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INTELLECTUAL PROPERTY AND THE ABUSE OF A DOMINANT POSITION UNDER EUROPEAN UNION LAW: EXISTENCE, EXERCISE AND THE EVAPORATION OF RIGHTS

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I. INTRODUCTION

The interface between intellectual property rights and competition law has proven a fertile source of debate and litigation under the Treaty of Rome.¹ The mere fact that a legal or natural person (an "undertaking" within the parlance of Articles 85 and 86) is the holder of an intellectual property right does not make that undertaking dominant within the meaning of Article 86. Article 86 prohibits the abuse of a dominant position within the common market but only insofar as it affects trade between member states of the Union. The mere exercise of an intellectual property right does not necessarily exclude a third party from the market, though it may do so where the right is pivotal or critical to presence in the market in question.² The mere possession of intellectual property rights confers upon the holder a dominant position where that holder is able to impede effective competition on a relevant product market. Insofar as patents are concerned, it is possible

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY] arts. 85-86.

2. *Cf.* Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, 1971 E.C.R. 487; which states:

A manufacturer of sound recordings who holds a right related to copyright does not occupy a dominant position within the meaning of Article 86 of the Treaty merely by exercising his exclusive right to distribute the protected articles.

Since that article requires that the position to which it refers should extend to a "substantial part" of the common market this further requires that the manufacturer, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.

Id. at 501.

to contemplate a patent or collection of patents which contribute materially to the possession of dominance. Insofar as trademarks are concerned, the protection from infringement conferred by statute is rarely likely to amount to a serious obstacle to competition, save in circumstances of an unusually strong brand which could at least represent a contributory factor. Insofar as copyright is concerned, the European Commission and the European Court of Justice have, in a number of cases, concluded that the activities of, for instance, collecting societies may infringe Article 86.³

Moreover, even where dominance exists, the exercise of intellectual property rights may not always amount to an abuse, notwithstanding that the exercise may materially affect competition in the market. In this regard, there is a critical distinction to be drawn between what European law has termed the "existence" and the "exercise" of an intellectual property right. Traditionally, the Treaty of Rome does not prejudice rights which may be defined as going to the existence of that right. Conversely, the exercise of that right may give rise to interference by competition rules.

II. EXISTENCE AND EXERCISE: THE RIGHT TO REFUSE A LICENSE

The debate as to the difference between the existence and exercise of a right came to a head in *AB Volvo v. Erik Veng (UK) Ltd.*⁴ In that case, Volvo, the owners of registered designs in the United Kingdom for the front wings of Volvo series

3. See, e.g., Case 395/87, *Ministere Public v. Jean-Louis Tournier*, 1989 E.C.R. 2521; Joined Cases 110, 241 & 242/88, *François Lucazeau v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM)*, 1989 E.C.R. 2811, 4 C.M.L.R. 248 (1991); Case 127/73, *Belgische Radio en Televisie v. SV SABAM*, 1974 E.C.R. 51, 2 C.M.L.R. 238 (1974); Case 22/79, *Greenwich Film Prod. v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM)*, 1979 E.C.R. 3275, 1 C.M.L.R. 629 (1980); Case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission*, 1983 E.C.R. 483, 2 C.M.L.R. 645 (1983); Case 125/78, *Gesellschaft für Musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) v. Commission*, 1979 E.C.R. 3173, 2 C.M.L.R. 177 (1980); Case 402/85, *G. Basset v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM)*, 1987 E.C.R. 1747, 3 C.M.L.R. 173 (1987).

4. Case 238/87, 1988 E.C.R. 6211; see also Case 53/87, *Consortio italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie Nationale Des Usines Renault*, 1988 E.C.R. 6039, 4 C.M.L.R. 265 (1990); Case 144/81, *Keurkoop BV v. Nancy Kean Gifts BV*, 1982 E.C.R. 2853, 2 C.M.L.R. 47 (1983).

200 cars, instituted proceedings against Veng before the High Court of Justice for infringement of its sole and exclusive rights. In the course of that litigation, certain questions were referred by the English High Court to the European Court of Justice, including a question which asked whether the conferral of the sole and exclusive right to make and import replacement body panels by national law upon a substantial car manufacturer made that manufacturer a dominant undertaking within the meaning of Article 86 of the Treaty with respect to such replacement parts. Further, the question asked whether it was *prima facie* an abuse of such dominant position for the manufacturer to refuse to license others to supply such body panels, even when they were willing to pay a reasonable royalty for all articles sold under the license. The European Court of Justice concluded that it was not necessary to answer the first question—namely, whether the conferral of the exclusive rights to import and manufacture resulted in dominance. The Court did address the second question regarding abuse:

It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a license cannot in itself constitute an abuse of a dominant position.⁵

The Court continued, however, to limit the otherwise extraordinary breadth of the right to refuse a license:

It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many

5. Case 238/87, *Veng*, 1988 E.C.R. at 6235.

cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.⁶

The Court in this case made no attempt to go behind the national law and design rights which were not standardized and were not harmonized at the European level. The Court emphasized that it was for the national legislature to determine which products were to benefit from protection, even where they formed part of a unit which was already protected as such.⁷

It is thus clear that it may be an abuse for the dominant undertaking to overprice the sale of its spare parts, to refuse to supply them without objective justification, or to reduce or withdraw parts for secondhand or older models with a view to stimulating the market for new products.

A. The Remedy in Cases of Abuse

Of considerable importance is the fact that the Court did not, in those circumstances where it identified an abuse, stipulate the remedy for the abuse. On the one hand, the normal remedy is the imposition of a cease and desist order and/or the imposition of fines. For example, where the abuse consisted of the overpricing of spare parts, the Commission's decision requiring termination of the infringement could entail a reduction in the price of those spare parts. Alternatively, where the abuse consisted of the refusal to supply spare parts without objective justification, the remedy could be an obligation to supply to the customer concerned. Nothing in the judgment of the Court necessarily implied that the Commission could require, as the appropriate remedy, the right-holder to license a third party on a permanent basis.

B. Compulsory Licensing

The first chink in the right-holder's armor occurred in a series of cases concerning the right of the copyright owner in television listings to refuse to license that copyright to magazine producers seeking to rely upon the information in those television listings in order to provide weekly schedules of

6. *Id.*

7. *Id.*

television programs.⁸ In one of these cases, *RTE v. Commission*, the Court of First Instance stated:

However, while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the Treaty, which is to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86 In that case, the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of a rule of national intellectual property law in a manner contrary to those principles.

That analysis is borne out by the case-law of the Court of Justice which in . . . [*Veng v. Volvo*] on which the Commission relies . . . held that the exercise of an exclusive right which, in principle, corresponds to the substance of the relevant intellectual property right may nevertheless be prohibited by Article 86 if it involves, on the part of the undertaking holding a dominant position, certain abusive conduct. The questions referred to the Court in those . . . cases . . . turned on whether the conduct of two car manufacturers who reserved to themselves the exclusive right to manufacture and market spare parts for the vehicles which they produced, on the basis of their registered designs for those parts, was permissible. The Court cited, as examples of conduct constituting abuses within the meaning of Article 86, the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model were still in circulation

In the present case, it must be noted that the applicant, by reserving the exclusive right to produce its weekly televi-

8. Cf. Case T-69/89, *Radio Telefis Eireann (RTE) v. Commission*, 1991 E.C.R. II-485, 4 C.M.L.R. 586 (1991); Case T-70/89, *British Broadcasting Corp. (BBC) v. Commission*, 1991 E.C.R. II-535, 4 C.M.L.R. 669 (1991); Case T-76/89, *Independent Television Publications Ltd. (ITP) v. Commission*, 4 C.M.L.R. 745, 1991 CEC (CCH) 174.

sion programme listings, was preventing the emergence on the market of a new product, namely a general television magazine likely to compete with its own magazine The applicant was thus using its copyright in the programme listings which it produced as part of its broadcasting activity in order to secure a monopoly in the derivative market of weekly television guides. It appears significant, in that connection, the applicant also authorized, free of charge, the publication of its daily listings and of highlights of its weekly programmes in the press in both Ireland and United Kingdom. Moreover, it authorized the publication of its weekly listings in other Member States, without charging royalties.

Conduct of that type—characterized by preventing the production and marketing of a new product for which there is potential consumer demand on the ancillary market for television magazines, and thereby excluding all competition from that market solely in order to secure the applicant's monopoly—clearly goes beyond what is necessary to fulfill the essential function of the copyright as permitted in Community law. The applicant's refusal to authorize third parties to publish its weekly listings was, in this case, arbitrary [insofar] as it was not justified either by the specific needs of the broadcasting sector, with which the present case is not concerned, or by those peculiar to the activity of publishing television magazines. It was thus possible for the applicant to adapt to the conditions of a television magazine market which was open to competition in order to ensure the commercial viability of its weekly publication The applicant's conduct cannot, therefore, be covered in Community law by the protection conferred by its copyright in the programme listings.⁹

The Commission decision (which was under appeal), in order to bring the abuse to an end, required the copyright owners to permit third parties to publish its weekly program listings. In effect, the Commission required the right owner to grant compulsory licenses of the protected work to third parties. In the appeal before the Court of First Instance, it was alleged by all of the broadcasting companies concerned that the Commission had no power to order compulsory licenses since this deprived the holder of an intellectual property right of the very substance of that right. The Court rejected the appellant's claims. It stated that the infringement justified the measure

9. Case T-69/89, *RTE*, 1991 E.C.R. at II-519-21.

imposed by the Commission. The Court ruled:

[t]he requirement that the applicant supply . . . third parties on request and on a non-discriminatory basis with its weekly listings with a view to their publication is, in the light of the specific circumstances of the case as found by the Court when considering the constituent elements of the infringement, the only means of bringing that infringement to an end, as the Commission established in the contested decision. By ordering the applicant to permit third parties, on request and on a non-discriminatory basis, to publish its weekly listings, the Commission did not deprive it of its choice between the various measures which could bring the infringement to an end. It must, moreover, be emphasized that the counterpart to the requirement that the applicant allow third parties to publish its listings, subject possibly to the payment of reasonable royalties, is the applicant's right, which Article 2 of the decision quite properly recognizes, to include in any licenses granted such terms as are necessary to ensure "comprehensive high-quality coverage of all [its] programmes, including those of minority and/or regional appeal, and those of cultural, historical and educational significance."¹⁰

The effect of the ruling of the Court of First Instance was to denude the intellectual property right holder of the right to refuse to grant a license in circumstances where the Commission concluded that the only way to remedy the abuse was the grant of a license. It is to be noted that in paragraph 72 of the ruling, the Court spoke in terms of prohibiting the exercise of the intellectual property right. If a right may not be exercised, it may not (at least to some degree) be enforced. To this extent, the rulings in the television listings cases go some way to answering the question left unresolved by the ruling of the European Court of Justice in *Veng v. Volvo*. The ruling of the Court of First Instance is currently under appeal before the Court of Justice, which will accordingly have the opportunity to reconsider the issue.

10. *Id.* at II-529.

C. Unavoidable Abuse and the Evaporation of Rights: Veng Extended

Subsequently, the Court of Justice has addressed the question of the misuse of statutorily conferred monopoly powers, in the context of the compatibility of commercial monopolies with the competition rules. In *Höfner v. Macrotron GmbH*,¹¹ the Court was confronted with the questions referred to it by the Higher Regional Court, Munich, concerning the interpretation of *inter alia* Articles 86 and 90 of the Treaty. The questions were raised in proceedings between certain recruitment consultants against Macrotron GmbH (MG), a company governed by German law and established in Munich. The dispute concerned fees claimed from MG by the recruitment consultants pursuant to a contract under which the latter were to assist in the recruitment of a sales director on behalf of MG. In Germany, employment is governed by the Law on the Promotion of Employment (the AFG). Measures adopted under the AFG are intended to achieve and maintain a high level of employment, constantly to improve job distribution and thereby to promote economic growth in Germany. The attainment of these general aims and objectives is entrusted to the Federal Office for Employment (the Federal Office) whose activity consists essentially of uniting prospective employees with prospective employers and in administering unemployment benefits. The exclusive right of employment procurement is expressly conferred upon the Federal Office by the AFG. However, the AFG also provides for the possibility of a derogation from the exclusive right of employment procurement pursuant to which the Federal Office may, in exceptional circumstances and after consulting the workers and employers associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations subject always to the supervision of the Federal Office. Notwithstanding this, the exclusive monopoly over recruitment and employment services has developed in Germany for business executives.

Over a period of many years, the Federal Office has been tolerant of this peripheral market which has developed in breach of its exclusive monopoly. The dispute in the proceedings concerned the compatibility of the recruitment contract

11. Case C-41/90, 1991 E.C.R. I-1979, 4 C.M.L.R. 306 (1993).

concluded between the recruitment executives and MG. Pursuant to the contract, MG refused to pay the fees stipulated in the contract for the provision of the services in question. The recruitment executives commenced proceedings in order to obtain payment of the fees. At first instance, the German courts considered that the contract was void since it was in breach of the exclusive monopoly of the Federal Office. The recruitment executives, however, contended that the exclusive monopoly was itself an infringement of Article 86 of the Treaty of Rome. In these circumstances, the reference to the Court of Justice was made.

Previously the Court of Justice of the European Commission contended that it would be an abuse if a public undertaking entrusted with a monopoly failed to satisfy the demand for the services covered by the monopoly. The Commission noted that the Federal Office had for many years been unable to satisfy the demand for its services as evidenced by the fact that it provided candidates for only twenty-eight percent of vacancies and, by its own conduct, in effect renouncing its monopoly in the field of executive recruitment. The Commission emphasized that the net effect of the German legislation was to limit production, markets or technical development within the meaning of Article 86(b) of the Treaty. Of importance to this paper is the fact that the Commission sought confirmation of its views in the ruling of the Court of Justice in *Veng v. Volvo*. Advocate General Jacobs considered that this approach deserved support:

There is much to commend the Commission's view. Admittedly, it may seem harsh to describe the Bundesanstalt's [Federal Office's] conduct as abusive. There is nothing in the file to suggest that it has not endeavored to the best of its ability to satisfy the demand for assistance in the recruitment of executives. Moreover, it has voluntarily relaxed its monopoly by expressing its willingness to tolerate competition from private operators None the less, the combined effect of the German legislation and the Bundesanstalt's failure to satisfy demand is that the consumer (i.e. the employer in search of executives or the executive in search of employment) is not receiving the sort of service which he is entitled to expect and which he almost certainly would receive if the sector in question were subject to the system of free competition envisaged by the Treaty. As a result the employer or executive who

wishes to use the services of a recruitment agent is likely to find himself in the same situation as the Volvo owner who cannot obtain a new body panel for his car because the proprietor of the registered design for such parts does not manufacture them and refuses to allow anyone else to do so.

Although the connection between the present case and the *Volvo* and *Renault* cases seems remote at first sight, it might be possible to regard *Volvo* and *Renault* as illustrating a general principle to the effect that, where national law confers an exclusive right on someone—whether in the form of a patent, a registered design or a monopoly in the provision of certain services—and he fails to produce the goods or services covered by the exclusive right, that failure may amount to abuse of a dominant position, in which case the prohibition laid down in Article 86 will apply in so far as the abuse is capable of affecting trade between Member States. The effect of that prohibition is that the exclusive right can no longer be enforced.¹²

The Court of Justice did not expressly apply the *Veng v. Volvo* analogy in giving its judgment. However, it did adopt the concept of unavoidable abuse advanced by the Advocate General and the effect of its judgment was to denude the Federal Office of its monopoly by virtue of Article 86. The Court stated that any measure adopted by a member state which maintained in force the statutory provision creating a situation in which a public employment agency could not avoid infringing Article 86 was compatible with the rules of the Treaty. The Court stressed that a member state was in breach of the prohibition contained in Article 86 and Article 90(1) if the undertaking in question, merely by exercising the exclusive right granted to it, could not avoid abusing its dominant position contrary to Article 86(b) by limiting the provision of a service to the prejudice of those seeking to avail themselves of it. The Court concluded:

A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is

12. *Id.* at I-2005-06 (emphasis added).

rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.¹³

The relevance of the *Höfner* case is that, upon extension of a perceived rule developed in relation to intellectual property cases, a statutory monopoly evaporated as a result of the application of Article 86. It is, perhaps, easy to see how the intellectual property cases may be extended to cases of commercial monopoly. The critical question is whether the reverse applies and principles established in the context of commercial monopolies may also apply to intellectual property rights. It will be recalled that Advocate General Jacobs referred to a "general principle" to the effect that where national law confers an exclusive right upon a party, and that person fails to produce goods or services covered by the exclusive right, the failure amounts to an abuse of a dominant position in which case the prohibition laid down in Article 86 would apply. The net result is "that the exclusive right can no longer be enforced."¹⁴

It would appear that, at least, Advocate General Jacobs concluded that the abuse of a dominant position by an intellectual property right holder could lead to the effective loss—the "evaporation"—of the right to enforce the intellectual property right in question. Certainly this was the effect of the *Höfner* case where the Federal Office lost its monopoly.

It was further the case in *ERT v. DEP*.¹⁵ In that case, the Court of Justice was asked to rule upon, *inter alia*, the application of Articles 86 and 90 to the structure of the Greek radio and television undertaking to which the Greek state had granted exclusive rights. The Court made clear that whilst European law did not preclude the conferring of a monopoly, the manner of its organization and exercise could nonetheless be in breach of the competition rules. The Court ruled that Article 90(1) prohibits the grant of an exclusive right to re-transmit television broadcasts to an undertaking where those rights are liable to create a situation in which that undertak-

13. *Id.* at I-2018.

14. *Id.* at I-2006.

15. Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis*, 1991 E.C.R. I-2925.

ing is alleged to infringe Article 86.¹⁶ Accordingly, a statutory monopoly may infringe Article 86 where its exercise inevitably leads to abuse or where its exercise is liable to lead to abuse.

The end result of these cases is that the abuse of a dominant position by an intellectual property right holder could lead to the evaporation of that right altogether. This is a remarkable proposition that warrants further consideration.

III. THE EVAPORATION OF RIGHTS: MEANING

There would appear to be three broad alternatives. First, that the abuse of the right leads to the total and permanent evaporation of the right to enforce the exclusive right. Second, that the abuse leads to the temporary evaporation of the right to enforce but that the right returns upon cessation of the abuse (the condensation of rights?). Third, that abuse does not result in *any* loss of the right to enforce, but *does* involve an obligation upon the right holder to grant compulsory licenses.

With regard to the first of the options, namely the total evaporation of the right, it is this author's view that the Court of Justice would stop short of applying its case law on commercial monopolies to intellectual property rights. The grant of a commercial monopoly right is not a quid pro quo for a creative endeavor. It is a right conferred in accordance with the political-economic judgment of a particular government at any one time. The grant of a commercial monopoly may not be said to be a property right in the same way as a patent or copyright may be so defined. Accordingly, it may be that Article 222 of the Treaty of Rome (which provides that the Treaty shall not prejudice national systems of property ownership) would apply to preserve intellectual property rights but not commercial monopolies. Further, there is a general principle of European law that property may not be expropriated without compensation. If a single abuse (regardless of the severity or duration) results in the total loss of a property right, it would appear to infringe the general principle of respect for property as embodied in the European Convention on Human Rights. That Convention

16. *Id.* at I-2962-63; see also Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, 1994 CEC (CCH) 196, 215; Case 18/88, *Régie des Télégraphes et des Téléphones (RTT) v. GB-Inno-BM SA*, 1994 CEC (CCH) 117 (1991).

forms a *locus classicus* for the general principles of European law which apply in the context of competition law.¹⁷ Further, to deny a right holder the right to enforce its exclusive right would deny it the financial reward for its creative effort which the Court of Justice has, on many occasions, held goes to the existence of the intellectual property right, and, as such, may not be encroached upon by competition rules.¹⁸

If the abuse of a dominant position on the part of an intellectual property right holder does not result in the permanent evaporation of that right, but merely the temporary loss of that right whilst the abuse is pending, then this, while a less draconian result, is still not without its difficulties. First, it is liable to give rise to legal uncertainty as to the right to enforce during the currency of an alleged abuse. In this regard, what is to be understood by the notion of "liability" to abuse is far from clear. Simply because a plaintiff issues proceedings for alleged abuse does not mean to say that the right holder is thereby debarred from the right to exercise its intellectual property right.

Difficult questions will arise in injunctive proceedings where the plaintiff seeks to persuade a court that it should be entitled to use the right holder's intellectual property right pending trial on the ground that the right holder is abusing its dominant position. Many courts, particularly in the United Kingdom, would be most likely to take the view that the plaintiff's primary remedy lay in damages if it were excluded from the market prior to trial but, at trial, it successfully established an infringement by the defendant. A second area of difficulty lies in determining the point in time when the alleged infringer ceases to infringe and thereby regains the right to enforce its intellectual property rights. What is the position of a third party who has relied upon the abuse as permitting it

17. For an example of an unusual case in which the concept of non-expropriation of property without compensation and respect of a property was applied by the Court of Justice, see Case 5/88, Wachauf v. Federal Republic of Germany, 1989 E.C.R. 2609, 2629-30, 2639-40.

18. See, e.g., Case 62/79, SA Compagnie Generale pour la Diffusion de la Television v. SA Ciné Vog Films, 1980 E.C.R. 881; Case 262/81, Coditel SA v. Ciné Vog Films SA, 1982 E.C.R. 3381: "In the same judgment the Court further held that the right of the owner of the copyright in a film and his assigns to require fees for any showing of that film is part of the essential function of copyright." See also Case T-69/89, Radio Telefís Éireann (RTE) v. Commission, 1991 E.C.R. II-485, II-519, 4 C.M.L.R. 586 (1991).

to use the right owner's property right and has developed a business upon the basis of that right? A temporary right to use an intellectual property right may, in practice, amount to no effective right to use it at all; no sensible third party will build a business upon an intellectual property right where the continued existence of the business is dependent upon another party's continued abuse of a dominant position.

The third option, namely that the abuse does not result in the evaporation of the right, but only in third parties having the right to a compulsory license, is by far the most satisfactory of all the possible outcomes. This solution permits a compromise between the right of the intellectual property right holder to retain title to and enforce its property right and the right of the third party to not be subject to an abuse arising out of that intellectual property right. Further, a compulsory license upon reasonable terms also constitutes a compromise in that the right holder, although not entitled to refuse a license, is nonetheless compensated financially for profits foregone. Furthermore, as the Court of First Instance stressed in *RTE*, the intellectual property right holder has a residual right to ensure the maintenance of quality on the part of the licensee.

IV. CONCLUSION

In conclusion, European competition law, insofar as it concerns intellectual property rights, is at a crossroads. A number of broad propositions may be postulated. First, *prima facie*, an intellectual property right holder may stand firm upon his right and refuse to license a third party notwithstanding that this refusal will exclude third parties from a market and reinforce a monopoly position on the part of the right holder. Second, certain activities associated with the exercise of an intellectual property right (in particular, underuse or overpricing of products manufactured from use of the intellectual property right) may result in an infringement of Article 86 of the Treaty of Rome. Third, where abuse is established, the Commission has the power pursuant to Article 3 of regulation 17/62/EC to impose a compulsory licensing regime upon the right holder subject always to the right of that right holder to collect reasonable royalties and impose reasonable conditions as to the maintenance of quality by the licensee.

Fourth, recent Court of Justice rulings in relation to commercial monopolies suggest that abuse on the part of the commercial monopoly holder may lead to the total and permanent loss of that monopoly. Fifth, certain dicta on the part of Advocate General Jacobs suggest that the commercial monopoly cases are a logical extension of the intellectual property cases. Finally, while it may be logical to extend the intellectual property cases to the commercial monopoly cases, it is by no means certain that the converse applies, namely that abuse of a dominant position by an intellectual property right holder results in permanent loss of the right to enforce the intellectual property right in question.

Ultimately, the Court of Justice will need to reconcile these conflicting strands. In the meantime, business and owners of intellectual property rights in general can only hope that European competition law does not operate as a veritable "Sword of Damocles" which falls and severs the intellectual property right upon a single incidence of competition law infringement.

