

**Copy made by the Australian National University Library for
the purpose of research or study.**

INFO #: 50657337



CustID: 4287

Australian National University
Andrew Hannaford
Library - Document Supply Services
Menzies Library, Building 2
Canberra ACT, Australia 0200

Customer No :	4287 / 4287
Date of Order:	22.04.2009
Date of Shipping:	28/04/2009
Orderer:	Andrew Hannaford
Department:	
Bill Ref:	Maguire, Peter
Order No:	1160461@ill
Shipping method:	Ariel
	150.203.84.100

Journal:	bk: Intellectual Property, Market Power and the Public Interest (College of Europ
Citations:	*(*)299-315 2008
Author:	Imelda Maher
Title:	Exploitative Abuses: Which Competition Policy, Which
ISSN:	9052014221

\$50ILL

This work was copied under licence from the Copyright Agency Limited (CAL).
A licence is required from CAL for the making of further copies by any means.

CHAPTER 12

Exploitative Abuses

Which Competition Policy, Which Public Policy?

Imelda MAHER*

*Sutherland Professor of European Law, School of Law,
University College Dublin*

Introduction

This paper briefly outlines the nature of exploitative abuses before turning to the question of the relationship between competition law and intellectual property law in the context of what Teubner¹ calls the regulatory trilemma and from that draws a two-fold conclusion. First, the demands on law from the social phenomenon of markets are more acute when those demands raise issues across the different law domains of intellectual property and competition. Second, where intellectual property law and competition meet, the aim should be for both domains to internalise the values of the other. This however can only happen to the extent, but only to the extent, that there can be what Collins² calls productive disintegration. Finally, in the specific context of exploitative abuses the overlap between intellectual property law and competition law arises primarily in relation to claims of excessive pricing in licensing arrangements. Such claims could form the basis of a private action³

* imelda.maher@ucd.ie.

¹ See *infra* note 35.

² Collins, H., *Regulating Contracts*, Oxford, Oxford University Press, 1999, p. 46. Collins uses the term to describe the impact of public law regulation on modern contract law under English law. Contract law in his view has proved doctrinally robust so the reconfiguration of legal reasoning has been productive.

³ *Attheraces Ltd v. The British Horse Racing Board*, 2007, EWCA Civ. 38 (2 February 2007) although the pre-race data which was the essential facility in this case was not governed by IP law.

or can arise out of claims that the FRAND standard⁴ is being breached in the licensing of patents that form part of an agreed industry standard.⁵ The involvement of competition agencies in pricing decisions goes to the heart of concerns about the nature of competition law and the role of competition agencies and highlights the need for the law to indirectly control rather than inappropriately attempt to directly control markets.

I. Exploitative Abuses

Instances of exploitative abuses covered by Art. 82 lit.(a) EC Treaty – those abuses which result in direct loss of consumer welfare – are often compared to exclusionary abuses being covered by Art. 82 lit.(b) EC Treaty which exclude competitors from the market.⁶ The distinction is useful but not definitive with exclusionary abuses the primary focus of Art. 82 EC Treaty and exploitative abuses uncommon.⁷ The primary example of such an abuse is excessive pricing defined by the ECJ as a price that has no reasonable relation to the economic value of the product supplied.⁸ Where such prices have the effect of curbing parallel trade or unfairly exploiting customers then it falls within Art. 82 EC Treaty.⁹ Excessive pricing is caught under Art. 82 lit.(a) EC Treaty which prohibits the charging of unfair prices thus prices that are unfairly high are prohibited.¹⁰ The failure of the Commission in *United Brands*¹¹ to prove excessive pricing before the ECJ meant that it was more inclined to invoke discriminatory pricing than excessive pricing when

⁴ Fair, reasonable and non-discriminatory.

⁵ See Rambus EC Commission press release <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&format=HTML&aged=0&language=EN&guiLanguage=en> and Qualcomm. See EC Commission Press release at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/39247/proceedings.pdf>.

⁶ On exploitative abuses under Art. 82 EC Treaty see generally Whish, R., *Competition Law*, London, Butterworth, 5th ed., 2003, pp. 195-196. See also Geradin, D. & Rato, M., “Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-up, Royalty Stacking and the Meaning of FRAND”, April 2006, available at SSRN <http://www.ssrn.com/abstract=946792>.

⁷ Thus exclusionary abuses are the focus of the DG Competition discussion paper on reform of Art. 82 EC Treaty see EC Commission, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) in particular p. 4 para. 3 and p. 17 para. 53.

⁸ Case 27/76, *United Brands*, 1978, ECR p. 207; 1 CMLR p. 429 paras. 250-252.

⁹ Case 26/75, *General Motors v. Commission*, 1975, ECR p. 1367.

¹⁰ The imposition of unfair terms is also included under Art. 82 lit.(a) EC Treaty and can also be exploitative and (rarely) tying under Art. 82 lit.(d) EC Treaty could lead to excessive prices.

¹¹ *United Brands*, *supra* note 8.

alleging abuse under Art. 82 EC Treaty.¹² In fact, excessive pricing has only been found by the ECJ in two cases: *British Leyland*¹³ and *Hilti*.¹⁴ In both cases, as Temple Lang notes, the prices found to be excessive were four to six times the prices charged by the same company for the same service at the same time in the same geographic market.¹⁵ More recently, excessive pricing has been raised by the Commission in *Deutsche Post II*,¹⁶ and the *Port of Helsinborg*¹⁷ decisions and by the UK CAT in NAPP¹⁸ and in the English Court of Appeal.¹⁹ Excessive pricing is addressed also *ex ante* through regulatory frameworks in relation to those sectors where entry barriers are particularly high and state monopolies were previously the norm *i.e.* utilities and communications.

Outside of this specific regulatory environment, competition law rightly shies away from alleging excessive pricing for several reasons. First, substantively there is no satisfactory legal test that will allow effective benchmarking of prices to determine when prices are excessively high especially in innovative markets.²⁰ The two step test is whether the difference between the costs actually incurred and the price actually charged is excessive and if so, whether a price has been imposed which is either unfair in itself or when compared to competing products.²¹ Evans and Padilla point out that not only is the test highly ambiguous but also entirely subjective. The EC Commission in the Port of Helsinborg decision rightly rejected a 'costs + reasonable profit' approach to determining excessive pricing.²² A positive difference between price and production cost did not automatically imply prices were unfair. In that particular decision, it noted the high sunk costs for

¹² EC Commission, Twenty Fourth Report on Competition 1994.

¹³ Case 226/84, *British Leyland*, 1986, ECR p. 3263.

¹⁴ Case T-30/89, *Hilti*, 1991, ECR II p. I439 on appeal Case C-53/92P, 1994, ECR I-667.

¹⁵ Temple Lang, J., "Fundamental Issues Concerning Abuse under Article 82 EC", Regulatory Policy institute Oxford, July 2005.

¹⁶ O.J. (2001) L 331/40, para. 155 *et seq.*

¹⁷ COMP/A.36.570/D3 24 July 2004.

¹⁸ CA98/2/2001. NAPP 15 January 2002 Competition Commission Appeal Tribunal, <http://www.catribunal.org.uk/documents/JdgNapp150102.pdf>.

¹⁹ *Attheraces Ltd. v. British Racing Board*, *supra* note 3.

²⁰ Evans, D.S. & Padilla, A.J., "Excessive Prices: Using Economics to define Administrative Legal Rules", CEMFI Working Paper No. 0416, September 2004, <ftp://ftp.cemfi.es/wp/04/0416.pdf> at p. 3.

²¹ *United Brands*, *supra* note 7, at p. 252.

²² Comp/A.36.568/D3 23 July 2004, http://ec.europa.eu/comm/competition/antitrust/cases/decisions/36568/reject_en.pdf.

the ferry and no-cost factors like the intangible value of the location of the port had to be considered. A similar approach can be seen in the English Court of Appeal decision in *Attheraces* where the first instance finding of excessive pricing was overturned because the appellate court was of the view that a costs+ test takes too narrow a view of what constitutes economic value. In particular it does not have regard to the value to the purchaser of the product of service.²³

Second, price comparison is often used in competition law cases but it may be difficult if not impossible to compare prices set by different competitors given that intellectual property rights are by definition unique.²⁴

Third, under both US and EC competition law monopolisation and dominance are not prohibited. Given the economic view of dominance as that of the ability to charge prices significantly higher than the competitive level it is problematic if not paradoxical to view excessive pricing as abusive given it goes to the definition of dominance.²⁵ Finally, institutionally, if there is a finding of excessive pricing a competition agency may look like it is imposing price controls which runs counter to the *raison d'être* of competition law facilitating competitive markets where prices are allowed to find their own level to the benefit of consumer welfare. In fact, excessive pricing can be unproblematic – if a dominant undertaking charges monopoly rents, provided there is no market foreclosure then the competitive forces of the market will ensure that new entrants or existing incumbents will intervene and compete on price. Even less efficient competitors may act as a constraint on dominant firms.²⁶ Excessive pricing can even promote consumer welfare where the ability to charge high prices encourage innovation.

Given the difficulties of evaluation, remedy and the conceptual integration of dominance and pricing, Evans and Padilla warn of the high risk of errors with excessive pricing either wrongly condemned (type I error) or wrongly acquitted (type II error).²⁷ The difficulty is that of devising a sufficiently realistic legal test that will allow dominant undertakings to make pricing decisions that will be predictably legal.²⁸

²³ *Attheraces Ltd. v. British Racing Board*, *supra* note 3, from para. 148.

²⁴ *Geradin & Rato*, *supra* note 6 at p. 48.

²⁵ Katsoulacos, Y., "Exploitative Practices in Article 82", *European Enterprise Journal*, 2006, available at <http://www.cresse.info/uploadfiles/Exploitative%20Practices%20in%20Article%2082.pdf>.

²⁶ *Ibid.*

²⁷ *Ibid.* at p. 4. See generally Schrader-Frechette, K., *Risk and Rationality*, Berkeley and Los Angeles, University of California Press, 1991, esp. Ch. 9.

²⁸ Whish, *supra* note 5, p. 689.

Evans and Padilla for this reason suggest that excessive pricing should only be alleged in obvious, serious and indefensible cases.²⁹ This of course begs the question to some extent: when are cases obvious, serious and indefensible? The NAPP case in the UK I suggest comes close to meeting the test. NAPP was fined for excessive pricing of its sustained release morphine drug in the community (general practitioner) market. On appeal NAPP had argued that account had to be taken of the need to recoup for investment in R&D in a dynamic market with pricing evaluated on a portfolio basis for a range of products. While the Competition Appeals Tribunal seemed to accept the principle of the argument, it was rejected in this case. The drug in issue had been put on the market in 1980. There was no evidence put forward as to the costs that had to be recouped and, given the time frame, it was taken as given that recoupment had taken place long before the decision. The pricing in the case was evaluated under both price-costs margin and price benchmarking tests (a preponderance of the evidence standard). NAPP was found to have earned 80% profit under the price-costs margin test with its nearest competitor earning less than 70% and under price benchmarking its prices were 33-67% higher than those of its competitors in 2000 – the year before the initial decision. In the community market prices were over 10 times those in hospitals and 4-7 times higher than NAPP's own export prices. But NAPP is and should remain the exceptional case leaving excessive pricing as a possible basis for an A82 action but only one to be invoked rarely.

Evans and Padilla suggest a modified *per se* test as a means of limiting the risk of error. Excessive prices would be *per se* legal save in exceptional circumstances defined as: (a) firms have a near monopoly position in the market which is not the result of past investments or innovations, and which is protected by insurmountable legal barriers to entry; (b) the prices charged by the firm widely exceed its average total costs; and (c) there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets. The test is cumulative and the final requirement is explicitly reminiscent of the *Magill* and *IMS* tests³⁰ under which refusal to licence can constitute an abuse if it prevents the sale of a new product for which there is potential consumer demand. The requirements are cumulative under the proposed test and the new product rule as well as tying it to the compulsory licensing cases also ties it firmly to exclusion – market entry to adjacent markets is restricted through the excessive pricing. Thus excessive pricing is

²⁹ Evans & Padilla, *supra* note 19, at p. 22.

³⁰ Cases C-241/91 & 242/91P, *RTE and Others v. Commission*, 1995, ECR I-743; Case C-418/01, *IMS Health v. NDC Health*, 2004, 4 CMLR 28.

redefined as exclusionary rather than merely exploitative underlining once again the difficulty of alleging excessive pricing under Art. 82 EC Treaty.

II. Intellectual Property Rights and Competition

From a sociological perspective markets require three legal tools in order to function: property, contract and good governance.³¹ These tools are necessarily complimentary but, insofar as they are normatively distinct or closed to each other, tension can exist between them. Competition law is one aspect of the governance of markets and, like intellectual property law shares the overlapping but not exclusive objective of promoting innovation in the market. As subsystems of law, they are normatively closed but also linked (or structurally coupled to use the language of autopoiesis)³² through the social phenomena of markets and innovation. It is this combination of linkage and closure that is a source of tension. This tension is compounded by the demands that are made on law in general and on both these domains of law in particular by the social phenomenon that they are called on to address. This is not just a matter of what is often called ‘regulatory drag’ although in dynamic high tech markets regulatory drag may be an inevitable feature of the law. Other factors such as the extent to which laws adopted are a response to intense lobbying – which is a hallmark of intellectual property laws generally including those adopted within the field of competition law – are also relevant.³³ Irrespective of the institutional or public choice features of the domain, regard is had to the theoretical underpinnings of law, its role and the nature of the modern state. By adopting

³¹ Fligstein, N. & Mara-Drita, I., “How To Make a Market: Reflections on the Attempt to Create a Single Market in the European Union”, *American Journal of Sociology*, Vol. 102, 1996, pp. 1, 14. See also Maher, I., “The Interface of EC Competition Law and Intellectual Property Rights: The Essential and the creative”, *Cambridge Yearbook of European Law*, 2005, pp. 187-208.

³² Teubner, G. (ed.), *Autopoietic Law: A New Approach to Law and Society*, 1998 Berlin, De Gruyter; Teubner, G., “Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital” in R.J. in t’Veld, L. Schaap, C.J.A.M. Termeer and M.J.W. van Twist (eds.), *Autopoiesis and Configuration Theory: new Approaches to Societal Steering*, Dordrecht, Kluwer, 1991, at pp. 133-134.

³³ See e.g. the discussion of the Directive on Protection of Databases Directive 96/9/EC O.J. (1996) L 77/20 in I. Lianos, “Competition Law and Intellectual Property Rights: Is the Property Rights’ Approach Right?”, *Cambridge Yearbook of European Law*, 2006, at p. 173; and the reference to frenzied lobbying by I. Saltzman, in his discussion of the adoption of a block exemption regulation in “The New Technology Transfer Block Exemption Regulation”, *European Intellectual Property Review*, Vol. 9, 1996, p. 506.

this perspective, it is hoped to shed some light on the question posed in the title.

A. *The Regulatory Trilemma*

Juridification is – as Teubner suggests – an ugly word and one that is difficult to define.³⁴ The context of juridification is the changing and increasing demands on law in the modern regulatory state. Juridification is not defined by a proliferation of laws but as a process in which the interventionist state produces a new type of law, regulatory law, which specifies conduct in order to achieve particular substantive ends.³⁵ Given that juridification is different from the mere proliferation of law, the ambition should not be to attempt to stop ‘legalisation’ instead the aim should be to channel law so as to avoid or minimise any negative side-effects.

Formal rationality which is a hallmark of law is being changed by the process of juridification such that material rationality is to the fore and is defined by reference to function, legitimation and norm structure.³⁶ In relation to function, law is no longer exclusively concerned with conflict resolution but increasingly with political intervention. The political sphere has taken on responsibility for many social processes and in turn requires the definition of goals, the choice of normative means and their implementation. Competition law has not been entirely instrumentalised by this process – thanks in part to its influential episteme of legal practitioners³⁷ and the high level of technical expertise and discourse that operates in the field. At the same time, within the specific context of the EC the fact that competition decisions are taken by the full College of Commissioners allows some scope for instrumentalisation. Substantively, the emphasis on market integration has also proved a powerful driver for the development of competition law in the first 50 years.

Teubner argues that the basis of legitimation is no longer exclusively traditional values and goals encapsulated within the rule of law. There is instead an increasing emphasis on result orientation both institutionally

³⁴ Juridification: “Concepts, Aspects, Limits, Solutions” in R. Baldwin, C. Scott and Ch. Hood (eds.), *A Reader on Regulation*, Oxford, Oxford University Press, 1998, p. 389. Blichner, L.C., & Molander, A., “Mapping Juridification”, *European Law Journal*, Vol. 14, 2008, pp. 36-54.

³⁵ Teubner, G., “Juridification: Concepts, Aspects, Limits, Solutions” in Baldwin, Scott and Hood, *supra* note 34, p. 405.

³⁶ *Ibid.*, p. 401.

³⁷ van Waarden, F. & Drahoš, M., “Courts and (Epistemic) Communities in the Convergence of Competition Politics”, *Journal of European Public Policy*, Vol. 9(6), 2002, pp. 913-934.

and substantively. Agencies who implement laws are required to justify their role through reference *e.g.* to value for money, performance indicators and benchmarking under better regulation initiatives see *e.g.* the introduction of management plans by the EC Commission's Directorate General for Competition in the last years.³⁸ The success of a policy field may be defined by reference to what political scientists refer to as output legitimacy³⁹ and this can be seen in the form of self-evaluation contained in competition agency annual reports. This emphasis on outputs can also lead to general questions being raised in the context of specific cases. Thus the question 'who wins?' is raised not just in relation to the parties of the action but more widely in relation to (economics-defined) consumer welfare. In intellectual property competition cases this question can be particularly pertinent and difficult to answer given the tensions in relation to concerns about market foreclosure, freedom of contract, and innovation.

For example in *Microsoft* the requirement to deal was not limited to any particular customer creating an unusually wide obligation, and the issue of whether innovation was adversely affected was argued from two radically different perspectives with Microsoft arguing that the incentive to innovate would be removed by the obligation to deal while the Commission argued that any negative effect on Microsoft's incentive to innovate was offset by the positive effect of innovation for the whole industry – with the Court of First Instance endorsing the view of the Commission.⁴⁰ Finally the structure of regulatory law is characterised by a weakening of the idea of generality and methods of interpretation with increasing discretion and particularisation of the law. The law is increasingly purpose orientated (in keeping with result orientation legitimisation) and dependent on social science thinking that can measure outputs and define legal function.⁴¹

Teubner suggests that law is on the one hand increasingly formalised to the extent that it is self-referential and professionalized. On the other hand, it is becoming increasingly instrumentalised as it is exposed more

³⁸ See *e.g.* the 2006 management plan available at http://ec.europa.eu/comm/competition/publications/annual_management_plan/amp_2006_en.pdf.

³⁹ See *e.g.* Lord, C. & Magnette, P., "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU", *Journal of Common Market Studies*, Vol. 42(1), 2004, pp. 183-202.

⁴⁰ EC Commission, Decision Microsoft/W2000 (COMP/C-3.37.792) 24 March 2004 at para. 783 approved by the Court of First Instance Case T-201/04, *Microsoft v. Commission*, 17 September 2007, [2007]5 CMLR 11, see paragraphs 648-659 in particular.

⁴¹ Teubner, *supra* note 35, p. 402.

and more to the demands of politics and of regulated areas of life.⁴² This paradox of increasing autonomy of law and its increasing interdependence creates a tension such that regulatory law can only trigger self-regulatory processes rather than seek to control social processes directly. The self-referential nature of law and other social systems makes anything more direct impossible. If law tries to intervene over and beyond the extent it is possible within the autopoietic social system then this gives rise to the regulatory trilemma⁴³ *i.e.* one of three things can happen:

- The law is ignored as irrelevant and has no impact;
- It produces disintegrating effects on the social system; or
- It produces disintegrating effects for law itself.

There are potentially many solutions to this trilemma such as focusing on how the law is implemented, deregulation (in particular reliance on cost-benefit analysis – which Teubner criticises for the fact that economic costs are more readily calculable than social costs),⁴⁴ and, the approach favoured by Teubner, proceduralisation, which is the control of self-regulation.⁴⁵ The strength of this fairly pessimistic but ultimately realistic approach is that it acknowledges the limits of the law and hence advocates indirect control by law through a focus on the regulation of organisation, procedures and the redistribution of competences.⁴⁶ Teubner specifically refers to the negotiated outcomes in merger law as an example of such negotiated regulation. The aim is to replace direct state control with effective internal control through incentives and legal strategies. Thus by recognising the limits of the law, it can be put to best effect in the social world and thereby avoid the risk of either social or legal disintegration.

Regulatory law in this context is not understood in the narrow sense of state intervention to prevent market failure⁴⁷ but in the wider sense of law having a role beyond conflict resolution where function, legitimation and structure have been re-defined. Black's definition: the intentional activity of attempting to control, order or influence the behaviour

⁴² *Ibid.* p. 407.

⁴³ *Ibid.* p. 408.

⁴⁴ *Ibid.* p. 417.

⁴⁵ *Ibid.* p. 420.

⁴⁶ *Ibid.* p. 421.

⁴⁷ See *e.g.* Ogus, A., *Regulation: Legal Form and Economic Theory*, Oxford, Hart Publishing, 2004, pp. 1-3.

of others⁴⁸ is more useful for our purposes as it can encapsulate competition law provided control is construed as indirect control. In other words, the analysis is not predicated on the conventional dichotomy between competition and regulation but seeks to distinguish the modern phenomenon of the simultaneously increasing formal law and the instrumentalised law. The challenge is to locate competition law and intellectual property law within that framework.

B. Competition and Intellectual Property Law: Subsystems of Law

Teubner's analysis is at a high level of abstraction. While he draws examples from labour law, consumer law and competition law, he does not address the regulatory trilemma that can arise between legal subsystems such as competition law and intellectual property law. While intellectual property and competition law may share some objectives they remain autonomous but overlapping normative subsystems of law. This view is re-enforced in the current debate which seeks to remove the distinction between intellectual property rights and other property rights.⁴⁹ Lianos questions this trend, which for antitrust purposes at least, is accepted in US law.⁵⁰ He notes that intellectual property rights are for a defined period, there are conditions for validity of patents which has no parallel in tangible property law and, critically in his view, the creation of intellectual property is contingent on the intervention of a regulatory agency. In other words, intellectual property rights have a public dimension that is almost entirely absent from ownership of tangible property. The Fundamental Rights Charter of the EU extends the right to property to intellectual property.⁵¹ The Charter is of course not binding – yet – and the ECJ does not seem to have formed a firm view as to the conflation or distinction between intellectual property and other property rights.⁵² For example there is a ready cross-referencing

⁴⁸ Black, J., "Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World", *Current Legal Problems*, Vol. 54, 2001, p. 103.

⁴⁹ See Lianos, *supra* note 33, p. 155.

⁵⁰ US Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property 1995 <http://www.usdoj.gov/atr/public/guidelines/0558.htm>. See Katz, A., "Intellectual Property, Antitrust and the Presumption of Market Power: Making Sense of Alleged nonsense", University of Toronto, Legal Studies Series Research paper No. 02/05.

⁵¹ Art. 17 lit.(2) EC Treaty see http://ec.europa.eu/justice_home/unit/charte/en/charter-freedoms.html.

⁵² Cf. the position of the European Court of Human Rights see Helfer, L.R., "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights", *Harvard International Law Journal*, Vol. 49, 2008, pp. 1-52.

between the compulsory licensing of intellectual property rights and essential facility-type cases.⁵³ Thus *Magill* (compulsory licensing of intellectual property rights),⁵⁴ was much cited in *Bronner* (essential facility-type case).⁵⁵ Nonetheless, a clear distinction is drawn between the cases in that there is an extra element to the exceptional circumstances test in intellectual property rights cases viz. that the refusal to licence must prevent the emergence of a new product. While it is important not to overstate the differences between the two subsystems of law, a number of writers refer to the tensions between intellectual property law and competition law due to the expansion of intellectual property rights.⁵⁶

Whether intellectual property law is equated with tangible property rights or not, the potential for friction between the two legal domains exists and the dilemma is how the two systems can best seek to indirectly control markets where intellectual property plays a role. The risk is that both domains will be irrelevant *e.g.* the early experience with cyber space. Alternatively and more pertinently, the risks are either that there will be disintegration of the two systems or their attempt to control the market will produce disintegrative effects on the market. Under this analysis there is no hierarchy between the domains. Neither can control the other and their influence on each other and the market is indirect. Nonetheless, because of the linkages between the two domains – *e.g.* litigation, a common commitment to promote innovation – the two domains are forced (or should be), to process at the same time and repeatedly their reaction to externalities such as events in the market.

Lianos suggests that the discourse of regulation (I would suggest regulatory law) is better suited to constructive dialectic relation between competition law and intellectual property law.⁵⁷ This is because such a conception allows for the internalisation of competition concerns within intellectual property law. I would suggest that this cannot be a one-way street and that the internalisation of intellectual property concerns within competition law is also necessary. This can be done at the statu-

⁵³ See Maher, *supra* note 31, pp. 187-208.

⁵⁴ *RTE and Others v. Commission*, *supra* note 30.

⁵⁵ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG and Other*, 1998, ECR I-7817.

⁵⁶ See Lianos, *supra* note 32, p. 154; Cornish, W., *Intellectual Property: Omnipresent, Distracting, Irrelevant?*, Oxford, Oxford University Press, 2004; in relation to copyright Laddie, H., "Copyright: Over-strength, Over-regulated, Over-rated?" in "Innovation, Incentive and Rewards: Intellectual Property Law and Policy", *Hume Papers on Public Policy*, Vol. 5(3), 1997, pp. 1-17. A similar point is made by Helfer *supra* note 52, p. 159.

⁵⁷ Lianos, *supra* note 33, p. 179.

tory level *e.g.* through the Software Directive as Lianos suggests and on the competition side through block exemption regulations. This is not sufficient however as the iterative processes of reflexive law require that the internalisation of intellectual property law and competition law concerns become part of *ex poste* conflict resolution also. The suggestion that each domain should seek to indirectly influence the other so it can self-regulate to take account of competition/intellectual property concerns has a policy dimension and a practical legal dimension but also on a more fundamental level is important to ensure that the two legal domains can develop in a manner that is both legally coherent, consistent and relevant for the market so that the two domains do not undermine their respective internal coherence and structure.

C. Exploitative Abuses and Regulatory Law

In the specific context of exploitative abuses, what evidence is there of the regulatory trilemma and its resolution? Art. 82 EC Treaty is not a general provision for the regulation of prices.⁵⁸ And while Art. 82 lit.(a) EC Treaty does refer to unfair prices, the Commission has until recently steered clear of basing decisions on excessive pricing and where it has been alleged has rejected a test based on costs+ or applied it in the context of a recently liberalised sector where the dominant undertaking retained a monopoly position. In doing so, the internal coherence of Art. 82 EC Treaty is retained. And excessive pricing allegations or findings are even rarer in relation to intellectual property rights. Where the competition agency ends up as a price regulator most notably in the context of findings of exclusionary abuse (refusal to supply) the remedy involves licensing on reasonable terms. If subsequently there is a suggestion that the licence fees are not reasonable (*i.e.* excessive) then not only does the agency (or their agent) end up as a price regulator but also has to apply a test that is generally seen as ambiguous and vague and one to be invoked only in obvious, indefensible and serious cases. The difficulty here is that the role of competition law and the competition agency is corroded by the remedy offered with the need to monitor prices at odds with the emphasis in competition law of price being determined by competitive markets. This is why compulsory licensing can only be imposed in exceptional circumstances – not just to protect the freedom of contract but also to ensure the integrity of the competition law and of the intellectual property law regimes.

The Commission has however opened two investigations based on exploitative abuses arising out of standard-setting arrangements. Standard setting organisations (SSOs) with voluntary membership agree

⁵⁸ *Attieraces Ltd. v. British Racing Board*, *supra* note 3, para. 217.

common industry standards – driven by the needs of technology, interoperability and product compatibility.⁵⁹ Such organisations operate on the basis that should members find that their patents are necessary for the operation of the agreed standards that they will disclose this fact and then grant licences on fair, reasonable and non-discriminatory (FRAND) terms. Because these standard-setting arrangements are voluntary and self-regulatory, it is possible for members to seek to exploit their patents by failing to disclose that they are necessary for the standards agreed or by breaching the FRAND terms in their licences where those patents are essential for that standard.

In July 2007 the Commission sent a statement of objections to Rambus which is claiming patent rights in relation to an industry standard set by a standard setting organisation for ‘Dynamic Random Access Memory Chips’.⁶⁰ The Commission alleges that Rambus had hidden its patents from the SSO when the standard was being set (leading to what is called a patent ambush) and has since claimed unreasonable royalties such excessive prices constituting a breach of Art. 82 lit.(a) EC Treaty. This case is following on actions by the US Federal Trade Commission finding Rambus had engaged in illegal monopolisation contrary to US antitrust law. While US law differs from EC law in this area – there is no specific EC law dealing with patent ambushes and exploitative abuses are *per se* illegal under EC law but not under US law – the Commission has clearly decided to address the interplay of standard-setting organisations, patents and competition law using exploitable abuses under Art. 82 EC Treaty as the appropriate legal tool. In October 2007 it opened an investigation into Qualcomm’s licensing terms following complaints that it has abused the dominant position it acquired as a result of its (patented) technology having been chosen as the technical standard for third generation (3G) mobile phone technology.⁶¹ The Commission will investigate whether Qualcomm – a chip set manufacturer – meets its FRAND commitment given its technology is the common standard.

The cases are important as they can be seen as indicating a new willingness by the Commission to invoke Art. 82 lit.(a) EC Treaty in a competition and intellectual property right context. Geradin and Rato warn against FRAND being seen as an adequate means through which to measure excessive pricing. They also point to the problems of determining whether an undertaking is dominant given that these standards cases tend to involve dynamic high tech markets. And of course, domi-

⁵⁹ Geradin & Rato, *supra* note 6.

⁶⁰ See EC Commission press release, *supra* note 5.

⁶¹ *Ibid.*

nance is not illegal under EC law – only abuse. What is interesting is that it is in the context of self-regulatory regimes operating in the shadow of the law but on a voluntary basis that the Commission has decided to act. Both cases can be seen as supportive of voluntary standard-setting regimes with the Commission responding to complaints about licensing arrangements. The risk is that competition law, should it be seen as interfering too directly in the operation of standard-setting, may have a negative impact on SSO regimes and/or on the coherence of Art. 82 EC Treaty especially if the outcome of the cases increases uncertainty as to when Art. 82 lit.(a) EC Treaty applies and as to who determines what is the FRAND standard in any particular regime. If interpretation of the FRAND is delegated to a competition agency or a Court then it may lose its flexibility which has been its hallmark and has contributed to its widespread use. What these cases may show is the general effectiveness of SSOs and they will test where the boundaries of Art. 82 lit.(a) EC Treaty lie *i.e.* whether the circumstances are sufficiently clear-cut in this case to warrant a finding of exploitative abuse.

Conclusion

The key question for both competition law and intellectual property law is how to ensure that the two domains can adapt while retaining their integrity. There are two suggestions that can be made. First, in the context of conflict resolution one way forward is to examine procedural issues such as the burden of proof and roles relating to standing, it would be useful to address questions such as: who should decide a dispute? How? At what level (national/supra-national/international)? Using which legal tools? For what sort of remedy? In other words, analysis could usefully turn to functional rather than substantive issues on the basis that a clear functional analysis could shed light on the degree of tension and commonality between competition law and intellectual property law. Second, by limiting analysis to intellectual property law and competition law issues, the analysis is arguably limited especially in the EU context where the market integration imperative is significant and Art. 30 EC Treaty continues to cast a long and influential shadow.

Contributors

Steven ANDERMAN is Professor of Law at the University of Essex. He has been an expert on competition policy to the Economic and Social Committee of the European Union since 1984. He is currently advising the Intellectual Property Academy and the Intellectual Property Office of Singapore on the interface of Intellectual Property with the new Singapore competition law while also advising the Singapore Competition Commission on the implications of the new Competition Act and the preparation of Block Exemption Regulations and Guidelines.

Josef DREXL held a Chair for European Economic Law at the University of Würzburg from 1997 to 2000; Chair for Private Law, European and International Law at the University of Munich from 2000 to 2006. He is director of the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich since 2002 and Honorary Professor at the University of Munich since 2006.

Christine GODT, PD Dr. jur. (Bremen), is visiting (2007/2008) Professor of Law at the Ludwig-Maximilians-Universität Munich teaching Private Law, Intellectual Property, European and International Economic law. She is based as Assistant Professor of Law at the University of Bremen. Her research interests focus on intellectual property, the international transfer regime of genetic resources and the embeddedness of non-trade issues in International Economic Law. She heads the work group "Boundaries of Information Property" under the umbrella of the comparatist association of the Trento Project "Common Core of European Private Law". Habilitation thesis: "Eigentum an Information" (2007), Ph.D. thesis: "Haftung für ökologische Schäden" (1997).

Pablo IBÁÑEZ COLOMO is a Researcher at the European University Institute in Florence (Italy) and Fellow of Transatlantic Technology Law Forum at Stanford Law School. He has been a Teaching Assistant at the Department of European Legal Studies at the College of Europe (Bruges, Belgium) from 2004 to 2007. His research interests include competition law, telecommunications law and intellectual property.

Annette KUR, Professor, Max Planck Institute for Intellectual Property, University of Munich.

Imelda MAHER is the first holder of the Sutherland Chair, taking up the post in 2005 having previously worked at the London School of

Economics. She is an EU lawyer where her primary research interest is in the intersection of law and governance where she has explored the substantive fields of competition law (she is author of *Competition Law: Alignment and Reform*) and fiscal governance.

Matteo NEGRINOTTI is a teaching assistant for the ELEA Programme at the College of Europe (Bruges), since August 2006. He received an LL.M. degree in EC Law, with specialisation in ELEA, from the College of Europe, Bruges, (2005-2006); M.Sc. in Law and Economics at the University of Siena (2003-2004); PhD Candidate in Law and Economics at the University of Siena (2003-on going) and a Law Degree (Laurea in Giurisprudenza), Facoltà di Giurisprudenza, Università degli Studi di Pavia (1998-2003). His research interests are at competition law, intellectual property rights, EC business law, regulated industries, law and economics.

Mark PATTERSON is a professor at Fordham University School of Law in New York and a registered US patent attorney. He previously practiced patent law and antitrust law, and he currently teaches courses in those areas and in contract law. His research interests are primarily at the intersection of intellectual property and antitrust law.

Heike SCHWEITZER holds the joint chair for competition law at the European University Institute since fall 2006. Before, she has been affiliated with the Max-Planck-Institute for Comparative and International Private Law in Hamburg and has been an Assistant Professor at Hamburg University. Her main research interests include EU competition and US antitrust law, competition and regulation and comparative contract and corporate law.

Eileen SHEEHAN is a graduate of Trinity College Dublin and the College of Europe, Bruges. She is currently working as a *Référéndaire* at the Court of Justice.

Mario SIRAGUSA received an LL.M. degree from Harvard Law School in 1972, a Diploma of High European Studies from the College of Europe in Belgium in 1971, and a J.D. degree, magna cum laude, from the University of Rome La Sapienza in 1970. His most recent publications include: "Immunity from Fines and Fine Reductions for Companies that Offer to Co-Operate in the Investigation of Cartel Infringements" in M. Siragusa, C. Rizza (eds.), *EU competition law: Cartel Law*, Leuven, Claeys & Casteels, 2007; "Economia e Diritto Antitrust", Carocci, 2006 (L. Prosperetti, M. Beretta, and M. Merini co-authors). His practice focuses on Italian and European Community competition law. He has extensive experience representing clients before the European Court of Justice, the Court of First Instance of the

European Communities, the Directorate General for Competition of the EC Commission, and the Italian Antitrust Authority.

Elżbieta TRAPLE is Professor at the Jagiellonian University Poland and Attorney at law in Krakow. Her academic research covers civil law and intellectual property law. She is author of numerous publications in this field. During the period of Poland's preparations to accession to the EU she participated in a group of experts appointed by the EC to work on the harmonization of Polish intellectual law with EU Law.