

**THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW:
COMPETITION LAW AS A HARMONIZATION TOOL TO TAKE OFF THE SHARP EDGES OF
INTELLECTUAL PROPERTY LAW**

By

LEANIE MOUTON

Submitted in partial fulfilment of the requirements for the degree

Magister Legum

IN THE FACULTY OF LAW

AT THE

UNIVERSITY OF PRETORIA

SUPERVISOR : Prof C van Heerden

19 February 2013

THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: COMPETITION LAW AS A HARMONIZATION TOOL TO TAKE OFF THE SHARP EDGES OF INTELLECTUAL PROPERTY LAW

Table of Contents

CHAPTER 1: INTRODUCTION AND OVERVIEW OF COMPETITION AND INTELLECTUAL PROPERTY LAW	4
1.1 Introduction	4
1.2 Competition law	7
1.2.1 Introduction	7
1.2.2 Objectives of the Competition Act	8
1.2.3 Scope of application	9
1.2.4 Conduct regulated by the Competition Act	10
1.2.5 Abuse of dominance	10
1.2.6 The Competition Act and intellectual property rights	12
1.2.7 The Agreement on Trade-Related aspects of Intellectual Property Rights	13
1.2.8 Developments in the EU	14
1.3 Intellectual Property law	15
1.3.1 Introduction	15
1.3.2 The Patents Act	16
1.3.3 The Copyright Act	16
1.3.4 Intellectual property provisions contained in the Patents Act relative to the abusive exercise of intellectual property rights	17
1.3.5 Inherent controls in the relevant intellectual property laws	18
CHAPTER 2: EXAMINING LEGAL PRINCIPLES DRAWN FROM EU JURISPRUDENCE: HOW THEY COULD FIND APPLICATION IN SOUTH AFRICAN JURISPRUDENCE	20
2.1 Abuse of a dominant position (the refusal to deal) in the South African context	20
2.2 Application of foreign case law	21
2.3 The Essential facility doctrine	23
2.4 Examples of European case law concerning the refusal to deal	25
2.4.1 Refusal to supply	25
2.4.1.1. <i>Commercial Solvents</i>	26
2.4.1.2. <i>United Brands</i>	26
2.4.2 Refusal to license – the emergence and development of the ‘exceptional circumstances test’	27
2.4.2.1 <i>Volvo</i>	27

2.4.2.2 <i>Magill</i>	28
2.4.2.3 <i>Ladbroke</i>	30
2.4.2.4 <i>Oscar Bronner</i>	32
2.4.2.5 <i>IMS Health</i>	33
2.4.2.6 <i>Microsoft</i>	37
2.5 Examples of South African competition law cases which dealt with abuse of a dominant position by an intellectual property rights holder.....	39
2.5.1 <i>DW Integrators</i>	39
2.5.2 <i>Glaxo Wellcome</i>	41
2.5.3 <i>Hazel Tau</i>	44
CHAPTER 3: ANALYSIS AND CONCLUSION	46

LEANIE MOUTON

26018022

**MASTERS IN PRIVATE LAW: INTELLECTUAL PROPERTY LAW
MINI-DISSERTATION**

**THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION
LAW: COMPETITION LAW AS A HARMONIZATION TOOL TO TAKE OFF THE SHARP
EDGES OF INTELLECTUAL PROPERTY LAW**

This mini-dissertation is an assessment of whether or not and, in which circumstances, the competition authorities could intervene when the holder of an intellectual property right refuses to deal with a competitor (i.e. refusal to license the use of intellectual property right or refusal to supply a competitor). The writer will draw from European case law relating to abusive conduct by market-dominant intellectual property right holders to contextualise section 8 of the South African Competition Act, which regulates such conduct.

CHAPTER 1: INTRODUCTION AND OVERVIEW OF COMPETITION AND INTELLECTUAL PROPERTY LAW

1.1 Introduction

“There is perceived tension between the exercise of intellectual property rights and competition law and this stems from the fact that intellectual property provides a person with exclusive rights to his or her property and it is what one does with this exclusivity that comes into consideration under the Competition Act¹,”² as stated by Mr Alexis Apostolidis, Head of the Competition Law Practice Group at the law firm, Adams & Adams. The concept underlying this statement is one which receives a lot of attention from writers on this topic and it is sparking much debate between scholars and practitioners of intellectual property law and those of competition law.

At first sight, competition and intellectual property law seem to have conflicting aims: intellectual property rights create monopolies, whilst competition law combats monopolies. The basic function of intellectual property law is providing the exclusive right to an innovator, also referred to as the intellectual property right(s) holder, within a specific market, to exploit³ his or her innovation and to exclude others from using the subject matter of the right.⁴ According to the specific circumstances, such innovation can be protected by copyright and by registering designs, trade marks, patents and plant breeder rights. There are also other ways of protecting intellectual property, such as, for example relying on the common law principles of delict and lodging complaints with the Advertising Standards Authority of South Africa. Competition policy, on the other hand, aims to prevent the exercise of monopoly power where this leads to the exclusion of competitors.⁵ Competition regulation is, therefore, capable of eliminating the abusive exploitation of intellectual property rights; that is, exploitation beyond the *raison d'être* of these rights.⁶

However, intellectual property rights and competition regulation are also interrelated in many ways. When one takes a closer look at the objectives of both regimes, their ultimate

¹ Competition Act 89 of 1998 (hereinafter the “Competition Act”).

² Apostolidis A (2011).

³ Exploit in this context means that the specific intellectual property may be employment of its subject matter, licensing, hypothecation, assignment or transfer.

⁴ Korah V (2005) 430.

⁵ Pham A (2008).

⁶ *Ibid.*

objectives, essentially, are the same. Intellectual property law has, as its objective, to promote innovation and, thereby, enhance consumer welfare. The regime caters to consumer welfare by promoting the development of new products and technologies, which, in turn, add to the line of product and services already available to consumers.⁷

Exclusivity is granted to intellectual property right holders, firstly, to prevent the unfair exploitation of their innovation and, secondly, to provide an incentive (in the form of the fruits of the exploitation of the rights) to engage in further innovation.⁸ Competition law aims to correct market failures. It does so by eliminating certain restrictive practices, such as abuses of dominant positions, which would, otherwise, lead to higher prices or reduced choices for consumers, which negatively impacts on consumer welfare.⁹ Competition law opens up markets by combatting business' monopolies, which, again, operate to the detriment of consumers. The relevant legal regime supports innovation and fair competition which encourage competitors to provide the best quality products at the lowest economic prices.

It is clear, therefore, that, if the intellectual property and competition law legal regimes are properly structured and applied, they would complement each other, as opposed to the apparent contradiction between them. A sound balance should be struck between innovation and regulation, thereby maximising consumer welfare.¹⁰ The balancing act, however, is complex and warrants specialised care, particularly in relation to a respect for the function of both regimes, because tipping the scale to either side will create real-world economic imbalances.

Imbalances are created by the boundaries created by intellectual property law where they lead to significant power in the market, something prone to happen where there are no demand side or supply side substitutes.¹¹ Intellectual property rights may, in this way, create barriers to entry into the relevant market.¹² Thus, the harmony existing between intellectual property law and competition law is disrupted when the conduct of a holder of an intellectual property right extends beyond that which is compatible with the purpose for the protection of these rights.

⁷ Brandenburger R (2011) 2.

⁸ Du Plessis et al (2011).

⁹ In some jurisdictions, such as China, competition law used to be commonly referred to as anti-monopoly law.

¹⁰ Lowe P (2005).

¹¹ *Ibid.*

¹² *Ibid.*

In so-called innovation markets, where a new product or a new market is in its infancy, intellectual property rights are seldom allied with sufficient market power¹³ to allow a firm to engage in abusive behaviour.¹⁴ The holder of a recently registered intellectual property right does not possess any market power in the economic sense, even though the right to exclude others still accrues to the right holder. Nevertheless, where intellectual property rights are combined with market power, exclusionary conduct, such as a refusal to license the use of intellectual property, can lead to social losses in the form of economic inefficiency and lost opportunity for add-on innovations.¹⁵

Competition regulators should guard against unduly limiting or reducing the protection conferred by the existence of the intellectual property right. Excessive or ill-considered regulation could lead to a decrease in incentives for firms to invest in and generate new products. Intellectual property rights sustain and promote economic growth on an international level.¹⁶ Accordingly, poor decisions by competition authorities relating to intellectual property issues can have substantial, negative domestic and global repercussions.¹⁷

In most cases, the manner in which an intellectual property right is exercised does not give rise to competition concerns. Because intellectual property rights are classified as negative rights, their mere ownership cannot amount to an abuse of a dominant position, as contemplated in the Competition Act. The problem lies in the exercise of those rights, when the way in which a dominant intellectual property right holder use this right do not accomplish the consumer-welfare and incentive-to-innovate objective.¹⁸ Competition law can be a useful tool to restore or maintain the balance.

In the South African context, the above debate is subject to some uncertainty because there is little established precedent relating to the enforcement of competition law in respect of the exercise of intellectual property rights. As a result, our authorities need to fall back on the basics, when dealing with any alleged abusive exercise of intellectual property rights.

¹³ Section 1 of the Competition Act defines “market power” as the power of a firm to control prices, exclude competition, or behave in an appreciable extend independently of its competitors, customers or suppliers.

¹⁴ Maskus KE and Lahouel M (1999) 10.

¹⁵ See discussion of cases below in chapter 2.

¹⁶ Idris K (2003).

¹⁷ Van Aswegen PF (2003) 14 SLR 115.

¹⁸ An argument can be made that for competition law purposes, intellectual property should be treated in the same way as any other form of property, such as physical goods, real estate, property represented by contractual rights and other species of tangible and intangible property.

In the hope of providing guidance to our authorities, practitioners and academics, this mini-dissertation then analyses intellectual property rights in the context of the abuse of dominance provisions set out in section 8 of the Competition Act. The writer examines whether the refusal by the holder of an intellectual property right to deal with a competitor by refusing to grant a licence and refusing to supply a competitor with goods or services that are subject to the intellectual property right, is considered to be anti-competitive. The writer will draw from European case-law relating to abusive conduct by market-dominant intellectual property rights holders to deal with the topic. Before delving into this issue, however, it is first necessary to provide basic information relating to the regimes in question, starting with competition law.

1.2 Competition law

1.2.1 Introduction

Competition law originated in North-America (anti-trust laws) and most westernised countries have adopted laws and/or rules which have the purpose of preventing or restricting anti-competitive behaviour or conduct, which is similar to the laws of the United States of America (“US”).¹⁹ South Africa has a well-developed competition regime based on best international practice. Even though our economic system is mainly based on free market principles, competition is regulated by statutory created competition authorities, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court (“the CAC”).

Competition in South Africa was first regulated in terms of the Maintenance and Promotion of Competition Act, 96 of 1979 by the former Competition Board, which was mandated to investigate matters at its own initiative.²⁰ Unlike the new Competition Act, the 1979 Act did not make provision for any explicit prohibitions and lacked merger control provisions as well as compulsory enforcement action.²¹ In 1994, with the new political dispensation, it became clear that there was a need to regulate the South African economy so as to eliminate business practices which prevented the efficient and competitive functioning of our economy and a transformation of the old system was necessary.²²

¹⁹ Nuehoff M et al (2006) 12.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

The Competition Act became effective on 1 September 1999. It fundamentally transformed South Africa's competition legislation and substantially strengthened the powers of the competition authorities, in line with the models of the European Union ("the EU"), the US and Canada.²³ Regarded as still being in its infancy stage, competition law in South Africa has developed increasingly since the enactment of the Competition Act and a greater level of sophistication in the manner in which competition issues are handled by the regulators is noted.²⁴

While our authorities have made great progress in the development of our own jurisprudence, support from competition counterparts in other countries have assisted this development to a great extent.²⁵ Our South African Competition Act gives explicit recognition in section 1(3) to the consideration of foreign and international law when applying the Competition Act. Our rules regarding restrictive agreements are premised upon some of the language contained in the EU Treaty.²⁶ Our rules on price discrimination are regarded as a revised version of the US' Robinson Patman Act of 1936²⁷ while our merger standards are similar to Canada's standards.²⁸ As discussed in more detail below, it is generally necessary to prove net anti-competitive effects in the case of a contravention of the Competition Act, however, a few of the prohibited practices contained in this Act are *per se* prohibited.²⁹

1.2.2 Objectives of the Competition Act

The purpose of the Competition Act is to promote and maintain competition in the Republic in order –

- “(a) to promote the efficiency, adaptability and development of the economy;*
- (b) to provide consumers with competitive prices and product choices;*
- (c) to promote employment and advance the social and economic welfare of South Africans;*
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;*
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and*

²³ Organisation for Economic Co-operation and Development (2003) 21.

²⁴ Webber Wentzel Bowens Attorneys (2006) 1.

²⁵ *Ibid.*

²⁶ *Supra* fn 23.

²⁷ Anti-Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526. The Act is a United States federal law which prohibits anti-competitive practices by producers, specifically in respect of price discrimination.

²⁸ *Supra* fn 23.

²⁹ *Ibid.*

*(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged person.*³⁰

The latter four goals relate to public interest issues.³¹ These public interest considerations are reflected in the preamble and purpose of the Competition Act and are also set out as a consideration in both the assessment of exemptions (in terms of section 10) and mergers (in terms of section 12A) under the Competition Act.³² Unlike some foreign jurisdictions, South African competition law focuses not only on pure competition law matters, but also contains pertinent public interest and social objectives, as set out above. Role players who assisted with the drafting of the Competition Act thought that it was essential to include public interest considerations in the Act, because of *"the challenges that follow from our legacy of economic distortions..."*³³ Together with the above policy goals, the Department of Trade and Industry acknowledged that the attraction of foreign investment lies in a country's competitiveness.³⁴

David Lewis, the former chairman of the Competition Tribunal, defended this decision to take account of public policy goals in a competition regime and stated that *"a competition statute that simply ignored the impact of its decisions on employment or on securing a greater spread of black ownership would consign the act and the authorities to the scrap heap."*³⁵

1.2.3 Scope of application

Chapter 2, section 3 of the Competition Act, sets out the scope of the application of the Act, namely that it applies to all economic activity within, or having an effect within the Republic of South Africa, which includes intellectual property rights and the exercise thereof.³⁶

³⁰ Section 2 of the Competition Act.

³¹ *Supra* fn 23 at 17 and 18.

³² Hodge J et al (2009) 3.

³³ Department of Trade and Industry (1997) 18.

³⁴ *Ibid* at 4.

³⁵ Lewis D (2002) 3.

³⁶ *American Soda Ash Corporation and Another v Competition Commission of South Africa and Others* (12/CAC/DEC01) [2002] ZACAC 5 relating to the 'effects theory.' In this matter the Tribunal held (pages 29-30) that, *"not only is there no basis in international law to support Ansac's reading, but also there is no practical foundation for it either. In effect it leads to a double inquiry. First, one will have to inquire into whether the Tribunal has jurisdiction. This entails a net balancing of pro- and anti-competitive effects. Then if a net harm is shown one proceeds with the substantive enquiry, which might in a rule of reason case involve extensive duplication of the evidence. In a per se contravention it would mean the leading of evidence in the jurisdiction enquiry, which is then inadmissible in the substantive enquiry."*

1.2.4 Conduct regulated by the Competition Act

Our South African Competition Act regulates the following types of conduct:

- a) Horizontal practices (dealing with the relationship between competitors) in section 4;
- b) Vertical practices (dealing with the relationship between suppliers and their customers) in section 5;
- c) Behaviour of firms in a dominant position in section 8;
- d) Pricing behaviour of firms in section 9; and
- e) Mergers and acquisitions in section 12.

1.2.5 Abuse of dominance

Sections 6 and 7 of the Competition Act define the requirements for dominance. Section 6 stipulates that the Competition Act will only apply to a firm if it meets a specified threshold of annual turnover or assets (published in the Government Gazette).³⁷

Section 7 states that:

“A firm is dominant in a market if –

- (a) it has at least 45% of that market;*
- (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
- (c) it has less than 35% of that market, but has market power”*

Section 8 of Competition Act regulates prohibited abusive conduct engaged in by a dominant firm. It states that:

“It is prohibited for a dominant firm to –

- (a) charge an excessive price to the detriment of consumers;*
- (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*

³⁷ According to GN 253 in GG 22025 of 1 February 2001, as amended by GN 562 in GG 22128 of 9 March 2001, *Part B of Chapter 2 of the Competition Act applies to any firm –*

- a) whose annual turnover is, into or from the Republic is valued at or above R 5 million; or*
- b) whose assets in the Republic are valued at or above R 5 million.*

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services below their marginal or average variable cost; or

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor.”

A few of the practices listed in the Competition Act are *per se* prohibited, meaning that there is no defence available to a party who has engaged in such a prohibitive practice.³⁸ However a finding of a contravention of the Competition Act generally relies on the rule of reason approach which requires the presentation of net anti-competitive effects.³⁹ In respect of section 8, subsections 8(a) and (b) are examples of such *per se* provisions, whereas the remainder of the subsections entail a rule of reason approach.

Competition occurs in markets and, in any competition law matter, it is necessary to define the relevant market in which the parties operate, before any decision can be made regarding its conduct.⁴⁰ The relevant market usually consists out of a product or service market and a geographic market. The nature of the product and/or services has to be determined as well as possible substitutes for these products and/or services. Where the geographic market is concerned, the boundaries in which competition takes place have to be established. In some instances, sub-markets may also be identified which can form a separate, distinctive market. A relevant market is defined in order to provide a context in which competition law matters can be assessed by the relevant competition law authorities.⁴¹ This is done to determine:

- a) the nature and strength of competition in a market;
- b) the possession of market power by any of the firms concerned; and

³⁸ Edward Nathan Sonnenberg Attorneys (2012) 26.

³⁹ *Supra* fn 23 at 21.

⁴⁰ Boshoff WH (2010) 1.

⁴¹ *Supra* fn 19 at 30.

- c) restraining factors which will thwart the abuse of market power.⁴²

Albeit not within the scope of this work to assess remedies relative to abusive practices which involve intellectual property rights, section 58(1)(a)⁴³ of the Competition Act is informative when considering measures to remedy such harmful effects. This section contains provisions that allow competition authorities to impose certain conditions or remedies in relation to anti-competitive conduct in order to restore the conditions of fair competition.

1.2.6 The Competition Act and intellectual property rights

Although the Competition Act does not make specific provision for the handling of matters relating to intellectual property rights, it does make provision in section 10(4) of the Act for an exemption from the Competition Act in respect of an agreement or practice, or category of agreements or practices that relates to the exercise of specific intellectual property rights.⁴⁴

In line with the general approach to South African competition law and policy, it is accepted that certain anti-competitive conduct may be required to achieve broader industrial and macro-economic goals.⁴⁵ The Competition Act therefore provides a mechanism whereby a party or parties can apply for an exemption from prosecution in certain cases. What we infer from section 10(4) is that the legislator intended for the current Competition Act to extend to the exercise of intellectual property rights and that an exemption is required for certain intellectual property rights in order to achieve these broader industrial goals. To date, there has been only one exemption application in South Africa in respect of intellectual property

⁴² *Ibid.*

⁴³ Section 58 of the Competition Act: Orders of Competition Tribunal

(1) *In addition to its other powers in terms of this Act, the Competition Tribunal may -*

(a) make an appropriate order in relation to a prohibited practice, including -

- (i) interdicting any prohibited practice;*
- (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;*
- (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;*
- (iv) ordering divestiture, subject to section 60;*
- (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;*
- (vi) declaring the whole or any part of an agreement to be void;*
- (vii) ordering access to an essential facility on terms reasonably required.*

⁴⁴ These rights include rights acquired or protected in terms of the Performers' Protection Act (11 of 1967), the Plant Breeders' Rights Act (15 of 1967), the Patents Act (57 of 1978), the Copyright Act (98 of 1978), the Trade Marks Act (194 of 1993) and the Designs Act (195 of 1993).

⁴⁵ Section 10(3)(b) of the Competition Act.

rights. VISA was granted an exemption in terms of its copyright for a period of eight years which is to lapse in 2013, unless extended.⁴⁶

1.2.7 The Agreement on Trade-Related aspects of Intellectual Property Rights

The Agreement on Trade-Related aspects of Intellectual Property Rights (hereinafter “TRIPS agreement”) is of paramount importance to the regulation of intellectual property rights under the Competition Act because the Act arguably derives the competence to deal with such rights from the treaty.⁴⁷

South Africa is a member state of the World Trade Organization and it is also a party to the TRIPS agreement.⁴⁸ The purpose of the TRIPS agreement is to establish minimum safety measures for the protection of intellectual property rights in every member state. Competition policy is explicitly covered by the TRIPS agreement in some of its articles because of its impact on goods and products covered by intellectual property protection and as a result the Competition Act should be interpreted in the context of South Africa’s responsibilities under the TRIPS agreement.⁴⁹

Members to the TRIPS agreement are empowered to utilise competition law to correct abuses by holders of intellectual property rights. Article 8 of the TRIPS agreement explicitly states that member states may adopt measures necessary to protect public health, together with special measures to prevent the abuse of intellectual property rights by right holders who resort to practices which unreasonably restrain trade.⁵⁰ Article 31(k) of the TRIPS agreement makes further provision for the granting of compulsory licences in the case of patents in order to remedy any anti-competitive conduct engaged in by the holder of the

⁴⁶ *Supra* fn 8 at 400. Physical documents also available on <http://www.compcom.co.za/assets/Banking/Submissions/Visa-Annexures-A-Visa-Exemption-from-Competition-Commission.pdf>.

⁴⁷ Rakhudu M (2007) 5.

⁴⁸ South Africa has been a WTO member since 1 January 1995.

⁴⁹ *Supra* fn 47 at 5.

⁵⁰ Article 8 of TRIPS states the following:

- (1) *Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement;*
- (2) *Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.*

patent.⁵¹ Articles 40(1) and (2) also take cognisance of the fact that some licensing practices or conditions relative to intellectual property rights may restrain competition and may obstruct the transfer of technology.⁵²

The above provisions of TRIPS clearly allow member states to enforce their particular competition statutes with regard to conduct that may constitute an abuse of intellectual property and members may also adopt suitable measures to prevent anti-competitive practices.⁵³ Accordingly, the Competition Act should apply to any anti-competitive conduct undertaken by intellectual property rights holders, unless an exemption was applied for and granted by the Competition Commission in terms of the Competition Act.⁵⁴

Although the TRIPS agreement does not specify the type of practices caught by its provisions, writer submits that these would include, *inter alia*, anti-competitive conduct such as the refusal to grant a competitor access to an essential facility, refusal to grant a licence, refusal to supply goods or services which are subject to intellectual property rights and the engagement in exclusionary conduct or restrictive acts that substantially prevent or lessen competition in a market.⁵⁵ Article 8 of the TRIPS agreement, for example, addresses intellectual property related anti-competitive issues within the pharmaceutical market so as to ensure the availability of much needed medicines at affordable prices.⁵⁶

1.2.8 Developments in the EU

The South African position regarding the enforcement of intellectual property rights in relation to competition law is to a great extent influenced by the position in the EU.⁵⁷ One

⁵¹ Correa C (2007) 20.

⁵² Article 40 of TRIPS states:

(1) *Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.*

(2) *Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.*

⁵³ *Supra* fn 47 at 5.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ UNAIDS (2011) 10.

⁵⁷ Hlatshwayo N (2008) 2.

writer⁵⁸ on this subject is of the view that regional developments, such as the establishment of The Common Market for Eastern and Southern Africa (“COMESA”) Competition Commission, should lead South Africa to seek guidance from the EU on the issues around intellectual property and competition law. COMESA’s competition regime is based on the European Commission’s (hereinafter the “EC”) model and it is likely that its enforcement policies will be influenced by EC jurisprudence. Even though South Africa is not a member of this regional competition authority, COMESA’s supervisory oversight is sure to impact on the South African Competition Commission’s decisions and on companies conducting business in Africa.

1.3 Intellectual Property law

1.3.1 Introduction

Intellectual property rights are intangible property rights which are granted by way of legislation to creators and owners of works that are the results of human intellectual efforts and creativity.⁵⁹ Broadly speaking, intellectual property entails two main categories:

- copyright, mainly existing in written, electronic and other forms of information, musical compositions, computer programs and artistic, photographic and audio-visual creations; and
- industrial property, such as inventions (patents), innovations, trade marks, industrial designs and models and trade secrets.⁶⁰

In South Africa, plant breeder’s rights are also recognised and protected as another category of intellectual property.⁶¹

Where the interface between intellectual property and competition law is concerned, the issues often arise from those rights granted in respect of patents and copyrights. Accordingly, this discussion, in relation to intellectual property rights, is confined in scope to the said categories of intellectual property.

⁵⁸ *Ibid.*

⁵⁹ Dube C (2008) 1.

⁶⁰ WIPO (2004) 3.

⁶¹ *Supra* fn 44.

1.3.2 The Patents Act

The Patents Act⁶² regulates patent protection in South Africa. The Patents Act provides for a patent to be issued to an applicant upon meeting certain requirements. The granting of a patent confers monopoly rights to the patent owner over a new invention. In other words, the patent owner is given the exclusive right to prevent others from exploiting his invention for the lifetime of the patent. In South Africa, patent protection lasts for twenty years from the date when the first patent application was filed.⁶³

Intellectual property rights are territorial in nature and can only be enforced in countries or region where protection has been granted (i.e. by way of registration) and where such protection remains in force.⁶⁴

1.3.3 The Copyright Act

The Copyright Act⁶⁵ governs the protection of copyright and the right to control the use and distribution in South Africa of the several categories of copyright works which are recognised under and protected by that Act. Copyright does not vest in ideas, but only in ideas which have been reduced to writing. The protected categories of copyright works are: artistic, literary and musical works, cinematograph films, sound recordings, broadcasts, program-carrying signals, published editions, and computer programs.⁶⁶ The works must be original, in the sense that they have not been copied, to qualify for protection.

Copyright protection grants to the holder of the copyright several entitlements, including the right to preclude others from making reproductions or adaptations of the copyright work. Certain limitations on this protection apply, the most common one being reproduction for private study, research purposes or personal use, which are known as the 'fair use' exemptions.⁶⁷

⁶² *Supra* fn 44.

⁶³ Section 46(1) of the Patent Act: "*The duration of a patent shall, unless otherwise provided in this Act, be 20 years from the date of application therefor, subject to payment of the prescribed renewal fees by the patentee concerned or an agent.*"

⁶⁴ WIPO (year of publication unknown).

⁶⁵ Copyright Act (98 of 1978).

⁶⁶ See Section 2(1)(a) – (i) of the Copyright Act.

⁶⁷ See Section 12 – 19 of the Copyright Act.

Copyright arises automatically by law and copyright protection exists for the entire lifetime of an author in respect of artistic works for a period of fifty years after the author's death.⁶⁸ The period of copyright protection in respect of cinematograph films, photographs and computer programs, is fifty years from the end of the year in which the work is 1) first made available to the public with the consent of the owner of the copyright, or 2) first published, whichever term is the longer.⁶⁹ For sound recordings the protection period is fifty years from the end of the year in which the recording is first published;⁷⁰ for broadcasts it is fifty years from the end of the year in which the broadcast first takes place;⁷¹ for programme-carrying signals it is fifty years from the end of the year in which the signals are emitted to a satellite;⁷² and for published editions it is fifty years from the end of the year in which the edition is first published.⁷³

1.3.4 Intellectual property provisions contained in the Patents Act relative to the abusive exercise of intellectual property rights

The Patents Act contains provisions relating to the control and regulation of potentially abusive exercises of the patent holder's rights. Section 57 of the Patents Act is also relevant in this regard in the sense that it provides for the termination of contract relating to licences and ensures that the licence contracts under a patent do not outlast the patent itself.⁷⁴ Section 90 of that Act incorporates specific provisions which are directed at preventing distortion of competition through the anticompetitive exercise of a patent.⁷⁵

⁶⁸ See Section 3(2)(a) of the Copyright Act.

⁶⁹ See Section 3(2)(b) of the Copyright Act.

⁷⁰ See Section 3(2)(c) of the Copyright Act.

⁷¹ See Section 3(2)(d) of the Copyright Act.

⁷² See Section 3(2)(e) of the Copyright Act.

⁷³ See Section 3(2)(c) of the Copyright Act.

⁷⁴ Section 57 of the Patents Act, titled "[t]ermination of contracts relating to licences" reads as follows:

(1) Any contract, in so far as it relates to a licence under a patent to make, use, exercise, offer to dispose of, dispose of or import a patented invention, shall terminate on the date on which the patent under which the licence was granted expires, is revoked or otherwise ceases to protect such invention: Provided that where the contract relates to licences under more than one patent, such part of the contract as relates to any particular licence shall terminate when the patent under which it was granted expires, is revoked or otherwise ceases to protect the invention concerned, and that the contract as a whole shall terminate when all the patents under which all such licences were granted and which were in force at the time when the contract became operative, expire, are revoked or otherwise cease to protect the relevant inventions.

(2) Nothing in this section shall affect any right to terminate a contract or a condition in a contract independently of this section.

⁷⁵ Section 90 of the Patents Act, dealing with the conditions excluded from contracts relating to patents provides that:

(1) Any condition in a contract relating to the sale of a patented article or to a licence under a patent of which the effect will be—

(a) to prohibit or restrict the purchaser or licensee from purchasing or using any article or class of articles, whether patented or not, supplied or owned by any person other than the seller or licensor or his nominee;

1.3.5 Inherent controls in the relevant intellectual property laws

Apart from the interface between competition law and intellectual property law, the latter does contain legislative mechanisms to counter the anti-competitive effect of the regime. These mechanisms have not been tested to date, but the success of its application is questionable.

Incentives in the form of intellectual property protection by way of a right accruing to the originator, financial benefits and personal recognition, are necessary in order to spur on innovation and further develop existing creations.⁷⁶ The balancing act between the rights of the originator of the creation and the rights of society is accomplished by limiting the creator's exclusive or monopoly right by way of limiting the time period for protection of the creation and by writing in certain exceptions into legislation governing the specific intellectual property.⁷⁷ Upon expiry of such a term, the intellectual property becomes part of the public domain.⁷⁸ Another way of balancing these rights is the granting of voluntary or compulsory licences to use the intellectual property. It is recognised that licensing, more specifically the compulsory licensing of intellectual property rights, can possibly remedy anti-competitive conduct related to intellectual property rights.⁷⁹

Turning to the counterparts in the Competition Act, the Competition Tribunal is granted wide powers in terms of section 58 of the Competition Act to make orders relating to prohibited conduct. Section 58(1)(ii) states that Competition Tribunal has the authority to order a party to supply or distribute goods to another party on terms reasonably required to end such prohibited practice. Writer is of the view that in principle, this implies that the Tribunal may also require a party to license its intellectual property. The relevant provisions of the Patents

-
- (b) to prohibit or restrict the licensee from using any article or process not protected by the patent;*
(c) to require the purchaser or licensee to acquire from the seller, licensor or his nominee any article or class of articles not protected by the patent;
(d) to require or induce the purchaser to observe a specified minimum resale price in respect of any article or class of articles protected by the patent; or
(e) to prohibit or restrict the making, using, exercising or disposing of the invention concerned in any country in which the invention is not patented, shall be null and void.
(2) Nothing in this section shall—
(a) affect any condition in a contract whereby a person is prohibited from selling any goods other than those of a particular person; or
(b) affect any condition in a contract for the lease of or a licence to use a patented article, whereby the lessor or licensor reserves to himself or his nominee the right to supply such new parts of the patented article, other than ordinary articles of commerce, as may be required to put or keep it in repair.

⁷⁶ Klopper HB et al (2011) 13.

⁷⁷ *Ibid* at 14.

⁷⁸ *Ibid*.

⁷⁹ *Supra* fn 51 at 20.

Act and the Competition Act correspond, to some degree, in terms of their aims, but it is beyond the scope of this work to delve too deeply into this issue. Writer, however, now turns to an examination of EU Jurisprudence to provide insight into the possible function of the Competition Act in its regulation of intellectual property rights.

CHAPTER 2: EXAMINING LEGAL PRINCIPLES DRAWN FROM EU JURISPRUDENCE: HOW THEY COULD FIND APPLICATION IN SOUTH AFRICAN JURISPRUDENCE

2.1 Abuse of a dominant position (the refusal to deal) in the South African context

In the context of a refusal to deal, the abuse of a dominant position which is held by an intellectual property rights holder most commonly manifests itself in the following ways:

- a) refusal to license intellectual property;
- b) refusal to supply information which relates to patents or copyrighted material; and (similar to what was argued in *Microsoft Corp. v Commission of the European Communities* (hereinafter “*Microsoft*”)⁸⁰ as discussed below);
- c) refusal to supply products which are either patented or manufactured by a patented process or know-how process.⁸¹

In terms of the Competition Act, any of the above conduct could, theoretically, contravene sections 8(b), 8(c) or 8(d) of the Competition Act. Section 8(b) prohibits a dominant firm from refusing to give access to an essential facility, when it is economically feasible to do so. In terms of section 8(c), it is prohibited for a dominant firm to engage in an 'exclusionary act' if the anti-competitive effect of such conduct outweighs any technological, efficiency or pro-competitive gain. An 'exclusionary act' is defined in section 1 of the Competition Act as conduct that impedes or prevents a firm from entering into, or expanding within, a particular market. Section 8(d)(ii) of the Act prohibits the refusal to supply scarce goods to a competitor when supplying those goods is economically feasible.

The abusive practice listed in section 8(b) is *per se* prohibited, meaning that it does not require a showing of actual harmful effect or permitting a showing of net efficiency. Section 8(c) and 8(d)(ii) of the Competition Act embodies the 'rule of reason' approach. The 'rule of reason' approach finds application in the assessment of the conduct and the effects of the

⁸⁰ *Microsoft Corp. v Commission of the European Communities* [2007] (T-201/04) ECR II-3601.

⁸¹ *Supra* fn 17 at 120.

conduct must be considered.⁸² The difference between section 8(c) and section 8(d)(ii) lies in the onus of proof. Where section 8(d)(ii) is concerned, the respondents also carry the onus in weighing-up efficiency benefits against any anti-competitive effect, whilst under a section 8(c) case, this onus remains with the complainant.

In practice, a finding that certain conduct by an intellectual property rights holder contravenes any one or more of the above sections is, however, far from straightforward.

In the context of a refusal to deal, one's best guess would be that the South African competition authorities will assess the intellectual property right holder's conduct under either section 8(b), section 8(c) or section 8(d)(ii) of the Competition Act. An argument can be made out that the abuse by a market dominant intellectual property right holder will not and should not be considered as a *per se* contravention under section 8(b) of the Competition Act. Intellectual property attracting to products, goods or services⁸³ is not included in the definition of an essential facility, as contemplated in the Act. Brand seems to suggest that the adjudicators should rather consider the effect of the conduct and apply a rule of reason approach, as it may very well be that the anti-competitive effect of the conduct may be outweighed by technological, efficiency or other pro-competitive gain resulting from the conduct.⁸⁴ This will be elaborated upon in the analysis section. Writer will now draw from foreign case law relating to the refusal to deal, to provide guidance.

2.2 Application of foreign case law

As indicated above, the Competition Act expressly provides for reliance on foreign law. Section 3(1) of the Act states that "*any person interpreting or applying this Act may consider appropriate foreign and international law*". In the context of the interface between competition and intellectual property law, it is valuable for the South African competition authorities to have regard to, and apply foreign case law in its interpretation of cases which concern allegations of anti-competitive conduct. This is because South Africa has had little opportunity to deal with this issue, which is evident from the lack of jurisprudence on this subject.⁸⁵

Jurisprudence on the issue, such as that which is discussed below, indicates that the EU competition authorities apply the rule of reason approach when considering intellectual

⁸² *Supra* fn 23 at 25.

⁸³ Such as pharmaceutical products – see paragraph 2.5.2 below.

⁸⁴ Brand J (2005) 122 SALJ 927.

⁸⁵ See discussion below in Chapter 3.

property related competition issues, such as the refusal to deal with one's intellectual property.⁸⁶ It is important to note from these cases that the EU competition authorities deal with these issues under the essential facility doctrine in terms of which the pro- and anti-competitive effects of a competitor's conduct are weighed.⁸⁷ The doctrine finds home in our Competition Act under section 8(b). The implication of its inclusion under the *per se* prohibition provisions will be dealt with in detail, below.

In the EU, firms are generally free to trade with any other business or person.⁸⁸ Article 82 of the European Community Treaty ("the EU treaty")⁸⁹, however, prohibits the abuse of a dominant position by one or more undertaking. This article contains four types of conduct which may be considered abusive. It states that:

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical developments 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.'

The above provisions are, to some extent, mirrored in Section 8 of the Competition Act. As discussed above, the Competition Act does contain a provision dealing with the essential facility doctrine, which is a topic of discussion of this mini-dissertation, in terms of its applicability to the regulation of intellectual property rights. Similarly, and again as indicated

⁸⁶ *Supra* fn 84 at 928.

⁸⁷ Opi BS (2001) 423.

⁸⁸ *Oscar Bronner GmbH & Co KG v Mediaprint Zeinungs-und Zeitschriftenverslag GmbH & Co KG* [1998] (C-7/97) ECR I-7791: Opinion of Advocate General Jacobs delivered on 28 May 1998 at par53: "[t]he laws of the Member States generally regard freedom of contract as an essential element of trade. Nevertheless, the competition rules of some Member States explicitly provide that an unjustified refusal to enter a binding contract may constitute an abuse of a dominant position."

⁸⁹ The Lisbon Treaty came into force within the European Union on 1 December 2009. Consequently the Treaty of Nice, being the legislative base of the European Union has been revised and the numbering of the Articles that relate to the single market and competition has changed. Article 81 is now Article 101 and Article 82 is now Article 102. • For ease of reading, writer will still refer to Articles 81 and 82 in the text, because the referenced texts and cases do so.

above, the essential facility doctrine is the basis upon which the EU's relevant legal principles were established. Therefore, it is pertinent to elaborate on the relevant doctrine in view of discussing its applicability to South African jurisprudence.

2.3 The Essential facility doctrine

The doctrine of essential facility has its origin in the US,⁹⁰ but also finds wide application in EC jurisprudence. The doctrine seeks to protect competition by requiring dominant firms owning an essential facility to extend access to competitors and customers when it is economically feasible to do so. The doctrine is not expressly referred to in either the US or EU statutes, however, the competition legislation of these jurisdictions contain provisions which relate to the general prohibition of an abuse of a dominant position.⁹¹ The US Agencies generally apply the same antitrust principles to conduct involving intellectual property than they apply to conduct which involves any other form of tangible or intangible property.⁹² Therefore, in principle, intellectual property, such as any other kind of property (tangible or intangible), can constitute an essential facility.⁹³ In the EU, the essential facility doctrine is governed by Article 82 of the EC Treaty. The EC defines an essential facility as, “a facility or infrastructure which is essential for reaching customers and/or enabling competition to carry on their business and which cannot be replicated by any reasonable means”.⁹⁴

The EU treaty played a central part in the drafting of the South African Competition Act. Jurisprudence developed in the EU in relation to the said treaty is therefore instructive in

⁹⁰ In the early days, the US Supreme Court of Appeal dealt with a refusal to provide reasonable access to the only railway terminal in St Louis in the matter of *United States v Terminal Railroad Association of St Louis* 224 US 383 (1912). The modern essential facility doctrine originated in the US with *Otter Tail Power & Co v United States* 410 US 366, 377-8 (1973).

⁹¹ In the US, Section 2 of the Sherman Antitrust Act (Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7) deals herewith and in the EU, Article 82 governs abuse of a dominant position.

⁹² American Bar Association (2010) 171.

⁹³ In US legislation there is no antitrust exemption for intellectual property holders. The essential facilities doctrine has been applied in appropriate instances to “facilities” allegedly protected by intellectual property laws as is evident in the case of *Eastman Kodak Co. v. Image Technical Servs., Inc.* [1992] 504 US 451, 483 n. 32. In this matter, it was held on review that Kodak, a manufacturer and servicer of copiers, had illegally monopolized the latter market for service of its copiers by refusing to deal in its patented replacement parts. Kodak was subsequently required to sell such parts on reasonable terms to its competitors. After describing the essential facilities doctrine as one theory of a more general unilateral refusal to deal claim, the court confronted the tension between attaching antitrust liability to exclusionary acts (because “neither patent nor copyright holders are immune from antitrust liability”) and the principle that “patent and copyright holders may refuse to sell or license protected work.”

⁹⁴ OJEC C265/2 at par 68.

those areas where South African' competition law still needs to be developed.⁹⁵ For example, and importantly, the EU competition law authorities have already dealt with the interface between competition law and intellectual property law over the past few years, as is evident from the communities' jurisprudence on the subject.

A plethora of legal principles, which are discussed below, have been established in the EU community dealing with the issue of whether refusing to license intellectual property rights or refusing to supply goods over which intellectual property is claimed, will constitute an abuse of a dominant position, as contemplated by the relevant competition laws. In most instances, the essential facility doctrine found application in relation to these issues. The European authorities permitted the granting of compulsory licences by the intellectual property rights holder in certain well-defined 'exceptional circumstance' and indicated that, in these circumstances, they will favour competition law principles over intellectual property rights. The refusal of a dominant firm to grant access to an essential facility will, under EU law, amount to an abuse of the firm's dominant position when such refusal:

- a) has an anti-competitive effect; and
- b) cannot reasonably be justified.⁹⁶

The above test involves a balancing test. In European law, the essential doctrine can be applied to products, such as a raw material, services and the provision of access to a place, such as a harbour, airport or to a distribution system, including a telecommunications network.⁹⁷ However, it is also possible that intellectual property could be the subject of an essential facility. In *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v. Commission*⁹⁸ (hereinafter "*Magill*"), which is discussed in detail below, the essential facilities doctrine was applied to intellectual property rights, specifically copyright. As mentioned above, the essential facility doctrine also found its way into South African competition law and is expressly mentioned in section 8(b) of the Competition Act. An essential facility is defined in section 1 of the Competition Act as '*an infrastructure or resource that cannot reasonably be duplicated and without access to which competitors cannot reasonably provide goods or services to their customers.*'

⁹⁵ Reyburn L (2005) 3.

⁹⁶ *Supra* fn 84 at 914.

⁹⁷ According to Advocate General Jacobs in case C-7/97 *Bronner v. Mediaset* [1998] ECR I-7791 at 7806–7807

⁹⁸ *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v. Commission* [1995] (joined cases C-241/92 and 242/92) ECR I-743. Mr Magill, an Irish magazine publisher, was the complainant in this matter and therefore his name is cited as a reference to this case.

The essential facility doctrine has not yet been tested to the full before the South African competition authorities where the alleged abuse concerns intellectual property rights. The only matter of substance with regards to the definition and interpretation of the essential facility doctrine in the context of intellectual property rights, is that of *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers & Others* (hereinafter “*Glaxo Wellcome*”).⁹⁹ The matter will be dealt with in detail, below, suffice for current purposes to mention that the Court here indicated that it takes a very narrow approach to the doctrine, which does not allow for much flexibility in the interpretation of what constitutes an essential facility. It seems like the definition of an essential facility is confined to traditional infrastructure, such as ports, electricity grids, telecommunication networks, airports, pipelines, railway terminals and railways. Consequently, intellectual property rights will not constitute an essential facility.

In other matters, such as *The Competition Commission v Telkom*,¹⁰⁰ the essential facility doctrine was also addressed. This matter, however, did not concern intellectual property rights, but concluded that the resource in question, namely the facilities bought by value added network service providers, constituted an essential facility. The decision did not outline the scope of the definition of an essential facility or provide any further guidance on how to deal the essential facility doctrine, leaving us with the inflexible approach adopted in the *Glaxo Wellcome* matter.

The legal principles extracted from EU case law relevant to competition and intellectual property law are discussed and examined below to show, firstly, what part, if any, the principles may play in developing our own jurisprudence on the relevant issues and, secondly, to provide guidance on how to deal with these issues, as and when they arise.

2.4 Examples of European case law concerning the refusal to deal

2.4.1 Refusal to supply

A firm’s refusal to deal with another firm is regulated under Article 82 of the EU Treaty.¹⁰¹ The refusal to deal with a competitor can manifest itself in two ways: refusal to license, which

⁹⁹ *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers (Proprietary) Limited and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002).

¹⁰⁰ *The Competition Commission v Telkom* Case No. 11/CR/Feb04.

¹⁰¹ *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, Joined Cases 6/73 & 7/73, [1974] ECR 223.

is related to intellectual property, and refusal to supply, which is relevant to tangible property.¹⁰² Both instances of refusal to deal have been considered by the European courts, as will be seen below.

2.4.1.1 *Commercial Solvents*

The European Court of Justice upheld a decision by the EC in respect of a refusal to supply in the case of *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp v Commission* (hereinafter “*Commercial Solvents*”).¹⁰³ This was the first case in which the ECJ recognized the obligation to deal. In this case it was held that a dominant firm’s refusal to continue to supply raw materials to its existing customer and downstream competitor, in the absence of any objective justification for such refusal, constituted a contravention of Article 82.¹⁰⁴ The ECJ held that “*an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 82.*”¹⁰⁵ Accordingly, Commercial Solvent’s conduct of refusing to supply its existing customer after dealing with it for four years constituted an abuse of a dominant position under Article 82.

2.4.1.2 *United Brands*

In the matter of *United Brands Co & United Brands Continental BV v Commission*¹⁰⁶ United Brands refused to continue its supply of Chiquita bananas to a customer on the basis that this customer has advertised one of its competitors’ bananas. The ECJ in this case again recognised that the refusal to supply an existing customer constituted a violation of Article 82.¹⁰⁷

¹⁰² Derclaye E(2003) 686 and 687.

¹⁰³ *Supra* fn 101.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *United Brands Co & United Brands Continental BV v Commission* 27/76 [1978] ECR 207.

¹⁰⁷ *Ibid* at par 159.

2.4.2 Refusal to license – the emergence and development of the ‘exceptional circumstances test’

2.4.2.1 *Volvo*

The cornerstone case in which the European Court of Justice was confronted with the interface between fair competition and intellectual property protection was in the matter of *AB Volvo v Erik Veng (UK) Ltd* (hereinafter “*Volvo*”).¹⁰⁸ The conduct complained of entailed Volvo abusing its dominant position in the market for automobile spare parts by refusing to grant licences to third parties for the manufacture and supply of the spare parts.¹⁰⁹ An important principle which was established in this case was that the mere existence of intellectual property rights did not constitute abusive conduct. The court was also of the view that the refusal to grant a licence, without more, in respect of intellectual property rights does not automatically constitute an abuse of a dominant position.¹¹⁰ In this matter, the court found no evidence which suggested that Volvo was conducting itself in an abusive way and it was held that Volvo’s refusal did not amount to an abuse of a dominant position as contemplated in Article 82.¹¹¹

The *Volvo* judgment listed certain scenarios in which the exercise of intellectual property rights could be considered abusive for the purpose of competition law, 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 cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.”*¹¹²

Although the list indicates that a refusal to supply may be considered abusive, no express reference is made in the judgment to a refusal to license and or when such conduct could be regarded as being abusive within the context of competition law. This judgment, however, sets the standard for intellectual property related abusive conduct by dominant undertakings and much debate on the topic followed subsequent thereto.¹¹³

¹⁰⁸ *AB Volvo v Erik Veng (UK) Ltd* C-238/87 [1988] ECR 6211.

¹⁰⁹ *Ibid* at par 1.

¹¹⁰ *Ibid* at par 8.

¹¹¹ *Ibid* at par 11.

¹¹² *Ibid* at par 9.

¹¹³ *Supra* fn 84 at 916.

2.4.2.2 *Magill*

The next important judgment, where it was considered whether a refusal to grant a licence for the use of an intellectual property right constituted abusive conduct, was the *Magill* decision, referred to above.¹¹⁴ This matter is also unique in the sense that it not only confirmed that, in certain exceptional circumstances, the refusal to license intellectual property could be in breach of Article 82, it was also the first matter in which a compulsory licence was imposed by the EC in order to remedy the effect of the abusive conduct.¹¹⁵ The judgment can be explained by the particular circumstances of the case, which overlap with the requirements which are generally considered to be necessary for the application of the essential facility doctrine.¹¹⁶ The *Magill* case can, accordingly, be seen as an example of the application of this doctrine.

In *Magill*, three broadcasters in Ireland and the UK provided all the newspaper publishers in these countries with lists of its future programme times, with permission to publish these times on a daily basis, free of charge.¹¹⁷ At that point in time, no comprehensive weekly television guide was available on the market in Ireland or in Northern Ireland and a viewer had to purchase three separate magazines every week if it wanted to have a full picture of the programmes and its times.¹¹⁸ Each television station published a television guide covering exclusively its own programmes and claimed copyright protection for its listings in order to prevent third parties from reproducing these.¹¹⁹ An Irish publisher of weekly television guides by the name of Magill, identified this gap in the market and enquired about obtaining a licence from these broadcasters, as it wanted to reproduce the three weekly television schedules in one inclusive television guide.¹²⁰ Magill was, however, refused a licence and took the matter to court on the basis that the refusal to license an intellectual property right (such as the copyrights entrenched in the listings) constituted an abuse by a dominant firm.¹²¹

¹¹⁴ *Supra* fn 98.

¹¹⁵ *Supra* fn 84 at 917.

¹¹⁶ These are 1) the raw information on TV schedules constituted a unique resource on the market and could not be duplicated independently by Magill; 2) such information was essential to enable Magill to operate in the market; and, 3) the result was a “new” product, and the exercise of a copyright by RTE was a permanent obstacle to its entry into the market.

¹¹⁷ *Supra* fn 98 at par 9.

¹¹⁸ *Ibid* at par 7.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at par 10.

¹²¹ *Ibid* at par 11.

It was in this case that the Court of Justice provided detailed conditions under which a refusal to license (i.e. the exercise of an exclusive right by the proprietor) would be regarded abusive. Born out of this revolutionary judgment was the requirement that certain ‘exceptional circumstances’ have to be present before a refusal to license could constitute an abuse.¹²² These exceptional circumstances were:

- a) the relevant raw material must be indispensable;¹²³
- b) the refusal to license must result in the prevention of the appearance of a new product which the intellectual property right holder did not offer and for which there was a potential customer demand;¹²⁴
- c) the refusal must not be justified;¹²⁵
- d) the intellectual property right holder reserves to himself a secondary market by excluding all competition on that market.¹²⁶

The Court of Justice held that the refusal to license the intellectual property rights constituted an abuse and found that the basic information on the programme scheduling was an indispensable raw material. The remaining listed exceptional circumstances were also found to be present.¹²⁷

The *Magill* case is one of the few examples where the principles of competition law superseded the protection afforded to a holder of certain intellectual property rights.¹²⁸ Advocate General Jacobs¹²⁹ said in the *Oscar Bronner GmbH & Co KG v Mediaprint Zeinungs-und Zeitschriftenverslag GmbH & Co* (hereinafter “*Oscar Bronner*”) matter, as

¹²² Whilst the phrase ‘essential facility’ is not expressly mentioned in the case, it is clear that the issue at hand was dealt with under the essential facility doctrine because of the facts of the case, principles discussed and the decision made by the court.

¹²³ *Supra* fn 98 at par 53.

¹²⁴ *Ibid* at par 54.

¹²⁵ *Ibid* at par 55.

¹²⁶ *Ibid* at par 56.

¹²⁷ *Ibid* at paras 53 and 54.

¹²⁸ Bear in mind the argument that, for competition law purposes, intellectual property must be treated in the same way as any other form of property. Any form of property is capable of being used in an abusive manner and the category to which it belongs (tangible or intangible) should be irrelevant in the determination of the competition law complaint.

¹²⁹ The Advocate General, being a full member of the European Court of Justice, is tasked to generate a written, non-binding opinion for this Court, setting out his understanding of the relevant law applicable to the case. He will also make a recommendation to the Court on how he thinks the case should be decided. This opinion can be persuasive, albeit non-binding, and seems to be followed by the Court in most instances.

discussed in more detail hereinafter, that *‘the provision of copyright protection for programme listings was difficult to justify in terms of rewarding or providing an incentive for creative effort.’*¹³⁰ From this statement, the inference could be drawn that weak intellectual property with little innovation would more easily be trumped by competition law.

2.4.2.3 *Ladbroke*

The next important case which further developed the ‘exceptional circumstances’ test was that of *Tierce Ladbroke SA v Commission* (hereinafter “*Ladbroke*”).¹³¹ *Ladbroke* operated betting shops focussed on horse races and, to that end, sought access to its French competitor’s television channels and sound commentaries, which were protected by copyright. The EC declined to grant a compulsory licence in this regard. In challenging the decision, *Ladbroke* relied heavily on the *Magill* case and claimed that it could not compete in the horse race betting market without having access to the televised pictures and sound commentaries.¹³²

Unfortunately for *Ladbroke*, the European Court of First Instance held that the televised pictures were not essential to the betting agency and also that they were not considered indispensable. Therefore, so the court held, the *Magill* case was distinguishable from that of *Ladbroke*.¹³³ The judgment recorded that:

*“the refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers.”*¹³⁴

The court held further that:

“[i]n this case, as moreover the Commission and the interveners have pointed out, the televised broadcasting of horse races, although constituting an additional, and indeed suitable, services for bettors, it is not itself indispensable for the exercise of bookmakers’ main activity, namely the taking of bets, as is evidenced by the fact

¹³⁰ *Supra* fn 88 at par 63.

¹³¹ *Tierce Ladbroke SA v Commission of European Communities* [1997] (T-504/93) ECR II-923.

¹³² *Ibid* at par 13.

¹³³ *Ibid* at par 130.

¹³⁴ *Ibid* at par 131.

*that the applicant is present on the Belgian betting market and occupies significant position as regards bets on French races.*¹³⁵

The relevant pictures were only shown after bets were already placed and it could also not affect a customer's selection of a betting agency, therefore it was not considered to be 'indispensable.' Hence, not even the very first requirement of the 'exceptional circumstances' test as laid down in the *Magill* case was met by the parties in the *Ladbroke* case. This matter was also different from the *Magill* case in that the product in question (i.e. the spreading of pictures and sounds of French horse races to Belgian viewers) was considered to be an additional service in relation to the betting undertaken by customers and was not in itself seen as a new product, whereas in *Magill* the consolidated television guides was considered a new product.¹³⁶ Where the remainder of the requirements for the essential facilities test is concerned, *Ladbroke* could also be distinguished from *Commercial Solvents*¹³⁷ on the basis that Ladbroke's competitor had no presence in the downstream market and, therefore, it could not use its supposed dominant position in the upstream market to restrict competition in the downstream market.¹³⁸

The above exceptional circumstances test was altered to a certain extent in *Ladbroke*. In *Ladbroke*, the criteria were espoused as follows:

- a) the refusal to license must concern a product or service which is essential for the exercise of the activity in question, in that there is no real or potential substitute;
- b) the refusal must prevent the appearance of a new product which the intellectual property right holder did not offer and for which there was a specific, constant and regular potential demand on the part of consumers;
- c) the refusal must not be justified; and
- d) the intellectual property right holder reserves to himself a secondary market by excluding all competition in that market.¹³⁹

¹³⁵ *Ibid* at par 132.

¹³⁶ *Supra* fn 84 at 918.

¹³⁷ *Supra* fn 101 at par 41.

¹³⁸ *Supra* fn 131 at par 133.

¹³⁹ *Supra* fn 131 at par 131.

2.4.2.4 *Oscar Bronner*

Even though the *Oscar Bronner*¹⁴⁰ matter did not relate to intellectual property rights, it dealt with the essential facility doctrine and served as an important reference in subsequent case law which dealt with intellectual property rights and the abuse of a dominant position. The salient facts of the matter were that a certain Mr Oscar Bronner was a publisher of a daily newspaper called Der Standard, which had about 4% share of the Austrian daily newspaper market.¹⁴¹ Mr Bronner applied to the Court of Justice and requested an order from it which required Mediaprint, a competitor of Der Standard and a newspaper publisher, to distribute Der Standard in Austria through the nationwide early morning newspaper home delivery network of Mediaprint.¹⁴² Mediaprint was considered a big player in the market with a market share of more than 40%.¹⁴³ Mr Bronner relied on the principles established in the *Commercial Solvents*¹⁴⁴ case, which stated that a dominant company must supply access to competitors in the downstream market unless there are objective justifications for a refusal to supply.¹⁴⁵ He alleged that Mediaprint had a duty to provide access to this distribution network, the network being the essential facility.

The court in *Oscar Bronner* once again modified the requirements for the exceptional circumstances test and indicated that:

- a) the service in itself must be indispensable to carrying on that person's business, in as much as there is no actual or potential substitute in existence;
- b) the refusal of the service must be likely to eliminate all competition on the part of the person requesting the service; and
- c) such refusal cannot be objectively justified.¹⁴⁶

In casu, the court found that there were potential substitutes to the service available, as the complainant could have established the same resource. It was further held that other reasonable substitutes existed through which Mr Bronner could distribute his newspapers

¹⁴⁰ *Supra* fn 88.

¹⁴¹ *Ibid* at par 6.

¹⁴² *Ibid* at par 8.

¹⁴³ *Ibid* at par 6.

¹⁴⁴ *Supra* fn 101.

¹⁴⁵ *Ibid* at paras 41 and 42.

¹⁴⁶ *Supra* fn 88 at par 41.

into the market in order to compete and, therefore, the Mediaprint home's delivery system was not considered an essential facility.¹⁴⁷ In this matter, the complainant failed to establish the first requirement of the exceptional circumstances test, which resulted in an unsuccessful prosecution of the matter.¹⁴⁸

2.4.2.5 *IMS Health*

The four conditions as set out in the *Magill* matter were confirmed and expanded on in *IMS Health GmbH & Co KG v. NDC Health* (hereinafter "*IMS Health*").¹⁴⁹ It is important to note, at this stage, that the ECJ and the European Court of First Instance are not bound by their previous judgments.¹⁵⁰ This results in a certain degree of flexibility, but at the same time creates ambiguity and can place dominant firms with valuable intellectual property in a dangerous position.

Anticipated to create the necessary certainty, preliminary hearings¹⁵¹ in *IMS Health* considered the business's refusal to license. IMS Health was a supplier of marketing data to pharmaceutical and other healthcare companies.¹⁵² It owned intellectual property rights in respect of a certain database called the '1 860 Brick Structure'.¹⁵³ IMS Health has built a structure in 1 860 geographical areas or zones to arrange its reports on sales of medicines, which it then sold to the pharmaceutical companies in Germany in order for them to measure how effective their marketing efforts and strategies were in each geographical area.¹⁵⁴ By virtue of its success in the market, the bricks structure became the industry standard.¹⁵⁵ There was also a demand on the side of customers for pharmaceutical sales data to be collated in accordance with the bricks structure.¹⁵⁶

Competitors of IMS tried to enter the market for regional sales data services by using a different structure, but were unsuccessful in their efforts to do so.¹⁵⁷ The competitors then approached IMS Health with a request to make available the brick structure through

¹⁴⁷ *Ibid* at par 43.

¹⁴⁸ *Ibid* at par 47.

¹⁴⁹ *IMS Health GmbH & Co KG v. NDC Health* [2004] (C-418/01) ECR I-5039.

¹⁵⁰ Scmitz T (2006) 1.

¹⁵¹ *NDC Health GmbH v IMS Health: Interim measures* [2001] (2001/165/EC) OJEU L59/18.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid* at par 16.

¹⁵⁵ *Ibid* at par 141.

¹⁵⁶ *Ibid* at par 53.

¹⁵⁷ *Ibid* at par 6.

licences, but IMS refused to grant licences in respect of its copyright in the bricks structure.¹⁵⁸

Several issues were referred to the EC for determination, which turned on IMS Health's use of its copyright to prevent competitors from competing in the market.¹⁵⁹ As an interim measure, the EC compelled IMS Health to grant a licence to all firms which were already present in the market.¹⁶⁰ This resulted in an appeal lodged by IMS Health which ultimately resulted in the suspension of the Commission's decision.¹⁶¹ After further litigation, the Commission eventually withdrew its initial decision.¹⁶²

In April 2004, Advocate General Tizzano provided his opinion on criteria of the exceptional circumstances test.¹⁶³ He indicated that, in terms of Article 82 of the EU Treaty, an abuse will be present in the following circumstances:

- a) the use of the intangible asset is essential;
- b) the use must be for operating in a secondary market with the consequence that, by refusing access to the essential facility, the intellectual property right owner ultimately eliminate all competition in that market;
- c) the undertaking seeking the license must not intend only to duplicate the goods or services already offered on the secondary market by the owner of the intellectual property right but must intend to produce goods or services of a different nature which, although in competition with those of the owner of the right, answer specific consumer requirements not satisfied by the existing goods or services; and
- d) there must be no objective justification for the refusal to license.¹⁶⁴

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid* at par 28.

¹⁶⁰ *Ibid* at par 220.

¹⁶¹ *R IMS Health v Commission* [2001](T-184/01) ECR II-3193.

¹⁶² *P(R) NDC Health v IMS Health and Commission* [2002] (C-481/01) ECR I-3401.

¹⁶³ Opinion of Advocate General Tizzano.

¹⁶⁴ *Ibid* at par 66.

In his discussion of the meaning of ‘essential’ in the context of the essential facilities doctrine, Advocate General Tizzano listed the following factors as being determinative: they were:

- a) the level of participation by third parties in the development of the protected structure;
and
- b) the effort to be made by the third party wishing to gain access to the facility in conducting its own studies on facilities other than the protected facility.¹⁶⁵

A very important factor arising from the Advocate General’s opinion is the importance of the degree of user lock-in¹⁶⁶ in relation to the product or goods concerned. The first listed factor seems to suggest that firms can expose themselves to a bigger risk of compulsory licencing in situations where they work close together with customers in developing their own products and services and where such products or services were custom-made to cater for specific customer needs.¹⁶⁷ The second factor relates to the secondary market consideration.¹⁶⁸ In relation to intellectual property rights, the primary market consists of the physical instrument itself where the secondary market consists of the goods or services produced in relation to the actual use of the instrument.¹⁶⁹ Brand argues that this means Article 82 can in all likelihood be used by direct competitors to allow them to compete in the same market(s) as the intellectual property rights owner.¹⁷⁰

It is unclear what is meant with the requirement that a product must be of a ‘*different nature and answers specific consumer demand*’ as the opinion of Advocate Tizzano did not explain what was meant by this requirement.

In April 2004, the ECJ handed down its decision in this matter.¹⁷¹ The ECJ interpreted the case to read that the three cumulative conditions for access to essential facility to have been unduly refused, the refusal must be as follows:

¹⁶⁵ *Ibid* at par 86.

¹⁶⁶ Consumer “lock-in” refers to the situation where consumers are unable to switch to alternative goods due to cost or logistical difficulties. Consumers have, for example, no option but to purchase the certain goods from a particular supplier.

¹⁶⁷ *Supra* fn 84 at 922.

¹⁶⁸ *Ibid* at 923.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*.

¹⁷¹ *Supra* fn 149.

- a) the refusal must prevent the emergence of a new product for which there is a potential consumer demand;
- b) the refusal must not be justified by an objective consideration; and
- c) the refusal must exclude any or all competition or eliminate any or all competition in a secondary market.¹⁷²

The ECJ made it clear that there is a difference between the existence of intellectual property rights and the exercise of intellectual property rights. It noted that:

*“[a]ccording to settled case-law, the exclusive right of reproduction forms part of the owner’s rights, so that the refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position”.*¹⁷³

On the other hand, the exercise of an exclusive right by the owner may, in exceptional circumstances, constitute abusive conduct.¹⁷⁴ The ECJ stated that the ‘exceptional circumstances’ which had to be present before the refusal to grant a license could be considered to amount to an abuse of the intellectual property right holder’s dominant position under Article 82 were:

- a) the protected structure has to be indispensable;
- b) the undertaking requesting the licence must have intended to offer, in the market in question, new products or services not offered by the intellectual property owner and for which there was a potential consumer demand;
- c) the refusal must not be justified by objective considerations; and
- d) the refusal had to be such as to reserve to the copyright holder the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition in the market.¹⁷⁵

¹⁷² *Supra* fn 149 at par 52.

¹⁷³ *Supra* fn 149 at par 34.

¹⁷⁴ *Supra* fn 149 at par 50.

¹⁷⁵ *Supra* fn 149 at par 52.

2.4.2.6 Microsoft

Professor Anderman of the University of Essex, Department of Law, is of the view that whilst *IMS Health* entrenched the main considerations created by the *Magill* case in respect of the 'exceptional circumstances' test, the *Microsoft*¹⁷⁶ case seems to create a new paradigm for this category.¹⁷⁷ In September 1998, an American manufacturer of servers and server operating systems, called Sun Micro Systems Inc., requested Microsoft to supply information regarding the inter-operability of its Windows system.¹⁷⁸ The Windows system was designed and manufactured by Microsoft and it held copyright over this system and related products.

The information regarding inter-operability was required by Sun Micro Systems to enable its own operating system, called Solaris, to interconnect with the Windows system. In response, Microsoft stated that the requested information was already available to any developer of software on its Developer Network. Sun Micro Systems had apparently already bought 32 licenses from Microsoft's Network. In this same year Sun Micro Systems filed a complaint with the EC regarding Microsoft's refusal to make available the requested information.¹⁷⁹ This was the beginning of a protracted court battle between the two parties.

The EC, in applying a hybrid legal analysis, ruled in March 2004 that Microsoft infringed Article 82 of the EC Treaty in that it abused its dominant position.¹⁸⁰ In remedying the effect of Microsoft's abusive conduct, the Commission required Microsoft to make available the specifications pertaining to its client-server and its server-to-server communication protocols to any company which wanted to develop and install operating systems for its work group server.¹⁸¹

Microsoft subsequently approached the Court of First Instance, requesting either that the EC's decision be declared invalid or for the fine imposed on it to be reduced.¹⁸² The Court, with reference to established jurisprudence, although recognising that firms are in principle free to trade with whomever they want, such freedom of association may be restricted where a dominant competitor refuses to supply certain goods or services.¹⁸³ The Court held that, in

¹⁷⁶ *Supra* fn 80.

¹⁷⁷ Anderman S (2004) 9.

¹⁷⁸ *Supra* fn 80 at par 2.

¹⁷⁹ This complaint was brought under Article 3 of the European Commission Regulation 17/1962.

¹⁸⁰ Decision of Commission in *Microsoft* [2004] (COMP/C-3/37.792) ECR II-755 The Commission imposed a fine of more than 497 million euros on Microsoft.

¹⁸¹ *Ibid.*

¹⁸² *Supra* fn 80.

¹⁸³ *Ibid* at 336.

order for the refusal by the intellectual property rights holder to grant a licence to a third party to be seen as abusive, the action must meet the following conditions:

- a) the refusal must relate to a product or service indispensable to the exercise of a commercial activity in a neighbouring market;
- b) the refusal must be such as to exclude any effective competition on that market; and
- c) the refusal must prevent the appearance of a new product for which there is potential consumer demand.¹⁸⁴

Both *IMS Health* and *Microsoft* prominently featured the ‘aftermarket scenario’ as a requirement for the ‘exceptional circumstances test’, under which the EC is willing to limit the exercise of intellectual property.¹⁸⁵ In *Microsoft* the court found that the four-pronged test as set out in the *Magill/IMS Health* matters was satisfied, confirming the Commission’s finding that it was necessary for competing work group server operating systems to be reliably marketed so that these systems are able to interoperate with the Windows designs on an equal level with its operating systems.¹⁸⁶ Therefore, if all these conditions are met cumulatively, the refusal to grant a license can constitute an abuse of a dominant position, absent objective justifications.

The court overruled the argument advanced by Microsoft that its refusal to supply the information relating to interoperability was justified because its technology was protected by intellectual property rights.¹⁸⁷ Again referring to established case law, the court was of the view that Microsoft’s rationalisation for its conduct went against the principles established in the previous cases.¹⁸⁸ Microsoft also failed to prove that it would have been prejudiced in terms of the incentives-to-innovate principle, in the event that it had to disclose information regarding the interoperability of its systems.¹⁸⁹

¹⁸⁴ *Ibid* at 332.

¹⁸⁵ *Supra* fn 177 at 9.

¹⁸⁶ *Supra* fn 80 at par 299.

¹⁸⁷ *Ibid* at par 747.

¹⁸⁸ *Ibid* at par 712.

¹⁸⁹ *Ibid* at par 783.

2.5 Examples of South African competition law cases which dealt with abuse of a dominant position by an intellectual property rights holder

Where competition law and jurisprudence is concerned, the South African Competition Act is relatively new in comparison to other jurisdictions' competition laws.¹⁹⁰ South Africa has not yet had the same opportunity as countries such as the US and EU to test its competition law jurisprudence so extensively,¹⁹¹ but has, nevertheless, made great progress in this regard.

The question of when and in what circumstances the competition authorities should intervene when the intellectual property rights holder exercises his or her intellectual property rights in such a way that the conduct can be regarded as anti-competitive, can be aired by an analysis of foreign law and the existing few local cases.

The South African Competition Tribunal dealt with only a few cases involving anti-competitive conduct relating to intellectual property rights, which are discussed below. These cases are, unfortunately, not very instructive on how the South African competition authorities deal with intellectual property related abuse of dominance complaints. This is so because few of them have ended up before the Tribunal and, even then, they did not give rise to firm guidelines and principles because they were either settled,¹⁹² failed on technical grounds¹⁹³ or the complainants were not able to establish the basic elements of the alleged anti-competitive conduct.¹⁹⁴

2.5.1 *DW Integrators*

In the case of *DW Integrators CC and SAS Institute (Pty) Ltd* (hereinafter “*DW Integrators*”)¹⁹⁵ the question was asked when a refusal to license one’s intellectual property constitutes anti-competitive conduct that warranted intervention by the Competition Tribunal. The facts were briefly as follows: SAS Institute (Pty) Ltd (“SAS”), a large software firm with various valuable intellectual property rights on software programmes had an arrangement

¹⁹⁰ *Supra* fn 84 at 908.

¹⁹¹ *Ibid.*

¹⁹² *South Africa Competition Commission, Hazel Tau et al. v GlaxoSmithKline, Boehringer Ingelheim et al.*, Competition Commission, Statement of Complaint in Terms of Section 49B(2)(b) of the Competition Act 89 of 1998.

¹⁹³ *Ibid.*

¹⁹⁴ *DW Integrators CC v SAS Institute (Pty) Ltd* [1999] (14/IR/NOV99).

¹⁹⁵ *Ibid.*

with DW Integrators (“DWI”) in terms of which DWI was licensed to use SAS’ intellectual property rights in its business. This business entailed supporting other businesses which made use of the SAS software programmes. At some point in time, SAS refused to continue with its agreement with DWI and DWI decided to approach the Competition Tribunal for an order for interim relief. It was of the view that the refusal by SAS to license its intellectual property was anti-competitive. DWI’s argument was that through its actions it created an important sub-market and SAS’s refusal to continue to license its intellectual property was based on SAS’s plan to expand into this sub-market.¹⁹⁶

It is important to take note that SAS’s refusal to license its copyrights is not *per se* in contravention of the Competition Act. This is so because SAS, as the owner of the relevant intellectual property, is free, on the face of it, to abstain from licensing its copyright to others. In other words, the protection afforded to SAS by these rights provides it with the opportunity to exclude others using its intellectual property, provided that such a refusal does not amount to an abuse.

This matter was unfortunately not considered on its merits as the Competition Tribunal held that DWI failed to establish that SAS was a dominant firm.¹⁹⁷ Accordingly, there was no basis to examine the alleged abuse of dominance. If a firm is unable to prove that the respondent is dominant in a specific market then there can be no suggestion of an abuse of this dominant position.

The complainant, DWI, based its complaint on an alleged contravention of section 8(b) and section 8(c) of the Competition Act.¹⁹⁸ In order for DWI to have succeeded with its complaint, it had to first and foremost to prove the following:

- a) that SAS was dominant in a specific market relative to its intellectual property; and
- b) that SAS’s conduct amounted to an abuse of its dominant position (i.e. general exclusion or names exclusion which in this case was the refusal to supply access to an essential facility).¹⁹⁹

¹⁹⁶ *Ibid* at par 2.

¹⁹⁷ *Ibid* at par 32.

¹⁹⁸ *Ibid* at par 2.

¹⁹⁹ *Ibid* at par 24.

It is important to note that one can, however, not simply assume that SAS, as the intellectual property rights holder, is automatically dominant in the relevant market. The more substitutes available, the bigger the market becomes and the less likely it is for one firm to be dominant in the relevant market.²⁰⁰ Even if SAS was dominant in the relevant market, the competition authorities would have had to consider its actual conduct in relation to its dominant position in order to determine whether it abused this position. Dominance may be the result of superior business skills, superior goods or products or even because of some historical advances²⁰¹ and dominance on its own is not an offence in terms of competition law.

2.5.2 *Glaxo Wellcome*

The next case in which the Competition Tribunal was faced with scrutinising the interface between competition law and intellectual property law was in that of *Glaxo Wellcome*.²⁰² Once again, the scope for examining this issue was limited as the matter was taken on appeal due to procedural challenges²⁰³. The complainants in this matter operated in the downstream pharmaceutical wholesale and distribution, market whilst the respondents operated in the upstream manufacturing market for pharmaceutical products. The parties were considered to be in a vertical relationship with each other, as the complainants distributed and sold a significant amount of the respondent's products.

The complaint involved allegations of prohibited practices in terms of section 8 of the Competition Act. One of the core elements of the complaint was the transformation of a company called Druggist Distributors (Pty) Ltd from its former position as a wholesaler into a distributor, which acted on behalf of the respondent as its distribution agent. The Commission referred the complaint outside of the prescribed statutory time period, which meant that it was deemed to have issued a certificate of non-referral.²⁰⁴ This resulted in the complainants referring their complaint directly to the Tribunal.²⁰⁵ Based on an allegation that the complainants were attempting in its referral to rely on conduct not forming part of its original complaint, the respondents subsequently applied to the Tribunal for the striking out

²⁰⁰ *Ibid* at par 25.

²⁰¹ *United States v Grinnell Corp.*, 384 US 563 [1966].

²⁰² *National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Proprietary) Limited and Others* [2000] (68/IR/Jun00) ZACT 15.

²⁰³ *Supra* fn 99 at par 11.

²⁰⁴ Rule 19(4) of the Competition Commission Rules states that, “[i]f the Commission has not referred a complaint to the Tribunal, or issued a Notice of Non-referral, within the time allowed by sub-rule (2), or sub-rule (3) if different, the Commission will be deemed to have issued a Notice of Non-referral on the expiry of the relevant time period.”

²⁰⁵ Section 51(1) of the Competition Act permits a complainant to refer its complaint directly to the Tribunal should it not agree with the Commission's decision.

of several prayers forming part of the referral.²⁰⁶ These related to the prohibited practices under section 8(d) of the Competition Act, namely predatory pricing and section 8(a), namely excessive pricing.

The Tribunal ultimately struck out the paragraphs and prayers in the complaint relating to section 8(a) of the Competition Act, but, because, the Tribunal refused to strike out reference to section 8(b) of the Act, namely the refusal to grant access to an essential facility, the respondents took the matter on appeal to the CAC.²⁰⁷ Here, the judges drew a clear distinction between sections 8(c) and 8(d)(ii) of the Act as the two rule of reason provisions, and identified section 8(b) as the *per se* prohibition.²⁰⁸ The complaint was outlined in broad terms in the complaint referral and the complainants made out an argument that any act which amounts to a refusal to deal in terms of section 8(d)(ii), also fell within the realm of section 8(b) of the Act.²⁰⁹

From an economic perspective, the Tribunal did not distinguish between the application of section 8(b) and section 8(d)(ii). However, Hussain JA stressed that it does not make sense to apply this logic. He stated that:

“[t]here exists no language in the Act that supports the Tribunal’s approach that refusals to deal and denial of access to an essential facility “are often two sides of the same coin”.²¹⁰ On the Tribunal’s reasoning, an exclusionary act under section 8(d)(ii) could be justified, but precisely the same conduct under section 8(b) could not be defensible. An absurd result which could not have been intended by the legislature.”²¹¹

The CAC ultimately ruled that the Tribunal made a mistake by refusing to strike out the reference to the refusal to grant access to an essential facility from the complaint referral.²¹² *Glaxo Wellcome* is instructive on how the South African competition courts deal with the essential facility doctrine. Hussain JA was of the opinion that, in order to succeed with a complaint in terms of section 8(b), the particulars in the complaint referral had to be framed as follows:

²⁰⁶ *Supra* fn 99 at par 7.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* at par 51.

²⁰⁹ *Ibid* at par 54.

²¹⁰ *Ibid* at par 52.

²¹¹ *Ibid.*

²¹² *Ibid* at par 59.

- a) the dominant firm is refusing to grant the complainant access to an infrastructure or resource;
- b) the dominant firm and the complainant must be competitors;
- c) the infrastructure or resource must not reasonably be capable of being duplicated;
- d) without access to the infrastructure or resource, the complainant must not be able, on reasonable grounds, to provide goods or services to its customers without access to the infrastructure or resource; and
- e) it is economically feasible for the dominant firm to provide access to this infrastructure or resource to its competitors.²¹³

This test seems to resemble the one adopted in the *Oscar Bronner* matter although it does not stress the objective justification requirement. The reason for this is that, in the South African context, under section 8(b), such a refusal, if economically feasible to supply, is considered *per se* illegal and no justification exists.²¹⁴ Writer will elaborate on this below.

The complainants argued that pharmaceutical products are considered ‘resources’ in terms of the definition of an essential facility. The CAC, however, disagreed with this argument. In his judgment, Hussain JA held that the definition of a ‘resource’ was not meant to be construed so broadly as to include products together with goods and services, which it explicitly makes mention of.²¹⁵ Therefore ‘pharmaceutical products,’ in this case, were not regarded as ‘resources’ in order to meet the requirements of an ‘essential facility.’²¹⁶ The CAC further held that *‘the widening of the application and scope of the essential facilities doctrine can have harmful economic effects such as discouraging investment in infrastructure,’*²¹⁷ clearly indicating that the essential facility doctrine will be narrowly interpreted by South African adjudicators. By limiting section 8(b) to traditional infrastructure, such as ports, electricity grids, telecommunication networks, airports, pipelines, railway terminals and railways, the *Glaxo Wellcome* matter limited the scope of this (usually strong) prohibition substantially, and possibly excluding intellectual property rights from its scope of application. The impact of this is significant on whether the refusal to deal can be brought under Section 8(b) of the Competition Act.

²¹³ *Ibid* at par 57.

²¹⁴ *Ibid* at par 51.

²¹⁵ *Ibid* at par 53.

²¹⁶ *Ibid*.

²¹⁷ *Ibid* at par 54.

On the other hand, if ‘infrastructure’ or ‘resource’ was interpreted in broad terms so as to include any form of intellectual property, such as an infrastructure over which intellectual property is claimed, the alleged abusive conduct would be *per se* prohibited, resulting in no opportunity for the adjudicators to consider the effects (possibly pro-competitive) of the conduct.²¹⁸

The significance of this matter is that, not only did it provide an example of where the South African competition authorities had to deal with intellectual property related abuse of dominance issues, it also:

- a) clearly distinguished between the application of sections 8(b) and 8(d)(ii) of the Competition Act, the one being a *per se* prohibition and the other being a rule of reason prohibition; and
- b) provided guidance on how the South African competition authorities deal with the essential facility doctrine.

2.5.3 *Hazel Tau*

Another important matter, which involved the refusal to license intellectual property (pharmaceutical patents) was *Hazel Tau*.²¹⁹ This matter, unfortunately, did not end up before the Competition Tribunal for determination due to settlement being reached between the Competition Commission and the respondents.²²⁰ The Commission initiated complaints against GlaxoSmithKline (“GSK”) and Boehringer Ingelheim (“BI”) in 2002 after identical complaints were lodged by a number of complainants, which included a certain Ms. Hazel Tau and the Treatment Action Campaign (“TAC”).²²¹ After conducting an investigation into the allegations regarding abuse of a dominant position, the Competition Commission found that GSK and BI contravened the Competition Act. The firms were found to have abused their dominant positions in their respective anti-retroviral (ARV) markets.²²² It was found that they, in particular, engaged in the following restrictive practices:

- a) excessive pricing in contravention of section 8(a);

²¹⁸ *Supra* fn 84 at 912.

²¹⁹ *Supra* fn 192.

²²⁰ Treatment Action Campaign Newsletter.

²²¹ *Supra* fn 192.

²²² Nguyen TT (2010) 187.

- b) denied a competitor access to an essential facility in contravention of section 8 (b);
and
- c) engaged in an exclusionary act in contravention of section 8(c).²²³

The Commission referred the matter to the Competition Tribunal on the above basis. Subsequent to the Commission's finalising its investigation, the said companies approached the Commission with settlement proposals.²²⁴ Negotiations followed and this resulted in separate agreements being entered into between the Commission and GSK and between the Commission and BI, in terms of which the Commission agreed not to refer the matters to the Tribunal on condition that GSK and BI issued a total of at least seven licences for their patented anti-retroviral drugs to generic manufacturers which would permit the manufacture in and importation into South Africa of anti-retroviral medicine.²²⁵ Even though the matter did unfortunately not create any precedent for South Africa in terms of a decided case, the desired outcome was still reached (voluntary licencing as opposed to compulsory licencing).

²²³ *Ibid.*

²²⁴ *Ibid* at 188.

²²⁵ *Ibid.*

CHAPTER 3: ANALYSIS AND CONCLUSION

It is perceived that tension exists between intellectual property law and competition law because the mechanisms employed by each regime to stimulate innovation, ensure consumer welfare and, ultimately, foster the creation of new products and technologies, appear to be at odds.²²⁶

From the above discussion, it is clear that, under EU competition law, the refusal by a market dominant intellectual property holder to deal (in the form of a refusal to license their intellectual property to a third party competitor or the refusal to supply a competitor) may amount to a contravention of applicable treaties and national legislation.

The European Courts and the EC have provided guidance on the criteria applicable to decide when such contraventions have taken place. In February 2009, and subsequent to *Magill*, *IMS Health* and *Microsoft*, however, the European policy makers gave birth to ‘*The EC Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*,’ which is hoped further to clarify which circumstances will give rise to such abuse.²²⁷ This guideline provides that the EC will consider the refusal to license or the refusal to supply as an enforcement priority, if all the following circumstances are present: i) objective necessity of the input; ii) elimination of effective competition; and iii) consumer harm.²²⁸ It remains to be seen how these factors will be applied to the situation under discussion.

In South Africa, the relationship between intellectual property and competition law is yet to be considered to its full before the competition courts. Therefore, the decisions by the European Courts and European policy documents should provide guidance, albeit that there are material differences between the structure and nature of the European competition instruments and their South African counterparts. A cautious approach is therefore required when applying the principles of foreign jurisdictions relating to the refusal of a market dominant intellectual property rights holder to license its intellectual property rights. This, of course, is overshadowed by the inherent dangers in a strict application of the mechanisms contained in the Competition Act to prevent the abuse of dominance by a competitor. The

²²⁶ Competition Bureau Canada (2006).

²²⁷ Communication from the European Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009).

²²⁸ *Ibid.*

Competition Tribunal in *DW Integrators*²²⁹ held the following regarding the alleged refusal to license information delivery software:

*“[c]aution is particularly well-advised when dealing with the interface between antitrust and intellectual property. We concur with the much-cited decision in Atari Games Corporation v Nintendo of America Inc. ...which warns that the ‘danger of disturbing the complementary balance struck by Congress is great when a court is asked to preliminary enjoin conduct affecting patent and antitrust rights. A preliminary injunction entered into without a sufficient factual basis and findings, though intended to maintain the status quo, can offend the public policies embodied in both the patent and antitrust laws.”*²³⁰

What is clear, however, is that European decisions and policies suggest that the refusal to license intellectual property rights by a market dominant firm may contravene sections of the Competition Act.²³¹

Once appropriate circumstances, as discussed above, present themselves in a complaint before the competition authorities, they would have to engage in an assessment of which sections of the Competition Act would be best suited to regulate the situation. As indicated, the most appropriate candidates appear to be sections 8(b), 8(c) and 8(d)(ii) of the Competition Act. In this regard, writer reminds readers, in concurring with Hussain JA’s approach in the *Glaxo Wellcome*²³² matter, that a fundamental distinction exists between these sections and it is not clear whether they are appropriate for a determination as to whether a dominant intellectual property rights holder refuses to license its rights or supply goods on the basis of the existence of its legal monopoly.

The rule of reason test is applied in an assessment of a complaint brought in terms of section 8(d)(ii) of the Competition Act. As indicated above, the refusal to deal with a competitor can manifest itself in two ways: refusal to license and refusal to supply. A dominant firm can still escape liability if it can prove that its conduct had a positive, net effect on competition in the relevant market.²³³ In the context of a refusal to license, the difficulty with section 8(d)(ii) is that it expressly applies to ‘scarce goods’ only. It is doubtful whether the refusal to license a right would classify as a tangible product, in the first place, and,

²²⁹ *Supra* fn 194.

²³⁰ *Supra* fn 194 at para 18.

²³¹ *Supra* fn 194 at 181.

²³² *Supra* fn 99.

²³³ *Supra* fn 84.

secondly, even if this hurdle is overcome, the licensing of intellectual property rights will probably not be classified as 'scarce'. Licences could be plentiful or rare, in terms of the number of licences granted by the licensor, something which falls completely within its discretion. Because the licensor has the discretion to grant further licences, irrespective of how many have been granted, it is unlikely that licences will ever be regarded as a scarce.

On the other side of the coin, the refusal to supply goods (as a category of the refusal to deal), forming the subject matter of an intellectual property right, may be caught by the provisions of section 8(d)(ii). Therefore, the door remains open to our competition authorities to apply section 8(d)(ii) to the situation where an intellectual property rights holder refuses to supply goods and cites its intellectual property rights as the basis for such refusal.

Because of the difficulties with section 8(d)(ii) of the Competition Act, it is likely that a complaint against a dominant intellectual property right holder will present itself in the form of a complaint brought under section 8(b) of the Act. As opposed to section 8(d)(ii) inviting application of the rule of reason approach, the refusal to grant a competitor access to an essential facility is a *per se* prohibition. Therefore, the only evidence which is required to prove that a firm has contravened section 8(b) is the conduct itself.²³⁴ The dominant firm is not allowed to raise an efficiency defence.²³⁵

Currently, in terms of decided competition cases, 'goods and services', in the strict sense of those words, do not qualify as essential facilities in South Africa. Therefore, section 8(b) will not apply to the situation where an intellectual property rights owner refuses to supply goods or services on the basis of intellectual property rights attached to them. On the other hand, where access to infrastructure or a resource is blocked in the name of intellectual property rights, the situation could be different. A complaint on the basis of such facts, unfortunately, has not yet been considered by the South African competition authorities. Clarity, therefore, is wanting.

In any event, where a complaint based on section 8(b) is filed at the South African competition authorities, an extensive enquiry is usually conducted before an 'essential facility' is identified. Although these intensive investigations may appear to soften the apparent severity of the *per se* effect, one must remember that, if such a facility has been identified and a dominant competitor refused access to it, then the conduct is deemed to be anti-competitive. This approach does not allow for much flexibility as there is no

²³⁴ *Supra* fn 202.

²³⁵ *Supra* fn 38.

consideration of the effects of the conduct at all. Writer is of the view that this inflexibility is undesirable when it comes to section 8(b) abuses because such conduct may even have efficiency or pro-competitive. This is especially apt when one is dealing with an essential facility blocked on the basis of intellectual property rights, because the exercise of those rights is in the name of market stimulation and growth. It is a catch-22 situation. Ultimately, the strict test applied under section 8(b) of the Competition Act and the harsh consequences which ensue when intellectual property owners stand in breach of it, may dissuade firms from making investments into new and innovative products. Some form of judicial reform is necessary, because adjudicators are left to the mercy of the *per se* provisions, when the application of the rule of reason approach could, ultimately, have benefitted consumers in the case concerned.

A complaint against a market dominant intellectual property holder may also be assessed under section 8(c) of the Competition Act. Conduct falling within the boundaries of section 8(c) must be proved to be exclusionary before the competitive effect thereof will be considered. The onus to prove a section 8(c) complaint rests entirely with the complainant. Section 8(c) is seen as a 'catch-all' provision, enabling a complainant to file a complaint against a dominant firm as a result of any conduct regarded as being exclusionary. Where a dominant firm exercises its intellectual property rights in such a way (i.e. refuse to deal with a competitor) that it impedes or prevents a firm from entering into or expanding within a market, it seems likely that the prohibition contained in section 8(c) may be used to examine this conduct. Section 8(c), of course, involves a rule of reason approach, which, for reasons already mentioned, the writer would wish to see applied to the situation where an intellectual property rights holder refuses to license their intellectual property rights or refuses to supply goods or services on the basis of those rights. This suits the caution which should be taken by the regulators when dealing with intellectual property related competition issues, which may defeat the pro-competitive objectives rooted in intellectual property law and policy.

Due to a lack of South African jurisprudence on this specific subject, it remains to be seen how the competition authorities will deal with these issues and under which section(s) of the Competition Act the authorities will consider such conduct.

The Department of Trade and Industry ("the DTI"), is currently developing a policy for intellectual property protection. DTI Minister Rob Davies, responded to the Treatment Action Campaign's letter dated 20 July 2011 regarding further detail on the policy, as follows:

“[t]he Government is developing an intellectual property policy which will also address access to medicines and public health issues... The intellectual property policy will also establish a framework for legislative reform across all areas of intellectual property policy to ensure a consistent approach that contributes positively to the economic and social interest of South Africa. The policy will provide clarity as to which sections of the Patents Act 57 of 1978 and the Medicines Control and Related Substances Act 101 of 1965 require amendment to ensure that the flexibilities relating to access to medicine and health are incorporated into national legislation.”²³⁶

The South African Competition Commission has also been approached, as a sister department of the DTI, to engage with the above document and to provide the DTI with inputs and written contributions on specific chapters of the draft policy, as this policy will in future serve as a means to guide South Africa’s development and synchronise all its intellectual property policy positions.

It is clear that competition law places limitations on the autonomy of an intellectual property right holder to enforce his or her rights, when the enforcement of these rights amounts to any abuse of its monopoly position. As indicated, EU case law such as *Microsoft*²³⁷, and others, states that in certain circumstances the intellectual property right holder may be obliged to license his or her intellectual property right to a competitor. This obligation can be imposed upon a firm, where the refusal to license its intellectual property right(s), is regarded to be anti-competitive. In *Microsoft* the EU’s Court of Justice ruled that:

“although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position”, infringing the prohibition on such abuses.”²³⁸

Competition law can go a long way in harmonising the anti-competitive effects of the abusive exercise of certain intellectual property rights, but it is important that the right balance must be struck between intellectual property rights and competition law. Intellectual property rights are aimed at culturing and rewarding innovation. The protection of intellectual property rights is also necessary in order to prohibit competitors to “free-ride” on the rights of the intellectual

²³⁶ Fix the Patent Laws (2012).

²³⁷ *Supra* fn 80.

²³⁸ *Ibid.*

property rights holder. Protection of innovation is a major incentive to innovate, but, at the same time, if enforcing an intellectual property right limits competition, this, conversely, negatively impacts on innovation.²³⁹ Therefore, Competition law should only in exceptional circumstances prevail over intellectual property rights.

The great Galileo Galilei, when applying for patent application in 1593, stated that “...*it does not suit me that the invention, which is my property and as created by me with great effort and cost, should become the common property of just anyone...*”²⁴⁰ This mirrors the sentiment of each and every inventor, emphasising the importance of the protection of intellectual property rights.

Writer approves of and concludes with the words of MacQueen, in his discussion of the intervention from outside intellectual property law, “*in exceptional circumstances it is appropriate to bring competition considerations to bear upon intellectual property rights, since the principal economic justification for such rights is the public interest in competition by innovation and creative activity. Where intellectual property in fact stifles rather than facilitates such activity, control is legitimate and necessary. Further, the scope of intellectual property and its role in a market economy is always in need of supervision and review, to ensure that its goals continue to be achieved.*”²⁴¹

(Number of words: 17 787)

²³⁹ Norton Rose LLP (2012).

²⁴⁰ Forrester IS (2007).

²⁴¹ MacQueen HL (2005) 466.

BIBLIOGRAPHY

1. Acts

Anti-Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526

Competition Act 89 of 1998

Copyright Act 98 of 1978

Designs Act 195 of 1993

Patents Act 57 of 1978

Performers' Protection Act 11 of 1967

Plant Breeders' Rights Act 15 of 1976

Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7

Trade Marks Act 194 of 1993

2. Books

Du Plessis ED et al (2011) Adams & Adams Practitioner's Guide to Intellectual Property Law
Pretoria: LexisNexis

Klopper HB et al (2011) Law of intellectual property in South Africa Durban: LexisNexis
Butterworths

Nguyen TT (2010) Competition Law, Technology Transfer and the TRIPS agreement:
Implications for developing countries United Kingdom: Edward Elgar Publishing Limited

Nuehoff M et al (2006) A practical guide to the South African Competition Act Durban: LexisNexis Butterworths

Reyburn L (2005) Competition Law of South Africa Durban: Butterworths

3. Electronic Sources

American Bar Association (2010) “The federal antitrust guidelines for the licensing of intellectual property: origins and applications” - Chicago, Illinois, American Bar Association, Section of Antitrust Law <<http://www.justice.gov/atr/public/guidelines/0558.htm>> (accessed 18 July 2012)

Apostolidis A (2012) “Intellectual Property and Competition Law: The challenge between IP and Competition Law” <<http://ipcompetitionlaw.iblog.co.za>> (accessed 13 March 2012)

Author and publication date unknown “South African Competition Law” <<http://www.southafrica.info/business/investing/regulations/competition-policy.htm>> (accessed 6 November 2012)

Boshoff WH (2010) “Antitrust market definition: rationale, challenges and opportunities in South African competition policy” <<http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conference/Session-4B/Boshoff-Market-Definition.pdf>> (accessed 5 September 2012)

Brandenburger R (2011) “Promoting Innovation through Competition” - Reporting on 2nd BRICS International Competition Conference held at Beijing <<http://www.justice.gov/atr/public/speeches/279093.pdf>> (accessed 13 March 2012)

Communication from the European Commission (2009) “Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT)> (accessed 11 December 2012)

Competition Bureau Canada, (2006) “The Interface between Competition Law and Intellectual Property Law Report” <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02285.html>> (accessed on 6 November 2012)

Correa C (2007) “Intellectual Property and Competition Law: Exploration of some issues of relevance to developing countries” - ICTSD IPRs and Sustainable Development Programme Issue Paper no. 21, International Centre for Trade and Sustainable Development, Geneva, Switzerland <<http://ictsd.org/i/publications/11376/>> (accessed 18 April 2012)

Department of Trade and Industry (1997) “Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development” <<http://www.compcom.co.za/assets/Files/ProposedGuidelinesforCompetitionPolicy.htm>> (accessed 17 August 2012)

Derclaye E (2003) “Abuse of dominant position and intellectual property rights: A suggestion to reconcile the community courts’ case law” - World Competition Law and Economics Review <http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=estelle_derclaye&sei> (accessed 12 April 2012)

Dube Cornelius, (June 2008), p 1, ‘*Intellectual Property Rights And Competition Policy*,’ CUTS Centre for Competition, Investment & Economics Regulation, <<http://www.cuts-international.org/pdf/viewpointpaper-IPRs-CompPolicy.pdf>> (accessed on 17 July 2012)

Edward Nathan Sonnenberg Attorneys (2012) “Doing business in South Africa” <<http://www.ens.co.za/Doing%20Business%20in%20SA.pdf>> (accessed 30 October 2012)

Hodge J et al (2009) “Public Interest Provisions in the South African Competition Act- a Critical Review”- paper presented at the South African Competition Commission, Pretoria <<http://www.compcom.co.za/presentations-third-annual-competition-conference>> (accessed 1 December 2012)

Fix the Patent Laws (2012) “South Africa’s Intellectual Property Policy: process for public consultation?” <http://www.fixthepatentlaws.org/?p=116#_ftn3> (accessed on 19 November 2012)

Hlatshwayo N (2008) "The Challenges of Intellectual Property Protection and Competition Enforcement: An Analysis of the Microsoft Decisions (US and EU) and their Implications for South African intellectual property and Competition Law" - Journal of Information, Law & Technology (JILT) <http://go.warwick.ac.uk/jilt/2008_2/hlatshwayo> (accessed on 13 March 2012)

Idris K (2003) "Intellectual Property – a Powerful Economic Tool"
<http://www.wipo.int/freepublications/en/intproperty/888/wipo_pub_888_1.pdf> (accessed 11 November 2012)

Korah V (2005) "The Interface between Intellectual Property Rights and Competition in Developed Countries" <www.law.ed.ac.uk/ahrc/script-ed/vol2-4/korah.asp> (accessed 14 March 2012)

Lewis D (2002) "The Role of Public Interest in Merger Evaluation"
<<http://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf>> (accessed 22 August 2012)

Lowe P (2005) "Intellectual Property: How Special is it for the Purposes of Competition Law Enforcement?" <<http://www.eui.eu/RSCAS/Research/Competition/2005/200510-CompLowe.pdf>> (accessed 14 March 2012)

MacQueen HL, (2005) "*Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law*" 2:4 SCRIPTed
<<http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/hlm.asp>> (accessed 11 November 2012)

Maskus KE and Lahouel, M (1999) "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement"
<http://m.iatp.org/files/Competition_Policy_and_Intellectual_Property_R.htm> (accessed 11 November 2012)

Norton Rose LLP (2012), "Intellectual property rights and technology: the 'smartphone' wars"
<<http://www.lexology.com/library/detail.aspx?q=97803e37-acf9-47e5-896b-bcf3d30afbfc>>
(accessed on 10 November 2012)

Opi BS (2001) "The application of the essential facilities doctrine to intellectual property licensing in the European Union and the United States: are intellectual property rights still

sacrosanct?” 11 Fordham Intellectual Property, Media and Entertainment Law Journal 423
<<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1214&context=iplj>> (accessed 2
December 2012)

Opinion of Advocate General Tizzano, delivered on 2 October, 2003 and accessible from
<<http://curia.europa.eu/juris/recherche.jsf?cid=765122>> (accessed 19 August 2012)

South Africa Competition Commission, Hazel Tau et al. v GlaxoSmithKline, Boehringer
Ingelheim et al., Competition Commission, Statement of Complaint in Terms of Section
49B(2)(b) of the Competition Act 89 of 1998 - available at
<<http://www.tac.org.za/Documents/>> (access 21 September 2012)

Organisation for Economic Co-operation and Development (2003) “Competition Law and
Policy in South Africa, an OECD Peer Review”
<<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf>>
(accessed 16 August 2012)

Pham A (2008) “Competition Law and Intellectual Property Rights: Controlling Abuse or
Abusing Control” <http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf> (accessed
11 October 2012)

Rakhudu M (2007) “Compulsory Licensing of Intellectual Property rights in pharmaceutical
products: what ground for competition law”
<[http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/June-07-
Newsletter-27.pdf](http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/June-07-Newsletter-27.pdf)> (accessed 11 August 2012)

Scmitz T (2006) “Important decisions of the European Court of Justice”
<<http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-1.htm>>
(accessed 1 December 2012)

Treatment Action Campaign Newsletter TAC Newsletter dated 10 December 2003 and
available at <http://www.tac.org.za/newsletter/2003/ns10_12_2003.htm> (accessed 21
September 2012)

UNAIDS (2011) “Doha +10 TRIPS Flexibilities and access to antiretroviral therapy: Lessons
from the past, opportunities for the future

<http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/JC2260_DOHA+10TRIPS_en.pdf> (accessed 15 September 2012)

Webber Wentzel Bowens Attorneys (2006) “Trends in South African Competition Law”
<<http://www.roylaw.co.za/home/article/trends-in-south-african-competition-law/pageid/competition-law>> (accessed 16 August 2012)

World Intellectual Property Organisation (2004) “WIPO Intellectual Property Handbook: Policy, Law and Use”
<http://www.wipo.int/freepublications/en/general/catalog/wipo_pub_catalog_2011.pdf>
(accessed 15 August 2012)

World Intellectual Property Organization Website – Small and Medium Size Enterprise Division, ‘Limitations and exceptions to patent rights,’
<http://www.wipo.int/sme/en/documents/ip_pharma.html> (accessed on 1 December 2012)

4. Journals

Brand J “Intellectual Property and the abuse of dominant position in South African competition law” (2005) 122 South African Law Journal 927

Van Aswegen “The Right to exclude others from using claimed intellectual property: a perspective from competition law” (2003) 14 Stellenbosch Law Review 115

Forrester, IS (2007) European Competition Law Annual 59 (as cited in Lehmann, M (1989) – “Property and Intellectual Property – Property Rights and Restrictions on Competition in Furtherance of Competition” (1989) 20 International Review of Intellectual Property and Competition Law 1 at 8

5. Official Notices

European Commission Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector-Framework dated 22 August 1998, published in Official Journal of the European Community C265/2 and available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:c:1998:265:0002:0028:en:PDF>> (accessed 23 July 2012)

6. Government Publications

South Africa. Department of Trade and Industry (2001), The Competition Act, 1998 (Act 89 of 1998) - Determination of Thresholds. (Proclamation no. 253, 2001) Government Gazette 22025:174, February 1 (as amended by Proclamation no. 562, 2001 in Government Gazette 22128:4, March 9

7. Cases

AB Volvo v Erik Veng (UK) Ltd C-238/87 [1988] ECR 6211

American Soda Ash Corporation and Another v Competition Commission of South Africa and Others 12/CAC/DEC01 [2002] ZACAC 5

Decision of Commission in Microsoft [2004] (COMP/C-3/37.792) ECR II-755

DW Integrators CC v SAS Institute (Pty) Ltd [1999] (14/IR/NOV99) – available at www.saflii.org/za/cases/ZACT/2000/16.rtf (accessed 23 September 2012)

Eastman Kodak Co. v. Image Technical Servs., Inc. 504 US 451 (1992)

Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers (Proprietary) Limited and Others [2002] (15/CAC/Feb02) ZACAC 3

IMS Health GmbH & Co KG v. NDC Health [2004] (C-418/01) ECR I-5039

Microsoft Corp. v Commission of the European Communities [2007] (T-201/04) ECR II-3601

Microsoft Corp. v Commission of the European Communities 410 US 366 (1973)

Oscar Bronner GmbH & Co KG v Mediaprint Zeinungs-und Zeitschriftenverslag GmbH & Co KG C-7/97 [1998] ECR I-7791

National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome [2000] (68/IR/Jun00) ZACT 15

NDC Health GmbH v IMS Health: Interim measures [2001] (2001/165/EC) OJEU L59/18

P(R) NDC Health v IMS Health and Commission [2002] (C-481/01) ECR I-3401

Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v. Commission C-241/92 and 242/92 [1995] ECR I-743

R IMS Health v Commission [2001] (T-184/01) ECR II-3193

South Africa Competition Commission, Hazel Tau et al. v GlaxoSmithKline, Boehringer Ingelheim et al., Competition Commission, Statement of Complaint in Terms of Section 49B(2) of the Competition Act 89 of 1998 - available at: <<http://www.tac.org.za/Documents/>> (access 21 September 2012)

The Competition Commission v Telkom 11/CR/Feb04 (accessible at <http://www.comtrib.co.za>)

United Brands Co & United Brands Continental BV v Commission Case 27/76 [1978] ECR 207

United States v Grinnell Corp., 384 US 563 (1966)

United States v Terminal Railroad Association of St Louis 224 US 383 (1912)

8. Abbreviations

EC – European Community

ECLA – European Competition Law Annual

ECR – European Court Reports

EU – European Union

GG – Government Gazette

GN – General Notice

OJEC - Official Journal of the European Community

OJEU – Official Journal of the European Union (former OJEC)

SALJ – South African Law Journal

SLR - Stellenbosch Law Review

US – United States

ZACAC – South Africa: Competition Appeal Court

ZACT – South Africa: Competition Tribunal