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Access to Copyrighted Databases Under European Competition Law

How Can Abuse of a Dominant Position Lead to Compulsory Licensing of Copyrightable Databases?

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1 Introduction

1.1 Topic and Research Question

In the recent years most types of services have been moving more and more into the digital realm and online presence and the possibility to offer ones services digitally has becoming more necessary in order for businesses to survive and thrive. At the same time we have seen the rise of a few large actors that have managed to position themselves in the markets in such a way that any other service providers are forced to work within their platform in order to be able to reach the customer base they want. These are, for example, the large social media platforms, and the large online marketplaces such as Facebook, Twitter, and Amazon along with others.
In order to function within those large actors‘ environments the smaller parties need access to codes and databases. This is something that puts the large actors at a significant competitive advantage, as they are able to, in theory at least, pick and choose who they want to see succeed and who they want to shut out. They would be able to give their own sub-entities or the businesses that they have a connection to preferential treatment, while shutting out those that they do not approve of. Such behavior would not be encouraging for the free and open market, and could in the long run be a bad deal for the consumer.
On the other side of the coin we have the protection of intellectual property rights. Those codes and databases that the smaller parties would need access to can presumably be protected by intellectual property laws and different forms of intellectual property rights. These would give the holder of such rights the private right to enjoy such codes and databases, and control who gets access to such information.
It is therefore the intention of this paper to look at how the courts have, and are likely to in the future, weighed these two opposite sides of the rights: i.e. the competition law and the right of the consumer and smaller parties in the markets for a fair competition environment, against the intellectual property rights of the larger parties, and if, and in which cases, courts are likely to issue orders for compulsory licenses. The research question is therefore as follows:

How is article 102 of the Treaty on the Functioning of the European Union and its' concept of abuse of a dominant position likely to be interpreted by European courts when it comes to access to copyrightable online databases, and is the proposed Digital Markets Act likely to alter the course set in previous precedents?

1.2 Research Method and Sources

In order to answer the question we will be looking into a few different sources. The research will mostly be centered around the primary sources, i.e. the law and the court decisions, but we will also be using some secondary sources in order to further deepen the understanding of the subject matter. The paper will therefore be relying on qualitative empirical research in order to reach a conclusion, taking the letter of the law and the previous decisions of the courts and reaching a conclusion based on patterns and rules that appear in those sources.

It is the view of the author that the best source in order to answer the question at hand is earlier decision by the European courts on the subject matter. The research question directly asks how the courts have, and are likely to, rule in these matters, and I therefore believe that the primary sources are the best ones to work from when answering that part of the question.

1.3 Outline

The research question has a few different parts that need to be looked at separately before they can be put together for a cohesive answer. The paper will therefore start by looking at each individual component before putting the different parts together in the end for what will hopefully be a complete answer to the question.

First we will look into the term "copyrightable databases." That is necessary in order to know what exactly we are trying to ascertain from the question and what we need to look into as we dive deeper into the law and court decisions.

Secondly we will take a look at the applicable law, namely article 102 of the Treaty on the Functioning of the European Union. We will take a deep dive into what conditions are set within the article and when it applies. A complete understanding of the article and its' different parts is necessary to be able to fully answer the question. This will be done by looking at the text of the article, and how the courts have interpreted the different terms therein, citing previous decisions where applicable, and text analysis of both those decisions and the article itself.

In chapter four we will look at the case law that is on point when it comes to the research question. We'll look into a few of the most applicable cases, what rules the court used and the outcome of those. That should give us an idea on how the courts have looked at these issues in the past, and how they are likely to interpret the law in the future.

After that we look into the proposed regulation on contestable and fair markets in the digital sector, or the Digital Markets Act. The proposed regulation is set to introduce clearer rules on the competition environment in the digital markets, and touches on the exact issues raised in this thesis. We'll look into how the proposed regulation aims at doing that, what and who the gatekeepers are according to the regulation, and how it is likely to effect the markets.

Finally we will summarize everything previously mentioned and piece it together for a final conclusion of the thesis, and attempt to answer the question in a complete and cohesive manner. We'll take all the information and compress it into a relatively short and concise summary that should answer the previously stated research question, and then end with a few thoughts from the author on what this all means.

2 Copyrightable Databases

In order to answer the research question we first need to establish what exactly falls within the scope of the term "copyrightable databases". The Cambridge dictionary defines a *database* as "a large amount of information stored in a computer system in such a way that it can be easily looked at or changed."[1] So in order for something to qualify as a database it needs to fulfill three main criteria. It needs to include a large amount of information, be stored in a computer based system, and it needs to be stored in such a way that it can be searched, edited, filtered and/or manipulated in such a way that there is added value to having the information within the system rather than outside of it.

Even though there are three criteria that the dictionary definition of a database notes, they are most definitely not overly restrictive with regards to what can be seen as falling under the term. Two out of the three criteria are quite open for interpretation, namely: what is a *large amount* of information, and when can it be *"easily looked at or changed"*. What one considers to be a large amount of information can vary drastically, all from 5-10 sets of datapoints up to the endless. What one considers to be an easy viewing or editing can also vary from person to person.

While the term "computer system" is not open to as much of an interpretation there are many ways that a computer system can materialize. All the way from excel, that most readers of this paper would be familiar with, to specially written, advanced systems specifically created to handle a specific type of data. Therefore a computer database may be everything from the members register of a small club, set up in Microsoft Excel for easier overview, to the largest collection of datapoints for a space program scanning the sky every night of the year.

Computer systems and software are commonly considered to be protected by copyright. This protection would, for example, cover software codes and the expression of the idea of the program that is protected.[2] This is an important distinction as the idea itself is not copyright protected. It is only when it has been formalized and fixed in some media that it gains the protection. It is, however, not necessary under European law to register the copyrightable work for it to gain protection, but ideas as such are not copyrightable.[3] This means that while a computer program would be copyright protected, the immaterialized or underlying idea would not be. This is due to the fact that if one were able to copyright an idea the protection could become so broad that it could, in theory, hinder all creation within the field in question.

Copyright is in its' essence a protection of creative works. One could in certain cases liken software code to a literary work. Both are a string of letters and symbols that create a certain

[1] Cambridge University Press. Definition of database from the Cambridge Advanced Learner's Dictionary & Thesaurus <https://dictionary.cambridge.org/dictionary/english/database> last accessed 13 november 2021.

[2] The World Intellectual Property Organization. Copyright Protection of Computer Software <https://www.wipo.int/copyright/en/activities/software.html> last accessed 13 november 2021.

[3] Aplin T., Cornish, W. and Llewelyn, D., Intellectual Property: Patents, Copyright, Trade Marks & Allied Rights (published by Sweet & Maxwell and Thompson Reuters 2013). Page 435.

meaning to the one looking at it, as long as the person (or, as often in the case of software code: the machine) knows how to read it. The thing being expressed needs to be, in some way, novel, either the underlying idea itself, or the way it is expressed. This means that for example basic lines of software code are not copyrightable, as this would mean that one could copyright the code lines for basic functions, which would in turn stop anyone without a copyright license to use that specific function, creating a monopoly in the markets and hindering creation. Therefore, like other literary works, where single words or sentences cannot be copyrighted (except in certain extreme cases), single lines or strings of software code does not qualify for protection, but the larger idea and execution as a whole does. It does not need to be the entire code for the entire program, but it needs to be a collection of lines or strings that together express a novel idea or represent the new way of materializing an idea.

From what has been mentioned above on might extrapolate that in order to be copyrightable the database in question would need to be a larger one and be, in some way, novel. The setup of a members registry for a club in an excel file would therefore not be copyright protected unless there was a new way of communicating that data to the viewer. It would, most likely, need to be a large dataset, organized and exhibited in a way that adds something. Even then the contents of the database would most likely not be protected as the database itself, but rather the underlying way of showing the data, i.e. the setup and the underlying code.

2.1 Definition of a Copyrightable Database for the Purpose of this Paper

Judging from what has been stated above there are a few things to consider when determining what exactly falls under the term *copyrightable database*. First of all it needs to fulfill the definition of a database. Although not a legal definition per say, one can and should look at the meaning of words outside of the law when they are not specifically defined in the relevant legal text.[4] In these cases one could look to the established dictionaries as we have done here and found out that a database is: a) a set of information, b) stored in a computer system, and c) set up in such a way that it can be easily searched or edited.[5]

Once we have determined what a database is we need to find out if it is a protected intellectual work, either by copyright or if it qualifies for protection under any other type of intellectual property, such as patenting or as a design. While some elements of the layout and the visual design of the database might qualify for a protection as a registered design[6] that would not cover the elements we are interested in for the purposes of this paper, that is, the underlying code and execution.

When looking into the question of copyright versus patent it has been widely acknowledged that copyright is what covers computer programs. Patents may grant protection for new

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[4] Róbert R. Spanó. Túlkun Lagaákvæða. (Published by Bókaútgáfan Codex 2007). Page 59.25

[5] Cambridge University Press. Definition of database from the Cambridge Advanced Learner's Dictionary & Thesaurus <https://dictionary.cambridge.org/dictionary/english/database> last accessed 13 November 2021.

[6] Patentstyret. Programvare og apper [2018] <https://www.patentstyret.no/tjenester/patent/programvare-og-apper/> last accessed 28 November 2021.

inventions using computer programs, but the programs themselves would be covered by copyright.[7] As discussed above the database itself could be copyrightable if there is something novel about the way it is set up or how one works within it. The compilation of data can in some instances be protected as well.

Article 7 of the Directive on the legal protection of databases (the Database directive)[8] puts forth protection of original databases. It also states that non-original databases can be protected in the same way if there was a substantial investment in creating, compiling or verifying the data.[9] Therefore any database that the creator has had to substantially invest in creating, be it time or money, is protected under the law, be it original or non-original work. The contents of databases therefore enjoy a somewhat wider protection under the law than the average copyrightable work. It is worth noting that the protection given under the Database directive is not, strictly speaking, copyright, but a sui generis right. Sui generis is a term meaning unique or different from others,[10] meaning that it is closely related to copyright, but does not fulfill all the criteria needed to gain traditional copyright protection. For the sake of simplicity we will include the sui generis right under copyright going forward in this paper, but it is worth keeping in mind that it is a different, but closely related, type of protection.

It is also possible that the underlying code for the system running the database could be protected by copyright. We will therefore, when referencing copyrightable databases in this thesis in reference to the research question be referencing both the copyrightable elements in the design of the database itself and the underlying code.

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[7] The World Intellectual Property Organization. Copyright Protection of Computer Software <https://www.wipo.int/copyright/en/activities/software.html> last accessed 13 November 2021.

[8] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

[9] The European Commission. Protection of Databases [2021] <https://digital-strategy.ec.europa.eu/en/policies/protection-databases> Last accessed 13 November 2021.

[10] Páll Sigurðsson. Lögfræðiorðabók með skýringum (Published by Bókaútgáfan Codex, 2008) Page 424.

3 Article 102 of the Treaty on the Functioning of the European Union

In order to answer the research question we do also need to take a look at how European competition law is interpreted when it comes to the concept of abuse of a dominant position. It is necessary to understand what the prerequisites are for article 102 of the TFEU to be applicable and how different parts of it are read.

The backbone of EU competition law can be found in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Article 101 focuses on agreements between undertakings and concerted practices that may have as their object or effect the distortion or exclusion of competition. Article 101 therefore requires the action of more than one undertaking for it to apply. [11] In this paper, however, our focus will be on article 102, which usually covers the actions of a single undertaking, although the actions of more parties can fall under it. For article 102 to apply there are a few conditions that need to be met.

3.1.1 Undertaking

Firstly the action must be by an undertaking. The ECJ definition most commonly used today comes from Case 41/90, Höfner and Eisner v. Macrotron (hereinafter Höfner). In paragraph 21 of the judgement an undertaking is defined as "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".[12] An entity can be either a single company or a group of company connected by ownership.[13] As such, a group of companies connected by ownership in a vertical position (mother-/daughter companies) or horizontally (sister companies) could be considered a single entity. This can become important when it comes to determining whether article 101 or article 102 of the TFEU applies, as 101 only applies to actions taken by more than one undertaking, while 102 can encompass actions taken by single undertakings without the involvement of others.

Secondly, the entity needs to be engaged in an economic activity. Economic activity has been characterized as "any activity consisting in offering goods and services on a given market."[14] Therefore the undertaking needs to be actively participating in the markets and offer services or goods for sale, not simply purchasing goods to use for a purely social purpose. As such a group of companies responsible for buying all equipment and supplies for the Spanish hospital systems were deemed to not be engaged in an economic activity when fulfilling their role, even with the great purchase power that came with it. The reason was that they were not re-selling the equipment on the free market, but distributing it throughout the Spanish hospital systems as

[11] Bailey, David & Wish, Richard. Competition Law (Published by Oxford University Press, Ninth Edition, 2018). Pages 101-102

[12] Case 41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH. Paragraph 21.

[13] Joined cases 56 and 58-64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community.

[14] Joined Cases C-180/98 etc., Pavlov and Others v Stichting Pensioenfonds Medische Specialisten. Paragraph 75.

a part of a governmental function.[15] Therefore any party only operating within non-economic boundaries will not be considered an undertaking. It is however worth noting that a government entity can be considered an undertaking if it is offering goods or services on the market, be it the open market in a larger sense, or a limited, niche market.

The legal status of the company and its' funding sources should not be a determining factor when it comes to determining whether it is an undertaking or not. According to the wording from Höfner quoted above, any party, engaging in economic activity, can be considered an undertaking. It then does not matter if it is a publicly traded company, a group of companies, a small family owned company or a sole proprietorship. As long as the other conditions are fulfilled anyone offering goods and services on the market will be considered an undertaking.

So in conclusion an undertaking is an individual, an entity, or a group of entities offering goods or services on the market in an economic capacity.

3.1.2 Dominant Position

In order for article 102 to apply to the undertaking in question it needs to be in a dominant position in the market it operates on. Such a dominant position has been seen as being achieved in one of two ways. The first one is when an undertaking has achieved a status in the relevant market where it can move independently of its' competitors and consumers without it effecting its' market share or profits.[16] It could, for example raise the prices of its' products while simultaneously lowering the standards to which the product is manufactured, thereby increasing its' profits while short changing its' customers. A company in a strong dominant position could do so without losing any noticeable amount of business, and therefore increase its' profits, further strengthening its position in the market and excluding any potential competition.

The second one is by looking into the market share of the company. A company with less than a 40% market share would usually not be considered a dominant party, while one with a market share between 40 and 50% share could, under the right circumstances be considered dominant. Most often when a company has over 50% of the market share, it is considered very likely that it is in a dominant position, and can therefore be presumed to have a dominant position.[17] When an undertaking has such a high market share it is extremely likely that its' sheer economic power over the market allows it to act in a way that it couldn't were it a smaller undertaking in the same market.

A market share of 70-80% is in the same way seen as a clear indication of a dominant position.[18] At that stage no competing party has any realistic possibility of challenging the dominant company and compete for its consumers.

[15] Case T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities

[16] Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities.

[17] Case 62/86, AKZO Chemie BV v Commission of the European Communities. Paragraph 60.

[18] Case T-30/89, Hilti AG v Commission of the European Communities. Paragraph 92

While a market share around 80% can just about always be seen as a dominant position more of the borderline cases would come into question where an undertaking has under a 40-50% market share. The makeup of the relevant market would then need to be looked at. If it is a closed and stable market with only a few competing undertakings, anything under a 50% market share would most likely be deemed as not being a dominant position. However, in a larger, more volatile market with a large number of competitors, and a low bar for entry, someone enjoying a market share as low as 30-40% could in some extreme cases be seen as holding a dominant position in the market. We would then need to take a look at a combination of the two tests, that is, market share and how the actions of the possibly dominant undertaking affect the market, their client base, and other undertakings on it. If their decision to raise prices for example leads others to follow, or induces no change in market shares, the undertaking is most likely in a dominant position, even though they may hold as low as 30-40% market share.[19]

A factor that is probably more important than any other single thing in determining whether an undertaking does enjoy a dominant position in the market is how the relevant market is defined. By defining the market broadly one may find that no one undertaking can be seen as being dominant. On the other hand, by defining the market too narrowly, just about any undertaking can be made to look like they have a dominant position in the market.

When defining the relevant market one will mostly look at two main factors. The product market, and the geographical market. When looking into the product market one must strike a balance between going too wide and too narrow. If for example we would need to determine whether a company selling tulips is competing with all other undertakings dealing in flowers, house plants, and their accessories, we are unlikely to find any dominance there. If we do, however, define the relevant market as containing only those undertakings that sell tulips grown in the northern part of the Netherlands one might quickly find a dominant position. The most likely market to be relevant here would be other companies selling offcut flowers, such as tulips, roses and chrysanths a more fair interpretation of the relevant market might be reached.

One scale that is often used to determine the relevant market would be to look at whether the products can serve as replacements for each other, and to what degree. For anyone looking to buy a bouquet of roses tulips may not be a perfect substitution, but in a mixed bouquet they might be seen as a suitable addition or substitution. This determination is demonstrated in the Commission Notice on the definition of relevant markets, Paragraph 7. There the relevant product market is defined as comprising of "*all those products and/or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products characteristics, their prices and their intended use*."[20] Judging from the definition above we could therefore determine that the tulips were entirely replaceable by tulips grown in other parts

[19] Bailey, David & Wish, Richard. Competition Law (Published by Oxford University Press, Ninth Edition, 2018). Pages 190-191.

[20] Commission Notice on the definition of relevant market for the purposes of Community competition law. Paragraph 7.

of the world, partially replaceable by the roses and other offcut flowers, but in a lesser degree by green houseplants, and not at all by accessories, such as pots and vases. Given that the prices are not too different between the tulips and the other offcut flowers we could thereby determine that the relevant product market would be for offcut flowers intended for bouquets.

The relevant geographic market is the second part of the criteria for determining the relevant market in order to find out whether an undertaking holds a dominant position. This determination can, like the determination of the relevant product market, be instrumental in determining whether a company holds a dominant position, and like it one can go into extremes in both directions. One may determine the relevant market to be the entire European Union, along with the European Economic Area, or in the other direction one could determine the relevant market as being a single state in Germany. According to paragraph 8 of the Commission Notice mentioned above the relevant geographical market would be the market where an undertaking is offering its goods or services, where the competition conditions are alike enough to be considered a single area, and are different enough from the neighboring areas to differentiate them.[21]

In conclusion one can determine if a dominant position can mostly be found by looking at the market share in the relevant market, both geographical and product market. Usually when an undertaking holds a market share of over 50-70% in a particular product market within a specific geographical area, they can be seen as enjoying a dominant position. However, depending on the market, a lower market share can also mean a dominant position. In those cases we need to look into the market itself. Is it a small market with high entry barriers, or is it a larger market with a low bar for entrance, and therefore many smaller competitors? In that case the behavior of the market, both undertakings and customers, in relation to the acts of the party in question can give an idea of whether that undertaking enjoys such a dominant position.

3.1.3 Trade Between Member states

In order for the TFEU to come into effect in any competition law case the case must affect, or have the potential to affect, trade between member states. Usually it is not required that any effect on trade between member states is shown, but it is enough that the potential for such an effect is present. That can, for example, be visible in cases where an undertaking has business in multiple member states, or is involved in import and export between member states. Such an effect may also be possible when an undertaking has complete covering of a single member state, even though it does not officially reach outside of that state. It is enough that it is probable that a certain behavior may have an: "influence, direct or indirect, actual or potential, on the pattern of trade between member states."[22]

[21] Commission Notice on the definition of relevant market for the purposes of Community competition law. Paragraph 8.

[22] Case 56/65, Société Technique Minére (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)

This part of the article is extremely important to fulfill if one wants to apply article 102 of the TFEU as that can only come into effect in cases where interstate commerce is involved, as otherwise it would be covered by national laws. The TFEU only has jurisdiction over matters that have an effect accross member state borders.

3.2 The Concept of Abuse

In itself the mere thing of being in a dominant position in the market is not forbidden under EU law. It is only when such a dominant position gets abused in a way that is likely to effect trade between member states that it becomes an issue in the eye of the TFEU.[23] What may constitute such an abuse is outlined in paragraphs (a) to (d) of article 102.

3.2.1 Paragraph 102(a) – Unfair Trading Conditions

Paragraph 102(a) prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.” Such unfair prices and/or trading conditions may for example include using predatory pricing to drive competitors out of the market. That is not to say that a company in a dominant position cannot compete on prices, but any pricing strategy that is clearly abusive and has as its’ purpose or effect that a competing company is driven out can be considered to be a breach of article 102. An example of such a strategy is when a company lowers the prices to a level where it knows that the competitor cannot stay for a longer period of time. The first company then uses its’ larger economic power to push through some losses for a limited amount of time, before raising prices again to a higher level than before to make up for those losses. Due to its’ economic power the dominant company has survived, and has now ensured that it has fewer competitors to deal with.[24]

This strategy was in question in the Akzo case. Akzo was a company manufacturing raw materials for the plastics industry. When a competitor decided to move into the same market and capturing some of Akzo’s client base, Akzo went after the competitors clients in a different market where the same raw materials were in use. The commission found that predatory pricing was happening with the aim of pushing the competitor out of the plastics market. Akzo appealed stating that even though the prices were above average variable costs (AVC)[25], they were still above average total costs (ATC)[26], and therefore, according to the test set forth in the Areeda-Turner test[27], their practices could not constitute an abuse. The court disagreed and found that

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[23] Case T-41/96 Bayer AG v. Commission of the European Communities.

[24] Bailey, David & Wish, Richard. Competition Law (Published by Oxford University Press, Ninth Edition, 2018). Pages 25-26.

[25] Average Variable Costs are the production prices per unit in the short run. These can change with economics of scale, salary costs and material costs. (Jan, Obaidullah. Average Variable Costs [2019] <https://xplaind.com/314657/average-variable-cost> last accessed on 22. October 2021)

[26] Average Total Costs are the long term costs per unit produced. ATC takes all costs over a longer period into question, but AVC over the long term will be the same as ATC. (Jan, Obaidullah. Average Total Costs [2019] <https://xplaind.com/730121/average-total-cost> viewed on 22. October 2021).

[27] The Areeda-Turner test for whether a practice constitutes that predatory pricing is present when the market structure points towards a reasonable chance of recoupment of losses when competitors have been squeezed out of the market by keeping prices below AVC for a limited amount of time. (Hovenkamp, Herbert. (2005)

even though the prices were above AVC such a behavior would constitute an abuse when the aim, as it was in this case, was to push a competitor out.[28]

Akzo in essence created the main test used today to determine whether a company is engaging in predatory pricing. It constitutes that prices below AVC are always considered to be predatory if the company engaging in such behavior is dominant in the market. Prices below ATC, but above AVC are not presumed predatory, unless the aim of the practice is to drive out competition as it was in the Azko case.[29]

3.2.2 Paragraph 102(b) – Refusal to deal

Paragraph 102(b) prohibits "limiting production, markets or technical development to the prejudice of consumers." This may include keeping production down to raise prices or keep them high or to deny parties in the market access to raw materials and/or tech that is necessary to compete in the market. Article 102(b) is probably the most essential paragraph to the subject matter of this paper, so we will therefore give it special weight going forward.

The interpretation of this paragraph was on display in the Commercial Solvents case.[30] In the case a producer of raw materials chose to refuse to supply a downstream competitor with materials needed for production, thereby removing them from competing on the market. This was seen as an abuse, seeing as the company also held a market position in the downstream market. By refusing to supply the competitors on that market with the raw materials needed to manufacture products that may compete with their subsidiary they excluded them from competition. It is not the mere refusal to supply that is the abuse here, but the refusal was given by a dominant company that had market interest in the downstream markets, effectively removing its' biggest competitor.

Arising from the Commercial solvents case was the Essential Facility Doctrine. It states that when an upstream undertaking has interest and control over the downstream market, and its' facilities are essential to competing in the downstream market; it cannot refuse access to those facilities. This idea originally came from US Antitrust law, mainly applying to physical infrastructure, such as power grids, pipelines, railways etc.[31] It was explained by the commission during an interim measures proceedings as such: *"[A] company or group which is in a dominant position and which owns or operates a facility or a part of an infrastructure which its competitors must use to carry on their business is obliged by Article [102] to grant access on a non-discriminatory basis to its competitors. Whether the dominance results from*

"Review of Industrial Organization; Vol 46, No. 3. Special Issue: 40 Years of Areeda-Turner" Springer. Page 209).

[28] Case C-62/86, Akzo Chemie BV v. Commission of the European Communities

[29] LawTeacher. The Concept of Predatory Pricing. [2013]. <https://www.lawteacher.net/free-law-essays/commercial-law/the-concept-of-predatory-pricing.php?vref=>1 Last accessed 22 October 2021.

[30] Joined cases 6 and 7-73. Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities.

[31] LawTeacher. The Concept of Predatory Pricing. [2013]. <https://www.lawteacher.net/free-law-essays/commercial-law/the-concept-of-predatory-pricing.php?vref=>1 Last accessed 22 October 2021.

the ownership of a facility, or from other factors, is irrelevant. "Non-discrimination" means that the dominant company is obliged to treat its competitors as users of the facility on equal terms with its own operations".[32]

This refusal to deal has also been settled to some extent when it comes to intellectual property rights and the refusal to license those. Those will be viewed more closely in chapter 5 of this paper when we look at case law pertaining to the refusal to license intellectual property rights.

3.2.3 Paragraph 102(c) – Dissimilar conditions

Paragraph 102(c) prohibits companies from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." In other words, it is considered an abuse when an undertaking in a dominant position gives different terms to different companies, in a way that affects the competitiveness of the market. This might for example be if a supplier of wood gives two competing undertakings different pricing terms for the same type and quality of wood, leaving one able to offer significantly lower prices on their products. For this to apply all other conditions would need to be similar of course. It is known that different quantities can lead to different prices, usually so that larger quantities, when purchased together, can lead to a lower per unit cost.

This paragraph may come into question in connection with the subject matter of this paper, although it is not as connected as 102(b). It would mostly come into question in regards to undertakings being offered a license of the same databases or underlying IPRs under significantly different terms, such as price or level of access, putting one undertaking at a competitive disadvantage to the other.

Such a disadvantage does not need to be quantifiable or shown above a certain threshold. According to the judgement in the MEO case it is enough that an analysis of the terms offered and the situation in the markets shows that it is likely to have an effect on the "costs, profits or any other relevant interest of one or more […]" competing undertakings on the market.[33] This leads us to believe that if a company were to offer significantly different terms to two competitors for the same service or raw goods, an abuse could be found if the terms are likely to affect the competitiveness of one of them, even though no hard data is there to back up such a claim.

3.2.4 Paragraph 102(d) – Subject to a third party's approval

Conditioning a transaction to a third party that has nothing to do with that particular case would be seen as an abuse. This article also covers the practices of tying and bundling. In case T-30/89 of Hilti v. the Commission it was found that the practice of conditioning the sale of nail cartridge strips for nail guns upon the purchase of corresponding set of nails from the same manufacturer was abuse. Hilti was the dominant party on the market and was therefore not allowed to

[32] Commission Decision of 11 June 1992 relating to a proceeding under Article 86 of the EEC Treaty (IV/34.174 - Sealink/B&I - Holyhead : Interim measures).

[33] Case C-525/16 MEO Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, Paragraph 37.

condition the sales in such a way. A similar finding was reached in the Microsoft case, which we will look into in chapter 5.

3.3 Summary

The TFEU has two main articles regulating competition in the internal market. Article 101 covers agreements between undertakings and concerted practices, while article 102 covers the actions of a single undertaking in a dominant position in the market. For the subject matter of this paper, we will focus on article 102. In order for the aforementioned article 102 to apply there are four main conditions that need to apply.

Firstly the action needs to be taken by an undertaking. An undertaking is any entity, no matter its' status of incorporation, ownership or in which way it is financed, that is engaged in economic activity on the market. Economic activity has been defined as offering any goods or services in the markets in an economic manner. As such, a company with a purely social purpose or activity, such as an NGA doing charity work or a governmental agency only handling purchases for a government run entity, no matter how large such an entity may be in the market, is not an undertaking.

Secondly the undertaking in question needs to be dominant in the market. To determine whether a company enjoys a dominant position in the market two things must first be defined: the relevant product market, and the relevant geographical market. The product market is determined by looking at the price ranges and interchangeability of products. If a consumer is likely to see a group of products to be completely or largely interchangeable then they would be considered to be a part of the same product market. The geographical market usually does mean the geographical area the products or services are offered and that constitute a homogenous marketplace. Note that the company's definition of the relevant market in marketing and business strategies is often not the same as it would be in the legal definition.

Once the relevant market has been defined the most common way to determine whether or not an undertaking holds a dominant position is to look into the market share. Usually a company with a market share of over 80% is seen as being in a dominant position. A market share of over 50% is a strong indication of a dominant position and a share of 40-50% can point towards a company holding a dominant position. If a company has less than 40% market share it is unlikely to be dominant, although that does depend on other factors as well. The size of the market, number of competitors, and entry restrictions can all change those rules of thumb. That coupled with how the market reacts to actions by the potentially dominant undertaking will give a better picture of the situation in the market.

Thirdly the undertaking must be involved in cross-border transactions or their action must be likely to have an effect across the borders of member states. This may be established if an undertaking involved in economic activity in multiple member states, or if they supply goods or services across borders. This may also be fulfilled when an undertaking only does business in one member state, but is so large within that state that its' actions are likely to have an effect outside of that state.

As mentioned previously it is not forbidden for an undertaking to have a dominant position in the market. It is only when it abuses that position that it becomes an issue in the eye of the TFEU. Such an abuse may take the form of predatory pricing, uneven terms for similar transactions, tying or bundling, or, most importantly for the subject matter of this thesis, a refusal to deal. The commercial solvents case set forth a rule dictating when an upstream supplier is not allowed to deny a downstream producer the raw materials needed for production and to maintain competition in the market. This becomes quite important when we get into the licensing of IPRs and copyright protected materials in the next chapter of this paper.

4 Relevant Case Studies

It is the opinion of the author that the best way to further understand the current laws is to look into the judgments and decisions of the courts having jurisdiction over the field. I will therefore dedicate a meaningful portion of this paper to looking into the main cases on point and diving into what each of them has added to the field. The following three cases are the leading cases on the interaction between copyright protection and competition laws.

4.1 Magill

In the joined cases of C241-91 P and C 242-91 P (hereinafter "Magill") the European Court of Justice for the first time took a look at the interplay between abuse of a dominant position under article 101 (ex. article 81) of the TFEU and copyright. That is, how a refusal to license copyrighted information may constitute abuse. In the case ITP, RTE and BBC (television broadcasters) allowed their television programming schedules to be printed in certain newspapers, so long as their rules on such publications were followed. Those rules included, for example, that the scheduling could only be run one day ahead of time, except in the cases of public holidays, where two days programming could be printed. Magill TV Guide Ltd. wished to create and publish a comprehensive TV guide, detailing the entire weeks programming, along with highlights and reviews. The practice of issuing the whole weeks programming schedule lead to the three television networks blocking Magill from obtaining the information needed to publish such a guide and therefore, in essence, blocking Magill from trading in the market.

Magill launched a complaint under article 81 (now 101), claiming that the television broadcasters had abused their dominant position in the market by their refusal to trade, and they should be ordered to provide the company with the information needed for Magill to be able to keep releasing its' comprehensive TV guide. The broadcasters, however, claimed among other things that the television programming information was proprietary and copyrighted, and they should therefore be allowed to control how it was published, citing the Berne Convention of 1886.

Article 9(1) of the Berne Convention sets forth the right of the author, or owner, of a copyrighted work to have the exclusive right to reproduction of said work. By the programming schedules being protected by the aforementioned article the broadcaster could indeed control how the schedules were published, and by whom. However, the question remained on whether competition law could limit the rights of the holder of a copyright to control its' publishing. Under article 9(2) of the convention member states can limit the rights of the owner of the copyrighted materials to full control of its' reproduction, but only insofar as it will not hinder or conflict with "normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author."[34] The convention does therefore allow for such rights to be

[34] Berne Convention for the Protection of Literary and Artistic Works of 1886, article 9

limited, but only in certain cases, and where the limitation does not enjoin the author from exploiting the right in a meaningful way. In this case the way of exploiting the copyrighted information would have been to print them in a TV guide, such as Magill was wanting to do. That would not, however, stop the broadcasters from exploiting the proprietary information themselves, but it would limit their control over how and when it was published.

The court did find that under certain special circumstances the ban on abusive practices by parties enjoying a dominant position in the market, as set forth in article 81 of the TFEU could limit the rights of the rights holder. In addition to the normal requirements of article 81 that establish abuse, the court set out further requirements that need to be fulfilled for competition law to override copyright protection.

Firstly the programming information was considered a non-replicable source, that is, Magill could not have created their own information to compete on the market. Secondly the information was essential for Magill to be able to compete. Thirdly, the product Magill created was new to the market.

4.1.1 Non Replicable Source

The first condition that needs to be fulfilled according to the Magill case is that the raw materials cannot be sourced any other way than through the dominant party in the market. In the Magill case the only source of the programming information was the broadcasters themselves, as they held all information on their programming structures. The argument could be made that the broadcasters were the gatekeepers to the entire television guide market, and were able to pick and choose who would get the permission to enter the market and compete. By doing so they could hold their dominant position in the market and prevent anyone from challenging them.

4.1.2 Essential Source

The second condition of Magill is that the information in question is essential to be able to compete on the market. Here the programming information was critical to Magill for them to be able to put out their guide, as it was the main selling point of their publication. Without the programming information people would have no incentive to purchase a copy of the guide and the publication would become obsolete.

The reasoning behind this could be similar to the first point. By denying a new party the access to a proprietary, but essential, source of materials or information to compete in a market the party holding the information would be acting as a gatekeeper to the market, allowing only those he knows won’t challenge him enter. Such a hindrance could very quickly start to negatively impact the consumer by lowering standards and driving up prices of products.

4.1.3 New Product Requirement

Lastly, the product being created and marketed from the proprietary information would need to be new to the market. This leads to a company not being able to demand proprietary copyrighted information to come into a market and directly compete with the company giving them the information. In Magill the novelty to the product was the fact that it was a guide that covered the entire week, rather than just one or two days. This requirement is absolutely essential to the party being forced to give up the information. Often such information is a result of a long and costly research and development phase, and handing that to a direct competitor would decrease the willingness to develop new products in the long run. The new product may, as in this case, create a new competing product on the same, or similar market, but it may not be the same as what is already on the market.

Magill was the first case where the European Court of Justice considered the possibility of competition law forcing companies to give up proprietary information. However, many questions were still unanswered, and the judgement was vague in many key questions that may come up in connection with such a situation. Even though the case deals with article 101, but not 102, the case is extremely relevant for the subject matter of this paper as it gives an indication of how the courts would view the interplay between the two fields in question, be it article 101 or 102 that is applicable on the competition law side.

4.2 IMS Health

The IMS Health case (Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG) the question on access to copyrighted databases was addressed by the European Court of Justice (ECJ). IMS had created a system consisting of 1860 “bricks” that each corresponded to a particular geographical area in Germany. This system became the industry standard due to its’ widespread use. It was developed with the help of its’ clients and provided valuable information for laboratories and sales groups, and was distributed free of charge to IMS’s clients. This distribution made it the industry standard and soon most undertakings in the field had adapted their entire systems to work with the brick structure of IMS.

Later NDC started to offer a similar system to IMS, first offering the system with a different number of “bricks” but after feedback from potential clients made it more like IMS’s system, using 1860 bricks. After IMS launched a copyright infringement case against NDC, NDC issued a complaint stating that NDC had abused its’ dominant position in the market by refusing to license the brick system. IMS claimed that the system was a copyrighted database and the competition law could not force them to open up their intellectual property rights to competitors. The German courts referred some questions to the ECJ asking the court to elaborate on the refusal to license IPRs under article 102 of the TFEU.

Firstly the court referred to previous case law, such as the Magill case outlined above, stating that the refusal to license an IP right would not, in itself constitute an abuse of a dominant position. It then set out four conditions that would need to be met for such a refusal to be considered abuse. Firstly the indispensability requirement, secondly the new product requirement, thirdly that the refusal is unjustified, and lastly that such a refusal to license is likely to exclude all new competition from the market. As one can see these are not so different from the conditions set forth in the Magill case, but in some ways they go deeper into the subject.

4.2.1 Indispensable source

Access to the source needs to be essential for a new undertaking to compete on the market. Here the system that IMS had developed had become the industry standard that everyone else had adjusted their systems to work with. Therefore it would be almost impossible to try to enter the market using any other structure than the 1860 brick structure as NDC had found out, first trying to market a system that used more bricks than the standard IMS one. The source material, i.e. the IMS brick system, would therefore be indispensable for someone to try to compete in the market.

The ECJ noted in its' judgement that for something to be indispensable enough to justify a competing undertaking to give up its' IP rights it is not enough that other options are not as feasible or not as likely to be popular with the relevant market. Rather the bar should be that there are "technical, legal or economic obstacles" that make the creation of an alternative solution impossible, or at least "unreasonably difficult".[35]

On that factor in this particular case the court did point out that due to the level of involvement from the pharmaceutical companies and laboratories, as well as sales offices, in creating and improving this system, and the dependency of the market on that system it would be extremely difficult creating a new, competing product. The costs of acquiring all information needed to create such a system would also be a high bar for entry. Those factors would therefore be enough to not make it feasible to create a new, competing system from scratch.

4.2.2 New Product Requirement

Here, like in Magill, the court noted that an undertaking wishing to license IPRs from a competitor would need to bring something new into the market that the original owner of the IPR is not currently supplying, and for which there is a demand for in the market. IMS argued here that there was nothing new that NDC was wishing to offer and therefore this condition was not fulfilled. NDC on the other hand did maintain that it was bringing something new to the market. This was left up to the national courts to decide.

As stated the requirement for a new product is central in justifying the request to be granted access to a competitors IPRs. Otherwise it is likely that the incentive to go through the process and costs of compiling the data would be diminished, and technical progress to the benefit of both the market and the consumers would be much slower. It is therefore important that a product that will be created from the licensed IPRs is new, and not identical to the original product.

4.2.3 Likelihood of exclusion from competition

The decision to refuse to license needs to be likely to exclude all possible competition from the secondary market. This condition is only fulfilled when the IPRs in question are so essential to the market that without them an undertaking could not enter at all. This could for example apply here if NDC was planning on processing the data in a different way and thereby offering

[35] Case C-418/01, MS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, paragraph 28

different analytics for the clients than what was offered in the IMS systems. Without the underlying data NDC could not offer such a service and would thereby be excluded completely from the market.

4.2.4 Objective Justification

There may, in some cases, be objective justification to refusing to license the underlying IPRs. If such justifications exist the refusal to license will not be considered abuse. In this case the ICJ did not go into any possible justifications as none were raised by the parties. It is hard to imagine what such objective justifications could be if all other conditions are fulfilled, but they may exist in some extreme cases.

4.2.5 The result

In this case the ECJ was only referred some questions to clarify if and when the refusal to license intellectual property might constitute abuse. The list of conditions above were the main weight in the answer, and did as such indicate that there was abuse present in the decision on refusing to license the structure and data behind IMS's systems. This case, along with Magill, also solidify the fact that in these cases where an abuse of a dominant position is present compulsory licenses can be issued. This was, and continues to be, one of the most important cases in this field, and is central to answering the research question as put forth for this paper.

4.3 Microsoft

One more relevant case would be case T-201/04, Microsoft Corp. v. The Commission of the European Communities. Here there were two main issues at hand, one was the access to the underlying code and information on how integrated systems worked in order for a third party software creator to ensure full integration of their products into the Microsoft environment. Microsoft claimed that any such information was copyright protected and that they were not required to give access to such information. They had set up a system on how third party creators could make their products work within their operating systems and claimed that should be enough.

The counter party here claimed that the information given was not sufficient in order to give the customers full integration and to ensure that full interoperability between the Microsoft software and the new software. Based on the previous precedents from Magill and IMS health the courts found that they could order Microsoft to give full access, given that they were an upstream producer that held a non-replaceable and non-replicable source, and that without the information the downstream producers could not compete. They also found that the new product requirement was met and therefore Microsoft were ordered to give access to the underlying information so that smaller parties could integrate sufficiently with the leading operating system, or the dominant party, of the market.

The second issue at hand was within tying or bundling. The Windows Media Player application was included in all versions of the Windows operating system and set as the default application to view films and listen to music on the computers running the operating systems. This was found to be illegal bundling and was seen to be a hindrance for smaller parties to enter the market and successfully compete. Microsoft were therefore ordered to offer a version of Windows without the media player included.[36]

4.4 Summary of Current Case Law and How it Affects the Research Question

From the cases summarized above we can see that the European courts have put forth some relatively clear rules and guidelines on how to handle intellectual property rights when it comes to compulsory licensing in regards to competition law. If we look back to chapter 2 of this paper and first go through in what cases we can expect this to come into question:

4.4.1 Is there abuse?

As we noted previously, being in a dominant position in a given market is not prohibited. What becomes problematic is when an undertaking in a dominant position starts abusing its' position of strength in the market. As always the entity in question needs to be shown to be an undertaking (see chapter 3.1.1), in a dominant position (see chapter 3.1.2) and be involved in cross boarder dealings. Once we have established all those we do need to conclude if the behavior of the undertaking may qualify as abuse. The possible ways that a company may be abusing its' dominant position are listed in paragraphs 102(a) to (d). What we are most interested in for the purpose of the research question is paragraph 102(b), which covers the refusal to deal.

As stated in both Magill and IMS Health the act of refusing to license something covered by copyright or other intellectual property rights cannot be seen as an abusive practice in itself. There might, however, be some cases where such a refuse to license is abusive under article 102 of the TFEU. One must, however, be careful as to not interpret those rules too broadly as such an interpretation may seriously impact the protection afforded by intellectual property law, and the Berne Convention.

4.4.1.1 Essential source

The intellectual property right an undertaking may be requesting access to on the grounds of abuse of a dominant position must be completely essential for the undertaking to be able to get into the market. There must be no other substitute for that particular IPR, and it is not enough that any other source would not be as good. It must be impossible, or completely unreasonable to expect that a new party, alone, or in cooperation, could create a comparable source from scratch. We saw this in the IMS health case, where the court stated that given the status of the brick system in the market it would be completely unreasonable to expect a new undertaking to create their own database.

4.4.1.2 New Product Requirement

This requirement does really take the spirit of the intellectual property rights to heart, as it stands strongly to protect the work and underlying rights of the creator. In order to get access to the protected rights the requesting party must show that they are wishing to create a new product

[36] T-201/04, Microsoft Corp. v. The Commission of the European Communities

that the market requires or requests. It is not and, in the opinion of the author, should not be possible to demand a compulsory license to compete directly with the creator of the IPR with the same product as they are offering. That would create a tilted market where the newcomer could offer the same product at a significantly lower price due to their savings on not having to have created or collected the underlying data, and drive the original undertaking out of the market.

4.4.1.3 Likelihood of Exclusion from Competition

The demand of likelihood of exclusion sets down that in order for a compulsory license to be given, it must be shown that the undertaking holding the IPRs can exclude anyone from competing on the market if they withhold the information. It is related to the first condition of it being an essential source, in that the denial must have some demonstrative effects. If the IPR in question is an essential source to creating a new product and competing on the market, it is likely that such a denial does lead to the original IPR holder becoming a gate keeper, controlling who is allowed to enter the market, and under which conditions they will be able to compete with the undertaking.

4.4.1.4 Objective Justification

While the cases outlined above do not include any examples of objective justification, the possibility of such a justification existing is mentioned. One must, however, keep in mind that such a justification would need to be extremely strong if it were to override the other three conditions, given that they were met.

If all of the above-mentioned conditions are fulfilled and the undertaking that holds the IPRs still refuses to license the rights, the conditions for abuse under article 102 are met. In those circumstances the courts can issue a compulsory license, forcing the IPR holder to share its' data.

4.4.2 What Does the Case Law Mean for the Research Question?

One part of the research question concerns how the courts might respond if they were asked to look into access to online databases and access to them. Taking IMS Health and its' finding as the case most on point for the question we could see that the access to such databases is not at all unlikely to be granted, given that the four conditions are fulfilled. Given that more and more of the business today is based in electronic databases, they become even more a part of the "essential facility" in order to compete. On the other hand the bar for entry on the electronic markets gets lower every year, and the access to general data about consumers is easier to obtain. The more specialized data, and data in order to make applications work with the bigger players in the market might, however be more difficult to obtain. In those cases the findings in the IMS Health case be more relevant.

It is difficult to imagine a situation where a court would find that the cases above would not be relevant when looking into the online databases. Therefore any case where the requestor that would be able to show that the requirements of Magill and IMS were fulfilled should most likely be able to demand that a compulsory license be issued.

5 The Proposed Digital Markets Act and its' Effects

5.1 Introduction to the Proposed DMA

On 15th of December 2020 the commission put forth a proposal for the regulation on contestable and fair markets in the digital sector, or the Digital Markets Act (hereinafter the "DMA", when only the DMA is mentioned, the proposed nature of the regulation is implied). The intention behind it being, as the name suggests, to secure a higher degree of competition in the digital markets, and limiting the power of the large players which will be designated as "gatekeepers" under this new legislation when it gets enacted. The European competition laws have so far only been applicable when there is a case of abuse by a party in a dominant position. It is therefore likely that this new legislation will be able to widen the scope of such actions that the courts have already been ordering in the last years, namely access to data, compulsory licensing of copyrighted databases and a further widening of the rule set forth in the Microsoft case, when it comes to the treatment of third party service providers, in the cases where a company has its' own integrated solution (such as Microsoft had in its' media player).

5.1.1 Who are the Gatekeepers?

The proposed DMA does offer some explanations of what a gatekeeper can be under the regulation. There are three main criteria that a *core platform provider* needs to fulfill. Namely the possible gatekeeper must "(i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations."[37]

The first criteria that must be fulfilled is that the undertaking in question must be a *core platform provider*. The core platform services, according to the proposal include: (i) marketplaces, app stores and mediation services, (ii) search engines, (iii) social network platforms, (iv) video sharing platform services, (v) number independent interpersonal electronic communication services, (vi) operating systems, (vii) cloud services and (viii) advertising services.[38] The fact that an undertaking is active on one of these markets does not in itself mean that it will be classified as a gatekeeper. For it to fall under that definition the other three criteria need to be fulfilled as well. This is rather intended to give an idea on what type of platform can be important enough in today's digital environment that it might qualify as becoming a gatekeeper and a core platform. Most of the services provided online will most likely go through, or benefit from using, one of the eight groups of platforms listed above. They have therefore become instrumental in the European marketplace and, in the eye of the commission, need to be regulated as such in order to secure a fair and open marketplace, and filling in the gaps that articles 101 and 102 cannot cover in their form.

The first of the three criteria that the DMA sets forth for a core platform provider to be classified as a gatekeeper is that it must have a significant impact on the internal market. In order to find

[37] Commission proposal for the Digital Markets Act, page 2.

[38] Commission proposal for the Digital Markets Act, page 2.

out how such significant impact might be interpreted we must look further into the proposal. Some of the main indicators of a core platform provider having a significant impact are that it has a “very significant turnover” and that it offers a core platform service in no less than three member states.[39] When these two points are met then the provider should be presumed to have a significant impact on the market. This may also be fulfilled if the market value of the undertaking providing the service is very significant, or the undertakings are able to capitalize on their service to a high degree. Turnover thresholds and market value thresholds will be set forth at a later time, but as such thresholds are to cover the turnover for the entire EEA, any such threshold is to be expected to be quite high. That is necessary in order to not having smaller providers fall under this definition as the turnover for a technical service provider can get quite high over the entire EEA, in the environment that they work in, without them having any real gatekeeper functionalities as such.

Secondly the service provider must “operate one or more important gateways to customers”. In today’s environment where more and more of goods and services are sold and/or supplied via digital and online means the biggest platforms, or gateways, are becoming more and more important. One can for example imagine today’s marketplace where a larger company would try to operate without a presence on Facebook. With Facebook being such an important platform for most internet users today, it would be difficult for companies to reach new users or clients through other means. Traditional advertisements are unlikely to have the same reach and or effect as a well-orchestrated online campaign, centered around social media. Such a gateway may also serve to link together multiple platforms. Keeping with the Facebook example above, one might imagine the link between Facebook and Instagram. Both are, as most people know, owned by Meta Platforms, Inc. (holding company that was previously named Facebook, inc.), and the links in between are strong, with inter-operability that moves users from one platform to the other.

The third criteria is that they are deeply rooted and enjoy and are expected to enjoy this good market position for a longer time. In a volatile market like the online one, the changes come fast and users move between platforms quickly and without much warning. One of the relatively recent examples of this would be Myspace. It enjoyed a large market share (over 70% in the USA in 2007) and was the most popular social media platform for a number of years.[40] However, the fall came quickly, and users flocked away from Myspace and over to Facebook. When looking at Facebook’s market position today it is difficult to imagine such an exodus of users in such a short time period. They would therefore most likely fulfill this criteria. With the mother company holding many different platforms, and with the social importance of those platforms, one can hardly imagine that everyone would quickly move away from it and into

[39] Commission proposal for the Digital Markets Act, paragraph 17 (page18).

[40] Marketing Charts. [2008]. https://www.marketingcharts.com/demographics-and-audiences/youth-and-gen-x-3075. Last accessed 20 September 2021.

other platforms. They have also managed to create an all-encompassing platform, where the user can fulfill all his or her wants. Other players that have admittedly taken some of Facebooks market share, such as Twitter, have managed to fill a gap where Facebook wasn't, but have not been able to take over the sections of the market where Facebook is at its' strongest, such as larger format posts, image sharing, and marketplaces. Judging from what is mentioned above, we could therefore imagine that companies such as the biggest social media platforms (Facebook, Twitter, Instagram etc.) would qualify quite easily as gatekeepers under the proposed regulation.

5.1.2 What Duties are laid on the Gatekeepers under the DMA?

Under the new proposed DMA there are many new duties laid upon the companies that will be designated as gatekeepers under the regulation. These are mostly in accordance with earlier decisions from the European Court of Justice in the cases we've looked at earlier in this paper, but with the key difference that an abuse of a dominant position no longer needs to be shown in order for the rules to apply. The main objective of the regulation will be to create a fairer and more competitive environment for both the users and for the undertakings working within the markets in question. The main new provisions include for example the duty to allow innovators to work within their platforms without needing to comply with unfair terms that may have a hindering effect on the development. The regulation does not include any rules that are likely to limit the opportunity of the gatekeepers to keep innovating and creating new services, but they will not be allowed to use any unfair practices towards users and or customers to gain an unfair advantage.

This will be done by putting the duty on the gatekeepers to allow new startups and innovators to work within the gatekeepers platform without having to comply with limiting or unfair terms. What would constitute unfair terms is not entirely clear from the proposition but one could imagine that any terms or action that would have as their intent or result limitation in competition or innovation in the field. From the text of the proposed act it appears to the author of this paper that the idea is to take over where article 102 ends, and offer added protection and a better environment for new ideas and new creation within the digital markets, and applying the same basic ideas and rules that can be found within the text and application of article 102 of the TFEU without the need of there being a proven dominant position in the applicable market. As long as the undertaking is large enough and powerful enough to be considered a gatekeeper the duty is on it to provide a fair competition environment and access to smaller parties to their platform.

On the other side the gatekeepers will also have some duties towards the consumer. They will need to allow consumers to change between service providers without hinderances if they wish to do so and not create such an environment that would keep the consumer locked within their platform, either by locking their data within their own system, or making it impossible for consumers to leave a provider within their platform to use services from a provider working within another platform, gatekeeper or otherwise. At the same time gatekeepers are not allowed to give their own services more favorable terms for working within the platform than that of a different party. This is a clear continuance of the rules set by the judgement in the Microsoft case, where Microsoft was forced to offer its' operating systems without bundled products and give access to competitors to their systems, creating an environment more suited to real competition within the markets. Continuing within that scope the gatekeepers will also have to allow users to remove or uninstall applications and software programs from their platforms if they wish to do so.

5.2 What is it Likely to Change?

From what is stated above we can see that the main components of the new proposed Digital Markets Act is not a complete revolution of the rules in the market. It is rather a regulation that widens the scope of article 102 of the TFEU and is likely to help increase the competition in the digital markets. The main change from article 102 to the DMA is that there no longer needs to be an abuse of a dominant position. In order for the DMA to apply the offending party only needs to be designated as a gatekeeper, something that, at first glance at least, does appear to be a wider designation than that of a dominant position. Of course, some of the gatekeepers will be in a dominant position in their own markets, but the DMA does open up for a wider application of the rules.

In addition the DMA is more targeted at the digital service providers than the general ban on the abuse of a dominant position in article 102 of the TFEU. It creates a certain set of actions that put either a positive or a negative duty on the gatekeeper (that is the duty to do something, or not to do something)

In regards to the subject of this thesis it is likely to create an environment where the compulsory licensing of IPRs might be more common. Under article 102 the only way for a competitor to obtain access to the underlying data or access to a system would be if the party denying the access is abusing a dominant position. Under the new DMA it is sufficient that the party denying the access is a gatekeeper and the undertaking is behaving in an abusive manner that is likely to hurt competition and or the consumer. Some of the gatekeepers will, most likely, be in a dominant position, and in those cases the smaller party could choose whether to proceed under article 102 or the DMA. However, it is the feeling of the author that article 102 will in the future be reserved for the more blatant and more serious offenses in the competition environment and will keep being the main instrument for the states to prosecute bad actors. However, the DMA will be mor e f a tool for the parties in the markets that further defines what a gatekeeper can and cannot do, opening up for a more fair and open marketplace in the digital markets.

This will lead to a more open market and a better access for different parties to enter the platforms of the gatekeepers. Also this will ensure that the freedom of the consumer to choose their provider and the ability to move between different platforms as they wish

5.3 What does it mean for the compulsory licensing of online databases

The new, proposed, DMA will, most likely, mean that the compulsory licensing will become more usual than it is now through article 102 of the TFEU. The scope of the new regulation is broader and it creates a more standardized way of looking at these things. This will most likely mean that smaller service providers in the market will have an easier way into the platforms that are designated as gatekeepers than they would have had under article 102, as the rules within the article are more subject to interpretation, and do not directly order the compulsory licensing. As we have seen compulsory licensing does, indeed, exist within article 102, but it is through a more of an evaluative process of the facts and circumstances.

The proposed DMA will therefore most likely be a success in securing the way of the smaller competitors into the larger markets by way of the gatekeepers. It should simplify the processes if a gatekeeper were to refuse to license, and it will most likely even the playing field to a certain extent.

6 Conclusion

At the start of this thesis we laid out the research question: *How is article 102 of the Treaty on the Functioning of the European Union and its' concept of abuse of a dominant position likely to be interpreted by European courts when it comes to access to copyrightable online databases, and is the proposed Digital Markets Act likely to alter the course set in previous precedents?* In order to come to a conclusion we need to break down the question into a few parts in order to lay out a clear and logical answer.

6.1 Copyrightable Database

The first thing we need to do in order to answer the question is to define what we mean by the term *copyrightable databases.* As noted in chapter 2 above a database is a collection of data set up in a computer system that makes it possible to easily search, sort and or edit the datapoints in a way that would not be possible, or at least not feasible, outside of such a system. Therefore a database could be any type of a collection of information that is collected in a sortable computer system, which can be anything from the simplest of Excel documents, to the most complete and complex specially written system designed specifically to handle the type of information in question.

When it comes to the question of copyright the matter gets a little bit more complicated. A database would usually comprise of a few different elements that come together to make the interface and the database itself. One is the datapoints that make up the database, the next one would be the way in which it is organized and set up, further on we get the look and user interface and then lastly there is the code working in the background and running the entire system.

The first part, the datapoints or the information that is stored in the database might be protected by various rules, such as privacy rules and rules on industrial secrets etc. We will, however, only be looking at the copyrightable aspects here. The collection of data may, in some cases, be protected by copyright. The compilation of data can be a new work and therefore protectable under copyright law or it may fall under the sui generis protection granted by the Database directive.

The way in which a database is organized or compiled can also be copyrightable. The new way of compiling and showing the datapoints can be a new creation and therefore protected by copyright. The code running the whole system can also, in some cases at least, be protected by copyright. Software codes can be protected as literary works of sorts, and are then protected as a whole, or larger chunks of code, rather than single lines or strings of code. This is due to the reason that the ability to copyright a single line of code could be extremely limiting for other software creators.

The last point mentioned, the design and user interface of the database are not protected by copyright. They can be protected as design rights, but would usually not qualify for copyright protection.

6.2 Article 102 of the Treaty on the Functioning of the European Union

Article 102 of the TFEU is one of two main legislative tools within the European Union when it comes to competition laws. Article 101 concerns the actions of two or more undertakings working together, but article 102, the one that we are focusing on here, concerns the acts of a single undertaking in a dominant position.

6.2.1 When Does Article 102 Apply

In order for article 102 to apply a few conditions need to be fulfilled. The action in question needs to be done by an undertaking in a dominant position and such an action (or in some cases inaction) needs to be of the nature that it is likely to effect the trade between member states.

Firstly an undertaking is any entity, no matter its' form of incorporation, offering services or goods in the internal market. It can therefore be anything from a single proprietorship to the largest of publicly traded companies, or a government run entity, as long as it offers goods or services. In the case of Fenin v. Commission the entity was not considered to be an undertaking as its' only role was to purchase goods and services on the market and then distribute to the Spanish hospital system. No sales were done, and it was not offering anything on the market. Therefore it could not be an undertaking.

Once the status of an undertaking has been established we look into whether it is in a dominant position in the market. In order to determine a dominant position there are two tests that can be used in tandem. One of them is looking into the market share of the undertaking in the relevant market. Usually a market share over 50% would indicate a possible dominant position, and any market share over 70-80% would be considered a clear sign of such dominance. However, one could imagine instances where an undertaking with only 30-40% market share might be in a dominant position in the market. In these borderline cases one will use the other test in tandem with the market share. That is, looking at whether the undertaking is in a position where it can move independently of its' competitors and the consumers without it having much effect on its' position in the market.

Thirdly the prohibited action needs to effect, or have the possibility to effect, trade between member states. This is due to the fact that European rules only apply to cross-border trading. If the action only has an effect inside the boarders of a member state internal laws would apply.

6.2.2 Abuse of Dominance

The simple act of enjoying a dominant position is not in itself against the law. It is only when such a position is abused it becomes a problem under article 102. Such abuse may come in the form of unfair trading conditions, aimed towards keeping new competitors outside of the market, or pushing existing ones out, or giving competitors dissimilar terms, favoring one over the other. Another type of abuse might be to make any type of an agreement subject to a third party approval. The main type of abuse in relation to this paper would be the refusal to deal. If an undertaking in a dominant position would refuse to grant a competitor access to a database or its' underlying systems that are completely necessary in order to do business in the relevant market that might be seen as abuse as it would be likely to eliminate any possible competition.

6.3 Access to Databases

As noted at the end of the last sub-chapter the refusal to deal can be seen as an abuse of dominance. In Magill the creator of a new TV guide was denied the information he needed in order to create his product. The TV broadcasters only allowed for the publication of their programming one to two days in advance and therefore opposed Magill's intention to create a weekly TV guide, printing the programming for the whole week. The court found that this was an abuse of dominance seeing as the TV stations in question held a dominant position in the upstream market (the broadcasting of television in the relevant market) and thereby controlled the downstream market (the printing and publishing of TV guides) entirely, as any guide that did not include their programming would not be able to succeed in the market. The court found that the programming information was an essential and non-replaceable source. It also found that Magill was attempting to create a new product that did not exist in the market and there was a demand for. Therefore the court found that such a refusal to license the information on by the TV broadcasters was an abusive practice and ordered the compulsory licensing of the information.

In the case of IMS health a competitor was denied access into the systems that the company had created. Due to the fact that IMS was in an extremely strong position in the market and had managed to make its' system the industry standard it was impossible for a competitor to break into the market without using their platform. Like in Magill the court used the criteria that this was an essential source, the product being offered was a new one and that there was a danger of exclusion of competition. It also added the possibility of an objective justification, but such a justification was not found in the case. Therefore IMS was forced to allow competitors access to its' systems.

Lastly in the Microsoft case a software developer had been denied access to information required in order for them to create a software solution that worked within Microsoft's operating system, and worked with inter-operability with Microsoft's own software. Due to the fact that Microsoft had a strong dominant position in the market and was, in essence, reducing competition by limiting what information new software developers got, their actions were seen as abusive and they were ordered to ensure that the information was available for competing developers.

From the three cases mentioned above we can see that there is a pattern that has emerged in the European courts when it comes to licensing of IPRs. If the protected information is held by a dominant undertaking and it is essential in order to compete in the market it is likely that a compulsory licensing may be ordered. The new competitor must, however, bring something new to the market. This requirement is essential so that a new party cannot simply demand information to all of the dominant competitors systems that they have spent time and money developing and copy their systems and models. The danger of that would most likely decrease the will to innovate among the larger players in the market, and in the long run hurt consumers.

6.4 The Proposed Digital Markets Act

The proposed Digital Markets Act (DMA) is a new proposed legislation aimed at creating a fairer and mor competitive digital marketplace. It does so by designating certain parties in the market as *gatekeepers* and placing some extra responsibilities on them. These gatekeepers are undertakings that enjoy a position in the markets that allow them to control larger parts of the consumer experience and have a significant financial power within the market. The definition of a gatekeeper is, at first glance at least, wider than that of a dominant position so it is likely that the DMA will capture more undertakings than article 102 of the TFEU would. Another key difference is also that the DMA puts clear duties on the gatekeepers' shoulders to behave in a certain way, such as allowing newer developer access to their platforms and not giving preferential treatment to developers connected to them or pushing consumers towards their own software solutions.

6.5 Summary and Final Conclusions

Copyright protected databases can range from a small collection of information set up in a computerized system for easier viewing and editing, all the way to the largest set of datapoints collected from web services or space programs. Copyright protection can be granted to most elements of such databases: the data itself, the way it is set up and displayed and the code behind the system.

The European courts have on several occasions found that the refusal to license when it comes to copyrighted materials can be considered an abusive practice. When the refusing party is in a dominant position and the materials are an essential and non-replicable source for competing in the market, the dominant party can be ordered to give access to such information. The wording of both article 102 and the conditions set forth in the underlying precedents do, however, substantially limit the possible use of article 102 to gain access to such information. The party withholding the information must be in a dominant position, and the information must be absolutely critical to being able to compete in the market. It is well possible to show that it should apply, but it will only do so in limited cases.

The proposed DMA will open up the access to information a little bit further. If an undertaking is large enough to be designated a gatekeeper it will be forced to give access to their platforms and systems to smaller developers, and a duty is established on them to create a fair and open competition environment. This will likely facilitate a more standard code of practice between the larger gatekeepers and the smaller downstream developers and create a system that is easier for all parties involved to keep to and understand.

6.6 A Few Final Thoughts

From what is stated above one can see that competition law has the possibility to limit the monopoly one can have over one's own intellectual property rights. An undertaking that enjoys a dominant market position can be forced to give access to its IPRs and that duty will most likely get further expanded by the new proposed digital markets act. This can be essential in order to ensure that there is a strong market with healthy competition for the good of the consumer, but there can be a fine line to follow. The protection of IPRs can be a fundamental part of the livelihood of companies and they are an absolute necessity to keep pushing for innovation. IPRs are like other assets protected by property rights and ordering an undertaking to give up those rights requires solid reasoning and a strong basis. It is therefore the opinion of the author that while compulsory licensing can be a good and necessary factor in the operation of a free and open market it needs to be approached carefully and not overdone so that the value of the intellectual property rights is not diminished or removed.

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