Lost in translation

The assessment under Article 102 TFEU in relation to intellectual property rights

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ABSTRACT

Intellectual property rights have a firm place within the European Union. Measures are taken to assure that such rights are secured and protected. Such rights are said to foster innovation, creation, competition and consumer welfare. EU competition law carries the same objectives.

Yet, at the very same time, case law on EU competition law and the assessment under Article 102 - TFEU regarding abuse of a dominant position, indicates a failure to take notion of the rights of the intellectual property rights holder, and rather views the possession of such a right, and exploitation, in itself as an abuse, and a monopoly.

Seemingly such handling of the matter creates a clear discrepancy between the two legal fields and creates an uncertainty with regards to when the exercise of an IPR, by a dominant undertaking, amounts to an abuse.

Keywords: European Union, Intellectual Property Rights, Article 102 TFEU, Abuse of a dominant position.
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<td>AG.</td>
<td>Aktiegesellschaft</td>
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<td>cf.</td>
<td>Compare</td>
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<td>B.V.</td>
<td>Besloten Vennootschap</td>
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<td>CJ</td>
<td>Court of Justice</td>
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<td>Co.</td>
<td>Company</td>
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<td>DG</td>
<td>Directorate-General</td>
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<td>ed./eds.</td>
<td>Editor/Editors</td>
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<td>e.g.</td>
<td>exemplum gratia (for example)</td>
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<td>et seq(q)</td>
<td>et sequens/et sequentia</td>
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<tr>
<td></td>
<td>(and the following one/those that follow)</td>
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<td>EU</td>
<td>European Union</td>
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<td>ECR</td>
<td>European Court Reports</td>
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<tr>
<td>GmbH</td>
<td>Gesellschaft mit beschränkter Haftung</td>
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<td>Inc.</td>
<td>Incorporation</td>
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<tr>
<td>ibid.</td>
<td>Ibidem (the same place)</td>
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<td>id.</td>
<td>Idem/eadem (the same)</td>
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<td>IPR(s)</td>
<td>Intellectual Property Right(s)</td>
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<td>Ltd.</td>
<td>Limited</td>
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<td>OJ</td>
<td>Official Journal of the European Union</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>para.</td>
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<tr>
<td>Plc.</td>
<td>Public limited Company</td>
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<td>S.A.</td>
<td>Société Anonyme</td>
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<td>UN</td>
<td>United Nations</td>
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<td>v.</td>
<td>versus (against)</td>
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<td>WIPO</td>
<td>World International Property Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1 INTRODUCTION

1.1 Background

The European Union (EU) has the goal of establishing and guaranteeing a functioning internal market.¹ The internal market shall be without internal borders between the Member States, and free movement of goods, people, services and capital shall be ensured according to the provisions of the Treaties.² The internal market shall also consists of being a highly competitive social market economy and include a system ensuring that competition is not distorted.³ Therefore the Union has exclusive competence within the area of establishing competition rules that are necessary for the functioning of the internal market.⁴

One measure adopted in pursuit of reaching the Union’s goal of a functioning internal market is Article 102 of the Treaty on the Functioning of the European Union (TFEU) - interdicting unilateral behavior in the form of abuse of a dominant position. Case law by the Court of Justice (CJ) illustrates that an owner of an intellectual property right (IPR) may fall under the notion of abuse of a dominant position when exercising such a right, as such rights have been said not to be immune to the system of competition law.⁵ Simultaneously the Court has stated that “normal exercise” of IPRs will not trigger EU competition rules.⁶ This suggests that the exercise of an IPR must in principle comply with Article 102 TFEU.

To be noted is that the exercise of IPRs must in principle also comply with the rules on free movement of goods under Articles 34-37 TFEU. This is the effect of an effort to reconcile IPRs dealt with under national legislation in each Member State and EU competition law.⁷ However, in relations to the rules on free movement of goods, IPRs can fall outside the scope of EU law by way of derogation. Article 36 TFEU stipulates that “the protection of industrial and commercial property” can justify a prohibition or restriction on imports and exports between Member States as long as such prohibitions

¹ Article 3(3) Treaty on the European Union (TEU). See also Article 26(1) the Treaty on the Functioning of the European Union (TFEU).
² Article 26(2) TFEU.
³ Article 3(3) TEU and Protocol 27 of the TEU.
⁴ Article 3(1)(b) TFEU.
⁷ Anderman & Schmidt (2011), p. 18, Bernitz. Karnell, Pehrson & Sandgren (2011), p. 379. Albeit touched by harmonization and disregarded the notion of special Union based IPRs, the actual granting of an IPR still lies within the competence of each Member State.
or restrictions do not constitute measures of arbitrary discrimination or disguised restriction on trade. Article 102 TFEU does not have a companion in the shape of Article 36 TFEU; no derogation connected to IPRs is to be found. This could indicate, that in relations to the free movement of goods, the nature of IPRs – conferring *inter alia* exclusive rights of exploitation – is somewhat respected, whilst not cared for under Article 102 TFEU.

Case law on the matter indicates that the assessment under Article 102 TFEU concerning abuse of a dominant position contains no intention of regarding the nature of IPRs. Handling the matter in such way seems to create uncertainty in relations to the existence and exercise of IPRs in relations to dominant undertakings – what, how and when does it amount to an abuse?

This can also be problematic as the neglect to acknowledge the proper nature of IPRs might create a discrepancy between the two areas of law.

### 1.2 Purpose

The aim of this paper is to examine the intersection between EU competition law and intellectual property rights in relations to the assessment of abuse of dominance under Article 102 TFEU and what seems to be problematic so forth that it creates a question whether the assessment respects the natural boundaries between the two areas of law or whether it *de facto* only makes room for competition rules, without considering the nature of intellectual property rights. The paper thus also tries to examine and clarify when the exercise of such a right amounts to an abuse under Article 102 TFEU. Consequently the underlining questions are:

1) Intellectual property rights, do they have a firm place within the legal system of EU law or are they “secondary citizens” from the get-go?

2) Is there a natural conflict between EU competition law and intellectual property rights with regards to their natures and objectives?

3) When is the exercise of an intellectual property right considered to be an abuse according to Article 102 TFEU?

4) Does the legal assessment under Article 102 TFEU regard the nature of intellectual property rights?
1.3 Method and Material

In the aim of clarifying and analyzing de lege lata of the subject, the analysis of this work is based on the traditional legal dogmatic theory. Relevant legal sources, such as treaties, secondary legislation and case law are used in such fashion that the theory accepts. The interpretation and analysis of those sources is then supported or developed by non-legal sources such as official publications of the EU and doctrine in the form of literature and articles. Some sources have been obtained by using reliable websites deriving either from EU organs, well-know international organizations or databases for articles.

Case law and analysis of the same play a significant role in this paper, particularly as the subject of this paper derives from it, but also since EU law generally evolves through case law. This has also been the most problematic area when working on this paper. Case law on the matter contains great diversity in opinion, albeit sometimes reaching the same conclusion; it thus been hard to follow a stringent pattern or consistency in the handling of the matter and what constitutes the reasons of reaching de lege lata.

The judicial interpretation and analysis is based on traditional methods, e.g. regarding the purpose and wording of law.

1.4 Delimitation

As this paper focuses on the specific matter of assessing abuse of dominance in relations to IPRs no further general analysis of abuse of dominance will be given. Some questions having relevance for the establishment of abuse of dominance will also be left out from this work, such as an analysis of particular behavior amounting to abuse, a in-depth analysis of competition on the merits or whether the conduct has had affect on trade between Member States. Nonetheless are those subjects of importance, however this thesis does not have the capacity of making them justice in relations to its purpose.

Furthermore, to be noted is that Article 345 TFEU provides that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership, including IPRs. This is highly interesting and very connected to the subject of this thesis but will not be discussed, as this paper does not have the aim of focusing on questions of competence.
This paper contains information deriving from international Treaties on intellectual property rights, a subject apt for discussion could thus be the compliance of the verdicts referred to in this paper, concerning IPRs and Article 102 TFEU, with such treaties. The Court has though quite firmly stated its opinion on the matter - nevertheless such an opinion could be discussed – this thesis would not do the subject justice nor would it be preferable in the aim of fulfilling the objective of this thesis, as such it will not be dealt with.\footnote{However, for further reading on the matter please see e.g. Korah Valentine, 

The “to be or not to be “ of the system of IPRs will not be dealt with.\footnote{For reading on the matter see i.e. Levin Marianne, ” Upphovsrättens gränsytor mot det indistruella rättsskyddet och konkurrensrätten (Amförande hållet vid Dansk Selskab for Ophavsrets hyllningsseminarium för Mogens Kokkedegaard, Festvalen, Köpenhamns Universitet, den 6 maj 2003). NIR 4/2003, 325-333.}

\section*{1.5 Disposition}

The paper can be described as having three main sections; the first section regarding intellectual property rights, the second competition law and the last the area where the two meet.

This thesis start with the area of intellectual properties because I wanted to stress its belonging within the Union and its legal system. Chapter 2 thus generally describes intellectual property rights and their nature. But also contains a categorized presentation of the most common forms of intellectual property rights. This is done in order to get a better understanding of their nature: how such rights are obtained and their specific character and specific subject matter. It also contains a description of the EU policy on the matter. Chapter 3 enters into the world of competition law and describes the EU policy on the matter and contains an analysis of the assessment under Article 102 TFEU. This is to get an understanding of the structure of the Article and the notion of abuse of dominance. We reach the actual core of this paper in chapter 4 where the intersection between the notion of abuse of dominance under Article 102 TFEU and IPRs is analyzed. Chapter 5 contains the conclusion.
2 INTELLECTUAL PROPERTY RIGHTS

2.1 Generally About the Objectives of Intellectual Property Rights

Patents, trademarks, copyright and designs are commonly referred to as intellectual property rights. An IPR can be granted a creation of the human intellect and with it comes a right to exclusive exploitation, meaning that e.g. others cannot make, use or copy the protected creation.10

IPRs embody a protection system shaped to give incentives to create, innovate and invent. That objective is said to rest upon the belief that society in its whole will benefit from such a system.11

Creators benefit from their fruit and are encouraged to invest in creations – without it, creators might not want to invest in some projects due to the fact that it would no give any profit if others could e.g. produce the same thing.12 Also, why innovate if it only meant that your competitors would or could get ahead of you – on your behalf? Why create something if everyone else could free ride on you work, if you did not get recognition or compensation for it - whilst you have been the one spending time, money and other resources during the process of development? With IPRs, creators get the benefit of being protected from having their creations copied, looted or kept in their nest due to lack of profit if massively produced by many.13 The protection can also give inventors a chance to recuperate investments that have gone into the work, as the process might have been costly.14

This system of protection can also be beneficial to consumers as the incentives to create, innovate and invent can mean better products, lower production costs – thus lover wholesale costs, and more variety of choice when consuming.15 For example the strive to innovate makes a good base for competition as it pushes the market away from a stagnated thinking and acting, making competition vibrant. The economic benefit of holding an exclusive right also contributes to the competitive aspect of IPRs.

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10 Albeit trademarks, which have the objective of making it possible to recognize different products or servicer coming from different sources from each other.
11 Greenhalg & Rogers (2010), p. 34.
12 ibid., p. 32.
The objectives behind different IPRs vary and each IPR is said to have its own “specific subject matter”.  

2.2 The World Wide Spread of Intellectual Property Rights

The existence of IPRs is, with more or less power to it, widely spread around our globe, making it highly international. Globalization has made it easier for rights to travel between countries, but it has also created a need for a common ground on the matter. What is to be categorized as apt to bear a right and how fare does that right go? As most IPRs are still granted nationally, common markers have been created through various conventions and agreements in order to reassure coherence between national systems. As such it seems like IPRs are very welcome within legal orders and that there is a want of preserving such rights. This is not something new, as some of the oldest conventions on the matter actually have an age of being over a hundred years old. The Bern- and Paris conventions both stem from the latter part of the 1900-century and regard copyright and protection of industrial property. The latest versions of both conventions are from the end of the sixties beginning of the seventies. They both have the aim of making sure that a carrier of an exclusive right will find itself having the same protection within all the signing states. A majority of the countries in the world are signers to the two conventions and all states within the EU are signers, as is also the Union itself. Another indication of the importance of IPRs is the TRIPs-agreement, which actually sprouts from the above-mentioned conventions. The TRIPs-agreement, in full name; Trade Related Aspects of Intellectual Property Rights was adopted within the World Trade Organization (WTO). The EU and its Member States are both members of the agreement. The agreement regards trade-related aspects of IPRs. This was due to the fact that several of it signers, previously to the agreement, thought that the international protection of IPRs was too soft and inefficient. The creation of a global agreement with a connection to WTO hoped to better the protection of IPRs. The agreement includes a unified order of protection of IPRs and includes e.g. rules on how

\[\text{footnotes}\]

16 Faull & Nikplay (2007), p. 1239. Albeit, see Eklof (2005), p. 329 where he insinuates that it might be “passé”. The different objectives or "specific subject matter" will be dealt with under section 2.4.


18 Members have the right to enter into special agreements with each other for the protection of the covered IPRs, as long as they respect the Conventions; Article 19 The Paris Convention and article 20 the Bern Convention.

19 Preamble of TRIPS, see also Vrins & Schneider (2012), p. 52 et seqq.
signing members can shape their IPRs and minimal thresholds of protection and standards of law.\textsuperscript{20} Another similar convention on the matter is the Rome Convention, which covers the area of copyright.\textsuperscript{21}

An organ of interest is also the World Intellectual Property Organization (WIPO).\textsuperscript{22} It is connected to the United Nations (UN) and administers international conventions on intellectual property. The organization runs several services in order to ease the obtaining of protections, it also develops international framework on the matter and develops capacity in order to use intellectual property to boost economic development. WIPO has produced several treaties regarding specific IPRs but also treaties regarding cooperation and administrative matters.\textsuperscript{23}

\textbf{2.3 The EU Policy on Intellectual Property Rights}

\textbf{2.3.1 A Fundamental Right}

Article 345 TFEU stipulates, as previously mentioned, that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership, where as intellectual property being one aspect of such a system. Intellectual property is also covered and acknowledged as a fundamental right in the EU Charter of Fundamental Rights (The Charter) as the second paragraph of Article 17 of the same stipulates that intellectual property shall be protected. The Article states that everyone has the right to own, use, dispose and bequeath a lawfully acquired intellectual property. It also stipulates that no one may be deprived of such a possession, except due to public interest or under the conditions provided by law - subjected that such a loss is fairly compensated in good time.

The acknowledgment of intellectual property both in the TFEU and the Charter indicate that such rights are of strong importance. It has also been stated that the explicit mentioning of intellectual property is an effect of the growing importance of such rights within the Union.\textsuperscript{24} This importance has many times been restated by \textit{inter alia} the

\textsuperscript{20} Article 41, TRIPS.


Commission and is a part of the EU 2020 agenda – EU’s growth strategy for the coming decade.\textsuperscript{25}

\subsection*{2.3.2 The Goal of the Policy}

It is also noted in the introduction of the non-binding Commission communication on A single Market for Intellectual Property Rights, where one finds the firm statement of belief that innovation is the solution to those problems facing society today.\textsuperscript{26}

It states that through innovation we can ensure food security, tackle the matters of climate changes and improve citizens’ health. The effects of IPRs can also turn in to high quality jobs and economic growth helping to create and maintain an open and competitive market.

In the Communiqué the Commission emphasizes the importance of an IPR’s potential revenue and how it is a key player when it comes to the incentive to innovate.\textsuperscript{27} The Commission’s agenda of assuring the existence of different IPRs is clear and firm; there is no question that the vision is a strong and well-functioning IPR system containing equally efficient measures to protect such rights.

\subsection*{2.3.3 The Different Dimensions of the Policy}

The EU policy on IPRs is characterized by three different elements. Firstly there is great works on harmonization of national legislation and approximation of protection of intellectual property rights. The granting of IPRs has mostly fallen within the competence of the Member States and there has been a need of harmonizing those rules governing it to ensure the functioning of the internal market.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} COM(2011) 287 final, A single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, 24. 5. 2011, p. 3. The communiqué is not a legally binding document, however it sets the agenda for how the Union will shape its policy on IPRs and thus it is nevertheless of importance.
\item \textsuperscript{27} COM(2011) 287 final, A single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, 24. 5. 2011, p. 4.
\item \textsuperscript{28} Faull & Nikplay (2007), p. 1237.
\end{itemize}
\end{footnotesize}
The approximation of Member State laws plays a significant role in doing so, however the degree of harmonization varies depending on the IPR. Nevertheless all rights are in some way touched by harmonization.  

Article 118 TFEU has the function to serve the approximation of law of the Member States; it states that the parliament and the Council shall establish measures for the creation of European IPRs to provide a uniform protection of such rights throughout the Union. It shall also establish measures to enable arrangements of coordination, supervision and thus set up centralized authorization throughout the whole Union, in the context of the establishment and functioning of the internal market within the Union.

This takes us to the second element of the policy, and its aim of a Single Market; specific EU intellectual property rights. In addition to the national granted and bound IPRs there is a coexisting system of unified IPRs which serves to have equal effect in all Member States of the European Union.

The third element within the policy on IPRs is the active work of combatting counterfeiting and piracy within the internal market in order to protect such rights. This is integrated in the two mentioned characteristics but often stands out as battling ship on its own. In the previous mentioned Communiqué the commission states that:

Infringers of IPR deprive EU creators of appropriate rewards, create barriers to innovate, harm competitiveness, destroy jobs, decrease public finances and possibly threaten the health and safety of citizens.

Infringement of IPRs is said to have a negative impact on EU businesses and consumers. With regards to businesses, it can stagger competition by reducing the demand of genuine goods, and in the long run deflate the incitements of creating or innovating. The image of a right holder might be damaged due to the fact that copied goods might have a lower quality and thus harm their goodwill or stream of consumers. Some goods might even be harmful to consumers.

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30 COM(2011) 287 final, A single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, 24. 5. 2011, p. 17.

31 Vrins & Schneider (2012), p. 79.

32 ibid., p. 15, 79.
Hence the EU regime on combatting counterfeiting and piracy has the aim of assuring a functioning economy and competition, whilst also clearly caring for consumer wealth.

The Union’s signing of the TRIPS agreement and legislative measures connected to it, in order to fulfill its obligations, clearly indicates that IPRs have a firm place within the Union.

In the works of doing so the Commission has worked actively and one product is the, previous mentioned, Directive 2004/48/EC of 29 April 2004 on the enforcement of Intellectual Property Rights, also know as IPRED. The directive has the aim to assure the protection of IPRs by sanctions and cuts across all intellectual property rights, however it only focuses on remedies available in civil courts and not on criminal offenses. It requires all Member States to assure for measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights covered by the directive.  

Since IPRED does not cover criminal offenses that area has been targeted through other means. The most well known attempt within this field has to be the Anti-Counterfeiting Trade Agreement (ACTA). The EU, together with Australia, Canada, Morocco, New Zealand, Singapore, South Korea, Japan and the United States signed this agreement. It will enter into force once ratified by six states. At the moment, whilst this paper is being written, Japan is the only state that has ratified the agreement. ACTA has also been found provocative by many, due to its shape and form – which could be called aggressive and might not comply with EU law. This has also lead to the situation that the European Parliament has refused to give its consent to ratification. Some might claim that the agreement is “dead” due to these circumstances. However, the “existence” of an agreement indicates that there is a strong interest of protecting intellectual property within inter alia the European Union.

The agreement focuses on a cooperative combatting of counterfeiting by boarder measures, criminal and civil sanctions. It goes beyond the TRIPS agreement by enhancing the level of sanctions whilst also being more detailed.

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34 Vrins & Schneider (2012), p. 52.
36 See e.g. Articles 15 and 23 ACTA.
37 e.g. cf. Article 61 TRIPS and Article 23 ACTA.
The diversity of the EU policy on intellectual property rights indicates, as stated before, that IPRs are of great value and importance within the Union. It also shows an aspiration of preserving and maintaining a functioning protection system of such rights.

2.4 Different Intellectual Property Rights

As I have chosen to exemplify the problematic area between IPRs and EU competition law in relations to the notion of abuse of dominance and the holding and exercising of an exclusive right, the following section will contain a presentation of different IPRs. In order to fully comprehend the intersection between competition law, in relations to the assessment under Article 102 TFEU, and IPRs - one needs to understand what IPRs inhale and the nature thereof; their specific subject matter.

2.4.1 Patents

This exclusive right can be granted to inventions, it often has the shape of being nationally bound and only protecting in the county where it is granted. It is limited in time, generally twenty years, in exchange for the disclosure of the public. The time limit exists so society in total will have the chance to benefit from the invention but is also motivated because those innovations deriving from this system is thought to be positive for society in its whole.

A granting requisitions several criteria, it must be an invention and it has to be a subject matter that can be patented – this often means a product of the human intellect and excludes e.g. forces by nature. This might have to do with the frequently found criteria that the innovation must be useful and industrially applicable and that it has to be new. Lastly one finds a criterion of innovation, meaning that it cannot be an obvious thing without an innovative step.

38 Much of the information in this section originates from international conventions. (Paris Convention for the Protection of Industrial Property (1883), Berne Convention for the Protection of Literary and Artistic Works (1886), International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)(1961)) As the European Union and its Member States are signers of the conventions referred to, there should be great similarities between the intellectual property laws existing with the Member States of the European Union. The content of the convention should thus also be able to give a somewhat reasonable description on how the different IPRs are formed and shaped and what objectives they have.


40 See e.g. Article 27.3 TRIPS Agreement, which most countries in the world have signed.

A granting normally means that only the holder of the patent has an exclusive right of exploitation: manufacturing, selling, using or even in some cases import the protected creation.\textsuperscript{42} This means that if anyone else wishes to exploit it they need the authorization of the owner in advance. If the right to exclude others from using the patent did not exist, few would find it interesting to invest in research and development.\textsuperscript{43}

This is the exclusive right that most can be said to resemble a monopoly. WIPO has though stated that a patent does not give the owner or inventor a right to make, use or sell something – thus it is not a de facto monopoly.\textsuperscript{44} What the patent is supposed to protect is unauthorized commercial exploitation by others than the holder.\textsuperscript{45} A patent is thus a negative right that lets the innovator or the holder of it gain the material benefits of his intellectual work and effort. It serves as compensation for resources, time and expenses used while in the process of inventing what has been granted. At the same time, the holder often needs to pay an annual fee in order for renewal or maintenance of the patent.\textsuperscript{46}

The excluding and exclusive right of a patent does not automatically hinder other from using the invention. The holder must guard the right himself/herself by inter alia bringing actions against those infringing the right.\textsuperscript{47} There are also often exceptions to the rights conferred in relations to the limit of how the exclusive right may be exploited. e.g., Article 30 of the TRIPS agreement states that members may provide limited exceptions provided that they do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner.

Patent laws often limit the exercise of a patent; some countries might have rules regulating the event of an abuse. The previously mentioned Paris Convention declares that each country has the right to take legislative measures providing for compulsory licensing to prevent an abuse resulting from the exercise of the exclusive right.\textsuperscript{48}

\textsuperscript{43}See e.g. Article 28 TRIPS Agreement, Anderman (2007), p. 19.
\textsuperscript{44}Anderman (2007), p. 19.
\textsuperscript{46}ibid., p. 28.
\textsuperscript{47}ibid., p. 28.
\textsuperscript{48}Article 5(a)(2) Paris Convention (1883).
convention exemplifies an abuse as failure to work – *i.e.* not making use of the patent, this seems to be to make sure that patented inventions are used and not kept in the dark to stagger innovation.\(^4\) Exhaustion of a patent is thus a possible.

2.4.1.1 **Union Measures on Patents**

The Union has enhanced its cooperation with regards to patent protection by the creation of Unitary Patent and a Unified Patent Court.\(^5\) The objective is to help cut costs for patenting inventions but also offer a simpler process of obtaining a patent protection.\(^6\) The patent also has the objective of increasing an overall competitiveness.\(^7\)

There is also the possibility of being granted a European patent under the procedure established by the European Patent Convention (ECP). Such a patent is granted by the European Patent Office (EPO, which is not a body of the European Union), however this patent needs to be validated in each state for which it has been granted – in contrary to the unitary patent, which has a direct unitary effect in all 25 Member States (Italy and Spain is not participating).\(^8\)

2.4.2 **Trademarks**

A trademark can comprise of a single word, a logotype or a unique concept. Trademarks can be said to serve two functions: to individualize goods and services so costumers can tell the difference between producers, but also act as a quality indicator for consumers.\(^9\) Consequently a trademark lets its owner position itself amongst competitors – and can thus be used as a tool of competition.

A trademark right is often obtained through use, but can also be obtained by registration.\(^10\) The holding of such a right means an exclusive and excluding right to

\(^4\) *id.* 49.


\(^6\) *ibid.*, Preamble (4).

\(^7\) *ibid.*, Preamble (9).

\(^8\) Article 1, Council Decision 2011/167/EU of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 76, 22. 3. 2011, p. 53.


exploit the trademark but also an exclusive right to prevent unauthorized use by third parties. Some “automatic” protection of unauthorized use can be found when it comes to registered trademarks. The registration functions in that way that it does not allow a similar or exact copy of the trademark to be registered. Except from that, the holder must him/her-self, as with patents, guard the interest of exclusivity. Trademark laws may though contain limitations to the right conferred by the trademark. Such limitation might be an obligation of usage when a trademark right has been obtained, as unused trademarks can act as barrier to the registration of new marks.

The duration of protection is often restricted to the usage, but sometimes also regulated with a time limit but with the possibility of a renewal.

2.4.2.1 Union Measures on Trademarks

Legislative harmonization within the Union has been done through various directives with regards to trademarks. The approximation of the law of the Member States relating to trademarks has been done through the Directive 2008/95. The approximation was done in order to promote the free movement of goods and services as well as free competition within the internal market. The directive concerns trademark acquired through registration and the fundamental rules of such trademarks. It lays down a framework for inter alia the signs of which a trademark may consist, ground for refusal of a trademark, the rights conferred by a trademark and the use of trade marks. At the present time the European parliament and the Council have proposed a new directive. This is one of the strategies to ensure a high quality system for trademarks and an efficient protection of such rights. The proposal aims to foster innovation and economic

56 See inter alia Article 16, TRIPS.
57 See inter alia ibid., Article 17, where Member states may provide limited exceptions.
59 ibid., p. 82.
61 ibid., Preamble (2).
growth whilst also assuring that there is a coexistence and complementarity between the nation and EU trademarks system.\

Regulation (EC) No 207/2009 established a stand-alone system for the registration of unitary trademark rights with equal effects within the Union. The offering of a Uniform trademark protection throughout the Union was done in order for a proper functioning of the internal market. This regulation is also under revision.

2.4.3 Designs

This IPR regards the protection of the outward appearance of a product. It can cover the whole product or a part, and results from the features of the product itself and/or the way it is constructed; as such the shape, the contours, lines, colors, materials and texture have a central role. In order to get protection the design needs to be novel, have an individual character, not be solely dictated by the technical function or against morality and public order.

Visual appeal is a part of a consumer’s choice of preference over one product from another. As such designs serves an important functioning in achieving market success whilst also giving incentives to invest in the design of a product.

The right aims to protect the design of a product and not the product itself. As such the grant does confer a right of commercial exploitation of the products bearing the protected design. The Paris Convention states that designs shall not, under any circumstances, be subjected to any forfeiture, in contrary to e.g. patents.

2.4.3.1 Union Measures on Designs

Harmonization has been done within this field of IPR law. Directive 98/71 regards the legal protection of designs. The Directive covers only registered designs and compels

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68 ibid., p. 112.
69 Article 5(b), Paris Convention (1883).
Member States to protect such designs. A protection shall confer an exclusive right upon the holder and the directive contains provisions regard the requirement of protection. It also states a term of protection.

The directive also stipulates that a registration of a design shall confer an exclusive right of usage and a right to prevent unauthorized usage by others. That means, in particular, that the right covers the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it applies. The directive also stipulates that the right conferred by the design is to be limited in certain situation, acts done in privately or non-commercial purposes, experimental purposes, citations or teaching shall not provoke the right.

However, the Union has not only worked for an approximation of Member State laws but also created a European Community design protection. It is a unitary right with equal effect within the Union.

2.4.4 Copyright and Related Rights

Books, music, and paintings are often thought about when talked about such rights. The rights concerns protection of creativity and is granted to intellectual creations, it does not cover ideas but the expression of ideas. This means that it is the way someone has wanted to present in example a set of notes in certain way that is protected. The general rule is that in order to get protection, the creation needs to be original. In difference to in example patents, there is no criterion of quality or value to the work. It does not have to be innovative or “good” - it will still get protection. The protection in itself means that others are not to copy the creation without authorization and/or referring to the original work. Copying without the authorization of the creator is often called piracy and such conduct is said to have a detrimental effect on the elements that builds the system of copyright. Even if a cheaper copied product can be said to be beneficial to consumers, it might as well in the long run have a negative effect on consumers. Creators might not get remunerated and piracy might thus render the incentives to sell or distribute works covered by copyright. As such it contains a moral aspect to it but

72 Vrins & Schneider (2012), p. 5.
also an economic aspect of copyright, as creators should get the benefit of their creations.


Related rights refer to the right of those helping intellectual creators to communicate their works.\footnote{See inter alia Article 1 as to a difference to copyright and Article 3 for the definitions, The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) (1961).} It covers the performance of an artist, the right of producers in their productions and the rights of broadcasting organizations in their broadcasting.

2.4.4.1 Union Measures on Copyright

Copyright and related rights have been significantly harmonized within the European Union. This has been done to reduce barriers to trade and fulfill the establishment and fulfillment of the single market and ensure that competition is not distorted within the internal market.\footnote{Preamble (1), Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22. 6. 2001, p. 10.} A number of directives outline the harmonization, one is the Copyright Directive,\footnote{Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22. 6. 2001, p. 10.} adopted to fulfill obligations deriving from a treaty on copyright and related rights adopted within the framework of WIPO.\footnote{WIPO Copyright Treaty (WTC), 1996.} The directive contains provisions regarding the exclusive rights conferred by copyright and related rights, but is also contains exceptions and limitations which Member States may apply to such rights.\footnote{Articles 2-5, Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22. 6. 2001, p. 10.} The directive stipulates that Member States must affirm an adequate legal protection against piracy.\footnote{ibid., Articles 6-7 and preamble (47).}

The aim is to provide an efficient and effective protection system while adapting copyright legislation to reflect technological developments and to foster substantial investment in creativity and innovation in order to prosper the competitiveness of


\section*{2.5 \textit{Is it a de facto Monopoly?}}

With the formation of being excluding and exclusive, an IPR also bears limitations, in order to prevent negative side effects due to its existence. The limitations of an exclusive right are often based on the need of preserving a functioning market without creating unnecessary “monopolies” or having the opposite effect of its specific subject matter.

One such limitation is, as previously shown, time - an exclusive right is granted only for a limited period of time. This limitation is also very characteristic as it means that the “owning” of an exclusive right is naturally time regulated, something that is not found when it comes to \textit{inter alia} the owning of a tangible thing. Another limitation is exhaustion; a right can be “lost” or “extinguished” if not properly handled.\footnote{http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf, [19. 4. 2013, 17:56], Tritton (2008), p. 75, Keeling (2004), p. 256, See also in a EU law context, \textit{e.g.} Case C-173/98 Sebago Inc. and Ancienne Maison Dubois et Fils S.A. v. G-B Unic S.A. [1999] ECR I-4103, also those previously referred to harmonizing directives of the Union.}

The usage above of the plural wording of “monopoly” is actually somewhat, as previously mentioned - deceiving, as the holding of an exclusive right does not\textit{ e.g.} equal market power or \textit{ipso facto} a monopoly.\footnote{However, see McKenzie & Lee (2011) for a “non-conventional” way of handling the notion of monopoly, insinuating that the concept might not be (totally) harmful.} Faull and Nikplay emphasize that it is important to distinguish exclusive IPRs from monopolies and that many lawyers
inaccurately forget to do so. I believe that it is important to distinguish them apart from each other due to the fact that IPRs and monopolies carry different objectives but also different effects. An IPR is received on *inter alia* the basis that such an excluding and exclusive right can have a positive effect on competition. Whilst in contrary, a legal monopoly is granted to hinder competition and the effects of competition that might not be desired. A monopoly also automatically confers market power whilst the holding of an IPR does not automatically mean that market shares will rise, factors on the market such as *e.g.* other actors on the market, consumer demand and buy power has impact on market shares. A product might very well be protected by an IPR, but that does not mean that there is a consumer demand for that product and that it confers market power.

### 3 EU COMPETITION LAW

Starting at the heart of EU competition policy we find Article 3(3) TEU, which establishes that the Union shall contain a competitive social market economy. Additional to this Article there is Protocol No. 27 on the internal market and competition, annexed to the TEU. The protocol states that the market shall be based on system that secures competition from being distorted. In order to sustain such a structure Article 3(1)(b) TFEU states that the Member States have confirmed an exclusive competence to the Union when it comes to the establishment and legislation of rules that are necessary for the functioning of the internal market. The legislative part of competition is just a general part of the policy, the more specific shaping of the policy can be found within case law of the Court of Justice and publications of the Commission. However, the Court of Justice has several times referred back to the broad aims of the Treaties when it has tried to structure and pinpoint the aim of the EU competition rules within the EU, in order to determine if something contributes or diminishes the competitive structure within the market. Generally, the Court has stated that the purpose of those rules is to prevent competition from being distorted to the

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91 Arnold (2010), p. 231 *et seq.*, Mankiw (2011), p. 336 *et seqq.* cf. also, Smith 1776, book 1, chapter 7, section I.7.26 *et seqq.* (Noted should though be that Smith has a broad definition of what falls within the notion of monopoly and regards legal monopolies in the form if IPRs granted by the state as equally detriment to competition as those naturally occurring or actually granted with the aim of hindering a competitive environment (legal monopoly to *e.g.* sell a good *et seqq.*). See also McKenzie & Lee (2011), p. 30 *et seqq.*
93 Protocol No. 27 on internal market and competition annexed to the TEU and TFEU, OJ 2010 C 83, 30. 3. 2010, p. 309.
disadvantage of the public interest, individual undertakings and consumers, and thereby contribute and ensure the welfare within the Union.\footnote{Case C 52/09 Konkurrensverket v. TeliaSonera Sverige [2011] ECR I-527 p. 22, Case C-94/00 Roquette Frères [2002] ECR I-911, p. 42. See also Craig & De Búrca (2011), p. 719 et seq.}

One of the main articles of the EU competition policy is Article 102 TFEU, which regards the notion of abuse of a dominant position. Generally, the Article aims to prevent an undertaking having great market power from misusing its position and rendering competition and the negative effects that might come or comes thereof. Another objective behind regulating on the matter is also due to the fact that dominance can be said to have a monopoly-like character and thus the same encumbering effect on competition as a monopoly.\footnote{Russo, Schinkel, Günster & Carree (2010), p. 113.}

What or who is to be protected from the dominant firms’ misuse of power can be somewhat complex to understand, this is due to the fact that case law shows a great diversity in opinion of the Article’s objective.\footnote{Several cases state different main objectives and differ on what is to be emphasized as the main objective of protection in order to ensure a competitive market. See inter alia Akman (2009) p. 268.} However, it is of great importance to understand the objective of Article 102 TFEU in order to understand the notion of abuse as case law show that the assessment of what falls within the notion often is made on the basis of the objective of the Article. As such the next section will deal with the objective of Article 102 TFEU.

### 3.1 The Objective of Article 102 TFEU

Some trends can be discovered when seeking the aim of Article 102 TFEU. Several cases point in the direction that the objective of the Article is solely to protect competition in order to ensure consumer welfare.\footnote{See Case 6/72 Europenmballage Corporation and Continental Can Company Inc. v. Commission [1973] ECR 215, para. 26, Joined Cases 6/73 and 7/73 Instituto Chemioterapico Italiano S.p.A and Commercial Solvents Corporation v. Commission [1974] ECR 223, para. 25.} Others state that the main objective is to protect a competitive structure in order to safe harbor competition and a third category serves the opinion that the article actually encompasses the aim of protecting different competitors.\footnote{DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 2005, paras. (4)(54)(55)(88)} A forth category claims all the above as the Article’s mission.\footnote{The first case regarding the notion of abuse, Continental Can, states that the objective of Article 102 TFEU is not only to protect consumer welfare, but also to...}
protect the structure of competition. The latter is though not motivated solely on itself but on the argumentation that a deflated competitive structure would indirectly have a negative effect on consumers.\textsuperscript{103} The argumentation of a need to protect a competitive structure has been widely interpreted and it seems like the trend of arguing in favor of that Article 102 TFEU encompasses the aim of protecting different competitors stems from it. The Court’s argumentation in the case of \textit{Commercial Solvents} indicates this as the Court states that behavior, by a dominant undertaking that in fact could amount to eliminating all competition, is abusive.\textsuperscript{104} The Court does not talk about consumer welfare or the need to protect the structure of competition as a motivation. Indisputably it does not specifically mention the aim of Article 102 TFEU but its argumentation can be interpreted as if the Court finds elimination of competitors \textit{per se} as not complying with the aims of Article 102 TFEU. Such an interpretation was also done in \textit{Irish Sugar} where the Court says that the primarily justification of Article 102 TFEU was the fact that dominant undertakings should not be able to eliminate a competitor.\textsuperscript{105} The case of \textit{Deutsche Telecom} narrows the sphere of competitors, which article 102 TFEU seeks to protect, this as the Court specifies that the competitors, whom it seeks to guard with Article 102 TFEU, are “equally efficient” competitors.\textsuperscript{106} However, the view that there is a need of protecting different competitors seems to have faded. In a non-binding guidance paper from the Commission, it states that it is of the opinion that competition is the main object to safeguard and not only competitors as such.\textsuperscript{107} This paragraph indicates that the Commission also finds other competitors of interest to be shielded from dominant undertakings. Although it seems like the Commission, albeit sharing the beliefs of the Court, finds that it is not competitors \textit{per se} which are to be secured by Article 102 TFEU, as the paper follows by stating that maintaining an effective competition may very well have the effect of competitors leaving the market due to less competitiveness in price, selection, quality and innovation.

This was also recently stated during a conference on antitrust in Technology, when the Director-General of Directorate-General Competition, Alexander Italianer, gave - on

\begin{itemize}
\item Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24. 2. 2009, p.7.
\end{itemize}
what seemed to be on the behalf of the Commission, some remarks on the aim of the Commission’s work and competition policing. Italiner clearly stated that the Commission’s job is to ensure consumer welfare and not protect inefficient competitors. The Court of Justice seems to have moved on too and shares the same believes and two recent cases speak in favor of a conclusion that the objective of Article 102 TFEU is to protect competition in the interests of consumers, as in those cases one finds an argumentation based on consumer welfare being the main objective of Article 102 TFEU. Thus it seems like Article 102 TFEU has the objective of ensuring and protecting consumer welfare whilst also ensuring an effective allocation of resources, but in order to do so, it seems like one has to safeguard competition as such. Albeit while assuring competition, Article 102 TFEU does not seem to have the aim of protecting different competitors as such, especially not those who lack in competitiveness.

3.2 The Material Scoop of Article 102 TFEU

The Article prohibits an undertaking, holding a dominant position within the internal market or in a substantial part of if, from abusing its dominance to the extent it could affect trade between Member States. It deals with the intricate situation when an undertaking has a monopoly or an accumulation of power having somewhat the equivalent effect of a monopoly, and how that undertaking may act in such a position. Generally speaking it is not supposed to have the connotation to crimate the mere holding of a dominant position. It has been stated by the Court that an undertaking, which has gained a dominant position on its own merits, cannot be criticized for being in such a position.

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108 See Akman 2009, for a similar reasoning and for an in-depth analysis of the matter.
The article does not stipulate when an undertaking is dominant, such an evaluation must be done on a case-by-case basis via the definition set out by the Court of Justice. According to case law the notion “dominance” found in Article 102 TFEU relates to an undertaking holding a strong economic position on a market, giving the undertaking the power to be able to distort effective competition due to its possibility to act independently of other actors on the market. Meaning that the existence or behavior of competitors, customers and/or consumers has no influence on the position of the undertaking, due to its power on the market.

Further the Article states what may constitute an abuse:

(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;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Noted should be that the list is only exhaustive when it comes to categories but not when it comes to the different types of conduct within the categories. A conduct must not fit exactly into a category to constitute an abuse, as Article 102 TFEU must be interpreted in its whole.

3.3 The Objective Concept of “Abuse”

When talking about abuse one finds that there are different forms of abuse. “Exclusionary” and “exploitative” are the most frequently used notions when

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114 An interesting point of view is though shared by Russo, Schinkel, Günter & Carree; that it is hard to imagine any undertaking being able to act totally independent of customers and consumers seen to the fundamental principles regulating a market economy; (supply) but utterly costumer and consumer demand. Russo, Schinkel, Günter & Carree (2010), p. 113.
explaining an abuse.\footnote{See e.g. Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports S.A. and Others v. Commission [2000] ECR I-1365, Jones & Sufrin (2011), p. 316 et seq., Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24. 2. 2009, p. 7, para. (7).} This is because an abuse can have the character of being exclusionary, meaning that a dominant undertaking uses its power to hinder or prevent competition on the market - shutting out any competition. Abuse can also have the character of being exploitative, meaning that a dominant undertaking exploits its customers through its market power. This paper focuses on the first form of abuse. Most cases have regarded exclusionary abuse; however case law on the matter often speak in a general terms of the notion abuse, making them applicable when determining other forms of abuse.

\textit{\textbf{e.g.}} the case of \textit{Hoffman La-Roche}, which regards exclusionary abuse, where the Court states that:

\begin{quote}
The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which; through recourses to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\footnote{Case 85/76 Hoffman La-Roche & Co. AG. v. Commission [1979] ECR 461, p. 91. This has also been restate in \textit{\textbf{e.g.}} the following cases; Case C-62/86 AKZO Chemie B.V. v. Commission [1991] ECR I-3359, para. 7, Case T.219/99 British Airways Plc. v. Commission [2003] II-5917, para. 241, Case T-201/04 Microsoft Corp. v. Commission [2007] ECR II-3601, para. 664, Case T-228/97 Irish Sugar Plc. v. Commission [1999] ECR II-2969, p. 111, Case C-520/09 Konkurrensverket v. TeliaSonera Sverige [2011] ECR I-527, p. 27, Case C-280/08 P Deutsche Telekom AG. v. Commission [2010] ECR I-9555, p. 174.}
\end{quote}

\subsection{3.3.1 Certain Behaviors Regarded as Abusive \textit{per se}}

The use of the wording “objective concept relation to the behavior...” in the citation above indicates that the mere form/shape of an action or measure taken by a dominant undertaking can adjudicate whether the behavior is abusive or not. This has also been confirmed by latter cases, \textit{\textbf{e.g.}} \textit{Irish Sugar}.\footnote{Case T-228/97 Irish Sugar Plc. v. Commission [1999] ECR II-2969, p. 111.} Normal competitive behavior like predatory pricing – keeping prices down and competing aggressively in prices, selective price cutting, fidelity rebates – giving just some customers a lower price on the basis of certain conditions, tying and bundling - supply of a product or service with the demand that the costumer obtains something else from the supplier and excessive prices are
regarded as abusive when done by a dominant firm.\textsuperscript{120} This is due to the fact that dominant undertakings are believed to often use such measures to eliminate competition.\textsuperscript{121} In example it is presumed that setting prices below the average of variable of costs (those that change due to quantities produced), is predatory, as such a behavior cannot be motivated on rational economic thinking as it will not \textit{e.g.} generate profit, and thus only must exist solely on the grounds that one wants to eliminate competitors.\textsuperscript{122} Predatory pricing has as such almost been absolutely banned from the repertoire of dominant undertakings as it has been stated to constitute an abuse of dominant position.\textsuperscript{123} Certain behaviors have been seen as abusive \textit{per se}, no matter if they \textit{de facto} have rendered competition or not.\textsuperscript{124}

In the verdict of \textit{Kingdom of Spain v. Commission} the Court of First Instance (now The General Court) states that case law does not mean actual effect, it is sufficient to show that the abusive conduct tends to restrict competition.\textsuperscript{125} It also continues by stating that the practice must have an anti-competitive effect but that it does not have to be a concrete effect.

\subsection*{3.3.2 Weakening of Competition}

It is also clear that the Court believes that a behavior is regarded as abusive if it obstructs or weakens competition on the present market.\textsuperscript{126} The Court of Justice has also stipulated that a conduct can be found illicit even if the dominant undertaking has not actually exploited or used its position, if the dominant undertaking has excluded competitors, strengthened its power on the market or made competitors weaker.\textsuperscript{127} The Court has though established that dominant undertakings are not deprived of the right to

protect their own commercial interest if other competitors attack them.\footnote{Case T-65/89 BPB Industries and British Gypsum v. Commission [1993] ECR II-389, para. 17, Compagnies Maritime Belge Transports S.A. and Others v. Commission para. 146, 185, Case C-52/09 Konkurrensværket v. TeliaSonera Sverige [2011] ECR I-00527, para. 28.} A dominant undertaking is allowed to take those measures it finds appropriate to protect its commercial interest, as long as the measures have that goal and not the purpose of strengthening or abuse its dominant position. However, the objective concept of abuse also means that it does not matter if the undertaking actually had the intentions of rendering competition.\footnote{Case T-301/04 Clearstream Banking AG. and Clearstream International S.A. v. Commission [2009] ECR II-3155, para 143.}

## 3.4 Special Responsibility

_Hoffmann-La Roche_ also states that dominant undertakings are to compete solely on the merits of products or services, anything else is to be regarded as abusive.\footnote{Case 85/76 Hoffman La-Roche & Co. AG. v. Commission [1979] ECR 461, p. 91, Østerud (2010), p. 8.} Case law indicates that dominance is allowed to exist on the basis that undertakings in such a position have a _special responsibility_ not to behave in such a way that it distorts competition on the common market.\footnote{Case C-533/94 P Tetra Pak International S.A. v. Commission [1996] ECR I-5951, para. 24, 115.} Furthermore that such an undertaking must make sure that its conduct does not harm others that may be of competition to them or harm the competitive structure as such.

### 3.4.1 Grows With “Size”

It has also been stated through case law that the special responsibility grows with the degree of dominance.\footnote{ibid., p. 115.} How far a special responsibility stretches is determined in the light of the specific facts or “special circumstances” in each case.\footnote{Joined Cases C-395/96 P and C-396/96 P Compagnie Maritime Belge Transports S.A. and Others v. Commission [2000] ECR I-1365, p. 137, (super dominance) and Case C-333/94 P Tetra Pak International S.A. v. Commission [1996] ECR I-5951, para. 31, “quasi monopoly”. The use of such notions has also been questioned, see inter alia Jones & Sufrin (2011), p. 354, 366 et seq.} The holding of “super dominance” or “quasi-monopoly has been said to be such a special circumstance.\footnote{ibid.} Such argumentation can be seen in the case _Microsoft_, where the Court
of First Instance (Now the General Court) argued in favor of the opinion held by the Commission, that Microsoft had abused its dominance *inter alia* on the basis that the undertaking had forgotten that it, through its holding of a “quasi-monopoly”, had the a special responsibility not do distort or hinder effective competition in the common market. The equation would consequently be that the bigger the market share, the lesser room for playing the feel in a competitive way.

The Court has also indicated that a dominant undertaking with large market shares is more likely to be found infringing Article 102 TFEU, then a dominant undertaking holding a lesser degree of power on the market. Given the reason that an undertaking with a large market share might firstly, more easily be found not regarding its special responsibility, but also, secondly if not doing so, the effects might be greater then when done by a dominant undertaking with a lesser degree of power.136

4 THE INTERSECTION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND EU COMPETITION LAW

4.1 *EU Competition Law Enters the Stage*

4.1.1 The Existence and Exercise of an Intellectual Property Right

The first case where the Court of Justice touched upon the delicate matter of IPRs and EU rules on competition was *Consten and Grundig*.137 The case did not regard Article 102 TFEU but its cousin Article 101 TFEU – concerning anticompetitive bilateral behavior. However the Court’s statement regarded the rules of competition law in general – including Article 102 TFEU and it declared that the EU rules of competition law would not interfere with the grant of an IPR by a Member State, but nevertheless that it could limit the *exercise* of such a right in order to secure the functioning of those rules.138 IPRs have been said not to be immune to the Union rules on competition, *inter alia* as they encompass the notion of being excluding and exclusive.139 The Court of

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138 *ibid.*, para. 345 et seq.
Justice has many times stated that the *exercise* of an IPR must obey with EU competition rules where the two areas come into conflict.\textsuperscript{140}

Anderman & Schmidt state that the case of *Parker Davis v. Probel* marked three legal categories where EU competition law and IPRs interface.\textsuperscript{141} Firstly, Article 102 cannot target the *existence* of an IPR as that authority lies within the Member states. Secondly, regarding the permissibility of the *exercise* of an IPR, was defined as relying on the power granted by the IPR and the limits set up by Article 102 TFEU. Thirdly and lastly, the prohibited form of *exercise* of an IPR was defined by the prohibitions in Article 102 TFEU.

The Court of Justice has made a firm statement that there is a difference in the *existence* and the *exercise* of an IPR and how they are to be handled in relations to the Treaties.\textsuperscript{142} The Court has argued that the *existence* of an IPR does not fall within the competence of being reviewed by the Treaties, as it is governed by national laws.\textsuperscript{143} This distinction has been made on *inter alia* the grounds that the *existence* of an IPR falls within the specific subject matter of an IPR whilst the *exercise* is left outside.\textsuperscript{144}

### 4.1.2 The Specific Subject Matter of an Intellectual Property Right

The notion first appeared in the judgment of *Deutsche Grammophon*.\textsuperscript{145} The specific paragraph where it is discussed regards the relationship between the provisions regulating the free movement of goods and IPRs, but is still applicable as it handles the matter in general terms with relations to the Treaty (now TEU and TFEU) in its whole.\textsuperscript{146} In the case the Court states that:

> [A]lthough the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regards to industrial and commercial property, the *exercise* of such

\begin{itemize}
\item \textsuperscript{141} Anderman & Schmidt (2011), p. 20.
\item \textsuperscript{143} With the exception of those IPRs governed directly by EU legislation and the areas of nationally granted IPRs, which have been harmonized.
\item \textsuperscript{144} Faul & Nikplay (2007), p. 353. See Fine (2006), p. 7 for an interesting view on the matter, suggesting that they both fall within the subject matter.
\item \textsuperscript{145} Case 78/70 Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH. & Co. KG. [1971] ECR 487.
\item \textsuperscript{146} However, see Eklöf (2005), p. 340 et seq., stating that such analogy may be the reason to why the penumbra of the specific subject matter is somewhat unclear.
\end{itemize}
rights may nevertheless fall within the prohibitions laid down by the Treaty. […] Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights, which constitute the specific subject-matter of such property.\textsuperscript{147}

The Court never defined what the specific subject matter of such a property was or what the concept meant. The definition came in latter cases where the Court did not speak in general terms but in relations to each specific IPR. In the case of \textit{Sterling Drug} the Court took use of the notion and specified the specific subject matter of a patent.\textsuperscript{148} In the judgment the Court of Justice declares that:

In relations to patents, the \textit{specific subject-matter} of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licenses to thirds parties, as well as the right to oppose infringements.\textsuperscript{149}

The Court thus framed the subject matter of a patent. In my opinion it did so with a \textit{er} argumentation. This as the Court failed to properly argue in the light of the full extent of the objectives behind patents, but also in its way of arguing when defining such exploitation or exercise of such a right, which could be regarded as being the mere existence of an IPR and thus fall within the sphere of the specific subject-matter of that IPR.

Surely the Court referred to one of the said objectives of patents – to assure reward for effort, but that is not the only objective of a patent. As such the Court only conferred one dynamic of patents but failed to regard the total aspect of its nature.

In the case of \textit{Centrafarm}, the Court defines the subject matter of trademarks as:

The guarantee that the owner of the trade mark has the exclusive right to use that trade mark, for the purpose of putting products protected by the trade mark into circulation for the first time, and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark.\textsuperscript{150}

\textsuperscript{149} ibid., para. 9.
In relations to the specific subject matter of copyright the Court has stated in the verdict of *Warner Brothers* that the essential rights of copyright, being exclusivity in production and performance, are not called in question by the Treaty.\(^{151}\)

In all these cases the Court failed to regard an IPR’s feature of *inter alia* promoting innovation and invention and thus creating competition or enhancing or sustaining consumer welfare, and in the last recited case the Court even fails to regards the objectives at all.

Regarding the Court’s definition of what falls within the specific subject matter of an IPR on the basis of a division of *existence* and *exercise* many things can be said, but especially that it is a bit confusing.\(^{152}\)

For example, the judgment of *Consten and Grundig* only contains the wording that the *exercise* of national industrial property rights are not immune to community law, however the Court makes no attempt of defining what is to be regarded as the *exercise* of a such rights in relations to the specific subject matter of an IPR.\(^{153}\) Advocate General Roemer attempted to define the relationship between IPRs and Article 102 TFEU in terms whether or not an injunction would interfere with the function – or in other words: the specific subject matter of that IPR.\(^{154}\) In *Consten and Grundig* the question regarded a trademark and Roemer thought its function to be guaranteeing the origin of the products to the consumer. As noted, the Court of Justice did not accept this as it stated that the specific function – or specific subject matter, could not create immunity if the *exercise* of that right was contrary to the provisions of the Treaty.

In the case of *Parker Davis v. Probel*, this distinction was paraphrased and the Court restated that Article 102 TFEU could indeed limit the *exercise* of an IPR.\(^{155}\) The Court motivated this due to the fact that a patent is only an expression of a legal status granted by a Member State. Its *existence* cannot be targeted by Article 102 TFEU and neither can the *exercise* of such an IPR fall within Article 102 TFEU if there is no abuse of a dominant position.\(^{156}\) The Court thus affirmed that a normal use of an IPR could not be

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\(^{154}\) *ibid.*, para. 366.


\(^{156}\) *ibid.*, para. 72.
treated as an abuse of a dominant position. As long as the holder of the IPR did not exercise the right in a way that went beyond the principle subject matter of the right it could not be targeted as abusive just by its existence.

Furthermore, case law indicates that the Court of Justice has interpreted the term exercise in a broad meaning, which has given the effect that the Court has held an important discretionary power as when an exercise could fall outside the sphere of the specific subject matter of the IPR and within the scope of Article 102 TFEU.

4.1.3 The Scope of the Subject Matter in Relation to the Market

Hilti, a company producing nail guns, cartridges and nails, which it sold as a package, was accused of abusing a dominant position. The guns and the cartridges were both protected with patents, but the company held no exclusive right on the nails. The Commission did not regard the market where the package was being sold as being the relevant market. Instead it divided each of the products consisting of the package into three different markets. This division led to the situation that Hilti, due to the patent’s contribute of market power, held a dominant position on the market for cartridges. The behavior was caught by Article 102 TFEU since Hilti had tied-in its (patented) cartridges together with (non-patented) nails.

According to Anderman this was done as an attempt of levering the patent protection from going beyond its specific subject matter – in other word; going beyond the scope of the patent. Such argumentation is interesting, as IPRs do not come with a restraint of only “protecting” in one market. The specific subject matter contains no such limitations and an IPR is not limited to protect a creation in only one market.

4.1.4 A correct Definition and Handling of the Specific Subject Matter?

As others have criticized, is seems as the Court has defined the specific subject matter in such ways that it is always possible for it to get the result it wants. Such case-by-

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157 Vogelaar (2009), p. 119
160 ibid., para. 6 et seq.
case determining of the notion might be appropriate to prevent stagnation of law but it also deflates the opportunity of legal certainty. It also insinuates that the Court has had not interest in regarding the nature of IPRs.

The *exercise* referred to, seems to both cover such behavior as actual use of the IPR covered creation in production *etc.*, but also the exercising of the right in order to hinder (unauthorized) exploitation by others.\textsuperscript{163} This is a natural part of the exclusive right given to an IPR holder – the undertaking has been given the right to eliminate others from exploiting the covered creation. Thus the very nature of an IPR is to be legally excluding and give exclusive exploitation rights. If thus the exclusive exploitation right is within the very core of the *existence* of an IPR – then how can it *not* belong within the sphere of the specific subject matter of an IPR?

The Court argues in a way that the *exercise* of an IPR falls outside the scope of the specific subject matter (being the green circle), figure (1.) The argumentation above would give another figure (2.), with an expanded green circle also covering the *exercise* of an IPR. As such the *exercise* would be at the core of the “essential function” or specific subject matter of an IPR and shielded from EU competition law and the assessment of abuse under article 102 TFEU.

1.  
2.  

Fine has stated that theoretically, an intrusion of the specific subject matter is not an attack on the IPR itself but on the exercise of such exclusive rights connected with the specific subject matter of the IPR.\textsuperscript{164} In my opinion, it is exactly what the Court has done: incorrectly attacking IPRs from behind and with diffuse definitions so it can target dominant firms’ exploitation of such rights. However Fine also believes that the both the existence and the exercise of an IPR falls within the “specific subject matter”

\textsuperscript{163} Domeij (2007), p. 144, talks of ”patent usage” (exercise) when giving an example of the same as being *e.g.* denial of licensing, indicating that usage/exercise encompasses a variety of measures.

and that Case law indicate that that area can be intruded by *inter alia* EU competition law. Another dimension is found within the argumentation of Faull & Nikplay; the division of *existence* and *exercise* is due to the “specific subject matter” and behavior that goes beyond the “specific subject matter” of an IPR. In other words, they don not believe that the *existence* is subjected to EU competition law but that an *exercise* that goes beyond the “specific subject matter” is. Such an argumentation indicates that a “normal” exercise of an IPR falls within the “specific subject matter” of an IPR.

The Court of Justice has argued that *inter alia* taking stand against unauthorized use is part of the very core of an IPR but at the same time it has claimed that such an *exercise* is not covered by the specific subject matter of an IPR. That means that such behavior might be targeted by Article 102 TFEU and that such a firm falling within the scope of that article might be found abusing its position due to such an exercise of a right - a right, which has been granted to reassure exclusivity but which also often does not contain an automatic protection from third party use and thus must be actively protected by the holder. The existence of an IPR promotes and provokes the exercise. What is the point of being granted an exclusive right if the exercise of such a right, both covering actual use by the holder and hindering of unauthorized use of that right, emerges into penalization if you are in the “wrong” position on the market? The Courts confusing argumentation of what constitutes the specific subject matter has great effects on the findings whether an undertaking falls within the prohibition of Article 102 TFEU as it is present throughout the whole assessment under the Article when the situation regards an undertaking holding and/or exercising an IPR - it is present both in the assessment of defining the relevant market, finding dominance but also when the Court assesses abuse of such a position.

4.2 The Assessment Under Article 102 TFEU and Intellectual Property Rights

The previous section on abuse dealt with how the notion generally is defined, and assayed to give some understanding to the structure of the notion and its assessment. The following sections will focus on the notion in relations to IPRS; however primarily

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165 *ibid.*, p. 7.
167 Albeit that some are of the opinion that an IPR generates such effects only occasionally or not at all, see e.g. Tritton (2008), p. 991 et seq.
there is a need to address the relationship between the assessment under Article 102 TFEU and the defining of dominance in relations to the holding of an IPR.

4.3 Defining the Market

In order to assess abuse under Article 102 TFEU there is a need of determining the existence of a dominant position.

Firstly one must define the relevant market, this consists of determining the relevant product market and the relevant geographic market. The relevant product market consists of products or services, which can be regarded by the consumer as interchangeable or substitutable. In Michelin the court has stated that the evaluation, of which products are to be seen as relevant, is not limited to the objective characteristics of a product. One must also regard the structure of supply and demand and the competitiveness within the market. The relevant geographic market consists of the area where the undertaking is involved in supply or demand of products or services, where the conditions of competition are sufficient homogeneous. Korah has in a summarized way described the assessment of defining the market, by stating that it consists in actually defining what alternative sources of supply costumers can turn to in terms of products or services and geographically wise.

The way the relevant market is defined has great impact on the likelihood of finding dominance. A good example is the case of United Brands, where the Court stated that

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the relevant market was the product market for bananas and the geographical market within (now) six Member states of the Union.\textsuperscript{173} In the opinion of United Brands, the company would surely rather have seen that the relevant product market was fresh fruit (or even fruit in general) and that the relevant geographical market was only the Country of origin. This is due to the fact that a narrow definition of the product market creates lesser alternative of competing products – hence; lesser chances that the court will find interchangeable or substitutable products. With the geographical market a more narrow definition can be in favor of the undertaking. As article 102 TFEU only applies to cross-boarder situation, the ultimate position is said to be found to only have a geographical market within the own state.

4.3.1 Defining the Market by an Intellectual Property Right

The holding of an IPR is of interest when it comes to the defining of the relevant market, especially when it comes to the definition of the relevant product market. Nihaul recognizes this in an article when analyzing case law on the matter.\textsuperscript{174} In the cases of Magill, Volvo, Renault, IMS Health and Microsoft the Court narrowly defines the relevant product market, making the definition limited to the market of the protected product.\textsuperscript{175} Nihaul points out that the attitude of the Court regarding the market definition makes undertakings that innovate and hold a protection of their innovations, more apt to be found dominant.\textsuperscript{176}

Tritton implies that the existence of a legal monopoly; in other words - an IPR, is largely irrelevant to the determination of what the relevant market is for the purpose of assessing dominance or whether an undertaking has dominance in that market.\textsuperscript{177}

However, I believe that, case law shows that the Court has often defined the market as being the market of the protected item – logically such a finding also guarantees that there is no interchangeable or substitutable item within that market. Such a definition of

\textsuperscript{173} At two countries belonged to the Belgo-Luxembourg economic Union ("BLEU") and the other countries were Germany, Denmark, Ireland and the Netherlands.

\textsuperscript{174} Nihaul (2008), p. 496 \textit{et seqq}.


\textsuperscript{176} Nihaul (2008), p. 497.

\textsuperscript{177} Tritton (2008), p. 991.
the market indicates that the Court has not regarded the nature of an IPR and its objective of conferring exclusivity on its holder and the possibility of being alone within a market.

### 4.4 Dominance and Intellectual Property Rights

#### 4.4.1 Market Shares and Market Structure

After defining the relevant market, the next step is to consider if the undertaking has a dominant position on that market.

Large market shares have often been viewed as being an indication of dominance. This is in exampled to be found in the case **AKZO**, where the Court states that very large market shares evidence the existence of a dominant position.\(^{178}\) In the case the Court also sets a threshold of 50%, the holding of less market shares may indicate that there is no dominance. One thing should though be remembered, the ratio is calculated on the basis the market shares held by the company at stake and the market shares held by its competitors. In example, undertaking A, alleged of abusing its dominance, has a market share of 51%, the only sole competitor, B holds 49%; is A to be found dominant in relations to its competitor? Case law shows that even if an undertaking has a high market share, strong competition on the market might render the possibility of finding dominance.\(^{179}\) A high market share does not per se mean that there is not sufficient competition going on within the market. In **United Brands** the Court also states that high market shares might indicate dominance, but it is not the sole criterion - dominance might be found on other grounds.\(^{180}\)

Even the holding of a smaller market share then 50% can emerge into a dominant position; as such a position can derive from several factors.\(^{181}\) These factors may, even though harmless separately, in combination create a dominant position. A high entry

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\(^{179}\) Commission Decision of 4 June 2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.4513 - Arjowiggins/ M-real Zanders Reflex) (Not published), para. 363, Commission Decision of 5 September 2007 Notification of 02.07.2007 pursuant to Article of Council Regulation NO 139/2004, 5. 9. 2007 (Case COMP/M.4533 SCA – SCA/P&G European tissue business) (Not published), para 126, where the market shares did not reflect the undertaking’s real market power because of strong competition.

\(^{180}\) Case 27/76 United Brands Co. and United Brands Continentaal B.V. v. Commission [1978] ECR 207, para. 65 et seq. See also Commission Decision of 4 June 2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.4513 - Arjowiggins/ M-real Zanders Reflex), (Not published), para. 363, where the Commission recognized that theoretically a market where a firm has a market share of 50% might still be competitive.

barrier, which may be found in the exemplification above with undertakings A and B, is one such factor. Other factors accounted for are *inter alia* diversity of supply sources, production and transport organization, PR-exploitation and the nature of the product.

In relations to the gain of market shares and the holding of an IPR one thing can be noted. In the case of AstraZeneca the Court of First Instance (Now the General Court) found dominance solely due to the fact that the undertaking had a particular high market share and that that share was much higher than its competitors. Rose points out that it did not matter at all if AstraZeneca’s market power was a result of a successful innovation. This is interesting as dominance can be a legitimate effect of a competitive behavior and sometimes competitors cannot reach the same level of “excellence”. It is interesting that the Court did not regard this in its evaluation.

4.4.2 Intellectual Property Right as a Generator of Dominance by Existence?

In relations to the fruit of innovation and dominance we target the subject of IPR:s and dominance. Consequently this generates two questions; can the mere holding of an IPR create dominance, and if not, can the exercise of an exclusive right create dominance?

In the case of Michelin the Court states that the reason behind the dominance is not relevant. It should mean that if a dominant undertaking gained its position through an IPR - it should not matter. Whilst at the same time it is also not a secret that the giving of an exclusive right could put an undertaking in a dominant position.

If an undertaking receives *e.g.* a patent on a product throughout the Union, and no other company manages to produce such a product, the company would inevitably have a dominant position. As such the patented product would create a new market, and the market could actually only be defined as the market for that product as no other product

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185 Rose (2012), p. 185.


187 It is also very fascinating in relations to previous discussions under sections 2.5 and 4.3.1 on the relationship between IPRs and market shares and how the market has been defined.

188 Case 322/81 NV Nederlandsche Banden-Industrie-Michelin v. Commission [1983] ECR 3461, p. 57. (In the case, Michelin had argued that it was being penalized for succeeding on the market.)
could act as a substitute. Until someone else invented a product, which could substitute the patented product, the legal holder of the patent would have a legal “monopoly” on the relevant market within the Union. The thing is that such an effect is the objective of a patent, its reason of existents is *inter alia* to confer an exclusive and excluding right on an innovative product. At the same time, a giving of an exclusive right does not per automatic create a dominant position. There might *e.g.* already exist a market with many actors on it prior to the granting of an IPR. The same goes for a creation covered by copyright or protection of design. Inevitably the same for a trademark.

An interesting case on the subject is *Volvo.* The company held a right to a design of body panels for its own cars in the UK. Another company imported pirate made body panels from another Member State into UK. Volvo was not pleased with the importation and sued the company for infringing their IPR. The matter was put before the Court of Justice as case of preliminary ruling. The national Patent Court asked *inter alia* whether Volvo had a dominant position due to its exclusive and excluding right and whether the undertaking had abused such a position. When assessing this, the Court did not address the question if there was a dominant position; it just determined that some behaviors were to be seen as abusive. Since the assessment of abuse needs a preliminary investigation if there is a dominant position one can wonder why the Court skipped it. Either the Court thought that the exclusive right held by Volvo created such a position by its mere existence or maybe the Court did not feel it was necessary to stipulate if Volvo was dominant or not, the holding of an IPR was “bad” enough. Whichever of those two - or other reasons, they might have had for not assessing dominance; the Court did not regard existing case law on the matter. Such a handling of the matter is problematic, as the holding of an IPR does not presumably mean that one is dominant. Hence, not assessing dominance in a case solely due to the fact that the present undertaking has an IPR is not fully assessing the question under Article 102 TFEU. It also indicates that the Court did not have an interest of regarding the nature of IPRs and lastly it also indicates that the Court believed the holding of an IPR to be the same as having a dominant position. By not answering the question whether IPRs created a dominant position whilst also claiming there to be an abuse of such a position,

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189 See discussion under section 2.5 and 4.3.1
191 *ibid.*, para. 4.
192 *ibid.*, para. 7 et seq.
the Court actually indirectly answered the first question and even “criminated” the holding of an IPR.

4.4.3 Intellectual Property Right as a Generator of Dominance by Exercise?

Another interpretation of the *Volvo* case could indicate that the Court did not assess the notion of dominance as it found the mere exercise of a right to create a dominant position. This leads us in to question whether the exercise of an IPR can create dominance.

However, the Court of Justice has stated that an undertaking holding an IPR does not occupy a dominant position according to Article 102 TFEU merely by exercising this right.\(^\text{193}\) Case law on the matter also emphasizes this in the situation where the IPR holder and its competitors are somewhat comparable in economic strength and in position of competing with the IPR holder.\(^\text{194}\)

4.4.4 Or is the Intellectual Property Right Irrelevant to the Finding of Dominance?

It is thus possible to draw the conclusion that whilst assessing dominance, the existence of an IPR is irrelevant until other circumstances make it relevant. Naturally that would also proclaim that the mere holding or exercise of an IPR does not create a dominant position. This was also partly stated in the latter case of *Magill*.\(^\text{195}\)

In the case *Magill* three companies held copyright to information regarding television broadcasting, and they had refused to share the information. They were accused of having abused their dominance. In the verdict the Court firmly states that the holding for an IPR does not itself lead to a dominant position.\(^\text{196}\) Somewhat contradicting the Court follows by stating that the companies had a *de facto* monopoly on the information and thus were in a dominant position.\(^\text{197}\) Keeling covers the matter by saying that the Court’s “stubborn refusal to recognize that an intellectual property right can by


\(^\text{196}\) *ibid.*, para. 46.

\(^\text{197}\) *ibid.*, para. 47.
itself confer a dominant position […] was difficult to understand.” I too have a problem understating the argumentation of the Court, but it is not due to the same reasons. In my opinion the Court actually confirmed the opposite, namely that IPRs can confer dominance and that in this case it had done so. I cannot see any other reason as the verdict reads:

By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a de facto monopoly over the information […] The appellants are thus in a position to prevent effective competition on the market in weekly television magazines […] the appellants occupied a dominant position.

In my opinion it is far more concerning that the Court actually based the dominance on the existence and exercise of an exclusive right as it had started off by saying that IPRs in them selves do not encompass such forces.

The circumstances referred to were that the information could not bee obtained any other way then via the undertakings holding the copyright. In my opinion such a circumstance is heavily related to existence of an exclusive right, as it is exactly the nature of copyright to be exclusive, excluding and in need of authorization by the holder before use by someone else. As such, in my opinion, the Court’s argumentation rests on the existence (and exercise) of an IPR. Faull and Nikpay has pinpointed that the finding of dominance due to the existence of an IPR can generate somewhat problematic situations. I am of the same opinion. Think about the fact that strong efforts within creating, research and development can contribute to a strong position within a market and thus a dominant position. Then, if the assessment of dominance under Article 102 TFEU is done on the basis of stressing an establishment over competitor, it actually contains a tool for penalizing those undertakings succeeding on innovative thinking and high quality products. Should one really punish technological superiority and the meeting of consumer demand and choice? As Anderman & Schmidt point out; the actual possibilities of commercial exploitation depend both on the competition on the market, but also the demand for the protected creation, the undertaking itself has little input on the actual gain of market shares.

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However regarding the Commission’s and the Courts way of assessing dominance under Article 102 TFEU in relations to IPRs, the facts give that:

1. The *existence* (the holding) of an IPR does not, in itself, automatically confer a dominant position.
2. The *existence* (the holding) of an IPR can, under certain circumstances, confer a dominant position.
3. The *exercise* of an IPR does not, in itself, confer a dominant position, but can under certain circumstances amount to dominance.

Yet, case law also indicates that the existence and exercise of an IPR often decides the relevant market as being the market of the protected creation, thus one could claim that it *eo ipso facto* confers or at least can confer a dominant position within a market.\(^{202}\)

Gustafsson & Westin states that the existence of an IPR does not make a difference in relations to the finding of dominance; the point is whether the exercise of such right can amount to an abuse.\(^{203}\) Hence, the existence of an IPR is irrelevant when assessing dominance.

### 4.5 Intellectual Property Rights and Abuse

#### 4.5.1 Normal Exercise

*Hoffman-La Roche* states that the *exercise* of an IPR cannot be regarded as contrary to Article 102 TFEU on the sole basis that it is a dominant undertaking exercising that right, if the right has not been used to abuse that right.\(^{204}\) This is in line with the argumentation found in the earlier verdict of *Parker Davis v. Probel*, where the Court states that:

> For [Article 102] to apply it is thus necessary that three elements shall be present together: the existence of a dominant position, the abuse of this position and the possibility that trade between Member States may be affected thereby. Although a patent confers on its holder a

\(^{202}\) See reasoning under section 4.5.2. See also Anderman & Ezrachi (2011), p. 12.

\(^{203}\) Gustafsson & Westin, p. 196.

special protection at national level, it does not follow that the exercise of the rights thus conferred implies the presence together of all three elements in question.\textsuperscript{205}

The Court has thus advocated that neither the nature and nor the exercise of an IPR are, in themselves, anticompetitive according to Article 102 TFEU. If an IPR is exercised in a “normal” way it will not be caught by the prohibition in Article 102 TFEU.

This indicates a need of certain circumstances in order for the exercise to constitute an abuse. The Court of Justice has also confirmed this through various judgments.\textsuperscript{206} A good example is the case of Microsoft as it has the character of being summarizing when it comes to case law on the matter.\textsuperscript{207}

The company Microsoft develops, designs and markets a broad spectrum of software products for computer devices.\textsuperscript{208} The software products consists of, \textit{inter alia}, operating systems for personal computer, work group servers and media player. The company also provides technical assistance for its products.

The background of the dispute traces back to 1998, when Microsoft got a request by another company, Sun Microsystems (Sun) - supplying servers and server operating systems, wishing to be provided with information so its products could be compatible with the ones Microsoft offered. The information at requested was so interoperability information to \textit{inter alia} Microsoft’s product Windows – a client PC operating system, but also other supplier’s operating systems.\textsuperscript{209} The information at stake was to some parts covered by intellectual property rights.\textsuperscript{209} Microsoft stated that it had no plans on clearing the path and “porting” a special part of its system to Sun’s product, as there were already many ways for the products to interoperate. Yet, if the company still was in need of assistance, after reading MSDN, Microsoft would offer it support. Sun was not pleased with the answer and lodged a complaint with the Commission, against Microsoft. The lodged complain related to Microsoft’s refusal to supply Sun with the

\textsuperscript{207} Case T-201/04 Microsoft Corp v. Commission [2007] ECR II-3601
\textsuperscript{208} ibid., para. 1.
\textsuperscript{209} For a better understanding regarding the technical part, see The commission Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft corp. (Case Comp/C-3.37.792 – Microsoft) OJ L 32, 6. 2. 2007, p. 23, recital 30-71, 144 et seqq., 324- 332.
\textsuperscript{210} Commission Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft corp. (Case Comp/C-3.37.792 – Microsoft) OJ L 32 6. 2. 2007, p. 23, recital 190.
information and technology it had requested via mail. This latter accumulated into a Commission Decision in 2004 where the Commission found Microsoft to have infringed Article 82 EC (Now Article 102 TFEU) twice.\textsuperscript{211} This is also the contested decision in the case of Microsoft.

The Commission had found Microsoft to be dominant on two out of three worldwide product markets. The three products markets were:\textsuperscript{212}

1. client PC operating systems;
2. work group server operating systems;
3. streaming media players

Microsoft was found to be dominant within 1 and 2, whilst also carrying “extraordinary features” as the company did not only hold a dominant position, but additionally, also the “\textit{de facto} standard” for the systems on market 1.\textsuperscript{213} The commission found that Microsoft had abused its position when it refused to supply Sun with interoperability information and to authorize that information for the purpose of developing and distributing products which would compete with Microsoft’s own products on market 2.\textsuperscript{214} Such a refusal also caused a risk of elimination of competition within market 2 and has a negative effect on technical development and on consumer welfare.\textsuperscript{215}

The Court of First Instance (Now the General Court) largely upheld the Commission’s decision ruling that Microsoft had abused its dominant position. In the judgment, the Court states that a dominant undertaking, refusing to license a third party to use a product covered by an IPR, has not (generally) committed an abuse.\textsuperscript{216} As such a refusal cannot itself constitute an abuse in the meaning of article 102 TFEU. The Court emphasizes this by following with the statement that:

\textit{It is only} in exceptional circumstances that the exercise of the exclusive right by the owner of the [IPR] may give rise to such an abuse.\textsuperscript{217}

\textsuperscript{211} Commission Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft corp. (Case Comp/C-3.37.792 – Microsoft) OJ L 32, 6. 2. 2007, p. 23 recital 23.
\textsuperscript{212} \textit{Ibid.}, recitals; 324-342, 343-401, 402-425.
\textsuperscript{213} \textit{Ibid.}, recitals 429 – 541, 472.
\textsuperscript{214} \textit{Ibid.}, recitals 546 – 791.
\textsuperscript{215} \textit{Ibid.}, recitals 585 – 692, 693 – 708.
\textsuperscript{217} \textit{Ibid.}, para. 331.
The wording “only” and “may give” indicates a restrictive approach towards allowing the exercise of an IPR to fall within the category of abuse. The reasoning of this might be that the opinion of the Court is that the owner of a product covered by an IPR, should be able to exploit the right as he or she wished. The circumstances or underlying objectives behind the restricted approach is not expressed in the verdict and thus one can just guess to why it chose such an approach. Noticed can also be that here, the Court talks generally about the exercise of an exclusive right, and not specifically about refusal. Meaning that the statement has a broader sphere of application, then only applying when in connection to a refusal of *inter alia* licensing.

### 4.5.2 The Requirement of Exceptional Circumstances

In the case of Microsoft, the undertaking had exercised its exclusive right by refusing to license the IPR. As such the Court continued by exemplifying circumstances, which “in particular”, must be considered to be exceptional.\(^{218}\)

Three circumstances are demonstrated in the verdict as falling in the category of being exceptional:

- “In the first place, if the refusal relates to a product or service *indispensable* to the exercise of a particular activity on a neighboring market;
- in the second place, the refusal is of such kind as to *exclude any effective competition* on that neighboring market;
- in the third place, the refusal prevent the appearance of a *new product* for which there is potential consumer demand”\(^{219}\)

The list of such circumstances seems to be non-exhaustive as the Court simply exemplifies those circumstances that “in particular” must be seen as exceptional, leaving room for other circumstances to be added.\(^{220}\) As such, the list of circumstances does not give an exhaustive answer or limitation to when the exercise of an exclusive right by the owner, is to be regarded as abusive. Two other things can also be noted; firstly, the list only regards circumstances connected to a refusal and no other forms of circumstances. Secondly, that the list only mentions refusal in general and not specifically refusal to license.

\(^{218}\) *ibid.*, para. 332.


\(^{220}\) See, in comparison the Swedish version where the word “bland annat” is used.

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The list is also a compilation of circumstances, which have been regarded as exceptional in previous cases.\textsuperscript{221}

The by the Court that it is only in exceptional circumstances that an exercise can amount to an abuse indicates, as mentioned before, that the Court of Justice seems to have some reluctance towards linking the notion of abuse with the exploitation of an IPR. However when the Court assesses what can constitute an exceptional circumstance it does not take any notice to the subject matter of an IPR. The excluding and exclusive formation of an IPR can always created such “exceptional circumstances” as demonstrated in the case of Microsoft when a holder exploits such rights.

The arguing declares that Microsoft had not exercised its IPR in a “normal” way when it refused to license the protected creation to its competitor. One must though question; what is to be regarded as a “normal” use of an IPR if one of the corner stones of such a right – declining a grant of exploitation to third parties, can be regarded as abusive behavior? Case law has stipulated that such a refusal is, in itself not empowered of being abusive.

Interesting is also that the Commission has acknowledge in its (non-binding) discussion paper on the mater that “The very aim of the exclusive right is to prevent third parties from applying the IPR to products and distribute products without the consent of the holder of the right”.\textsuperscript{222}

IMS Health held the copyright to a database structure “the brick structure”, a system of tracking sales of pharmaceutical and health products.\textsuperscript{223} Its competitor NDC, was active doing the same activities and had been prohibited by court order to use “the brick structure” after IMS Health was found to have copyright on the system and had claimed its exclusive right to exploit the system.\textsuperscript{224} NDC complained to the Commission claiming that IMS’s refusal to grant it a license to use “the brick system” was an infringement of Article 82 EC (Now Article 102 TFEU).\textsuperscript{225} The Commission adopted a decision, which ordered IMS to grant a license for all the undertakings present on the relevant market. Such a measure was found by the Commission to be justified by the

\begin{flushleft}
\textsuperscript{222} DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses. 2005, para. 238.
\textsuperscript{223} Case C-418/01 IMS Health v. NDC, judgment of 29 april 2004, p.1.
\textsuperscript{224} ibid., p. 9 et seq.
\textsuperscript{225} ibid., p. 11.
\end{flushleft}
existence of “exceptional circumstance” – as the “brick structure” created by IMS had become a standard on the relevant market. As such a refusal of access to the structure, without any objective justifications, would likely to eliminate all competition on the relevant market - without access it would be impossible to compete.\textsuperscript{226} The Commission later withdrew the decision due to an Order of the President of the Court of First Instance (Now the General Court).\textsuperscript{227} The order by the President indicates that so was done due to the fact that NDC did not intend to create a “new product” but merely compete with IMS on the same market by the same product or services.\textsuperscript{228}

As such the main proceeding did not regard a contesting of that decision but a preliminary ruling, yet IMS still had the objective of prohibiting NDC from using “the brick system”.\textsuperscript{229} However the reasoning of the Court of Justice was supportive of the analysis the president had done in his Order.\textsuperscript{230}

The Court stated that a refusal by a dominant undertaking to allow access to a product protected by an IPR may be regarded abusive only if the undertaking requesting the license does not intend to limit itself essentially to duplicating the goods or services already offered by the owner of the IPR, if it intends to produce new goods or services not offered by the owner of the right and for which there might be a consumer demand.\textsuperscript{231} An IPR has the aim of preventing and protecting third parties from duplicating the protected creation; in so far the Court respects the very nature of IPRs. However, when it then goes on by stating that the emerging of a new product changes the situation it clearly loses this respect. The “exceptional circumstance” that the protected creation is needed for the purpose of developing a new product or service does not comply with the nature of IPRs. Surely rights can be exhausted due to \textit{inter alia} general public interest, such is commonly known. But is this such a situation? The situation did not regard a license of in example a medicine curing a generic decease; it regarded the allowance to use a specific system in order to supply sales data. IMS Health held the right to the system and thus the right to exclude others from

\begin{itemize}
\item \textsuperscript{226} ibid., p. 12.
\item \textsuperscript{228} Case T-184/01 R IMSHealth v Commission (2001) ECR II-3193, p. 106.
\item \textsuperscript{229} Case C-418/01 IMS Health v. NDC, judgment of 29 april 2004, p. 15 \textit{et seq}.
\item \textsuperscript{230} ibid., p. 9
\item \textsuperscript{231} ibid., para. 49
\end{itemize}
Unauthorized use regardless if a competitors wanted to use the protected creation to make a new product or service.

In the previously mentioned case of Magill, the defendants were found abusing their position when it refused Magill to obtain copyright protected information from them in order to make a new product. The Court of Justice followed the First Instance’s (Now the General Court) statement that the defendants, when using its exclusive right to reproduce the information, had gone beyond what was necessary to ensure the protection of the actual substance of its copyright. 232

The “exceptional circumstances” for such a finding was that the undertaking could not obtain the information through any other channel. 233 Clearly such a circumstance indicates that the Court has not grasped the mere core of the protection through copyright – it is meant to be exclusive and excluding and should thus only have one channel of source.

In Tetra Pak, the Court of First Instance (now the General Court) stated that the mere fact that an undertaking in a dominant position acquires an exclusive license of an IPR does not per se constitute an abuse according to Article 86 of the Treaty (Now Article 102 TFEU), but due to exceptional circumstances such a finding can be made. 234

Abuse of dominance was found due to the fact that the company had acquired an exclusive license and thus obtained advantages that their competitors did not possess. The finding was based on the verdict of Hoffmann-La Roche where the Court had stated that a strengthening of a dominant position encompassing a detriment of competition could constitute an abuse. 235 In the case of Tetra Pak the First Instance (Now the General Court) found this to be applicable as the acquiring of the license prevented or at least delayed the entrance of new competitors.

In the Case of Volvo the exceptional circumstances regarding inter alia the refusal to supply spare parts to independent repairers and a decision to no longer produce spare parts for a particular model still being in circulation (on the market) could constitute

abuse. In this case the Court argues in line with the principle that IPRs should no longer confer protection or rights when they are not used.

Giannino gives the facts of an Italian case in an article in the Journal of Intellectual Property Law & Practice. There, one can read how the Italian Competition Authority holds that a patentee who files an application for a prolonging of protection with intention to hinder the entry of generic forms abuses its dominant position according to Article 102 TFEU. Pfizer held the patent for an active ingredient used in a glaucoma medicine. The patent was supposed to expire in July 2011, however Pfizer obtained a one-year extension under the EC Regulation 1901/06 and the protection was to last until January 2012. Pfizer was found dominant on the market for the medicine of such medicines based on a component containing the active ingredients covered by the patent. Pfizer was said to misuse its position by strategically eliminating competitors by misusing the litigation and patent process system by continuously filing applications to prolong the patent protection. Supplementary protection certificate The Italian Competition authority drew parallels and conclusions from the case of AstraZeneca, which inter alia regarded anticompetitive behavior amounting to a delay of market entry of other, similar products.

However the arguing by the Court in AstraZeneca is not apt to apply generally to other cases of alleged abuse in relations to the exercise of an IPR. This is because of the distinct circumstances regarding the case, AstraZeneca’s behavior could not even fit in within the notion of exercising an IPR and thus nevertheless an evaluation if the exercise of that right was within the limits of the IPR’s specific subject matter, as AstraZenec de facto, did not de jure have an existing IPR to exercise (it had expired). Thus applying the same argumentation to those cases, where an undertaking has exercised an existing IPR (not expired), like in the Italian case, becomes somewhat strange. A matter of a fact is that the “exceptional circumstances” found in AstraZeneca were not present in the case of Pfizer, still the Italien Competition authority rested on the AstraZeneca case and found an abuse.

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238 ibid., p. 391. Article 5 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 the Treaty, OJ L 1, 4.1.2003, p. 1, provides that national competition authorities have the power to apply Article 102 TFEU.
4.6 **Objective Justification**

Article 102 TFEU does not explicitly declare that behavior can be justified. However, the Court of Justice has stated that a finding of abuse of dominance can be prevented through objective justification.240 But as Van der Vijver puts it, “the precise use and meaning of objective justifications are still unclear.”241

Public interest can serve as an objective justification. In the previously mentioned case *Hilti* the undertaking argued that its behavior was necessary in the light of public health and safety.242 However, in the Hilti’s case the Court rejected this claim, as such interests were already protected by *inter alia* regulations.

Through the case of *Hoffmann-La Roche* it became clear that efficiency could be accounted for if it prevailed the negative effect on consumers.243 Another way of arguing, which could be seen as qualifying as a claim of efficiency is Microsoft arguing in the previously mentioned case holding the same name.

In *Microsoft* the undertaking argued that its conduct was due to the fact that the information (which it had refused to share with a competitors) was covered by IPR(s) but also that the information was of valuable to the company.244 The Court did not find such an argumentation meeting the criteria of an objective justification.245 Instead it said that the fact that something is covered or protected by IPRs does not constitute an objective justification for refusal if all other conditions for abuse are fulfilled. In the case the Commission argued that the claimed value was not due to the fact that the information involved innovation but that it belonged to a dominant undertaking.246 Clearly both the Commission and the Court of First Instance (Now the General Court) did not regard the nature of IPRs as having the objective of *inter alia* economic compensation for innovation irrespective of the market power of the holder and that a refusal to license lies within the very core of such a right.

Microsoft also argued that the effect of finding its behavior abusive would render their incentives to innovate. The Court of First Instance (Now the General Court) did

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241 Van der Vijver (2012), p. 56.


245 *ibid.*, para. 960.

246 *ibid.*, para. 280.
not buy such reasoning. Maybe the Court thought that any other way of arguing would inevitable lead to negative consequences in the shape that dominant firms holding an IPR could always work the right and the objectives of such a right as a shield against Article 102 TFEU.\(^{247}\)

Another reason behind such an argumentation can be rooted within the finding of “super dominance”. The Commission has stated in its non-binding and post-Microsoft published guidance paper regarding Article 102 TFEU that super dominant firms might not be apt to have its behavior justified.\(^{248}\) Such a finding goes hand in hand with case law and its’ stating that the degree of responsibility grows with size of dominance.\(^{249}\) Conversely none of those reasoning regard the nature of IPRs.

### 4.7 “Calling It a Duck Does Not Make It a Duck”

The case Der Grüne Punkt regards the usage of a symbol covered by a trademark protection. DSD provided a service for a system of collecting and recycling of cartons. If one bought the service goods could bear a symbol showing that recycling was possible. The symbol was covered by a trademark right held by DSD.

DSD charged everyone using its trademark-covered symbol on a good, even if they were not using its system of recycling. The behavior was targeted as being abusive according to Article 102 TFEU by all instances.

In the verdict by the First Instance, DSD was obliged to stop its behavior, \textit{i.e.} charging for the use of the symbol, even if the service in itself was not used. DSD’s Trade Mark Agreement stated that its customers had to pay if they use the logo, albeit not using the system.\(^{250}\) It also compelled the customers using the system to use the logo. The Court of Justice found that the First Instance was right in finding DSD abusing its position.

DSD also tried to argue that the First instance had \textit{inter alia} made errors of law concerning the exclusive rights relate to the logo and that the fining was incompatible with trade mark law and that there was an infringement of the trademark.\(^{251}\) This as the


\(^{249}\) See discussion under section 3.4.1.


\(^{251}\) \textit{ibid.}, p. 98.
First Instance found it OK for packaging not processed under the DSD system liable to bear the trademark covered logo – depriving the logo of its mere reason of existence whilst also rendering the rights of exclusivity. DSD thus tried to claim its exclusive right of usage and rejecting of unauthorized usage – which can be seen as a “normal” exploitation of a trademark right.

The CJ stated that DSD could not validly rely on the exclusive right conferred by the right in relations to those it had entered into a Trademark Agreement with. It then quoted the Advocate General by saying that DSD itself had made the situation of authorized usage at it compelled all entering into an agreement of usage of its system to use the logo on all packaging, no matter if the system actually was used. The Court also stated that if DSD was not pleased with its situation, it could try to take measures through national law but that both the Commission and the First Instance had acted correct.

DSD was found to abuse its position when charging for the usage of its trademark logo in all cases of usage, even if the system itself was not used. The Court argued that the verdict did not oblige DSD to license the usage of the logo, DSD still had the freedom of choice in relations to whom it wished to enter into a Trademark Agreement with as the decision only obliged DSD not to claim money for services it had not provided.

Surely DSD’s freedom of choice was still there, and that it could try to claim its right through national law – however that is not the core of the problem, in my opinion the verdict targeted a normal exercise of an IPR as abusive. DSD wanted to make sure that their logo was used as it wished, and if it was used, they wanted to be remunerated for it, it also tried to secure its control over the usage of the logo and thus the shape of the Trade Mark Agreement. To me the Court found the behavior illicit by calling it something else and not regarding the nature of the holding of a trademark.

252 ibid., p. 129.
253 ibid., p. 143. et seq.
254 ibid., p. 145.
255 ibid., p. 146.
5 CONCLUSION
5.1 Not a Secondary Citizen

As follows, it is clear that the legal system of IPRs and the process of granting such exclusive rights require the establishment of a balance of interests. Incentives to innovate and create must exist in the form of an effective IPR protection whilst at the same time there is a necessity that such protection does not go beyond what is necessary and that it promotes its objectives. The need of IPR protection is weighed in relations to the interest of society in general and along those lines a balancing mechanism shapes and forms IPRs. The balance is established by careful consideration resting on several factors, such as *inter alia*; what is the definition of the subject matter of protection – *e.g.* what is a patent to protect and how far stretches the rights conferred by it? For how long shall or does such a right last? How is the right acquired and who is entitled to it? These questions are present at all times of the existence and exercise of an IPR and they carry its present and future in their hands.

It is also clear that the system of IPRs have a firm place within the legal system of the Union, in no way are they to be seen as “secondary citizens” as evidently the Union strives to preserve and protect such rights to a great extent.257

5.2 Intellectual Property Rights and Competition Law - A Mutual Goal

Some might say that competition law and IPR law lack coherence in aims, due to the fact that competition law strives to create or uphold competition in order to prevent a situation of monopoly, while IPRs can be seen as actually conferring a monopoly like situations onto its holder an thus “deteriorates” competition. Whilst such an argumentation might be right so far that IPR confer an exclusive and excluding right on its holder (that very well can be regarded as monopoly-like if someone wishes), it lacks the full picture of IPRs’ meaning of existence.258

Blankly stating that it is a fact that IPRs by their conferral of exclusive rights act as entry barriers and are anti-competitive, is in my opinion an incorrect way of describing the situation.259 This is due to the fact that such a statement does not regard the nature or

257 See discussion under section 2.3.
the reason of the existence of IPRs. I will explain why in a reversed order, starting with the second part of the statement. IPRs are not anti-competitive, as they ipso facto have a built in goal of actually creating and encouraging competition. The very mere existent of an exclusive right created by an IPR has, as stated earlier, the goal of promoting innovation, competition and economic prosperity and consumer wealth or wealth for society in general.

As for the first statement, the direct creation of entry barriers on a market is fictional as it is not an absolute effect of an IPR it is merely the definition of the relevant market that puts an IPR in such a position.\textsuperscript{260}

The Commission has also stated that it finds IPR law and competition law to share the same objectives, inter alia to enhance consumer welfare.\textsuperscript{261} Both policies are also promoted as means of enhancing competition and economic growth.\textsuperscript{262}

However, it is also true that one can find dissimilarities when it comes to methods used to pursue the same objective. One truly significant difference is the previous stated use of a monopoly like situation. Whilst IPR law allocates resources, in the sense that it confirms the creator as the sole user of a resource – hindering others from using it, to ensure an innovative and competitive market; competition law uses allocation of resources in order to prevent a monopoly like situation in order to preserve competition. It is also stated in the Commission’s report on competition policy 2011 that competition is a fundamental driver of innovation.\textsuperscript{263} Thus it must also be assured that dominant firms do not use their positions to hinder the entrance of smaller challengers wishing to enter the market.

Even though differences in methods, the two legal systems do not have a natural built in mechanism of not complying with each other.\textsuperscript{264} The problematic area of the intersection between EU Competition law and IPRs does not seem to be due to conflicting aims. Both EU Competition law and the system of IPRs have the aim of inter alia sustaining and promoting a competitive environment but also innovation, creativity and consumer welfare. There should thus not be a discrepancy built on a difference in objectives as they share the same objectives.

\textsuperscript{260} See discussion under section 2.5 and 4.3.1.


\textsuperscript{262} See discussion under sections 2.1 and 2.5, specifically in a EU contect2.3.2 and regarding the objectives of Article 102 TFEU, section 3.1.

\textsuperscript{263} European Commission, Report on Competition Policy 2011, p. 20.

\textsuperscript{264} A similar conclusion is also reached in Anderman & Ezrachi (2011), p. 61, in relations to the construction of an exclusive right, Muldin (2001), p. 542.
Evident is thus that the system of IPRs carries the objective of creating a competitive environment that fosters innovation and creation to ensure consumer wealth and economic prosperity in society and that the objective is present at all times when dealing with IPRs. For example, no IPR is granted with the intention of stagnating innovation or competition, however, those seeking protection might have the aim of doing so but that does not mean that IPRs in themselves are creatures of a bad nature.

5.3 The Penumbra of the Notion Abuse in Relations the Exercise of an Intellectual Property Right

This also indicates that it is the chosen method of application and opinion that creates the discrepancy between the two areas of law. This brings us the next question; when does the exercise of an IPR become an abuse under Article 102 TFEU?

For the exercise of an IPR to still fall within the notion of “competition on the merits” and not within the category of abuse it seems like case law has set up some criteria. The findings of this paper show that the exercise of an IPR is not abusive if it constitutes:

a. Behavior that is not categorized as abusive per se by its very nature
b. Behavior that fall within category a. and does not, will not or may not have the effect of distorting the structure of competition
c. Behavior that falls within category a. and c. and which does not strengthen the dominant undertaking’s position or weaken the position of competitor
d. Behavior that falls within a.- c. and which constitutes competing on the merits.
e. Behavior that falls within a.- d. and that does not exercise the IPR in a way that it goes beyond the specific subject matter of that IPR; i.e. normal exercise of an IPR.

As such the penumbra of what can constitute abuse of dominance in relations to the exercise of an IPR seems to have a floating shape, which can be targeted by legal principles like legal certainty but also the commonly used and also EU acknowledged principle of proportionality. For an interesting point of view on the matter of competition on the merits harboring uncertainty, see Hull (2012), p. 473-480

265 For an interesting point of view on the matter of competition on the merits harboring uncertainty, see Hull (2012), p. 473-480
1. The *existence* (the holding) of an IPR does not constitute an abuse.

2. The *exercise* of an IPR does not automatically constitute an abuse.\(^{266}\)

3. However, the *exercise* can fall within the scope of Article 102 TFEU due to *exceptional circumstances*, even if the practice still falls within the scope of the specific subject matter (if “extended” as in section 4.1.4).\(^{267}\)

The green circle is the limit of the exploitation right of an IPR – defined by the specific subject matter. Here illustrated in two green circles to show the limit of the specific subject matter as stated by the Court of Justice (The inner circle) and the proposed limit discussed under section 4.1.4.

If we say that the specific subject matter is limited to existence of an IPR (as the Court has done) then we will find that the *exercise* of an IPR can always be targeted by Article 102 TFEU. This gives the fact that the wider the definition of exercise is, the wider becomes the sphere of when an exploitation can fall within the scope of Article 102 TFEU. Hence; if one regards the exercise to be more narrow towards the circle of existence, the farther away will the scope of Article 102 TFEU be.

What is clear it that it is all about what is regarded being encompassed in the specific subject matter, both the existence and the exercise or just the existence? As I have argued under section 4.1.4 I am of the opinion that the specific subject matter encompasses both the existence and the exercise of an IPR.

Case law stipulates that “normal” exercise of an IPR is not targeted by the Article. However, there seems to be no correlation of the specific subject matter and what constitutes “normal” exercise if one regards the verdicts previously referred to. All the

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cases regards exploitation in the form of hindering third parties from (unauthorized) use of the IPR; a core right that comes with an IPR – i.e. something that could be seen as a “normal” use of an IPR and thus outside the target area of Article 102 TFEU.

At the same time such practice, as all the previous mentioned undertakings had engaged in, such a refusal to supply or license, has been seen, no matter the holding of an IPR or not, as abusive *per se*. Obviously one could thus question why its behavior should be treated different? In my opinion it is clear; in those case the behavior was an actual exploitation of the exclusiveness of an IPR and thus something that the undertaking was entitled to, regardless its status of being dominant.

Provocatively one could state that the exercise of an IPR by an undertaking holding a strong position of a market could become an abuse whenever the Commission, or other competitors, find the need of allocating resources in order to make sure that the company does not stay in such a position.268 Such application of Article 102 TFEU plays with the notion of what falls within the very existence of an IPR’s subject matter and suggests that the mere holding of in IPR if you are considered being an undertaking in a dominant position is “incriminating”. But as Vesterdorf has pointed out “competition law is not meant to be used to abolish the very subject-matter of the right(s) created”, which would be the effect of such argumentation.269

5.4 How About the Nature?

The nature of IPRs indicates that both the existence and exercise fall within the subject matter of IPRs, that their formation relies on the ground that one respect such a definition and that the area and width of the subject matter should be formatted by IPR law, and not by competition law.270

This is also clear when regarding the effects of finding the exercise of an IPR abusive. Presented case law demonstrates that a finding of abuse through the exercise of an IPR can emerge into several effects.

Firstly, the actual effect given by a verdict or a decision in the form of having to agree with others exploiting the protected creation through *inter alia* licensing or supply. Secondly, the effect of exhaustion - as the mere core of exclusivity is lost when the

270 See previous sections 2.4, 4.1.4 and 5.3.
previously mentioned statement obliges an IPR holder to allow third parties exploit the protected creation. Thirdly, if competition rules in example provide compulsory licenses of IPRs, compulsory supply or access as remedies, they can reduce the incentives of undertakings to innovate and thereby reduce the dynamic between competition law and IPRs.271

Case law shows that there is little notion taken to this dimension of an IPR. Instead focus lies on a pre-determined assumption that IPRs are equivalent to monopolies and the negative effects thereof on competition. The assessment under Article 102 TFEU seems to be infested with this deception. A granting of an IPR is based on the assumption that it will enhance e.g. competition and that society in total will benefit from such a granting and not as in the case of granting a monopoly.

The relevant market is often declared as being the market of the protected item; the market structure is then considered weak and diseased with entry barriers, if not even found to have the shape of a “de facto monopoly” – thus the given exclusive right fires back at the holder; placing a dominant undertaking holding and exercising an IPR, in a “damn you if you do, damn you if you don’t” situation. If the undertaking does not proceed to hold and/or exploit such a right it might face negative economical consequences but also find itself in a competitive disadvantage. Whilst on the other hand, if it holds and/or exploits such a right, it might find its behavior to fall under Article 102 TFEU.

When it comes to the finding of abuse in relations to the exercise of an IPR it is clear that in general - except for the case of Volvo - previously mentioned case law indicates that there is little notice, if any, paid to the nature of IPRs.272 The core of an IPR as being excluding, exclusive and remunerative; meaning that the control of usage of the protected item should lay within the hands of the holder and that the benefit of creating or innovating should fall on the creator or the holder seems to be forgotten.

The findings of this paper indicate that the intersection of competition law and IPRs under Article 102 TFEU only makes room for one driver; competition law.

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271 For similar reasoning see Eklöf (2005), p. 41, 355 et seq.
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