Appeals ruled on February 26, 2002 that IMS could not assert jurisdiction where it appeared to the Court that the German pharmaceutical industry was extensively involved in the development of the 1860 brick

[66] Korah, supra note 7, at 825.
[67] Korah, supra note 7, at 828.
[68] See eg Masterfoods, Case C-344/98 [2000] ECR I-11369 (the ECJ ruled that the Irish Supreme Court could not take a decision under the EC competition rules which conflicted with that of the Commission).
[69] Korah, supra note 7, at 828.

structure. This second premise also assumes, given the conservatory nature of interim relief, that the illegal character of the copyright infringement involves greater turpitude than the refusal to license. This latter assumption was flatly rejected by the Commission.[70]

By an extension of the above argument made by IMS, a compulsory copyright license under Article 82 would become virtually impossible to obtain because by the time the Commission was in a position to impose such a license, the copyright owner would have obtained an injunction preventing the copyright's use. The remedy would be ineffectual. In fact, the ineffectual nature of the remedy would be even more severe in the case of a copyright, as opposed to a patent, for example, because the "right," in Germany as elsewhere in the world, normally arises from the moment of the work's creation. No filing is necessary to establish the copyright. As a fine legal point, in such jurisdictions, the alleged "illegality" would exist simply by virtue of using someone else's copyright without his permission, that is, in the absence of injunctive relief.

The only *status quo ante* which made sense for the Commission in the IMS case, and it was certainly the only one which provided NDC with the benefits of the relief requested, was the status quo existing prior to the granting of injunctive relief. It was only this *status quo ante* which allowed NDC legal access to the 1860 brick structure until the Commission took a final decision in the case.

It has also been suggested that the Commission decision benefited competitors rather than competition or consumers.[71] This is rather interesting when one considers that the consumers in this case, the pharmaceutical firms in Germany, almost uniformly expressed outrage when IMS denied its competitors access to the 1860 brick structure. They did not protect themselves by requiring IMS to license the 1860 brick structure because they did not believe, and they still do believe, that IMS owned a copyright in the structure. Even IMS did not think of exercising a copyright in the 1860 brick structure or in its predecessor, the 1845

[70] IMS Decision, supra note 3, at para 198.
[71] Korah, supra note 7, at 828.

brick structure, which was in force since 1993 and is 92% identical to the 1860 brick structure, until NDC was preparing to acquire a controlling interest in PI , which NDC did acquire in June 2000, thereby becoming IMS's first meaningful competitor. It is also worth stressing that a decision in favor of IMS would have resulted in a consolidation of the market, which was not in the interest of competition or consumers.[72]

One commentator has also posited that it was imprudent of the Commission in IMS to have imposed such a "far-reaching" remedy, ie compulsory licensing, by interim decision. [73] However, as the ECJ has long established, the very purpose of interim measures is to prevent a later final Commission decision "from becoming ineffectual or even illusory because of the action of certain undertakings."[74] Moreover, there is ample authority for the Commission's fashioning of a compulsory licensing remedy.[75] In the IMS case, the Commission rightfully concluded that the character of the remedy suited the extreme nature of IMS's infringement and its preemptive effects on competition. This was the first time in the experience of the Commission that a dominant firm had obtained a court-approved copyright in an industry standard and had sought to exclude all competitors from having access to it, let alone where there was also conclusive evidence that the industry standard in question constituted an essential facility.[76] The Commission specifically found that interim relief was necessary to prevent IMS from obtaining complete foreclosure of the German market. The Commission was clearly correct in finding that the harm to NDC and the other entrant, AzyX, in denying them interim relief (ie that they were likely to be driven out of business) outweighed the harm to IMS in granting such relief, in that it would only suffer economic loss resulting from the loss of some contracts, and this loss was both quantifiable and recoupable following

[72] IMS Decision, supra note 3, at para 196.
[73] Korah, supra note 7, at 829.
[74] Camera Care v Commission, Case 792/79R [1980] ECR 119, at para 18.
[75] See eg, Opinion of AG Mischo, Volvo v Veng, supra note 39, at para 31; Opinion of AG Gulmann, RTE and ITP v Commission, supra note 4, [1995] ECR I-743, at paras 81-83; Opinion of AG Jacobs, Bronner v Mediaprint, supra note 6, at paras 64-65.
[76] See also Temple Lang II, supra note 1, at fn 3.

restoration of IMS's monopoly in the event that NDC's compulsory license was terminated by the Commission in its final decision.

V. THE DUTCH "MAGILL" CASE

The recently published decision in the case of De Telegraaf/NOS-HMG (hereinafter "Telegraaf") reinforces the above-stated discussion of EC case law concerning the compulsory licensing of copyrights pursuant to Article 82 of the Treaty. This case arose pursuant to a complaint by De Telegraaf under Article 24 of the Dutch Competition Act of 1997 (which is virtually identical to Article 82 of the EC Treaty). The Dutch competition authority ("*Nederlandse Mededingingsauthoreit*," hereinafter "NMa") gave its partial primary decision for De Telegraaf on September 10,1998, and this decision was confirmed in a further decision of February 16,2000. Following an internal appeal by the respondents, the NMa issued a third decision on October 3, 2001, which confirmed the two earlier decisions.

The fact situation in Telegraaf was very similar to that of Magill. The Dutch newspaper publisher, De Telegraaf, wished to publish a comprehensive weekly TV guide. De Telegraaf would not have been the first to publish such a guide in the Netherlands, as the public broadcasters had been publishing comprehensive weekly TV guides for decades. The Dutch Media Act requires Dutch public broadcasters to license their weekly listings of individual programs to the NOS, the Dutch broadcasting foundation, which in turn licenses the aggregate listings back to all broadcasters. The Holland Media Group ("HMG"), the largest media group in the Netherlands, which included the commercial broadcasters RTL 4, RTL 5 and until recently Veronica, cross-licensed the weekly listings of its channels with the NOS. Likewise, the remaining privately-owned broadcaster in the Netherlands, SBS 6, licensed its weekly listings to the NOS. Both the NOS and HMG licensed their daily listings only to newspapers and their weekly listings only to foreign media, subject to the condition that they are not directed at the Netherlands.

As a result of the cross-licensing practices of the NOS and HMG, the eight public broadcasters operating in the Netherlands were able to, and did in fact, publish a comprehensive weekly TV guide. HMG also published several guides: the Veronica guide containing complete weekly program listings and another guide devoted to satellite transmitted broadcasts. The NOS, however, actively refused to license weekly listings to non-broadcasters. HMG's licensing policy was less clear, but HMG had not licensed its broadcasters' weekly listings to anyone except the NOS.

In January 1998, De Telegraaf filed a complaint with the NMa, which alleged that both the NOS and HMG abused their dominant positions by refusing to license their weekly listings to De Telegraaf. In its first decision of September 1998, the NMa found that there were separate markets in daily TV listings and weekly TV listings in magazines in which weekly TV listings appear. It unclear from the face of the decision whether it was critical to the NMa whether there was trade in the listings, but the facts were that both daily and weekly TV listings were licensed for a negotiated royalty.[77] The relevant geographic market was the territory of the Netherlands. The NMa found each broadcaster held a monopoly in its own listings, and that by virtue of the mandatory licensing by public broadcasters to the NOS, the NOS held a monopoly in the aggregate listings of the public broadcasters. Moreover, HMG held a monopoly in the listings of its own member broadcasters.

In its decision of September 10, 1998, the NMa held that the NOS and HMG abused their dominant positions in weekly listings by refusing to license their listings to De Telegraaf, thereby reserving the market in weekly TV guides to themselves. The NMa also stated that this abuse was in the form of refused access to an essential facility, in that to refuse provide access to a facility, when access to the facility was necessary to compete with the dominant firm on the relevant market. Moreover, the NMa found that there was no

[77] This distinguished Telegraaf from the Magill case, in which the Commission and the EC Courts had held that there was a primary market in daily TV listings, even though it was clear from the facts of the case that there had been no trade in the daily listings and that there could not be any market in the listings in any economic sense, nor market share or market power attributable to the daily listings.

objective justification for the refusals to license partly because the refusals were against the policy objectives that were behind the liberalization of Dutch media, as exemplified by the Dutch Media Act.[78]

In finding for De Telegraaf on the abuse issue, the NMa expressly confirmed that the Magill judgment compelled its result. The NMa found that as in Magill, the broadcasters concerned were reserving for themselves the market in weekly TV guides, thereby preventing the emergence of a "new" product. This latter finding was most interesting because, unlike the situation in Magill, the public broadcasters in Telegraaf were *themselves* publishers of comprehensive weekly TV guides. The NMa therefore concluded that De Telegraaf was seeking to introduce a "new" product only in the sense that it wished to offer its own form of comprehensive weekly TV guide, rather than one which copied one of the public broadcasters' existing publications. This definition comports with the above discussion of Ladbroke, Bronner and IMS in that consumers had a right to select among competing weekly TV guides, and it was for the NMa to determine when a product was "novel" enough to justify an incursion on the exercise of copyright.

The NMa did not impose licensing terms in its September 10, 1998 decision, but rather, stayed this decision and gave the parties an opportunity to negotiate terms of a voluntary license.[79] However, the parties subsequently failed to agree to terms, and the NMA thereupon, in a decision of February 16, 2000, imposed a compulsory license on the NOS

[78] It should be noted that in IMS, the alleged copyright in question was the result of the transposition of the EC Database Directive, which contained an express derogation from copyright protection where the copyright owner commits an abuse of dominant position. Arguably, there was no objective justification for IMS's refusal to license on the ground that such refusal would have overridden the policy objectives of the Database Directive in placing limits on the ability of database creators to refuse licenses. However, such a conclusion was necessary for the Commission decision, in which the Commission found a lack of objective justification on a number of other grounds.

[79] This fact critically distinguished this Dutch procedure from that of the Commission in its final decision in Magill, which did, in fact, involve a decision to impose a compulsory license, and it was not stayed either by the Commission or by the subsequent Order of the ECJ in 1989. See RTE v Commission, Cases 76,77 & 91/89 R [1989] ECR 1141.

and HMG, and this license provided for all terms, including an appropriate royalty rate based on cost plus reasonable rate of return.

The NOS and HMG lodged an internal appeal with the NMa in respect of each of the above decisions. The launching of this internal appeal gave rise to a mandatory consultation with the statutorily designated independent advisory commission (by analogy to the EC Advisory Committee, which provides non-binding recommendations to the Commission in competition proceedings). This Dutch advisory commission disagreed with the NMa on the issue of whether the NOS and HMG had committed an abuse of dominant position. In particular, the advisory commission believed that De Telegraaf was not seeking to introduce a "new" product within the sense of Magill because, in contrast to Magill, each of the eight public broadcasters were already on the relevant market with its own comprehensive weekly TV guide. Moreover, in the advisory commission's view, in contrast to Magill, the refusal to license De Telegraaf did not eliminate all competition on the relevant market because there were already many comprehensive weekly TV guides in competition with each other.

In its final decision of October 3, 2001, the NMa not only rejected both of NOS/HMG's appeals, but in doing so, expressly disagreed with the above conclusions of the independent advisory commission. First, the NMa established as the relevant conceptual framework for its third and final decision that Bronner had interpreted Magill as not requiring the applicant for a compulsory license to introduce a new product. Second, the NMa held that there was no basis for treating intellectual property differently from any other form of property for the purposes of determining whether a refusal to supply is an abuse of dominant position. Third, citing Paragraph 41 of the Bronner judgment, the NMa stated that the ECJ in Bronner held that the refusal of access to the facility in question constituted an abuse of dominant position when it was likely to eliminate all competition on the relevant market on the part of the applicant, provided that access to the facility in question was indispensable for the carrying on of that person's business and there was no objective justification for the refusal. The NMa also explicitly mentioned the IMS decision as a case in which the Commission confirmed the Bronner approach to compulsory licensing.

The NMa therefore established, on the basis of the above EC precedents, that the refusal to provide access to a facility constituted an abuse of dominant position when the facility was essential for the applicant's activity on the market in question, the refusal disrupts competition on said market and there is no objective justification for the refusal. The NMa's interpretation of EC case law provides further support that Ladbroke, Bronner and IMS do not, as Korah suggests, require a "new" product in any sense implying a threshold of novelty, but rather, that "new" product must be interpreted in connection with another requirement of Magill, that is, the requirement of potential consumer demand. The NMa rightly agreed with the CFI in Ladbroke, the ECJ in Bronner and with the Commission in IMS that it is the consumer, not the antitrust regulator, who must decide whether the applicant's product is "new" or more appropriately, sufficiently competitive to garner consumer acceptance. If after the compulsory license is given, the product were rejected by consumers, this would demonstrate that the product was not competitive and the license would disappear along with the product from the market. The licensor need not debate the question of whether a product is sufficiently novel in order to justify a license--in doing so, he admits that the licensee's product is superior and that customers will prefer it to his own.

The NMa's explicit recognition of IMS is noteworthy for the purposes of this article, not only for the NMa's rejection of a "new" product requirement. In fact, the Telegraaf case goes farther than the IMS case. The NMa held that it was not necessary for the refusal to license by the NOS and HMG to result in the elimination of all competition in the market for weekly TV guides, as it was apparent that all eight public broadcasters were on this market. This author does not wish to opine on this conclusion of the NMa because the effect of IMS's refusal to license was the complete elimination of competition from the German market in regional sales reports.

VI. CONCLUSION

In this author's view, the Commission acted responsibly in its application of Article 82 against IMS. This case is not "controversial,"[80] as some have suggested, and this author's view is shared by the relevant customers in the IMS case, the German pharmaceutical industry. These manufacturers, which are more concerned than those most sectors in maintaining the value of their intellectual property, are firmly supporting NDC. A number of the companies that do not go public with their support of NDC are fearful of retribution by IMS. If any aspect of the IMS case should be controversial, it should not be the application of a well-established line of essential facilities precedent to IPRs that are essential to compete, but rather, the fact that a monopolist was able intentionally to foreclose competition in a market by belatedly asserting a copyright in an "open" industry standard.

[80] Korah, supra note 7, at 824.