A legal solution to a real problem: the interface between intellectual property, competition and human rights

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Degree of PhD
The University of Edinburgh
2008

Certificate

Regulation 2.5

I certify that this thesis has been composed by me and is my own work.

……..

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30 September 2008

Dedication

For Robbie, Hamish and Ross. Without whom….

Acknowledgements

Many people have helped me along the way. For igniting and maintaining my interest in intellectual property, thanks to Charters Macdonald-Brown, Fiona Russell, Heidi Hurdle, Eleanor Scacco, Mary Padbury, Belinda Findlay, Grant Fisher, Jim Cormack, Graeme Colquhoun and Seona Burnett. For introducing me to competition, thanks to Bill Reid and Maddi Lawrence. For asking me to "look at intellectual property and human rights", thanks again to Graeme Colquhoun. Thank you also to all the participants in the "Intellectual property, competition and human rights" events held by the AHRC Research Centre for Studies in Intellectual Property and Technology Law at the University of Edinburgh, in December 2004 and March 2006.

I have received a great deal of support from my colleagues at the School of Law, University of Edinburgh, in particular Gillian Black, Niamh Nic Shuibhne, Graeme Laurie, Anna Souhami, Nick Dyson and all in the law library. To friends old and new, near and far, for all their support, again thank you - Katie Chapman, Kate Beaton, Vanessa King, Louise Hobbs, Liz Mosin, Vicki Antipatis, Eleanor Scacco, Wendy Harris, Louisa Macdonell, Nicola Hudson, Kate Patrick, Moira Simpson, Catherine McCabe-Raitt, Kathryn Hunter, Frankie Bell, Karen Sawyer, Ruth Callan and Lisa Cormack.

Thank you to friends and family for reading draft chapters – Heather Lockhart, Wendy Harris, Charlotte Carty, Jim Cormack, Louise Hobbs, Chris Stothers, Pat Treacy, Nic Lockhart, Eleanor Scacco, Brian Lockhart and Christine Lockhart. Finally, thank you to Dr Bob Lane and above all to my principal supervisor, Professor Charlotte Waelde.

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I Introduction[1]

I.1 Overview

"The essence of intellectual property rights is the right to exclude"[2]

The owner of an intellectual property ("IP") right may exclude others from using the technology or material which is the subject of the IP. This right to exclude can have significant negative consequences for persons other than the IP owner. [3] For example, patent owners can limit access to essential medicines by preventing the making or importing of medicines which are, or have elements which are, technically identical to those which are the subject of the patent;[4] copyright owners can prevent the reproduction or downloading[5] of material containing health related information and of material which is important for education or could be used for entertainment;[6] and

[1] **Please note (i) that all links to websites included in this work were correct when last checked between 20 and 30 September 2008; (ii) in these notes, all page, note and section references in which appear in bold are references to other pages, sections and notes of this work.**

[2] *HM Stationery Office v Automobile Association Ltd* [2001] E.C.C. 34 ("*HMSO"*) para 19, per Laddie J.

[3] See full consideration of these in Cornish, W. R. (2004) *Intellectual Property. Omnipresent, Distracting, Irrelevant?* Clarendon Law Lectures, Oxford University Press, Oxford, UK ("Cornish Clarendon"); Kur, A "A New Framework for Intellectual Property Rights – Horizontal Issues" IIC vol 35 1/2004 1; Maskus, K.E. and Reichman, J.H. "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" 3 in Maskus, K.E. and Reichman, J.H. (eds) (2005) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* Cambridge University Press, Cambridge, UK ("Maskus/Reichman").

[4] Eg section 60(1)(a) UK Patents Act 1977 ("PA"). Note that more than one patent may be relevant to a product – see eg Anderman, S.D. "The competition law/IP 'interface': an introductory note" 1 ("Anderman Introductory") in Anderman, S.D. (ed) (2007) *The Interface between Intellectual Property Rights and Competition Policy* Cambridge University Press, Cambridge, UK ("Anderman Interface"), 19. See discussion of patents and essential medicines in Medicins Sans Frontieres Access to Medicines campaign http://www.accessmed-msf.org/index.asp and from an academic legal perspective, see Abbott, F. "Managing the Hydra: The Herculean Task of Ensuring Access to Essential Medicines" 393 ("Abbott Hydra") and Klug, H. Comment "Access to Essential Medicines – Promoting Human Rights over Free Trade and Intellectual Property Claims" 481 all in Maskus/ Reichman **n3;** Gathii, J.T. "Approaching to Accessing Essential Medicines and the TRIPS Agreement" 393 in Yu, P. (ed) (2007) *Intellectual Property and Information Wealth. Issues and Practices in the Digital Age. Volume 4: International Intellectual Property Law and Policy* Praeger Perspectives, Praeger, Westport, Connecticut, USA and London, UK ("Yu Information Wealth"); and Hestermeyer, H. (2007) *Human Rights and the WTO. The Case of Patents and Access to Medicines* Oxford University Press, New York, USA ("Hestermeyer"), chapters 1 and 4.

[5] Eg UK Copyright Designs and Patents Act 1988 ("CDPA"), section 16.

[6] See discussion in David, P.A. "*Koyaanisqatsi* in Cyberspace: The Economics of an "Out-of-Balance" Regime of Private Property Rights in Data and Information" 81 in Maskus/ Reichman **n3**; Elkin-Koren, N. "It's All About Control: Rethinking Copyright in the New Information Landscape" 79 in Elkin-

trade marks and copyright can be used to limit adverse comment and cultural dialogue, through the ability of their owners to control the use of protected words and images.[7]

Yet IP may make a positive contribution to society. Economic argument[8] and practical evidence[9] suggest that patents encourage innovation and the dissemination of

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Koren, N. and Netanel, N. (2002) *The Commodification of Information* Kluwer Law International, The Hague, The Netherlands, London, UK and New York, USA ("Elkin-Koren/Netanel"); Yu, Peter K., "Bridging the Digital Divide: Equality in the Information Age" Cardozo Arts & Entertainment Law Journal, Vol. 20, Iss. 1, pp1-52, 2002; Story, A. "Don't Ignore Copyright, the "Sleeping Giant" on the TRIPS and International Educational Agenda" 125 in Drahos, P and Mayne, R. (eds) (2002) *Global Intellectual Property Rights. Knowledge, Access and Development* Palgrave Macmillan, Basingstoke, UK and New York, USA ("Drahos/Mayne"); Guadamuz, A. "The digital divide: it's the content, stupid: Part 2." C.T.L.R. 2005, 11(4), 113-118; and Okediji, R. L. "Sustainable Access to Copyrighted Digital Information Works in Developing Countries" 142 in Maskus/ Reichman **n3**.

[7] Eg section 10 UK Trade Marks Act 1994 ("TMA"). See Richardson, M. "Trade Marks and Language" (2004) 26 *Sydney Law Review* 193, at paras 26-43.

[8]See discussion of diverging views in Machlup, F. and Penrose, E. (1950), 'The Patent Controversy in the Nineteenth Century", *Journal of Economic History*, **X**(1), May, 1-29, Plant, A. (1934) 'The Economic Theory Concerning Patents for Inventions", *Economica*, **1**, February, New Series, 30-51, Machlup, F. (1959), *An Economic Review of the Patent System: Study of the SubCommitee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary*, US Senate, 85th Congress, 2nd Session, Study Number 15, Washington: United States Government Printing Office, 1-86, 129 in Towse, R. and Holzhammer, (eds) (2002) *The Economics of Intellectual Property: vol II Patents* The International Library of Critical Writing in Economics 145, Edward Elgar Publishing Ltd, Cheltenham, UK at 8, 37 and 129 respectively; Mackaay, E. (1990 "Economic Incentives in Markets for Information and Innovation', *Harvard Journal of Law and Public Policy'*, **13**(3), Summer, 867-909 and Merges, R.P. (1994), 'Of Property Rules, Coase, and Intellectual Property', *Columbia Law Review*, **94**, 2655-73 both in Towse, R. and Holzhammer, (eds) (2002) *The Economics of Intellectual Property: vol I Introduction and Copyright* The International Library of Critical Writing in Economics 145, Edward Elgar Publishing Ltd, Cheltenham, UK at 8 and 95 respectively; Scotchmer, S. (1996), 'Patents as an Incentive System' in Beth Allen (ed.), *Economics in a Changing World: Proceedings of the Tenth World Congress of the International Economic Association, Moscow*, Volume 2, Chapter 12, Houndmills, Macmillan, 281-96, 281 in Towse, R. and Holzhammer, (eds) (2002) *The Economics of Intellectual Property: vol II Patents* The International Library of Critical Writing in Economics 145, Edward Elgar Publishing Ltd, Cheltenham, UK; Pretnar, B. "The economic impact of patents in a knowledge-based market economy." IIC 2003, 34(8), 887-906; Fisher, M. (2007) *Fundamentals of Patent Law. Interpretation and Scope of Protection* Hart Publishing, Oxford, UK ("Fisher"), 57 et seq; Dutfield, G. "A rights-free world – is it workable, and what is the point" 211 in Waelde, C. and MacQueen, H. (2007) *Intellectual Property: The Many Faces of the Public Domain* Edward Elgar Cheltenham, UK and Northampton, MA, USA; Guellec, D. "Patents as an Incentive to Innovate" 46 in Guellec, D. and van Pottelsberghe de la Potterie, B. (eds) (2007) *The Economics of the European Patent System. IP Policy for Innovation and Competition* Oxford University Press, Oxford, UK; and Maskus, K.E. "The Economics of Global Intellectual Property and Economic Development: A Survey" 159 in Yu Information Wealth **n4.**

[9]See Sherwood, R. M. (1990) *"Intellectual Property and Economic Development"* Westview Special Studies in Science, Technology, and Public Policy Westview Press Inc, Colorado, USA and Oxford, UK ("Sherwood"); Scherer, F.M. "The Innovation Lottery" 3 in Dreyfuss, R.C. et al (eds) (2001) *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society* Oxford University Press, Oxford, UK and New York, USA ("Dreyfuss Expanding"); Macdonald, S. "Exploring the Hidden Costs of Patents" 13 in Drahos/Mayne **n6**; Greenhalgh, C. and Rogers, M. (2006) "The Value of Innovation: The Interaction of Competition, R&D and IP" University of Oxford

its proceeds,[10] thus providing a base for further innovation; and they suggest that copyright may have a role in encouragement of creativity.[11] IP can be justified also on the basis of natural rights and utilitarianism.[12] Further, the rights of the IP owner are not unlimited.[13] There are restrictions on duration[14] and territorial scope,[15] requirements which must be met for the rights to exist[16] and for the IP owner to be able to exclude in a particular situation,[17] sharing may be required through compulsory licensing[18] and some conduct is permitted in any event - for example fair dealing, [19] use for non commercial purposes[20] and use of one's own name.[21]

Economics Working Paper Series, No. 192 http://ideas.repec.org/p/oxf/wpaper/192.html; Allred, B. B. and Park, W.G. **"**Patent rights and innovative activity: evidence from national and firm-level data" Journal of International Business Studies (2007) 38, 878–900; Hestermeyer, **n4** 158-166; and Pharmaceutical Research and Manufacturers of America ("PHRMA") http://www.phrma.org/innovation/ and PHRMA website under "Issues – Intellectual Property" http://www.phrma.org/index.php?option=com_content&task=view&id=123&Itemid=109&cat=Intellectual+Property and http://www.innovation.org/ .

[10] See discussion in Anderman Introductory **n4** in Anderman Interface **n4**, 12-3 and Forrester, I.S. Q.C. "Regulating Intellectual Property Via Competition? Or Regulating Competition Via Intellectual Property? Competition and Intellectual Property: Ten Years On, the Debate Still Flourishes" ("Forrester Ten") 59 in Ehlermann, C.D. and Atanasui, I. (eds) (2007) *European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law* Hart Publishing, Oxford, UK and Portland, Oregon, USA ("Ehlermann/ Atanasui"), 65-7.

[11] See discussion in Towse, R. (2001) *Creativity, Incentive and Reward. An Economic Analysis of Copyright and Culture in the Information Age* Edward Elgar, Cheltenham UK and Northampton, MA, USA.

[12] For full analysis, see Drahos, P. (1996) *A Philosophy of Intellectual Property* Dartmouth, Aldershot UK and Vermont, USA ("Drahos Philosophy") , chapter 3 and 6 (see also other principles considered in chapters 4, 5, 7-9 of that work).

[13] See also Ghidini, G. (2006) *Intellectual Property and Competition Law. The Innovation Nexus* Edward Elgar, Cheltenham, UK and Northampton, MA, USA ("Ghidini Innovation"), 6; Geiger, C. Fundamental rights, a safeguard for the coherence of intellectual property law? IIC 2004, 35(3), 268-280 ("Geiger Safeguard"), 270-3; and Torremans, P.L-C. "Copyright as a Human Right" ("Torremans1") 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands ("Torremans Copyright"), 11.

[14]Section 25 PA (20 years), sections 42-3 TMA (potentially perpetual provided renewal fees) and sections 12-15 CDPA (in most cases life of the author plus 70 years).

[15] Section 60 PA, section 16 CDPA, section 9 TMA.

[16] Sections 1-4 PA, Sections 1, 3-8 CDPA and Sections 1, 3, 4 TMA.

[17]Eg Section 16 (3) CDPA, section 60(1)PA, section 10 TMA. See eg *Nova Productions Ltd v Mazooma Games Ltd* [2007] R.P.C. 25 ("*Nova Productions"), Kirin-Amgen Inc v Transkaryotic Therapies Inc (No.2)* [2005] R.P.C. 9 ("*Kirin-Amgen*") and *Adidas-Salomon AG v Fitnessworld Trading Ltd* (C408/01) (ECJ) [2004] Ch. 120.

[18] Relevant provisions are considered at **p33.** See consideration of this in Panel Discussion Panel VI: "Abuse of Dominance in Licensing and Refusal to License" 439 in Ehlermann/ Atanasui **n10**, 439-444,449-451, 454-456; and Kallay, D.(2004) *The Law and Economics of Antitrust and Intellectual Property* Edward Elgar, Cheltenham, UK and Northampton, MA, USA ("Kallay"), 124-5.

[19] Section 30 CDPA.

[20] Section 60(5)(a) PA.

[21] Section 11(2) TMA.

But if a benevolent company in the United Kingdom ("UK") manufactures educational technology by following exactly a published patent specification, during the patent term and then sells this at cost price to an inner city school in the UK, the owner of the UK patent could exercise its right to exclude and enforce the patent – irrespective of the impact on the pupils of the school. For those pupils and indeed the benevolent manufacturer, the more theoretical and high level arguments in support of IP may seem remote.

In the light of this, this work will argue[22] **that there are situations, albeit narrow, when courts can and must restrict the ability of an IP owner to enforce its IP.** This work will develop these arguments building upon a combination of case law, national and international legislation, academic commentary and policy developments from the fields of IP, competition and human rights. It will demonstrate that through creative but legally robust interpretation and analysis, restrictions can, and must, be imposed by courts on the conduct of IP owners and the apparent scope of their rights. This can be done now, without the need for legislative change; and also without encroaching overly upon the positive societal contribution of IP.

If courts were to adopt these arguments, there would be no finding of infringement. Questions of orders to bring conduct to an end or of appropriate financial remedies would not arise;[23]and conduct could continue, with no liability to make payment in

[22] A chapter outline is provided at the end of this introduction, at **p37.**

[23] As a result this work will not seek to contribute to the significant body of work regarding the appropriate approach to remedies. For some basis principles in respect of England and Wales see section 50 Supreme Court Act 1981and *Interbrew SA v Financial Times Ltd* [2002] E.M.L.R. 24 para 47 et seq. Regard life and health see *Biogen Inc v Medeva Plc* [1993] R.P.C. 475 and *Roussel-Uclaf v GD Searle & Co Ltd (No.1)* [1977] F.S.R. 125 and regarding human rights, *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 [2002] Ch. 149 ("*Ashdown")*, para 46, 59, 82. See also Firth, A. "'Holding the Line' – The Relationship between the Public Interest and Remedies Granted or Refused, be it for Breach of Confidence or Copyright" 421 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands ("Torremans IP"), in particular 437 et seq; Netanel, N.W. "Copyright and 'Market Power' in the Marketplace of Ideas" ("Netanel Marketplace 1") 49 in Leveque, L. and Shelanski, H. (2005) *Antitrust, Patents and Copyright* Edward Elgar, Cheltenham, UK and Northampton, MA, USA ("Leveque/Shelanski"), 169 and Netanel, N.W. "Copyright and 'Market Power' in the Marketplace of Ideas" ("Netanel Marketplace 2") 3 in Macmillan, F. (ed) (2007) *New Directions in Copyright Law, Volume 4* Edward Elgar, Cheltenham, UK and Northampton, MA, USA ("Macmillan Directions 4"), 31; Hugenholtz, B. "Copyright and Freedom of Expression in Europe" ("Hugenholtz Copyright 1") 343 in Dreyfuss Expanding **n9** 359-60; Bell, A. and Parchomovsky, G.

respect of the past. On an interim basis, the arguments could also lead to courts refusing to order conduct to cease pending full determination of the action,[24] with the prospects of this increasing as courts become more familiar with the arguments.[25]

I.2 The need for this thesis

The next section will explore further the need for these arguments and the reasons for the approach taken.

I.2.1 More obvious approaches

The examples raised at the start reveal that the enforcement of IP can have tangible consequences for many. It may seem appropriate, therefore, for an attempt to address these to be based on practical or policy action, rather than on courts. These approaches could lead to needs being addressed directly, with people being provided with medicines or educational material. They could also lead to the development of high level changes to IP legislation, which would have an impact beyond specific infringement actions.

Some steps have been taken at policy level. An early one was the UK Commission on Intellectual Property Rights ("CIPR") report, "Integrating Intellectual Property Rights and Development Policy", of September 2002.[26] This noted the contribution of IP in rewarding those investing and engaging in innovation and creativity. It considered,

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"Pliability Rules" October, 2002 101 Mich. L. Rev. 1; and a post by the author on 16 May 2006 on "ipedinburgh" http://ipedinburgh.blogspot.com/2006_05_01_archive.html.

[24] Contributing to the analysis of the strength of the infringement case, an import

[25] See, for example, the approach of the courts to human rights in *Ashdown* **n23** and *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) [2006] E.C.D.R. 20 ("*HRH*") and to Euro-Defences in *Philips Electronics NV v Ingman Ltd* [1998] 2 C.M.L.R. 839 ("*Ingman*")and *Intel Corp v VIA Technologies Inc* [2002] EWCA Civ 1905 [2003] F.S.R. 33 ("*Intel v Via*"). These cases and the principles they discuss are considered throughout this work.

[26] Report of the Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" ("CIPR") http://www.iprcommission.org>.

however, that more flexibility was required to ensure an equitable outcome for users, in respect of the products of the innovation and creativity. [27] The CIPR made recommendations, including that there be greater access to scientific databases and to publicly funded research[28] and increased ability to use material which is available online.[29]

More direct challenges to IP were seen at the World Intellectual Property Organisation ("WIPO").[30] WIPO is an intergovernmental organisation under the auspices of the United Nations, which co-ordinates international applications for trade marks and patents,[31] administers IP treaties,[32] and also has an educational role as countries review, and indeed, establish IP regimes.[33] Concerns arose that WIPO was not evaluating and considering fully the possible risks for developing economies of IP and its expansion into new fields.[34] This stimulated an international debate led by the Consumer Project on Technology, involving activists, lawyers, academics and policymakers.[35] The result was the Geneva Declaration on the Future of WIPO of 2004 ("Geneva Declaration"). This asked:[36]

> "[w]ill we evaluate, learn and profit from the best of …. new ideas and opportunities, or will we respond to the most unimaginative pleas to suppress all of this in favor of intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient policies?"

[27] CIPR,**n26** 15-6, 19, 96-7, 123-5.
[28] CIPR, **n26** 30.
[29] CIPR, **n26** 120-1.
[30] See WIPO website http://www.wipo.int/portal/index.html.en.
[31] See WIPO website Gateway pages http://www.wipo.int/trademarks/en/ and http://www.wipo.int/patentscope/en/ .
[32] See WIPO website http://www.wipo.int/treaties/en/.
[33] Eg WIPO Worldwide Academy http://www.wipo.int/academy/en/events/ and IP Outreach in Practice http://www.wipo.int/ip-outreach/en/tools/practice/.
[34] See CIPR, **n26** chapter 6.
[35] See collection of resources of the Consumer Project on Technology at http://www.cptech.org/a2k/a2k-debate.html under heading "Meetings on the Development Agenda" and Boyle, J. "A Manifesto on WIPO and the Future of Intellectual Property" 2004 Duke L & Tech. Rev. 0009 http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html
[36] Geneva Declaration on the Future of the World Intellectual Property Organization http://www.cptech.org/ip/wipo/futureofwipodeclaration.html ("Geneva Declaration").

The Geneva Declaration goes on to "insist"[37] "that WIPO take a balanced view of IP "as a tool, but not the only tool, for supporting creative intellectual activity."[38] Later in 2004, a proposal for the establishment of a Development Agenda made by Argentina and Brazil[39] was considered by the WIPO General Assembly.[40] After meetings between 2005 and 2007,[41] recommendations[42] were ultimately agreed.[43] These relate to capacity building, norm-setting, flexibilities, public policy and public domain, technology transfer and access to knowledge. [44]

The Adelphi Charter of 2005[45] also supports a new approach to and greater balance in IP. This was the result of investigations and debate by an international group of academics, activists and policy makers,[46] led by the UK Royal Society for the Encouragement of Arts, Manufactures and Commerce. The Adelphi Charter expresses concern that

> "the expansion in [IP's] breadth, scope and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend"[47]

[37] Geneva Declaration **n36**, 6th paragraph.
[38] Geneva Declaration **n36**, 6th paragraph.
[39] WIPO "Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO" WO/GA/31/11 http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=31737. This had been referred to in the Geneva Declaration, n**36** 8th paragraph
[40] For WIPO background on this process, see http://www.wipo.int/ip-development/en/agenda/pcda04.html#background. See also collection of resources regarding WIPO Development Agenda at IP Justice http://ipjustice.org/wp/campaigns/wipo/wipo-development-agenda/.
[41] The work is ongoing, see resources at webpage "Development Agenda for WIPO" http://www.wipo.int/ip-development/en/agenda/.
[42] See webpage "The 45 Adopted Recommendations under the WIPO Development Agenda" http://www.wipo.int/ip-development/en/agenda/recommendations.html.
[43] For discussion of the process, see Yu, G. "The Structure and Process of Negotiations at the World Intellectual Property Organization" Chi-Kent Law Review 2007 vol 82(3) 1445-1456 and Visser, C. "The Policy-Making Dynamics in Intergovernmental Organizations: A Comment on the Remarks of Geoffrey Yu" (2007) 82 Chi-Kent Law Review 1457–1466.
[44]Regarding their possible contribution, see Ho, C.M. "A New World Order for Addressing Patent Rights and Public Health" 207 82(3) Chi-Kent Law Review 1469-1515 ("Ho"), 1505-6.
[45] See website http://www.ipcharter.org/. The author worked as a research associate on this project.
[46] See list of Commission members at http://www.ipcharter.org/group.asp.
[47] Adelphi Charter, **n45** preamble para 5.

It calls for "an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights".[48]

The UK Gowers Review of Intellectual Property ("Gowers Review")[49] took place in 2005-6, beginning shortly after the launch of the Adelphi Charter. The Gowers Review considered whether "the IP system was "fit for purpose in an era of globalisation, digitisation and increasing economic specialisation."[50] The resulting report again confirmed the valuable contribution of IP to innovation,[51] yet noted that innovation could be supported in other ways.[52] The report did not consider that "the system is in need of radical overhaul", but felt "there is scope for reform to serve better the interests of consumers and industry alike."[53] Recommendations made included a review of exceptions to the rights of an IP owner, particularly regarding the use of material in distance learning, in respect of copyright and use for experimental purposes, in respect of patents.[54] The report was welcomed by the UK Intellectual Property Office[55] and some steps have been taken by it in response,[56] notably the launch in 2008 of a consultation regarding patents and research activities.[57]

These considerations of IP at national and international policy level have revealed there to have been recognition of a need for IP and its impact to be fettered, although the considerations have also revealed support for what IP can achieve. The policy

[48] Adelphi Charter, **n45** recommendation 9 point 1.
[49] See Gowers Review website http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm.
[50] See report of the Gowers Review ("Gowers Review Report") http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf, 1 (Forward).
[51] Gowers Review Report,**n50** paras 1.1-1.9.
[52] Gowers Review Report, **n50** paras 1.24-25 and 1.40-45.
[53] Gowers Review Report,**n50** 1 (Forward).
[54] Gowers Review Report, **n50** paras E.9 and E.11, recommendations 1 (patent research exemption) and 2 (copyright and distance learning) and paras 3.13, 4.4-8 and 4.13-9.
[55] As the UK Patent Office was recommended to be renamed by the report - Gowers Review Report recommendation 53. See also The Patent Office response to the Gowers Review of Intellectual Property (IP) http://www.ipo.gov.uk/press/press-release/press-release-2006/press-release-20061208.htm.
[56] Eg the establishment of the Strategic Advisory Board for IP Policy http://www.sabip.org.uk/ and the launch of a fast track trade mark application service http://www.ipo.gov.uk/press-release-20080114.htm.
[57] See "UK-IPO launches a Consultation on the Patent Research Exception" http://www.ipo.gov.uk/press/press-release/press-release-2008/press-release-20080707.htm and The "Patent Research Exemption" http://www.ipo.gov.uk/about/about-consult/about-informal/about-informal-current/consult-patresearch.htm.

consideration has also had some tangible impact, such as the greater development focus at WIPO[58] and the new UK consultation regarding exceptions. Yet these have not led to new and clear limits on the rights of IP owners.

An approach more focused on particular issues may be of greater effect. Some developments in relation to communications and health are considered below.

I.2.2 Issue based approaches

I.2.2.1 The communications experience

The importance of information and communications technologies ("ICT") to international development was noted in the United Nations Educational Scientific and Cultural Organisation ("UNESCO")'s Information for All Programme launched in 2000.[59] This promotes "universal access to information and knowledge for development"[60] and is monitored through the United Nations Conference on Trade and Development ("UNCTAD")'s "Digital Divide Report: ICT Diffusion Index."[61]

These initiatives do not refer to IP. This is concerning, as it is quite possible that important ICT projects could be affected by the stance of an IP owner, as was the case with the One Laptop Per Child initiative.[62] Launched by Nicholas Negroponte with roots in activity from 1982,[63] this project seeks, in conjunction with corporate supporters, to provide children in developing countries with laptops, to assist in their

[58] Which appears likely to continue given the approach of the new Director General, see acceptance speech of 22 September 2008 http://www.wipo.int/about-wipo/en/dgo/dg_gurry_acceptance_speech_2008.html
[59] UNESCO Information for All Programme http://portal.unesco.org/ci/en/ev.php-URL_ID=1627&URL_DO=DO_TOPIC&URL_SECTION=201.html ("IFAP website")
[60] See front page of IFAP website **n59**.
[61] UNCTAD ICT Diffusion Index 2005, http://www.unctad.org/Templates/webflyer.asp?docid=6994&intItemID=2529&lang=1 published in May 2006 and the most recent available at time of writing.
[62] See project website http://www.laptop.org/index.en_US.html ("OLPC website").
[63] See OLPC website webpage http://www.laptop.org/en/vision/progress/index.shtml.

education.[64] In 2007, an IP infringement claim was raised in Nigeria, in respect of the keyboard technology used in the project computers.[65] A court order was made by a Nigerian court in 2008 which prevented distribution of such computers in Nigeria. The project activities there came to an end.[66]

Some ICT related projects have sought to address directly and to avoid problems relating to IP. An example is the World Health Organization ("WHO")'s HINARI knowledge management and access to research project, launched in 2002. Through this, leading publishers of biomedical and social science journals provide local non profit organisations in developing countries with free or low cost online access to their journals.[67] Their involvement is on the basis of a Publishers' Statement of Intent,[68] which sets out their respect and support for copyright and also for the sharing of scientific information.

The HINARI project serves to confirm, like the difficulties encountered in Nigeria, the need for those working with ICT to address IP and its possible implications. In the light of this, it is encouraging that some regard was paid to IP in an international dialogue, under the auspices of United Nations, relating to communications and development. This was the World Summit on the Information Society ("WSIS").[69]

The WSIS met in Geneva in 2003 and in Tunis in 2005. The Geneva meeting gave rise to a Declaration of Principles ("WSIS Geneva Declaration")[70] which noted a "common desire and commitment to build a …development-oriented Information

[64] See OLPC website webpage http://www.laptop.org/faq.en_US.html.

[65] Gross, G. 29 November 2007 "One Laptop Per Child hit by patent infringement claim" http://www.computerworlduk.com/management/government-law/compliance/news/index.cfm?newsid=6437.

[66] See reports at http://www.olpcnews.com/countries/nigeria/ of 3 January 2008 and see commentary on the case at Groklaw 1 January 2008 "News about Lancor v OLPC" http://www.groklaw.net/article.php?story=20071226210020415.

[67] See HINARI webpages http://www.who.int/hinari/about/en/.

[68] Available at http://www.who.int/hinari/statementofintent/en/.

[69] See WSIS main webpage http://www.itu.int/wsis/.

[70] WSIS Geneva Declaration available at http://www.itu.int/wsis/docs/geneva/official/dop.html.

Society, where everyone can create, access, utilize and share information and knowledge".[71] It then stressed the importance of ICT in relation to freedom of expression and information[72] and the goal of universal access to ICT.[73] The Geneva meeting also generated a Plan of Action[74] with targets in respect of ICT infrastructure projects[75] and access to information and knowledge[76] and which established a Digital Solidarity Fund to mobilise resources to overcome the digital divide.[77]

The WSIS Geneva Declaration referred to IP:

> "Intellectual Property protection is important to encourage innovation and creativity in the Information Society; similarly, the wide dissemination, diffusion, and sharing of knowledge is important to encourage innovation and creativity. Facilitating meaningful participation by all in intellectual property issues and knowledge sharing through full awareness and capacity building is a fundamental part of an inclusive Information Society."[78]

This recognition of a place for IP did not continue, however, in other WSIS outputs. The Geneva Plan of Action merely noted the need for IP to be respected[79] and the documents from the Tunis meeting, which concentrated more on internet governance,[80] made no reference to IP.

There was greater engagement with, and challenge to, IP in relation to ICT in other activities[81] of the Consumer Project on Technology (now known as Knowledge

[71] WSIS Geneva Declaration **n70** para 1.
[72] WSIS Geneva Declaration **n70** paras 2 and 4.
[73] WSIS Geneva Declaration **n70** paras 19 and 22.
[74] Available at http://www.itu.int/wsis/docs/geneva/official/poa.html ("Geneva Plan of Action").
[75] Geneva Plan of Action, **n74** B6.
[76] Geneva Plan of Action, **n74** C3 10.
[77] Geneva Plan of Action, **n74** D.
[78] WSIS Geneva Declaration,**n70** para 42.
[79] Geneva Plan of Action, **n74** C3 10(d).
[80] See WSIS Tunis Commitment available at http://www.itu.int/wsis/docs2/tunis/off/7.html and Tunis Agenda for the Information Society http://www.itu.int/wsis/docs2/tunis/off/6rev1.html. This led to the establishment of the Internet Governance Forum http://www.intgovforum.org/, considered by Kleinwachter, W. in"WSIS and internet governance: the struggle over the core resources of the internet" Comms. L. 2006, 11(1), 3-12 and "Internet governance and governments: enhanced cooperation or enhanced confrontation?" Comms. L. 2007, 12(4), 111-118.
[81] See their involvement in the Geneva Declaration **n36**

Ecology International). [82] A diverse group of noted academics, activists and information professionals[83] met in 2005[84] to draft an Access to Knowledge Treaty ("A2K Treaty").[85] The preamble of this recognises "the importance of knowledge resources in supporting innovation, development and social progress, and of the opportunities arising from technological progress, particularly the Internet" and states its objectives to be to "protect and enhance [expand] access to knowledge, and to facilitate the transfer of technology to developing countries".[86] The A2K Treaty then proposes a long list of clearer and mandatory exceptions to copyright[87] and also an "expanded knowledge commons" within which more material is to be widely available.[88] Work on Access to Knowledge continues with annual public conferences[89] but has not led (yet) to the adoption of a treaty nor to tangible restrictions on the impact of IP in the development, use and exploitation of ICT.

I.2.2.2 The health experience

Matters took a different course in relation to health and IP. International action was stimulated by the reaction of the pharmaceutical industry to South African legislation in 1997. This legislation sought to facilitate access to treatment in respect of HIV/AIDS, notwithstanding any relevant patents.[90] The validity of this legislation was challenged in the South African courts by large multinational pharmaceutical companies and the industry association. Reference was made to South Africa's international obligations regarding parallel importing and compulsory licensing under the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"),

[82] http://www.keionline.org/
[83] See those involved at http://www.cptech.org/a2k/a2k-contacts.html.
[84] For details, see http://www.cptech.org/a2k/a2k-debate.html under section headed "February 3-4, 2005. Experts Meeting on the WIPO Development Agenda and a Treaty on Access to Knowledge.
[85] http://www.cptech.org/a2k/a2k_treaty_may9.pdf ("A2K Treaty").
[86] A2K Treaty, **n84** 1-1.
[87] A2K Treaty, **n84** 3-1 and 3-2.
[88] A2K Treaty, **n84** 5. See discussion at Ho, **n44** 1506-9.
[89] For details, see following webpages http://www.law.yale.edu/news/6191.htm (2008) http://research.yale.edu/isp/eventsa2k2.html (2007) and http://research.yale.edu/isp/eventsa2k.html (2006).
[90] Section 15(c) Medicines and Related Substances Control Act 1965 as amended by the Medicines and the Related Substances Control Amendment Act 1997.

which is part of the Agreement establishing the World Trade Organization ("WTO Agreement").[91]

This case was ultimately settled.[92] The dispute led, however, to significant publicity and to the involvement of social activists and non governmental organisations in the IP and health debate.[93] Further, commentators have argued[94] that TRIPS did not in fact prohibit this legislation, as TRIPS permits compulsory licensing in national emergencies[95] and leaves open the question of parallel importing.[96] This combination of public outrage and legal arguments in support of the legislation led to consideration of IP and health in the WTO's Doha Development Round[97].

As a result, in 2001 there was the Doha Declaration on the TRIPS Agreement and Public Health ("Doha Declaration").[98] This sought to clarify, rather than change, the relationship between TRIPS and health. The Doha Declaration stated that TRIPS

[91] Agreement on Trade Related Aspects of Intellectual Property Law 1994, Annex IC to WTO Agreement http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm ("TRIPS").
[92] See discussion in Cameron, E. and Berger, J. "Patents and Public Health: Principle, Politics and Paradox" Inaugural British Academy Law Lecture http://www.law.ed.ac.uk/ahrb/script-ed/docs/cameron.asp ("Cameron/Berger") 541-2.
[93] See Matthews, D. "NGOs, Intellectual Property Rights and Multilateral Institutions" http://www.ipngos.org/Report/IP-NGOs%20final%20report%20December%202006.pdf, especially case study at 2.2; Matthews, D. "The Role of International NGOS in the Intellectual Property Policy-making and Norm-Setting Activities of Multilateral Institutions" 2007 82(3) Chi-Kent Law Review 1369-1387 ; Abbott, F.M. "Trade Diplomacy, the Rule of Law and the Problem of Asymmetric Risks in TRIPS" (2003) Quaker United Nations Office Occasional Paper 13 available at http://www.quno.org/geneva/pdf/economic/Occassional/Asymmetric-Risks-in-TRIPS.pdf, ("Abbott Asymmetric") 3-4; and Pretorius, W. "TRIPS and Developing Countries: How Level is the Playing Field?" ("Pretorius") 183 in Drahos/ Mayne, **n6** 190-4; Cameron/ Berger, **n93** 535-6.
[94] It was also argued to be consistent with South African constitutional protection of access to healthcare, emergency medical treatment and the right to life. See Murakyembe, H. and Kanja, G.M. "Implications of the TRIPS Agreement on the Access to Cheaper Pharma Drugs by Developing Countries: Case Study of South Africa v The Pharmaceutical Companies" Zambia Law Journal vol 34, 2002, 111.
[95] Article 31(b) TRIPS.
[96] Article 6 TRIPS.
[97] See details of these at webpage "Doha Development Agenda: Negotiations, implementation and development" http://www.wto.org/english/tratop_e/dda_e/dda_e.htm.
[98] "Declaration on the TRIPs agreement and Public Health" DOHA WTO MINISTERIAL 2001: TRIPs. Adopted on 14 November 2001. WT/MIN(01)/DEC/2 20 November 2001 ("Doha Declaration") available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

should be part of international attempts to address public health problems.[99] It also confirmed that, as suggested by commentators in relation to the South African dispute, the reference in TRIPS to national emergencies regarding compulsory licensing covered public health crises, including those relating to "HIV/AIDS, tuberculosis, malaria and other epidemics".[100] Further, the Doha Declaration confirmed that TRIPS did not and should not prevent states taking steps to promote access to medicines for all,[101] including through parallel importing and compulsory licensing.[102]

The Doha Declaration is not a treaty and its status in international law and its contribution as distinct from TRIPS has been the subject of debate.[103] In any event, TRIPS and the Doha Declaration do not require states to issue compulsory licences and only enable countries to deal with "national" emergencies. This is an important limit as, unlike South Africa, some countries may not have the requisite manufacturing capacity and skill base for anything to be gained by the potential for a compulsory licence. Consideration of this issue was requested in the Doha Declaration.[104]

The resulting consideration led to a WTO Decision in 2003.[105] This established a limited waiver regime in respect of the compulsory licensing provisions of TRIPS; although perhaps revealingly, this was adopted with a statement seeking "to provide comfort to those who feared that the decision might be abused and undermine patent

[99] Doha Declaration, **n98** paras 1and 2.
[100] Doha Declaration, **n98** para 5(c).
[101] Doha Declaration, **n98** para 4.
[102] Doha Declaration, **n98** see paras 4 and 5(b) and (c)
[103] Eg Charnovitz, S. "The legal status of the Doha Declarations." J.I.E.L. 2002, 5(1), 207-211; Gathii, J.T. "The Doha Declaration on Trips and Public Health Under the Vienna Convention of the Law of Treaties" Harvard Journal of Law and Technology, Vol. 15, No. 2, 2002, 292; Shanker, D. "The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement" J.W.T. 2002 36(4) 721-772 ("Shanker"); and Ruse-Khan, H.G. "Proportionality and Balancing within the Objectives for Intellectul Property Protection" 161 ("Ruse-Khan") in Torremans IP **n23** 183-5.
[104] Doha Declaration, **n98** para 6.
[105] Decision of the General Council "Implementation of paragraph 6 of the Doha Declaration on the TRIPs agreement and public health" 30 August 2003 http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm ("2003 Decision")

protection."[106] This Decision set up a procedure, pursuant to which states can grant compulsory licences to their domestic manufacturers, so that they can manufacture essential medicines for export to countries which have no or insufficient manufacturing capacity.[107] An amendment to TRIPS has been agreed to formalise this arrangement,[108] with an amendment process being ongoing at the time of writing in 2008 which need not be completed (if at all) until the end of 2009.[109]

In terms of practical value, the system established by the Decision has been said to be complex, time consuming and to fail to provide a solution for those most in need. [110] It has detailed rules as to licensing fees and labelling and also regarding notification by states which intend to use the system, either as importer (save in respect of least developed countries) or as exporter.[111] It may be noteworthy that so far only Canada has notified in respect of exporting[112] and only Rwanda in terms of importing,[113] although as a least developed country it did not need to notify formally.[114] On a more positive note, it has been argued that the very existence of these compulsory licensing procedures has led to voluntary agreements being reached (ultimately and after

[106] "The General Council Chairperson's statement" available at http://www.wto.org/english/news_e/news03_e/trips_stat_28aug03_e.htm.
[107] See 2003 Decision, **n105** para 1(b) and note 3. Some developed countries have stated that they will not use the system as importers.
[108] Decision of the General Council 6 December 2005 "Amendment of the TRIPS Agreement" WT/L/641 http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm and see also "Chairperson's statement, December 2005") http://www.wto.org/english/news_e/news05_e/trips_319_e.htm.
[109] See Attachment to the Protocol Amending the TRIPS Agreement http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm paras 2 and 3 and webpage "Members accepting amendment of the TRIPS Agreement" http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm
[110]Alcorn, K. (2006) "2001 Doha trade agreement failing to improve access to medicines Oxfam says" http://www.aidsmap.com/en/news/32E9675E-B18A-4841-8947-BDDC37AD42DD.asp; Abbott, F. and Reichman, J. "The Doha Round's public health legacy: strategies for the production and diffusion of patented medicines under the amended TRIPS provisions." J.I.E.L. 2007, 10(4), 921-987; and Bradford Kerry, B. and Lee, K. (24 May 2007) "TRIPS, the Doha declaration and paragraph 6 decision: what are the remaining steps for protecting access to medicines?" http://www.globalizationandhealth.com/content/3/1/3.
[111] See 2003 Decision, **n105** paras 2, 3, 4, 5 and webpage "TRIPS and public health: dedicated webpage for notifications" http://www.wto.org/english/tratop_e/trips_e/public_health_e.htm.
[112] See webpage "Notifications by exporting WTO Members" http://www.wto.org/english/tratop_e/trips_e/public_health_notif_export_e.htm. There have been some developments in the EC through Council Regulation 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems, OJ L 157, 9.6.2006.
[113] See "Patents and health: WTO receives first notification under 'paragraph 6' system" 20 July 2007 http://www.wto.org/english/news_e/news07_e/public_health_july07_e.htm.
[114] See "Notifications by importing WTO Members" http://www.wto.org/english/tratop_e/trips_e/public_health_notif_import_e.htm.

significant controversy) between governments and patent owners, such as occurred in Brazil and Thailand, regarding treatments for HIV/AIDS.[115]

These WTO developments progressed to an extent in parallel with another initiative allied to the United Nations, this time of the WHO.[116] In 2003, the WHO established the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIPH").[117] This engaged in wide consultation[118]and delivered a final report in 2006.[119] The CIPIPH report noted that IP does provide an incentive for innovation in public health. It also noted, echoing other reports,[120] that this is part of a wider set of incentives, of which IP may not be the most effective where there is limited market demand for a new treatment.[121] Further, it considered that IP may have a mixed impact upon diseases which were chosen to be the subject of research[122] and upon the delivery of treatment.[123]

Rather like the WSIS outputs,[124] the CIPIPH report then recommended that the WHO develop a Global Plan of Action, in this case to address treatment of diseases which were affecting developing countries disproportionately.[125] Unlike most of the WSIS outputs, the CIPIPH report did refer to IP, stressing the need to explore the flexibilities in TRIPS which were confirmed in the Doha Declaration.[126] Discussions followed at the World Health Assembly with resolutions in 2006[127] and reports in

[115] Bridges (9 May 2007) "Brazil issues compulsory licence for AIDS drug" http://ictsd.net/i/news/bridgesweekly/6490/ See also Kuanpoth, J. "Patents and access to medicines in Thailand - the ddI case and beyond." I.P.Q. 2006, 2, 149-158 and Ho, **n44** 1484-93.
[116] See WHO website http://www.who.int/about/en/.
[117] WHO Commission on Intellectual Property Rights, Innovation and Public Health ("CIPIPH") webpages http://www.who.int/intellectualproperty/en/.
[118] For details of this, see webpages http://www.who.int/intellectualproperty/events/workshop/en/ and http://www.who.int/intellectualproperty/submissions/en/.
[119] Final report of the CIPIPH http://www.who.int/intellectualproperty/report/en/ ("CIPIPH Report").
[120] See **pp16-18**
[121] CIPIPH Report, **n119** 19 et seq and 86 et seq.
[122] CIPIPH Report, **n119** 48 et seq.
[123] CIPIPH Report, **n119** 116 et seq.
[124] **See p21**
[125] CIPIPH Report, **n119** 175 et seq
[126] CIPIPH Report, **n119** recommendations 4.13-4.27.
[127]See resolution WHA59.24 "Public health, innovation, essential health research and intellectual property rights: towards a global strategy and plan of action" http://www.who.int/gb/ebwha/pdf_files/WHA59/A59_R24-en.pdf.

2007,[128] culminating in 2008 with the "Draft global strategy on public health, innovation and intellectual property".[129] This has been hailed as the most significant document in this field since the Doha Declaration[130] and it confirms the flexibilities within TRIPS and the place of other forms of encouragement of innovation.[131]

These developments in respect of health,[132] more so than those in respect of communications, suggest that significant international concern and activity can lead to new legislation in respect of IP[133] and also to practical change. But achieving the developments in health took around a decade after the issue received significant public attention, with the South African case.[134] In addition, the contribution of further exploration of flexible approaches to IP, as suggested by the WHO, is uncertain and the more specific tangible outputs of the WTO process have been criticised.[135]

I.2.3 Towards a legal solution

I.2.3.1 The need for a legal solution

The limited impact of policy initiatives upon the rights of the IP owner, and the potential for IP owners to use their IP to block projects, suggest that attempts to limit the power of IP owners should be based on law; invitations to be involved in worthy

[128] WHO Sixtieth World Health Assembly Fifth Report of Committee B A60/64 24 May 2007 http://www.who.int/gb/ebwha/pdf_files/WHA60/A60_64-en.pdf.
[129] IGWG Draft global strategy on public health, innovation and intellectual property 3 May 2008 http://www.who.int/phi/documents/IGWG_Outcome_document03Maypm.pdf.
[130] See quote in IP Watch 29 May 2008 **"**WHO Adopts 'Most Important Document Since Doha' On IP And Public Health" http://www.ip-watch.org/weblog/index.php?p=1067.
[131] See **pp17-8, 23-4**.
[132] Note also the proposed treaty in respect of Medical Research and Development of 2005 led by the Consumer Project on Technology http://www.cptech.org/workingdrafts/rndtreaty.html.
[133] For detailed analysis of the Doha Declaration and subsequent developments, see Hestermeyer **n4**, 255-87.
[134] See also Ho, **n44** 1509-1510.
[135] See **p25**

practical projects or to have regard to international reports and declarations may be ignored by IP owners - but new legislation and court decisions should not.

Developments at international level in respect of health and communications suggest that there may be a treaty, ultimately, which revises the contours of IP and the rights conferred on IP owners. There has been some academic support for this approach[136] and there is already the draft A2K Treaty. But experiences in respect of IP treaties suggest that it should not be assumed that this or anything else will be adopted; and that even if it is, this would be the start, rather than the end, of a process. This is considered below in relation to TRIPS.

I.2.3.2 The limits of the treaty approach

When TRIPS became part of the WTO in 1994, IP was already well established as part of the national law of many countries.[137] These national regimes formed part of a flexible structure of international treaties, administered by WIPO.[138] These were without effective enforcement systems[139] and countries could also choose not to join; indeed, it has been argued that many did not until they had reached an adequate level

[136]See Anderson, R.D. and Wager, H. **"**Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" J.I.E.L. 2006 9(3), 707-747 ("Anderson/Wager") at 722-730 and745; Suthersanen, U. "Towards an International Public Interest Rule? Human Rights and International Copyright Law" ("Suthersanen Public Interest") 96 in Griffiths, J. and Suthersanen, U. (eds) (2005) *Copyright and Free Speech: Comparative and International Analyses* Oxford University Press, Oxford, UK ("Griffiths/ Suthersanen"), 124; Derclaye, E. "Intellectual property rights on information and market power - comparing European and American protection of databases" IIC 2007, 38(3), 275-298 ("Derclaye").

[137] See discussion in Sherman, B. and Bently, L. (1999) *The Making of Modern Intellectual Property Law. The British Experience, 1760-1911* Cambridge University Press, Cambridge, UK; Drahos Philosophy, **n12** chapter 2; and Fisher, **n8** chapters 2 and 3.

[138] such as the Berne Convention for the Protection of Literary and Artistic Works 1886-1979 at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html ("Berne Convention") and Paris Convention for the Protection of Industrial Property 1883-1979 http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

[139] See only article 33 Berne Convention, and for consideration of its limits see Frankel, S. "WTO Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property" 46 Va. J. Intl L. 365 2005-6 ("Frankel"), 378-9.

of development – often by replicating technologies which were protected elsewhere.[140]

In contrast, the more rigid structure of the WTO appealed to IP owners and also to sympathetic countries, such as the United States. This led to strenuous efforts to include IP in the WTO and to create a new international framework, within which national IP rights would subsist.[141] These negotiations[142] culminated in TRIPS.[143] TRIPS imposed mandatory obligations[144] on the wide WTO membership[145] in respect of the existence[146] and duration[147] of IP. It also permitted[148] legislation which was "necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development" and legislation which imposed some exceptions, within certain boundaries,[149] on IP rights.[150] Further, the WTO Agreement established[151] the WTO Dispute Settlement

[140] See discussion in Pretorius **n93** in Drahos/ Mayne **n6**, 183-4; Drahos, P. "Negotiating Intellectual Property Rights: Between Coercion and Dialogue" 161 ("Drahos Coercion") in Drahos/ Mayne **n6**, 161-8 ; and Dutfield, G. "Is the World Ready for Substantive Patent Law Harmonisation? A Lesson from History" 228 in Drahos, P. (ed) (2005) *Death of Patents* Lawtext Publishing Ltd and Queen Mary Intellectual Property Research Institute, University of London, London, UK.

[141] See Drahos Coercion **n140** in Drahos/ Mayne **n6** and AELBrown "Socially responsible intellectual property: a solution?", (2005) 2:4 *SCRIPT-ed* 485 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/csr.asp ("Brown Responsible"), 487.

[142] For discussion of these, see Braga, C. A. P. (1989) "The Economics of Intellectual Property Rights and the GATT: a View from the South*", Vanderbilt Journal of Transnational Law*, **22** (2), 243-64 at 399 in Towse, R. and Holzhammer, (eds) (2002) *The Economics of Intellectual Property vol IV Competition and International Trade* The International Library of Critical Writing in Economics 145, Edward Elgar Publishing Ltd, Cheltenham, UK ("Towse/ Holzhammer 4"); Gervais, D. (2003) (2nd edn) *The TRIPS Agreement. Drafting History and Analysis* Thomson Sweet & Maxwell, London, UK , 3-26.

[143] **See n91**

[144] Article 1 TRIPS

[145]See list at http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm.

[146] Articles 9 (copyright, referring to the Berne Convention **n138**), 15 (trade marks) and 27(1) (patents) TRIPS.

[147] Article 12 (copyright), 18 (trade marks) and 33 (patents) TRIPS.

[148] Article 8(1) TRIPS.

[149] Articles 13 (copyright), 17 (trade marks) and 30 (patents) TRIPS. For consideration see Janis, M.D. "'Minimal' Standards for Patent-Related Antitrust Law under TRIPS" 774 in Maskus/ Reichman.

[150]For commentary and criticism of the imbalance between the mandatory and the optional, see Sell, S.K. (2003) *Private Power, Public Law. The Globalization of Intellectual Property Rights* Cambridge University Press, Cambridge, UK; Maskus, K.E. and Reichman, J.H. "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods" 3 and Drahos, P. "The Regulation of Public Goods" 46 both in Maskus/Reichman **n3**.

[151] By the Dispute Settlement Understanding, Annex 2 to the WTO Agreement http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm ("DSU").

Body (in this work collectively referred to as the "WTO DSS").[152] This provided a means for interpreting TRIPS, if members complain[153] that another member has acted inconsistently with its obligations under TRIPS. This has occurred in some cases in respect of IP legislation.[154]

For present purposes, the very fact that some states have considered IP to be sufficiently important for them to make a complaint to the WTO DSS, confirms that there may also be challenges to legislation following any new treaty. Taking the A2K Treaty as an example, in relation to copyright it requires the "use of works, by educational institutions, as primary instructional materials, if those materials are not made readily available by right-holders at a reasonable price; provided that in case of such use the right-holder shall be entitled to equitable remuneration".[155] This could give rise to legislation permitting free use of materials in summer clubs run by large companies. There could be then be arguments as to whether these summer clubs were educational institutions, whether "free" can be a reasonable price and that this legislation was not consistent with the treaty.

In terms of how these may proceed, the section of the draft A2K Treaty which is to address dispute resolution[156] is blank at the time of writing. Under the WTO DSS model, if a complaint is upheld the state will be asked to remedy its conduct, mainly by bringing it to an end,[157] and if this is not done there could be trade based remedies

[152] This includes dispute resolution panels (articles 6, 8, 11, 12, 16 DSU) and an Appellate Body (article 17 DSU) **see n151** The WTO DSS is considered in more detail in the conclusion in Section C.3.3.
[153] See article 64(1) TRIPS.
[154] See eg *United States — Section 110(5) of US Copyright Act* DS160 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (regarding article 13 TRIPS) ("*US Homestyle*"; *Canada — Patent Protection of Pharmaceutical Products* DS 114 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm (regarding article 30 TRIPS) ("*Canada Pharmaceutical Patent*") ; *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* DS 174 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm joined with European *Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* DS 290 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm (regarding article 17 TRIPS). See also **pp213-4 and 286-7.**
[155] A2K Treaty, **n84** article 3.1(iv).
[156] A2K Treaty, **n84** section 12.
[157] Article 19, DSU **n151**.

or sanctions.[158] But even if any new treaty had no specific dispute resolution provision, there are further avenues for states to ensure that others take an approach to a treaty, and IP more generally, which is consistent with their own.

The first would be the use of bilateral trade agreements, requiring states to have higher levels of IP protection than is required by an IP treaty.[159] The second would be more direct. For example, the United States has legislation[160] enabling it ultimately to impose trade sanctions if a state provides what the United States considers[161] to be inadequate IP protection.[162] These two avenues have indeed been said to have

[158] Articles 21-2 DSU **n151**. For general consideration and criticism of the WTO remedies regime, see Warren F. Schwartz and Alan O. Sykes (2002) 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' *Journal of Legal Studies*, **XXXI** (1, Part 2), January, S179-S204, **52** and Steve Charnovitz (2001) 'Rethinking WTO Trade Sanctions' *American Journal of International Law*, **95**(4), October, 792-832, **247** ("Charnovitz Rethinking") both in Mavroidis, P.C. and Sykes, A.O. (eds) (2005) *The WTO and International Trade Law/Dispute Settlement* Edward Elgar, Cheltenham, UK and Northampton, MA, USA ("Mavroidis/Sykes"). For analysis with specific reference to TRIPS, see Ethier, W. J. "Intellectual Property Rights and Dispute Settlement in the World Trade Organization" 852 in Maskus/ Reichman **n3** and Grosse Ruse-Kahn, H. "A pirate of the Caribbean? The attractions of suspending TRIPS obligations" J.I.E.L. 2008, 11(2), 313-364.

[159]Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf, article 4; and United States - Singapore Free Trade Agreement http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf, chapter 16; Australia - United States Free Trade Agreement http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html, chapter 17. For discussion, see Brown Responsible **n141**, 488; Brown, A.E.L., Guadamuz, A. and Hatcher, J. "The Impact of Free Trade Agreements on Information Technology based business' (2007) http://www.law.ed.ac.uk/ahrc/files/95_scopingreportjune2007.pdf, ("Brown/Guadamuz/Hatcher") at 6, 12, 44. This could in turn lead to all countries increasing their own levels of IP protection: see Drahos, P. "BITS and BIPS: Bilateralism in Intellectual Property", 4 (2001) Journal of World Intellectual Property 791-808; Ho, **n44** 1494-1505; Vivas Eugui, D. and von Braun, J. "Beyond FTA Negotations: Implementing the New Generation of Intellectual Property Obligations" 113 and Drahos, P. "Doing Deals with Al Capone: Paying Protection Money for Intellectual Property in the Global Knowledge Economy" 141 both in Yu Information Wealth **n4.**

[160] Section 301 Trade Act 1974 and Section 1303 Omnibus Trade and Competitiveness Act 1988 "Special 301" which specifically addresses intellectual property . Considered in Bhagwati, J. (1990) 'Aggressive Unilateralism: An Overview' in Jadwish Bhagwati and Hugh T. Patrick (eds), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System*, Chapter 1, Ann Arbor, MI: University of Michigan Press, 1-45, **487** in Mavroidis/ Sykes **n158**. The WTO DSS found that this legislation and practice in respect of it could be consistent with WTO obligations, with particular regard being had to a domestic statement that WTO rules and procedures would be followed. *United States — Sections 301–310 of the Trade Act 1974* DS 152 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm, paras 7.31-3, 7.53-4, 7.109-126

[161] See Special 301 Report for 2008 http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_Special_301_Report/Section_Index.html.

[162] notwithstanding that it may comply with treaty obligations cf EC Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular

contributed to an unwillingness of states[163] to explore fully the flexibilities in TRIPS.[164]

Thus even if there were to be a new treaty,[165] it may not be followed by new national legislation; and even if it is, this may be challenged by other countries. But in any event, new and unexplored national IP legislation may still seem distant from those in need of medicine or information and those seeking to deliver it. This suggests that a more direct and less avoidable legal solution is required – one for use at national level, by those who may be faced with allegations of infringement, rather than by legislatures in parliaments. Some opportunities may lie within existing systems of compulsory licensing and this will now be considered.[166]

I.2.3.3 The role of licensing

IP owners can be required to share the technology or material which is the subject of their IP.[167] This is known as compulsory licensing and is quite distinct from voluntary licences which may be agreed between IP owner and user, usually, although not always, for a commercially sensible licence fee.[168] In the UK, there are statutory

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those established under the auspices of the World Trade Organization (as amended by Council Regulation 356/95 of 20 February 1995).

[163] See Drahos Coercion **n140** 172-4 and Correa, C. M. "Pro-competitive Measures under TRIPS to Promote Technology Diffusion in Developing Countries" 40 ("Correa Promote") in Drahos/ Mayne **n6**; Maskus, K.E. (2000) "Intellectual Property Rights in the Global Economy" Institute for International Economics, Washington D.C., USA 171 et seq; and the author's previous consideration in Brown, "Power, responsibility and norms: could and should human rights be used as a curb on intellectual property rights" http://www.law.ed.ac.uk/ahrc/files/29_brownipandhumanrights.pdf ("Brown Curb") 6-7, 23.

[164] See Cameron/ Berger **n92,** 539-40; Ghosh, S. Comment II "Competitive Baselines for Intellectual Property Systems" 793 ("Ghosh") in Maskus/Reichman **n3**; and Correa Promote **n163** in Drahos/Mayne **n6**, 52-3 and **pp22-3**.

[165] See also regarding previous international negotiations in relation to IP, McKee, M. (1986) "You Can't Always Get What You Want: Lessons from the Paris Convention Revision Exercise", *Research in Law and Economics*, **8**, 265-72, at 391 in Towse/ Holzhammer 4 **n142.**

[166] See **p13**

[167] See **pp13, 22-3**. Article 40(2) TRIPS permits the specification of licensing practices which would be abuse of IP, subject again to the rest of TRIPS. See analysis in Ullrich, H. "Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective" 726 in Maskus/Reichman **n3.**

[168] See eg section 67 PA and sections 90(4) and 92 CDPA and also **p26** .

licensing regimes in respect of copyright, for example regarding educational transmission of broadcasts.[169] Compulsory licences may also be granted in respect of patents, when the invention has not been worked for three years and there is unmet demand, technical development is hindered or commercial activities are unfairly prejudiced.[170]

Yet there may be uncertainty as to whether the necessary requirements are met and also as to the appropriate terms of the licence.[171] In the past, such questions have ultimately been considered by courts and this can involve time and cost.[172] Even once the licence is settled, orders must be placed, any manufacturing undertaken and products delivered and used. This could again be a lengthy process and the ultimate products may be too late for those who would have benefited if the project could have proceeded at the outset. It may be possible for manufacturing and delivery to be done in parallel with the licensing application process,[173] but this would still involve diversion of resources and attention from the project. Finally, any licensing is likely, as seen in respect of the A2K Treaty example[174] and at the WTO,[175] to involve some form of payment; and not all valuable projects involving technology which is the subject of IP may be able to make a payment.[176]

In some cases, of course, it may be sensible for those seeking to use technology or material which is the subject of IP to take the time to approach the IP owner and agree

[169] Sections 116-149 CDPA.
[170] Section 48 PA et seq.
[171] See consideration at Cornish, W. R. and Llewelyn, D. (2007) (6th edition) *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* Sweet & Maxwell, London, UK ("Cornish/Llewelyn") 298-301 and Thorley. S et al (eds) (2006) (16th edn) *Terrell on the Law of Patents*, Thomson/Sweet & Maxwell, UK ("Terrell"), chapter 11.
[172] Eg *Smith Kline & French Laboratories Ltd Cimetidine Patent (No.2)* [1990] R.P.C. 203; also *Allen & Hanburys Ltd's (Salbutamol) Patent* [1987] R.P.C 327, regarding licences of right. There are questions of whether a court is the appropriate body to set the terms of a commercial relationship - see Cornish Clarendon **n3**, 24-5.
[173] Eg in the UK section 46 PA if undertakings are given then no injunction can be granted cf under previous legislation, see *F Hoffmann La Roche & Co AG v Inter Continental Pharmaceuticals Ltd* [1965] Ch. 795 [1965] 2 W.L.R. 1045.
[174] See **n84.**
[175] See **p25**
[176] See analysis of the impact of compulsory licensing in developed and developing countries in Correa, C.M. "Can the TRIPS Agreement Foster Technology Transfer to Developing Countries" 227 in Maskus/Reichman **n3**.

a licence, on the basis of compulsory licence legislation or otherwise. This is particularly so if those involved in the project would be able to pay a fee. But in other cases, those involved may be unable to pay or may choose not to use their available resources to do so. They may also be concerned that any negotiations could lead to the project being blocked or delayed. And in any event, all this involves steps to placate the IP owner. From the perspective of IP legislation, this is clearly correct; yet this work began with concerns at the power which this legislation confers on the IP owner.

The discussion in this section suggests that legal approaches based in treaty and licensing could not provide an adequate solution. Another legal approach is required.

I.2.3.4 A court based holistic solution

Accordingly, this work will present new, outward looking proposals such that courts can, and must, avoid findings of infringement in some IP actions. But not in all actions. The arguments will not require legislative change and will not be dependent upon new treaties and on the support of other countries. The proposals will provide a structured and legal basis for courts to avoid findings of infringement, rather than suggesting that they exercise their discretion in considering the appropriate remedy.[177] In terms of diversion from projects, if there is no finding of infringement then clearly no payment would need to be made to the IP owner.

The proposed approach will address individual infringement allegations which are argued before a court. It will not in itself provide, therefore, a wider solution to the questions of the impact of IP and its enforcement[178]- although given its focus on

[177] See **n23**
[178] See MacQueen, H.L. (1995) (2nd ed) *Copyright, Competition and Industrial Design* Hume Papers on Public Policy: Vol. 3 No. 2, Edinburgh University Press, Edinburgh, UK ("MacQueen Copyright") 92, 94.

structured and robust legal argument, it will do more than find a means for an emotive project to continue. The proposed approach is also consistent with the view that

> "the law often cannot wait for adequate theoretical development, much less firm empirical conclusions. Actual disputes among actual parties must be resolved, and court should be encouraged to draw upon such insights as are available, even if they are not fully developed."[179]

From a legal perspective, however, it has been seen that although IP law has its limits, conduct which may be considered of value, for example the cost price supply by the benevolent manufacturer,[180] may still appear to infringe the patent. For findings of infringement to be avoided, therefore, regard must be made to other areas of law.

Legal fields do not exist apart from other legal fields[181] and for present purposes it is noteworthy that a relationship between IP, competition and human rights was recognised in the Adelphi Charter.[182] More specifically, questions of access to medicines and access to information opportunities can be framed in terms of competition and human rights – there are questions of the human rights to life[183] and to freedom of expression and information and also of the ability of the IP owner to restrict the ability of others to manufacture pharmaceutical drugs or communications hardware.[184] Accordingly, this work will look outside IP to these fields and explore the extent to which IP, competition and human rights can be combined in IP

[179] Lemley, M.A. and McGowan, D. "Legal Implications of Economic Network Effects" May, 1998 86 Calif L. Rev. 479 ("Lemley/ McGowan"), 485.
[180] See **p14**
[181] See Dreier, T. "Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights" 295 in Dreyfuss Expanding, **n9** 309-312.
[182] Adelphi Charter, **n45** paras 2 and 3. See also CIPR, **n26** 30.
[183] See consideration of human rights in relation to IP in Harrison, J. (2007) *The Human Rights Impact of the World Trade Organisation* Hart Publishing Oxford, UK and Portland, Oregon, USA ("Harrison"), chapter 9.
[184] See consideration in MacQueen, H.L. "Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law", (2005) 2:4 *SCRIPTed* 466 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/hlm.asp ("MacQueen Utopia") and Nwauche, E.S. "HUMAN RIGHTS-Relevant Considerations in respect of IP and Competition Law", (2005) 2:4 *SCRIPTed* 467 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/enyinna.asp, ("Nwauche") 478.

enforcement actions, to enable findings of infringement to be avoided in appropriate cases.

I.3 Parameters, structure and contribution

IP rights are national rights,[185] which are enforced in national court actions.[186] It is not possible to develop a new approach to enforcement of IP which will necessarily be applicable in all national actions. This work will focus, therefore, on actions in the jurisdictions of the UK.[187] These have been chosen in the light of the wealth of relevant case law and legislation regarding IP, human rights and competition. Some account will also be taken of decisions of other national courts, the WTO DSS and decisions makers in respect of human rights and competition. A focus on the UK may seem surprising, given that some examples and concerns discussed have involved the relationship between IP and development. It is possible, however, for relevant situations to arise in the UK, as was seen with the example of the benevolent manufacturer and the school.[188]

There are differences between IP rights - for example a patent owner can prevent independent innovation within the scope of the invention, whereas copyright will be infringed only by copying of some kind.[189] A solution focused on one IP right cannot,

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[185] See **pp20, 28-9**. There are regional rights, for example the Community Trade Mark and Design (administered by OHIM, http://oami.europa.eu/ows/rw/pages/index.en.do), pursuant to Regulation No 40/94 of 20 December 1993 on the Community trade mark and Regulation No. 6/2002 of 12 December 2001 on Community Designs.

[186] There is a significant parallel debate, which is outside the scope of this work, as to jurisdiction in respect of IP litigation – see Torremans, P. "Exclusive jurisdiction and cross-border IP (patent) infringement: suggestions for amendment of the Brussels I Regulation" E.I.P.R. 2007, 29(5), 195-203. There is also discussion regarding a European Patent Litigation Agreement, see details on webpage "EPLA: European Patent Litigation Agreement http://www.epo.org/patents/law/legislative-initiatives/epla.html and discussion in Luginbuehl, S. "At Last: a European Patent Court Which May Come True. The European Patent Litigation Agreement" www.iipi.org/Views/Luginbuehl0103.pdf; and also regarding a Community Patent which would involve a Community Patent Court, see webpages "Community Patent" http://www.epo.org/patents/law/legislative-initiatives/community-patent.html and "Enhancing the patent system in Europe" http://ec.europa.eu/internal_market/indprop/patent/index_en.htm.

[187] given the nature of the case law and commentary, mainly England, with some consideration of Scotland.

[188] See **p14**

[189] See **p13**

therefore, necessarily be applied readily to another. Yet there must be a starting point. This work will focus on patents, therefore, drawing where appropriate on literature and case law in respect of other IP rights. Further, this work started with examples of the ability of IP owners to control important uses of the technology or material which is the subject of the IP. In the light of this, the discussion will proceed on the basis that any patents in question are valid and should have been granted;[190] and also that the proposed activity involves technology which is, unquestionably, the same as the protected invention and thus, apparently, infringes.

Accordingly, chapter 1 will consider in detail human rights and competition, their relationship with IP and the extent to which these three fields may be used in national actions.[191] Chapters 2[192] and 3[193] will review existing case law regarding the interface between the three fields. These early chapters conclude that the three fields cannot, at present, be combined in national actions in such a way as to enable findings of infringement to be avoided, irrespective of the possible benefits of the activity. Chapter 4 develops, therefore, a central role for human rights in judicial decision making, which is innovative yet based on the Human Rights Act 1998 ("HRA") and on established principles of statutory interpretation.[194] Chapter 5 combines this with new creative approaches to interpretation (including reference to some of the projects and documents considered here), arguing that, in some cases, a new approach to an exception or infringement provision can mean that there is no patent infringement.[195] When these arguments cannot be made, chapters 6[196] and 7[197] build on human rights, competition, IP and the proposals in respect of decision making and interpretation to argue that if the technology which is the subject of the patent is a market in itself, it could be inconsistent with competition law to raise an infringement action. The conclusion draws together the arguments made and identifies areas for future work. It

[190] Regarding validity and the challenges frequently made in this regard in infringement actions, see Sections 1-4, 14-21, 72, 74 PA and see draft pleading in Terrell **n171**, 684, Form 18.05.
[191] From **p39**
[192] From **p89**
[193] From **p119**
[194] From **p158**
[195] From **p203**
[196] From **p230**
[197] From **p251,** with this chapter considering patent construction and market definition in the light of the arguments developed

considers also the extent to which the proposals are likely to be found to be consistent with the obligations of the UK, and indeed of other countries, under the Council of Europe's European Convention on Human Rights and Fundamental Freedoms 1951 ("ECHR") and TRIPS.

In summary, the contribution of this work will be to suggest that a combination of IP, competition and human rights provides an immediate means by which courts can and must avoid findings of infringement. The challenge is to develop arguments which are consistent with the international obligations of the UK; which are sufficiently limited and structured so as not to remove the incentives provided by IP; and which produce some certainty for courts, IP owners, users and advisers.

1 Over the legal barricades: human rights and competition

This chapter introduces human rights and competition, their relationship with IP and the extent to which their enforcement frameworks could be relevant to patent actions in the UK jurisdictions. Such an introduction is not a straightforward exercise. There are instruments, at national and regional level in both fields and also at international level in respect of human rights. Yet the parameters of human rights and competition are still much less clear than those in respect of IP, likely owing to their having at least in part a public nature and remaining strongly linked with questions of theory. This uncertainty is also reflected in the means of enforcement.

1.1 Human rights

There are three tiers of human rights legislation relevant to the UK – international and regional treaties to which the UK is a signatory and also the Human Rights Act 1998 ("HRA"). These tiers do not interconnect, however, in the manner of TRIPS and national IP legislation.[198] For example, the UK is a signatory to both the ECHR[199] and to the United Nations' International Covenant on Civil and Political Rights 1966 ("ICCPR"), [200] which are quite distinct in terms of membership, substance and the obligations imposed on states.[201] This means that the basis and substance of "human rights" can appear uncertain. Theory remains, therefore, an important part of human rights.

[198] See **p29**
[199] 213 U.N.T.S. 222.
[200] 999 U.N.T.S. 171.
[201] The relationship between treaties is considered in **Sections 5.2.2.4 and C.3.3.3.**

1.1.1 A theoretical approach

Human rights can be argued to be fundamental individual entitlements which unlike, say, the rights of a UK patent owner exist irrespective of treaty, legislation or territorial or other limits. There are a wide range of human rights theories which could support this view,[202] with important examples being the long standing ones of natural rights and utilitarianism and the twentieth century work of Ronald Dworkin and of John Rawls.

In the seventeenth century, John Locke ("Locke") was a key proponent of natural rights, which he saw as arising from nature on the basis of reason.[203] Of interest here, is that Locke teaches rights in respect of life and also in respect of property, on the basis of entitlement to the fruits of one's labour.[204] This approach to property has been argued to support IP, as it provides a reward for innovation and creativity.[205]

Utilitarianism, of which a leading proponent was Jeremy Bentham writing in the nineteenth century, is in marked contrast to natural rights. Rather than focussing on the individual, utilitarianism aims to bring about the greatest good to the greatest number, irrespective of the consequences for others. The appropriateness of any action is determined by its impact on the happiness of the individual or group in

[202] See for overview Symonides, J. (ed) (2002) *Human Rights: Concepts and Standards* Dartmouth Publishing Co Ltd, Aldershot, UK and Ashgrove Publishing Co, Vermont, USA and UNESCO, Paris, France ("Symonides)" and Eide, A., Krause, C. and Rosas, A. (eds) (1995) *Economic, Social and Cultural Rights. A Textbook* Martinus Nijnhof, Kluwer Academic Publishers, The Netherlands.
[203] Locke, J. (The Legal Classics Library, 1994edn) *Two Treatises of Government* New York, USA ("Locke").
[204] Locke, **n203** 169, 185-8.
[205] See Drahos Philosophy, **n12** 41 et seq; Gordon, W.J "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" May, 1993 102 *Yale Law Journal* 1533 at 1535-1539, 1606-9; Afori, E. F. "Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law" Winter, 2004 14 Fordham Intell. Prop. Media & Ent L. J. 497 at 498-9, 501, 518-525, 531-6 538, 548-560; and Ziemer, L. (2007) *The Idea of Authorship in Copyright* Ashgate, Aldershot, Hampshire UK and Burlington, VT, USA.

question,[206] with their internal and external preferences having a key role in the analysis. [207]

In the 1970s, Ronald Dworkin ("Dworkin") placed great weight on individual rights, which he considered to be quite apart from politics[208] and utilitarian analysis. According to Dworkin, rights would exist if they were required by the fundamental right of an individual to be treated as an equal[209] and if their restriction would be based on the preferences, rather than rights, of another.[210] Rights could be over-ridden by other rights in some cases, but not merely by the interests of the majority.[211] Dworkin considered that his arguments supported a right to free speech,[212] but not a right to property.[213]

Finally, John Rawls ("Rawls") writing around the same time at Dworkin developed a theory of justice.[214] According to this, persons would choose the fundamental terms on which they would associate with each other in a proposed society, at a time when they were ignorant of their proposed role in the society.[215] Rawls considered that this would lead to equal assignment of liberty, rights and duties,[216] with inequalities to be justified only if all, particularly the least advantaged, would still benefit from the arrangement as a whole.[217] These assumptions and choices would be tested by those involved, until a reflective equilibrium was reached.[218] Rawls considered that this

[206] Bentham,J. (1963 edn) The Hafner Library of Classics) *An Introduction to the Principles of Morals and Legislation* Hafner Publishing Co, New York, USA, ("Bentham")in particular 2, II and III.
[207]Bentham,J. (1963 edn) The Hafner Library of Classics) *An Introduction to the Principles of Morals and Legislation* Hafner Publishing Co, New York, USA, 73, XI.
[208] Dworkin, R. (1977) *Taking Rights Seriously* Duckworth, UK ("Dworkin"), initial discussion at 184-7, 192.
[209] Dworkin, **n208** 271, 273-4.
[210] Dworkin, **n208** 275-7.
[211] Dworkin, **n208** 193-4, 204-5.
[212] Dworkin, **n208** 277.
[213] Dworkin, **n208** 277-8.
[214] Rawls (1972) *A Theory of Justice* Clarendon Press, Oxford, UK ("Rawls").
[215] Rawls, **n214** 14-5.
[216] Rawls, **n214** 61, 302.
[217] Rawls, **n214** 11-2, 14.
[218] Rawls, **n214** 48-50.

theory would support rights to freedom of speech[219] and in respect of free use of property.[220]

1.1.2 Human rights theories and enforcement of patents

Theories of natural rights, individual rights and justice give rise to rights which could be relevant when a patent is enforced in situations raised in the introduction. Rights to life, supported by natural rights, could be relevant to those seeking access to essential medicines and to communications in an emergency; rights to freedom of speech, supported by Rawls and Dworkin, could be relevant to those seeking material for use in education and entertainment; and rights to property, supported by Rawls and natural rights, could be relevant to the patent owner wishing to enforce its rights and also to others wishing to utilise their resources as they saw fit, such as the benevolent manufacturer who wished to supply educational technology. [221]

Yet although Rawls and Dworkin both support freedom of speech, they do so on different bases. Further, the range of rights identified means that conflicts arise: questions of patents and access to emergency communications could involve the right to life as taught by Dworkin and the right to property as taught by Rawls and indeed, a conflict within natural rights, which teaches both rights. These three sets of theories do address questions of conflict to an extent - Locke discusses regulation of property,[222] Rawls the ranking of rights[223] and Dworkin the balancing of rights.[224] These theoretical proposals do not, however, provide sufficient detail to resolve a particular situation. This uncertainty can also be seen in utilitarianism. This might suggest that permitting use of medicine without the consent of the patent owner would

[219] Rawls, **n214** 61, 225
[220] Rawls, **n214** 61.
[221] See **p14**
[222] Locke,**n203** 273-4.
[223] Rawls, **n214** 41-5, 243 et seq, 302, 543.
[224] Dworkin, **n208** 194, 199, 203-4.

be for the good of a greater number than would benefit if control remained with the patent owner. There may, however, be less innovation if patent owners felt they would be unable to exercise their exclusive rights. This would be to the detriment of those who could have benefited from the innovation.[225]

Accordingly, introducing theories of human rights into discussions of enforcement of patents can provide rights which are relevant; however, these rights would support both sides of an action and the theories considered do not provide an adequate means of resolving conflicts between rights. Thus, even if a court were minded to look to human rights theories in their decision making,[226] they would be of limited practical assistance.

But human rights does not only comprise human rights theories. The present human rights framework can be traced from the aftermath of World War II, when leaders of the international community sought to avoid a recurrence of the war time atrocities. This led to a series of positive statements, in declarations and treaties, as to the human rights which states must accord their citizens.[227] These statements included limits on these rights and permitted exceptions to them, thus providing some means of addressing conflicts between rights. These instruments, and their possible impact on patent actions in the UK, will now be explored.

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[225] See discussion at Drahos Philosophy, **n12** 200-1 and also Ostergard, R.L. Jnr "Intellectual Property: A Universal Human right?" Human Rights Quarterly 21 (1999) 156-178 ("Ostergard"), 157-8 and 162-5.

[226] The extent to which courts may or do have regard to legal theories, in respect of human rights and other matters, is outside the scope of this work. See eg MacCormick, N. (2005) *Rhetoric and the rule of law: a theory of legal reasoning* Oxford University Press, Oxford, UK; Dworkin **n208**, 279 et seq; and Gearty, C. (2004) *Principles of Human Rights Adjudication* Oxford University Press, Oxford, UK ("Gearty Principles"), 121 et seq.

[227] For consideration of the appropriate roles of human rights theories and instruments, see Campbell, T. "Human Rights Strategies: An Australian Alternative" 319 in Campbell, T. et al (eds) (2006) *Protecting Rights Without a Bill of Rights. Institutional Performance and Reform in Australia* Ashgate, Aldershot, Hampshire, UK and Burlington, VT, USA ("Campbell Protecting"); Gutmann, A. "Introduction**"** vii, xviii and Ignatieff, M. "Human Rights as Idolatry", 77, 77 both in Ignatieff, M. (ed) (2001) *Human Rights as Politics and Idolatry* Princetown University Press, Princetown, USA ("Ignatieff"); and Eide, A. "Interdependence and Indivisibility of Human Rights" 11 ("Eide") in Donders, Y. and Volodin, V. (2007) *Human Rights and Educational, Social and Cultural Developments and Challenges* UNESCO Publishing and Ashgate, Aldershot, Hampshire, UK and Burlington, VT, USA ("Donders/ Volodin"), 17-25.

1.1.3 The instrumental perspective and the UK

1.1.3.1 Human rights treaties

The Universal Declaration on Human Rights ("UDHR") was made in 1948.[228] This was followed by further international discussion and negotiation, culminating in 1966 with two treaties - the ICCPR[229] and the International Covenant on Economic Social and Cultural Rights ("ICESCR").[230] Most, although not all, nations have ratified at least one of these and the UK ratified them both in 1976.[231]

This creation of two instruments resulted from a lack of accord as to the existence and appropriate protection of some rights, notably in respect of economic matters.[232] There has since been some movement to a wider international human rights consensus.[233] At the World Conference on Human Rights in Vienna in 1993, there was a declaration reaffirming the "commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights" and that "the universal nature of these rights and freedoms is beyond question." [234]

[228] 1948 UNGA Resolution 217 (LXIII).
[229] For overview discussion of the ICCPR, see Nowak, M. "Civil and Political Rights" 69 ("Nowak") in Symonides **n202**.
[230] 003 UNTS 3. For discussion of this instrument as a whole, see Eide, A. "Economic and Social Rights" 109 in Symonides **n202**.
[231] See Office of the United Nations High Commissioner for Human Rights "Status of Ratifications of the Principal Human Rights Treaties as of 09 June 2004" http://www.unhchr.ch/pdf/report.pdf. For reservations by some states see United Nations Treaty Collection Declarations and Reservations as of 5 February 2002 http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.
[232] Eide **n227** in Donders/Volodin **n227**, 23.
[233] For consideration of the goal of universal global human rights protection see Kirby, Justice M., AC, CMG "Human Rights: An Agenda for the Future" 2, at 2, 18-22 and Bayefsky, A. F. "The UN and the International Protection of Human Rights" 74 both in Galligan, B. and Sampford, C. (eds) (1997) *Rethinking Human Rights* The Federation Press, Sydney, Australia ("Galligan/Sampford"); Nowak **n229** in Symonides, **n202** 69-72; Eide, A. "Economic and Social Rights" 109 in Symonides **n202**, 109-124, 156-170; Buergenthal, T. "Human Rights in an Historical Perspective" 3 in Symonides **n202**, 10-25.
[234] See http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En ("Vienna Declaration"), article 1

Regional activity suggests wide support for human rights, through the ECHR, [235] the American Convention on Human Rights of 1969 ("ACHR"),[236] the African Charter of Human and Peoples' Rights of 1981 ("African Charter"),[237] the Revised Arab Charter of Rights of 2008 ("Arab Charter")[238] and at the time of writing in 2008, there are ongoing discussions among the Asia Pacific nations.[239] There are also strong similarities between the rights recognised in these instruments - for example, a right to freedom of expression is recognised in the ECHR,[240] the ICCPR,[241] the ACHR,[242] the African Charter[243] and the Arab Charter.[244]

At national level, the UK did not incorporate the ECHR, ICCPR or ICESCR into national law. As a result, these treaties are not part of the laws of the UK.[245] Courts in the UK jurisdictions can still have regard to unincorporated treaties, however, when they are interpreting legislation.[246] Indeed, when interpreting ambiguous legislation courts have showed a particular willingness to have regard to the ECHR and also to reach an interpretation which is consistent with it.[247]

[235] For details of members see Council of Europe Simplified Chart of signatures and ratifications http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG.
[236] O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123. See consideration in Viljoen, F. "The Justiciability of Socio-economic and Cultural rights. Experiences and Problems" 53 ("Viljoen") in Donders/Vollodin **n227**, 78-80.
[237] OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. See consideration in Viljoen **n236** in Donders/Volodin **n227**, 80-3.
[238] Arab Charter of Human Rights, League of Arab States in force 2008 available at http://www1.umn.edu/humanrts/instree/loas2005.html
[239] See Asian Charter of Human Rights < http://www.ahrchk.net/charter/> proposed by Asian Human Rights Commission.
[240] ECHR, article 10.
[241] ICCPR, article 17.
[242] ACHR, article 13.
[243] African Charter, article 9.
[244] Arab Charter, article 32.
[245] See Brownlie, I. (2003) *Principles of public international law* Oxford University Press, UK ("Brownlie"), 44 et seq. For more theoretical consideration of this issue see Nijman, J. and Nollkaemper. A. "Introduction" 1 at 6-10 and Gaja, C. "Dualism – a Review" 52 both in Nijman, J. and Nollkaemper, A. (eds) (2007) *New Perspectives on the Divide between National and International Law* Oxford University Press, Oxford, UK.
[246] This is considered further in **section 5.2.2.2-4**
[247] *T, Petitioner* 1997 S.L.T. 724 , 733-4 and *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534, 550-1 cf *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696.

1.1.3.2 Other European perspectives

Questions of human rights also arise in the light of the UK's membership of the European Union ("EU") and European Community ("EC").[248] Treaties and legislation of these bodies are supreme over national law, as has been confirmed by the European Court of Justice ("ECJ")[249] and also by the UK European Communities Act 1972. [250] At the time of writing in 2008, the EU has no binding human rights instrument. The abandoned EU Constitution[251] had included the Charter of Fundamental Rights of the European Union ("EU Charter")[252] and the Treaty of Lisbon[253] of 2007 inserted a recital in the Treaty on European Union of 1992[254] ("TEU") which referred to "the universal values of the inviolable and inalienable rights of the human person". The Treaty of Lisbon will not come into effect, however, at least in its present form, after its rejection by Ireland in 2008.[255]

Yet there is already an important role for human rights in the EU and EC. The TEU provides that

[248] The gateway website is at http://europa.eu/index_en.htm.
[249] *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* (6/64) [1964] E.C.R. 585
[250] See also *R v Secretary of State for Transport ex p Factortame (No. 2)* [1991] 1 AC 603 ("*Factortame*"), 659 considering Section 2(1) European Communities Act 1972 . See also Bennion, F. et al (eds) (2008)(5th ed) *Bennion on Statutory Interpretation: A Code* Reed Elsevier LEXIS NEXIS London and Edinburgh, UK ("Bennion 2008"), 1274 et seq, 1287 et seq and 1293 et seq.
[251] For details see webpage "Institutional Reform of the European Union" http://europa.eu/institutional_reform/index_en.htm.
[252] O.J. C 303/01 14.12.2007 and (non binding) explanations relating to the Charter of Fundamental Rights at O.J. C 303/02 14.12.2007. For early analysis see Rochere de la "The EU Charter of Fundamental Rights" http://www.ecln.net/elements/conferences/book_athens/dutheil.pdf and MacCormick, N. "Human Rights and Competition Law: Possible Impact of the Proposed EU Constitution", (2005) 2:4 *SCRIPTed* 444 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/maccormick.asp , 445-7 ("MacCormick Human Rights") and from 2008 see Cruz, J.B. **"**What's left of the Charter? Reflections on law and political mythology" Maastricht J. 2008, 15(1), 65-75.
[253] Treaty of Lisbon 2007/C. O.J 306 17.12.2007.
[254] See Consolidated Versions of the Treaty on European Union ("TEU") and of the Treaty Establishing the European Community ("EC Treaty")
O J C 321E of 29 December 2006.
[255] See webpage "Taking Europe into the 21st Century" http://europa.eu/lisbon_treaty/index_en.htm

> "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[256]

This provision built on longstanding case law of the ECJ[257] which established that fundamental rights must be respected by EC institutions, which include the ECJ, and also that these rights are an integral part of the common law of the Community.[258] This has consequences for courts in the UK, as when they apply and consider Community law, they must do so with regard to decisions of the ECJ and to Community law as a whole,[259] which would include EC fundamental rights. [260]

The precise content of such "fundamental rights" is again unclear. The ECJ has provided some guidance, confirming in 1974 that fundamental rights include rights common to the traditions of EC member states;[261] in a series of cases from 1991 that they include rights in international treaties on which the Member States have collaborated or to which they are signatories, with the ECHR having special significance;[262] in 2001 that they include the right to human dignity;[263] and in 2007[264]

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[256] Article 6(2), TEU **n254**
[257] See articles 220, 225-6, 228, 230-1, 234-240 EC Treaty regarding the jurisdiction of the ECJ.
[258] See *Internationale Handelsgesellschaft v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel* (11/70) [1970] E.C.R. 1125 para 4; *Hauer v Land Rheinland-Pfalz* (44/79) [1979] E.C.R. 3727 paras 16-7; *Society for the Protection of Unborn Children (Ireland) Ltd (SPUC) v Grogan* (C159/90) [1991] E.C.R. I-4685, paras 30-1; *Wachauf v Germany* (C5/88) [1989] E.C.R. 2609, paras 17-18. See consideration of these cases and the place of fundamental rights in the ECJ, see Clayton, R. and Tomlinson, H. (2000)*The Law of Human Rights* Oxford University Press, Oxford, UK ("Clayton/ Tomlinson") at 32-4. 81 et seq and for more detailed analysis see Lockhart, N.J.S. and Weiler, J.H.H. "Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence" Part 1. C.M.L. Rev. 1995, 32(1), 51-94 and Part 2. C.M.L. Rev. 1995, 32(2), 579-627.
[259] *CILFIT Srl v Ministero della Sanita* (283/81) [1982] E.C.R. 3415 ("*CILFIT*") paras 17, 20.
[260]Eg *Productores de Musica de Espana (Promusicae) v Telefonica de Espana* SAU (C- 275/06) [2008] 2 C.M.L.R. 17, ("*Telefonica*") para 61 when a reference was made by a national court regarding whether an interpretation of legislation would be consistent with the fundamental right to property. .
[261] *J Nold Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* (4/73) [1975] E.C.R. 985, para 13.
[262] *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] E.C.R. 1651, para 18. See also *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP*) (C260/89) [1991] E.C.R. I-2925, para 41, *Roquette Freres SA v Directeur General de la Concurrence* [2002] E.C.R. I-9011, paras 23-5 and *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (C-

(after the abandonment of the EU Constitution) that fundamental rights include the rights set out in the EU Charter.[265] The EU Charter is strongly based in the ECHR and non binding accompanying explanations,[266] and also a leading commentator,[267] suggest that the EU Charter rights are likely to be interpreted in the same way as the corresponding ECHR rights, even although they do appear to be subject to fewer exceptions.[268]

Leading commentators have argued that there is also a more general European legal order, with the ECHR at its centre.[269] This is a challenging suggestion and even at the most basic level difficulties have been identified in combining different "European" instruments and values.[270] The potential for some fundamental common principles can be seen, however, from the recognition of European Court of Human Rights ("ECtHR") of the importance of fundamental rights in the EC. In *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* ("*Bosphorus")*[271] in 2005, the

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112/00) [2003] E.C.R. I-5659 para 71, considered at Jaeckel, L. "The Duty to Protect Fundamental Rights in the European Community" E.L.Rev. 2003, 28(4), 508-527, 518-20.

[263] *Netherlands v European Parliament* (C377/98) [2001] E.C.R. I-7079, para 70 ("*Biotechnology*") (see also **pp108-9)** and *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (C-36/02) [2004] E.C.R. I-9609, see detailed analysis in the Opinion of the Advocate General Stix-Hackl paras 3-6, 18, 20, 32-99 and see the judgment of the ECJ at paras 32-3, 35-9.

[264] *Telefonica* **n260** paras AG Kokott 51, 53, 55 and paras 61 and 64 (this last noting that the directive in question refers to the EU Charter)

[265] The Treaty of Lisbon, see **nn 253 and 255** includes the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Treaty of Lisbon 2007/C. O.J 306 17.12.2007. ("Lisbon Protocol"). This notes in a recital that the EU Charter rights are recognised in article 6 of the Treaty on European Union and that the EU Charter is to be applied in accordance with this and in article 1 that the EU Charter shall not extend the ability of the ECJ or national courts to find that laws or actions of the UK are inconsistent with fundamental rights. But in the light of these cases, this Protocol would have been unlikely to have had a substantive effect.

[266] See **n252**

[267] MacCormick Human Rights **n254**, 446-7. This would also be consistent with the Lisbon Protocol in terms of the EU Charter creating no new obligations, **n265**

[268] There are unrestricted rights to life and to health (articles 2 and 14), some limits in respect of expression and information (article 11) and of property (article 17) although there is a bald statement that "intellectual property shall be protected" (article 17(2)). See in this regard MacCormick Human Rights **n254**, 447-8 and MacQueen Utopia, **n184** 465-6.

[269] See Beyleveld, D. and Brownsword, R. (1993) *Mice, Morality and Patents. The Onco-mouse Application and Article 53(a) of the European Patent Convention* Common Law Institute of Intellectual Property, London, UK 40, 68, 69.

[270] See Plomer et al, University of Notting ham "Stem Cell Patents: European Patent Law and Ethics Report" chapters 6 and 7 http://www.nottingham.ac.uk/law/StemCellProject/project.report.pdf considering the issue in the light of the European Patent Convention**.**

[271] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (45036/98) (2006) 42 E.H.R.R. 1 ("*Bosphorus*"), paras 148-156 and 159-160.

ECtHR considered that as the EC legal framework includes fundamental rights, there was a rebuttable presumption that states did not depart from their ECHR obligations in complying with obligations under the EC Treaty.[272]

Fundamental rights are therefore an important and longstanding part of the EC legal framework and have a role in the decision making of national courts. This be only be so, however, when courts are considering an EC instrument[273] and there is very limited EC patent legislation at the time of writing in 2008.[274] The PA is rather an instrument of national law, within the wider and distinct European Patent framework.[275]

1.1.3.3 The national perspective

Unlike some countries,[276] the UK has no constitution within which to recognise formally and protect human rights.[277] With the HRA, however, there is a more direct, although still limited, role for human rights in the UK. Section 3 HRA imposes obligations on courts to, so far as possible, read and give effect to legislation in a way which is compatible with most ECHR rights (which the HRA terms "Convention

[272] See consideration in Parga, A.H. "Bosphorus v Ireland and the Protection of Fundamental Rights in Europe" E.L.Rev. 2006, 31(2), 251-259, 254-5, and Banner, C. and Thomson, A. "Human Rights Review of State Acts Performed in Compliance with EC law – Bosphorus Airways v Ireland " E.H.R.L.R. 2005, 6, 649-659, 654-6. See also detailed critical analysis in Douglas-Scott, S. "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis". C.M.L. Rev. 2006, 43(3), 629-665.
[273] See *Factortame*, 659 **n250**
[274] Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological Inventions O.J. L 213/13.
[275] This is considered in more detail in **section 5.2.1**
[276] See the constitutions of France http://www.assemblee-nationale.fr/english/8ab.asp and the United States http://www.law.cornell.edu/constitution/constitution.table.html, the Canadian Charter of Human Rights and Freedoms http://laws.justice.gc.ca/en/charter/, the Basic Law of the Federal Republic of Germany (translation available via http://www.psr.keele.ac.uk/docs/german.htm) and the South African Bill of Rights, s. 26, 27 and 28 of the Constitution of the Republic of South Africa 1996 http://www.info.gov.za/documents/constitution/index.htm.
[277] See discussion in Bradley, A. "The Sovereignty of Parliament – Form or Substance?" 25 in Jowell, J. and Oliver, D. (eds) (2007) (6th ed) *The Changing Constitution* Oxford University Press, Oxford, UK ("Jowell/Oliver").

rights").[278] Section 6 HRA makes it unlawful for courts to make a decision incompatible with a Convention right unless primary legislation cannot be read or given effect in a way which is compatible.[279]

The UK and the courts of the UK jurisdictions are subject, therefore, to various obligations in respect of human rights, in the light of international and regional treaties and national legislation. The relevance of these to IP will now be explored.

1.1.4 Instrumental human rights and IP

The ECHR, the EU Charter and the ICCPR all contain rights in respect of life[280] and of freedom of expression and to receive and impart information.[281] There are also EU Charter and ICESCR rights to health[282] and ICESCR rights to share in cultural life[283] and to enjoy the benefits of scientific progress and its applications.[284] From the perspective of the patent owner, the ECHR and EU Charter include rights to enjoyment of property[285] and the ECHR right has been held by the ECtHR to guarantee the right to property itself.[286] More specifically, the EU Charter states that "[i]ntellectual Property shall be protected".[287]

[278] Section 1 and Schedule 1 HRA.
[279] Section 6(2)(b) HRA.
[280] ICCPR, article 6; ECHR, article 2; EU Charter, article 2.
[281] ICCPR, article 19; ECHR, article 10; EU Charter, article 11.
[282] ICESCR, article 12; EU Charter, article 14.
[283] ICESCR, article 15(1)(a).
[284] ICESCR, article 15(1)(b).
[285] ECHR Protocol 1, article 1; EU Charter, article 17(1).
[286] *Marckx v Belgium* (A/31) (1979-80) 2 E.H.R.R. 330 , para 63, a case involving status of the children of unmarried mothers.
[287] EU Charter, article 17(2).

The ECtHR held, in a case involving "Budweiser" trade marks,[288]that the right to property can apply to IP. [289] This is consistent with decisions of the disbanded European Commission on Human Rights[290] when considering copyright[291] and the compulsory licensing of patents[292] and also with the statement in the ECHR that the right exists in respect of both legal and natural persons.[293] Conversely, decisions of the ECtHR in relation to commercial advertising [294] suggest that it would be possible for corporate entities faced with a patent action, such as the benevolent manufacturer of educational technology,[295] to rely on the ECHR right to free expression and information. When the European Commission on Human Rights considered, however, the rights of a copyright owner, first in respect of programme listings[296] and second in respect of frescos televised in a report on the restoration of the building in which they were situated, it was of the view that it was not for it to consider the relationship between the two rights. [297]

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[288] *Anheuser-Busch Inc v Portugal* (73049/01) [2007] E.T.M.R. 24 (2007) 45 E.H.R.R. 36 ("*Budweiser*") .

[289] For comprehensive analysis of decisions of European human rights bodies in relation to IP, see Helfer, L.R. "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights" Harvard Journal of International Law Vol 49. No. 1 Winter 2008 ("Helfer Innovation").

[290] Protocol 11 to ECHR http://conventions.coe.int/treaty/EN/Treaties/html/155.htm

[291] *Dima v Romania* App No 58472/00 (2005) (regarding designs for the national emblem of Romania). Case report available only in French, see discussion in Helfer Innovation **n289,** 3.

[292] *Smith Kline & French Laboratories Ltd v Netherlands (Admissibility)* (12633/87) October 4, 1990 Eur Comm HR 70 ("*Smithkline*"). See also *Lenzing AG v United Kingdom* App No. 38817/97, 94-A Eur. Comm HR 136, 146

[293] ECHR Protocol 1, article 1, line 1.

[294] *Markt Intern v Germany* (1990) 12 E.H.R.R. 161 ("*Markt Intern*") and *Casado Coca v Spain* (1994) 18 E.H.R.R. 1 ("*Casado*"). See also Munro, C. "The value of commercial speech." C.L.J. 2003, 62(1), 134-158. For wider consideration of the extent to which companies can have human rights, see Bottomley, S. "Corporations and Human Rights" 47 ("Bottomley Corporations") in Bottomley, S. and Kinley, D. (eds) (2002) *Commercial Law and Human Rights* Dartmouth Publishing Company, Ashgate Publishing, Hampshire, England and Virginia, USA ("Bottomley/Kinley"), 63-8 and Emberland, M. (2006) *The Human Rights of Companies. Exploring the Structure of ECHR Protection* Oxford University Press, Oxford, UK.

[295] See **p14**

[296]*De Geillustreerde Pers NV v Netherlands* European Commission on Human Rights D.R. 8 Dec 1977, 5 [1978] E.C.C. 164 [1979] F.S.R. 173. See discussion in Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding , **n9** 358-9 and also in Hugenholtz, P. B. "Copyright and Freedom of Expression in Europe" 239 ("Hugenholtz Copyright 2") in Elkin-Koren/Netanel, **n6** 259; Strowel, A. and Tulkens, F. "Freedom of Expression and Copyright under Civil Law: of Balance, Adaptation and Access" 287 ("Strowel/Tulkens") and Barendt, E. "Copyright and Free Speech Theory" ("Barendt") 11, 23 in Griffiths/Suthersanen **n136**

[297] Case unable to be located. See discussion in Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9** 359-60 and Hugenholtz Copyright 2 **n296** in Elkin-Koren/Netanel, **n6** 260 referring to *France 2 v. France*, European Commission of Human Rights 15 January 1997 Case 30262/96 [1999] *Informatierecht/AMI* 115.

There is also a right in the ICESCR (and also the UDHR) [298] to the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author. It has been argued that this is a human right to IP[299] and the right of authors to some benefit from their work would be consistent with natural rights theories.[300] The view that this gives rise to a human right to IP, however, is not uncontroversial. This has been much debated by commentators,[301] in the light of theoretical concerns and the legislative history of the human rights instruments and has in turn given rise to questions of whether there is indeed a conflict between IP and human rights.[302]

Questions of a human right to IP, and human rights and IP more generally, have been considered within the human rights system of the United Nations. In 1998, a discussion day on "Intellectual Property and Human Rights"[303] was held by both the United Nations and WIPO, to commemorate the 50th anniversary of the UDHR. Since then, the United Nations has been active in relation to IP and human rights. The UN Sub-Commission for Promotion and Protection of Human Rights ("Sub-Commission") delivered a resolution in 2000.[304] This acknowledged that an author

[298] ICESCR, article 15(1)(c).
[299] which is also included in the UHDR article 27(2)
[300] See **p40**
[301] For discussion, see Drahos, P. "Intellectual property and human rights" I.P.Q. 1999, 3, 349-371; Ostergard **n225**; Chapman, A. "Approaching intellectual property as a human right: obligations related to Article 15(1)(c) Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing, Paris, France ("Chapman"); Helfer, L. "Human Rights and Intellectual Property: Conflict or Coexistence" 5 *Minnesota Intellectual Property Review* 47 (2003);Ricketson, S. "Intellectual Property and Human Rights" 187 ("Ricketson") in Bottomley/ Kinley **n294**; Torremans, P.L-C. "Copyright (and other Intellectual Property Rights) as a Human Right" 195 in Torremans IP, 199-204; MacQueen Utopia, **n184** 463-4; Nwauche, **n184** 468-72; Geiger, C. "Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union" IIC 2006, 37(4), 371-406 ("Geiger Constitutionalising") ; Dreyfuss, R.C. "Patents and Human Rights: Where is the Paradox?" New York University Law and Economics Research Paper Paper No. 06-38 Public Law and Legal Theory Research Paper Series Paper No. 06-29 available via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929498; Hestermeyer, **n4** 154 et seq; and Gervais, D.J. "Intellectual Property and human rights: learning to live together" 3 in Torremans IP, 14-23.
[302] Chapman **n301**, 10-3; Torremans 1 **n13** in Torremans Copyright, **n13** 4-6, 8-9.
[303] See webpage "Intellectual Property and Human Rights: an overview" with links to developments http://www.wipo.int/tk/en/hr/.
[304] UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2000/7 ("2000 Resolution")

had rights in respect of moral and material interests, but went on to note a conflict between the manner in which states implemented their obligations under TRIPS[305] and their obligations under international human rights instruments.

The Sub-Commission considered that primacy should be accorded to human rights and to the social function of IP in encouraging innovation and creativity, rather than an economic approach being taken to IP.[306] Reports followed in June 2001 from the Secretary General[307] and from the High Commissioner of the Sub-Commission.[308] These adopted a similar approach to the resolution, as did a further Sub-Commission resolution of August 2001. This also called for an expert seminar to be held on the relationship between IP and human rights, for further work on patents and for the UN High Commissioner for Human Rights to seek observer status in respect of WTO discussions regarding TRIPS.[309] Following this, a submission was made by the High Commissioner[310] to the WTO discussions in 2003.[311]

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http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument.

[305] Article 1, 2000 Resolution.

[306] See 2000 Resolution, final recital and articles 1-5. See also Sun, H. "Copyright Law Under Siege. An Inquiry Into the Legitimacy of Copyright Protection in the Context of the Global Digital Divide" IIC 2005 26 (2) 192, 209-10, 212

[307] United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Economic, Social and Cultural Rights, Intellectual property rights and human rights. Report of the Secretary-General. E/CN.4/Sub.2/2001/12 14 June 2001 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.En?Opendocument and Addendum to the Report on Economic, Social and Cultural Rights, E/CN.4/Sub.2/2001/12/Add.1 3 July 2001, http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.Add.1.En?Opendocument>>

[308] Commission on Human Rights Sub-Commission for the Promotion and Protection of Human Rights. Report of the High Commissioner. The Impact of the Agreement on Trade-Related Aspect of Intellectual Property Rights on human rights ("Report of High Commissioner") See http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/590516104e92e87bc1256aa8004a8191/$FILE/G0114345.doc see paras 10, 11, 14, 16, 17, 20, 21, 23, 28, 30, 61-2.

[309] UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2001/21 http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument paras 13, 10, 9.

[310] Office of the High Commissioner for Human Rights "Human Rights and Trade" for Cancun, Mexico, 10-14 September 2003 http://www.unhchr.ch/html/hchr/cancunfinal.doc.

[311] See **p24**

The relationship between IP and human rights was also considered by the UN Committee on Economic Social and Cultural Rights[312] ("CESCR"), which was established in 1985 to monitor the implementation of the ICESCR by states. In 2001, the CESCR issued a statement "Human Rights and Intellectual Property"[313] and in November 2005[314] it issued a General Comment,[315] setting out its interpretation of the right in respect of the protection of moral and material interests.

The General Comment noted[316] that this right is recognised in a range of instruments[317] and considered, as it was a right deriving from the inherent dignity of all persons,[318] that it was a human right.[319] The General Comment distinguished, however, the fundamental right to protection of moral and material interests from IP rights, which it considered were limited and created artificially.[320] The General Comment considered that human rights were inherent to individuals[321] and that IP was "first and foremost" a means of state encouragement of innovation.[322] It saw the right in respect of moral and material interests as linked in a mutually reinforcing and reciprocally limitative relationship with other rights, such as taking part in cultural life and sharing in the benefits of scientific progress[323] and to be dependent upon rights to expression and information and to own property.[324] Finally, the General Comment

[312] See main webpage http://www.unhchr.ch/html/menu2/6/cescr.htm.
[313] Statement CESCR "Human Rights and Intellectual Property" November 2001 E/C. 12/2001/15 http://www1.umn.edu/humanrts/esc/escstatements2001.html.
[314]Office of the High Commissioner for Human Rights Committee on Economic Social and Cultural Rights "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author" General Comment No. 17 (2005) http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.17.En?OpenDocument ("General Comment")
[315] For further details of General Comments, see webpage "Human Rights Bodies - General Comments" http://www2.ohchr.org/english/bodies/treaty/comments.htm.
[316] See also consideration of the drafting process by the author in Brown Responsible **n141**, 491-2.
[317] General Comment, **n314** article 3.
[318] General Comment, **n314** article 1.
[319] General Comment, **n314** article 1
[320] General Comment, **n314** articles 1-3, 10. See Ricketson **n301** in Bottomley/Kinley **n294**, 194-7
[321] General Comment, **n314** article 7. See also Grear, A. "Challenging corporate "humanity": legal disembodiment, embodiment and human rights" H.R.L. Rev. 2007, 7(3), 511-543. This is in contrast to the approach of the ECHR and ECtHR and also the EU Charter considered above in respect of property and expression. See **n252** and **pp50-1**.
[322] General Comment, **n314** article 1.
[323] General Comment, **n314** articles 4, 22-4.
[324] General Comment, **n314** article 4.

considered that states should ensure that their protection of the moral and material interests did not impede their ability to comply with their obligations in respect of health, education, taking part in cultural life and enjoying the benefits of scientific progress and its applications - making particular reference to the prevention of unreasonably high costs for access to essential medicines or schoolbooks and learning materials.[325]

It can be seen, therefore, that there are instrumental human rights upon which both sides of a patent action may wish to rely – example, property for the patent owner and freedom of expression and property for the alleged infringer.[326] But can they? The instruments considered confer rights upon citizens against states or dictate the conduct of EC institutions; patent owners do not have responsibilities under these instruments.

There has been some movement towards imposing, recognising and utilising obligations in respect of international human rights in relation to large corporate entities. The most significant development has been the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("UN Business Norms").[327] These built on earlier initiatives, such as the UN Global Compact[328] and the Caux Roundtable.[329] The UN Business Norms "realize" that corporations must respect international human rights obligations under a list of instruments, including the ICCPR, ICSECR and the ECHR;[330] and provide that while primary responsibility in respect of human rights lies with states, there is also an obligation on the part of transnational corporations and also other business enterprises (which could cover all patent owners, irrespective of their size)[331]

[325] General Comment, **n314** article 35.
[326] See also Ignatieff, M. "Human Rights as Politics" 3 in Ignatieff **n227**, 20; and Weissbrodt, D. and Schoff, K. "Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7" 5MINN.INTELL.PROP.REV.1 (2003). 25-31 and 34-45.
[327]UN Business Norms (U.N. doc. E/CN.4/Sub.2/2003/12/Rev.2(2003), together with interpretative commentary available at http://www1.umn.edu/humanrts/links/commentary-Aug2003.html.
[328] Available at http://www.unglobalcompact.org/.
[329]Available at http://www.cauxroundtable.org/documents/Principles%20for%20Business.PDF.
[330] UN Business Norms **n327**, preamble, para 4.
[331] See discussion in Suthersanen Public Interest **n136** in Griffiths/Suthersanen **n136** 112-3,

to "within their respective spheres of activity and influence", secure the "fulfillment of, respect, ensure respect of and protect human rights".[332]

The UN Business Norms have had some practical impact, for example stimulating the Business Leaders Initiative on Human Rights[333] which includes Novartis, the large pharmaceutical business and the communications operator Ericsson. Work is also ongoing at international policy level.[334] From the legal perspective, questions have been raised as to the extent to which obligations under human rights instruments can properly be "realized" to apply to companies.[335] It has also been argued that although projects such as the Business Leaders Initiative on Human Rights are largely based on mutual voluntary engagement, they may form part of a movement towards the imposition or assumption of obligations by companies.[336] Yet this still does not mean that instrumental human rights are relevant to a patent action in the UK jurisdictions. This is discussed below, using an example.

1.1.5 Human rights and patent actions

Consider the rights of citizens to expression and information on the basis of the ICCPR and the ECHR.[337] The obligations of the UK government in respect of these

[332] UN Business Norms **n327**, article 1
[333] See website at http://www.blihr.org/.
[334] See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie May 2008 A/HRC/8/5 Available via http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf
[335] Kinley, D. "Human Rights as Legally Corporations and Human Rights Binding or Merely Relevant" 25, at 25, 42, Bottomley Corporations **n294**, 60-1 and MacCorquodale, R. "Human rights and Global Business" 89-114, 114 all in Bottomley/Kinley **n294**; and Muchlinski, P. "Corporate social responsibility and international law: the case of human rights and multinational enterprises" 431 in McBarnet, D. et al (eds) (2007) *The New Corporate Accountability Corporate Social Responsibility and the Law* Cambridge University Press, Cambridge, UK ("McBarnet").
[336] See McBarnet, D. "Corporate Social Responsibility beyond law, through law, for law" 9 and Kinley, D. et al "'The Norms are dead! Long live the Norms!' The politics behind the UN Human Rights Norms for corporations" 459 both in McBarnet **n335**; Weissbrodt, D. and Kruger, M. "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" October, 2003 97 *A.J.I.L.* 901; and Brown Responsible **n141**, 499-502 and 503-5.
[337] See **p45**

might lead to it deciding to provide all schools with access to cutting edge computers. Yet it may choose not to do so. The benevolent company of the introduction[338] may then choose to disregard some relevant rights of a patent owner and to make computers, following the published specifications of this very patent, and provide these computers to schools. The patent owner may choose to raise a patent infringement action on the basis of the Patents Act 1977 ("PA"). From the patent perspective, a court may, depending upon the details, find there to be infringement.[339] The failure of the UK government to provide the computers, the finding of infringement by a court and indeed the PA which led to the finding of infringement, could all give rise to questions of the conduct of the UK in the light of the ICCPR and the ECHR.

1.1.5.1 The international contribution

In terms of the ICCPR, the Complaint Procedure[340] of the UN Human Rights Council[341] could be used by those individuals, say the benevolent manufacturer or pupils in the school, who consider that they are victims of a breach by the UK of its obligations. The complaint would be considered by a working group. If it was upheld, the UK would merely be notified of this and expected, perhaps assisted, to address it, for example amending the PA or providing computers. If it should not do so, there are no powers to require this to be done or to impose a sanction on the UK.[342] This is consistent with the collaborative approach to human rights of the

[338] See **p14**
[339] See **p13**
[340] See webpage "Human Rights Council Complaint Procedure" at http://www2.ohchr.org/english/bodies/chr/complaints.htm .
[341] See website at http://www2.ohchr.org/english/bodies/hrcouncil/. The UNHRC replaced the UN Commission on Human Rights in 2006 (see website at http://www.unhchr.ch/html/menu2/2/chr.htm) and is assisted by the Sub-Commission referred to above.
[342] This continues the more informal "1503" procedure of the Commission on Human Rights, see details at http://www.unhchr.ch/html/menu2/8/1503.htm.

Human Rights Council, of encouraging state compliance with their international human rights obligations, clarifying them and providing practical support.[343]

The ICCPR also has a dedicated monitoring and reporting system in respect of the behaviour of states, which is operated by the Human Rights Committee.[344] Again, complaints can be made to this body and they will be investigated. Once again, even if a complaint were to be upheld, the UK would merely be notified of this, with no sanction for the UK then or in due course.[345] There is an Optional Protocol to the ICCPR[346] which enables direct complaints to be made to the Human Rights Committee by individuals, rather than by states, provided that domestic remedies have been exhausted.[347] The UK has not ratified this, however and even if it did, invoking the process could yet again not involve sanctions, only investigation and report.[348] The process has also been little utilised in matters involving decisions in court actions of this nature and it is difficult to assess how such a complaint would fare.[349]

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[343] For examples and analysis of this of potential interest to ICT, see Chapman, A.R. "Development of Indicators for Economic, Social and Cultural Rights. The rights to Education, Participation in Cultural Life and Access to the Benefits of Science" 111and Schabas, W. A. "Study of the Rights to Enjoy the Benefits of Scientific and Technical Progress and its Applications" 273 both in Donders/Volodin **n227**.

[344] See main webpage at http://www.unhchr.ch/html/menu2/6/hrc.htm. The CESCR considered above **p54** has a similar role in respect of the ICESCR. For proposals regarding unification, see O'Flaherty, M. and O'Brien, C. "Reform of UN human rights treaty monitoring bodies: a critique of the concept paper on the High Commissioner's proposal for a unified standing treaty body" H.R.L. Rev. 2007, 7(1), 141-172 and Bowman, M. "Towards a unified treaty body for monitoring compliance with UN human rights conventions? Legal mechanisms for treaty reform" H.R.L. Rev. 2007, 7(1), 225-249.

[345] See Barnhizer, D "Human Rights as a Strategic System", 1 in Barnhizer, D. (ed) (2001) *Effective Strategies for Protecting Human Rights* Dartmouth Publishing Company, Ashgate Publishing, Hampshire, England and Virginia, USA; Eide, **n227** 45 and Viljoen **n236** 84-7, both in Donders/ Volodin **n227**. For practical guidance, see Maastricht Training Manual on Human Rights Monitoring issued by the United Nations 1997 http://www1.umn.edu/humanrts/monitoring/chapter1.html and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997 http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425803.

[346]Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966 999 U.N.T.S. 302 ("ICCPR Optional Protocol"). There are ongoing initiatives in respect of an similar arrangement for the ICESCR - see Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic Social and Cultural Rights, Geneva 6-17 February 2006 http://www2.ohchr.org/english/issues/escr/group3.htm.

[347] ICCPR Optional Protocol, article 2. See consideration by Steiner, H.J. "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee" 15-53 in Alston, P. and Crawford, J. (eds) (2000) *The future of the UN Human Rights Treaty Monitoring* Cambridge University Press, Cambridge, UK.

[348] ICCPR Optional Protocol, articles 5 and 6.

[349] A complaint to the Human Rights Committee was made following a decision of the Australian High Court in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56 did not proceed. See AAP "Australian

The enforcement framework of international human rights[350] reveals, therefore, no mechanism which could be pursued by a person concerned at a breach of their human rights by the enforcement of a patent in the UK. There is, however, a relevant mechanism under the ECHR.

1.1.5.2 The ECHR contribution

The ECHR established the ECtHR,[351] which has been much lauded as a role model for transnational adjudication.[352] Most important for present purposes is the opportunity it raises for individuals. Following a finding of patent infringement and the exhaustion of the appeals process,[353] a complaint could be made to the ECtHR that the UK, through the decision or the PA itself, was in breach of its obligations under the ECHR.

Possible bases for complaint could be the rights of the manufacturer to express its views and assist a school[354] and to utilise its business assets as it saw fit[355] and also

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laws challenged at UN" 18 April 2003 http://www.smh.com.au/articles/2003/04/18/1050172745955.html and Ramasastry, A. " Should the U.N. Intervene in a Transnational Internet Defamation Case?" 7 May 2003 http://writ.news.findlaw.com/ramasastry/20030507.html. For consideration of other examples, see Viljoen **n236** in Donders/Volodin **n227**, 86-7

[350] For full exploration of this, see Cassel, D. "International Human Rights Law in Practice: Does International Human Rights Law Make a Difference?" Spring, 2001 2 Chi. J. Int'l L. 121; Donoho, D. "Human Rights Enforcement in the Twenty-First Century" Fall, 2006 5 Ga. J. Int'l & Comp. L. 1.

[351] The ECtHR was established by Section II of the ECHR.

[352] Janis, M.W. "The Efficacy of Strasbourg Law" Winter / Spring, 2000 15 Conn. J. Int'l L. 39 and Helfer, L. "Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy?" Spring, 1998 39 Harv. Int'l L.J. 357. For analysis of the ECtHR from a different perspective, see Arold, N-L.(2007) *The Legal Culture of the European Court of Human Rights* Koninklijke Brill NV, Netherlands.

[353] within 6 months - ECHR, Article 35(1). Regarding the need for exhaustion, see *Earl Spencer v United Kingdom* (28851/95) (1998) 25 E.H.R.R. CD105 and more generally Leach, P. (2nd edn) (2005) *Taking a Case to the European Court of Human Rights* Blackstone's Human Rights Series, Oxford University Press, Oxford, UK ("Leach"), section 5.4.

[354] ECHR, article 10.

[355] ECHR, Protocol 1, Article 1.

the rights of the teachers and pupils to expression and information by pursuing their education using the computers.[356] Again, a complaint must be brought by a victim, which is interpreted here as a person "directly affected" by the alleged breach of the obligations.[357] The benevolent manufacturer would be likely to meet this test, as would pupils and teachers of the school. Given that a flexible approach has been taken to the test,[358] complaints may also be possible by those who are not yet, but may become, pupils or teachers of the school.

If the ECtHR were to find against the UK,[359] the ECtHR may award "just satisfaction."[360] The UK must comply with this order.[361] Remedies imposed by the ECtHR have been largely financial,[362] although it has granted some more creative positive orders in respect of restitution of property, [363] which may suggest that the ECtHR could order, say, that the patented technology be provided free of charge to the school. It would then be for the UK to bring this about. In any event, however, such order would likely be made several years after the project in question would have begun[364] and much of the benefit which could have been delivered would have been lost.

In the light of the enforcement opportunities at international level and through the ECHR, the HRA is important.

[356] ECHR, article 10.
[357] ECHR, Protocol 11 and article 34.
[358] Leach,**n353** section 5.3; and *Open Door Counselling Ltd v Ireland* (A/246) (1993) 15 E.H.R.R. 244, paras 41-4 (in a challenge to an injunction regarding abortion counselling, women were found to be victims directly affected as although they were not pregnant, they were of child bearing age).
[359] This is considered from the more substantive perspective in the conclusion.
[360] ECHR, article 41.
[361] ECHR, article 46(1) and see Council of Europe webpage regarding execution of judgments of the ECtHR http://www.coe.int/T/E/Human_rights/execution/.
[362] See Clayton/Tomlinson **n258**, 1422-8, 1471-6, 1554, 1566; and Leach, **n353** 398-405.
[363] See Leach, **n353** 405 -6 and Schedule of Awards at 409 et seq. See more detailed discussion in Leach, P. "Beyond the Bug River. A New Dawn for Redress Before the European Court of Human Rights" E.H.R.L.R. 2005, 2, 148-164 .
[364] In *Budweiser* **n288** the dispute began in 1989 with the final decision of the ECtHR in 2007.

1.1.5.3 The national contribution

The HRA requires courts in the UK jurisdictions to have significant regard to Convention rights when making decisions and interpreting legislation.[365] Courts have confirmed, for example in *Campbell v MGN Ltd* ("*Campbell*"),[366] that in the light of section 6 HRA human rights must have a role in all cases, including those between two private parties.[367] This has led to human rights having an important, though limited, impact in IP cases and these cases are considered in chapter 2.[368]

This new role for human rights is still, however, only as part of the decision making process within existing causes of action. Early concerns that section 6 HRA could lead to the development of new human rights based claims proved to be unfounded,[369] although human rights have been used, as in relation to privacy and breach of confidence, to develop these causes of action.[370] The HRA cannot be used, therefore, to found complaints by a patient, teacher or pupil that their rights to life or expression have been breached by enforcement of the patent.

[365]See **pp49-50** re sections 1, 3, 6 and Schedule 1HRA. See discussion from the constitutional perspective in Lester, Lord Q.C. and Beattie, K. "Human Rights and the British Constitution" 59 in Jowell/Oliver.

[366] *Campbell v MGN Ltd* [2002] UKHL 22 ("*Campbell*"), at para 17-19. See also *HRH* **n25 p**aras 85 et seq and 170 et seq.

[367] For discussion see Beale, H. and Pittam, N. "The Impact of the Human Rights Act 1998" 131, 131-9 in Friedman, D. and Barak-Erez, D. (2001) *Human Rights in Private Law* Hart Publishing Oxford, UK and Portland, Oregon, USA ("Friedman/Barak-Erez"); Phillipson, G. "The Human Rights Act, "horizontal effect" and the common law: a bang or a whimper?" *M.L.R.* 1999, 62(6), 824-849; Himsworth, C. "The Hamebringing: Devolving Rights Seriously" 19 at 30-1 and MacQueen, H. and Brodie, D. "Private Rights, Private Law, and the Private Domain" 141 ("MacQueen/Brodie"), 154-5 both in Boyle, A. et al (eds) (2002) *Human Rights and Scots Law* Hart Publishing, Oxford UK, Portland Oregon USA ("Boyle"); Hunt, M. "The "horizontal effect" of the Human Rights Act" P.L. 1998, Aut, 423-443, 438-40; and more generally Geiger Safeguard **n13** 275-8 cf Phillipson, G. "Transforming breach of confidence? Towards a common law right of privacy under the Human Rights Act" M.L.R. 2003, 66(5), 726-758 and Phillipson, G. "Clarity postponed: horizontal effect after *Campbell*" 143 in Fenwick, H.,Phillipson, G and Masterman, R. (2007) *Judicial Reasoning under the UK Human Rights Act* Cambridge University Press, Cambridge, UK ("Fenwick") 148 et seq.

[368] See **n366**

[369] See Klug, F. "The Human Rights Act 1998, Pepper v. Hart and all that" P.L. 1999, Sum, 246-273 ("Klug Pepper"), 257-91and Gearty Principles **n226**, 80-1, 157-4 and 178-9.

[370] See *Campbell*, **n366** where the HRA was used to develop the action of breach of confidence in respect of limited information privacy. For detailed analysis, see Aplin, T. "The Development of the Action for Breach of Confidence in a Post – HRA Era" I.P.Q. 2007, 1, 19-59.

Yet the HRA still offers a specific and immediate means of addressing the impact of, say, patents on rights to life, particularly when the argument is met with one based on the right to property. The new[371] HRA requirement for courts to consider both these Convention rights[372] means that the different theoretical bases in respect of these rights, uncertainty as to their existence, scope, inter-relationship and place in court actions[373] and the failure of the UK to incorporate the ICCPR,[374] become significantly less relevant.[375]

The potential contribution of Convention rights will now be explored in an introductory analysis,[376] again with an example.

1.1.5.4 Using the Convention rights

Consider a patent action which is raised in an English court regarding the use of emergency communications technology, identical to that which is the subject of a patent, to call for an air ambulance from a mountain top. Making the call involves the right to expression and information in article 10 ECHR and the patent owner may in turn rely on its right to property in ECHR Protocol 1. Both of these are Convention rights.

Article 10(2) states that freedom of expression may be subject to restrictions

> "as are prescribed by law and are necessary in a democratic society…for the protection of health or morals"

[371] See **n247**
[372] See also Gearty Principles **n226**, 13 et seq.
[373] See **sections 1.1.1 and 1.1.2**
[374] See **section 1.1.3.1**
[375] Although not wholly irrelevant, as is seen from consideration of the contribution of other human rights sources in **sections 5.2.2.2 and 5.2.2.3**
[376] Convention rights are considered in detail in chapter 4.

The legal status of patents and court orders made on the basis of them, suggests that they could be a restriction prescribed by law.[377] The patent could be argued to encourage innovation in ICT,[378] which could protect health by enabling more people to be treated in emergencies and using the correct information. This could also be argued to facilitate and provide medical treatment (and perhaps also education and entertainment) which could contribute to the protection of morals. The key question would be, therefore, whether the restriction imposed was necessary in a democratic society. This is assessed on the basis of what is proportionate in an individual case.[379]

ECHR Protocol 1 too has its limits:

> "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law…which is not to impair the right of State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest." [380]

An important case in relation to this right and its limits is the decision of the ECtHR in *Sporrong & Lonnroth v Sweden ("Sporrong")*.[381] This involved land the subject of an expropriation order which had not been invoked. The ECtHR found that there was interference with the rights of the land owner.[382] Considering whether the requirements for the right to be limited were satisfied, the ECtHR focused on whether, on the facts, there was a fair balance between the general interest of the community and the protection of the individual's fundamental rights.[383] It also considered, notwithstanding the different wording of limits in different parts of Protocol 1, article

[377] See Gearty Principles **n226**, 74, 79 regarding the importance of this requirement
[378] See **pp12-3**
[379] See **sections 4.2.2.3 and 4.3.2.1**
[380] For discussion of the ECHR in relation to property, Gretton, G. "The Protection of Property Rights" 275 ("Gretton") in Boyle **n367.** See in particular criticism of the range of wording in the article, and the potential for internal conflict, at 278-1.
[381] *Sporrong & Lonnroth v Sweden* (A/52) (1983) 5 E.H.R.R. 35 ("*Sporrong*").
[382] *Sporrong*, **n381** paras 60, 63.
[383] *Sporrong*, **n381** paras 60, 63, 73-74.

1, that "the search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1".[384]

The consideration of what will be a fair balance between competing interests has focused on whether the restriction is again proportionate, [385] often in the light of compensation paid.[386] The payment of compensation is unlikely to be an appropriate response here, for those other than the patent owner.[387] There could also be a general interest in access to medical support and treatment, as well as, of course, one in respect of innovation. If that in respect of access to medical support and treatment should be preferred, then it is highly likely that restriction of the property of the patent would meet the criteria for the right to be limited.[388]

This very preliminary analysis suggests that the HRA requirement for courts to consider Convention rights in a patent action will not necessarily lead to a solution more in favour of one party or another.

Like the policy or more practical efforts considered in the introduction, therefore, human rights at international, regional and national level offer a long, indirect and possibly fruitless road for those in need. Is competition more attractive?

[384] *Sporrong*, **n381** para 69.
[385] See also *Smith Kline*, **n292** paras 58-83; *JA Pye (Oxford) Ltd v United Kingdom* (44302/02) (2008) 46 E.H.R.R. 45– paras 53-5 (regarding payment) and 75 (regarding the ends sought and the means employed to achieve them).
[386] See Gretton **n380** in Boyle **n367**, 281-3 and Leach, **n353** 358 et seq.
[387] See **p33-4**
[388] The alternative basis for a restriction, "general principles of international law" has been argued to be of little value in the light of decisions that this could not apply to nationals of a country and also not to non nationals, see Gretton **n380** in Boyle **n367**, 280. Treaties were referred to in *Budweiser* **n288** (paras 54-5, 61, 80) however the court did not consider the possible contribution of "general principles of international law".

1.2 Competition[389]

1.2.1 Basic principles

Like human rights, "competition" is not readily identified. [390] In the United States it is referred to as "antitrust" and in Australia as "trade practices". It can be described as a doctrine which seeks to enable a market to operate freely and effectively, with minimum external involvement.[391] At a more basic level, however, there could be said to be "competition" when more than one entity provides goods and services which may be of interest to the same customer with each pursuing the customer by providing innovative high quality products at the lowest possible prices. An entity might win this competition, just as one might win a race at a sports day. In the commercial world, however, this would not be the end of the matter.

The winning entity may then become complacent, increase its prices and cease innovation. If the market is operating effectively, others should respond to this by lowering their prices and/or offering new products, which should lead to them winning customers, which should in turn stimulate the other to new approaches to pricing and innovation. All this would be in the interests of consumer welfare. Yet if a business has been very successful and customers have formed a strong loyalty to it, it may be hard for others to attract those customers, even with new products and lower prices. The established entity may therefore feel free to continue to raise prices and to decrease its efforts in respect of innovation.[392]

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[389] The next section develops and draws on Brown, A.E.L. "Intellectual Property, Competition and the Internet" in Edwards, L. and Waelde, C. (3rd edn) *Law and the Internet* (forthcoming) Hart Publishing, Oxford, UK. The final draft is available from the author.

[390] See also Kallay, **n18** 58-9, 63.

[391] See eg Hutchings, M. "The Competition Between Law and Economics" [2004] E.C.L.R. 531; Kallay, D.(2004) *The Law and Economics of Antitrust and Intellectual Property* Edward Elgar, Cheltenham, UK and Northampton, MA, USA, chapter 2; and McNutt, P. A. (2005) *Law, Economics and Antitrust. Towards a New Perspective* Edward Elgar, Cheltenham, UK and Northampton, MA, USA.

[392] Whish, R. (2008) (6th edition) *Competition Law* Oxford University Press, Oxford, UK 1-2, 3-19 ("Whish"); Bishop, S. and Walker, M. (2002) (2nd ed) *The Economics of EC Competition Law:*

In these circumstances, the market has failed and external intervention, by a court or a public body often called a competition regulator, may be required. An example of intervention which may arise could be requiring a large company to allow others to use its important communications technologies. Yet the aim of this intervention is unclear, as there is a long standing debate as to whether competition seeks to protect consumers, by enabling lower prices and more innovative products or to protect competitors by enabling them to compete when they were not otherwise able to do so - even if this was, at least in part, through their lack of efficiency and poor products.[393]

Positions taken on this issue involve a range of theories of competition and economic perspectives, for example the comparative role of questions of efficiency, wider social factors and short and long term perspectives.[394] In the twenty-first century, there has been a movement to a consensus that the objective of competition is to benefit consumers, rather than the interests of competitors.[395] These interests are not necessarily inconsistent: increased activity from competitors as a result of their ability to use the important technologies could lead to lower prices and yet more innovation. This would be in the interests of consumers and may also encourage the incumbent

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Concepts, Applications and Measurement, Sweet & Maxwell, London, UK ("Bishop/Walker"), 33-9; Kallay, **n18** 17-9 and presenting a different perspective, at 18-19; Anderson/ Wager, 730-1 **n136**; Geroski, P.A. "Intellectual Property Rights, Competition Policy and Innovation: Is There a Problem?", (2005) 2:4 *SCRIPT-ed* 422 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/geroski.asp, ("Geroski"), 426-7;and Anderman, S. D. (1998, 2000) *EC Competition Law and Intellectual Property Rights. The Regulation of Innovation* Oxford University Press, Oxford, UK ("Anderman Regulation"),16-19.

[393]Whish, **n392** 19-24, 191-3

[394] See **n392** and **393**, and in addition see the discussions Malloy, R.P. and Evensky, J. (eds) (1994) *Adam Smith and the Philosophy of Law and Economics* Kluwer Academic Publishers, The Netherlands.

[395] See Speech of EC competition commissioner Neelie Kroes 23 September 2005 "Preliminary Thoughts on Policy Review of Article 82" Speech at the Fordham Corporate Law Institute SPEECH 05/537, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en and Kroes, N. "Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of article 82" 29 Fordham International Law Journal 593, 2005-6,and Speech of EC competition commissioner Neelie Kroes 25 September 2008 "Exclusionary abuses of dominance - the European Commission's enforcement priorities" SPEECH/08/457 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/457&type=HTML&aged=0&language=EN&guiLanguage=en ; also Korah, V."The Interface Between Intellectual Property Rights and Competition in Developed Countries", (2005) 2:4 SCRIPT-ed 429 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/korah.asp , ("Korah Interface") 432

operator to become even more innovative, leading to more consumer choice and benefit. If another operator contemplating its approach, however, sees that competition principles may lead to the incumbent being ordered to share important technology with it in due course, the operator may be disinclined to compete vigorously in respect of its own products and prices, or to engage in its own innovation. This would not be in the interests of consumers.[396]

There is also a view that requiring the sharing of technology will in any event achieve little, in terms of encouraging innovation. This proceeds on the basis that from time to time, a "gale" of innovation will bring new technologies and blow away the old power bases. [397] An example of this would be the "IPod" and the mobile phone, which rendered less important the positions of power and consumer allegiances in respect of CD players and the walkie-talkie.

IP adds another layer to the relationship between competition and innovation. If a new form of communications equipment is the subject of a patent, competitors cannot provide that equipment and others are less able to work with and develop a new version of it or incorporate it into other products. They must rather work around the patent, which could involve inefficient, reduced or indeed stifled innovation.[398] There has been particular concern at the impact of IP on innovation in the ICT field, given

[396]See discussion of views in Sherwood **n9**; Gallini, N.T. and Trebilcock, M.J. "Intellectual Property Rights and Competition Policy: A Framework for the Analysis of Economic and Legal Issues" 17 ("Gallini/Trebilcock") in Anderson, R.A. and Gallini, N.T. (eds) (1998) *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* University of Calgary Press, Canada ("Anderson/Gallini"); Anderson, R. D. (1998) "The Interface between Competition Policy and Intellectual Property in the Context of the International Trading System", *Journal of Economic Law*, **1** (4) December 655-78, at 421, 424-6 and Reichman, J. H. (1997) "From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement", *New York University Journal of International Law and Politics*, **29**, (1-2) Fall-Winter, 11-93, at 445, 501-5, 513-520, both in Towse/Holzhammer 4 **n142**; Kallay, **n18** 22-29; Korah Interface **n395**, 430-1; Ghidini Innovation, **n13** 108-9; and Glader, M (2006) *Innovation, Markets and Competition Analysis* Edward Elgar, Cheltenham, UK ("Glader"), 16 et seq.
[397] Schumpeter, A. (1943) "*Capitalism, Socialism and Democracy*" George, Allen & Unwin Ltd, London, UK, 84; Korah Interface **n395**, 431; Geroski, **n392** 427; and Peritz, R. "Competition Policy and IPRs in the USA" 125 ("Peritz") in Anderman Interface **n4**, 175-6.
[398] See **p66**

the support and cultural sympathy there for a collaborative, open and continuous approach to innovation[399] as can be seen from the growth of open source software.[400]

1.2.2 Competition law

1.2.2.1 An overview

Even a theoretical consensus as to why and to what extent competition principles should require the sharing of technology, could not in itself require a patent owner to do this. There is, however, a framework of competition legislation[401] which does provide bases for intervention if an operator engages in prohibited conduct. Unlike the position in respect of international human rights, some competition legislation does confer significant power on courts and regulators. [402] For example, when the EC Commission, the EC competition regulator, investigated Microsoft, it found that Microsoft had engaged in prohibited conduct and ordered that Microsoft supply important protocol interface information to its competitors and also pay significant financial penalties.[403]

[399] See evidence from hearings of US Federal Trade Commission and Department of Justice "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy" ("US Hearings") - http://www.ftc.gov/opp/intellect/detailsandparticipants.shtm#February% sessions on "IP and innovation", "Competition and innovation", "Business Perspectives on Patents: Software and the Internet"); and also Moglen, E. "Anarchism Triumphant: Free Software and the Death of Copyright" 107 in Elkin-Koren/Netanel **n6**.

[400] See Open Source website http://www.opensource.org/docs/definition.php

[401] See **p32**

[402] More generally in terms of remedies, see Forrester, I.S. QC "Remedies and Sanctions for Unilateral Conduct in Competition cases" 559, Lowe, P. and Maier-Rigaud, F. "Quo Vadis Antitrust Remedies" 597 and Panel Discussion "Remedies and Sanctions for Unlawful Unilateral Conduct" 613 all in Hawk, H.E. (ed) (2008) *International Antitrust Law and Policy* Competition Law Institute Fordham University School of Law, Juris Publishing Inc, USA ("Hawk").

[403] See *Commission Decision relating to a proceeding under article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft)* March 2004 Available at http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf ("*Commission Microsoft*") , p299, articles 3 and 5.

1.2.2.2 Competition law and the powerful

The most important provision of competition law for this work is article 82[404] EC Treaty ("article 82"). Article 82 prohibits, as incompatible with the common market, the abuse of a dominant position within the common market insofar as it may affect trade between EC member states.[405] The question of what will be abuse is left open, although examples are provided including, of interest here "limiting production, markets and technical development to the prejudice of consumers."[406] As part of the EC Treaty, article 82 takes precedence over inconsistent national law,[407] which could include the PA. Further, article 82 has direct effect[408] and can therefore be invoked directly in national courts, including in patent actions.

There is also national competition law in the UK, the Competition Act 1998.[409] This includes, in section 18 ("section 18 CA"), a prohibition on abuse of a dominant position in a market, if this may affect trade in the UK, with the same examples of what may be abuse as are in article 82.[410] As part of the restructuring in 2003 of the EC regime for enforcement of competition law, [411] article 82 and section 18 CA must so far as possible be approached in the same way.[412] National courts considering

[404] Originally article 86, see Annex B to the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts O.J. C 340 10.11 1997.
[405] For consideration of this EC focus, see Whish, **n392** 48-59.
[406] Article 82(b).
[407] This was confirmed in the UK by consideration by the House of Lords of Section 2(1) *European Communities Act 1972* ("ECA") in *Factortame* **n250** 659. See also Bennion 2008, **n250** 1274 et seq, 1287 et seq and 1293 et seq
[408] See *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) [1963] E.C.R. 1, Section B 6th paragraph and para 1.
[409] Whish, **n392** 59-74.
[410] Section 18(2)(b) CA.
[411] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty O.J. L 001 4.1.2003 3 ("Regulation 1/2003").
[412]Article 3(1) Regulation 1/2003 **n411** (providing that courts applying national competition law shall also apply article 82) and section 60(1),(2) and (6) CA. See consideration in Ward, T. and Smith, K.(eds) (2005) *Competition Litigation in the UK* Thomson/Sweet & Maxwell, London UK ("Ward/Smith") **n412**, 390 and Whish **n392**, 74-8.

these provisions can refer questions of interpretation and application[413] to the ECJ,[414] if the issue is not so obvious as to leave no scope for reasonable doubt and needs to be resolved for the court to give judgment.[415]

This consistency in competition law at national and regional level does not continue at international level. TRIPS includes some references to competition,[416] in relation to legislation to prevent abuse of intellectual property rights (subject to the other provisions of TRIPS) [417] and compulsory licensing to address anti-competitive conduct.[418] These matters are not, however, the focus of the agreement. The UNCTAD has international competition projects, but no agreement.[419] Attempts were made, without success, to introduce an international competition agreement early in the WTO Doha Development Round.[420] The strong links between competition and the concept of unrestricted market access made a competition agreement a controversial issue, given the range of different economic perspectives and circumstances within the WTO.[421]

[413] Even if section 18 CA were used, a reference to the ECJ could likely still be made *Oscar Bronner GMbH & Co.KG V. Mediaprint (7/97)* [1998] ECR 1-7791 ("*Oscar Bronner"*) and Ward/Smith **n412**, 397.
[414] Article 234 EC Treaty.
[415] *CILFIT*, **n259** paras 6,8-20. See eg *Levi Strauss & Co v Tesco Stores Ltd* [2002] EWHC 1625 (Ch) [2002] 3 C.M.L.R. 11 [2003] R.P.C. 18 ("*Levi*"), para 58; *Telefonica* **n260** paras 36-8.
[416] See Abbott, F.M. "Are the competition rules in the WTO TRIPS Agreement adequate?" J.I.E.L. 2004, 7(3), 687-703.
[417] Article 8(2) TRIPS
[418] Article 31(k) TRIPS. Considered in Carvalho, N.P. de (2008) *The TRIPS Regime of Antitrust and Undisclosed Information* Kluwer Law International, The Hague, The Netherlands, 137-9 (history of the provision) and also 139-45.
[419] See webpage "Competition Law and Policy" http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&lang=1. See Marsden, P. (2003) *A Competition Policy for the WTO* Cameron May, London, UK, ("Marsden") at 15-66, Fox, E. M. "International Antitrust and the Doha Dome" Virginia Jnl Int'l Law Spring 2003 and Anderson/Wager, **n136** 734-40.
[420] See Decision of General Council 1 August 2004 WT/L/579 http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm, para g, second paragraph and WTO webpage "Interaction between Trade and Competition Policy" http://www.wto.org/english/tratop_e/comp_e/comp_e.htm. See also Marsden, **n419** 60 et seq.
[421] See Marsden, **n419** 39, 42-3, 77-8, 136, 159 et seq, 186 et seq, 223, 236 et seq.

Notwithstanding this, discussion continues in relation to an international competition agreement[422] and competition has been included in some free trade agreements.[423] There has also been increased voluntary cooperation and exchange of learning between national competition agencies,[424] notably through the International Competition Network.[425] Further, as was seen in respect of human rights, there is significant substantive similarity, with legislation in Australia,[426] the United States,[427] South Africa[428] and Canada[429] approaching the concept of abuse of a dominant position in a similar manner to that taken in the UK and the EC.

The impact of competition law on enforcement of IP will now be considered.

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[422] See Majoras, D. "Convergence, Conflict and Comity: The Search for Coherence in the International Competition Community" 1 and Panel Discussion on this issue, 25, both in Hawk **n402**.
[423]See Brown/Guadamuz/Hatcher **n159**, 48 et seq and Anderson/ Wager **n136**, 740-1.
[424] See Kovacic, W.E. and Reindl, A. P. "European Union An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy" 28 *Fordham International Law Journal 952* (2005) 1062 and Whish, **n392** 490-5.
[425] See website http://www.internationalcompetitionnetwork.org/index.php/en/about-icn.
[426] Section 46 Trade Practices Act 1974 (Cth) prohibits the misuse of market power. See *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5 and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.For analysis in relation to IP, see Oddie, C. and Eyers, P. "Erosion of Rights – or redressing balance: Competition challenges to intellectual property rights" (2004) 12 TPLJ 6 at 14 and Hanks, F. "IPRs and Competition in Australia" in Anderman, Interface **n4**, 318-321, 325-33-3 and 332 .
[427] Section 2 Sherman Act prohibits possessing and wilfully having acquired or maintained a monopoly with a negative effect on competition.
[428] Section 8 Competition Act 1998 (South Africa)
prohibits the abuse of a dominant position by refusing to give a competitor access to an essential facility when it is economically feasible to do so, to engage in an exclusionary act if the anti-competitive effect outweighs its technological, efficiency or other pro-competitive gain unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect. Section 1(vi) defines an essential facility as an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers. The Competition Tribunal of South Africa considered this for the first time in DW Integrators CC v SAS Institute Pty Ltd
http://www.saflii.org/za/cases/ZACT/2000/16.html in a case involving refusal to license IP on an application for an interim injunction. Dominance was not established and so abuse was not considered.
[429] Section 79 Competition Act 1986 sets out a general prohibition on abuse of dominance. Section 32 addresses specific instances of "mere exercise" of IP, in respect of which the Attorney General can apply for a special remedy, which may include orders to license or refrain from conduct Section 32(2)(c) and (e). See also the Intellectual Property Enforcement Guidelines of 2000 ("IPEG") of the Competition Bureau http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01286e.html p4, 7,8, 13-4, 16, 24-6 and for consideration of the impact of section 32 upon section 45, see *Eli Lilly and Company v. Apotex* 2005 FCA 361 , paras 16-9, 22, 28. See discussion Goldman, C.S. QC and Gudofsky, J. "Canada's Competition Act, Unilateral Conduct and the Licensing of IP Rights: Balancing on a Tight Rope" 577 in Ehlermann/ Atanasui **n10**.

1.2.3 Competition and IP

Competition law in the EC and the UK has been seen to prohibit abuse of a dominant position and the penalties for abuse could lead to a dominant entity being ordered to share its technology. In the EC Microsoft case, the fact that this technology was argued to be protected by IP, including patents, did not prevent an order to share technology.[430] But could it ever be abuse of a dominant position for a patent owner to exercise its right to exclude? This question is at the heart of the complex relationship between competition and IP and has led to a significant body of literature which will be referred to throughout this work.[431]

An aim of competition has been seen to be to encourage innovation - but this can also be said to be a justification for IP.[432] It is possible, therefore, that IP and competition are different means of delivering the same aim.[433] Indeed, the intricate relationship between IP, competition and innovation is reflected in the approaches which have been taken to IP by competition regulators. In the twentieth century, there was great concern in the EC and in the United States that there was a conflict between IP and competition and that restrictions should therefore be imposed on the exercise of IP in

[430] See **p68**

[431] See eg Kallay, **n18** 4-16, 22-7, 40-69; Ullrich, H. "Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony and International Harmonization" ("Ullrich Harmony") 365 in Dreyfuss Expanding **n9**; Drexl, J. "The Critical Role of Competition Law in Preserving Public Goods in Conflict with Intellectual Property Rights" 709, especially 719-20, Fink, C. Comment I. "Competition Law as a Means of Containing Intellectual Property Rights" 770 and Ghosh **n164**, all in Maskus/ Reichman **n3**; Ghidini Innovation, **n13** 99 et seq; Anderman Introductory **n4** in Anderman Interface **n4**.

[432] **See p12-3**

[433] See consideration in Govaere, I. (1996) *The Use and Abuse of Intellectual Property Rights in E.C. Law* Sweet & Maxwell, London, UK ("Govaere") 9, 135; Robertson, A. "Compulsory Copyright Licensing under EC Law" L.Q.R. 1992, 108(Jan), 39-43; Kallay, **n18** 10-15; Geroski, **n392** 426-8; Hovenkamp, H. Janis, M.D. and Lemley, M.A. "Unilateral Refusals to License in the US" ("Hovenkamp") in Leveque/ Shelanski 16-7 and Hovenkamp, H., Janis, M.D. and Lemley, M.A. "Unilateral Refusals to License" Journal of Competition Law and Economics 2(1), 1-42 ("Hovenkamp Unilateral"); Montagnani, M. L. "Predatory and exclusionary innovation: which legal standard for software integration in the context of the competition versus intellectual property rights clash?" IIC 2006, 37(3), 304-335 ("Montagnani") 304-5, 330-333; Peritz **n397**, 171-9, 185 et seq and Regibeau P. and Rockett, K "The relationship between intellectual property law and competition law: an economic approach" 505 ("Regibeau/Rockett") in Anderman Interface **n4**; Ullrich, H. "The Interaction between Competition Law and Intellectual Property Law: An Overview" xxviii at xxvii-xxi and lxiv-lxv and Lowe, P. and Peeperkorn, L. "Intellectual Property: How Special is its Competition Case" 91, at 91-100, both in Ehlermann/Atanasui **n10**.

terms of how it could be licensed or sold.[434] In the late twentieth and early twenty-first century, however, regulators in the EC[435] and the United States [436] and also in Australia[437] and Canada,[438] have focused on the possible positive contribution which could be made to innovation of IP and its licensing.[439]

But this does not address the question of whether a refusal to license or raising an infringement action can involve abuse of a dominant position. In this regard, it has been said regarding refusals, that "[i]t is very easy for the discussion to move rapidly from sobriety to zealotry." [440] The question of enforcement in the UK and the EC will be introduced here, first in respect of substance and then in relation to how any arguments could be used in a patent action in the UK jurisdictions.

1.2.4 Patent actions and abuse of a dominant position

For questions of abuse to arise, the patent owner must first be in a dominant position in a market as properly defined.[441]

[434] The "Nine No Nos" of the 1970s set out by Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division, before the Michigan State Bar Antitrust Law Section, September 21, 1972 http://www.cptech.org/cm/ninenonos.html, discussed in Anderman Regulation **n392**, 57- 89. See also in the EC Regulation 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements OJ L 31, 9.2.1996,
[435] Regulation (EC) on the application of article 81(3) of the Treaty at categories of technology transfer agreements No. 772/2004 Official Journal L 123, 27.04.2004, pages 11-17 ("TTBE") and Commission Notice Guidelines on the application of article 81 of the EC Treaty to technology transfer agreements O.J. C 101, 27.04.2004, pages 2-42 ("TT Guidelines").
[436] US Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (1995) ("US 1995 Guidelines") available at http://www.usdoj.gov/atr/public/guidelines/0558.htm.
[437] Section 51(3) Trade Practices Act 1974 (Cth) Australia) and Intellectual Property and Competition Review Committee "Review of intellectual property legislation under the Competition Principles Agreement" http://www.ipaustralia.gov.au/pdfs/ipcr/finalreport.pdf (September 2000), 202-215 and Government Response to Intellectual Property and Competition Review Recommendations http://www.ipaustralia.gov.au/pdfs/general/response1.PDF, recommendation 26.
[438] See IPEG http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01286e.html in particular p6, 8, 11-15 and examples at 16 and 26.
[439] For full overview of developments in this field, see Glader **n396**, 59 et seq.
[440] Forrester, I.S. "European Union Article 82: Remedies in Search of Theories" 28 *Fordham International Law Journal 919* (2005), 933
[441] Eg Anderman, S.D. and Schmidt, H. "EC Competition Law and IPRs" 37 ("Anderman/Schmidt") in Anderman Interface **n4**, 41-2.

1.2.4.1 Market definition

If a market is widely defined, it will have more participants and it is less likely that any one will be in a dominant position, than if the market is narrowly defined. The EC Commission and the UK Office of Fair Trading ("OFT"), the UK competition regulator,[442] have both issued guidance concerning market definition.[443] These note that the key factors are product substitutability, in respect of both supply and demand, and geography.

From the IP perspective, the market definition analysis will therefore be conducted on the basis of the technology or the material that is the subject of the IP, rather than on the basis of the IP itself. The distinction between these two can be unclear[444] and this issue, and its consequences for market definition, is the subject of chapter 7. There has been recognition by competition regulators in the EC and also in the United States that "technology markets" may exist in respect of the licensing of IP itself and any substitutes for this.[445] These regulators have also recognised the concept of an "innovation market".[446] This would be highly dynamic and unpredictable, comprising attempts to develop new and improved products or processes and any substitutes for them, in situations when those who are unsuccessful in the race to develop products are likely to leave the ultimate field to the winners.[447]

[442] See website http://www.oft.gov.uk/.
[443] See Commission Notice on the definition of the relevant market for the purposes of Community competition law O.J. C 372/03 9.12.1997 "Commission Market Definition Notice"; OFT (2004) *Market Definition Understanding Competition Law* 403 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft403.pdf ("OFT Market Definition").
[444] See some consideration at Anderman Regulation **n392**, chapter 11; Anderman/Schmidt **n441**at 41-4 in Anderman Interface **n4** and in *Tetra Pak Rausing SA v Commission of the European Communities* (T51/89) [1990] E.C.R. II-309 [1991] 4 C.M.L.R. 334 ("*Tetra Pak*") paras 1, 3, 5
[445] See US 1995 Guidelines **n436** para 3.2.2 p8-10, TT Guidelines **n435** para 22,Glader **n396**, 201-3.
[446] See US 1995 Guidelines, **n436** para 3.2.3 pp10-13 and TT Guidelines **n435** para 25 in the context of licensing. See consideration of innovation markets in Bishop/ Walker **n392**; Gallini/Trebilcock **n396** in Anderson/ Gallini **n396**, 31, 32-4; and Glader **n396**, 135-157, providing examples.
[447] See also Glader **n396**, 57, 194-208 (in particular 197-201, 203-4) and conclusions regarding market definition at 208-217, 219-223 and 299-311.

In any event, substitutability, both actual and potential, remains an important factor in market definition. This is assessed on the basis of product characteristics and their respective prices and intended use[448] and can involve evidence from consumers and potential competitors and also evidence gained through surveys. Sample questions on the demand side might be whether consumers would see patented technology as one of several which would enable students to learn online, with students being able to switch readily from one to the other or whether they rather see the patented technology as the only means by which to facilitate their learning in particular circumstances. From the supply side, the question would be how easily another provider could adapt its processes or equipment to offer the same technology as that provided by the patent owner.

The geographical market is the area in which the conditions of competition are sufficiently homogeneous, for example in terms of distribution of market shares and pricing levels[449] and can be distinguished from neighbouring areas where conditions of competition are appreciably different.[450] This geographical question could be particularly important for patents, given that they are national rights and this is considered further in chapter 7. It should be borne in mind, however, that although the EC Microsoft case involved national IP rights, the EC Commission considered the geographical market to be worldwide.[451]

It is also important to bear in mind that although the focus on substitutability and geography suggest a desire to reflect commercial and consumer reality, a market is defined not in the abstract but in the light of the issue in question. An alleged abuse may have occurred recently or several years ago and just once, over a period of time

[448] Commission Market Definition Notice **n443**, Section II,OFT Market Definition **n443** 7 et seq.
[449] See Commission Market Definition Notice **n443** under heading "Evidence to define markets - Geographic dimension."
[450] Commission Market Definition Notice **n443**, Section II and OFT Market Definition **n443** 15 et seq.
[451] *Commission Microsoft*, **n403** paras 426-7.

or be ongoing.[452] This means that there could be different outcomes of market definition depending upon the abuse in question, as consumers become more aware of alternatives, transport and information opportunities change and there are more industry players prepared to be innovative and adaptable and to move into new areas.

1.2.4.2 Assessment of dominance

Once the market is defined, the position within it of the patent owner must be determined. A leading commentator has said that "[t] recognition that intellectual property rights are about market power is essential to a true understanding of the law".[453] But he also noted, and it is well established, that this does not mean that the patent owner necessarily holds a dominant position in the market, as properly defined, in which the patented technology is situated. [454]

The question of dominance must rather be assessed in each case[455] on the basis of competition principles. According to EC case law[456] and guidance from the OFT,[457] the patent owner would be in a dominant position if it is in a position of economic strength, can hinder the maintenance of effective competition and can act to an appreciable extent independently of competitors and consumers, without loss of customers and/or competitor activity in response.[458]

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[452] See Commission Market Definition Notice **n443** 3rd third paragraph under "Concept of relevant market and objectives of Community competition policy" and OFT Market Definition **n443**para 5.7.
[453] MacQueen Copyright **n178**, 92.
[454] See *Parke Davis & Co v Probel* (24/67) [1968] E.C.R. 55 ("*Parke Davis*"), 72; *Radio Telefis Eireann v Commission of the European Communities* (C-241/91 P) [1995] E.C.R. I-743 ("*Magill*"), paras 46 and 47. See also discussion in Anderman/ Schmidt **n441** at 44-6 in Anderman Interface **n4** and Kallay, **n18** 7. Note also in the United States, Patent Reform Act No. 1 of 1988 and the decision of the Supreme Court in 2006 in *Illinois Tool Works Inc v. Independent Ink Inc*, 547 U.S. 28.
[455] See also Office of Fair Trading (2004) "Abuse of a Dominant Position" OFT 402 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft402.pdf, para 4.22.
[456] *United Brands Co v Commission of the European Communities* (27/76) 1978] E.C.R. 207, para 65
[457] The UK OFT Guidelines "Assessment of Market Power", ("OFT Market Power Guidelines") OFT 415 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft415.pdf.
[458] See also Thompson, R. and O'Flaherty, J. "Article 82" 909 in Roth, P. Q.C. and Rose, V. (eds) (6th edn) *Bellamy & Child. European Community Law of Competition* Oxford University Press, Oxford,

The market share of the patent owner in the market as defined is a key part of this assessment. Some guidance is available from the OFT[459] and the EC Commission[460] in respect of how market share is to be calculated. Once it has been established, the ECJ has found that a dominant position can be presumed if an entity has a market share of persistently over 50%,[461] although there may still also be dominance if there is a lower market share - for example 40% or even 30%[462]- if all other participants at a particular time have very small market shares.[463]

Thus here, as in respect of market definition, questions of time are important. How stable is the market share?[464] Is the market a highly dynamic and innovative one, in which new competitors may be expected to enter and develop new competitive products and challenge existing participants?[465] Or would those seeking to enter the market be faced with insurmountable barriers to entry, which may include patents, [466] and network effects.[467]

These questions also form an important part of the assessment of dominance.[468] The impact of patents on those seeking to provide a particular technology has already been considered.[469] The ICT industry is frequently used as a source of examples of network effects. Thus, there would be a network effect if a new communications system,

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UK, 920 et seq and for wider analysis see Utton, M.A. (2003) *Market Dominance and Antitrust Policy Second Edition* Edward Elgar, Cheltenham, UK and Northampton, MA, USA, in particular chapter 1, chapter 4 71 et seq, chapter 6, 144 et seq and chapter 11, 280 et seq.

[459] OFT Market Power Guidelines **n457**, paras 2.11-2, 4.6.

[460] TTBE, **n435** article 8 and TT Guidelines, **n435** article 23.

[461] OFT Market Power Guidelines **n457** para 2.12, *F Hoffmann La Roche & Co AG v Commission of the European Communities (85/76)* [1979] E.C.R. 461 ("*Hoffman*"), paras 39-41 and 51 et seq *AKZO Chemie BV v Commission of the European Communities* (C-62/86) [1991] E.C.R. I-3359, para 60.

[462]See eg *Commission Microsoft* **n403** paras 473-514

[463] OFT Market Power Guidelines **n457**, 2.12. See consideration of market share in relation to dominance in Whish **n392**, 176-179.

[464] OFT Market Power Guidelines **n457**, 2.10, 3.1-5; *Hoffman* **n461,** para 41.

[465] OFT Market Power Guidelines, 5.34, 5.36; Kallay **n18**, 42-3, 90-109, 133-153;Glader **n396** 56-7 .

[466] See Heit, J. "The justifiability of the ECJ's wide approach to the concept of "barriers to entry"" E.C.L.R. 2006, 27(3), 117-123, considering patents at 120-1.

[467] See g OFT Market Power Guidelines **n457** 5.21-2.

[468] See Whish **n392**, 179-191 for overview.

[469] See **pp14 and 67**

which cannot operate with any other technology, is embraced by users to such an extent that it would not be appealing for new users to join any other system, as they would be unable to communicate with the users of the first system. This would make it very difficult for providers of other systems to compete in the market, irrespective of the quality of their product or its price.[470] This would place the provider of the first system in a strong and entrenched position in the market – and likely a dominant one.

A closely related issue is that there may be different pieces of technology which could be used in a product or service, but which cannot be used together or interchangeably.[471] This can create problems for users, with an example being the development of two forms of video technology by VHS and Betamax: a consumer with a VHS recorder could not play a Betamax tape.[472] It may be helpful, therefore, for consumers and also efficient for business for all products in a field to use technologies which can work together.[473] This has become known as standardisation. Yet if any technology the subject of or within a standard is also the subject of a patent, the patent owner would be in a significant position of power, able to demand high licence fees or to refuse to license others.[474] This would affect competition and the operation of the market. [475]

[470] Forrester Ten **n10** in Ehlermann/ Atanasui **n10** 71-4; Monti, G. "Article 82 and New Economy Markets" ("Monti") in Graham, C. and Smith, F,. (eds) (2004) *Competition, Regulation and the New Economy* Hart, Oxford, UK, ("Graham/Smith") 17 et seq; and Ghidini Innovation **n13** 39, 66-7, 104-7. For more detailed analysis, see Lemley/ McGowan **n179**

[471] See consideration of both in Kallay **n18** from the perspective of theories of dynamic innovation and competition, 166-183.

[472] See Peritz **n397** in Anderman Interface **n4** 150-1. See also, regarding DVDs, Dranove, D. and Gandal, N. "Network Effects, Standardization, and the Internet: What Have We Learned From the DVD v DVIX Battle? " 461 in Elkin-Koren/Netanel **n6**.

[473] See Kallay, **n18** 173-182 and Farrell, J. (1989) "Standardization and Intellectual Property", *Jurimetrics*, **30** (1), Fall, 35-50, at 546 in Towse/Holzhammer 4 **n142.**

[474] See Anderman Introductory **n4** 22-3, Anderman/ Schmidt **n441** at 44-5 in Anderman Interface **n4**.

[475] See discussion in Church, J. and Ware, R. "Network Industries, Intellectual Property Rights and Competition Policy" 227 and Farrell, J. "Comment" 286 both in Anderson/Gallini **n396**; Kallay, **n18** 166-173; Ghidini, G, and Arezzo, E. "On the Intersection of IPRs and Competition Law With Regard to Information Technology Markets" ("Ghidini/Arezzo") 105, 108-115 and Pate, R.H. "Competition and Intellectual Property in the US: Licensing Freedom and the Limits of Antitrust" 49 at 54-5 in

The launch, in late 2007, of an EC Commission investigation into Rambus Inc regarding its licensing practices in respect of Dynamic Random Access Memory Chips,[476] is an example of regulatory concern in respect of IP and standards.[477] Concerns are less likely to arise if a standard has been established formally by standards organisations – these tend to require (possibly as a result of previous regulatory intervention)[478] that members disclose any IP which they own and which is essential to the standard[479] and that they license this to other members on fair, reasonable and non discriminatory terms. [480] Standardisation remains a significant concern, however, when technology, particularly that protected by IP, has become a de facto standard and is not subject to the rules of any organisation. The EC Commission in Microsoft considered that this would be so if a technology consistently held a market share of over 70%.[481]

Yet even if technology has become a standard and the owner of relevant IP is in a dominant position, this may not last long in a fast moving, innovative field such as ICT. [482] Consumers may at present wish to use one system - but a new and quite

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Ehlermann/ Atanasui **n10**; Staniszewski, P. "The interplay between IP rights and competition law in the context of standardization." J.I.P.L.P. 2007, 2(10), 666-681.

[476] Case number COMP /38.636. See EC Commission Press release http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&form and Treacy, P. and Lawrance, S. "Patent Misuse and Patent Ambush: The Competition Authorities get to Grips with IP" , [2006] 5 Euro. C.L. xi-xvi. *Also available at http://www.bristows.com/?pid=46&level=2&nid=861* , (Treacy Misuse") Section 2.

[477] See Lemley, M.A. "Intellectual Property Rights and Standard-Setting Organizations" December, 2002 90 Calif. L. Rev. 1889 and also Ghidini Innovation **n13** 102-4 regarding greater intervention by competition authorities in relation to IP and standards.

[478] See Treacy Misuse **n476,** Section 2.

[479] In the light of this, it is significant whether IP is "essential": see *Nokia Corp v Interdigital Technology Corp* [2007] EWHC 445 (Pat) 2007 WL 919428, [2007] EWHC 987 (Pat) 2007 WL 1467265, [2007] EWHC 1041 (Pat) 2007 WL 1425673, [2007] EWHC 1076 (Pat) 2007 WL 1685300, [2007] EWHC 1913 (Pat) 2007 WL 2186960).

[480] Eg SNIA IP Policy v 3 (2006) http://www.snia.org/about/corporate_info/ip_policy/SNIA_IP_Policy_v3.0_Final.pdf and ETSI webpage on IP with policies and rules http://www.etsi.org/WebSite/AboutETSI/IPRsInETSI/IPRsinETSI.aspx.

[481] *Commission Microsoft* **n403** paras 428-472.

[482] See eg Graham, C. "Introduction", 1 in Graham/Smith **n470**, 1-6.

different one might soon be developed to which they would turn.[483] The prospects of this can be seen from the many and diverse forms of communication which have developed since the mid 1990s, such as electronic mail, mobile phone, wireless handheld devices and internet telephony. New providers have also emerged, such as Skype Technologies SA (Providers of SKYPE), Research in Motion Ltd (Providers of BLACKBERRY) and Talk Talk Telecom Ltd to operate alongside existing businesses which have adapted, such as Microsoft with its electronic mail product Hotmail.

Thus even if the owner of an ICT related patent had a market share of, say, 60% in a market as properly defined and it could be argued to be a standard, it will not necessarily be found to be in a dominant position. [484] The key issue in making this assessment will be the weight accorded by the decision maker to dynamic competition and new innovation, as opposed to the more immediate presence of network effects and barriers to entry posed by the patent. For example, Microsoft had argued that the EC Commission should have regard to the dynamic nature of the new economy in assessing dominance with any dominant position not to last for long, given the constant development in new economy industries. The EC Commission was more concerned, however, at the network effects arising from Microsoft's position and stated that competition principles must be applied irrespective of the nature of the industry.[485]

Further, even if the patent owner is in a dominant position, it is not the holding of this which is prohibited, but its abuse.

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[483] See **p67** considering wholly new forms of innovation, often termed radical or disruptive. See Kallay, **n18** 40-4, 90-109; Messina, M. "Article 82 and the New Economy: Need for Modernisation?" The Competition Law Review Vol 2 Issue 2 March 2006, available via http://www.clasf.org/CompLRev/Issues/Vol2Issue2Art3Messina.pdf ("Messina"). See also from a different perspective Christiansen, C. M. (1997, 2000, 2003) "The Innovator's Dilemma. The Revolutionary Book that Will Change the Way You Do Business" HarperBusiness Essentials, USA.
[484] See Monti **n470** in Graham/Smith **n470**, 31-6.
[485] *Commission Microsoft*, **n403** see paras 437,439, 447, 448-459, 461-3, 465-470 and paras 515-525, 515-524. See also discussion in Anderman Introductory **n4** in Anderman Interface **n4** 10-11.

1.2.4.3 Abuse

Article 82 (and section 18 CA) do not[486] set out all conduct which will be abuse. [487] There is a growing and complex line of decisions, however, of the ECJ, the EC Commission and the English courts relating to the extent to which it can be abuse of a dominant position for a patent owner to rely on its right to exclude.

For present purposes, it is important to note that it can be abuse of a dominant position to refuse to license technology which is the subject of an IP right and also to raise an enforcement action in respect of that IP. This will be so, however, only in exceptional circumstances.[488] Cases have set out criteria, which are rather unclear and evolving, as to when there will be exceptional circumstances.[489] These criteria, and the potential for them to be developed, are important for this work and they are considered in detail in chapter 3.[490]

The potential for reliance on an IP right to be an abuse could be an application of the essential facilities doctrine, which was first developed in relation to infrastructure assets such as ports and railways. According to this doctrine, access to a facility (in the present context, the technology the subject of a patent)[491] must be provided to competitors if they would otherwise be unable to compete with the incumbent

[486] See **p69**
[487] See consideration in relation to ICT in Glader **n396**, 281-9, 292-4.
[488] *Volvo AB v Erik Veng (UK) Ltd* (238/87) [1988] E.C.R. 6211 ("*Volvo v Veng*")
[489]*Magill*, **n454**; *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C418/01) [2004] E.C.R. I-5039 ("*IMS*"); *Microsoft Corp v Commission of the European Communities* (T-201/04) [2007] 5 C.M.L.R. 11 ("*CFI Microsoft*"); and *Intel v Via* **n25**.
[490] See **sections 3.2 and 3.3**

[491] Arguments based on essential facilities have also been advanced in relation to obtaining access to fundamental developments in the biotechnology and medical spheres. Basheer, S. "Block Me Not: Are Patented Genes 'Essential Facilities'?" (April 3, 2005). bepress Legal Series. Working Paper 577. http://law.bepress.com/expresso/eps/577/

operator of the facility and if the facility is of particular economic importance.[492] This doctrine is not universally accepted, not least by the United States Supreme Court.[493] Its focus on the importance of the asset is resonant, however, of the concerns seen in relation to standards and there has also been a strong theme in IP and competition cases[494] that the technology in question had become a de facto standard. [495]

The potential exists, therefore, for it to be abuse of a dominant position to enforce a patent. Yet the issue remains, as it did with human rights, as to what use could be made of this argument when one is sued for patent enforcement in the UK.

1.2.5 Using the prohibition on abuse of a dominant position

1.2.5.1 The regulatory route

A pupil or the benevolent manufacturer wishing to supply the school[496] could, when faced with the patent action, complain to the OFT or to the EC Commission. They could also merely hope that one of the regulators would choose on its own initiative to investigate.[497] These opportunities have been termed as providing a "voice to the

[492] See comprehensive overview provided by Advocate General Jacobs in *Oscar Bronner* **n413** AGO paras 33-53, including cases from the EC and United States. See consideration in Cotter, T. F. (1999) "Intellectual Property and the Essential Facilities Doctrine" *Antitrust Bulletin*, **XLIV** (1) Spring, 211-50, at 177 in Towse/Holzhammer 4 **n142.**; Hovenkamp Unilateral **n433** 9-12; Ghidini/Arezzo **n475** in Ehlermann/Atanasui, **n10** 108-115; and Stratakis, A. "Comparative analysis of the US and EU approach and enforcement of the essential facilities doctrine" E.C.L.R. 2006, 27(8), 434-442
[493] See **pp144-5**
[494] See **pp138 and 246**
[495] See *NDC Health v IMS Health* Case COMP D3/38.044 (OJ 2002) L 59, p18. Available via http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38044/en.pdf, see paras 20 20, 26, 75-92, 123. Also considered by the ECJ in that case, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG (Case C-418/01)* [2004] ECR I-5039 [2004] 4 C.M.L.R. 28 see paras 29, 30; *Commission Microsoft* **n403** paras 50, 113-4, 429 et seq, 472, 697, 732-3; and *CFI Microsoft* **n489** H16, paras 107,112, 116, 124, 269-89.
[496] See **p14**
[497] Eg in the EC, article 5 pursuant to Regulation 1/2003 **n411**.

weak".[498] Yet any investigation is unlikely to proceed quickly; for example, the EC Microsoft investigation began in 1999, there was the EC Commission decision in 2004 and the decision of the Court of First Instance ("CFI") in an annulment application was delivered in 2007.[499] Any regulatory action in respect of court proceedings also does not, in itself, bring the national action to an end, although the court may decide that it should be put on hold for the time being.[500]

If a regulator should ultimately find that there had been an abuse of a dominant position, then it could require that the patented technology be provided to, say, the school. [501] As seen in respect of the ECtHR, however, this order would be forward looking and given the time likely involved in reaching this stage, may be too late for the individuals involved in stages of the project the subject of the action.

1.2.5.2 The court route

A finding of abuse could lead to "follow on" actions for compensation in the UK.[502] This would be some time in the future, unrelated to the proposed project and would still involve time, cost and disruption for the project. More proactively, when the patent action is raised the benevolent manufacturer or pupil could respond with their own parallel court action. This would be for breach of statutory duty, on the basis of

[498]Sackville, R (Justice) "Monopoly versus freedom of ideas: The expansion of intellectual property" (2005) 16 AIPJ 65, 75
[499]See *CFI Microsoft* **n489**
[500] Eg *Ingman*, **n25** paras 4, 13-14.
[501] See **p14**
[502] See section 47A CA 1998 (as amended by the Enterprise Act 2002). See UK Office of Fair Trading Discussion Paper April 2007 "Private actions in competition law effective redress for consumers and business" http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf OFT 916. For the EC contribution, see EC Commission White Paper "Damages Actions for Breach of the EC antitrust rules 2 April 2008 http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf with Annex Staff Commission "Commission Staff" Working Paper on Damages Actions for Breach of the EC antitrust rules (SEC (2008) 404 http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf

an alleged abuse of a dominant position.[503] Such actions have been raised in courts in the UK[504] and have been attempted once in relation to conduct preliminary to the enforcement of IP, in *SanDisk Corp v Koninklijke Philips Electronics NV*.[505] If such an action succeeded, there could be an injunction or interdict that the patent owner cease pursing the patent action.[506] It is unlikely, however, once again, that the benevolent manufacturer or the pupils would wish to initiate litigation.

More interesting, therefore, is the potential for the benevolent manufacturer to respond, within a patent action, that the raising of the action itself is an abuse of a dominant position. The English courts have accepted[507] that it is possible to rely on article 82 in response to an IP infringement, in what has become known as the Euro-Defence. These stem from the pre-eminent role of article 82 in the laws of the UK, and also its direct effect.[508] For this to be done, there must be a nexus between the alleged infringement and the alleged abuse.[509] The existence of this can be unclear in some cases; however it is likely to be present if the alleged abuse was argued to be the raising of the action itself.

The consequences of a finding of abuse have not been considered fully by courts, as there has not yet been a case which has proceeded to a trial. The diversity of comments made in this regard, however, suggests that courts were glad not to have to

[503] *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130. Regarding the level of proof, see *Ineos Vinyls Ltd v Huntsman Petrochemicals (UK) Ltd* [2006] EWHC 1241 2006 WL 1518689 ("*Ineos Vinyls")* paras 210-1 cf *Microsoft Corp v Ling* [2006] EWHC 1619 (Ch) paras 20-21.
[504] Eg *Wireless Group Plc v Radio Joint Audience Research Ltd* [2004] EWHC 2925 [2005] U.K.C.L.R. 203; *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38 [2007] U.K.C.L.R. 309 [2007] E.C.C. 7; *Chester City Council v Arriva Plc* [2007] EWHC 1373 (Ch) [2007] 2007 WL 1623378; and *Software Cellular Network Ltd v T-Mobile (UK) Ltd* [2007] EWHC 1790 (Ch) [2007] U.K.C.L.R. 1663
[505] *SanDisk Corp v Koninklijke Philips Electronics NV* [2007] EWHC 332 (Ch) [2007] F.S.R. 22 ("*Sandisk*").
[506] For examples of injunctions that offending conduct is to cease, see *Jobserve Ltd v Network Multimedia Television Ltd* (Restored Injunction Hearing) [2001] EWCA Civ 2021 2001 WL 1479864 and *Getmapping v Ordnance Survey Getmapping Plc* [2002] EWHC 1089 (Pat) [2002] WL 820137 . These cases did not involve IP.
[507] See early analysis in Greaves, R. "The Herchel Smith lecture 1998: Article 86 of the E.C. Treaty and intellectual property rights" E.I.P.R. 1998, 20(10), 379-385, 385
[508] See **n408**
[509]See eg *Sportswear Co SpA v Stonestyle Ltd* [2007] F.S.R. 2 ("*Sportswear*") paras 29 et seq

consider the question. A court in a patent case in 1989 considered that it would be a disproportionate response to an abuse to deprive the patent owner of the means of maintaining a dominant position and that there were other remedies, particularly compulsory licences, which should be explored.[510] Slaughton LJ in a patent case in 1993 sought to "grasp the nettle" in this regard. Rather, however, he merely acknowledged that there might be extraordinary circumstances when it was proper not to grant an IP owner relief if there was infringement.[511] The Court of Appeal was still noting in 2002 that if conduct was contrary to article 82 this might constitute a defence to any liability for infringement or any remedies;[512] and in 2005, a court noted, albeit in the context of whether there was the necessary nexus, that it has never been held that the existence of a proven abuse results in unenforceability of IP.[513]

In summary, therefore, there is a complex relationship between IP and competition, with IP conferring the right to exclude and competition seeking to enable the unrestricted operation of the market. Yet an objective of both IP and competition is the encouragement of innovation and there is a strong view that the two fields are at least capable of being consistent, as a matter of principle. From a more practical and substantive perspective, EC and UK competition law prohibit the abuse of a dominant position and it has been held by EC and UK decision makers that in exceptional circumstances, it is possible for raising a patent infringement action to be abusive. It is also possible for these arguments of abuse to be made in the UK courts in direct response to a patent infringement claim.

[510] *Pitney Bowes Inc v Francotyp-Postalia GmbH* [1991] F.S.R. 72, 77 ("*Pitney Bowes*").
[511] *Chiron Corporation v Murex Diagnostics (No. 2)* [1994] F.S.R. 187,199-200 ("*Chiron No. 2*").
[512] *Intel v Via*,**n25** para 80.
[513] *Hewlett-Packard Development Co LP v Expansys UK Ltd* [2005] EWHC 1495 (Ch) [2007] E.C.C. 9 [2005] E.T.M.R. 111 ("*Hewlett-Packard")* para 16

1.2.6 A role for patents, human rights and competition?

In summary, therefore, there are rights in respect of life and expression which may seem inconsistent with IP and its enforcement. IP can be argued, however, to be consistent with some aspects of human rights, on the basis of rights to property[514] and reward of creativity.[515] The exclusive rights of an IP owner can be argued to be inconsistent with the unrestricted operation of the market. There are also arguments, however, that IP can be consistent with competition, in respect of the interest of both in encouragement of innovation.[516]

Nonetheless, at the level of principle, the UN Sub-Commission on the Promotion and Protection of Human Rights considered that human rights have primacy over IP[517] and a pre-eminent IP scholar has said that competition is a more fundamental doctrine than IP and that "freedom to compete should remain the norm".[518] These statements in themselves - of international bodies and of theory – can have no direct impact upon patent enforcement actions raised in the UK. Of greater value here, therefore, are the HRA and article 82. The HRA brings rights to life, information and expression and also property more directly within the ambit of national patent actions ,[519] although an action still cannot be raised for breach of these human rights. Article 82 can lead to it being an abuse of a dominant position (albeit only in exceptional circumstances and to uncertain effect) to enforce a patent, even if this would seem to be consistent with, and supported by, the PA.[520]

[514] See **pp40, 50-5** and **n301**
[515] See **n514**
[516] See **p72**
[517] See **n304**
[518] Cornish Clarendon **n3**, 113. See also Anderman/Schmidt **n441** in Anderman Interface **n4** 70-1 regarding the higher place of competition as a public law norm.
[519] See **pp61-2**
[520] See **p81**

Looking to competition and human rights to address problems arising from the enforcement of patents, rather than seeking to revise patent law itself,[521] could be termed a form of reverse "regime shifting".[522] An example of regime shifting is the establishment of the WSIS[523] to consider ICT, IP, development and the digital divide, rather than these questions being pursued within the Doha Development Agenda of the WTO. Depending upon one's view, establishing the WSIS may have sidelined its issues into a forum unlikely to require substantial action and unable to impose obligations, or may have created a proactive and focused initiative, which avoided the issues being lost in wider world trade debate.[524]

This question of whether issues should be situated within only one forum or specialist area has parallels in the present discussion. Questions of patent infringement involve not only patent law but also human rights and competition. Considering these legal fields in patent actions can be distinguished from including them in policy debate given that it is not only possible, but compulsory, for the HRA and article 82 to have a role in patent actions. Human rights and competition are therefore properly part of an analysis of patent enforcement. The key question is rather the impact which they might actually have.

Accordingly, the next chapters will provide a more substantive discussion of the relationship between IP, human rights and competition as it has been considered by

[521] See **p32**

[522] Helfer, L.R. "Regime Shifting: The TRIPS Agreements and New Dynamics of International Intellectual Property Lawmaking" 29 Yale J Int'l L 1 (Winter 2004) and see also Yu, P. "Challenges to the Development of a Human-Rights Framework for Intellectual Property" 77 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 87-93.

[523] See **pp20-1.**

[524] Cf arguments for a networked and multipartite approach combining non binding initiatives see eg Drahos, P [2003] 'The Global Intellectual Property Ratchet: Why it Fails as Policy and What Should be Done About It' Paper for the Open Society Institute http://cgkd.anu.edu.au/menus/PDFs/IPRatchet_Drahos.pdf,;Helfer, L.R. "Mediating Interactions in an Expanding International Intellectual Property Regime" 180 ("Helfer Mediating") in Cottier, T., Pauwelyn, J. and Burgi Bonamoi, E. (eds) (2005) *Human Rights and International Trade* Oxford University Press, Oxford, UK ("Cottier"); and Suthersanen Public Interest **n136** in Griffiths/Suthersanen **n136** ,117.

decision makers when faced with individual cases. These are particularly important, given the aim of this work of developing arguments for immediate use within individual cases. As will be seen, there has been very limited consideration of the three fields within one case. In the light of this and given the number of cases combining two of the fields, the next chapter will analyse cases involving IP and human rights.[525] Chapter 3 will then consider cases concerning IP and competition.

[525] although it will not revisit the consideration of IP by the ECtHR and European Commission on Human Rights which has been discussed here.

2 IP and human rights: a more individual analysis

2.1 Introduction

There have been many instances of courts exploring the interface between IP and human rights. These have mainly been in the course of IP infringement actions, with some challenges to legislation on human rights grounds. This chapter will review these cases and explore the extent to which courts have managed any conflicts arising between IP and human rights. It will then draw together the principles developed and consider the extent to which they could form part of arguments in patent actions in the UK, such that there may be no finding of infringement.

Given the focus of this work, decisions of courts in the UK and of the EC decision making bodies are of primary importance. Decisions from other jurisdictions[526] are also considered. These are inevitably decided on their own principles (for example unlike in the UK, there may be a constitutional right to free speech on the basis of which legislation is challenged), are based on their own legislative wording and are in any event not binding on courts in the UK jurisdictions.[527] That said, courts in the UK have on occasion referred to decisions from elsewhere and found them to be of some assistance, particularly in novel legal areas[528] or when the decisions concern a similar statutory provision to that before the court.[529]

[526] Where possible, primary reported sources in English have been consulted. Otherwise use is made of internet commentary and secondary sources.
[527] Nor between them, see *Quilty v Windsor* 1999 SLT 346, 347, 355, also *Zino Davidoff SA v A&G Imports Ltd (No.1)* [2000] Ch. 127 cf *Zino Davidoff SA v M&S Toiletries Ltd (No.1)* 2000 S.L.T. 683 [2000] 2 C.M.L.R. 735.
[528] Although not always to great effect – see *Miss World Ltd v Channel 4 Television Corp* [2007] EWHC 982 (Pat) [2007] E.T.M.R. 66 [2007] F.S.R. 30 ("*Miss World*") paras 29, 32-6 and *Abnett v British Airways Plc* [1997] A.C. 430 ("*Abnett*"), 443 cf *La Croix du Arib SA v Kwikform (UK) Ltd* [1998] F.S.R. 493 ("*La Croix du Arib")* 498 Canadian authorities were rejected as irrelevant.
[529] *Pioneer Electronics Capital Inc v Warner Music Manufacturing Europe GmbH* [1995] R.P.C. 487, 494-9 ("*Pioneer v Warner*") and *La Croix du Arib*, 499.

2.2 The UK experience[530]

There has been a small but significant body of cases which suggests that human rights have had an impact on IP litigation in the UK. [531] It is the nature of this impact which is important, however, given that, as commentators have rightly argued in the context of copyright and free speech, the fields "cannot simply be 'balanced' in an unaccountable manner, but must be viewed in the detailed contexts of actionable legal rights".[532]

2.2.1 Relevant arguments, irrelevant effect?

An example of the making of human rights arguments in IP cases is the 2004 decision in Scotland of the Inner House of the Court of Session *ITP SA v Coflexip Stena Offshore Ltd ("ITP").* [533] In a procedural application, it was argued that a patent infringement action should be sisted (put on hold), pending an application to the ECtHR that an order of the European Patent Office ("EPO") revoking the patent in suit was in breach of article 6 ECHR. The decision of the Inner House focused on the relationship between national court and international tribunals.[534] It was open, however, to the arguments that there was a right to property in respect of a patent.[535] Further, it considered section 6 HRA in respect of its approach to the decision of the

[530] The case discussion which follows is a development of that in Brown. A.E.L."Guarding the guards: the practical impact of human rights on protection of innovation and creativity" available at http://www.bileta.ac.uk/Document%20Library/1/Guarding%20the%20Guards%20-%20the%20Practical%20Impact%20of%20Human%20Rights%20on%20Protection%20of%20Innovation%20And%20Creativity.pdf#search=%22bileta%20brown%20guarding%20%22 ("Brown Guards") and Brown, A.E.L. "Human rights: in the real world" J.I.P.L.P. 2006, 1(9), 605-613 ("Brown Real World").
[531] See also Pinto, T. "The Influence of the European Convention on Human Rights on Intellectual Property Rights" E.I.P.R. 2002, 24(4), 209-219 ("Pinto"), 209
[532] Griffiths, J. and Suthersanen, U. "Introduction" 1 in Griffiths/ Suthersanen **n136** 7.
[533] *ITP SA v Coflexip Stena Offshore Ltd* 2005 1 S.C. 116 2004 S.L.T. 1285 ("*ITP*"). See also MacQueen Utopia, **n184** 462-3.
[534] *ITP* **n533** paras 20-26
[535] *ITP*, **n533** para 27.

EPO[536] and section 3 HRA regarding interpretation of relevant provisions of the PA.[537]

The first prominent acknowledgement of the place of human rights in IP actions came in the English decision in 2002 of the late Pumfrey J, as he was then, in *Levi Strauss & Co v Tesco Stores Ltd* ("*Levi*").[538] This case involved the parallel importing of jeans bearing Levi's trade marks, which had previously been put on the market outside the European Economic Area ("EEA") without the trade mark owner's consent to them being put on the market in the EEA. There is a significant body of law to the effect that in such a situation there could be trade mark infringement, as the trade mark owner's rights were not "exhausted" in respect of the EEA.[539]

Notwithstanding this, Tesco argued that the court should interpret the relevant UK and EC trade mark legislation such that there was no infringement, [540] as to do otherwise would be inconsistent with the courts' obligations under section 3 HRA. This was argued to be so on the basis of Tesco's rights in respect of property pursuant to Protocol 1 article 1 ECHR (regarding the jeans it had imported) and also Tesco's right to free expression pursuant to article 10 ECHR (regarding the use of the name "Levi" on the jeans).[541]

Considering this, Pumfrey J noted that there were in fact two rights to property involved; those of Tesco in respect of the jeans but also those of Levi in respect of its trade mark.[542] He then considered that the relevant trade mark legislation did, in the light of the limits on the ECHR right to property and the discretion available to legislatures in respect of it, strike a proportionate and reasonable balance between

[536] *ITP*, **n533** paras 17 (argument) 25.
[537] *ITP* paras 16 (argument) and 23-5.
[538] *Levi*, **n415**
[539] Eg *Zino Davidoff SA v A&G Imports Ltd* (C-414/99) [2001] E.C.R. I-8691. See *Levi* **n415** paras 3, 12-14, 17.
[540] *Levi*, **n415** paras 22 and 23.
[541] *Levi*, **n415** para 22.
[542] *Levi*, **n415** para 40.

these two property rights.[543] He noted also that the right to freedom of expression was itself subject to limits, was in any event weaker in respect of commercial expression than in other cases and must be balanced against other human rights – that of Levi in respect of its trade mark.[544] Pumfrey J concluded, therefore, that regard to all relevant Convention rights did not require the trade mark legislation to be interpreted such that there was no infringement. [545]

This decision confirms[546] that the HRA provides only a starting point for those seeking to challenge the enforcement of IP. It will not necessarily lead to the interests of the IP owner being set aside. [547]

2.2.2 Old legislation for new ends

In the seminal case of *Ashdown v Telegraph Ltd* ("*Ashdown*")[548] in 2002, the Court of Appeal established that the HRA could lead to other interests prevailing over those of the IP owner. *Ashdown* concerned the publication by a newspaper of extracts of diaries of the leader of a UK political party, without his consent. The newspaper argued that in the light of sections 3 and 6 HRA, those provisions in the Copyright Designs and Patents Act ("CDPA") which limited the rights of the copyright owner in respect of fair dealing[549] and on the basis of the public interest,[550] should be interpreted in a manner consistent with the article 10 ECHR right to freedom of expression.[551]

[543] *Levi*, **n415** para 39, 40, 42
[544] *Levi*, **n415** para 41
[545] *Levi*, **n415** paras 42-3.
[546] See **pp61, 64**
[547] See also Ricketson **n301** in Bottomley/Kinley **n294**,198-200, 208
[548] *Ashdown*, **n23**.
[549] Section 30 CDPA.
[550] Section 171(3) CDPA.
[551] *Ashdown*, **n23** paras 1,15.

The first instance court considered that the HRA could not provide defences in addition to those within the CDPA.[552] In contrast, the Court of Appeal accepted, in principle, the arguments of the newspaper. It stressed, however, that the article 10 ECHR right and its limits must be balanced with the ECHR right of the copyright owner to enjoyment of property, and the limits on this.[553] In respect of this balance, the Court of Appeal then concluded that the parameters of copyright already reflected freedom of expression through the idea/expression dichotomy, as copyright did not protect the idea itself but the expression of it in a particular work.[554]

Notwithstanding this, the Court of Appeal considered that there could be "rare cases" when, after balancing the two Convention rights, freedom of expression should still prevail over copyright and its own limits: an example was given of a need to use specific words and not just the information relayed by them.[555] The Court of Appeal considered that this could often, but not always, be done by declining to grant an injunction and awarding a financial remedy.[556] Yet it considered also that there could again be "rare" cases when a work should be able to be reproduced "without any sanction".[557] It is this lack of sanction which is of particular interest here.

The Court of Appeal then reviewed the CDPA provision referring to the public interest.[558] It considered that the circumstances in which this provision might be used were not "capable of precise categorisation or definition"[559] and went on to note that "now that the Human Rights Act 1998 is in force",[560] it could be in the public interest for freedom of expression to prevail over copyright when there was a "rare case" of

[552] referred to by the Court of Appeal in *Ashdown* **n23** paras 2, 16-21, 38 – see also first instance decision reported at [2001] R.P.C. 34.
[553] *Ashdown*, **n23** para 25, 28
[554] *Ashdown* **n23** para 31, 39
[555] *Ashdown*, **n23** paras 30-1, 43, 45
[556] *Ashdown*, **n23** para 46.
[557] *Ashdown*, **n23** para 47.
[558] See Sims, A. "The Public Interest Defence in Copyright Law: Myth or Reality" E.I.P.R. 2006, 28(6), 335-343, for detailed analysis of this provision.
[559] *Ashdown*, **n23** paras 52-8 ,quote at para 58 cf *Hyde Park Residence Ltd v Yelland* [2000] R.P.C. 604. See Griffiths, J. "Copyright law after Ashdown – time to deal fairly with the public" I.P.Q. 2002, 3, 240-264, 246 and Pinto **n531**,218 for examples of what may be such rare cases, such as publication of events of fundamental news value.
[560] *Ashdown*, **n23**, para 58

conflict between copyright and freedom of expression. It considered that if there was such a rare case, the public interest provision in the CDPA could "permit the defence of the public interest to be raised".[561]

This suggests that without the public interest provision, the Court of Appeal could not, even with its obligations under the HRA and its views of the relationship between copyright and freedom of expression in relation to particular facts, have enabled freedom of expression to "trump"[562] copyright. The *Ashdown* approach was applied in 2006 by the English High Court in *HRH Prince of Wales v Associated Newspapers Ltd* ("*HRH*").[563] This case again involved diaries, this time of the Prince of Wales regarding amongst other matters the handover of Hong Kong to China. That court considered that it would be wholly disproportionate for there to be a public interest defence. This was not a "rare case", as on the facts there were no clear grounds for the public interest to trump the balance set out within the CDPA.[564]

2.3 The position elsewhere

2.3.1 Reliance on legal principle

In Australia in 2005, the High Court, the ultimate court of appeal, considered the impact of fundamental rights on IP legislation in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* ("*Sony*").[565] This case involved the supply of regional

[561] *Ashdown*, **n23** para 58 and see also 59.For further analysis of *Ashdown* see Johnson, P. "The public interest: is it still a defence to copyright infringement?" Ent. L. R. 2005, 16(1), 1-6 ("Johnson"); Birnhack, M.D. "Acknowledging the conflict between copyright and freedom of expression under the Hunan Rights Act" Ent. L.R. 2003, 14(2), 24-34; and Waelde, C. "Copyright, Corporate Power and Human Rights: Reality and Rhetoric" 291 in Macmillan, F. (ed) (2006) *New Directions in Copyright Law, Volume 2* Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 297-300.
[562] *Ashdown* **n23** para 58.
[563] *HRH*, **n25** para 179. The case was subsequently heard by the Court of Appeal, but it did not consider the points of importance here - *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776 [2007] 3 W.L.R. 222
[564] *HRH* **n25** para 180.
[565] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 ("*Sony*")

coding devices installed in Playstation consoles to prevent games being copied, without the consent of the relevant national copyright owner. The key issue before the court was the meaning of the term "inhibit", in the context of a reference to "prevent or inhibit" in the Australian legislation.[566]

The lower court, the Full Federal Court, had taken a broad approach to the term, on the basis of the language of the statute as a whole and the accompanying and extrinsic materials.[567] Three of the High Court judges considering the issue applied established principles of statutory interpretation and took a narrower view of "inhibit".[568] Kirby J also noted that if a wider meaning were given to the term, then by installing regional coding devices copyright owners could effectively "opt out" of the fair dealing provisions of the Australian copyright legislation.[569] He considered that this would mean that copyright owners could acquire "a de facto control over access to copyrighted works or materials that would permit the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law."[570] Further, Kirby J considered that if copyright legislation were to move beyond the "legitimate purposes traditional to copyright protection at law, the Parliament risks losing its nexus to the constitutional source of power",[571] without which there can be no federal legislation in Australia.

Importantly for present purposes, Kirby J also considered that a narrow interpretative approach should be preferred, as this would be consistent with the High Court's history of protecting the fundamental rights of individuals to unrestricted dealings with their property – here the console they had bought.[572] Kirby J considered that this

[566] Section 10(1) *Copyright Act* 1968 (Cth) (as amended by the *Copyright Amendment (Digital Agenda)* Act 2000 (Cth))
[567] *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157, paras 1-78, 83-140. See Weatherall, K. "On Technology Locks and the Proper Scope of Digital Copyright Laws Sony in the High Court" [2004] SydLRev 41 (2004) Sydney Law Review 613.
[568] *Sony*, **n565** paras 29-55, 104-7, 114-8, 120-1, 124-43 and 167-209.
[569] *Sony*, **n565** para 210.
[570] *Sony*, **n565** para 211.
[571] *Sony*, **n565** para 218.
[572] Elements of this right were also noted to be recognised by the constitution of the Commonwealth of Australia. See *Sony* **n565** para 216 and also Evans, S. "Constitutional Property Rights and Australia.

fundamental right could only be removed by the clear intention of Parliament and that this was not present in this case.[573]

2.3.2 Copyright and free expression

There have been a number of cases in other jurisdictions involving copyright and freedom of expression, with the Netherlands, France and the United States in particular having seen cases of interest.[574] The importance of the interface between the fields is also reflected in the international academic attention which these cases have attracted.[575]

2.3.2.1 Continental Europe

In the Netherlands in 2003, courts considering *Rowling v Uitgeverij Byblos BV* reviewed the proposed publication of a book, translated from Russian, about a girl wizard called "Tanja Grotter" with similar characters and plotlines to a well known J.K. Rowling "Harry Potter" book. The District Court of Amsterdam[576] considered that the Dutch constitutional[577] right of free expression of thoughts and opinions did not provide a licence to infringe copyright and granted a preliminary injunction.[578] The Appeal Court of Amsterdam[579] (in a decision which will be referred to here as

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Reconciling Individual Rights and the Common Good" chapter 8, 197-222, both in Campbell Protecting **n227**.

[573] *Sony*, **n565** para 217, 219

[574] For excellent English language overview of the cases, see Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9**, 357-8 and Jehoram, H.C. "Copyright and freedom of expression, abuse of rights and standard chicanery: American and Dutch approaches." E.I.P.R. 2004, 26(7), 275-279 ("Jehoram").

[575] See excellent collections of commentary in Griffiths/Suthersanen **n136** and also in Torremans Copyright **n13 .**

[576] *Rowling v Uitgeverij Byblos BV* [2003] E.C.D.R. 23 – first instance. For analysis of similarities, see paras 1, 4 -7

[577] Constitution of the Kingdom of the Netherlands Article 7(1) Last amended 2002 http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.

[578] *Rowling v Uitgeverij Byblos BV* [2003] E.C.D.R. 23, H6, para 7.

[579] *Rowling v Uitgeverij Byblos BV* [2004] E.C.D.R. 7 ("*Harry Potter*")

"*Harry Potter*") considered article 10 ECHR rather than the constitution, although the basis for this is not clear.

The Appeal Court reviewed in detail the similarities between the two stories[580]and then turned to the relationship between the limits in article 10(2) ECHR and copyright. It noted that in a democratic society, literary works are protected by law against unauthorised derivation or imitation by third parties, on the conditions prescribed by law through copyright. It considered that on these facts, the copyright owner was entitled to be protected and that the protection offered by article 10 ECHR should be limited. Finally, it noted that no matter how essential the protection offered by article 10 ECHR may be, the writer of the other book had overstepped its legitimate boundaries.[581]

A renowned commentator has considered that this decision mirrors standard practice in the courts of the Netherlands. Freedom of expression arguments have been said to succeed rarely in copyright cases, with a prominent example being the unsuccessful reliance on freedom of expression in an attempt to publish extracts from the diary of Anne Frank.[582] The same commentator noted with concern, however, that there was an increasing use of freedom of expression arguments in copyright cases. He considered that this could be a "use [of] the freedom as a chicanery";[583] another commentator has termed it, more straightforwardly, an attempt by infringers to avoid punishment.[584]

In the light of this, it is interesting to note that freedom of expression was used to greater effect in another case in the Netherlands around the same time as *Harry*

[580] *Harry Potter*,**n579** paras 12-28.
[581] *Harry Potter*, **n579** paras 12-29.
[582] Jehoram, **n574** 279 and footnote 27 for references.
[583] Jehoram, **n574** 279.
[584] Geiger, C. "Trade marks and freedom of expression - the proportionality of criticism" IIC 2007, 38(3), 317-327 ("Geiger Proportionality"), 318-9

Potter, in *Church of Scientology v XS4ALL ("Church of Scientology").* [585] This was an action by the Church of Scientology against an internet service provider and the owner of a website and it sought removal from the website of extracts from the works of the Church of Scientology. The Court of Appeal in The Hague held, on the basis of article 10 ECHR, that the interest of the public in receiving information about the Church of Scientology should prevail over its copyright in the works. The Court of Appeal considered that this was an exceptional case and that the restriction on copyright was proportionate, given the nature of the Church of Scientology and its secret activities, which were considered to be of concern. It was also relevant that some information had already been available on US websites.[586]

This approach of the Court of Appeal was confirmed by the Dutch Advocate General in 2004.[587] He did accept that copyright was covered by the human right to property, but considered that it was still not exempt from review. He considered that competing human rights should be balanced and that here, free expression should prevail over the copyright and right to property of the Church of Scientology. The case was withdrawn by the Church of Scientology before the decision of the Supreme Court[588] and this court therefore dismissed the claim without adding to the judgement of the Advocate General. [589]

[585] See summary in Krikke, J. "Netherlands - Infringement by Quotation - Confidentiality of Documents - Freedom of Speech – Human Rights" E.I.P.R. 2004, 26(4), N50-1.
[586]See also Strowel/Tulkens **n296** in Griffiths/Suthersanen **n136**, 309-10.
[587] See "Attorney-General confirms ruling for XS4ALL in Scientology case" 19 March 2005 http://www.xs4all.nl/nieuws/bericht.php?id=625&taal=en&msect=Nieuws&year=2005. Original court documents are not available in English.

588 "Judgment postponed in Scientology vs. XS4ALL court case" 8 July 2005 http://www.xs4all.nl/nieuws/bericht.php?msect=nieuws&id=652&taal=en and "Withdrawal attempt of Scientology case proves futile" 16 September 2005 http://www.xs4all.nl/nieuws/bericht.php?msect=nieuws&id=680&taal=en
[589]"Final Victory! XS4ALL and Spaink win Scientology battle" 16 December 2005 http://www.xs4all.nl/nieuws/bericht.php?msect=nieuws&id=706&taal=en

This encroachment upon copyright has been criticised, on the basis that the traditional goal of copyright in the Netherlands is to protect the author, [590] resonant of the natural and instrumental rights in this respect.[591] A similar reluctance has also been noted in other countries which take an author focused approach to copyright, particularly in France. [592] In 2003 the Cour de Cassation, in a case similar to that involving frescos before the European Commission on Human Rights,[593] considered the broadcast of 12 Utrillo paintings, as background footage in a television programme about the exhibition in which they featured. The Cour de Cassation (in a case referred to here as "*Utrillo*") rejected arguments of a public right to receive information and considered that the case should involve only copyright and its exceptions; there was no place for article 10 ECHR.[594]

In 2007, the Cour de Cassation was more open to article 10 ECHR in *Hugo v Plon SA ("Plon")*[595] This involved a challenge by the heirs of Victor Hugo on the basis of moral rights, as the copyright had expired, to the publication of a sequel to "Les Miserables". The court found that no breach of moral rights had been established[596] and also noted that **"**the concept of creative freedom prevents the author of a work or his heirs from banning a sequel to it after their monopolistic exploitation rights have expired".[597]

[590] For criticism of early decisions, see Jehoram, **n574** 278 and overview of older Dutch cases see Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9**, 356-7 but cf Geiger Constitutionalising **n301**, 394-5
[591] See **n514**
[592] Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9**, 344-5.
[593] See **p51**
[594] See comment and criticism in Geiger, C. "France. Intellectual Property Code, AT&L 122-5-3; European Convention on Human Rights Art. 10 "Utrillo"" IIC Vol. 35 6/2004 716 at 717, 719, 723-6 (noting apparent analogies to Ashdown rare cases); Geiger Constitutionalising, **n301** 390; Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9**, 357-8; and Strowel/Tulkens **n296** in Griffiths/Suthersanen **n136**, 306.
[595]*Hugo v Plon SA* [2007] E.C.D.R. 9 ("*Plon*"), see Geiger, C. "Copyright and the freedom to create - a fragile balance" IIC 2007, 38(6), 707-722 ("Geiger Fragile").
[596] *Plon*, **n595** para 9.
[597] *Plon*, **n595** para 7. See also Hugenholtz Copyright 1 **n23** in Dreyfuss Expanding **n9**, 355-6 considering German cases suggesting that where there is an extreme need for information, constitutional rights to free expression could prevail over copyright.

2.3.2.2 North America

The First Amendment of the Constitution of the United States provides that Congress shall not pass legislation "abridging the freedom of speech". The Supreme Court of the United States has held that this could prevent private parties raising court actions which would limit speech. [598] This has been applied to copyright infringement[599] and also to restrictions on advertising.[600]

The Constitution of the United States also provides, in article 8(8), for Congress to pass legislation "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This second constitutional power has been used as a response to arguments that free speech is a counter to copyright with it being argued that free speech and copyright can co-exist, as they were intended to do by the Framers of the constitution.[601]

A leading example of this approach is the Supreme Court decision in *Harper & Row v Nation Enterprises* ("*Harper & Row*") in 1985. Once again, this involved unauthorised publication of memoirs of a public figure, this time of former President Ford. The Supreme Court found that the fair use doctrine, which is an internal limit within the copyright law of the United States, protected First Amendment interests. As a result, the Supreme Court found that separate arguments could not be made against copyright on the basis of free speech and indeed that copyright was an

[598] *New York Times Co v. Sullivan* 376 U.S. 254 (regarding libel), *Zacchini v. Scripps-Howard Broadcasting Co* 433 U.S. 562 (regarding rights of publicity and broadcast of performance).
[599] See discussion in Macmillan Patfield, F. "Towards a Reconciliation of Free Speech and Copyright" 199 (Macmillan Patfield") in Barendt, E. (ed) (1996) *The Yearbook of Media and Entertainment Law 1996* Clarendon Press, Oxford University Press, Oxford, UK ("BarendtYearbook"), 199-200 and Loughlan, P.L. "Looking at the Matrix: Intellectual Property and Expressive Freedom" E.I.P.R. 2002, 24(1), 30-39 ("Loughlan"), 33.
[600] *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* 425 U.S. 748 (regarding publication of prices). See Loughlan, **n599** 33
[601] See Birnhack, M. "Copyrighting Speech: A Transatlantic View", 37 ("Birnhack Copyrighting") in Torremans Copyright **n13,** 42-4

instrument of free speech, rather than an obstacle to it.[602] This decision has been seen as an example of an unwillingness of courts in the United States to use the First Amendment to intervene in respect of copyright,[603] in a manner which has not been seen in other areas of law.[604] It has also been said to bring to an end the discussion of copyright and the First Amendment.[605] Yet the debate does go on;[606] and perhaps to some effect.

In 2001, the Court of Appeals of the Eleventh Circuit considered the book "The Wind Done Gone in *Suntrust Bank v Houghton Mifflin Co*" ("*Wind Done Gone*").[607] This book was a parodic treatment, written from the perspective of a slave, of "Gone with the Wind". The Court of Appeals considered the idea/expression dichotomy, the fair use doctrine and also the "First Amendment protections interwoven into copyright law",[608] noting that it should be "cognizant" of the First Amendment.[609] The Court of Appeals then declined to grant an injunction. It focused on the critical analysis provided by "The Wind Done Gone" [610] and stated that "the public interest is always served in promoting First Amendment values and preserving the public domain from encroachment". [611] A leading commentator has termed this a "laudable example" of courts ensuring that "[e]ven if the First Amendment imposes no external constraints

[602] *Harper & Row v Nation Enterprises* 471 U.S. 539 ("*Harper & Row*") Headnotes 10A and 10B, 545-6, 556, 558, 560.
[603] Eg *Campbell v Acuff-Rose Music, Inc* 50 US 569 involving a parody of the song "Pretty Woman". The Supreme Court considered only fair use as set out in section 107 US Copyright Act (see 586-93) and the IP power of the constitution (575), and made passing dismissive reference made to the First Amendment (518); ee also *Mattel v Walking Mountain Productions* 353 F. 3d 792, 802-9 regarding use of Barbie dolls on conjunction with kitchen appliances, which did not consider the First Amendment save at 803 where it is elided and assumed to be consistent with copyright.
[604] See discussion in Macmillan, F. "Commodification and Cultural Ownership" ("Macmillan Ownership") 35 Barendt **n296** at 28 and Netanel, N.W. "Copyright and the First Amendment: What Eldred Misses – and Portends" 127 ("Netanel Eldred"), at 130 – all of these are found in Griffiths/Suthersanen **n136**.
[605] Birnhack Copyrighting **n601** in Torremans Copyright **n13,** 43. For a detailed analysis and overview of the issue, see Jehoram **n574** 275, Loughlan **n599,** 36 and Netanel, N. W. "Locating Copyright Within The First Amendment Skein" October, 2001 54 Stan. L. Rev. 1 ("Netanel Skein").
[606] Loughlan, **n599** 38.
[607] *Suntrust Bank v Houghton Mifflin Co*., 268 F.3d 1257 (11th Cir. 2001) ("*Wind Done Gone*") .
[608] *Wind Done Gone*, **n607** 1263-5.
[609] *Wind Done Gone*, **n607** 1265-76.
[610] *Wind Done Gone*, **n607** 1276.
[611] *Wind Done Gone*, **n607** 1276. See discussion in Griffiths, J. "Not such a 'Timid Thing': The UK's Integrity Right and Freedom of Expression" 211 in Griffiths/Suthersanen **n136**, 227 and Netanel Skein **n605** at 2, 82-4.

on copyright, First Amendment principles must animate our understanding and application of copyright law."[612]

Findings of copyright infringement have also been avoided by courts in the United States by looking to the concept of the public interest, rather than to the First Amendment. This has been when there was no substitute for the copyright work - in *Rosemount Enterprise v Random House* regarding new information in a biography of secretive public figure Howard Hughes ("*Howard Hughes*")[613] and in *Time Inc v Geis* regarding images of President Kennedy's assassination ("*Kennedy*").[614] These judicial approaches were combined by a district court in *Holliday v CNN* when it considered footage of the beating of Rodney King in Los Angeles ("*Rodney King*"). It considered that the First Amendment provided an additional defence to copyright infringement when images were broadcast of images in exceptional, socially important circumstances and the use of words alone to describe the event could not serve the democratic process.[615]

In Canada, there is a right to free speech in the Canadian Charter of Human Rights and Freedoms ("the Charter") which the Federal Court accepted in 1984[616] could be a possible defence to copyright infringement[617]. The Federal Court in 1996 in *Cie Generale Des Establishments Michelin – Michelin & Cie vs CAW – Canada* considered this in relation to use of the Michelin "Bibendum Man" symbol in a union protest ("*Bibendum*").[618]

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[612] Netanel Eldred **n604** in Griffiths/Suthersanen **n136**, 148; and Birnhack Copyrighting **n601**in Torremans, Copyright, **n13** 46.
[613] *Rosemount Enterprise v Random House* 366 F.2d. 303, 309-311.
[614]*Time Inc v Geis* 293 F. Supp 130, 145-6 and see Loughlan **n599** 37.
[615]*Holliday v CNN*, this case is unreported. See detailed analysis of the transcript in Reis, L. A. "The Rodney King Beating - beyond fair use: a broadcaster's right to air copyrighted videotape as part of a newscast." Winter, 2005 13 J. Marshall J. Computer & Info. L. 269, 272, 284 et seq and comment at 304-5 and 310 and Loughlan, **n599** 38.
[616] *R v James Lorimer & Co Ltd* T 2216-81 [1984] 1 F.C. D 11491982.
[617] Cf **n598**
[618] *Cie Generale Des Establishments Michelin – Michelin & Cie vs CAW – Canada* (T.D.) T-825-94 [1997] 2 F.C. 306 1996 F.C. LEXIS 199 ("*Bibendum*").

The court confirmed that the right to free expression in the Charter could be relevant to copyright.[619] At a general level, however, it considered, resonant of *Harper & Row*, that Canadian copyright legislation and its limits comprised a reasonable and justifiable restriction on freedom of expression and were not inconsistent with the Charter.[620] The court also considered this particular use of a copyright work, balanced it with the nature of the expression and concluded that a finding of infringement would not involve a breach of rights to free expression.[621] The defendants were not entitled to use the private property of Michelin as a "vehicle" for conveying their anti-Michelin message.[622]

2.3.3 Free Expression and Trade Marks

Conflict can also arise between free expression and trade marks, notably in critical comment cases,[623] with cases having arisen in France, South Africa and the United States.

2.3.3.1 France

The Tribunal de Grande Instance de Paris in 2001, considered in *Societe Gervais Danone v Societe le Reseau Voltaire* ("*Danone*") the use of the domain name "jeboycottedanone.net" and also of a sign including a Danone logo, in an internet campaign challenging redundancies and restructuring by Danone.[624] The court

[619] *Bibendum*, **n618** para 78, 86 et seq, 102-3, 108, 111, 112.
[620] For further details, see Gendreau, Y. "Copyright and Freedom of Expression in Canada" 219 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 230-2, also Gendreau, Y "Canadian Copyright Law and its Charters" 245 in Griffiths/Suthersanen **n136**, 251-2.
[621] *Bibendum*, **n618** paras 95, 98-9, 101-3, 106.
[622] *Bibendum* **n618** headnote, paras 79, 83, 98-9, 105.
[623] See **p12**
[624] *Societe Gervais Danone v Societe le Reseau Voltaire* [2003] E.T.M.R 26 Tribunal de Grande Instance (Paris) (2001)) ("*Danone*")

discussed free speech, although the basis for this is not clear.[625] It noted that this right was accompanied by responsibilities and should be used within a legal framework and strictly as necessary for the aims pursued, to avoid the use of it becoming an abuse. [626] The court then held that the use of "Danone" in "jeboycottedanone.com" was in accordance with responsible exercise of the right to freedom of expression. It did not consider this to be so in respect of the use of the Danone logo, which it found could weaken the trade mark.[627]

Broadly similar issues arose in *Esso Francaise SA v Association Greenpeace France ("ESSO")*[628] in 2002. This involved the use of "ESSO" and "E$$O" on the website of Greenpeace and the use of "ESSO" as an underlying metatag. Similar to *Danone*, the first instance court granted an injunction in respect of "E$$O" but held that "ESSO" was covered by constitutional rights to free speech. In contrast, the appeal court found that the provider of the website and Greenpeace were not seeking to benefit commercially from these activities and that there was no confusion and so no trade mark infringement.[629] It also considered that the constitutional protection of free speech should be set aside only if it was strictly necessary to do so for the protection of trade marks. Trade marks had an economic nature; and if conduct involved no damage to this, then free speech should not be inhibited.[630]

The French Cour de Cassation in 2006 in *Comite Contre le Malade Respiratoire et law Tuberculose ("CCMRT") v Soc J.T. International GmbH* considered the use of the "Camel" trade mark by a public health body, in a parodic manner, in an anti-smoking campaign (this case will be referred to as "*Camel*") which did not include the

[625] For discussion of this, see Strowel/Tulkens **n296** in Griffiths/Suthersanen **n136**, 300 stating that the court considered free speech to be a constitutional right .
[626] *Danone*, **n624** paras 8 and 9.
[627] *Danone*. **n624** para 11. See comment in Geiger Safeguard **n13**,268-70.
[628] *Esso Francaise SA v Association Greenpeace France* [2003] E.T.M.R. 35, 2002 decision appealed in 2003, see *Esso Francaise SA v Association Greenpeace France* [2003] E.T.M.R. 66 ("*Esso*")
[629] *Esso*, **n628** paras 7-8.
[630] *Esso* **n628** para 9, in the context of remedies. This approach was echoed in *Esso SA v Association Greenpeace France* [2004] E.T.M.R. 90 and *Esso Plc v Greenpeace France* [2006] E.T.M.R. 53.

trade marks of all tobacco manufacturers.[631] The lower appeal court considered there to have been disparaging use of the trade mark, which it did not find to be justified on the basis of public health within the French Civil Code and article 10 ECHR.[632] The Cour de Cassation considered, however, that this use of the trade mark was not an abuse of the right of freedom of expression.[633]

2.3.3.2 South Africa

In South Africa in 2005, the Constitutional Court in *Laugh It Off v South African Breweries ("Laugh it Off")*[634] also considered the proper relationship between trade marks and free expression. This case concerned an anti-capitalist and anti-brand activist [635] who placed on T-shirts variations of the labels for "Carling Black Label" beer. This was argued to constitute trade mark infringement by dilution through blurring or tarnishing.[636] The activist relied on the constitutional right to free expression.[637] The lower Supreme Court held that South African trade mark law must

> "be construed in the light of the Constitution and applied in a manner that does not unduly trample upon freedom of expression. This approach would necessitate the weighing-up of the constitutional safeguard of free expression of the unauthorised user against the right to intellectual property of the trade mark owner". [638]

The Constitutional Court approved this statement. In carrying out this balance, rather than considering first infringement and then free expression,[639] it took a more holistic approach. It balanced the interests of the trade mark owner against the right to free

[631] *Comite Contre le Malade Respiratoire et law Tuberculose ("CCMRT")v Soc J.T. International GmbH* Case Note at IIC 2007(3) 357.
[632] The Case Note does not refer to the basis, but it is included in the case heading.
[633] See discussion in Geiger Proportionality **n584**, 320, 325-6.
[634] *Laugh It Off v South African Breweries* Case CCT42/04 available via http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 ("*Laugh it Off*").
[635] *Laugh it Off*, **n634** paras 4, 9, 14.
[636] *Laugh it Off*, **n634** paras 1, 3,4, 13.
[637] Section 16(1) Constitution of the Republic of South Africa, *Laugh it Off* **n634** paras 1, 2, 12.
[638] *Laugh it Off*, **n634** para 18.
[639] *Laugh it Off*, **n634** para 43.

expression of the alleged infringer, to establish whether there could be trade mark infringement in the first place.[640] As part of this, it reviewed the respect for free expression in case law of other jurisdictions and legal instruments[641] and considered the nature of a trade mark infringement action.[642]

The Constitutional Court concluded that the trade mark legislation must be interpreted in each case to "bear a meaning which is the least destructive of other entrenched rights and in this case free expression rights."[643] It considered, like the French court in *ESSO*, that trade marks had an economic function[644] and that a trade mark owner seeking to prevent a use which was protected by the constitution must establish a likelihood of substantial economic detriment.[645] This form of detriment was not pleaded here and it could not be assumed.[646] Sachs J went on to stress that the process should not involve the limit of one right by another, but rather a balance of competing rights in the light of the facts;[647] and that here the exercise of free speech by way of the T-shirts was first much more significant than the trade mark right and could not have been carried out without use of the trade mark.[648]

Laugh it Off was considered by the late Pumfrey J in *Miss World v Channel 4* ("*Miss World*").[649] This involved the broadcast of a television programme called "Mr Miss World" about transsexuals and an application for an interim injunction. Freedom of expression was raised, given a provision in the HRA which specifically addresses the

[640] *Laugh it Off*, **n634** para 44.
[641] *Laugh it Off*, **n634** para 45.
[642] *Laugh it Off*, **n634** para 48.
[643] *Laugh it Off*, **n634** para 48.
[644] See **n628** and **p104**
[645] *Laugh it Off*, **n634** para 56.
[646] *Laugh it Off*, **n634** para 57. For analysis of this decision, see Tanziani, D "South Africa: trade marks – infringement" E.I.P.R. 2006, 28(3), N45-49 and Rimmer, M. "The Black Label: Trade Mark Dilution, Culture Jamming and the No Logo Movement", (2008) 5:1 *SCRIPTed* 70 @: http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/rimmer.asp, ("Rimmer") 72-6, 87-101.
[647] *Laugh it Off*, **n634** paras 84-8 (regarding factors which may be taken into account, although these were not exclusive) and 90-101 in respect of the facts.
[648] *Laugh it Off*, **n634** para 102.
[649] *Miss World* **n528**

grant of interim injunctions when this may affect freedom of expression.[650] Channel 4 referred to *Laugh it Off* in support of the argument that their use of "Miss World" was protected by article 10 ECHR.[651]

Pumfrey J referred to the statements in *Laugh it Off* regarding the need for economic harm to the trade mark,[652] but found it difficult to accept that free expression questions could arise out of the use of a trade mark, unless there was use for political reasons.[653] In any event, he found that article 10 ECHR questions did not arise as the facts.[654] He also considered that the use of the trade mark in *Laugh it Off* had been so disconnected from the ordinary function of a trade mark, which he saw as an indication of origin and quality, that the trade mark was not affected[655] - and that if *Laugh it Off* had been heard in England, article 10 ECHR may have been relevant.

2.3.3.3 United States

There has been a great deal of consideration of the relationship between trade marks and free expression in the United States. It is now well established that it is not inconsistent with the First Amendment for there to be trade mark infringement when there is use of a trade mark in a commercial context and consumer confusion or dilution of the trade mark.[656] Outwith these boundaries, matters become complex.

A useful example and an important decision is that of the Court of Appeals in 2002 of the Ninth Circuit in *Mattel, Inc v MCA Records ("Barbie Girl")*.[657] This case involved the use of the trade mark "Barbie" in a song "Barbie Girl". The Court of

[650] Section 12(3) HRA See also *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) 2008 WL 925042 for consideration of this provision.
[651] *Miss World*, **n528** paras 29-31, 44, 45.
[652] *Miss World*, **n528** paras 32-5.
[653] *Miss World*, **n528** paras 36-8.
[654] *Miss World*, **n528** para 41-2, 47.
[655] *Miss World*, **n528** para 38.
[656] See also Loughlan, **n599** 33-5.
[657] *Mattel, Inc v MCA Records* 296 F. 3d ("*Barbie Girl*").

Appeals held that the use was descriptive and balancing the trade mark legislation and free expression, there was no infringement.[658] Regarding dilution, the Court of Appeals accommodated the apparently contradictory need for commercial use and an exception in respect of non commercial use, by considering that the exception would apply if there was use which was not wholly commercial, such as use in parody and satire as in the "Barbie Girl" song.[659] This could enable First Amendment interests to be protected in relation to dilution.[660]

This approach was echoed in the decision of the Court of Appeals of the Sixth Circuit in 2003 in *Taubman v Webfeats and Mishkoff ("Taubman").*[661] Like *ESSO*[662] and *Danone,*[663] this involved use of a trade mark in the domain name of a critical comment site. The Court of Appeals found that even if this was commercial use, there was no likelihood of confusion and found it to be important that there was a disclaimer on the website.[664] In terms of dilution, the court found the conduct to be within the non commercial use exception and "purely an exhibition of Free Speech" entitled to the protection of the First Amendment".[665]

2.3.4 A different contribution

With the exception of *ITP* and *Miss World*, the cases considered have involved infringement of IP. Human rights arguments have also been used in challenges to IP or related legislation, with courts adopting similar approaches to that seen so far and focussing on the content of legislation and the need for balance.

[658] *Barbie Girl*, **n657** 900-2.
[659] *Barbie Girl*, **n657** 906-7.
[660] *Barbie Girl*, **n657** 903-6.
[661] *Taubman v Webfeats and Mishkoff* 319 F 3d. 770 (2003) ("*Taubman*").
[662] See **n628**
[663] See **n624**
[664] *Taubman*, **n661** paras 17-18.
[665] *Taubman*, **n661** para 20. For wider analysis of the field, see Rimmer **n646**, 108-113

2.3.4.1 The UK and EC experience

In 2001, the ECJ in *Netherlands v European Parliament* ("*Biotechnology*")[666] considered the validity of the EC Directive on Legal Protection of Biotechnological Inventions ("the Biotech Directive").[667] The Netherlands argued that the Biotech Directive was invalid, as it permitted patenting of inventions in respect of body parts, which was said to be inconsistent with the right of human dignity - a fundamental principle of EC law. The ECJ confirmed that the right to dignity was an EC fundamental right.[668] It noted, however, that the Biotech Directive[669] included its own internal balance and limitations through restrictions on patenting of life per se, the need for a natural element to be combined with a technical process to enable it to be used for industrial application [670] and prohibitions on patenting contrary to "ordre public" and morality[671] and to human dignity.[672] As a result, the Biotech Directive as framed was not inconsistent with human dignity.

In *Levi*,[673] Tesco had argued that the underlying EC trade marks legislation was invalid, as it was inconsistent with EC fundamental rights in respect of free movement of goods, property and expression. Pumfrey J rejected this as "startling" and noted the wealth of established cases in which courts have sought to reconcile IP and free movement, without considering that this was inconsistent with fundamental rights.[674]

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[666] *Biotechnology* **n263**
[667] Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological Inventions OJ L 213, 30.7.1998 ("Biotech Directive")

[668] *Biotechnology* **n263** paras 69, 70, see also Advocate General Jacobs at paras A 193 and 197). See discussion in Bulterman, M.K. and Kranenborg, H.R. "What if rules on free movement and human rights collide? About laser games and human dignity: the Omega case". E.L. Rev. 2006, 31(1), 93-101, 96 et seq.
[669] Article 5(1) Biotech Directive.
[670] Paras 71-5 **n263** *Biotechnology,* article 5 Biotech Directive. See also paras A186-8, A199 *Biotechnology*
[671] Article 6 Biotech Directive, paras 76 *Biotechnology* **n263**. See also para A201 *Biotechnology*
[672] 38th recital to preamble, para 76 *Biotechnology* **n263**.
[673] See **n415**
[674] *Levi*, **n415** paras 4, 23, 24, 45-55

Similar arguments were raised before the ECJ in 2006 in *Laserdisken ApS v Kulturministeriet* ("*Laserdisken*").[675]

Laserdisken involved the validity of the EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society[676] and the Danish implementation of it which included international exhaustion of rights.[677] Denmark argued that this was consistent with its obligations under the directive, as IP should not restrict the rights of others to receive information The ECJ again confirmed the place of fundamental rights in EC jurisprudence and that these rights included those in the ECHR, which had special status in this regard.[678] Like the English court in *Levi*,[679] however, the ECJ noted that these rights not only included the freedom of expression and receiving information but also the right to enjoyment of property of the copyright owner;[680] and that article 10(2) ECHR included limits, such as on the basis of the public interest, which could cover a narrower exhaustion regime.[681]

2.3.4.2 The United States experience

In 1987, the Supreme Court in *San Francisco Arts & Athletic Inc v United States Olympic Committee* considered a challenge to legislation restricting the use which could be made of the term "Olympic" (this is known as the "*Gay Olympics*" case).[682] The Supreme Court held that the interests of the organisers of the 1984 Olympic Games in the term "Olympic" prevailed over First Amendment arguments of those others who may wish to use the term. A key part of this decision was that San

[675] *Laserdisken ApS v Kulturministeriet (C479/04)* [2007] 1 C.M.L.R. 6 ("*Laserdisken*").
[676] Council Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society O.J. L 167 22 June 2001
[677] For details of exhaustion, see **p91**
[678] *Laserdisken* **n675** para 61.
[679] See **p91-2**
[680] *Laserdisken*, **n675** para 62.
[681] *Laserdisken*, **n675** paras 63-8.
[682] *San Francisco Arts & Athletic Inc v United States Olympic Committee* 483 U.S. 522 ("*Gay Olympics*").

Francisco Arts & Athletic Inc wished to engage in commercial speech, which was entitled to less protection than political speech and also that the organisers could still promote their event in other ways.[683]

Copyright has also been favoured over free speech in challenges to legislation which has been argued to extend IP and its impact - both indirectly, in relation to anti-circumvention technologies[684] and also more directly, through the introduction of a longer copyright term.

Section 1201 of the Digital Millennium Copyright Act 1998 prevents the supply of technology, or information about it such as software code, which can get round anti-circumvention measures. This legislation has faced challenges that it is inconsistent with free speech in respect of the anti-circumvention technology itself and also in respect of the limits imposed on access to material for purposes which could be covered by fair use, or to material which is outside its copyright term.

Courts have considered that these restrictions on free speech are legitimate and proportionate. An example is a 2001 decision of the Court of Appeals for the Second Circuit *Universal City Studios and others v Corley* ("*Corley*").[685] Although the circumvention software was found to be capable of some First Amendment protection,[686] it was a tool which could be used to neutralise the anti-circumvention measures. As these were seen as important security devices and akin to burglar alarms, this use of the software for unlawful purposes should "inform and limit the scope of its First Amendment protection."[687]

[683] See consideration in Barendt **n296** in Griffiths/Suthersanen, 30 and Netanel Skein **n605**, 19.
[684] As considered in Australia in *Sony*, see **n565** and **p95**
[685] *Universal City Studios and others v Corley* 273 F. 3d 429 ("*Corley*").
[686] *Corley*, **n685** 445-452.
[687] *Corley*, **n685** 452, 454-5. See criticism of this decision in Samuelson, P. "The Constitutional Law of Intellectual Property After *Eldred v. Ashcroft*" Journal of the Copyright Society, Vol 50, available at http://people.ischool.berkeley.edu/~pam/papers/JCS%20post-Eldred.pdf ("Samuelson") 17-21. See also *United States v Elcom Ltd* 203 F. Supp. 2d 1111, 1126-1135 regarding a challenge to the validity of an indictment for selling a computer program enabling users to circumvent restrictions.

The Supreme Court considered the extension of the copyright term in 2002 in *Eldred v Ashcroft ("Eldred")*[688]. It was argued that this extension was in breach of the First Amendment, as speech in respect of copyright works would now be subject to copyright and its restrictions for a longer period.[689] As in *Harper & Row,*[690] however, the Supreme Court considered there to be no conflict between copyright and free speech. It referred to the adoption of the two constitutional provisions at the same time and also to copyright law's own free speech safeguards through the idea/expression dichotomy and fair use.[691] As a result, the Supreme Court considered that "when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary".[692]

This decision has been much criticised.[693] Despite its broad support of copyright, however, the decision in *Eldred* has again[694] not ended debate in respect of copyright and free speech.[695] The Supreme Court's reference to altering "traditional contours" has been the basis for further, so far unsuccessful, constitutional challenges to new copyright legislation.[696] A further challenge was made, however, in *Golan v Gonzales*[697] and in 2007 elements of this survived an initial challenge before the Court of Appeals for the Tenth Circuit.

[688] *Eldred v Ashcroft* 537 U.S. 186 ("*Eldred*").
[689] *Eldred*, **n688** 193.
[690] See **p100**
[691] *Eldred*, **n688** 219-221.
[692] *Eldred*, **n688** 221.
[693] See The Free Expression Policy Project "The Progress of Science and Useful Arts" 2003, updated 2004 at http://www.fepproject.org/policyreports/copyright2d.pdf, Section II; Samuelson **n687**; and Macmillan Ownership, **n604** 64 and Netanel Eldred **n604**, 132 et seq in Griffiths/Suthersanen **n136**.
[694] See **p101-2**
[695] See Netanel Eldred **n604** 127 in Griffiths/Suthersanen **n136** 144 et seq regarding anticircumvention legislation, and Birnhack, M. "Copyrighting Speech: A Transatlantic View" 37 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 48.
[696] *Luck's Music Library v Ashcroft* United States District Court of the District of Columbia 321 F. Supp. 2d 107; *Luck's Music Library v Gonzalez 2005 U.S. App. LEXIS 9419; Kahle v Gonzales* 487 F.3d 697.
[697] *Golan v Gonzales* F.3d 1179.

Following *Eldred*, a further challenge in 2004 was made to legislation regarding anti-circumvention technologies in *321 Studios v Metro Goldwyn Mayer Studios, Inc*.[698] This was again unsuccessful, with the court considering that the First Amendment could not save conduct which had been found to be illegal[699] and also that it was possible to access works non digitally for the purposes of fair use, even if this could be difficult.[700] The court also noted that 'it is a stretch to claim that *Eldred* mandated absolute First Amendment protection for fair use of copyrighted works'.[701]

2.3.5 Lessons and opportunities

2.3.5.1 The cases so far

2.3.5.1.1 Overview

Courts throughout the world have considered a range of human and IP rights on the basis of national legislation, human rights instruments, constitutions and principles of fundamental rights. There has been seen to be criticism in respect of some outcomes of these cases. This review has revealed wide acceptance, however, of the need to engage with the interface between the relevant IP and human rights and to balance them and their limits in the light of the facts of the case. This confirms that not only should courts hearing patent cases in the UK have regard to human rights under the HRA, but that they likely will be prepared to do so.

The cases also suggest that there is a range of guidance available to these courts when considering the possible impact of human rights on IP and the approach taken in *Levi*, when the court referred to *Ashdown*, suggested that courts considering patents will

[698] *321 Studios v Metro Goldwyn Mayer Studios, Inc*, 307 F. Supp. 2d 1085 ("*321*").
[699] *321*, **n698** 1097.
[700] *321*, **n698** 1104.
[701] *321*, **n698** 1101, 1102-3.

look to cases involving other IP rights[702] The nature of this guidance is uncertain, however, as the approaches adopted have varied, including within jurisdictions – compare *Harper & Row*[703] and *Wind Done Gone*[704], *Harry Potter*[705] and *Church of Scientology*[706] and *Utrillo*[707] and *Camel*.[708] Conversely, some common themes are to be discerned across jurisdictions, say between *Laugh it Off*[709] and *Esso*[710] and between *Ashdown*[711] and *Rodney King*.[712]

Looking at the cases in more detail, sometimes there would have been no infringement, irrespective of any human rights arguments, because relevant IP based tests were not met. This was so in *Taubman*,[713] *Plon*,[714] *Barbie Girl* (regarding trade mark infringement)[715] and *Esso*.[716] When there may have been infringement from the IP perspective and courts did engage with human rights, some courts still found that a finding of infringement or the existence or protection of IP was not inconsistent with human rights. This was so in *HRH*,[717] *Harry Potter*,[718] *Levi*,[719] *Bibendum*,[720] *Harper & Row*,[721] *Eldred*,[722] *Biotechnology*[723] and *Laserdisken*.[724] In other cases, however, this was not so and other rights and interests prevailed over IP: consider *Church of Scientology*,[725] *Ashdown*,[726] *Wind Done Gone*,[727] *Barbie Girl* (regarding dilution),[728]

[702] *Levi*, **n415** para 41.
[703] See **n602 and p100**
[704] See **n607 and p101**
[705] See **n579 and p97**
[706] See **nn585-9 and p98**
[707] See **n594 and p99**
[708] See **nn631-3 and p104**
[709] See **nn634-58 and pp105-6**
[710] See **nn628-30 and p104**
[711] See **nn548-62 and pp92-4**
[712] See **n615 and p102**
[713] See **n661 and p108**
[714] See **n595 and p99**
[715] See **n657 and p107**
[716] See **n628 and p104**
[717] See **n25 and p94**
[718] See **n579 and 96-7**
[719] See **n415 and p109**
[720] See **n418 and p102-3**
[721] See **n602 and p100** see also **p110** re *Gay Olympics* which did not involve an IP right per se.
[722] See **n688 and p111-2**
[723] See **n263 and 108-9**
[724] See **n675 and p109-10.** See also *Corley* and *321* **nn685 and 698,pp111-2**
[725] See **nn585-9 and pp97-8**
[726] See **n23 and pp92-3**
[727] See **n607 and p101**

Sony,[729] *Danone*,[730] *Camel*,[731] *Rodney King*[732] and also *Kennedy*[733] and *Howard Hughes*,[734] taking a different approach. A more holistic approach to infringement and free speech was taken in *Laugh it Off* and this too led to free speech prevailing.[735]

2.3.5.1.2 Extreme facts

When human rights have prevailed, there have been extreme factual situations, rather than mere interference with the legitimate interests of others. [736] From the second set of cases, *Ashdown*,[737] *Rodney King*,[738] *Kennedy*[739] and *Howard Hughes*[740] suggest a genuine need to see actual words or images; in *Church of Scientology*[741] there was desire to make available for debate secret controversial religious information; in *Danone*,[742] *Laugh it Off* [743]and *Wind Done Gone*[744] there was legitimate and serious critical comment and in *Camel* there was an advertising campaign for health purposes. *Barbie Girl*[745] and *Sony*[746] may be said to involve less extreme situations, however, the court in *Barbie Girl* did recognise the value of parody and critical comment and the court in *Sony* stressed the importance of protection of property.

2.3.5.1.3 A legal vehicle

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[728] See **n657 and 107**
[729] See **n565 and p94-5**
[730] See **n624 and p103-4**
[731] See **nn631-3 and p104**
[732] See **n615 and p102**
[733] See **n614 and p102**
[734] See **n613 and p102**
[735] See **n634 and p105-6**
[736] See also Macmillan Patfield **n599** in Barendt Yearbook **n599**, 218.
[737] See **n726**
[738] See **n732**
[739] See **n733**
[740] See **n734**
[741] See **n725**
[742] See **n730**
[743] See **n735**
[744] See **n735**
[745] See **n728**
[746] See **n729**

But even in these cases, the determining factor was often not the facts and the outcome of the balancing analysis, but the availability of a legal means to enable human rights to prevail. For example, in *Wind Done Gone*,[747] *Barbie Girl*[748] and *Rodney King*[749] the constitutional nature of the First Amendment meant that the court was able to give additional weight to free speech and in *Sony*[750] the court turned to Australian constitutional and fundamental rights arguments.

Most importantly here, without the public interest provision in the CDPA, the Court of Appeal in *Ashdown* could not have made a decision based on freedom of expression and the public interest. This is so even although it thought that there was a "rare case" where these matters should prevail over copyright. The HRA itself did not provide the necessary means, or what will be termed here a legal vehicle, to enable this to be done.

2.3.6 Moving forward with human rights

2.3.6.1 The need for a vehicle and structure

An additional legal vehicle would be required for human rights to prevail in patent actions in the UK. There is, however, no equivalent provision in the PA to the unusual public interest provision in the CDPA.

Further, the cases reviewed have involved courts considering one or two human rights, say, as in *Ashdown*, the right to property of the copyright owner and right to

[747] See **n607**
[748] See **n657**
[749] See **n615**
[750] See **n565**

freedom of expression. It is possible, however, for patent actions to involve three or four human rights: of the patent owner, of other innovators, of the pupil and of the benevolent manufacturer.[751] The cases considered here do not provide any means by which courts should consider this range of rights within an action. Rather, they confirm the need to have regard to the facts, the need for balance and that there is greater scope for restricting IP when there are extreme factual circumstances. New arguments must be developed, therefore, to provide structured guidance in cases which involve several human rights.

2.3.6.2 The need for competition

The combination of the PA, the HRA and cases involving IP and human rights from the UK and also from elsewhere, cannot provide a means of restricting the enforcement of IP when there is apparently infringing conduct. Accordingly, and in the light of the number of cases considered here which have involved copyright and the public interest in various forms, it is interesting that a leading commentator considered there to be a role for competition law in addressing copyright and the public interest. She stated that

> "[e]ven legal recognition, in the form of a public interest defence, of the fact that the exercise of the private copyright power may adversely affect the public interest in a vigorous public domain, may be insufficient to address the structural effects of private global concentrations of copyright power. To counter such structural effects, we need to think more broadly about the potential role of …. competition law at the international level."[752]

This point was made in the context of the activities of copyright owning corporations and the possible need for action in respect of competition at international policy level

[751] See **p14**
[752] See also in this regard Macmillan Ownership **n604** in Griffiths/Suthersanen **n136**, 65 and Macmillan Patfield **n599** in Barendt Yearbook **n599**, 222.

– which has been seen to be moving slowly.[753] Another leading commentator has stated, although not in the context of the use of competition in individual enforcement actions, that less tolerance should be accorded to the exercise of market power in respect of copyright, where this could have a negative impact on freedom of expression and where this could prevent development of substitutes and their acceptance. [754] This is resonant of the discussions in respect of network effects[755] and also extreme factual circumstances.[756] It has also been argued more generally that there should be a link between free competition and free expression[757] and also, in respect of copyright, that to the extent that its internal balances do not reflect human rights concerns and a further "external correction" may be required, there may be a role for competition and abuse of a dominant position.[758]

The place of competition when considering IP and human rights, as suggested by this body of respected commentary, should be explored. Given its status in the laws of the UK and the potential for raising a patent action to be abuse of a dominant position, article 82 could, rather than being a vehicle for human rights to prevail over patents, enable courts to restrict the rights of the patent owner to prevent the conduct of others. A key question in respect of such a role for article 82 is the extent to which it can indeed be an abuse of a dominant position to enforce a patent. Accordingly, the next chapter will review in detail cases which have considered abuse and enforcement of IP and also related principles, notably in respect of abuse and refusal to license IP.

[753] See **p70-1**
[754] Netanel Marketplace **n23** in Leveque/ Shelanski, in particular 166-7 and Netanel Marketplace 2 **n23** in Macmillan Directions 4 **n23,** in particular 28.
[755] See **p77-8**
[756] See **pp11-2,14**
[757] Phillips, J."Databases, the Human Rights Act and EU Law?"401 in Griffiths/Suthersanen **n136** 417.
[758] Torremans P.L-C. "Copyright as a Human Right" 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands 11-12, quote on 11 and 13-4. See also Torremans, P.L-C. "Copyright (and other Intellectual Property Rights) as a Human Right" 195 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 207-9.

3 IP and competition: a more individual analysis

3.1 Introduction

The relationship between IP and competition has been seen to be complex.[759] This is particularly so if competition is used to restrict the ability of an IP owner to refuse to share the technology or material which underlies the right, or, as is of present interest, to enforce its rights in court. Leading commentators have summarised the issue in the following way:

> "[i]ntellectual property law generally permits owners to enforce their rights by means of an injunction, and does not compel them to use or license those rights to others. For antitrust law to reach a contrary conclusion would require it to make illegal precisely the same conduct that the intellectual property laws explicitly authorize. Doing so would significantly reduce the innovation incentive intellectual property provides, not only to those who refuse to use the invention at all, but also to those who wish to licence their rights only in certain conditions."[760]

This chapter reviews cases which have considered the interface between IP and competition, from the perspective of unilateral conduct of the IP owner,[761] in both IP infringement actions and in regulatory investigations involving IP. It will address refusals to license and then enforcement actions, with cases again[762] considered which involve IP rights other than patents.

[759] See **pp67-85**
[760] Hovenkamp **n433** in Leveque/Shelanski, **n23** 16.
[761] The terms of licences which the IP owner was prepared to grant will not be considered in terms of article 81 EC Treaty see also **n435,** although article 82 and equivalent could also be relevant see eg *Compagnie Maritime Belge Transports SA v Commission of the European Communities* (C-395/96 P) [2000] E.C.R. I-1365
[762] See range of cases considered in chapter 2.

Decisions from the UK and EC decision making bodies regarding the prohibition on abuse of a dominant position are of main importance. Reference will also be made to decisions from the United States, but not to Canada and Australia as the legislation on point[763] has not given rise to relevant case law. In South Africa, which has also been seen to have legislation of interest,[764] in 2002 the Competition Commission investigated Glaxo Smith Kline and Boehringer Ingelheim in respect of refusals to license patents relating to treatment of HIV/AIDS. These patents were considered to be an essential facility and in the light of the special treatment of essential facilities in the legislation,[765] the patent owners were found to have abused a dominant position.[766] Important as this decision is, given that article 82 does not specifically address essential facilities, it is of no direct relevance. The International Competition Network's Working Group on Unilateral Conduct has considered IP and competition[767] and in 2007 prepared a report considering IP and abuse of dominant position. This report was mainly focused on the EC and the United States and it will not, therefore, be considered separately. [768]

3.2 IP and refusal to share

3.2.1 The EC Perspective

3.2.1.1 Preliminary points

[763] See **nn426 and 429 and p71**
[764] See **n428, p71**
[765] Section 8, see **n428**
[766] See consideration in Nwauche, **n184** 482-3.
[767] A survey was carried out, for responses see http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-questionnaire-and-responses, in particular Fox, E. Unilateral Conduct Working Group Questionnaire http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/FOXQuestionnaireResponseAD.pdf and Drexl, J. 31 October 2006 ICN Unilateral Conduct Working Group: Responses to the Questionnairehttp://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/questionnaire/DrexlQuestionnaireResponseECandGermany.pdf
[768] "Report on the Objectives of Unilateral Conduct Laws" presented at the meeting of the ICN in Moscow, 2007. http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf. See in particular pp22, 27 and 38.

The very possibility for it to be abuse of a dominant position to refuse to license an IP right, may appear to be inconsistent with article 295 EC Treaty. This provides that the EC Treaty shall not prejudice the rules in member states governing ownership of property. This may suggest a response to the arguments that the pre-eminent role of article 82 in the UK could provide a key role in this work for the prohibition on abuse of a dominant position.[769] Yet courts considering article 82 and article 295 and also the question of free movement of goods and IP,[770] have found that article 295 does not mean that EC law cannot impose limits on IP. The search for the "dividing line"[771] between these two Treaty provisions led to the principle of exhaustion of right and the distinction between the existence and exercise of a right,[772] to the concept of the specific subject matter of an IP right[773] and to the principles considered here in respect of IP and abuse of a dominant position.

For there to be an abuse of a dominant position, it has been seen that there must first be a dominant position in a market as properly defined and that this will not arise necessarily from the ownership of a patent.[774] This chapter focuses, however, on the significant line of cases when courts, having found there to be such a dominant position, have then held that it could be abuse to refuse to license information or material which is the subject of IP. These cases are important here, as they developed important tests regarding the interface between IP and competition.

3.2.1.2 The starting point

[769] See **n407 and p69**
[770] See **nn539 and 675**
[771] See *Intel v Via*, **n25** para 37
[772] See *Etablissements Consten Sarl v Commission of the European Economic Community* (56/64) [1966] E.C.R. 299, para 10, p345 ; *Parke Davis,* **n454** paras 1 and 2; and *Intel v Via* **n25** para 36-7.
[773] See *Volvo v Veng*, **n488** para 8 and *Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A. 37.507/F3 . AstraZeneca* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37507/en.pdf. ("*Astra Zeneca*") para 741.
[774] See **p76**

These cases have their roots in a decision of the ECJ in 1974, from outside the IP context, in *Commercial Solvents Corp v Commission of the European Communities* ("*Commercial Solvents*").[775] The ECJ found that it could be abuse of a dominant position for a company to refuse to continue to supply a customer with a raw material, if the dominant company proposed to make a product with that raw material and the refusal eliminated competition from the customer, in relation to this proposed new product.[776] In the 1980s, the EC Commission then made it clear, consistent with the scepticism shown to IP at the time by competition regulators,[777] that it would be prepared to intervene in respect of the conduct of IP owners.[778] Notably, in 1984 this led to an investigation into IBM regarding computer interface information, which culminated in IBM providing an undertaking to supply and disclose this information.[779]

The first seminal IP decision came in 1988 with the decision of the ECJ in *Volvo AB v Erik Veng (UK) Ltd* ("*Volvo v Veng")*.[780] This involved a refusal by an IP owner to license others to manufacture spare parts for cars, when, unlike in *Commercial Solvents*, there had been no previous relationship between the parties. The ECJ confirmed that the right to prevent manufacture by others, even if the potential licensee would have made a reasonable payment, remained the very subject matter of the IP right; and that reliance on this right "cannot in itself" be an abuse.[781] Yet it did accept that refusal to license could still be abuse in "certain" cases and provided some examples based on the facts of that case.[782]

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[775] *Commercial Solvents Corp v Commission of the European Communities (6/73)*[1974] E.C.R. 223 ("*Commercial Solvents*")
[776] *Commercial Solvents* **n775** para 25.
[777] See **p72**
[778]Eg *Oy Airam AB v Osram GmbH* [1982] 3 C.M.L.R. 614
[779] See *Commission of the European Economic Communities* v *International Business Machines* [1984] 3 C.M.L.R. 147. See Anderman/Schmidt **n441** in Anderman Interface **n4** 64.
[780] See **n488**
[781] *Volvo v Veng*, **n488** paras 8,11. The approach was confirmed on the same day by the ECJ in *Consorzio Italiano della Componentistica di Ricambio per Autoveicoli v Regie Nationale des Usines Renault* (C53/87) [1988] E.C.R. 6039 ("*CICRA*") regarding ornamental spare parts for car bodywork, para 15.
[782]*Volvo v Veng*, **n488** para 9. See also *CICRA*, **n781** para 16.

The approach of the ECJ in *Volvo v Veng*[783] suggests that although it did not propose that such cases would arise frequently, it was not prescribing the situations when they could. But subsequent cases provided more detailed and limited direction.

3.2.1.3 Evolving parameters

The first actual finding of an abuse of a dominant position as a result of a refusal to license IP[784] came in 1995, in the decision of the ECJ in *Radio Telefis Eireann and Independent Television Publications Limited* ("*Magill*").[785] This involved the refusal to grant a licence of copyright in respect of television listings, which had been sought by a company in Dublin so that the information could be included in a new composite listing. A copyright infringement action was raised in Ireland[786] and a complaint was made about this to the EC Commission.[787] The EC Commission found the refusal to license to have been an abuse of a dominant position[788] and the matter was ultimately[789] considered by the ECJ.

The ECJ held that in "exceptional circumstances", refusal to license would be an abuse. It set out the following criteria for these "exceptional circumstances": the work the subject of the IP would be used for the development of a new product[790] for which there is unmet consumer demand;[791] there is no justification for the refusal of

[783] See **n488**
[784] See discussion in MacQueen Copyright **n178**,17, 41 regarding consideration by the UK Monopolies Commission of licensing practices and refusals to license IP.
[785] *Magill*, **n454**
[786] *Radio Telefis Eireann v Magill TV Guide Ltd (Interlocutory Injunction)* [1986] E.C.C. 574
[787] See **p82-3**
[788] *Magill TV Guide Ltd v Independent Television Publications Ltd* (IV/31.851) Commission Decision 89/205/EEC of 21 December 1988 O.J. 1989 L78/43 4 C.M.L.R. 757 ("*Commission Magill*").
[789] First by the CFI *Independent Television Publications Ltd v Commission of the European Communities* [1991] E.C.R. II-575 and *RTE v. E.C. Commission* [1991] II E.C.R. 485.
[790] *Magill*, **n454** para 54.
[791] *Magill*, **n454** para 54.

the licence;[792] the refusal would exclude competition in a secondary market by denying access to raw material, which is indispensable to develop the new product for that market.[793]

The ECJ did not consider the potential consequences for IP of a finding of abuse, although arguments had been made in respect of this.[794] The ECJ did note, however, that the then draft of the Database Directive[795] included a provision for compulsory licensing of some collections of data.[796] This might suggest that the ECJ considered that it was appropriate to require sharing of television listings, as this was another collection of data. This view would also be consistent with comments of Advocate General Gulmann in *Magill*, who did consider in some detail the possible impact on IP of a finding of abuse. He suggested that a finding of abuse could be justified as these listings might not be deserving of copyright, as they lacked a creative element.[797] This perspective on *Magill* has been used to justify the decision and also to manage concerns regarding future encroachment upon other IP rights.[798]

Critics of the *Magill* decision could also have taken comfort from the limited nature of the criteria set out by the ECJ, given the contrast between them and the more open approach taken by the ECJ in *Volvo v Veng*. Yet in subsequent cases, courts took a fluid approach to the *Magill* criteria. *Tierce Ladbroke SA v Commission of the*

[792] *Magill*, **n454** para 55.
[793] *Magill*, **n454** para 56.
[794] Which were noted by the ECJ, *Magill* **n454** paras 34-6 and 38-41.
[795] Now Directive 96/9 on the legal protection of databases OJ L 77, 27.3.1996, p. 20–28.
[796] This was omitted from the final Directive. See Colston, C. "*Sui Generis* Database Right: Ripe for Review?" Refereed article, 2001 (3) *The Journal of Information, Law and Technology (JILT).* http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_3/colston .
[797] Opinion of Advocate General Gulmann in *Magill*, **n454** paras 15-6, 118-127 and 134-141.
[798] See Vinje, T.C. and Paisley, K. "Intellectual Property Licensing in Europe at a Crossroads: Advocate General Issues Controversial Opinion in Magill" I.C.C.L.R. 1994, 5(9), 321-323; Geradin, D. "Limiting the Scope of Article 82 EC: what can the EU learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom" CML Rev 41: 1519 -1553, 2004 ("Geradin"), 1528 cf Anderman Regulation **n392**, 211. Note that the decision has been justified from the perspective of a dynamic approach to competition, see Kallay, **n18** 126 etseq, NB 133-146.

European Communities ("*Tierce Ladbroke*")[799] in 1997, involved the seeking of licences to televise horse races in different countries. The CFI considered that this case could be distinguished from *Magill*, as the potential licensee was already in a strong position in the other market in question.[800] The CFI also stated that for refusal to license to be an abuse, the IP must be either essential for the proposed activity with there being no substitute or it must be required to develop a new product for which there was unmet demand. This suggests that an alternative, rather than a cumulative, approach should be taken to the *Magill* criteria.[801]

Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG ("*Oscar Bronner*")[802] in 1998 concerned requests for access to a successful existing local newspaper distribution network. The parties[803] and Advocate General Jacobs[804] approached the case from the perspective of essential facilities.[805] Although this was not an IP case, the ECJ considered the case on the basis of the *Magill* criteria.[806] The ECJ focused on the impact on another market and noted that the delivery system was not indispensable for those wishing to operate on this other market.[807] Further, the ECJ considered that for a system to be indispensable, it must not be economically viable for the business requesting access to set up an alternative system, on its own or with others.[808]

The focus in *Oscar Bronner* on "economically viable" suggests a flexible approach to the *Magill* criteria, given that this is not the same as "indispensable". The ECJ also

[799] *Tierce Ladbroke SA v Commission of the European Communities* (T504/93) [1997] E.C.R. II-923 [1997] 5 C.M.L.R. 309 ("*Tierce Ladbroke*")
[800] *Tierce Ladbroke*, **n799** para 130
[801] *Tierce Ladbroke*, **n799** paras 131
[802] *Oscar Bronner* **n413**
[803] See *Oscar Bronner*, **n413** para 24 referring to arguments made in this regard by Oscar Bronner.
[804] *Oscar Bronner*, **n413** para 33-4 (AG) see consideration of EC cases on similar issues but which were decided without reference to the doctrine, at paras 35-38 (AG) and of US and EC cases on essential facilities at paras 46-52 (AG).
[805] See p81-2
[806] *Oscar Bronner*, **n413** paras 39-41.
[807] *Oscar Bronner*, **n413** para 42-3.
[808] *Oscar Bronner*, **n413** para 44-5.

did not appear to consider it problematic that the access sought would not have led to the development of a new product. Further, in *Micro Leader Business v Commission of the European Communities*[809] ("*Micro Leader*)" in 1999, the CFI referred to the *Magill* criteria regarding attempts, on the basis of contractual terms and differential pricing, to prevent the parallel importing of French language software into France from Canada. The CFI also considered other factors, such as prices being fixed at an artificially high level,[810] which again suggests that the *Magill* criteria should not be viewed as complete and self-contained.

3.2.1.4 IMS: a more prescriptive approach?

The importance of the *Magill* criteria was revived, however, in 2004 by the ECJ in *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* ("*IMS*").[811] This concerned a reference from a German court in a copyright infringement action, involving structures for use in presenting pharmaceutical data. This proceeded for a time in parallel with a complaint to the EC Commission by NDC, regarding the refusal to license.[812]

As in *Oscar Bronner*, the parties and Advocate General Tizzano appeared to consider this question to be at least linked to the essential facilities doctrine;[813] and as in

[809] *Micro Leader Business v Commission of the European Communities* (T198/98) [2000] All E.R. (EC) 361 [1999] E.C.R. II-3989 ("*Micro Leader*").
[810] *Micro Leader* **n809** paras 1-4, 9, 50, 54-7.
[811] *IMS* **n495**
[812] See **p83**. Note Commission decision *NDC Health v IMS Health* Case COMP D3/38.044 (OJ 2002) L 59, p18 3 July 2001 ("*IMS Commission*") paras 169, 174, 181, 184, 185. This decision was quashed by the CFI in *IMS Health Inc v Commission of the European Communities* [2001] E.C.R.II-3193 and also in *IMS Health Inc v Commission of the European Communities* [2001] E.C.R. II-2349 and there was an unsuccessful appeal in *NDC Health Corp v Commission of the European Communities* (C-481/01 P (R)) [2002] E.C.R. I-3401. The regulatory aspect of the matter was formally brought to an end Decision of 13 August 2003 in Case COMP D3/38.044 Available via http://www.worldlii.org/eu/cases/ECComm/2003/48.html.
[813] *IMS*, **n495** paras AG35, AG 57-8, and AG71.

Magill, reference was made by an Advocate General to the lack of creativity involved in developing a work of this nature.[814] But yet again, the ECJ did not consider these matters. Instead, it focused on the *Magill* criteria.

Firstly, the ECJ (as Advocate General Tizzano had done) considered and justified the need for a new product to be developed. They both considered that this would ensure wider competition, the addressing of unmet consumer needs and limit the benefit of others from exploiting the innovation and investment of the IP owner. The Advocate General concentrated on a general need to encourage development of different goods which could address unmet consumer needs.[815] He also considered that the requirement was not inconsistent with *Volvo v Veng*, given that the facts there had necessarily involved the access seekers wishing to reproduce the spare parts.[816] The ECJ concentrated on the more specific issue of delivering new products which were not offered by this copyright owner.[817]

Regarding the rest of the *Magill* test, the ECJ did not engage with what might be a justification for refusal, stating that this was a matter for national courts.[818] It showed some fluidity regarding the need for competition to be excluded on a secondary market, considering that this market could be merely hypothetical or potential.[819] There was also, like in *Oscar Bronner*, an openness regarding the indispensability requirement. The ECJ considered that this would be met if there were alternative, albeit possibly less advantageous, means available, with the key question being whether there were technical, legal or economic obstacles such that development of

[814] *IMS*, **n495** para AG39
[815] *IMS*, **n495** paras AG 62, AG 64.
[816] *IMS*, **n495** para AG65.
[817] *IMS*, **n495** paras 37, 38, 48-9.
[818] *IMS*, **n495** para 51. See Stothers, C. "IMS Health and its implications for compulsory licensing in Europe." E.I.P.R. 2004, 26(10), 467-472 ("Stothers Implications"), 471 criticising the uncertainty for IP owners which could result. The approach of the ECJ was consistent, however, with it considering a reference from a national court – see **p70**.
[819] *IMS*, **n495** paras 39-45. See Geradin **n798**, 1529-30 and also Korah, V. (2006) *Intellectual Property Rights and the EC Competition Rules* Hart Publishing Oxford, UK and Portland, Oregon, USA, 147 suggesting that the need for another market could therefore be ignored.

these alternative means would be impossible or unreasonably difficult.[820] In respect of this, it found that regard could be had to the involvement of users in developing products including where, as in *IMS*, this had been done in conjunction with the industry, leading to an industry standard.[821]

The approach of the ECJ in *IMS* suggests that even if the *Magill* criteria can be expanded, they must still, ultimately, be satisfied. The ECJ stated in *IMS*:

> "[i]t is clear from that case law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumers demand, that it is unjustified and such as to exclude any competition on a secondary market."[822]

This quote confirms the relevance of the *Magill* criteria and the ECJ's views that, contrary to *Oscar Bronner* and *Tierce Ladbroke*, the criteria must all be met. But the passage also refers to it being "sufficient" that the conditions are met. This is not the same as "compulsory". This suggests, therefore, that a refusal to license could be abuse in other circumstances; this would also be consistent with the ECJ's general confirmation in *IMS* that the exercise of an exclusive right could in exceptional circumstances involve abusive conduct.[823]

The ECJ's decision in *IMS* was delivered on 29 April 2004.[824] The quite different decision of the EC Commission in *Microsoft* was adopted on 24 March 2004 and

[820] *IMS* **n495** para 28-9
[821] *IMS*, **n495** para 38.
[822] *IMS*, **n495** para 38.
[823] IMS, **n495** para 35. See also Anderman, S. "Does the *Microsoft* Case offer a New Paradigm for the 'Exceptional Circumstances' Test and Compulsory Copyright Licenses under EC Competition Law?" (2004) 1(2) CompLRev 1 http://www.clasf.org/CompLRev/Issues/Vol1Issue2Article1.pdf ("Anderman Paradigm"), 13.
[824] Note also discussion in Drexl, J. "Abuse of Dominance in Licensing and Refusal to License: 'A More Economic Approach' to Competition by Imitation and to Competition by Substitution" ("Drexl

delivered on 21 April 2004. The distinctions between these two cases and how they were then reconciled by the CFI in *Microsoft* are important for this work.[825]

3.2.1.5 Towards fluidity: the EC Commission Microsoft decision

The EC Commission investigation into Microsoft arose out of a complaint by Sun Microsystems in respect of Microsoft's failure to disclose information protocols regarding work group server operating systems. These were said to be required to enable other products to be designed which could interoperate with Microsoft's products.[826] There had already been a complaint and investigation into Microsoft in the United States on the basis of the Sherman Act, on similar, although not identical, issues. This had begun in 1998 and culminated in 2001 with a court approved settlement.[827]

The positions taken in this case exemplify the IP and competition debate and also the focus of this work. It involves the seeking of information to enable others to compete in existing markets, rather than to develop a new product; an industry with both dynamic innovation and network effects; communications opportunities which could have human rights implications for others; and IP rights in respect of which the IP owner has human rights. This case will therefore be considered in detail.

Imitiation" 647 in Ehlermann/Atanasiu **n10**, 656-60 regarding cases were considered in France and Germany around the same time and taking a different approach.

[825] The author has a CD-Rom containing the following "Commission Decision of March 2004", "Microsoft's Application for Annulment", "Microsoft's Reply to the Commission's Defence", "Microsoft's Observations on the Statements of Third Party Interveners", "CFI Report for the Hearing" and "Unofficial CFI Hearing Transcript." These are not confidential. Many thanks to Ian Forrester QC, White & Case, to Van Bael & Bellis and to Microsoft, for providing me with these for the purposes of my research.

[826] There was also a complaint initiated by the Commission concerning Microsoft's integration of its Media Player web browser with its client PC operating system, of less concern to this work.

[827] See summary in **n403** *Commission Microsoft* paras 14-20.

The most important aspect of the EC Commission's decision for present purposes is the legal test applied as to when there could be abuse. The EC Commission reviewed the cases available at the time, which, of course, did not include the ECJ decision in *IMS*.[828] The EC Commission considered that the tests set out in the authorities need not always be met and noted, resonant of the points made above,[829] that this approach was consistent with *Volvo v Veng* and *Micro Leader*.[830] Indeed, rather than applying another specific test, the EC Commission stated that the "entirety" of the circumstances in a case must be considered.[831]

The EC Commission did then go on to consider the *Magill* criteria, albeit in a rather unstructured manner.[832] It considered, notwithstanding arguments from Microsoft that information was already available in some form, [833] that there was a refusal to supply information and that this was part of a general pattern of conduct of Microsoft.[834] It considered that the information was indispensable[835] to enable other providers to ensure that their products could be interoperable (a term of constant debate throughout the case) with those of Microsoft, so that there could be viable competitor activity in the work group server market.[836]

The EC Commission also considered there to be a risk of elimination of competition as a result of the refusal to supply.[837] This was on the basis of the evolution of Microsoft's market share,[838] the heterogeneity of computer networks and the likely

[828] *Commission Microsoft*, **n403** paras 542-554.
[829] See **p123, 124-6**
[830] *Commission Microsoft*, **n403** paras 555-557.
[831] *Commission Microsoft*, **n403** para 558.
[832] See Geradin **n798**, 1534.
[833] For initial positions and argument on whether information was available and its adequacy, see *Commission Microsoft*, **n403** paras 185-301
[834] *Commission Microsoft* **n403** paras 573 et seq and 1064
[835] which finding has been strongly criticised – see Ridyard, D. "Compulsory Access under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation" E.C.L.R. 2004, 25(11), 669-673 ("Ridyard"), 670.
[836] *Commission Microsoft*, **n403** para 1064.
[837] *Commission Microsoft* **n403** paras 585-612.
[838] *Commission Microsoft*, **n403** paras 590-612.

lower level of uptake by consumers of unrelated alternatives.[839] It dismissed arguments that this was because Microsoft's products were of better quality.[840] Further, the EC Commission considered there to be a risk of elimination of competition, as the lack of access to the information would likely have a negative impact on the innovation of others, with consequences for competition and consumer choice.[841]

In terms of the place of IP, Microsoft had argued that the information protocols were the subject of IP and that this might provide an objective justification for the refusal. This was on the basis that requiring the information to be shared would be inconsistent with the role of IP as an incentive and reward for innovation and creativity and with efficient innovation for the benefit of consumers.[842] The EC Commission placed very little weight on the fact that the information protocols may be the subject of IP.[843] It did consider that it was possible for IP to found an objective justification. It looked widely, however, at all innovation by Microsoft and considered that Microsoft would in fact be spurred on by the greater research and development of its competitors which would follow if the information was available.[844] The EC Commission dismissed arguments that the disclosure would merely involve competitors cloning Microsoft's products, as to succeed in the market, competitors would need to add value to existing technology.[845] As a result, the EC Commission considered that the incentive to innovate arising from IP was outweighed by the exceptional circumstances identified. There could be, therefore, a finding of abuse.[846]

This stance of the EC Commission has been argued to introduce a new innovation balancing test to the question of IP and abuse. This has received some support, as an

[839] *Commission Microsoft*, **n403** paras 613-691.
[840] *Commission Microsoft*, **n403** paras 648-653.
[841] *Commission Microsoft*, **n403** paras 694-708, 781-2.
[842] *Commission Microsoft*, **n403** para 711
[843] See discussion in Anderman/Schmidt **n441**in Anderman Interface **n4** 69.
[844] *Commission Microsoft*, **n403** para 723-9, supported by existing industry disclosure of interoperability information -*Commission Microsoft*, para 730-741.
[845] *Commission Microsoft*, **n403** paras 713-723.
[846] *Commission Microsoft*, **n403** para 712, 783.

open and engaged attempt to address questions of impact on innovation;[847] yet it has been criticised being unclear and difficult to apply in future cases.[848] The approach has also been suggested to introduce a more social welfare based, long term approach to competition and to impact on innovation and consumers.[849]

But the EC Commission decision and its approaches[850] were soon challenged.

3.2.1.6 Towards greater certainty? The CFI contribution

After the decision of the ECJ in *IMS*, Microsoft sought annulment of the EC Commission's decision, before the CFI. Microsoft pleaded that the correct legal test to be applied was that in *IMS* or, if the case was considered not to be about IP, that in *Oscar Bronner*.[851] The EC Commission responded that these tests should not apply, as the presence of network effects in the industry required a separate approach.[852] Microsoft challenged the incentives balancing test in respect of objective justification

[847] Geradin, **n798** 1539-43 cf Ahlborn, C, Evans, D,.S, Padilla, A.J. "The European Union. Logic & Limits of the Exceptional Circumstances Test in Magill and IMS Health" 28 *Fordham International Law Journal 1109* (2005) ("Ahlborn Logic") and from an economic perspective Leveque, F. "Innovation, Leveraging and Essential Facilities: EU Microsoft Case" 103 ("Leveque Innovation") in Leveque/ Shelanski **n23** , 108-110.

[848] Temple Lang, J. "The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law" 56 in Leveque/ Shelanski **n23**, 76.

[849] Vezzoso, S. "The incentives balance test in the EU Microsoft case: a pro-innovation "economics-based" approach?" E.C.L.R. 2006, 27(7), 382-390 ("Vezzoso"), 386. See also p66. For consideration of this approach in the English courts, outside the IP context see *Attheraces Ltd v British Horseracing Board Ltd* [2005] EWHC 3015 (Ch) [2006] E.C.C. 24, paras 182, 185, 188-9, 199, but note the different approach of the Court of Appeal *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38 [2007] E.C.C. 7. See also Lawrance, S. "Attheraces v British Horseracing Board: what price abuse of dominance?" J.I.P.L.P. 2007, 2(9), 609-612.

[850] For consideration of the EC Commission decision see Anderman Paradigm **n823**; Korah Interface **n395**, 439-441; Geradin, **n798** 1533-6; and Messina **n483**.

[851] See Microsoft CFI complaint paras 4, 78,84-5, 97-111; Microsoft CFI Reply to Commission paras 41-258-60, 74-80; Third Party Observations in support of Microsoft paras 70-72; Supplementary CFI Report for Hearing paras 86-106.

[852] Microsoft CFI Reply to Commission, paras 6, 33-40 and CFI Report for Hearing, paras 154-273. See **p77-8** considering network effects.

and the lack of regard for IP rights inherent in the order to supply,[853] which it argued risked future lack of investment, with adverse consequences for innovation and consumers.[854] Finally, Microsoft challenged the lack of clarity resulting in respect of when competitors would be able to obtain and duplicate information.[855]

At the full hearing before the CFI in April 2007, key issues were the correct legal test[856] and whether IP could be relevant to its application.[857] There was discussion regarding the extent to which the EC Commission's open approach to exceptional circumstance was so uncertain as to be a cause for concern[858] or whether, as argued by the EC Commission, the wider approach followed from existing authorities and also avoided rigidity and potential support of unlawful conduct.[859] There was detailed discussion about whether a new product requirement was appropriate to limit inefficient duplication and encourage dynamic innovation or whether it could entrench, rather than challenge, refusals to supply indispensable material.[860] Finally, there was discussion as to whether the comments of the EC Commission in respect of objective justification, IP and incentives to innovate did indeed introduce a new incentives balancing test.[861]

Notwithstanding the detailed arguments, the CFI did not focus on these points.[862] Rather, and indeed consistent with the nature of the review which it could

[853] Microsoft CFI complaint paras 68-78, 112-131; Microsoft CFI Reply to Commission paras 87-9; Third Party Observations in support of Microsoft, paras 4, 15, 91-3, CFI Report for Hearing paras 86-98, 122-141 and Supplementary CFI Report for Hearing 81-84
[854] Microsoft CFI complaint paras 4-6, 79, Microsoft CFI Reply to Commission paras 81-6 and Supplementary CFI Report for Hearing paras 28-30, 48-60, 79
[855] Microsoft CFI complaint paras 11 (cf US settlement which was argued to be clearer, at 20-8). Supplementary CFI Report for Hearing para 37.
[856] Microsoft CFI hearing transcript Day 3 p52-4 .
[857] Microsoft CFI hearing transcript , Day 4, p111-2
[858] See also Microsoft CFI complaint paras 11 (cf US settlement which was argued to be clearer, at 20-8),supplementary CFI Report for Hearing para 37
[859] Microsoft CFI hearing transcript , Day 3 p 136-7
[860] Microsoft CFI hearing transcript Day 3, p64-7, 87-9, 147-150, Day 5, p33
[861] Microsoft CFI hearing transcript , Day 3, p73, 152-3, Day 4, p22-63, 66-8, 105-110, Day 5, p34. as discussed at **p131-2**
[862] *CFI Microsoft* **n489**.

undertake,[863] the CFI proceeded on the assumption that the information protocols which had been ordered to be disclosed were the subject of IP.[864] It then considered whether the cumulative elements of the *IMS* test were met on the facts, as this was the test most favourable to an IP owner; if it was met, then the decision would not be annulled - and issues relating to tests less favourable to the IP owner, such as whether the IMS test was exhaustive and whether the more flexible approach of the EC Commission was legitimate, would not need to be considered. [865]

The CFI found that the *IMS* test was satisfied. It considered[866] that the information protocols were indispensable[867] to develop a new product for which there was unmet consumer demand[868] and that without these there was a risk of elimination of viable competition.[869] The CFI also considered that there was no objective justification for the refusal, rejecting arguments based on IP[870] and indeed focussing more on whether Microsoft had established that it owned valid and relevant IP, than on consideration of the questions of principle.[871] Finally, the CFI considered that the EC Commission's comments regarding balancing innovation incentives were merely part of, and summarised, its wider assessment of objective justification. It rejected the argument that the EC Commission had introduced a new test.[872]

[863] *CFI Microsoft* **n489** paras 84-90. See Anderman, S. "Microsoft v Commission and the interoperability issue" E.I.P.R. 2008, 30(10), 395-399 ("Anderman Interoperability"), 296.
[864] *CFI Microsoft*, **n489** para 110.
[865] *CFI Microsoft*, **n489** paras 331-3, 336. See Howarth, D. and McMahon, K. "Windows has performed an illegal operation": the Court of First Instance's judgment in Microsoft v Commission." E.C.L.R. 2008, 29(2), 117-134 ("Howarth/McMahon"), 133.
[866] *CFI Microsoft*, **n489** paras 103-106, 108-110, 118-153, 207-266, 337-422.
[867] For argument and positions see Microsoft CFI complaint paras 4, 85-96, Microsoft CFI Reply to Commission paras 43-57, Third Party Observations in support of Microsoft paras 38-45, 57, 60-64, CFI Report for Hearing paras 70-85, 101-103, 109-120, 146 and Supplementary CFI Report for Hearing paras 17-27, 34-5, 39-46, 73-78, 107-112
[868] *CFI Microsoft*, **n489** paras 621-665.
[869] *CFI Microsoft*, **n489** paras 560-620.
[870] *CFI Microsoft*. **n489** paras 666-703.
[871] *CFI Microsoft* **n489** paras 267-289. See Eagles, I. and Longdin, L. "Microsoft's refusal to disclose software interoperability information and the Court of First Instance." E.I.P.R. 2008, 30(5), 205-208 ("Eagles/Longdin")
[872] *CFI Microsoft*, **n489** paras 666-703, notably paras 690-1, 695, 697-8. See Anderman Interoperability **n863**, 399.

In finding that the IMS criteria were met, the CFI did engage in some silent expansion of them.[873] It considered that the need for a new product was not the only relevant requirement of this nature and referred also to "technical development", a term included in article 82.[874] Further, the CFI considered that a risk, rather than a likelihood, of elimination of competition would suffice and that the competition which must persist should be "viable".[875]

Finally, it should be borne in mind that in the light of the approach taken, although the CFI did not consider and support the wider "all circumstances" test of the EC Commission, it also did not criticise it.

3.2.1.7 The role of the objective justification requirement

Yet another area of uncertainty is that for a refusal to license to be an abuse, there must be no justification. In the cases considered so far, only in *Microsoft* has there been direct engagement with IP and its possible benefits in this regard.[876] The question has been considered in some detail in relation to parallel importing in the pharmaceutical sector. *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) v Glaxosmithkline Plc* ("*Syfait*")[877] in 2005, involved alleged abuse of a dominant position[878] in respect of changes to the pricing practices of Glaxosmithkline in Greece. Advocate General Jacobs paid particular attention to objective justification, considering that each instance of allegedly abusive conduct must be

[873] See also Eagles/Longdin **n871**,208.
[874] *CFI Microsoft*, **n489** para 647. See Anderman Interoperability **n863**, 398-9.
[875] *CFI Microsoft*, **n489** paras 421 and 620.
[876] See also Anderman, S. "The Aftermath of Magill" ("Anderman Aftermath") 235 in Barendt Yearbook **n599**, 242 and Anderman, S.D. and Schmidt, H. "EC Competition Law and IPRs" 37 in Anderman, S.D. (ed) (2007) *The Interface between Intellectual Property Rights and Competition Policy* Cambridge University Press, Cambridge, UK, 48
[877] *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) v Glaxosmithkline Plc* (C53/03) [2005] E.C.R. I-4609 ("*Syfait*").
[878] *Syfait*, **n878** para AG 52.

assessed in its factual and economic context, including the regulatory framework, in order to identify possible justifications.[879] He also considered that the issue formed part of the overall analysis of abuse - if there was a justification, then there was no abuse. [880]

The ECJ declined jurisdiction in *Syfait* on the grounds of admissability.[881] In 2006, the CFI considered arguments that supply agreements Glaxosmithkline had in Spain which had dual pricing measures were anticompetitive, on the basis of article 81 EC Treaty.[882] It concluded that a relevant factor in assessing this was if these arrangements might, by contributing to innovation, give rise to a wider economic advantage.[883] In 2008 in *Sot. Lélos Kai Sia EE (and Others) v GlaxoSmithKline AEVE*, Advocate General Ruiz-Jarabo reviewed facts similar to those of *Syfait*.[884] It was considered that there could be objective justification if it was shown that the regulation of the market compelled a business to behave in a particular way, to protect its legitimate business interests. The need for this behaviour, on the basis of innovation incentives and investment, was considered not to have been established on the facts. This does suggest that if this need had been so established, it may have been

[879] *Syfait*, **n878** para AG 53, review of established cases paras AG54-AG56, 59-64 and non IP supply cases para AG57-58, para AG56 re Microsoft, and also paras AG 89, 100-1. See also Korah Interface **n395**, 438-9; Stothers, C. "Who needs intellectual property? Competition law and restrictions on parallel trade within the European Economic Area" E.I.P.R. 2005, 27(12), 458-466, ("Stothers Needs") 462 and 465; and Venit, J.S. "Article 82: The Last Frontier -- Fighting Fire with Fire?," 28 *Fordham International Law Journal 1157* (2005).

[880] *Syfait*, **n878** para 72. It has also been argued that objective justification rather introduces a change in the burden of proof, see Nazzini, R. "The wood began to move: an essay on consumer welfare, evidence and burden of proof in Article 82 cases" E.L. Rev. 2006, 31(4), 518-539, 530-535. However the manner it which it has been applied suggests a defence eg Magill **n454** AG 129, Microsoft CFI hearing transcript 121-123 and *CFI Microsoft* **n489** paras 688-701 - see also Anderman Paradigm **n823**, 16, Anderman Interoperability **n863**, 399 and Whish, **n392** 206-8, 209.

[881] As it was not a reference by a court *Synetairismos Farmakopoion Aitolias & Akarnanias (SYFAIT) v Glaxosmithkline Plc* (C53/03) [2005] E.C.R. I-4609, paras 29-38

[882] *GlaxoSmithKline Services v Commission* Case T-168/01 Judgment of the Court of First Instance of 27 September O.J. C 294/39 2006 and CFI Press Release http://curia.europa.eu/en/actu/communiques/cp06/aff/cp060079en.pdf. See Stothers Needs **n879**, 461.

[883] See overview consideration of these cases considered so far in this section in Kallaugher, J. "Antitrust and IP in the Pharmaceutical Sector – Current Legal Issues" http://www.ucl.ac.uk/laws/jevons/papers/colloquium_2007/Jevons07_kallaugher_pp.pdf

[884] *Sot. Lélos Kai Sia EE (and Others) v GlaxoSmithKline AEVE* Case C-468/06: reference for preliminary ruling by a Greek court at O.J. C 20/3 21 January 2007 and Curia press release No. 19/08 1 April 2008 http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080019en.pdf. The opinion was not available in English at the time of writing in 2008.

considered to provide an objective justification. When the ECJ delivered its opinion in 2008, however, it did not consider it necessary to evaluate this issue.[885]

These pharmaceutical cases did not concern IP. Yet they do support an open approach to what might justify what would otherwise be anticompetitive conduct and suggest that encouragement of innovation could properly form part of the analysis.

3.2.1.8 The future of article 82 and IP

Support for encouragement of innovation, but a sceptical approach to IP, can be seen in the EC Commission's review of article 82 and exclusionary abuses ("Article 82 Review") launched in 2005.[886] Prior to its launch, a report was prepared for the EC Commission by the European Economic Advisory Group for Competition Policy. This called for an economic approach[887] to article 82.[888] There was also a Commission Staff Discussion Paper of December 2005 ("Staff Discussion Paper")[889] which stated that "it is competition, and not competitors as such, that is to be protected"[890] and that the objective of article 82 was protecting competition, which could bring about innovation and resulting consumer benefit. [891]

[885] *Sot. Lélos Kai Sia EE (and Others) v GlaxoSmithKline AEVE Case 468/06 Available via http://curia.europa.e [full link in bibliography]* para 70. See arguments in this regard at paras 31, 44, 47. Note decision of the court in other respects at paras 54-7 and 67-71.
[886] See main webpage "Article 82 Review" http://ec.europa.eu/comm/competition/antitrust/art82/index.html.
[887] See also Drexl Imitation **n824** in Ehlermann/Atanasui, **n10**.
[888] EAGP Report (July 2005) "An economic approach to article 82" http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.
[889] DG Competition Staff Discussion Paper on the application of article 82 of the Treaty to exclusionary abuses http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf. ("Staff Discussion Paper").
[890] Staff Discussion Paper, **n889** para 54.
[891] Staff Discussion Paper, **n889** para 4.

The Staff Discussion Paper drew on the cases considered here,[892] referred to the exclusive nature of IP and considered that this should only be encroached upon in exceptional circumstances, even in return for a reasonable payment. The key question is, of course, what those exceptional circumstances may be. The Staff Discussion Paper proceeded on the basis of the criteria considered so far,[893] but also introduced some new points. It also does not state clearly that it is only in those situations discussed that there could be exceptional circumstances.[894]

In respect of what was discussed, the Staff Discussion Paper considered that an input would be indispensable if it is needed to engage in normal economic activity and is impossible, or extremely difficult, to duplicate. This included if it is not economically viable for an input to be duplicated,[895] with it being viable if there was a workable alternative or one could invent around the technology and not viable if the technology has become an industry standard or interoperability is necessary to be able to enter a market.[896] The Staff Discussion Paper also referred in this regard to the essential facilities doctrine. It considered that an IP owner should not be unduly restricted from benefiting from its investment and risk taken and suggested that there could be a shorter time limit during which the IP owner could enjoy its exclusive rights.[897]

The new product requirement also continues, as there should "not essentially [be] duplication [of] the goods or services already offered on this market by the owner of the IPR, but inten[tion] to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand."[898] In an approach

[892] See summary and comment on similarities in comparison with the Commission decision in Microsoft in McCann, D. "European Union: Competition Law – Abuse of Dominant Position" I.C.C.L.R. 2006, 17(4), N27-31, at N30 et seq but cf Howarth/ McMahon **n865**, 125 regarding the need for an economic approach.
[893] Staff Discussion Paper, **n889** para 237-9.
[894] Staff Discussion Paper, **n889** para 239 see also general introduction to refusal to start to supply under heading 9.2.2.2.
[895] Staff Discussion Paper, **n889** para 227.
[896] Staff Discussion Paper, **n889** para 230.
[897] Staff Discussion Paper, **n889** paras 233-5.
[898] Staff Discussion Paper, **n889** para 239.

which was to be echoed by the CFI in *Microsoft*, the Staff Discussion Paper also considered that there may be abuse "even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services", if there was to be "innovation brought about by the dominant undertaking's competitors", from which consumers may benefit.[899]

Finally, the existence of an objective justification for refusal to licence, to be established by the IP owner, is still considered relevant. The Staff Discussion Paper made specific reference to projects where there had not been a high degree of innovation leading to the IP and where it considered that there may have been investment in such projects, even if there had been a risk that the owner of any IP may be required to share it in the future. The Staff Discussion Paper considered that in such cases, an objective justification is unlikely to be established - particularly given that it considered that account should be taken of the possible positive consequences for investment in follow on innovation from others[900] and also, resonant of the EC Commission's balancing approach in *Microsoft*, of whether efficiencies from a refusal over a period could outweigh those gained from the sharing of material.[901]

The Staff Discussion Paper has led to significant debate, with many comments made in response[902] and in public hearings held in June 2006.[903] On point for present purposes is the submission of senior members of the Max Planck Institute.[904] This calls for a new, more developed and specific approach to conduct based on IP, distinct

[899] Staff Discussion Paper, **n889** para 240.
[900] Staff Discussion Paper, **n889** para 236.
[901] Staff Discussion Paper, **n889** paras 77-84, 88-9 – greater weight to be accorded to short term efficiencies over potential longer term gains.

[902] EC Commission Art 82 review: Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses (March 2006) http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html.

[903] EC Commission Art 82 review. Public hearing on article 82. http://ec.europa.eu/comm/competition/antitrust/art82/hearing.html..

[904] Drexl, J. et al "Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Directorate-General Competition discussion paper of December 2005 on the application of Art.82 of the EC Treaty to exclusionary abuses". IIC 2006, 37(5), 558-572 ("Drexl Max Planck")

from that which is available and which had been proposed in the Staff Discussion Paper.[905]

They argue that this should be consistent with the economics of IP and with dynamic competition in fields of high levels of innovation,[906] and that each case should be approached on its own facts,[907] in the light of the different IP rights and their possible rationales,[908] taking into account the variety of situations which could arise when IP can be an input for entry into another market.[909] They argue that there should also be a distinction between technology the subject of IP which is merely "successful" and that which is "indispensable" for further innovation.[910] They propose that a licence should be required only when it would enable the development of a substitute which would be potentially more innovative than that which is presently available. Finally, they are critical of the suggestion that IP owners should have a longer period of exclusivity in respect of some innovation than others,[911] considering this approach to be more suitable for static and predictable markets, rather than the risk orientated and dynamic ones in which in IP, innovation and investment tend to exist.[912]

3.2.1.9 Summary

The weight of case law, policy consideration and commentary suggests that a refusal to license IP will be an abuse only in exceptional circumstances. It also appears that for there to be such circumstances, there must be, at the very least, some form of technical development in a hypothetical other market. This is so notwithstanding the

[905] Drexl Max Planck, **n904** 568.
[906] Drexl Max Planck, **n904** 560-2 and 567 and see **p74, 77-8**
[907] Drexl Max Planck, **n904** 572.
[908] Drexl Max Planck, **n904** 562-3.
[909] Drexl Max Planck, **n904** 564-5.
[910] Drexl Max Planck, **n904** 568.
[911] Drexl Max Planck, **n904** 570.
[912] Drexl Max Planck, **n904** 572.

criticism which has been levelled at these criteria in respect of clarity[913] and also from an economic perspective, in respect of addressing the needs of competitors seeking to develop new products, rather than the needs of consumers seeking existing ones.[914]

These requirements for exceptional circumstances are unlikely to be met in the situations of concern to this work. The technology which would be used by pupils or supplied by the benevolent manufacturer would be identical to the technology the subject of the patent. It would also be used for its original purpose. Thus, there is no new product and no prospect of technical development. In terms of the need for another market to be involved, after *IMS* this may be less of a requirement from a legal perspective.[915] If it is still required, it may be argued that there are new needs which would be addressed, such as those of pupils who would not otherwise be educated in this way and that these are distinct from those of persons who would be able to pay for the technology or obtain it with the consent of the patent owner. In terms of market definition, however, it is likely that, notwithstanding the lack of ability to pay, or the opportunity to pay, these needs would be considered to form part of the same market as those which are met with the consent of the patent owner.

Notwithstanding the open approach taken by the ECJ in *Volvo v Veng* and later by the EC Commission in *Microsoft*, therefore, the weight of authority is against it being an abuse of a dominant position to refuse to license IP if there is to be no new product development or innovation. This EC case law would not, therefore, support an argument that it could be abuse of a dominant position to enforce a patent when the infringing conduct would not lead to a new product or development. The United

[913] See Geradin, **n798** 1527, 1531-2, 1537-8 and also Leveque Innovation **n847** in Leveque/ Shelanski **n23**, 105-108 and 110-116.
[914] Stothers Implications **n818**, 467-471; Derclaye, E "The IMS Health Decision and the Reconciliation of Copyright and Competition Law" E.L. Rev. 2004 , 29(5), 687-697, 696; Ridyard **n835**, 669-670; Ong, B. "Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to License Intellectual Property Rights" E.C.L.R. 2005, 26(4), 215-224, 221l; Ghidini **n13**,100-3; Meinberg, H. "From Magill to IMS Health: the new product requirement and the diversity of intellectual property rights." E.I.P.R. 2006, 28(7), 398-403 ("Meinberg"), especially 401 cf support in Ahlborn Logic **n847**.
[915] See **n819**

States jurisprudence will be seen to be of even less assistance in respect of such an argument.

3.2.2 The United States perspective

3.2.2.1 An apparently interventionist approach

Courts in the United States have been prepared to require the sharing of assets, including of IP. There is a strong view that this has been done on the basis of the essential facilities doctrine.[916] Important examples are the decision in *USA v Terminal Railroad* in 1912 involving access to railroad switching yards[917] and in the ICT field that in *MCI Communications v A T & T* in 1983, involving telephone networks.[918] The Supreme Court appeared to confirm the doctrine in 1985 in *Aspen Skiing v Aspen Highlands Skiing Corp.*[919] ("*Aspen Skiing*"), when it held that it could be unlawful monopolization, in breach of the Sherman Act,[920] to refuse to continue to allow holders of ski passes from one area to use the lift system of a neighbouring ski area. The Supreme Court considered that this would, without any legitimate efficiency justification, impair the interests of competitors and advance the long term commercial gain of the encumbent.[921]

Essential facilities has also been referred to in cases involving refusals to license IP. *Bellsouth Advertising v Donnelley*, a decision of a lower court in 1988,[922] involved access to a telephone directory and has facts similar to those in *Magill*. Although the court found there to be no breach of the Sherman Act, it held that this set of

[916] See **p81-2** and Peritz **n397** in Anderman Interface **n4**, 200-3.
[917] *USA v Terminal Railroad* 224 US 383.
[918] *MCI Communications v A T & T* 708 F.2d 1081, 1132-33.
[919] *Aspen Skiing v Aspen Highlands Skiing Corp* 472 U.S. 585
[920] See **n427**
[921] See Hovenkamp **n433** in Leveque/Shelanski, **n23** 33-4.
[922] *Bellsouth Advertising v Donnelley* 719 F. Supp. 1551 ("*Bellsouth*").

information could be a copyright work and an essential facility.[923] The decision of the Federal Circuit in *Intergraph Corp v Intel Corp*[924] ("*Intergraph*") in 1999, involved the disruption of supply of microprocessors and of information the subject of IP. The court placed no particular focus on IP but it did review the essential facilities doctrine and refer to the absence of competition between the potential licensor and licensee and the consequences for a downstream market. The court also noted that the information was only considered to be "essential" by the potential licensee in question because it had previously been supplied - the information would not have been essential to those with different business practices.[925]

The decision of the Federal Circuit in *SCM v Xerox Corp. (Independent Services Organisations)* ("*Xerox*")[926] in 2000 considered IP and essential facilities in more detail. This involved a refusal to continue to supply parts for photocopiers.[927] The court stressed that it had not been established that competition liability could arise from a refusal to license a patent and referred to *Data General Crop. v Grumman Systems Support Corp,* a decision of the Court of Appeals of the First Circuit of 1994,[928] which identified a rebuttable presumption that reliance on the exclusive nature of IP rights did not give rise to competition liability. The court in *Xerox* considered, however, that this presumption could be rebutted, including when the patent was used to gain a monopoly beyond the scope of the patent. On the facts, the presumption was found to be rebutted because IP was relied upon merely as a pretext, it not being a core part of the business model of Xerox. [929]

Courts in the United States have also taken another approach to IP and refusals to license. In 1992 in *Image Technical Services v Eastman Kodak* ("*Eastman*"), the Court of Appeals of the Ninth Circuit considered disruption of supply and refusal to

[923] *Bellsouth*, **n923** 1566-7. See Hovenkamp **n433** in Leveque/ Shelanski, **n23** 22.
[924] *Intergraph Corp v Intel Corp* 195 F.3d 1346 ("*Intergraph*").
[925] *Intergraph*,**n924** 1355. See Hovenkamp **n433** in Leveque/Shelanski **n23**, 20,22-3, 25, 27
[926] *SCM v Xerox Corp. (Independent Services Organisations)* 203 F.3d. 1322 ("*Xerox*")
[927] *Xerox*, **n926** paras 7-9, 13-15
[928] *Data General Crop. v Grumman Systems Support Corp*., 36 F.3d 1147, 1152, 1156-7, 1182-7.
[929] See Peritz **n397** Anderman Interface **n4** 190-1 Hovenkamp **n433** in Leveque/Shelanski **n23** , 28-9.

license in the photocopying industry.[930] It considered that IP owners are not immune from competition liability by reason of the exclusive nature of their rights but that relying on these exclusive rights could still give rise to competition liability, on other grounds. The Court of Appeals considered that the key factor was the intention behind a refusal to license.[931]

There has also been court action in the United States regarding Microsoft, on the basis of the Sherman Act.[932] This involved Microsoft's conduct in relation to Original Equipment Manufacturers ("OEMs") and the extent to which they were able to work with browsers other than those of Microsoft. The Court for the District of Columbia in 2000 found that in *United States v Microsoft* that Microsoft had unlawfully obtained and protected a monopoly in a relevant market, in breach of section 2 of the Sherman Act. The court noted, referring to *Eastman*, that a copyright holder is not entitled to exercise its copyright in a manner which directly threatens competition.[933] The decision was partially upheld by the District of Columbia Court of Appeals in 2001,[934] which rejected the argument that copyright justified licences to OEMs prohibiting alterations to enable the software to work with other technology.[935]

3.2.2.2 The retreat

A notably less interventionist approach to businesses in positions of power was taken by the Supreme Court in 2004, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* ("*Trinko*").[936] This involved access to telecommunications systems and the Sherman Act. The Supreme Court considered that mere possession of

[930] *Image Technical Services v Eastman Kodak* 125 F.3d 1195 ("*Eastman*")
[931] *Eastman*, **n930** paras 8, 55-9. See also Hovenkamp **n433** in Leveque/Shelanski **n23**, 29-33 and Peritz **n397** in Anderman Interface **n4** 200-3.
[932] See **p129**
[933] *United States v Microsoft* Corp 87 F. Supp. 2d 30 DDC, paras 18-22
[934] *United States v. Microsoft Corp.*, 253 F.3d 34, see 58-9 regarding copyright
[935] Peritz **n397** in Anderman Interface **n4** 221-4 and Glader **n396**, 166 et seq.
[936] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 ("*Trinko*")

a monopoly was unproblematic and that, although refusal to supply could involve a breach of the Sherman Act, this was so only in limited cases. These required an impact on consumers and competition, rather than on competitors. The impact was on competitors in *Trinko* and there was therefore no breach of the Sherman Act.

In this case the Supreme Court also declined, in what has been termed "a bit of revisionist history",[937] to recognise the essential facilities doctrine. It distinguished *Aspen Skiing* on the basis that it had involved the disruption of previous supply, which could be assumed to be for anticompetitive ends. [938] The Supreme Court was concerned about the impact on investment in innovation of a requirement to supply and at the prospect of the court becoming a central planner.[939]

Trinko did not involve IP. Commentators have argued, however, that the decision sends a strong message against requiring licensing of IP. The decision of a district court in *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc* ("NYMEX"),[940] which rejected Sherman Act arguments in respect of a refusal to supply settlement prices said to be the subject of copyright, has also been argued to support this view.[941]

The relationship between IP and competition has also been considered in detail at regulatory level. The Department of Justice and the Federal Trade Commission launched a joint investigation into "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition" in 2002. This involved several

[937] Hovenkamp **n433** in Leveque/Shelanski **n23**, 20.
[938] *Trinko,* **n936** 407.
[939] *Trinko,* **n936** 408. See Peritz **n397** in Anderman Interface **n4**, 202-3; Geradin, **n798** 1522-3; Hovenkamp **n433** in Leveque/ Shelanski **n23**, 18-20; Glader **n396**, 180 et seq; and Frischman, B. and Weber Waller, S. "Revitalizing Essential Facilities" 75 Antitrust Law Journal vol 75 1 2008, 1.
[940] *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc*. 323 F. Supp. 2d 559
[941] Fox, E.M. "European Union. A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal" 28 *Fordham International Law Journal 952* (2005), 952-966 ("Fox Orphan"), 959-961.

hearings, with contributions from national and international experts in the field.[942] It delivered a final report in April 2007 ("US 2007 Report"),[943] the first chapter of which considered unilateral refusals to license IP.

This discussed the relevant case law and noted it to be unclear, particularly in the light of the diverging approaches of *Xerox* and *Eastman*. Importantly, the US 2007 Report then stated that although the conduct of an IP owner should not be immune from challenge, there was a risk of a negative impact on innovation if there was too much intervention. It concluded that a unilateral unconditional refusal, that is a straightforward refusal by one IP owner without it being linked to any other matters, should not give rise to antitrust liability. It considered that any such liability would conflict with the core right of the IP owner to exclude. The US 2007 Report also considered - in marked distinction to the Staff Discussion Paper[944] - that the issue "will not play a meaningful part in the interface between patent rights and antitrust protection".[945]

This more supportive approach to IP[946] and a focus on the impact on competition and innovation by others, can also be seen in the April 2008 decision of the District of Columbia Court of Appeals in *Rambus Inc v Federal Trade Commission* ("*Rambus*").[947] The Federal Trade Commission had found Rambus to be in breach of the Sherman Act for having failed to disclose that it owned patents which were within

[942] For details of hearings, see http://www.ftc.gov/opp/intellect/ and also initial report based on the hearings "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" A Report by the Federal Trade Commission, October 2003 http://www.ftc.gov/os/2003/10/innovationrpt.pdf

[943] US 2007 Report http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

[944] See **p137-9**.

[945] See US 2007 Report, **n943** p5-6 and 15-22, 23, 27-32 (quote at 32). This is consistent with the view of leading commentators, although they proposed some limitations regarding standards and mergers, see Hovenkamp **n433** in Leveque/Shelanski **n23**, 23, 34.

[946] See Geradin, **n798** 1526 et seq; Melamed A.D. "Evolving Antitrust Treatment of Dominant Firms; Exclusionary Conduct Evolving Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal" Spring, 2005, 20 Berkeley Tech. L.J. 1247; Kanter, D. "IP and compulsory licensing on both sides of the Atlantic - an appropriate antitrust remedy or a cutback on innovation?" E.C.L.R. 2006, 27(7), 351-364; Fox Orphan **n941**.

[947] *Rambus Inc v Federal Trade Commission* 522 F.3d 456 ("*Rambus*").

an industry standard and for having made excessive demands for royalties in respect of those patents.[948] Setting aside this decision, the court referred to *Trinko*, the appeal decision in the US Microsoft case and noted that the mere existence of a monopoly does not violate the Sherman Act. Rather, the court considered that there must be "wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."[949] There must also be some anti-competitive effect, which was to be assessed in respect of impact on consumers and competition, rather than competitors. The court found there to be no such effect on these facts.[950]

3.2.3 Refusal and abuse: summary

This chapter's analysis of case law, legislation, policy exploration and commentary in respect of abuse and refusals to license can be summarised very briefly. IP is not, and should not be, immune from competition review. The exclusive rights conferred by IP cannot always be exercised - establishing when they may not be exercised, however, is less straightforward. Courts and decision makers in the United States have been reluctant to intervene. Those in the EC are more willing to do so, but the most relevant guidance available for present purposes is rather vague references to the need for "certain" and "exceptional" cases and suggestions that regard should be had to consumers, competition and innovation. There have also been seen to be more detailed tests; however these are of less assistance to the goal of this work.

Yet refusal to license is relevant here only because it involves extent to which there can be interference with the exclusive rights of an IP owner. This work is interested

[948] In the Matter of Rambus, Inc.Docket No. 9302 http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf
[949] *Rambus*, **n947** p11.
[950] *Rambus* **n947**p12. The appeals court rejected an application for a further appeal on 26 August 2008 see Reuters "U.S. trade commission loses bid for Rambus appeal" http://uk.reuters.com/article/rbssTechMediaTelecomNews/idUKN2748830020080827

in a different form of restriction - that in respect of enforcement of the right. Also important, therefore, is another line of case law in the EC and UK jurisdictions.[951]

3.3 The abuse of enforcement

3.3.1 The Euro-Defence

It is possible for persons faced with a patent infringement action to rely on article 82 in response. This can be traced from 1980 when allegedly excessive pricing was pleaded in response to a passing off action in *ICI v Berk*.[952] There the court stressed, in what was to become a recurrent theme, that for a plea of abuse of a dominant position to proceed, there must be a nexus between the alleged infringement and the alleged abuse. The court expressed concern that parties would otherwise be "outlawed" and unable to enforce their rights[953] and this was echoed in *Chiron Corporation v Murex Diagnostics (No. 2) ("Chiron No. 2")*[954] in 1993.[955]

In 1989 in *Pitney Bowes Inc v Francotyp-Postalia GmbH* ("*Pitney Bowes*"),[956] Hoffmann J considered that for there to be a sufficient nexus, the abuse need not be the direct or indirect consequence of the relief sought in the patent action. It would suffice if the IP "creates or buttresses the dominant position which the plaintiff is abusing."[957] A nexus will still not readily be identified, however, as can be seen from

[951] The question of reliance on abuse of a dominant position in response to an IP infringement action has not been considered by the ECJ, nor by other national courts. See research in this regard by Phillips, J. (2006) "The Role of Competition-Based Euro-Defences in IP Litigation", p19-20 paper on file with the author. I am grateful to Jeremy Phillips for kindly providing me with this.
[952] *ICI v Berk* [1981] F.S.R. 1 ("*ICI v Berk*").
[953] *ICI v Berk*, **n952** 6.
[954] *Chiron No. 2*, **n511**
[955] *Chiron No. 2*, **n511** 196-7, 199-200
[956] *Pitney Bowes*, **n510**
[957] *Pitney Bowes*, **n510** paras 6-11. See also *Sandvik AB v KR Pfiffner (UK) Ltd (No.2)* [1999] Eu. L.R. 755 [2000] F.S.R. 17 ("*Sandvik*") at 64.

the striking out by Laddie J of allegations in *Philips Electronics NV v Ingman Ltd* ("*Ingman*")[958] in 1998 and in 2005 in *Hewlett-Packard Development Co LP v Expansys UK Ltd*.[959] The Court of Appeal did take a more flexible approach in respect of parallel importing and defacing of labels against the backdrop of a distribution agreement in *Sportswear Co SpA v Stonestyle Ltd* ("*Sportswear*") in 2006. It considered that there may be a nexus, given the complex relationship between trade mark infringement, parallel importing and control of conduct.[960]

In an example such as the benevolent manufacturer sued for patent infringement,[961] the abuse which would be alleged would be the raising of the action itself. There would be a clear nexus, therefore, between the action and the abuse. But to what extent could raising an action be an abuse?

3.3.2 The Euro-Defence and raising actions

3.3.2.1 Initial reluctance

Courts have not set out all the circumstances in which article 82 could be pleaded in response to an IP action. There is, however, a strong theme of reluctance. In *Chiron No.2* in 1993, the Court of Appeal agreed with the dismissal, as speculative, of a plea that a refusal to license was abusive as it restricted access to potentially life saving equipment;[962] in *Ingman*[963] in 1998, Laddie J stressed that *Magill* should be viewed as exceptional and that in most cases it would not be abuse of a dominant position to rely

[958] *Ingman,* **n25** paras 59, 61, 62
[959] *Hewlett-Packard,* **n513** paras 13, 14, 16-8 .
[960] *Sportswear*, **n509** paras 29-31, 39-41, 51-7.
[961] See **p14**
[962] *Chiron No. 2,* **n511** 195.
[963] See **n25**

upon IP rights;[964] in *Sandvik AB v KR Pfiffner (UK) Ltd (No.2)* ("*Sandvik*")[965] in 1999 Neuberger J accepted that it was possible for abuse to be pleaded in response to a patent action, but there would need to be properly particularised exceptional circumstances;[966] and in 2000, Laddie J stressed again the exceptional nature of *Magill* in *HM Stationery Office v Automobile Association Ltd* ("*HMSO*"),[967] making it clear that it was not possible to use this to argue that not only should copyright be licensed but also that a reasonable licence payment was zero.[968]

There has been some consideration of article 82 and the raising of IP actions. In 1989 in *Pitney Bowes*,[969] Hoffmann J was unwilling to allow competition law to be relevant to a patent infringement claim. He considered that competition type concerns could be better pursued through the action for malicious prosecution.[970] The Court of Appeal took a different approach in *Intel Corp v VIA Technologies Inc* ("*Intel v Via*")[971] a patent action involving microprocessor technology in 2002.

3.3.2.2 A more open approach

It was pleaded in *Intel v Via* that the enforcement of the patents could in itself be an abuse of a dominant position.[972] Considering this, the Court of Appeal referred to the

[964] *Ingman*, **n25** para 63
[965] *Sandvik*, **n957**
[966] *Sandvik*, **n957**, 64
[967] *HMSO* **n2**
[968] *HMSO*, **n2** para 50. Several pleadings were dismissed for lack of detail and substance in terms of potential abuse, such that the question of an adequate nexus did not even arise, paras 28-32, 45, 47, 50-58.
[969] See **n510**
[970] *Pitney Bowes*, **n510** para 17. See Preece, S. "ITT Promedia v. E.C. Commission: establishing an abuse of predatory litigation?" E.C.L.R. 1999, 20(2), 118-122, (("Preece") 118, 120. In this regard, see also the doctrine of abuse of rights, where particular malicious or antisocial exercise of a right can give rise to liability – see Reid, E *The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*, vol 8.3 *Electronic Journal of Comparative Law*, (October 2004), http://www.ejcl.org/83/art83-2.html; and also provisions in some UK IP legislation regarding unjustified threats of infringement 70 Patents Act 1977, s21 Trade Marks Act 1994, s26 Registered Designs Act 1949 and s253 CDPA 1998 (regarding unregistered design right). There are no provisions in respect of copyright. These are considered in Preece, 121-2.
[971] *Intel v Via*, **n25**
[972] *Intel v Via*, **n25** paras 21,30.

evolving nature of EC authorities in this field and specifically to *Commercial Solvents*, *Volvo v Veng*, *Magill*, *Tierce Ladbroke* and *Oscar Bronner*, to early decisions in the *IMS* litigation and also to the distinctions between *Oscar Bronner*, *Tierce Ladbroke* and *Magill*.[973] Like the EC Commission in *Microsoft* in years to come, the Court of Appeal then declined to limit the categories of "exceptional circumstances" as to when there could be an abuse and noted that there might be future convergence amongst IP, competition and the essential facilities doctrine. It considered it arguable that the circumstances could include raising an infringement action.[974]

3.3.2.3 Narrower approaches

In 1998, the CFI considered the relationship between article 82 and the raising of court actions, in *ITT Promedia NV v Commission of the European Communities* ("*Promedia*").[975] The CFI took a more limited approach than that to be taken in *Intel v Via*. In *Promedia*, the CFI considered matters arising out of the breakdown of a relationship regarding the right to publish telephone directories.[976] These included an action raised in a Belgian court which involved a contract and transfer of IP,[977] in respect of which a complaint had been made to the EC Commission, which had declined to investigate. This decision was reviewed by the CFI. [978]

The CFI did not challenge[979] the EC Commission's approach that raising proceedings could be abusive if the proceedings could not reasonably be considered an attempt to assert the rights of the dominant undertaking and would be, on an objective view,

[973] *Intel v Via*, **n25** paras 36-46.
[974] *Intel v Via*, **n25** paras 48-51.
[975] *ITT Promedia NV v Commission of the European Communities* (T111/96) [1998] ECR II-2937[1998] 5 C.M.L.R. 491 ("*Promedia*")
[976] *Promedia*, **n975** paras 6-28
[977] *Promedia*, **n975** para 20
[978] *Promedia*, **n975** paras 23, 29.
[979] *Promedia*, **n975** paras 56-8.

manifestly unfounded, would serve to harass the opposing party and were part of a plan to eliminate competition.[980] The CFI also noted, however, the importance of general access to the courts to assert rights, in accordance with the constitutional traditions of member states and as protected in articles 6 and 13 ECHR. Thus, the CFI considered that bringing proceedings could only be an abuse of a dominant position in exceptional circumstances.

It considered, therefore, that the criteria used by the EC Commission should be approached strictly.[981] The key issue should be whether or not there was an intention to raise an action which could reasonably have been considered to be based on the rights of the dominant undertaking.[982] It is also noteworthy that later in the decision, the CFI stated in the context of a claim for contractual performance that this could "in particular" be an abuse, if it exceeded what could reasonably have been expected or there had been a change in circumstances. This suggests, once again, scope for some flexibility; however,[983] it is the stricter approach which has received more attention.

Echoes of the stricter *Promedia* approach can also be found in the United States, in the Noerr-Pennington doctrine. This is based in the First Amendment and confers immunity from actions under the Sherman Act, on court proceedings which have been raised to enforce legal rights.[984] This doctrine does not apply, however, if an action is a sham, which has been interpreted as meaning objectively baseless, with a party not meaningfully intending to win the action, rather merely to have a negative effect on competitors.[985]

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[980] *Promedia*, **n975** paras 30,55,56.
[981] *Promedia*, **n975** paras 60- 61.
[982] *Promedia*, **n975** para 73.
[983] *Promedia*, **n975** para 140.
[984] *The Thermos Company et al v Igloo Products Corporation* 1995 U.S. Dist. LEXIS 18382.
[985] *Professional Real Estate Investors Inc et al v Columbia Pictures Inc et al* 508 U.S. 49 and *Xerox* **n926** paras 10, 11. This future of this doctrine has also been considered in a Federal Trade Commission Staff Report called "Enforcement Perspectives on the Noerr-Pennington Doctrine" available at http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf and also by Peritz **n397** in Anderman Interface **n4** 193-4.

The *Promedia* criteria have been considered in the UK, notably with approval by the Patents Court in 1999 in *Sandvik*[986] regarding whether or not it had been abuse of a dominant position to raise a patent action. The court considered that the *Promedia* critera would not be met on the facts. In 2002 in *Intel v Via*, the Court of Appeal, when taking its broader approach, did not refer to this aspect of *Promedia*.[987] The strict *Promedia* approach was considered, however, by Pumfrey J in *SanDisk Corp v Koninklijke Philips Electronics NV* ("*Sandisk*")[988] in 2007.

Sandisk was an innovative and proactive competition action which claimed that preliminary steps, taken prior to raising an infringement action in relation to patents for MP3 technology, could be abuse of a dominant position. Philips had alleged, through statements to the media and activities at a trade show in Germany, that Sandisk had infringed their patents. Philips had also taken preliminary steps in Germany, Italy and the Netherlands to gather information through customs procedures about infringing acts.[989]

The English court upheld a challenge to its jurisdiction and the matter did not proceed further.[990] The English court commented unfavourably, however, on arguments that the pleaded conduct could be abuse of a dominant position. It appeared to prefer the limited *Promedia* test[991] and stated that "the enforcement action can be considered to be merely harassing ……. if the patent is obviously not infringed or if the patent is invalid and in either case the patentee either knows or believes that to be the case". The court considered that the facts of this case did not suggest harassment.[992] This is

[986] *Sandvik* **n957**, 72-3
[987] *Intel v Via*, **n25** para 36 The Court of Appeal only referred to this case in respect of its recognition of the tension in EC law between the prohibition on abuse of a dominant position and IP, given the protection provided in the EC Treaty at article 295 in respect of property rights.
[988] *Sandisk* **n505**.
[989] *Sandisk*, **n505** paras 7-9.
[990] *Sandisk*, **n505** paras 20-42, 47-57.
[991] *Sandisk*, **n505** para 43-45.
[992] *Sandisk*, **n505** para 46.

far removed from the flexibility suggested by *Intel v Via*; however, this case was, in its turn, not considered by the court in *Sandisk.*

Once again, therefore, tests are suggested, this time in *Promedia* and *Sandisk*, which would not be met when actions are raised in respect of conduct which appears to infringe. But another approach, that of the Court of Appeal in *Intel v Via*, does suggest that may be abuse to raise a patent action which would be highly likely to succeed. What does this suggest for the present work?

3.4 The need for a more combined approach

3.4.1 The contribution of existing case law

The status of article 82 can lead to its imposing restrictions on the conduct of a patent owner in respect of its rights, irrespective of what might be suggested by the PA.[993] The cases and policy discussion reveal there to be some grounds for arguing that it could be abuse of a dominant position to enforce a patent in cases where there is clear infringement. This would be based upon a decision of the Court of Appeal (*Intel v Via*) where the court was more reluctant to limit the circumstances in which there may be an abuse, given the evolving nature of EC law regarding IP and article 82, than willing to make a statement as to when this may be so. It would also be consistent with a decision of the ECJ from the 1980s (*Volvo v Veng*) and a decision of the EC Commission (*Microsoft*) which was not supported by the CFI, with both of these concerning refusals to license.

[993]Cf *Commission Microsoft*, **n403** para 745-755 regarding arguments based on the disclosure required by article 6 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs OJ L 122, 17.5.1991. See also Anderman Regulation **n392**, 248-50 and Anderman Interoperability **n863**, 399. See further *CFI Microsoft* **n489** 789-811 regarding the priority of article 82 over TRIPS.

The greater weight of authority, from *Promedia*, *Sandvik* and *Sandisk* regarding raising actions and from *IMS* regarding refusal to license, supports the application of more limited criteria to when there will be abuse. These would not be met here. Further arguments will need to be developed, therefore, before it could be argued with any prospect of success that it is an abuse of a dominant position to enforce a patent where there would be a clear case of infringement.

Human rights, as considered so far in this work, are unlikely to assist in this regard. The significant body of case law considering the interface between IP and human rights suggests that for decisions to be reached against the patent owner in the UK jurisdictions there must be a legal vehicle. There has been noted to be no such vehicle in the PA.

Thus, this work has established that each of competition and human rights, as a matter of substance and of structure, could be used to restrict the enforcement of patents. The principles which have been developed by courts do not support their use, however, when there appears to be a clear case of infringement. An approach is required, therefore, which moves beyond the established, and separate, relationships between IP and competition and between IP and human rights.

There is scope for the fields to be further combined - for example, human rights arguments based on ECHR Article 1 Protocol 1 were raised in *IMS*, but were not explored in the judgments and opinions;[994] and *Promedia* considered human rights only from the perspective of access to justice and fair trials.[995] The questions of software and interoperable technology at the heart of the Microsoft case could have

[994] See opinion of Advocate General Tizzano in *IMS* **n495** para AG37.
[995] See **p152**

been explored in terms of access to information and freedom of expression[996] within article 10 ECHR as well as article 1 Protocol 1 in respect of patents and copyright. This was not done. Human rights are also notable in their absence from the Article 82 Review[997] and from the US 2007 report.[998]

3.4.2 Towards a combined approach

Accordingly, the rest of this work will suggest that new arguments can be developed, within the existing legal framework of competition and human rights, which can, and must, be used now in patent actions in the UK jurisdictions, without the need for new legislation or policy support. These will be based on a further intertwining of competition and human rights, through the two key legal tools of the HRA and article 82.

Just as at the end of chapter 2 there was seen to be a place for competition against the backdrop of consideration of human rights, support for the tripartite approach appears to come from a leading commentator

> "[a]s *Magill* and *IMS Health* show clearly, society has a strong interest to have access to information and this interest can be impeded by the private interest of the rightholder to enhance its exclusive monopoly style property right by giving it full and unfettered control over the work and its use. But it is not just passive access for society as a whole that is required. Each individual member of society also must have a right of access and a right to borrow (ideas and some expression) in order to exercise its fundamental freedom to create in

[996] See initial analysis from a more theoretical perspective in Rotenberg, B. "The European Regulation of Communications Software: Building a "Plattform" for Freely Interoperable Digital Expression" *International Journal of Communications Law and Policy* Web-http://www.ciaonet.org/olj/ijclp/ijclp_8/ijclp_8b.pdf.
[997] See **p137-9**
[998] See **n943.** There has been some consideration of other aspects of the relationship between human rights and competition, see Ameye, E. M. "The interplay between human rights and competition law in the EU" E.C.L.R. 2004, 25 (6), 332.

> order to be able to exercise his or her Human Right to benefit from copyright in his or her creative effort."[999]

This work will draw, therefore, on the case law and discussion considered so far, to develop new arguments in respect of the HRA and article 82, such that in some cases there will be no finding of infringement. As a first step, the next chapter will develop a means for courts to combine the range of human rights which can arise in a patent action and will propose a central role for this combination in all decision making in the action.

[999] Torremans, P.L-C. "Copyright as a Human Right" Chapter 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 16. See also Ghidini Innovation **n13**, 71-2, regarding competition, copyright and the US constitution; Tansey, G. Comment "Whose Rules, Whose Needs? Balancing Public and Private Interests" 662, 668 in Maskus/Reichman **n3**; and Anderson/ Wager **n136**, 744 noting from the WTO perspective the potential relevance of refusal to license cases to human rights, although the point is not pursued there.

4 Using Convention rights: the Human Rights Emphasis[1000]

4.1 Introduction

This chapter will propose a new approach to judicial decision making, in the light of the obligations imposed on courts by the HRA. At the heart of this approach is a means by which all Convention rights, which are relevant to a patent infringement action, are to be reviewed and then combined by the court. This process will deliver what is termed here the **Human Rights Emphasis**. The Human Rights Emphasis must be used by the court when determining decisions which it is to make in the action. These will involve interpretation of the infringement provisions of the PA in respect of each allegation of infringement and it will be argued in chapters 5, 6 and 7 that there is a place for a form of the Human Rights Emphasis in decisions relating to abuse of a dominant position.

4.2 Using the HRA

4.2.1 A well trodden path?

New approaches to interpretation of IP legislation have been seen in the past. In adopting the proposals to be made here, courts in the UK would be continuing a course of judicial innovation and idiosyncracy on the part of English courts.[1001]

[1000] Aspects of this chapter regarding the obligations imposed by the HRA build on Brown Real World **n530** and also Waelde, C. and Brown, A.E.L. "A Practical Analysis of the Human Rights Paradox in Intellectual Property Law: Russian Roulette" in *The Human Rights Paradox in Intellectual Property Law* (forthcoming, Edward Elgar, a final draft is available from the authors).

[1001] See earlier analysis in Brown, A.E.L. "The increasing influence of intellectual property cases on the principles of statutory interpretation" E.I.P.R. 1996, 18(10), 526-530 ("Brown Interpretation").

For example, in *Pioneer Electronics Capital Inc v Warner Music Manufacturing Europe GmbH,*[1002] ("*Pioneer v Warner*") Aldous J interpreted the meaning of the "direct product of a patented process" in the PA. He noted that this was framed as to have, as nearly as practicable, the same effects in the UK[1003] as the corresponding provisions of the European Patent Convention ("EPC")[1004] and the Community Patent Convention.[1005] In the light of this, Aldous J looked at these provisions and their history[1006] and also at legislation and interpretation in relation to similar issues in other EPC member countries.[1007] He paid particular attention to the German position, upon which he considered the provisions to have been based, in respect of which a key source was the Reichstag law of 1891.[1008] Aldous J then interpreted "direct product" in such a way that the infringement action could not succeed and struck it out, with the decision and approach both being upheld[1009] by the Court of Appeal.[1010]

Pioneer v Warner was referred to by Laddie J in *Wagamama Ltd v City Centre Restaurants Plc*[1011] when he considered the meaning of "association" in the EC Trade Marks Harmonisation Directive. Laddie J declined to follow case law from the Benelux countries on the meaning of "association", notwithstanding an accepted view at the time that this new term had been taken from Benelux law. Laddie J termed this

[1002] *Pioneer v Warner* **n529** considered in Hurdle, H. "What is the direct product of a patented process?" E.I.P.R. 1995, 17(5), 249-252 and Brown Interpretation **n1001**, 528-9.
[1003] Section 130(7) PA.
[1004].European Patent Convention 1973-2007 http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html ("EPC").
[1005] Agreement 89/695/EEC relating to Community patents - Done at Luxembourg on 15 December 1989 O.J. L 401 30.12.1989 *http*://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41989A0695(01):EN:HTML *(*incorporating Community Patent Convention of 1975).
[1006] *Pioneer v Warner*, **n529** 494-5
[1007] *Pioneer v Warner*, **n529** 498-9
[1008]*Pioneer v Warner*, **n529** 495
[1009] *Pioneer Electronics Capital Inc v Warner Music Manufacturing Europe GmbH* [1997] R.P.C. 757, 766 et seq. See Hurdle, H. "What is the direct product of a patented process?" E.I.P.R. 1997, 19(6), 322-326.
[1010] See also *La Croix du Arib*, **n529** 499 and *Rhone-Poulenc Rorer International Holdings Inc v Yeda Research & Development Co Lt*d [2006] EWCA Civ 1094 [2007] R.P.C. 9 , paras 15, 21, 24-31 cf *Coflexip SA v Stolt Offshore MS Ltd* [2004] EWCA Civ 213 [2004] F.S.R. 34 ("*Coflexip*") paras 124-130 confirming the importance in interpretation of the CPC, although at the time of writing in 2008 it has come into effect in any form - see also **n186**
[1011] *Wagamama Ltd v City Centre Restaurants Plc* [1995] F.S.R. 713 ("*Wagamama*") referring to *Pioneer v Warner* at 726.

mere "Chinese Whispers".[1012] Further, he considered that the future of EC trade mark law was too important to be decided on the basis of the "first past the post".[1013]

The approach which will be suggested here is less innovative than those considered by the English courts. It will not be proposed that courts base decisions upon German law from the nineteenth century, no matter how directly its influence on UK legislation could be traced, nor upon Chinese Whispers. Rather, the argument will be based on the requirement in section 3(1) HRA that courts interpret legislation so that "so far as it is possible to do so", it is "read and given effect in a way which is compatible with the Convention rights"; and also on the provision in section 6 HRA that it is unlawful for a court to act in a way which is incompatible with a Convention right.[1014]

4.2.2 A new approach to statutory interpretation

4.2.2.1 The HRA and interpretation

There are two key aspects of section 3(1) HRA. The first is that for a court to make a decision in relation to "the Convention rights", a proposed interpretation must be "possible" and "compatible", with "compatible" and "Convention right" also featuring in section 6 HRA. There has been significant debate and uncertainty[1015] regarding the meaning of "so far as possible" and "compatible". There were early suggestions that courts could depart from the wording of legislation and intention of

[1012] *Wagamama*,**n1011** 726-7
[1013] *Wagamama*, **n1011** 728 (quote) and see 728-9. This decision stimulated significant debate amongst commentators: see Kamperman Sanders, A. "The Wagamama decision: back to the dark ages of trade mark law" E.I.P.R. 1996, 18(1), 3-5; Prescott, P. "Think before you waga finger" E.I.P.R. 1996, 18(6), 317-321; Kamperman Sanders, A. "The return to Wagamama". E.I.P.R. 1996, 18(10), 521-525; Prescott, P. Has the Benelux Trade Mark Law been written into the Directive? E.I.P.R. 1997, 19(3), 99-102. See also Brown Interpretation **n1001**, 528-30.
[1014] See **p49-50**
[1015] Gearty, C**. "**Reconciling Parliamentary democracy and human rights" L.Q.R. 2002, 118(Apr), 248-269; Phillipson, G. (Mis)-reading section 3 of the Human Rights Act. L.Q.R. 2003, 119(Apr), 183-188.

Parliament, in order to deliver "the Convention rights". It was argued in turn that this would have had a negative impact on certainty, Parliamentary sovereignty and more established principles of statutory interpretation.[1016] Two decisions of the House of Lords provided some clarification in this regard.

The 2001 decision in *R v A (Complainants Sexual History)* ("*R v A")*[1017] concerned the admissibility in a rape case of evidence of previous sexual relations. Lord Steyn stated that section 3 HRA introduced a new, strong, obligation to interpret legislation consistently with a Convention right; and that even if there was no ambiguity as to the meaning of the legislation, the wording used must be "strained", so as to ensure consistency. Lord Steyn also stated, however, that this should not be done if it was plainly impossible in the light of the legislation. [1018]

The 2004 decision in *Ghaidan v Godin-Mendoza* ("*Ghaidan")*[1019] concerned whether provisions of the Rent Act 1977 applied to the surviving partner of a homosexual relationship. The House of Lords held that section 3 HRA could lead to a "modified" meaning being given to legislation. This meaning must be consistent, however, with a fundamental feature of the legislative scheme and with its underlying thrust.[1020] If such a meaning is available, then it held that this must be preferred, even if there was no ambiguity in the legislation or the basis for this meaning is weaker than those in respect of others.[1021] The House of Lords also considered that the court should not

[1016]Bennion, F. "Human Rights: a Threat to Law?" UNSW Law Journal 26 2003 418 ("Bennion Threat"), Section IV; Manchester, C. et al (2000) (2nd edn) *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* Sweet & Maxwell, London, UK ("Manchester") 33, 37-76; Zander, M. (2004) (6th edn)*The Law Making Process* Cambridge University Press, Cambridge, UK, 127-147, 184-202, 330-370 ("Zander"); Walker, D.M. *The Scottish Legal System. An Introduction to the Study of Scots Law,* Sweet & Maxwell (8th ed.,2001), 413-432; Gearty Principles **n226**, 50, 146 et seq.

[1017] *R v A (Complainants Sexual History)* [2002] 1 A.C. 45 (HL) ("*RvA*").

[1018] *R v A,* 65-9, **n1017** notably 68. See consideration in Kavanagh, A. " Unlocking the Human Rights Act: the "radical" approach to section 3(1) revisited". E.H.R.L.R. 2005, 3, 259-275 ("Kavanagh Unlocking"), 226-80 and Gearty, C. "Revisiting section 3(1) of the Human Rights Act." L.Q.R. 2003, 119(Oct), 551-553.

[1019] *Ghaidan v Godin-Mendoza* [2004] 2 A.C.557 (HL) ("*Ghaidan*")

[1020] See in particular Ghaidan, **n1019** paras 33, 67, 73.

[1021] See discussion in *Ghaidan*, **n1019** paras 28-33 (Lord Nicholls); paras 44, 45, 49 (Lord Steyn), paras 68,77 (Lord Millett) and paras 113, 115 (Lord Rodger). See consideration in Kavanagh, A. "The

enter into the realm of parliamentary policy making, which was beyond the proper function of the court.[1022] Rather, if no interpretation could be reached which was consistent with Convention rights, the solution within the HRA should be adopted, namely a declaration of incompatibility.[1023]

4.2.2.2 A limited innovation

Further support for an approach which involves seeking new interpretations of legislation comes from the views of leading commentators. It has been argued that the impact of the HRA on statutory interpretation, the supremacy of Parliament and its legislative intent is less than has been argued by some.[1024] The HRA is itself a statement of Parliamentary intent[1025] and even prior to the HRA there were presumptions and interpretative tools by which courts could avoid a narrow interpretation of legislation.[1026] The House of Lords in *RvA* and in *Ghaidan*[1027] also considered that the interpretative approaches to be adopted under the HRA were similar to the established obligations of courts in respect of legislation implementing EC directives, pursuant to which courts must strive to achieve the result pursued by the directive, in the light of its wording and purpose.[1028]

The view of the HRA as having a less than revolutionary impact on statutory interpretation is supported by the work of Bennion, a leading authority in respect of statutory interpretation in England and Wales. In an edition of his seminal work which

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role of parliamentary intention in adjudication under the Human Rights Act 1998" O.J.L.S. 2006, 26(1), 179-206 ("Kavanagh Intention"), 191-2, 199-203. For further comment see Feldman. D. "Institutional roles and meanings of 'compatibility' under the Human Rights Act 1998" 87 in Fenwick **n367**, in particular 90, 92, 111.

[1022] *Ghaidan*, **n1019** para 19

[1023] Section 4 HRA, see *Ghaidan* **n1019** 23, 39, 46, 50 and Appendix. See also *Wilson v First Country Trust Ltd (No. 2)* [2004] 1 A.C. 816, paras 61-7 and 144.

[1024] Kavanagh Unlocking **n1018** and Kavanagh Intention **n1021** , 183-6, 189, 191, 197 and 205. See also Gearty Principles **n226** 22-3, 48.

[1025] Kavanagh Intention **n1021**, 181-3, 187-9, 197, 200, cf 200-1.

[1026] Kavanagh Intention **n1021**, 185-6, 194, 204-5.

[1027] *Ghaidan*, **n1019** paras 120-1 (Lord Rodger); *R v A* **n1017**, para 65 (Lord Steyn);

[1028] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] E.C.R. I-4135, para 8. See also Brown Interpretation, **n1001** 526-7 and *Levi*, **n415** paras 27-9, 34-7

predates the HRA,[1029] he considered the place of policy and the interpretation of legislation in a dynamic manner.

Bennion considered that courts when interpreting legislation should have regard to legal policy and, if there was no clear expression of Parliamentary intent to the contrary, reach an interpretation consistent with this policy.[1030] He recognised that there could be more than one relevant policy in respect of a question of interpretation and that the court should reach a decision consistent with that which should be given greater weight. He referred to the public interest, health, morality and international relations as being examples of policy which can be relevant.[1031]

The role of policy is more confined than "public policy", in respect of which a key case is the decision of the House of Lords *British Leyland v Armstrong*.[1032] This involved the manufacture of spare parts without the consent of the copyright owner. The House of Lords developed the principle of non derogation from grant, notwithstanding there being no reference to this in the relevant copyright legislation[1033] and found there to be no infringement. This decision has been criticised as improperly based in public policy[1034] although the same courts were willing to accept a residual role for public policy.[1035] Yet even legal policy was noted by Bennion to be "a very unruly horse",[1036] in particular because it is not static:

> "[l]egal policy changes in response to signals from all quarters, some subtle. The prevailing wind that is legal policy in a particular area backs or veers accordingly….[t]he more perceptive judges pick up the signals first. An

[1029] Bennion, F. (1997) (3rd ed) *Statutory Interpretation: A Code* Butterworths, London, Dublin and Edinburgh UK ("Bennion 1997").
[1030] Bennion 1997, **n1029** 600-1
[1031] Bennion 1997, **n1029** 60-2, 605
[1032] *British Leyland v Armstrong* [1986] A.C. 577[1986] R.P.C. 279 ("*British Leyland*").
[1033] *British Leyland*, **n1032** 361, 374, 376. See MacQueen Copyright, **n178** 45-8 noting that through this approach, there was a more substantive attack on IP than that taken by the EC decision makers in cases which was considered in chapter 3 of this work.
[1034] *Canon Kabushiki Kaisha v Green Cartridge Company (Hong Kong) Limited* [1997] F.S.R. 817, at 824 and *Mars UK Ltd v Teknowledge Ltd* [2000] E.C.D.R. 99 ("*Mars*"), 105. See also consideration in Brown Guards **n530**,p4 and Brown Curb **n163**.
[1035] *Mars* **n1034**, 108.
[1036] Bennion 1997 **n1029**, 595, 598 (quotation from *Richard v Mellish* (1824) 2 Bing 229.)

> aware judge tries to move it in the direction he thinks the law ought to advance".[1037]

Consistent with this, Bennion noted that statutes are "always speaking".[1038] He argued that statutes can speak and develop in a fairly uncontrolled manner[1039] as a result of the "dynamic processing"[1040] of language. As a result, "the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words, and other matters."[1041] An example was used of a court finding that making silent calls over the telephone constituted assault, although the relevant legislation pre-dated the invention of the telephone.[1042]

The obligations of courts in respect of interpretation of directives, together with a place for policy and dynamic processing in established principles of statutory interpretation all suggest that the HRA need not create new uncertainty or disregard for Parliamentary intent. This in turn suggests that courts in patent cases may be willing to continue their creative approaches to IP legislation and adopt the proposals to be made here. This can be supported further by the view that since the HRA, the greater role of human rights in decision making has sensitised courts to broader, less restricted approaches to interpretation,[1043] notably through their regard for decisions of the ECtHR[1044] which has a fluid approach.[1045]

[1037] Bennion 1997, **n1029** 600, quoting Lord Devlin *The Enforcement of Morals*, 94-5, 126.
[1038] Bennion 1997, **n1029** 537.
[1039] cf through official statements from government departments and delegated and subsequent legislation - Bennion 1997, **n1029** 537-541.
[1040] Bennion 1997, **n1029** 687-8 which also notes criticism of this view.
[1041] Bennion 1997, **n1029** 687.
[1042] Bennion 1997, **n1029** 686 – referring to *R v Ireland* [1997] 1 All ER 112, 115.
[1043]See Klug Pepper **n369**, 250-2; Gearty Principles **n226**, 42-7, 81-3, 179-185, 196-202; Jayawickrama, N. (2002) *The Judicial Application of Human Rights Law. National, Regional and International Jurisprudence* Cambridge University Press, Cambridge, UK ("Jayawickrama"), 61, 84-5, 96-7, 99-102,109-110; Feldman, D. "The Internationalization of Public Law and its Impact in the UK" 108 in Jowell/Oliver, 122 124, 126-7, 133-5, 138-9, 141; and Masterman, R. "Taking the Strasbourg jurisprudence into account: developing a "municipal law of human rights" under the Human Rights Act" I.C.L.Q. 2005, 54(4), 907-931.
[1044] Although pursuant to section 2(1) HRA these need only be taken into account, not followed
[1045] See eg *Tyrer v United Kingdom* (A/26) (1979-80) 2 E.H.R.R. 1, para 31. See also Stachan, J. "The Human Rights Act 1998 and Commercial Law in the UK" 161-185, 165,167,176 in Bottomley/Kinley **n294** and Clayton, R. "The Human Rights Act six years on: where are we now?" E.H.R.L.R. 2007, 1,

A potential openness of courts to the approach to be proposed here is important, given the practical aim of this work. Although it will be argued that courts must adopt the proposals, as they are based on the obligations under the HRA, courts may still be reluctant to adopt an approach which appears to be a radical departure from established principles. If courts had been likely to react in this manner, little of practical value would have been achieved by developing the arguments of this work.

4.2.2.3 The HRA and Convention rights

The second key aspect of section 3(1) HRA[1046] and the focus of the rest of this chapter, is what is meant by "the Convention rights".[1047] Several Convention rights may arise in an ICT related patent action: rights of the patent owner, in respect of property; rights of the alleged infringer, to life, freedom of expression and information or in respect of property; rights of ultimate beneficiaries of infringing acts, to life and freedom of expression, which would support the position of the alleged infringer; and rights in respect of property of other innovators who may wish to benefit, through patents, from their future innovation, which would support the patent owner.

Some of these Convention rights will support one party and some the other. It should also be borne in mind that article 17 ECHR, to which the HRA states that courts in the UK should have regard (although it is not a Convention right),[1048] provides that rights set out in the ECHR do not justify acts to the detriment of the rights of others or the

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11-26, 16-18; and more detailed analysis in Ost, F. "The Original Canons of Interpretation of the European Court of Human Rights" 283 in Delas-Marty, M. (ed) (1992) *The European Convention for the Protection of Human Rights. International Protection versus National Restrictions* International Studies in Human Rights Martinus Nijhoff Publishers Kluwer Academic Publishers Dordrecht, The Netherlands, Boston, USA, London, UK ("Delas-Marty").

[1046] See **p160**

[1047] Section 3 HRA refers to "Convention rights" cf section 6 (1)HRA refers to "a Convention right" and section 6(2)(b) to "Convention rights".

[1048] see Section 1(1) HRA.

imposition of more limits on the rights of others than are included in the ECHR.[1049] This, together with the obligation in the HRA for courts to make decisions "compatible" with Convention rights, requires a means for the range of Convention rights which could arise in action to be combined.

At present there are as noted[1050] only the rather vague references to the balancing of two human rights in the light of the facts of the case which were seen, for example, in *Ashdown* in respect of rights to free expression and to property.[1051] *Levi* did involve three human rights - two sets of rights to property, in respect of jeans and trade marks, and the right to free expression, in respect of identifying the jeans as coming from Levi. The court there focused, however, first on the conflicting human rights in respect of property[1052] and then on the need for a balance between the right of property in respect of the trade mark and the right of freedom of expression.[1053] *Levi* provides no guidance, therefore, as to how three human rights could all be combined. Proportionality has been seen to be a key factor in determining what will be a legitimate restriction on rights to property and to freedom of expression in IP cases.[1054] Commentators have noted, however, that a range of approaches have been adopted to proportionality by courts in these cases[1055] and also in the case law of the ECtHR more generally.[1056] Once again, therefore, no common themes can be discerned.

[1049] See Leach, **n353** 169-179; MacQueen/Brodie **n367** in Boyle, **n367** 165-6; and MacQueen Utopia, **n184** 465.
[1050] See **section 2.3.6.1**
[1051] *Ashdown***, n23** paras 24, 25, 28 and 39.
[1052] *Levi*, **n415** para 40
[1053] *Levi*, **n415** para 41.
[1054] See eg **pp94, 97-8, 104 and 106**
[1055] See also Geiger Safeguard, **n13** 278-9 calling for greater coherence in combining human rights and IP using proportionality as a guide, with no firm proposals provided; Geiger Proportionality **n584**, 324; Geiger Constitutionalising, **n301** 385-9, 397; and Geiger Fragile **n595**, 717-8.
[1056] But note Fenwick, H. and Phillipson, G (2006) *Media Freedom under the Human Rights Act* Oxford University Press, Oxford, UK , 86-7, 93-106. See also consideration of balance and proportionality in relation to breach of confidence and privacy in Phillipson, G. "The common law, privacy and the Convention" 215 in Fenwick **n367**, 279 et seq, in particular 282 and 293.

Thus although proportionality and balance are laudable goals and appropriate means of resolving some conflicts, they do not provide an adequate level of structure when more than two rights may be involved. Indeed, there can also be uncertainty with two rights, as was recognised by Baroness Hale in the decision of the House of Lords in *Campbell*, when seeking, on the basis of section 6 HRA, to balance article 8 ECHR (right to respect of private life) and article 10 ECHR in a proportionate, and separate and parallel,[1057]manner.[1058]

Baroness Hale stated:[1059]

> "[T]he application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interference with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a 'pressing social need' to protect it. The Convention jurisprudence offers little help with this"

Baroness Hale considered that this followed from the fact that cases considered by the ECtHR involved complaints against states.[1060] The ECJ considered more than two fundamental rights, albeit again from the perspective of state obligations, in *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* ("*Telefonica*").[1061] The ECJ considered that when implementing their obligations under directives relating to copyright, enforcement of IP and privacy in respect of

[1057] See *HRH* **n25** para 117 referring to parallel analysis. *Campbell* **n366** paras 115-118 (re article 10), paras 119-124 (article 8) and para 141; *HRH* proceeded on a similar basis paras 122-133 (regarding article 8) and 134-7 (regarding article 10).
[1058] *Campbell* **n366,** para 55, 86, 103,107 110 (referring to *Jersild v Denmark* (A/298) (1995) 19 E.H.R.R. 1 and *Bladet Tromso v Norway* (21980/93) (2000) 29 E.H.R.R. 125) 111, 113, 167.
[1059] *Campbell*, **n366** para 140.
[1060] *Campbell*, **n366** para 140 and also **p60.** Although note that states often rely on other rights in responding to the complaint, see eg *Bowman v United Kingdom* (24839/94) (1998) 26 E.H.R.R. 1 ("*Bowman*") a decision of the ECtHR regarding rights to freedom of expression in respect of the views of candidates in an election (ECHR article 10). The UK relied upon rights of others in respect of free elections (ECHR Protocol 1 article 3). See paras 31-48, focussing on proportionality to determine whether the restriction was legitimate.
[1061] *Telefonica*, **n260**

electronic communications, all of which included their own internal balances,[1062] member states must have regard to fundamental rights, in respect of property regarding IP and in respect of private life.[1063] Member states must then strike a fair balance amongst these rights and also have regard to proportionality; [1064] given the nature of the questions before it,[1065] however, the ECJ did not provide any detail as to how this may be done.

National case law and that of the ECtHR and ECJ do not provide structured guidance, therefore, in relation to the conflicting rights of parties in a private action. The next section will develop a more substantial, transparent and predictable test[1066] than that which is presently available, to be used by courts when considering more than two Convention rights.

4.3 Convention rights: a proposal

This section sets out a proposal which will be tested using an example.

4.3.1 Step 1: identify the relevant rights

Courts should begin by identifying those Convention rights which may be relevant to the patent action before the court. As the HRA imposes obligations on courts in terms of the decisions they make, this process should encompass those rights which are

[1062] *Telefonica*, **n260** paras 6-27, 65-6.
[1063] *Telefonica* **n260** paras 61-5 - also effective judicial protection
[1064] *Telefonica* **n260** para 68. See Kuner, C. **"**Data protection and rights protection on the Internet: the Promusicae judgment of the European Court of Justice." E.I.P.R. 2008, 30(5), 199-202.
[1065] See **p70 and n257**
[1066] See Bennion Threat, **n1016** Sections III and IV; Bennion 2008 **n250**, 799-807, 812-816 cf Kavanagh Unlocking **n1018**, 269.

relevant as at the date of the court's decision, rather than merely at the date of the alleged infringement. [1067]

It is likely, as seen, that this process will lead to more than one right being identified.[1068] It is also likely that not all of these will be rights of parties to the action – for example, there could be rights of teachers or pupils in a school supplied by the benevolent manufacturer or of other innovators in the ICT field. This raises the question of what rights should indeed be relevant, or "engaged"?[1069]

4.3.1.1 All rights of the parties?

English courts have been reluctant to accept that some Convention rights of parties, clearly raised by the facts pleaded in the case, are indeed engaged. This was seen in *Miss World*[1070] where the court queried whether trade mark infringement could involve questions of freedom of expression, other than when political statements were made.[1071] Another example is the decision at first instance in *Murray v Express Newspapers Plc*[1072] ("*Murray*"). This involved the publication of pictures taken from long range in the street, in unexceptional circumstances, of the infant child of a celebrity. The court considered that this could not involve questions of respect of private life and that article 8 ECHR[1073] was not engaged.[1074]

The decisions in *Murray* and *Miss World* were based, however, on the courts' view of the facts and scope of the Convention rights in question. The HRA itself does not

[1067] See *Ghaidan*, **n1019** para 23.
[1068] See **p165 (also pp50, 55, 61)**
[1069] Eg *Campbell*, **n366** paras 20, 25, 130.
[1070] See **n528**
[1071] *Miss World*, **n528** para 47 and see **p106-7.**
[1072] *Murray v Express Newspapers Plc* [2007] EWHC 1908 (Ch) [2007] E.C.D.R. 20 ("*Murray*")
[1073] See **p61, 167**
[1074] *Murray*, **n1072** paras 22-3, 66-7 (see paras 43, 45 commenting on ECtHR cases, 26-8 distinguishing *Campbell*.)

restrict when rights may be engaged. Rather, it makes general references to "Convention rights".[1075] It is also noteworthy that when the Court of Appeal considered the decision in *Murray*, it took a different approach [1076] and considered that article 8 ECHR was engaged.[1077]

What rights of parties may be engaged in ICT related patent actions? Take as an example the benevolent manufacturer[1078] who is sued for supplying the school with the educational technology and also with a communications system without which the school would be unable to call an ambulance. The benevolent manufacturer has done this because the local authority refused to supply the technology to the school. Here, the right to property of the patent owner and also of the benevolent manufacturer would likely both be engaged - the patent (property)[1079] is allegedly infringed and the patent owner is seeking to prevent the benevolent manufacturer utilising its resources (property) as it sees fit. The right to freedom of expression of the benevolent manufacturer may also be engaged. This is more uncertain, given the approach of the court in *Miss World,*[1080] but there is an argument that the benevolent manufacturer has chosen to express its support for local education and that enforcement of the patent will interfere with this. This may be particularly so if the benevolent manufacturer had ensured that its supply of the school had a great deal of media coverage.

4.3.1.2 All rights?

If the communications system is not supplied by the benevolent manufacturer, then an ambulance may not be able to be called and someone may die; and if the educational

[1075] See **p50 and nn278-9**
[1076] *Murray v Express Newspapers Plc* [2008] EWCA Civ 446 [2008] E.C.D.R. 122008 WL 1867537 ("*Murray Court of Appeal*"). The Court of Appeal considered the first instance court to have been influenced by its view, with which the Court of Appeal disagreed, that the action was an attempt to assert rights of the parent rather than the child - paras 12-16.
[1077] *Murray Court of Appeal,* **n1076** paras 22 et seq.
[1078] See **p14**
[1079] See **p50 and n288**
[1080] See **p107**

technology is not supplied, teachers will be less able to teach and pupils less able to learn. The rights of teachers and pupils to expression and information may be engaged, therefore, as may the right to life of the person who may die. There are also the rights to property of other innovators in the ICT field wishing to pursue their own innovation without fear of restriction of their reward. The teachers, pupils or other innovators are not, however, parties to the action.

This question of the rights of non parties is important. Persons in need will be unlikely to have the resources and access to equipment and infrastructure to enable them to manufacture or import technology, such that there could be patent infringement. This is particularly so in respect of patents for pharmaceuticals and communications hardware, although less so in respect of software related patents. Persons in need are unlikely, therefore, to be party to a patent action; but it is the needs of these persons which are most likely to lead to emotional and policy considerations in respect of the consequences of IP and its enforcement[1081] - are they to be excluded from the arguments of this work?

The fact that sections 3 and 6 HRA[1082] do not distinguish between the rights of parties and of non parties may suggest that all Convention rights should be considered by the court in an action. Yet some human rights would be met by any act of infringement, as a result of the wider availability of communications and pharmaceutical products. If the rights of those persons, possibly unidentified, are taken into account in all patent actions, it could be much more difficult for the patent owner ever to enforce a patent.

The aim of this work is to develop arguments by which the patent owner could be unable to enforce the patent - but to do so within legal framework. Consistent with the adversarial nature of court actions in the UK jurisdictions, patent actions should remain based within the PA; they should not become wider ranging enquiries in

[1081] See **pp11-2**
[1082] Likewise section 6 HRA

respect of the possible impact of human rights. This is consistent with the conclusion of the Court of Appeal in *Chiron Corporation and Others v Organon Teknika Limited and Others ("Organon"),*[1083] that arguments in relation to abuse of a dominant position, that reliance on IP could restrict access to life saving technology, were speculative and should be dismissed.[1084]

Rather than embarking upon speculative enquiries, therefore, this work proposes that the Convention rights of non parties can be engaged, to be part of the argument and consideration by the court. This should be so only, however, if they are established by the party seeking to use them (say, the alleged infringer in respect of the rights to life of patients)[1085] to be highly likely to be met, advanced or affected by the pleaded instances of infringing conduct.[1086] A party must do more, however, than refer to the pleadings. Details must be provided of how the human right would be advanced - for example, are there specific supply contracts and arrangements in respect of the use of the technology by a school[1087] or is treatment arranged in which the technology would assist a specific individual or group of patients? In respect of the rights of other innovators, reference could be made to the reaction of the pharmaceutical industry to increased compulsory licensing of essential patented medicines in Brazil and Thailand following the Doha and Cancun declarations, which suggested possible consequences for further innovation in the field.[1088]

[1083] *Chiron Corporation and Others v Organon Teknika Limited and Others* [1992] 3 C.M.L.R. 813 [1993] F.S.R. 324 ("*Organon*").
[1084] *Organon*, **n1083** para 34.
[1085] See **p172**
[1086] See in England Part 63 "Patents and Other Intellectual Property Claims" Civil Procedure Rules http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part63.htm, esp rule 63.9 and Practice Direction "Patents and Other Intellectual Property Claims" http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part63.htm (para 11.1) and see precedent Particulars of Claim at Terrell **n171**, 678. In Scotland see Rules of the Court of Session Chapter 55 "Causes relating to Intellectual Property" http://www.scotcourts.gov.uk/session/rules/chapter55.asp, rule 55.7.
[1087] although it would still be possible for this technology not to reach the destined users, as in *Glaxo Group Ltd v Dowelhurst Ltd* [2005] E.T.M.R. 104 when pharmaceutical drugs donated to a charity in Spain for use in Africa were ultimately imported into the UK.
[1088] See for example PhRMA press release 14 May 2007 "Compulsory Licensing Trend Dangerous" http://www.phrma.org/news_room/press_releases/phrma%3a_compulsory_licensing_trend_dangerous/ cf Statement of Knowledge Ecology International on the same issue 4 May 2007 http://www.keionline.org/index.php?option=com_content&task=view&id=46&Itemid=1.

4.3.2 Step 2: evaluating the Convention rights

4.3.2.1 Individual assessments

Once the Convention rights have been identified, each right should be assessed in the light of its restrictions or permitted exceptions, other Convention rights which are engaged and the need for balance and proportionality, on the basis of the facts of the case. This analysis would take the same form as the already established parallel analysis.[1089] Here, however, this would be merely the start of a much longer process.

As courts must make decisions in respect of each allegation of infringement, these analyses should be carried out separately in respect of each allegation. This may give rise to different outcomes. For example, the action against the benevolent infringer could involve both the supply of a technology system for use in education and also technology for use in emergencies. Different views may be reached regarding a proportionate restriction on rights in each situation – for example, a court may consider contacting a hospital to be more important than education, so that a restriction of the right to property of the patent owner on the basis of the right to life (particularly given the lack of relevant limits on the right to life)[1090] is more likely to be proportionate than one based on the right to obtain information (and its limits).[1091]

4.3.2.2 Underlying assumptions

[1089] See **p167**. See also Ricketson **n301**, 200 and MacMillan, J. "Administrative Law, Commerce and Human Rights" 257 at 277, both in Bottomley/Kinley **n294**.
[1090] See article 2 ECHR
[1091] See eg **p62**

For these analyses to be carried out, the underlying assumptions have impact on what restrictions there may be on, say, expression and whether or not this would be proportionate. For example, in the terms of the supply by the benevolent manufacturer,[1092] is it to be assumed that there is infringement? If so, is an injunction or interdict to be granted, so that the conduct will come to an end? Assumptions in respect of these matters at the start of the court's decision making could be seen as premature. They could also be said to be circular, given that the aim of this work is to avoid findings of infringement.

Yet the HRA obliges courts to make decisions which are compatible with Convention rights; it is unclear what this will mean in a particular case, given the range of rights which may be engaged and the limits on most of them; and it has been proposed so far in this chapter that these rights should each be considered to establish whether a restriction on them would be proportionate. It is necessary, therefore, to make some form of assumption as to the consequences of the court case and the likelihood of any restriction. Given the focus of this work on cases where there may seem to be clear infringement,[1093] an initial assumption of infringement is appropriate. This is, however, the start rather than the end of an analysis, as courts may still find ultimately that there is no infringement.

Remedies are also important. This may seem circular once again given the focus of this work.[1094] Yet the assessments could vary with the assumptions made – is just a payment to be made like in *Ashdown*,[1095] or must the conduct cease? The first may seem more proportionate than the second. Given once again the strength of the initial infringement case and also the fact that the patent owner can seek an injunction (although it may not be granted),[1096] the assessment should proceed on the initial assumption that there will be an injunction or interdict.

[1092] See **p14**
[1093] See p37
[1094] Cf p14 and **n23**
[1095] See **n23**
[1096] See section 61(1) PA and eg *Coflexip SA v Stolt Comex Seaway MS Ltd* [1999] F.S.R. 473, para 3. and also **n23**

If the proposals of this work are wholly based on this assumption, however, they will be of little value if a patent owner makes it clear that it does not seek an injunction or interdict. This could be done in the initial pleading, or through amendment as part of a strategic response to the arguments of this work. The patent owner may also undertake to the court (a statement taken seriously by parties, advisers and courts and not to be made lightly)[1097] that it will not seek such an order after the parallel analysis has been completed.

If there is such a pleading, amendment or undertaking then the parallel analysis should not proceed on the assumption of the grant of an injunction or interdict. Instead, it should proceed on the assumption that financial payments would be ordered but that the conduct could continue if this was wished. The question of what financial remedy might be ordered at the end of action is complex,[1098] as is that of the consequences of a party being unable to pay.[1099] But these issues are outside the scope of this work.

4.3.3 Step 3: combining the results

[1097] See Code of Conduct for Scottish Solicitors (2002) http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/Codeconduct/codeofconduct.aspx, rule 8, Solicitors' Conduct of Conduct 2007 (England and Wales) http://www.sra.org.uk/solicitors/code-of-conduct.page rule 10.05 and chapter 11 regarding litigation generally and Taylor, N. (ed) (8th ed) (1999) *The Guide to the Professional Conduct of Solicitors* Law Society Publishing, 351 et seq. See Terrell **n171** para 13.22 and *Volvo v Veng* **n488**, para 5 for an example of an undertaking given to the court.

[1098] *Ashdown* **n23** considers the matter only at the level of principle, paras 37, 46, 69, 82. See Terrell **n171**, para 13.23-4 and 13.32-56.

[1099] Regarding enforcement of financial remedies, see in England, rules 70, 73 and 74, and associated Practice Directions, available via http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm and in Scotland http://www.scotcourts.gov.uk/session/rules/ chapter 51. See also Mackay, Lord (ed) (2002) *Halsbury's Laws of England* Vol 17(1) Butterworths LEXISNEXIS, paras 1-190 and Morrison, N. et al (ongoing loose leaf servce) *Green's Annotated Rules of the Court of Session* W. Green & Son , chapters 7, 16 Part II and 59.

4.3.3.1 The aim

The results of the parallel analysis in respect of each Convention right should be combined for each allegation of infringement. The combining should be done using an arithmetical matrix. Given the number of rights which can be involved, this is a clear way of assessing and presenting the outcome of complex legal analysis. It remains, however, in essence a legal test like others explored so far in this work, such as in *IMS, Magill* and *Ashdown* and like other tests does "not simply amount to an adding up exercise".[1100]

The process will lead to the **Human Rights Emphasis,** which may be for or against the patent owner or may be neutral. The Human Rights Emphasis will constitute the "Convention right" in the consideration by courts of decisions which they are to make when interpreting the PA, in the light of sections 3(1) and 6 HRA. If there is more than one possible interpretation before the court, then that which is consistent with the Human Rights Emphasis must be chosen, even it is not supported by the strongest available argument.[1101] If the Human Rights Emphasis is neutral, then courts should prefer the strongest argument in the usual way.

4.3.3.2 The approach

Each Convention right which is engaged in relation to an infringement allegation should be awarded a numerical value, of "one". Those Convention rights which favour the patent owner (including, say, those of other innovators) should be accorded "plus one" and those which do not favour the position of the patent owner (those of the infringer but also, say, those of patients) should have "minus one".

[1100] Torremans, P.L-C. "Copyright (and other Intellectual Property Rights) as a Human Right" 195 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 214.
[1101] *Ghaidan,* **n1019**

The conferring of "one" on all rights is not the result of a value judgement that, for example, rights in respect of enjoyment of property can properly be equated with rights to life.[1102] Rather, it is consistent with the approach of the ECHR, from which the Convention rights come, which does not set out a hierarchy of rights. This recognises individual rights and their limits, albeit with some rights, such as life, subject to fewer limits than others, such as property and the lack of a hierarchy was confirmed in 1998 in a Council of Europe resolution regarding the "Right to Privacy".[1103]

4.3.3.3 The impact

Yet although each right has a starting point of "one", this may not remain its value. If the criteria for a right to be restricted were satisfied by a finding of infringement and an injunction, this should be reflected in establishing the appropriate outcome of a case from a human rights perspective. The varying limits on different rights and the extent to which these limits were considered to have been satisfied in each situation will therefore now be taken into account. If the criteria are met, an adjustment, also of "one", should be made to the value accorded to the right.

Thus, if the limits on the right to freedom of expression are considered met by the enforcement of a patent, the "minus one" in respect of freedom of expression would become "zero." Conversely, the "plus one" of the right to property of the patent owner

[1102] Cf Torremans, P.L-C. "Copyright as a Human Right" 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands , 17-8.
[1103] Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998) "Right to Privacy" http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm, para 11 – ECHR rights are not in any hierarchical order and of equal value in a democratic society. See also *Campbell*, **n366** paras 113, 138.

would be likely to remain unadjusted, given the underlying assumptions of the parallel analysis.[1104] This matrix in respect of this would be:

Convention Right	**Initial Value**	**Adjustment**	**End Value**
Right to property (patent owner)	Plus 1	0	Plus 1
Right to expression (alleged infringer)	Minus 1	1	Zero
		TOTAL	**Plus 1**

This Human Rights Emphasis of **"Plus 1"** would favour the patent owner.

The approach suggested can lead to rights making different contributions to the relevant Human Rights Emphasis.[1105] It can also mean that, even if the Convention right to life, in respect of which there will be no adjustment, is engaged, this will not necessarily be determinative. The Human Rights Emphasis provides a structured means, therefore, for courts to evaluate the overall contribution to be made by the Convention rights which are engaged, in respect of each decision the court is to make. The balance of this chapter considers the Human Rights Emphasis and its impact in

[1104] See **section 4.3.2.2**
[1105] Cf Beck, G. "Human rights adjudication under the ECHR between value pluralism and essential contestability" E.H.R.L.R. 2008, 2, 214-244 , 223-4, 236, 240-1 arguing that decision making under the ECHR must involve value judgments.

more detail, using a fictitious example of an ICT related patent action. This example is also used later in this work.[1106]

4.4 An example

4.4.1 The facts

A company in the UK, which is a private health provider, is engaged in apparently infringing conduct in respect of communications technology for use in air ambulances. The UK patent has just been granted to a large multinational company. The patent covers the only technology presently available which is effective for use in extreme conditions, and the patent owner has quickly built a very successful business in the UK based on this technology.
The health provider, through other parts of its company, has manufactured technology, the same as that the subject of the patent, by carefully following the patent specification. Its employees use this throughout the UK to communicate with the health provider's hospitals and this assists them in delivering initial treatment. The health provider makes a great deal of money from providing these services.
The patent owner is very annoyed about the health provider's activity, particularly as the health provider did not make any prior contact with the patent owner. Thus, although the patent owner would have been prepared to accept a payment and allow the conduct to continue, it raises a patent infringement action in the English courts against the health provider and seeks an injunction. The patent owner alleges that the health provider has infringed the patent through making, keeping and using the invention without the consent of the patent owner. It sets out particular instances of this which took place in 2008 throughout mainland England, including instances of activities of health professionals for professional purposes.

4.4.2 Identification of rights

[1106] See throughout chapter 7

On these facts, the **right to enjoyment of property** of the patent owner will be engaged in respect of its objection to the making, keeping and using of technology. Also, as in *Levi,*[1107] **the right of the health provider to enjoy and utilise its business assets** as it wishes - to use those assets to manufacture, keep and use technology the same as that the subject of the patent - will be engaged.[1108] Finally, the **right to freedom of expression and information** of health professionals will be engaged, in respect of their use of the technology when doing their job.[1109]

Given the conventional business nature of the activities of the health provider, its right to freedom of expression and information will not be engaged, in contrast with those of the benevolent manufacturer in the example which has already been considered.[1110] Arguments could be made in respect of the rights of ultimate patients in respect of life and expression, and, indeed in respect of property of other innovators. The information available is insufficient, however, for it to be established that it is highly likely that these rights would be met or affected. [1111]

4.4.3 Analyses of rights

4.4.3.1 Property

4.4.3.1.1 The health provider

Protocol 1, Article 1 ECHR provides that no one shall be deprived of possessions except in the public interest and subject to the conditions provided for by law and also

[1107] See **n415**
[1108] On the basis of **section 4.3.1.1**
[1109] On the basis of **section 4.3.1.2**
[1110] See **p170**
[1111] On the basis of **section 4.3.1.2**

that a person is entitled to peaceful enjoyment of their possessions. This has been interpreted by the ECtHR in *Sporrong* as guaranteeing the right of property[1112] and Protocol 1, Article 1 ECHR states this right can apply to the property of companies.[1113]

The assumed grant of the injunction on the basis of the PA would be a condition provided for by law. It would lead to restrictions on the health provider in respect of its making and keeping the technology and also the use of the technology by it and by its staff for medical purposes. This is so even if the health provider would still be able to use its resources in other ways.[1114]

The right is subject, however, to laws necessary to control the use of property in accordance with the general interest and the ECtHR in *Sporrong* considered that a fair balance between the general community interest and fundamental rights lay at the heart of any restrictions on rights to property.[1115] Case law suggests that proportionality is again very important in considering whether laws are necessary and whether there is a fair balance.[1116]

In the example, it would be in the general interest for the health providers to be able to manufacture, keep and operate air ambulances which use the best technology to enable their staff to better meet medical needs. It is also in the general interest, however, for this technology to be developed in the first place and after the expiry of the patent, to be available for all to use. The property rights of the patent owner will likely be considered to be the incentive which has led to this. Further, the patent is subject to the limits and restrictions imposed by the PA,[1117]which suggests an attempt for the rights of the patent owner to reflect a fair balance between different interests.

[1112] *Sporrong*, **n381** para 57 and p50
[1113] See **n293**
[1114] See also eg *Sporrong* **n381**
[1115] See **pp63-4**
[1116] See also **n385**
[1117] See **p13**

It is also noteworthy that in *Levi*, the court considered it to be highly unlikely that the trade marks legislation would have struck a disproportionate balance between two different property rights. [1118]

This discussion suggests that it likely would be considered to be in the general interest and proportionate for restrictions to be placed on this enjoyment of property of the health provider. This is further supported by the fact that the patent owner may have been willing to supply the technology and that no approach was made to it. Although this work aims to minimise communication with the patent owner,[1119] the existence or absence of it remains part of the proportionality analysis.

The criteria for this right to be restricted are therefore satisfied. An adjustment should be made to the allocated value in respect of the rights to property, from "minus one" to "**zero**".

4.4.3.1.2 The patent owner

The ECtHR has considered that IP is a relevant form of property.[1120] Given the assumption of infringement and of an injunction, there would be no restriction of this right to property of the patent owner. The value of this right will therefore remain as "**plus one**" in respect of each pleaded act of infringement.

Accordingly, the appropriate elements of the matrices in respect of the rights to property regarding making and keeping and also use for medical purposes would be:

[1118] See **p91-2**
[1119] See **p33-4**
[1120] See **n288, p50-1**

Convention Right	Initial Value	Adjustment	End Value
Right to property (patent owner)	Plus 1	0	Plus 1
Right to property (health provider)	Minus 1	1	Zero

4.4.3.2 Rights to free expression and information of health professionals

Article 10 ECHR confers the right to freedom of expression and to receive information, subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of health or morals or the rights of others.

4.4.3.2.1 Prescribed by law

A patent is prescribed by law, as it is a legal right conferred by statute. The assumed injunction on the basis of the patent and the PA would be a restriction prescribed by law.

4.4.3.2.2 The protection of health or morals or rights of others

The restrictions which would be imposed by an injunction could be argued to be to protect the health of others. The technology which is the subject of this patent does appear to facilitate access to medical treatment, by enabling the air ambulance to communicate with the hospital and deliver better treatment. [1121] The technology and its resulting benefits may not have been developed if a patent could not have been sought and then enforced. Further, after the patent has expired, the technology will be available to all.

The patent could also be argued to contribute to the protection of morals. Decisions of the ECtHR in respect of the protection of morals in article 10 ECHR have focused on sexually explicit material[1122] and on blasphemy.[1123] Yet the technology provides new opportunities in respect of a range of communications related activities and the importance of ICT in education and development has been seen.[1124] Finally, the restrictions imposed may be for the protection of the rights of the patent owner. This would be consistent with the consideration of copyright and article 10(2) ECHR by the Court of Appeal in *Ashdown*[1125] and also with the decision in *Miss World* where the court accepted that copyright could be engaged by article 10(2) ECHR.[1126]

The key issue, therefore, is whether or not the restriction on freedom of expression by an injunction is necessary in a democratic society. Proportionality is at the heart of this.

[1121] The place of health in respect of article 10(2) was considered regarding a publication discussing the impact of microwaves in *Hertel v Switzerland* (25181/94) (1999) 28 E.H.R.R. 534 at paras 1, 36, 39, 49, 52 and ECtHR paras 47-50.
[1122] *Handyside v United Kingdom* (A/24) (1979-80) 1 E.H.R.R. 737 ("*Handyside*"); *Vereinigung Bildender Kunstler v Austria* (68354/01) [2007] E.C.D.R. 7 (2008) 47 E.H.R.R. 5.
[1123] *Wingrove v United Kingdom* (17419/90) (1997) 24 E.H.R.R. 1. See also wider discussion in Koering-Joulin, R. "Public Morals" 83 in Delmas-Marty.
[1124] See **pp19-22**
[1125] *Ashdown*, **n23** paras 39 and 45 and paras 13-4, 38 regarding the first instance decision.
[1126] *Miss World*, para 47.

4.4.3.2.3 Necessary in a democratic society

The question is whether the benefit pursued in respect of the protection of rights (or health or morals) is proportionate to the harm which might be done by the interference with the right to expression and information, in circumstances where there is no other technology which could be used. In assessing this, it is well established that greater weight should be accorded to some forms of expression than to others. Cases have focused on the high value of political expression[1127] as opposed to advertising,[1128] but it is likely that significant weight would be accorded to expression to enable delivery of medical care.

The injunction would remove the only means by which the health professionals could engage in their professional activities in the circumstances in question. It may not be proportionate, therefore, for freedom of expression to be restricted in respect of their medical activities, notwithstanding the value which society has accorded to patents in terms of innovation and also the right to property of the patent owner.

An important part of this analysis has been that there was no other technology which could be used by the staff. This may suggest that the patent owner's rights are to be accorded less weight because the patent owner had been very innovative and the first to provide a technology in a new field. Yet the patent system is argued to be to encourage these activities; and according the patent less weight in such circumstances could discourage radical innovation.[1129] Further, it may again have been possible for the health provider to have sourced the technology from the patent owner, but the health provider chose not to do so.

[1127] *Campbell*, **n366** paras 19, 148, and note also the important watchdog role of journalists *Jersild v Denmark* (1995) 19 E.H.R.R. 1, para 31.
[1128] *Markt Intern, Casado* **n294**
[1129] See **pp67, 74**

This second set of factors suggests that the requirements for the article 10 ECHR right to be restricted are met. The value accorded to the freedom of expression should be adjusted from "minus one" to "**zero**".

The appropriate parts of the matrices in respect of the rights to freedom of expression regarding medical activities would be:

Convention Right	**Initial Value**	**Adjustment**	**End Value**
Right to freedom of expression (staff)	Minus 1	1	Zero

4.4.4 Combining the results

This next section will combine the results of these parallel analyses in matrices in respect of each allegation of infringement.

4.4.4.1 Alleged infringement by making and keeping technology

Convention Right	**Initial Value**	**Adjustment**	**End Value**
Property (patent owner)	Plus 1	0	Plus 1 **(p183)**

Property (health provider)	Minus 1	1	0 **(p183)**
		TOTAL	**Plus 1**

This matrix shows that the Human Rights Emphasis in respect of these pleaded acts of infringement is **Plus 1**, in favour of the patent owner. The impact of this is considered further below.

4.4.4.2 Alleged infringement by using technology for medical purposes

Convention Right	**Initial Value**	**Adjustment**	**End Value**
Property (patent owner)	Plus 1	0	Plus 1 **(p183)**
Property (health provider)	Minus 1	1	0 **(p183)**
Freedom of expression and information (staff)	Minus 1	1	0 **(p186)**
		TOTAL	**Plus 1**

The Human Rights Emphasis in respect of these pleaded acts of infringement is therefore once again **Plus 1**, in favour of the patent owner.

4.4.4.3 Initial thoughts

It is not entirely surprising, given the complex interrelationship between IP and human rights[1130] and the view that patents contribute to innovation,[1131] that these Human Rights Emphases favour the patent owner. When faced with more than one option in this case, courts must adopt that which favours the patent owner; and this means that once again,[1132] a new role for human rights has not produced a solution for those engaging in patent infringement.

The analyses above were strongly based in the facts of the example. A new set of circumstances may give rise to a different outcome.

4.4.5 The facts version 2

The patent owner refuses to service the Shetland Islands and the health provider in turn has focussed its activities on the Shetland Islands. This means that the inhabitants of the Shetland Islands, who were unable to receive emergency support in extreme weather conditions, can now be treated. Several lives have already been saved through patients being air-lifted to hospital in Aberdeen. The patent owner again raises an infringement action, but seeks only a financial remedy and undertakes not to seek an injunction.

4.4.5.1 Identification of rights

The same rights will be engaged.[1133] In addition, the health provider could likely argue successfully that the rights to life of the inhabitants of the Shetland Islands should be engaged in respect of making and keeping and also use for medical

[1130] See **p40, 42-3, 50-6**
[1131] See **pp12-3**
[1132] See **section 2.3.5.1**
[1133] See **section 4.4.2**

purposes. These inhabitants are a discrete group who would not otherwise be treated, given the refusal on the part of the patent owner.[1134] Further, some lives of those who could not otherwise have been contacted or assisted have already been saved. The rights to life of the inhabitants should therefore to be taken into account, in respect of making and keeping and also using for medical purposes, but only with one value of "**minus 1"**.

4.4.5.2 Analyses of rights

4.4.5.2.1 Property

The analyses regarding the relevance of the right, the potential for interference with enjoyment and the appropriate legal test again apply here.[1135]

The rights of the health provider to utilise its business assets, by servicing people in Shetland whose needs are not otherwise met, would outweigh the more general questions of encouragement of innovation. As no injunction is sought, however, the activities of the health provider would be able to continue. A payment would need to be made, which would restrict the right of the health provider to utilise its assets as it chooses. Yet this would be likely to be considered proportionate and the result of a fair balance, given the money being made by the health provider from these services. Accordingly, the requirements for this right to be restricted are again met, and an adjustment should be made from "minus 1" to **"zero**".

[1134] This may raise competition questions in terms of refusal to supply as considered in chapter 3. The impact of abuse of a dominant position on this is considered in **section 6.4.3** and throughout chapter 7.
[1135] See **section 4.4.3**

The patent owner has chosen to give the undertaking and to seek only damages. The assumed award of damages would not interfere with the patent owner's enjoyment of its property. No adjustment should be made and the value will remain **"plus one".**

4.4.5.2.2 Rights to free expression and information of health professionals

The analyses in respect of restrictions by law, health, morals and the rights of others and the contribution of patents to innovation and delivery of needs, all again remain applicable.[1136] Yet the new circumstances may lead to a different outcome in respect of proportionality.

There remains no other technology which can serve the same purpose as that the subject of the patent. Here, however, the patent owner has refused to provide technology to enable an air ambulance service to be provided to the Shetland Islands. Enforcement in this situation would appear to be a disproportionate restriction on the rights to free expression and information of the health professionals in respect of their medical duties. Yet no injunction is sought and the health provider, operating a successful business on the basis of its use of this technology, would again be well able to make a payment to the patent owner. The restriction on free expression by such an assumed order would not be disproportionate. Once again, therefore, value of free expression in respect of these allegations should be adjusted from "minus 1" to **"zero"**.

4.4.5.2.3 Life

This right does not permit any exception to it which would be relevant here.[1137] As a result, there are no countervailing arguments and the value will remain as **"minus one"**.

[1136] See **section 4.4.3**
[1137] See **n1090,** article 2(2) addresses defence and detention and article 2(1) conviction

The results of these analyses are again set out below in matrix form.

4.4.5.3 Alleged infringement by making and keeping technology

SHETLAND			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 **(p190)**
Enjoyment of Property (health provider provider)	Minus1	1	0 **(p189)**
Life (inhabitants)	Minus 1	Zero	Minus 1 **(p190)**
		TOTAL	**Zero= Neutral**

4.4.5.4 Alleged infringement by using technology for medical purposes

SHETLAND			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 **(p190)**
Enjoyment of Property (health provider)	Minus1	1	0 **(p189)**
Freedom of expression and information (staff)	Minus 1	1	0 **(p190)**
Life (inhabitants)	Minus 1	0	Minus 1 **(p190)**
		TOTAL	**Zero = Neutral**

4.4.5.5 Thoughts

These new circumstances had an impact on the rights which were engaged and on the parallel analyses. But even the inclusion of the right to life and an approach to proportionality which is less favourable to the patent owner have had little substantive effect on the ultimate Human Rights Emphases - they are neutral, and can make no impact on decision making.

4.4.6 More new facts

4.4.6.1 Version 3

Consider, however, the following:

In the Shetland example, the patent owner seeks an injunction

The seeking of financial compensation rather than an injunction was at the heart of the findings, in the first Shetland Islands example, that the restrictions on the right to property of the health provider[1138] and on the rights to freedom of expression of the health professionals were proportionate.[1139] As a result, an injunction would not be proportionate and no adjustments should be made the values in respect of the right to property of the health provider. This would be, therefore, **minus 1**; and the rights to freedom of expression in respect of medical activities would also be **minus 1**. The matrices would therefore be as follows.

[1138] See **p189**
[1139] See **p190**

4.4.6.1.1 Alleged infringement by making and keeping technology

SHETLAND – version 3			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 **(p190)**
Enjoyment of Property (health provider)	Minus 1	0	Minus 1 (**p193)**
Life (inhabitants)	Minus 1	0	Minus 1(**p190)**
		TOTAL	**Minus 1**

The Human Rights Emphasis is **"minus 1",** against the patent owner.

4.4.6.1.2 Alleged infringement by using technology for medical purposes

SHETLAND – version 3			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus1 (**p190)**
Enjoyment of Property (health provider)	Minus 1	0	Minus 1 **(p193)**
Freedom of expression and information (staff)	Minus 1	0	Minus 1 **(p193)**
Life (inhabitants)	Minus 1	0	Minus 1 **(p190)**
		TOTAL	**Minus 2**

The Human Rights Emphasis is **"minus 2",** against the patent owner. Another variation on the facts could be as follows.

4.4.6.2 Version 4

The health provider decides as part of its corporate social responsibility programme to provide its services to the Shetland Islands at cost price and not to make a profit. The patent owner does not seek an injunction.

4.4.6.2.1 Identification of rights

The rights in respect of property, freedom of expression of health professionals and life will remain engaged.[1140]

The new approach of the health provider is resonant of that of the benevolent manufacturer.[1141] There, the desire to express views regarding education was considered to engage the right to freedom of expression. Here, the motivation is the vaguer and more controversial corporate social responsibility programme.[1142] It could be argued, however, that by taking its programme in this direction the health provider is expressing its views as to appropriate corporate behaviour and also as to the value of meeting health needs. The argument may be stronger if it had been well publicised that the Shetland Islands were chosen because, say, of concern at the approach to funding of services to island communities. If this argument is accepted, then the right to freedom of expression of the health provider would be engaged here, in respect of making, keeping and using the technology in relation to medical activities.

[1140] See **section 4.4.2**
[1141] See **p170**
[1142] See **p55-6**

4.4.6.2.2 Analyses

The analyses in respect of life and of the rights to property of the patent owner and of the health provider would proceed in the same way.[1143]

The analysis of the right to freedom of expression of the health provider is to an extent similar to that in respect of the health professionals.[1144] There would be an order to pay which would be a restriction, prescribed by law, within article 10(2) ECHR. Significant weight will be accorded to the exercise of freedom of expression to enable medical treatment. This technology would again be the only means by which the health provider can exercise its freedom of expression in this manner and in so doing deliver a significant benefit to the people of the Shetland Islands.

Important here, however, is that the health provider will not be making a profit from its activities. It would not be in a position to make a payment to the patent owner as a result of these activities. The health provider is highly likely to be able to make a payment out of other resources, but it may make clear that it would not be prepared to do this and if ordered to do so would cease future activities. On the one hand it could be argued that this is the choice of the health provider and it would still be proportionate for it to be ordered to pay. On the other hand, this could remove the only means of the Shetland Islands being serviced. This could be considered, on balance, to be a disproportionate outcome. A court may take the view that the requirements for the right to freedom of expression of the health provider to be restricted have not been met, in relation to making and keeping and also in relation to use for medical activities. If so, there should be no adjustment and values of **"minus 1"** should be inserted in the matrices.[1145]

[1143] See **section 4.4.3**
[1144] See **4.4.3.2 and 4.4.5.2.2**
[1145] See **p195**

It should be borne in mind that this analysis is based in the right of freedom of expression. This can lead to a different view being taken of the use which should be made of resources of the health provider than would be reached when considering the right to property. The health provider does have a right to use its available resources as it sees fit; this is, however, also subject to the rights of the patent owner and the benefits of patents. From this perspective, it is proportionate in respect of each allegation of infringement for the health provider to have to pay if it uses technology the subject of a patent. There should be a deduction.

Regarding the freedom of expression of health professionals for medical activities in respect of the Shetland Islands, an important part of the analysis in relation was that a payment could be made and that this would be proportionate restriction.[1146] On these new facts and arguments, this would likely not be so. No adjustment should therefore be made to this right, and it should have a value of **"minus 1"**.

The new matrices for this set of facts are as follows:

[1146] See **p190**

4.4.6.2.2.1 Alleged infringement by making and keeping technology

SHETLAND – version 4			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 **(p190)**
Enjoyment of Property (health provider)	Minus1	1	Zero **(p198)**
Freedom of expression (health provider)	Minus 1	0	Minus 1 **(p197)**
Life	Minus 1	Zero	Minus 1 **(p190)**
		TOTAL	**Minus 1**

4.4.6.2.2.2 Alleged infringement by using technology for medical purposes

SHETLAND version 4			
Convention Right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 **(p190)**
Enjoyment of Property (provider)	Minus1	1	Zero **(p198)**
Freedom of expression (health provider)	Minus 1	0	Minus 1 **(p197)**
Freedom of expression and information (health professionals)	Minus 1	0	Minus 1 **(p198)**
Life	Minus 1	0	Minus 1 **(p190)**
		TOTAL	**Minus 2**

The Human Rights Emphasis is **"minus 2"**, against the patent owner.

The variations on the Shetland scenario which have been explored in this section confirm that the Human Rights Emphasis can be against the patent owner.

4.5 The contribution of the Human Rights Emphasis

This chapter has argued that the HRA requires courts to take a new, although not revolutionary, approach to decision making and statutory interpretation. A key part of this is the deceptively simple term "Convention rights". It has been argued that the HRA requires a broad approach to be taken to what might be "Convention rights" and that in an ICT related patent case these could encompass a range of rights, which may conflict. As a result, this chapter has developed a legal test to enable all these rights to be evaluated and combined, to deliver a single factor in respect of any allegation of infringement. The factor is termed the Human Rights Emphasis. This must then be used by courts in their decision-making in respect of that allegation when seeking, in the light of the HRA, to reach decisions which are compatible with "Convention rights".

This chapter has seen that the Human Rights Emphasis will frequently be in favour of the patent owner or even neutral. This will not be helpful from the perspective of the alleged infringer and those seeking to benefit from its acts. Even the broad approach to Convention rights advocated here and regard to the right to life and its lack of relevant limits can only give rise to a Human Rights Emphasis against the patent owner in particular circumstances. Important issues have been whether or not an injunction is sought, whether or not the alleged infringer is acting for wholly commercial purposes and whether or not the patent owner is approached in advance.

Even if the proposed approach delivers a Human Rights Emphasis which is against the patent owner in respect of an allegation of infringement, this will not be the end of the matter. The Human Rights Emphasis is not a vehicle, in the manner of the public interest provision in the CDPA, to enable other interests to prevail over those of the patent owner. Rather, the Human Rights Emphasis is a facilitator, a means of

clarifying obligations under the HRA and of enabling courts to give effect to them. Pursuant to those obligations, a decision cannot be reached which is against the patent owner unless there is an interpretation of the PA which is "possible" and which favours the alleged infringer. The next chapter will consider in more detail the availability of "possible" interpretations of the PA, such that there may be a role for the Human Rights Emphasis.

5 Making the Human Rights Emphasis relevant[1147]

5.1 Introduction

The HRA provides an opportunity for developing new interpretations of the PA. Yet any new interpretations must still be "possible" in terms of the HRA - in the light of *Ghaidan,*[1148] consistent with fundamental features and the underlying thrust of the PA. This chapter combines this, more established principles of statutory interpretation and policy developments, projects and declarations in relation to IP and argues that courts should approach the question of "possible" from a **questioning base**.

This chapter goes on to suggest that this questioning base should be combined with a "straining" and "modification" of the wording of the PA, consistent with *R v A* and *Ghaidan* and also the impact of the HRA upon established precedent, to result it in being "possible" to interpret the PA such that there is no infringement - even when the patent owner may seem to have had a very strong case. The Human Rights Emphasis would then be applied by courts to these "possible" interpretations.

This chapter will also establish, however, that such "possible" interpretations cannot always be identified - and when this is so, then as noted at the end of the last chapter, the Human Rights Emphasis cannot bring about a finding of non infringement, even if it is against the patent owner. Attempts to avoid findings of infringements would need to look, therefore, to abuse of a dominant position. This chapter will discuss the extent to which the Human Rights Emphasis may be relevant to this.

[1147] Aspects of this chapter regarding the role for wider sources build again on Brown Real World **n530** and also Waelde, C. and Brown, A.E.L. "A Practical Analysis of the Human Rights Paradox in Intellectual Property Law: Russian Roulette" in *The Human Rights Paradox in Intellectual Property Law* (forthcoming, Edward Elgar).
[1148] See **n1019**

5.2 Creating a new interpretative base

The key features of this base will be the fundamental features and underlying thrust of the PA[1149] and the established ability of courts to look beyond the wording of a legislative provision, including having regard to policy, international obligations and societal change.[1150]

5.2.1 Fundamental features

What are the fundamental features of the PA? The fundamental features of patents and their place in innovation has been seen to give rise to intense discussion of policy, theory and evidence.[1151] In comparison, the PA has more mundane origins. By 1977, the basic principles and internal balances of patents were already well established,[1152] as was the view that the purpose of patents was to encourage innovation and economic growth – even if this was not necessarily achieved.[1153] The PA had a practical and procedural aim, of clarifying and updating the means by which patents could be obtained and enforced and benefit be gained by those involved.[1154]

The PA also had an international element, to implement and ensure ongoing respect for the UK's obligations under agreements, notably the EPC of 1973.[1155] This was the

[1149] See **pp161-2**
[1150] See **pp163-4**
[1151] See **p12-3**
[1152] See **p29**
[1153] See **p12-3**
[1154] See Part I of the PA, ss1-76; Vitoria, M. "The Patents Act 1977" M.L.R. 1978 (42) 324-9; Cornish/ Llewelyn, **n171** 142-4; and discussion in the House of Lords debate on 25 May 1977, *HC Deb 25 May 1977 vol 932 cc1435-77* cols 1437-77, in particular 1464 http://hansard.millbanksystems.com/commons/1977/may/25/patents-bill-lords#S5CV0932P0-03398
[1155] See p159 and **n1004**. The PA also referred in Part II to the UK's obligations in respect of its membership of the in respect of the draft Community Patent Convention (which has still not yet come into force – see **n186 -** and to the International Patent Co-operation Treaty.

result of an attempt by European countries to co-ordinate the transnational patenting processes and to increase the consistency of approach of their decision makers.[1156]

As a result, encouragement of innovation remained a fundamental feature and underlying thrust of the PA. This must be taken into account in its interpretation. Yet it is also a fundamental feature and underlying thrust of the PA that there are limits on the rights of patent owners – there are threshold requirements in respect of patentability, infringement tests and exceptions to what will infringe.[1157] Thus, not all conduct by others in relation to the technology which is the subject of the patent will infringe. This suggests that for an interpretation to be "possible", it need not always favour the patent owner.

5.2.2 More established principles of statutory interpretation

When discussing the impact of the HRA upon statutory interpretation, chapter 4 considered a 1997 edition of Bennion's seminal work, which pre-dated the HRA.[1158] It is also noteworthy that the 2008 edition of Bennion, while considering the HRA in detail, maintains its structure and pre-existing principles of statutory interpretation remain of key importance. [1159] These principles teach that legislation is to be interpreted in the light of the ordinary meaning of words used, in the context of the legislation as a whole[1160] with language to be processed in a dynamic way, in the light

[1156] See the preamble to the EPC and Cornish/ Llewelyn, **n171** 113-4, 127-8; Terrell **n171**, paras 1.20-1.22, 1-31-1.40; Fisher, M. "New Protocol, same old story? Patent claim construction in 2007; looking back with a view to the future" I. P.Q. 2008, 2, 133-162, 137-9; Singer, M. and Stauder, D. (3rd edn) (2003) *The European Patent Convention. A Commentary* vol 1 Thomson/Sweet & Maxwell, London, UK, 9-10; and Paterson, G.(1992) *The European Patent System. The Law and Practice of the European Patent Convention* Sweet & Maxwell, London, UK, 2-3, 15-17, 19-20. Regarding decision making see section 130(7) PA, *Pioneer v Warner* **n529**, *Smith Kline & French Laboratories Ltd v RD Harbottle (Mercantile) Ltd* [1980] 1 C.M.L.R. 277 [1979] F.S.R. 555 paras 22-4 and Terrell **n171**, 310-1.
[1157] See **p13**
[1158] See **n1029**
[1159] See Bennion 2008, **n250** Part XXX and index, xlix-l
[1160] Bennion 2008, **n250** 585-92, 1181-1193, 1155-1170.

of societal developments.[1161] Regard is also to be had to legal policy including in relation to morality, health and international relations.[1162] Finally, account is to be taken of obligations of the UK under international law,[1163] with decision makers having regard to all relevant legal regimes so that law is "coherent and self-consistent".[1164]

In examples such as those of the benevolent manufacturer supplying the school,[1165] it is highly likely that the ordinary meaning of the words of the PA will suggest that there is infringement. The importance of the PA in encouraging innovation also suggests that the legislation as a whole and its context will support such an interpretation. Yet societal developments and other international obligations can suggest that this will not necessarily be the only interpretation available.

5.2.2.1 Societal developments

There has been seen to be considerable contemporary debate as to whether IP does have a positive impact upon society overall, for example in the light of its focus on encouragement of innovation and on reward of that which has taken place, rather than on enabling immediate problems to be addressed.[1166] For example, the CIPR[1167] considered that more flexibility was required in respect of IP to ensure an equitable outcome for users of the products of innovation and creativity and there have been the Adelphi Charter, the Gowers Review and the movement towards a WIPO Development Agenda.[1168] There have also been developments in relation to communications,[1169] leading to the draft A2K Treaty.[1170] More formal action has

[1161] Bennion 2008, **n250** 167-9.
[1162] Bennion 2008, **n250** 769-795, especially 780, 785.
[1163] Bennion 2008, **n250** 682-7, 817-824.
[1164] Bennion 2008, **n250** see heading for 808-810.
[1165] See **p14**
[1166] See discussion at **pp11-31**
[1167] CIPR,**n26** 15-6, 19, 96-7, 123-5
[1168] See **pp16-18**
[1169] See **pp19-22**

been seen from the WTO, WSIS and UN human rights bodies. There have been resolutions regarding a social as opposed to an economic approach to IP, confirming the primacy of human rights over IP; [1171] decisions seeking to facilitate access to patented essential medicines;[1172] and declarations that although IP is important for the Information Society, so too is the "wide dissemination, diffusion, and sharing of knowledge… to encourage innovation and creativity".[1173]

Neither the A2K Treaty and policy proposals in themselves,[1174] nor the more formal declarations, decisions and resolutions can have a direct role in national patent actions, given the place of international law in the UK.[1175] Further, the challenges to IP have been controversial and the debate has been heated, for example in relation to the WTO 2003 Decision.[1176] Yet they should not be ignored. They suggest an approach to IP in which courts should neither view the PA as isolated from other matters nor the protection of patents as an unmitigated good. This will be a small shift, given the unclear nature of and support for the developments; but it can still suggest that courts need not interpret the PA in the manner most favourable to the patent owner.

The international obligations of the UK can also support this approach. They are relevant both on the basis of legal policy[1177] but also as is seen below, in the light of a rebuttable presumption that the UK Parliament does not intend to legislate in breach of any of its treaty obligations.

[1170] See **p22**
[1171] See **p53**
[1172] See p23-6
[1173] WSIS Geneva Declaration para 42, p20-1
[1174] See **nn 1167-73**
[1175] See **p45**
[1176] See **eg n106** and the attempts to require higher levels of IP protection, see **p31-2**
[1177] See **p163**

5.2.2.2 International obligations – general principles

The UK has no obligations in respect of competition under international instruments. It does have obligations under TRIPS, in respect of IP and also under the ICCPR, the ICESCR and, of course, the ECHR, in respect of human rights.[1178] In the absence of implementing legislation, these treaties are once again not part of the laws of the UK[1179] but they should, on the basis of the presumption, be taken into account in resolving any ambiguity of legislation.[1180] A key contribution of the HRA was seen to be that interpretations compatible with Convention rights should be pursued even if there was no ambiguity in the legislation.[1181]

The obligations under the treaties may themselves be unclear and therefore of limited assistance to courts. Article 31(1) of the Vienna Convention on the Law of Treaties 1951 ("Vienna Convention") states that treaty provisions are to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of their object and purpose. The UK has ratified the Vienna Convention and courts in the UK have looked to it when considering the scope of treaty obligations relevant to decisions.[1182]

The approach to be taken by courts to treaties was reviewed by the House of Lords in *Abnett v British Airways Plc*[1183] in 1997. It considered that a purposive approach should be taken and that reference could be made to decisions of courts in other

[1178] See **p50**
[1179] See **p45**
[1180] *Salomon v Commissioners of Customs and Excise* [1967] 2 Q.B. 116 [1966] 3 All ER 871. See Zander , **n1016** 157 and Manchester, **n1016** 52, 92, 97-8.
[1181] See **p161**
[1182] See *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327 [2006] 3 W.L.R. 954 ("*Al-Jedda*"), para 36 and *R. v Asfaw (Fregenet)* [2008] UKHL 31 [2008] 2 W.L.R. 1178 , para 125 et seq.
[1183] *Abnett* **n528**

jurisdictions in respect of the treaty.[1184] Treaties have been considered in IP cases, for example in *Experience Hendrix LLC v Purple Haze Records Ltd* ("*Hendrix")*[1185] in 2007 regarding the introduction of performer's rights. The Court of Appeal considered an EC directive, TRIPS, the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and took care to reach an interpretation which was consistent with the UK's obligations under these treaties.[1186]

5.2.2.3 International obligations - human rights

5.2.2.3.1 UN Charter

An early international obligation of the UK comes from the Charter of the United Nations ("UN Charter") of 1945.[1187] The UK has been a member of the UN since 1945.[1188] The Charter states the purposes of the United Nations to be

> "to achieve international co-operation …. in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion";[1189] and ……to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[1190]

[1184] *Abnett*, **n528** 438, 442, 443 - although those referred to there were neither conclusive nor persuasive. See also *Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd (The Nagasaki Spirit*) [1997] A.C. 455.
[1185] *Experience Hendrix LLC v Purple Haze Records Ltd* [2007] EWCA Civ 501 [2008] E.C.C. 9 [2008] E.M.L.R. 10 ("*Hendrix*").
[1186] *Hendrix*, **n1185** paras 6-9, 27-33, 34-36, 60-2.
[1187] United Nations Charter 1945 59 Stat. 1031, T.S. 993, 3 Bevans 1153 ("UN Charter").
[1188] See list of members at http://www.un.org/members/list.shtml.
[1189] UN Charter, **n1187** article1(3).
[1190] UN Charter, **n1187** article 55(c).

The UN Charter also provides that if there should be any conflict between the obligations in it and other state obligations, the UN Charter is to prevail.[1191] The Court of Appeal followed this principle in 2006 in the judicial review of detention by the British forces in Iraq.[1192] The UN Charter does not refer to IP, which may suggest that courts in the UK jurisdictions should give more weight to human rights than to any other international obligations, such as those under TRIPS. Yet the references to human rights in the UN Charter are vague and introductory. Further, it also refers to solving international problems of an economic character[1193] and to promoting conditions of economic progress and development and solutions of international economic problems,[1194] with which IP could be argued to be consistent.

The UN Charter itself, therefore, does not provide clear guidance for courts. The human rights in the UN Charter were made more explicit in the international human rights treaties.

5.2.2.3.2 Human rights treaties

The UK had ratified the ICCPR, the ICESCR and also the ECHR by the time the PA was passed in 1977. All of these have been noted to include rights which could be relevant to an ICT-related patent action:[1195] both the ICCPR and the ECHR include rights to life and expression;[1196] there is the right in respect of property in the ECHR;[1197] and there are rights to health,[1198] to take part in cultural life,[1199] to enjoy the benefits of scientific progress[1200] and to benefit from moral and material interests

[1191] UN Charter, **n1187** article 103.
[1192] *Al-Jedda* **n1182** See also in Warbrick, B. "The European Convention on Human Rights and the Human Rights Act: the view from the outside" 25 in Fenwick **n367** 42.
[1193] UN Charter, **n1187** article 1(3).
[1194] UN Charter, **n1187** article 55 (a) and (b).
[1195] See **p50**
[1196] Articles 1 and 10 ECHR and articles 6 and 17 ICCPR
[1197] Protocol 1, article 1 ECHR
[1198] Article 12 ICESCR
[1199] Article 15(1)(a) ICESCR
[1200] Article 15(1)(b) ICESCR

resulting from a production which one has authored[1201] in the ICESCR, but not in the ECHR.

The HRA has confirmed that rights in the ECHR are to be considered by courts[1202] and the other rights should, on the basis of the presumption, be considered by courts when interpreting the PA - to the extent that there is an ambiguity.[1203] Yet respect for the UK's obligations under these instruments and regard for international relations means that should also form part of the court's view of the PA in any event. The rights to property and reward for innovation (although these likely could only be used by individual patent owners)[1204] mean that this could support the need for an interpretation in favour of the patent owner but the other rights could contribute to an alternative view.

5.2.2.3.3 UDHR and customary international law

There may also be a place for the UDHR. Once again, this has been seen to include rights in respect of property,[1205] freedom of expression,[1206] health,[1207] life,[1208] to share in the benefits of scientific advancement and to freely participate in cultural life[1209] and to protection of moral and material interests resulting from a production one has authored.[1210] As the UDHR is not a treaty ratified by states, however, it has no legal impact in itself, just as is so of the declarations and resolutions regarding the impact of IP.[1211]

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[1201] Article 15(1)(c) ICESCR
[1202] See **pp49-50**
[1203] See **p208** and **fn 1180**
[1204] See **p52**
[1205] Article 17 UDHR.
[1206] Article 19 UDHR.
[1207] Article 25 UDHR.
[1208] Article 30 UDHR.
[1209] Article 27(1) UDHR.
[1210] Article 27(2) UDHR.
[1211] See **p207**

Yet it is likely that the UDHR meets the requirements for it to be part of customary international law: it sets out principles which can be identified and respected by states, in a constant and virtually uniform manner, on the basis of a belief that a rule of law required this compliance.[1212] The same could not be said, at least not yet, in respect of, say, the A2K Treaty[1213] and the WSIS Geneva Declaration.[1214]

Courts in the UK jurisdictions will have regard to customary international law, although they could make decisions inconsistent with it if the PA clearly would not permit otherwise. [1215] Nonetheless, regard to the UDHR[1216] further increases the legitimacy of an interpretation which would be against the patent owner.

5.2.2.4 International obligations -TRIPS

In parallel with the obligations of the UK in relation to human rights, there are its obligations under TRIPS. This does not give rise to obligations to be relied on in national courts,[1217] but sets out requirements as to the protection to be conferred in respect of IP and permits some exceptions to it.[1218] Courts have considered TRIPS when interpreting IP legislation,[1219] even though it came after most of the national IP legislation, notably the PA. Courts will also have regard to TRIPS when considering

[1212] *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands) 20 February 1969 http://www.icj-cij.org/docket/files/52/5561.pdf. See discussion in Jayawickrama **n1043**, 5-6; Boyle, A. and Chinkin, C (2007) *The Making of International* Law Oxford University Press, Oxford, UK ("Boyle/Chinkin"), 232; Chinkin, C. "Challenge of Soft Law" 39 I.C.L.Q. 850; and Hestermeyer, **n4** 122 et seq and 129, using access to medicines as an example.
[1213] See **n84**
[1214] See **n70**
[1215] See Brownlie, **n245** 41 et seq; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529 [1977] 2 W.L.R. 356; *Lord Advocate's Reference (No.1 of 2000)* 2001 J.C. 143 2001 S.L.T. 507; Boyle/Chinkin **n1212**, 234 et seq.
[1216] See Torremans, P.L-C. "Copyright as a Human Right" 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 7 noting instances of other national courts having regard to the UDHR in respect of the copyright, although the basis for this is not considered.
[1217] *Portugal v. Council of the European Union* Case C-149/96 [1999] E.C.R. I-8395, paras 42-4.
[1218] See **p29**
[1219] See *Nova Productions*, **n17** para 37.

EC IP law or national legislation implementing it[1220] and must, as the EC is a party to TRIPS,[1221] as far as possible give effect to its wording and purpose. This is not directly relevant here as yet, given that EC patent legislation is confined to biotechnology,[1222] which is not the key focus of this work.

Just as regard to human rights led to courts considering the human rights of patent owners, regard to TRIPS will not necessarily lead to decisions which favour patent owners. Although TRIPS clearly and prescriptively sets out the protection to be afforded in respect of IP,[1223] it does include several provisions which can be argued to support other interests.[1224] Article 7 TRIPS provides that

> "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

This does not impose an obligation on the UK, yet it is part of TRIPS and should be considered by courts when establishing their international obligations. The provision has not been considered by national courts[1225] but the WTO DSS[1226] considered it, in the light of the Vienna Convention, in *Canada - Patent Protection of Pharmaceutical Products ("Canada Pharmaceutical Patent").*[1227] This involved the Canadian regulatory regime in respect of pharmaceuticals and its impact on patents. The WTO DSS panel found that article 7 and its balance of interests should be taken into

[1220] *Parfums Christian Dior SA v Tuk Consultancy BV* (C-300/98) [2000] E.C.R. I-11307 paras 47, 49; *Telefonica,* para 60; *Nova Productions,* **n17** paras 38-42, *Hendrix* **n1185** paras 6-9, 27-33, 34-36, 60-2.
[1221] Note that it was argued without success in *CFI Microsoft* **n489** that the requiring of a compulsory licensing of copyright was inconsistent with article 13 TRIPS respect of the permitted limits and exceptions to copyright, 789-811.
[1222] with the PA amended by SI 2000 No. 2037 http://www.opsi.gov.uk/si/si2000/20002037.htm, implementing, inter alia, Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.
[1223] See **p29**
[1224] See **p29**
[1225]Some national courts outside the UK have considered provisions of TRIPS regarding the exceptions permitted to IP. For comment and criticism, see Geiger, C. "From Berne to national law, via the Copyright Directive: the dangerous mutations of the three-step test" E.I.P.R. 2007, 29(12), 486-491.
[1226] See **p30**
[1227] See **n154**

account in interpreting other provisions of TRIPS, including those which set out the rights to be conferred and their permitted limits. It considered that a decision could still ultimately be reached which seemed inconsistent with article 7.[1228]

As a decision of the WTO DSS, this has been argued to be part of international law[1229] and should form part of the analysis of the PA by national courts.[1230] It contributes little, however, beyond confirming the place of a balance, which is already established within the PA – and indeed notes that this need not be struck invariably. Article 31 (3)(c)Vienna Convention provides that any relevant rules of international law which are applicable in the relations between the parties should be taken into account when interpreting a treaty – which suggests a role for international human rights treaties when national courts are considering article 7 TRIPS. There are diverging views as to whether "parties" requires that all countries party to each treaty must be identical, or whether only those countries involved in a particular dispute must be parties to both treaties.[1231] This is important as, although there is substantial overlap between membership of the WTO, the ICCPR and the ICESCR, the memberships are not identical.[1232]

The present discussion concerns a national court seeking to ensure that an approach to statutory interpretation is adopted which is consistent with the UK's obligations. All parties to each treaty could be concerned at the approach taken; an absolute match of membership should be required, therefore, for a court to be able to consider the other treaty. This was the stance taken by the House of Lords in *Abnett v British Airways*

[1228] *Canada Pharmaceutical Patent* **n154,** para 7.26, see arguments advanced at paras 4.10-4.13
[1229] See Trachtman, J.P. (1999) 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal*, **40**(2), Spring, 333-77, **78** ("Trachtman Domain"), Charnovitz Rethinking and Mavroidis, P.C. (2000) 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', *European Journal of International Law*, **11(**4), 763-813, **373** all in Mavroidis/Sykes **n158**, at respectively 86/341, 279/824 and 392-3/782-3
[1230] Bennion 2008 **n250**
[1231] See McLachlan, C. "The principle of systemic integration and Article 31(3)(c) of the Vienna Convention" I.C.L.Q. 2005, 54(2), 279-319 ("McLachlan") and French, D. "Treaty interpretation and the incorporation of extraneous legal rules" I.C.L.Q. 2006, 55(2), 281-314 ("French").
[1232] For example, the Russian Federation (then the USSR) ratified the ICCPR and ICESCR in 1973 – see **n231** but is not, at the time of writing, a member of the WTO. See also Hestermeyer, **n4** Annex B for lists of memberships.

Plc.[1233] Regard should not be had to international human rights treaties, therefore, when considering article 7 TRIPS.

5.2.3 The nature of the base

This combination of the fundamental features of the PA, legal policy, changes in approach to IP and obligations of the UK under human rights treaties and TRIPS results in a base for interpreting the PA which can be described as "questioning". It is not blindly supportive although it is also not necessarily opposed to the PA. Consequently, interpretations of the PA in a particular case which are against the interests of the patent owner may not be impossible. This questioning base will apply to all interpretations of the PA, with variations in the light of the facts – for example, the CIPIPH report[1234] may be more relevant in relation to pharmaceutical patents than the A2K Treaty.

Constructing the questioning base upon the HRA and existing principles of statutory interpretation provides a means, within the existing legal framework, therefore for courts to look to a wide range of sources and developments, and combine them as part of the process of statutory interpretation. This may be a limited contribution – but in some cases, this may have significant effect. The impact will depend upon the facts of the case before the court.

5.3 Building on the base: pursuing the possible

Indeed, no matter how questioning a court may be, it cannot reach a decision without reference to the legislation and to the facts of the case. These, the raw material of the case, are now considered.

[1233] *Abnett*, **n528** 443-3
[1234] See **n119**

5.3.1 The PA and the possible

5.3.1.1 The raw material

This chapter focuses on whether or not there is patent infringement. The starting point is, therefore, section 60 (1) PA. This sets out the acts which can infringe a patent - making, disposing of, offering to dispose of, using, importing and keeping an invention in the UK without the consent of the patent owner. It can also be infringement to supply an essential element[1235] for putting an invention into effect, subject to a knowledge requirement on the part of the supplier. Also important is section 60(5) PA, which sets out that acts which would otherwise infringe "shall not do so" if they are "done privately and for purposes which are not commercial" or "done for experimental purposes in relation to the subject-matter of the invention."[1236]

5.3.1.2 The raw material and interpretative disputes

Decisions of the English courts over the years reveal that it is not uncommon for arguments to arise as to the appropriate interpretation of Section 60 PA.[1237] For example, courts have been required to determine whether or not it is "making" to

[1235] and a possible exception in respect of staple commercial products: section 60 (2) PA.
[1236] The other exceptions in section 60(5) PA are more specific, being introduced to deal with particular problems or in light of other legislation. They concern preparation of prescriptions, use in relation to a ship, aircraft, hovercraft or vehicle temporarily or accidentally in the UK, use of a harvest product by farmer for propagation on his own holding following a sale by the patent holder for agricultural use, or use of an animal/reproductive material for agricultural purposes following a sale by the patent holder for of breeding stock or reproductive material.
[1237] See discussion of provisions and cases at Terrell **n171**, paras 8.21 (making), 8.22 (disposing), 8.23 (offering to dispose), 8.24 (using), 8.25 (importing), 8.26 (keeping), 8.31-4 (section 60(2) PA). See also 8.40-2 regarding joint tortfeasors which are outside the scope of this work.

repair pursuant to an implied right[1238] or to prepare kits which once assembled constitute an infringing item;[1239] to establish that importing (quite apart from the question of exhaustion of rights)[1240] is bringing goods into the UK under one's control, with title to them having transferred;[1241] and also to decide what might be the essential element of an invention[1242] and what is putting that invention into effect in the UK.[1243]

There have also been disputes regarding the exceptions provisions. The decisions suggest that private and non commercial acts need not be done in secret and can be carried out by a company, albeit for a wholly non commercial purpose;[1244] that the "subject matter of the invention" is to be determined by looking at the patent as a whole;[1245] and that research with a commercial end use in mind could be covered, but not commercial research to establish[1246] that a product works.[1247]

5.3.1.3 A new approach to the raw material

This wealth of case law suggests that section 60 PA is amenable frequently to more than one interpretation which advisers and courts considered it proper to put before

[1238] *United Wire Ltd v Screen Repair Services (Scotland) Ltd* [2001] F.S.R. 24
[1239] *La Croix du Arib*, 499 considering *Rotocrop International Ltd v Genbourne Ltd* [1982] F.S.R. 241 ("*Rotocrop*")
[1240] See **p91**. There has also been a series of cases regarding when goods have in fact been put on the market, for example *Class International v Colgate-Palmolive Company* (C405/03) [2006] Ch. 154 [2005] E.C.R. I-8735; *Montex Holdings Ltd v Diesel SpA* [2007] E.T.M.R. 13; *Peak Holding AB v Axolin-Elinor AB* (C16/03) [2005] Ch. 261[2004] E.C.R. I-11313; and *Eli Lilly & Co v 8PM Chemists Ltd* [2008] EWCA Civ 24 [2008] F.S.R. 12.
[1241] *Sabaf SpA v MFI Furniture Centres Ltd* [2004] UKHL 45 [2005] R.P.C. 10.
[1242] *Lifeline Gloves Ltd v Richardson (Application for Summary Judgment)* 2005 WL 1630796 and *Anchor Building Products v Redland Roof Tiles* [1990] R.P.C. 283.
[1243] *Menashe Business Mercantile Ltd v William Hill Organisation Ltd* 2002] EWCA Civ 1702 [2003] 1 W.L.R. 1462.
[1244] *Smith Kline & French Laboratories Ltd v Evans Medical Ltd* [1989] 1 F.S.R. 513.
[1245] *Auchincloss v Agricultural & Veterinary Supplies Ltd* [1999] R.P.C. 397, 406
[1246] *Monsanto Co v Stauffer Chemical Co* [1985] R.P.C. 515. See Terrell **n171**, para 8.46.
[1247] This has been criticised for its narrowness with consultation launched after the Gowers Review Report. See Cook, T. "Responding to concerns about the scope of the defence from patent infringement for acts done for experimental purposes relating to the subject matter of the invention." I.P.Q. 2006, 3, 193-222 and Bor, F. "Science Exemptions to patent infringement applied to biotechnology research tools" E.I.P.R. 2006, 28(1), 5-14.

the courts - even without a questioning base. It suggests also that litigation occurs often in relation to patents and that the arguments of this work may be pursued in due course.

The cases to which reference has been made may be considered by courts if one of the issues in question arises in another case. They will not necessarily, however, be binding upon a later court given that, as was recognised by the Court of Appeal in *Ashdown*,[1248] the HRA has led to a new attitude to precedent.[1249] The question is not how a provision has been interpreted in the past, therefore, but the extent to which it is now "possible" for it to be interpreted in a way which is compatible with Convention rights. The potential for such interpretations is explored below using new examples.

5.4 Examples

5.4.1 Scenario A

Two companies decide, separately, to make part of a very successful patented communications system and donate this to a charitable institution which has very limited financial resources. Each part is well known to be of practical use in itself, with the invention leading to the patent being the combining of these two parts in a particular way. The two companies make these products by following the patent specification. The institution combined the two parts using the technical skills of its own engineers, again following the patent specification. The institution then used the system in a free UK wide awareness raising campaign regarding the new scientific discoveries of the importance of a particular diet in preventing a rare disease. The patent owner sues in Scotland.

5.4.1.1 Raw material

[1248] *Ashdown*, **n23** para.71. See also the debate regarding the relationship between national precedent and decisions of the ECtHR: *Kay v Lambeth LBC* [2006] UKHL 10 [2006] 2 A.C. 465, see paras 28, 40-1, 44-5 and *Murray Court of Appeal*, **n1076** para 20: in the case of post HRA decisions of the House of Lords and inconsistent later decisions of the ECtHR, the House of Lords must be followed
[1249] See eg Manchester, **n1016** 48-151

Each company only makes part of the patented system, not the whole. It is highly likely that each company does not make the product which is the invention. It could be argued that by combining the two products, the charitable institution[1250] is also not making the whole and does not infringe the patent, although the existing authorities do suggest that combining two parts to make a whole is infringement.[1251] A stronger argument would be that the preliminary activity, the making by the charitable institution, takes place in private such as to be within the section 60(5)(a) PA exception - given the financial position of the charitable institution and the nature of the ultimate campaign, this act is clearly not for commercial purposes.

In any event, however, the charitable institution is likely to be "using" the invention in the nationwide campaign. This use will be for a public, albeit non commercial, purpose. The decided cases in relation to section 60(5)(a) PA suggest that the conduct need not be in secret and could be carried out by a company, but they have not focused in any more detail on the question of "private".

5.4.1.2 The limits of the raw material

As existing precedents will not be determinative, arguments could be developed that the activity is not "making" and that the use in the campaign is "private".

The first argument could seek to build on concerns expressed by Laddie J, at an interim hearing, in relation to being bound to find that making a kit for later assembly should infringe; he felt that this should be revisited by a higher court. [1252] Even with this point, however, and indeed, unconstrained by authority, combining two things such that there is a new thing which was not there before is "making". Further, engaging in a nationwide campaign is not a private act.

[1250] Which is assumed for present purposes to be capable of being sued.
[1251] *Rotocrop* **n1239**
[1252] *La Croix du Arib*,**n529** 499

This suggests that there are limits on how the PA can be interpreted. This is consistent with the decisions of the House of Lords in terms of "possible". *RvA*[1253] referred to "straining".[1254] This does not suggest that the wording of legislation can be disregarded[1255] and Lord Steyn did recognise that sometimes the straining and reading would be impossible.[1256] *Ghaidan* referred to "modified" interpretations,[1257] which again suggest some form of relationship with the legislation.

In the light of this and the raw material here, it could not be "possible", however questioning a base there may be, to interpret the conduct by the charitable institution as not "making" or the nationwide campaign as "private". Yet once again, some changes to the facts could lead to different outcomes and to the questioning base becoming relevant.

5.4.2 Scenario B

Consider the following in terms of the exception provision:

Rather than the system being used in a nationwide campaign, it forms part of a new means of the charitable institution contacting those who had previously agreed to being contacted by the charitable institution.

5.4.2.1 Raw material

[1253] *R v A* **n1017**
[1254] See **p161**
[1255] See also *ITP* **n533**, see paras 16, 24, 15 when it was argued to be possible to interprete s. 77(4A) PA such that it was qualified by the words "unless to do so would be contrary to any Convention right", without cutting down the fundamental features of the Act. This was not accepted.
[1256] See **p161**
[1257] See **p161**

This focus on a specific and possibly small group, given the rarity of the disease, makes it more arguable that this was use for a private purpose. Such an argument could draw on the view that information can still be confidential for the purposes of breach of confidence, even if it has been published to a confined group – say, those on a plane[1258] or those at a large wedding when an obligation of confidence has been made clear.[1259] A different approach has been taken to public performances in relation to copyright, where a performance has been held to be public when it took place in a private members club.[1260]

The copyright approach may seem more on point. Indeed, a leading commentator has considered that the copyright cases are based on the need for an economic reward of the copyright owner.[1261] A court may consider that there was also a need for a reward in relation to patents. Nonetheless, the breach of confidence analogy suggests that courts could take a wider view of "private", such that when the approach is applied to the raw material of section 60(5)(a), "private" can be strained and modified to cover this instance of communication. The questioning base would then become relevant.

5.4.2.2 Questioning base

Whereas the underlying thrust and fundamental feature of the PA is that in some cases patents will be infringed, it has also been noted this will not always be so - another

[1258] Gurry, F. (1984) *Breach of Confidence* Oxford University Press, Oxford, UK, 75-81 and MacQueen, H, Waelde, C. and Laurie, G. (2008) *Contemporary Intellectual Property. Law and Policy* Oxford University Press, Oxford, UK ("MacQueen Contemporary"), para 18.22
[1259] *OBG Ltd v Allan* [2007] UKHL 21 [2008] 1 A.C. 1 [2007] 2 W.L.R. 920 paras 118, 120-2, 307, 310. See also Black, G. "Douglas v Hello! - An OK! result", (2007) 4:2 *SCRIPTed* page @: < http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/editorial.asp > and MacQueen Contemporary, **n1258** paras 18.24-5.
[1260] Cornish/Llewelyn, **n171** 471. *Jennings v Stephens* [1936] Ch. 469 , 476-80 referred to in *Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd* [1943] Ch. 167, 171-5. See also *Performing Right Society Ltd v Kwik-Fit Group Ltd* [2008] E.C.D.R. 2 at paras 3, 9, 10.
[1261] Cornish/Llewelyn, **n171** 471

fundamental feature and underlying thrust.[1262] Further, there have been some societal changes in approach to IP,[1263] with this use of technology likely consistent with the views of the WSIS Geneva Declaration in respect of the limits of IP,[1264] and also changes in relation to personal space. This can be seen in the growth of social networking sites such as Facebook and a greater willingness on the part of some to take a more fluid approach what is private and what is public.[1265]

The human rights in international instruments and in the UDHR in respect of health and to share in the benefits of science, as well as the ECHR rights to life and expression and information, will form part of the base, together with the rights of the patent owner in respect of moral and material benefit (if it is considered to apply) and to property. This would be in the light of treaty obligations of the UK[1266] and customary international law.[1267]

The resulting base would likely be questioning. Combined with the arguments in respect of interpretation of "private", this could produce a "possible" interpretation that there is no infringement. The relevant Human Rights Emphasis would then be applied and if this is against the patent owner there would be no finding of infringement.

5.4.2.3 Thus far and no further

The analysis in relation to Scenario B confirms that the arguments developed here - in respect of the straining and modifying of raw material, a new approach to precedent

[1262] See **p13**
[1263] See **p11-27**
[1264] See **p21**
[1265] See consideration in Edwards, L. and Brown, I. "Data Control and Social Networking: Irreconcilable Ideas?" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148732 Forthcoming chapter 10 in Matwyshyn, A. (ed) (2009) *Harboring Data: Information Security, Law and the Corporation* Stanford University Press, Standard, USA
[1266] See **p208**
[1267] See **p212**

and a questioning base - can have an impact on questions of infringement. A court may find that the use by the charitable institution in Scenario B is private. These arguments cannot always, however, led to new interpretations of the PA which can avoid findings of infringements.

In developing new arguments, the focus so far has been the PA and the obligations imposed on courts by the HRA, rather than the prohibition on abuse of a dominant position. This is because the PA and the HRA will always be relevant in a patent action; they do not require a dominant position.[1268] Yet the technology the subject of the patent may be the only means by which the valuable nationwide education campaign of Scenario A could proceed. The patent owner's enforcement of the patent in these circumstances may raise questions of abuse. It is now time, therefore, to move beyond the PA, to consider the contribution of competition law.

5.5 A place for competition

It is unlikely to be abuse of a dominant position to raise a patent action where the technology being used is clearly that which is the subject of the patent and is being used for its existing purpose, rather than for new product or technical development. This is so irrespective of the human rights related benefits which may be argued to arise from the infringing conduct and which could only have been brought about through this technology. For raising such actions to be abuse of a dominant position, a new approach is required.

5.5.1 Human rights and abuse of a dominant position

[1268] See also eg *Ingman*, **n25** paras 7, 8, 10, 11, 13 and *Intel v Via*, **n25** paras 32, 34-5 and 95 regarding the separate consideration of patents and competition arguments.

Section 6 HRA imposes obligations on courts when they are making decisions in relation to the prohibition on abuse of a dominant position in article 82. Section 3 HRA is not relevant to article 82, as it applies only to primary legislation;[1269] yet section 18 CA, which is primary legislation, also contains a prohibition on the abuse of a dominant position - and when courts consider this, they will have obligations under both sections 3 and 6 HRA.

Does this matter? Article 82 and section 18 CA have been seen to be substantially identical, save that the prohibited conduct must have an effect on trade in the UK, in terms of section 18 CA and between EC member states, in terms of article 82.[1270] Given that the requirement for an impact on trade between member states is widely interpreted and readily met,[1271] which is particularly likely to be so in patent cases given their potential transnational impact,[1272] both provisions would frequently be relevant in a patent action. Further, courts considering section 18 CA must interpret it such that its application is consistent with the treatment of the same question on the basis of article 82;[1273] and EC competition legislation provides that if national competition law is being applied, article 82 must also be applied.[1274] Indeed, in Euro-Defence cases since the CA came into force, either article 82 and section 18 CA have been pleaded in the alternative, without the courts considering their different bases in any detail; or only article 82 has been pleaded. [1275]

It may seem appropriate, therefore, to continue this work on the basis of article 82 alone. The HRA complicates matters. Section 6 HRA provides that courts can act incompatibly with a Convention right, when primary legislation could not be read or

[1269] Section 21(1) HRA
[1270] See **p69**
[1271] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] O.J. C101/81, *Societe Technique Miniere v Maschinenbau Ulm GmbH* (56/65) [1966] E.C.R. 235.
[1272] See eg the Rambus investigations in the EC and in the United States - **pp79 and 146**
[1273] See **n412**
[1274] See **n412**
[1275] *Intel v Via*, **n25** paras 2 and 15,18, 21, 30 et seq; *Hewlett-Packard*, **n513** paras 13-4; *BHB Enterprises Plc v Victor Chandler (International) Ltd* [2005] EWHC 1074 [2005] E.C.C. 40, paras 18, 37, 39 and 43-4; *Sportswear*, **n509** paras 27-71 but for importance of addressing issue, see *Ineos Vinyls*, **n503** paras 203, 206-10, 258-60.

given effect in a way which is compatible with Convention rights. As article 82 is not primary legislation, this suggests that courts must reach decisions compatible with Convention rights, irrespective of article 82. This would not be so in respect of section 18 CA, given the place of "possible" in section 3 HRA. This suggests that it is important whether article 82 or section 18 CA is relied upon.

This also appears to be so when the supremacy of EC law and of articles of the EC treaty over inconsistent national law are considered.[1276] Section 6 HRA may suggest that Convention rights should prevail over the wording of Article 82; but article 82 itself is to prevail over the HRA, as it is still just a national statute introducing what has been termed a "principle of benevolent construction".[1277] Yet, the need for a consistent approach to section 18 CA and article 82 suggests again that the same outcome should be reached.

This need for consistency has a further consequence. When national courts apply article 82 they must have regard to the same matters as the ECJ would, when it considered article 82.[1278] The ECJ (and therefore national courts) will have regard not only to the EC Treaty, legislation and decisions of Community courts, but also to EC fundamental rights.[1279] These rights have been seen to include the ECHR rights,[1280] rights included in international human rights treaties to which EC member states are parties, rights in the EU Charter and the right to dignity.[1281]

Thus, human rights are part of the analysis to be carried out by national courts of abuse of a dominant position in patent cases. They should be considered as

[1276] See **p46**
[1277] *Levi*, **n415** para 44 (obiter) regarding the impact in the UK of EC principles of interpretation as based in section 2 European Communities Act 1972 and para 28 referring to *Thoburn v Sunderland District Council* [2003] Q.B. 151 [2002] 3 W.L.R. 247 [2002] 1 C.M.L.R. 50. See also Manchester, n**1016** 100, 144; and Johnson, **n561** 5-6.
[1278] See **p47**
[1279] See **p47**
[1280] See **p47**
[1281] See **p47**

fundamental rights and as Convention rights on the basis of section 6 HRA, when article 82 is pleaded; and as Convention rights, on the basis of sections 3 and 6 HRA, when section 18 CA is pleaded. Further, given the obligations regarding consistent outcomes, respect for fundamental rights and the importance of the prohibition on abuse of a dominant position should be pursued to the same end by courts in patent actions, even if only section 18 CA is pleaded.[1282] The next section will explore one means by which this could be done.

5.5.2 A new Human Rights Emphasis?

5.5.2.1 What rights

If human rights are part of the analysis of abuse of a dominant position in patent actions, what of the Human Rights Emphasis? This was developed on the basis of sections 3 and 6 HRA, not of fundamental rights and EC law. Yet section 6 HRA has been seen to be relevant when courts are considering article 82 and sections 3 and 6 HRA are relevant in respect of section 18 CA. The Human Rights Emphasis will apply, therefore, if abuse of a dominant position is raised in a patent action.

But courts must have regard to EC fundamental rights when considering article 82 and section 18 CA. While it has been seen that this includes Convention rights (importantly here life, expression, information and property), it also includes other rights in international treaties, such as those considered earlier in this chapter in respect of the questioning base. There will be a further role in the Human Rights Emphasis for these rights.[1283] The Human Rights Emphasis could also encompass the fundamental rights in the EU Charter[1284] in respect of, again, health,[1285] protection of

[1282] See Thompson, R. "Interpretive obligations under the Competition Act 1998 and the Human Rights Act 1998." L.E. 2001, Sum, 15-19, 17, 18.
[1283] As developed in chapter 4
[1284] See **p46**
[1285] EU Charter, article 35.

intellectual property[1286] and sharing in the benefits of science and cultural life[1287] and the right to dignity.[1288]

5.5.2.1 What impact

The inclusion of these new rights in the analysis of the Human Rights Emphasis could have some substantive impact. Consider the introduction of abuse of a dominant position arguments into the example regarding the supply to the Shetland Islands, by the health provider on an commercial basis, when no injunction was sought.[1289] The Human Rights Emphasis there, in respect of the use of technology for medical purposes, was **zero**.

If abuse of a dominant position is pleaded, a new right would be engaged - that to health of patients who were ill, but not in imminent danger of death and who were now highly likely to be treated. The right to health would be awarded an initial value of "**minus 1"**, as it is against the patent owner. As there are no exceptions permitted to the right, no adjustment would be made. The end value in respect of this right would therefore be "**minus 1".**

When this is added to the "zero" of the combined analysis of the other engaged rights, this would deliver a Human Rights Emphasis of **"minus 1" -** against the patent owner. This is shown in the following revised matrix, with additional items underlined.

[1286] EU Charter, article 17(2).
[1287] EU Charter, article 13.
[1288] See **p47**
[1289] See **section 4.4.5**

5.5.2.1.1 Alleged infringement by using technology for medical purposes

SHETLAND			
Fundamental right	**Initial Value**	**Adjustment**	**End Value**
Enjoyment of Property (patent owner)	Plus 1	0	Plus 1 (p190)
Enjoyment of Property (health provider)	Minus1	1	0 **(p189)**
Freedom of expression and information (staff)	Minus 1	1	0 **(p190)**
Life (inhabitants)	Minus 1	0	Minus 1 **(p190)**
Health (inhabitants)	Minus 1	0	Minus 1 **(p227)**
		TOTAL	**Minus 1**

Accordingly, if the court was faced with more than one possible decision in relation to abuse of a dominant position in respect of that infringement allegation, the court should adopt the decision which was most favourable to the alleged infringer. This was not so when the Human Rights Emphasis was zero.

Arguments could, in turn, be made in respect of the right to enjoy the benefits of scientific progress and its applications in respect of these patients and also in respect of the health provider, the health professionals and the patent owner. The patent owner could also try to rely on a right to benefit from moral and material interests.

Finally, arguments could be made in relation to the right to dignity of those who are ill or dying. The right to dignity has been considered, however, more in relation to questions of integrity and exploitation of the body[1290] and courts might not consider it to be engaged here.

Further and more detailed exploration of examples and the potential contribution to the Human Rights Emphasis of different fundamental rights, their engagement and their limits or lack of them, must lie outside the scope of this work. But the point has been made, that not only is the Human Rights Emphasis relevant to abuse of a dominant position, but that it must take into account fundamental rights - and that this can contribute to a different outcome.

5.5.3 A new search for the "possible"

Yet again, the Human Rights Emphasis is only a starting point. Is there a decision, or interpretation of abuse, which is "possible", such that it could be abuse of a dominant position to raise a patent action? The next chapter will consider this.

[1290] See **n263**

6 A new approach to abuse and enforcement

6.1 Introduction

An argument that it is abuse of a dominant position to raise a patent infringement action poses challenges at the level of principle. This is suggested by a statement of Laddie J, considering whether a reasonable licence fee was zero. He considered that this would

> "[mean] effectively that the intellectual property right might just as well not exist. There is no authority that I know of which would suggest that even in the most favourable climate Magill could be stretched to any such length. It would amount to Article 82 being used to destroy intellectual property rights."[1291]

This same point could be made in respect of restrictions on enforcement of a patent where there is a clear case of infringement. This chapter will develop, however, a means for this limit to be imposed on the rights of the patent owner, without the patent itself being destroyed. This will be done by building on the approach taken in the last chapter in respect of interpretation of the PA and also on the developments and cases considered earlier in this work.

6.2 Competition, IP, human rights and interpretation

6.2.1 The need for another new interpretative approach

[1291] *HMSO,* **n2** para 50.

The questioning and outward looking approach developed in respect of the PA[1292] will not provide a complete solution here. Those arguments had been developed in the light of the finding, across a range of jurisdictions, that human rights could prevail over IP in individual actions – but that frequently, including in the UK, a legal vehicle and extreme factual circumstances were needed to bring this about. Although extreme circumstances can arise in ICT related patent actions,[1293] the PA includes no appropriate vehicle.[1294] The questioning and outward looking approach to the PA was developed, therefore, for it to be "possible" for courts in the UK jurisdictions to make findings of non infringement.

There is a different relationship between IP and competition.[1295] The most interventionist approaches to IP have been taken in the EC and in the UK and there is a significant body of case law and commentary confirming that reliance on IP through refusal to license can be abuse of a dominant position. Case law from the United States is much less clear in this regard, notably in the light of *Trinko* and *NYMEX*[1296] and the US 2007 Report supports a less interventionist approach.[1297] Importantly, case law from the EC and the UK also confirms that raising a court action can be abuse of a dominant position and the Noerr-Pennington doctrine in the United States takes a similar position, in limited cases.[1298]

It could be said, therefore, that Article 82 has been a vehicle in the EC and in the UK in that it enables competition to prevail over IP – indeed it can do so without the need for the HRA.[1299] The issue for present purposes, rather, is that the weight of case law not only suggests that exceptional circumstances will be required for this to be so, but

[1292] See chapter 5
[1293] Eg the death of the patient in the air ambulance example
[1294] See **p116**
[1295] cf chapter 3
[1296] See **p144-5**
[1297] See **p146**
[1298] See **sections 3.3.2.2 and 3.3.2.3**
[1299] See **p118**

that the existence of these will be assessed on the basis of structured tests.[1300] These tests will not be met if there is use of technology which is clearly within the scope of the patent and when no new product or technical development is to result. Cases from the United States do not support a different argument.

EC and UK case law has also been seen to support, however, a much more fluid, although less certain, approach to exceptional circumstances.[1301] Corresponding arguments were not available in terms of the PA to suggest that there may not be infringement, notwithstanding an apparently strong case. The approach which was developed in the last chapter, therefore, regarding "possible" arguments, is not required in the same way here. Yet just as there was a slightly different role for the Human Rights Emphasis when considering abuse of dominant position, there is also a place for the arguments of the last chapter, with some variations, when considering what would be "possible" interpretations of abuse of a dominant position in terms of the HRA. The starting point will be the different legal tests of EC and UK decision makers.

6.2.2 The (less) raw material

Firstly, it can be abuse of a dominant position to refuse to license IP in exceptional circumstances. Decisions of the ECJ in *Magill* and *IMS* suggest that these circumstances will exist when the licence of IP is indispensable for the development of a new product for which there is unmet consumer demand, when the refusal risks elimination of any competition in a secondary (possibly hypothetical) market and when there is no objective justification for the refusal.[1302] This test is unlikely to be met when there is use of the technology the subject of the patent for the very purposes for which it was developed.

[1300] See **p123-4** and **sections 3.2.1.4 and 3.2.1.6**
[1301] See **section 3.2.1.2, p124-6** and **section 3.2.1.5**
[1302] See *Magill* **n454** and *IMS* **n495**

Yet when this test was considered in *Microsoft*[1303] regarding information argued to be the subject of patents, the EC Commission took a more flexible approach. It stressed the need for exceptional circumstances but considered that these could exist outside the strict criteria set out above and that all circumstances were to be part of the assessment.[1304] When the CFI considered the EC Commission's decision in *Microsoft* in 2007, it focused, given the nature of the application before it, on whether the more detailed test from *Magill* and *IMS* was in any event satisfied on the facts. The CFI found that this test was met,[1305] although in the process appeared to extend it in ways which would not assist here, for example the new product requirement now encompasses a technical development.[1306] Yet the CFI did not confirm, or reject, the legitimacy of the wider approach of the EC Commission.

The wider approach of the EC Commission can also be argued to be consistent with the original open stance taken by the ECJ when considering a Euro-Defence in *Volvo v Veng* in 1988.[1307] Courts have been prepared to adopt a more fluid approach when these elements were not all satisfied, such as in *Tierce Ladbroke*[1308] and *Oscar Bronner*;[1309] and *IMS* states that meeting its set of requirements is only "sufficient" (and not necessary) for there to be abuse.[1310]

Secondly, and most importantly here, it can be abuse to raise a patent action. When this question was considered by the Court of Appeal in *Intel v Via* in 2003, it took an approach which was to be echoed by the EC Commission in *Microsoft*. The Court of Appeal reviewed the authorities in respect of refusal to license and exceptional

[1303] **Sections 3.2.1.5 and 3.2.1.6**
[1304] See **section 3.2.1.5**
[1305] See **section 3.2.1.6**
[1306] See **p135**
[1307] See **n488, p122**
[1308] See **p123**
[1309] See **p124**
[1310] See **p128**

circumstances.[1311] It then declined expressly to limit the situations in which dealings with IP could involve an abuse of a dominant position.[1312]

The Court of Appeal in *Intel v Via* did not, however, comment on the approaches which had been taken in 1998 by the EC Commission and the CFI in *Promedia*. These appeared to view raising actions as different from refusals to license or supply and suggested that the prohibition on abuse of a dominant position could limit enforcement of rights only if a case was manifestly unfounded, was not reasonably based on a right and was conceived in the framework of a plan whose goal was to eliminate competition.[1313] The *Promedia* test is unlikely to be met in situations of concern here. This strict test had also been relied upon by the Patents Court in *Sandvik* in 1999[1314] and notwithstanding the approach in *Intel v Via*, the *Promedia* criteria were referred to with approval in *Sandisk* in 2007. That court did not, however, refer to *Intel v Via*. [1315]

A third area of interest is the activity of the EC Commission relating to the seeking and disclosure of IP and regulatory conduct in respect of IP. In 1990, the EC Commission found Tetra Pak to have abused a dominant position by taking an exclusive licence of a patent, in circumstances where this would delay the entry of competitors into the market. This was upheld by the CFI in *Tetra Pak Rausing SA v Commission of the European Communities ("Tetra Pak").*[1316] The EC Commission then found in 2005 that Astra Zeneca had abused a dominant position by withdrawing marketing authorisations for a pharmaceutical product, so that others could not get regulatory clearance for a generic product and also by providing misleading information to regulatory authorities regarding applications for supplementary

[1311] *Intel v Via*, **n25** paras 36-46
[1312] See **p151**
[1313] See **p151-2**

[1314] See **p153**
[1315] *SanDisk*,**n505** paras 43-46
[1316] *Tetra Pak*, **n444** paras 1, 23, regarding the abuse, see paras 59-74. See Anderman Regulation **n392**, 188-9 and also Treacy Misuse, **n476,**Section 1.

protection certificates ("*Astra Zeneca*").[1317] There, the EC Commission distinguished arguments based on the narrow approach of *Promedia*, noting that they related only to raising an action.[1318]

In 2007, the EC Commission launched an investigation into Rambus, regarding an alleged abuse of a dominant position by the non disclosure of patents within standards and the making of excessive royalty demands in respect of the patents. [1319] This investigation remains ongoing at the time of writing in 2008, as does the equivalent US enquiry and court cases.[1320] Further, an investigation was launched by the EC Commission in 2007 into Boehringer, in respect of alleged misuse of the patent application system through an application for a patent which was said to involve re-use of information.[1321] Finally, a wider enquiry into the pharmaceutical sector was launched in January 2008 which includes patents and abuse of a dominant position.[1322]

[1317] *Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A. 37.507/F3 . AstraZeneca* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37507/en.pdf. ("*Astra Zeneca*") regarding abuse, see paras 325-328, 741-9 and 602-862. See Fagerlund, N. and Rasmussen, S. B. "Astra Zeneca: the first abuse case in the pharmaceutical sector" Commission Competition Policy Newsletter Autumn 2005 http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf ("Fagerlund"), sections 1-3; Gunther, J-P. and Breuvart, C. "Misuse of patent and drug regulatory approval systems in the pharmaceutical industry: an analysis of US and EU converging approaches." E.C.L.R. 2005, 26(12), 669-684 ; and Negrinotti, M. "Abuse of regulatory procedures in the intellectual property context: the AstraZeneca case" E.C.L.R. 2008, 29(8), 446-459 ("Negrinotti"), 450-3

[1318] *Astra Zeneca*, **n1317** paras 738-9, 742.

[1319] See **p79**

[1320] See **p146**

[1321] EC Commission Opening of Proceedings COMP 39.246 http://ec.europa.eu/comm/competition/antitrust/cases/decisions/39246/initiations.pdf and "Investigation of the European Comission" 1 April 2007 http://www.boehringer-ingelheim.com/corporate/news/press_releases/detail.asp?ID=4514.

[1322] See webpage "Pharmaceuticals. Sector Inquiry" http://ec.europa.eu/comm/competition/sectors/pharmaceuticals/inquiry/index.html - initial report is expected in November 2008.

This last set of developments advances the question of abuse in relation to IP beyond licensing or enforcement.[1323] Yet although this suggests a willingness on the part of the EC Commission to intervene in relation to IP rights, it does not contribute directly to the question of when it may be "possible" for it to be abuse to raise a patent action.

6.2.3 The contribution of existing arguments

For the purposes of this work, a key point is the relationship between when it can be abuse to raise a patent action and when it can be abuse to refuse to license a patent. The different approaches in *Promedia* and *IMS* suggest that raising an action involves the enforcement of a right, which requires a narrow approach; whereas refusal to license concerns conduct in relation to a right, in the context of the operation of a market and that a more interventionist approach could therefore be taken. The approach of the Court of Appeal in *Intel v Via*[1324] suggests, however, that the key question in both cases is whether a restriction could be imposed on the exercise of the IP right.

The approach of the Court of Appeal is correct, as two sides of the same question are involved - what can an IP owner do with its IP? The IP owner can refuse to share it; and if the other party is still able to obtain the technology and proceed with its plans, the IP owner can raise an action to enforce its rights. The approach to one should be the corollary of the other. Consistent with this, the decisions of the Court of Appeal in *Intel v Via* and the EC Commission in *Microsoft* suggest that there is a common approach to these questions, with the key factor being an openness and regard to all the circumstances of the case.

This common approach provides an argument which suggests that it could be an abuse of a dominant position to raise a patent action in a wide, if uncertain, range of

[1323] See also Treacy Misuse, **n476** Section 1
[1324] *Intel v Via* **n25** paras 36-51, 96

circumstances. This argument has been identified without the need to "strain" the meaning of "abuse" on the basis of the HRA;[1325] and the new approach required to precedent, a result of the HRA, means that courts could prefer this argument over the apparently more widely supported approach of *Promedia*, *Sandvik* and *Sandisk*.

This common and fluid approach to "abuse" may also be consistent with the questioning and outward looking approach to "possible" interpretations of legislation, which were developed in the last chapter. The key issue would be the fundamental feature and underlying thrust of the prohibition on the abuse of a dominant position.[1326] The common approach arose out of the interface between competition and IP legislation and it is well established that these are to be considered together, to identify the appropriate encroachment which to be made by competition law upon the exclusive rights of the patent owner, in the light of the status of article 82 and the wider complex relationship between competition and IP. The common approach can be taken, therefore, to be consistent with the fundamental features and underlying thrust of article 82 and section 18 CA.

As a result, what is termed here the common approach could be a "possible" interpretation of article 82 and section 18 CA, in terms of the HRA, such that it could be an abuse of a dominant position to raise a patent infringement action, where technology clearly is within the scope of the patent and is used for its existing purpose.

6.2.4 Beyond the possible

The analysis could cease here. This work has provided a means for patents, competition and human rights to be combined in a patent action in the UK, by

[1325] Cf **p203**
[1326] See **p161 and 203**

delivering a "possible" argument which must be adopted by courts if the Human Rights Emphasis is against the patent owner.

Yet this "possible" argument is based upon flexibility and the need for decision makers to have regard to all the relevant circumstances. An aim of this work has been to move beyond flexibility and to provide guidance for courts (and advisers, patent owners and alleged infringers) as to how they can, and must, make no finding of infringement. Further, substantial legal and political forces would likely be mobilised against arguments suggesting more entrenched (if not new) restrictions on the ability to enforce IP. Examples of this are the outrage which accompanied the decision in *Magill*[1327] and the early reaction of the pharmaceutical industry to the South African essential medicines legislation.[1328]

A more structured approach is required, therefore, to when it is "possible" in terms of the HRA for raising a patent action to be an abuse of a dominant position. This is so irrespective of how strongly the existing argument could be said to be based in the obligations of the HRA. In pursuing this structure, this chapter will draw on the arguments developed regarding interpretation[1329] by looking widely to ensure a "coherent"[1330] approach to legislation. It will look to legal policy, the relationship between competition and IP and that between IP and other principles and consider the extent to which these support and suggest an interpretation of "abuse" which imposes clearer restrictions upon the patent owner.

[1327] See Robertson, A. "Compulsory Copyright Licensing under EC Law" L.Q.R. 1992, 108(Jan), 39-43; Thompson, R. "Magill: ECJ upholds use of Article 86 to control conduct of copyright holders on ancillary markets." Ent. L.R. 1995, 6(4), 143-146; Govaere **n433**, 9, 135; and Kallay, **n18** 126
[1328] See **p22**
[1329] See **sections 5.2 and 5.3**
[1330] See **p206**

6.3 A more detailed approach to restrictions

6.3.1 Misuse and limits of IP

Support for restrictions on the enforcement of IP comes from the "misuse of IP" doctrine in the United States. [1331] This was developed by courts in the light of concerns, based on equity and the public interest, at enforcement of IP. [1332] The doctrine has enabled courts to "withhold their aid where the plaintiff is using the right asserted contrary to the public interest" .[1333]

"Misuse of IP" has been stressed to be quite distinct from competition and antitrust principles[1334] and has indeed been raised by some commentators[1335] as an alternative to more substantive inclusion of competition in IP actions. The base in the public interest also suggests that courts should look to it on the basis of legal policy.[1336] Yet misuse cases have frequently involved conduct which, from the EC perspective, could be considered anti-competitive – for example, requiring products to be bought together[1337] or requiring entry into anti-competitive agreements.[1338] Further, the

[1331] See comprehensive analysis in Cotter, T.F. "The Procompetitive Interest in Intellectual Property Law" (27 January 2006) Berkeley Center for Law and Technology *Law and Technology Scholarship (Selected by the Berkeley Center for Law & Technology)*. Paper 15. http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1016&context=bclt ("Cotter**"). "**Note: Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values" 104 Harv. L. Rev. 1289; Hoerner, R.J. "The Decline (And Fall?) of the Patent Misuse Doctrine in the Federal Circuit," 69 Antitrust L.J. 669 (2002); Judge, K. "Rethinking Copyright Misuse" December, 2004 57 Stan. L. Rev. 901; Kobak, J.B. Jnr "The Misuse Defense and Intellectual Property Litigation**"**1 B.U. J. SCI. & TECH. L. 2; also Frischmann , Brett M. and Moylan, Daniel, "The Evolving Doctrine of Copyright Misuse" (July 2006). Available at SSRN: http://ssrn.com/abstract=914535; and Meurer, M. J. "Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation". Boston College Law Review, 2003 Available at SSRN: http://ssrn.com/abstract=361760.

[1332] See *Lasercomb v Reynolds* 911 F.2d 970 (4th Cir 1990) ("*Lasercomb*") para 7 - action would be barred from succeeding if misuse defence was made out

[1333] *Morton Salt Co v G.S. Suppiger Co* 312 U.S. 488 (1942) ("*Morton Salt*") quote at p492.

[1334] See Cotter, **n1331** esp pp17-21.

[1335] Ong, B. "Anti Competitive Refusals to Grant Copyright Licences: Reflections on the IMS Saga" *E.I.P.R.* 2004, 26(11), 505-514, 508-513

[1336] See **p163**

[1337] *Morton Salt***,n1333** patented products licensed on condition used in conjunction with non patented items; patent unenforceable when defendant not party to that licence cf *CFI Microsoft,***n48**9 paras 850-871.

doctrine has a focus on remedies, with substantial similarities between the concept of "withholding"[1339] aid and one position taken by courts in respect of the impact of Euro-Defences - that in extraordinary circumstances, if there was infringement it may be proper not to grant relief to an IP owner.[1340]

There has also been discussion by leading commentators in the United States[1341] about conduct outside the "legitimate scope" of the IP right. This might appear similar to misuse. The examples used, however, involve attempts to license the right to use an idea involved in a work, rather than the expression which is properly the subject of copyright.[1342] This is not merely use outside the "legitimate scope" of copyright, but outside copyright entirely; if an infringement action had been raised in these situations, rather than a licence being sought, the action would not have succeeded. The existence of essential limits on IP rights, in addition to their statutory parameters,[1343] is also seen from *ESSO*, where the French court considered that trade marks had an economic nature and that it was this which should be protected through infringement actions.[1344] A similar approach was taken in *Laugh it Off*.[1345]

This set of cases and arguments support the view that there are limits upon when a patent can be enforced and to what extent; yet it does not support imposing restrictions on enforcement when there is a clear instance of infringement, albeit in respect of conduct which might have other beneficial consequences. A more fruitful

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[1338] *Lasercomb*, **n1332** copyright owner had a standard licence agreement which the court considered objectionable in respect of its impact on others abilities to develop ideas, paras 6, 10-22 cf *Intel v Via*, paras 53-4, 58, 65-6, 69, 72.
[1339] See **p85**
[1340] Slaughton LJ in *Chiron (No. 2)*, pp199-200.
[1341] Hovenkamp **n433** in Leveque/Shelanski **n23**, 35-7
[1342] Hovenkamp **n433** in Leveque/Shelanski, **n23** 24-5,Hovenkamp Unilateral, **n433** 30-3, NB 32-3.
[1343] See **p13**
[1344] See **p104**
[1345] See **p105-6** Note also the difficulty of Pumfrey J in *Miss World* in identifying any place for free expression in trade mark analysis **p106.** See also the complex question of the need for trade mark use for infringement, eg *Celine Sarl v Celine SA* [2007] E.T.M.R. 80; for wider consideration of the place of economic and other consequences in relation to use of trade marks, see Griffiths, A. "The trade mark monopoly: an analysis of the core zone of absolute protection under Art.5(1)(a)." I.P.Q. 2007, 3, 312-349, 321-3, 334-341.

avenue may be the concept that IP rights have an inner core[1346] with which human rights and competition cannot interfere; and that outside this inner core, restrictions can be imposed on when IP can be enforced.

6.3.2 An inner core

6.3.2.1 EC contributions

The starting point is the EC Treaty. There have been seen to be potential conflicts between IP and the respect of the EC Treaty for national systems of property[1347] and competition and also between IP, respect for property and free movement of goods. Reconciling IP and free movement of goods has been seen[1348] to have created the distinction between the existence and exercise of the IP right and to the concept of the specific subject matter of IP,[1349] all of which have enabled courts to restrict reliance on exclusive rights.[1350]

Thus, in relation to trade marks, once goods bearing trade marks are put on the market in the EEA with the consent of the trade mark owner, the trade mark owner cannot object to those same goods being imported into other EEA states,[1351] save in respect of some instances of relabelling or repackaging of the product.[1352] In relation to patents, early cases suggested that the specific subject matter was to reward creative

[1346] See also references to "core" in Anderman Regulation **n392**, 14.
[1347] See **p121**
[1348] See **p121**
[1349] See *Deutsche Grammophon Gesellschaft GmbH v Metro SB Grossmarkte GmbH & Co KG* (78/70) [1971] E.C.R. 487 ("*Deutsche Grammophon")*, para 11 (regarding copyright) and *Centrafarm BV v Sterling Drug Inc* (Cases- 15/74 and 16/74) [1974] E.C.R. 1183 [1974] E.C.R. 1147 ("*Centrafarm*") (Case 16/74) para 8 regarding trade marks).
[1350] See consideration of cases in Govaere **n433**, 62-7, 74-6; Stothers, C. (2007) *Parallel trade in Europe: intellectual property, competition and regulatory law* Hart, Oxford, UK, 28-31, 68-9, 75-123, 331-42; Anderman Regulation **n392**, 12-13, 15-6; and Kallay, **n18** 8, 9, 125.
[1351] See **p91**
[1352] *Bristol Myers Squibb Co v Paranova* A/S (C-427/93) [1996] E.C.R. I-3457 see in particular paras 47-8. This area of law was further developed in *Boehringer Ingelheim KG v Swingward Ltd* (C348/04) [2007] 2 C.M.L.R. 52.

effort by the right to first manufacture or put on the market and to oppose infringement.[1353] The focus then appeared to move to whether goods have been put on the market with the consent of the patent owner - irrespective of the reasons for this and of reward for the inventor.[1354]

These principles and cases confirm that IP rights can be fragmented, without being destroyed. [1355] Questions of exercise and the specific subject matter of IP also arose in relation to refusals to license IP.[1356] In *Magill*, the EC Commission considered that the practices of the copyright owners were an abuse of copyright, outside its specific subject matter and that a finding of abuse would, therefore, have no impact upon copyright.[1357] The CFI in *Magill* considered that if copyright was exercised in a manner contrary to the objects of the prohibition on abuse of a dominant position, it was not exercised in a manner consistent with its "essential function". The CFI considered this to be protecting moral rights and rewarding creative effort.[1358]

Advocate General Gulmann in *Magill*[1359] also considered that the essential function of copyright is to protect the moral rights in the work and to ensure a reward for creative effort. [1360] He also considered that the essential function was a subset of the specific subject matter of copyright - which was the exclusive right to reproduce and refuse to license.[1361] He considered that competition law could, in exceptional circumstances, encroach upon the specific subject matter of copyright - but not, in any circumstances,

[1353] *Centrafarm*, para 9 (Case 15/74); *Generics (UK) Ltd v Smith Kline & French Laboratories Ltd* (C191/90) [1992] E.C.R. I-5335, para 23
[1354] *Merck & Co Inc v Primecrown Ltd* (C267/95) [1996] E.C.R. I-6285, Opinion of Advocate General Fennelly (paras 45, 54, 56, 61, 89-98, 100-66 cf Judgment of the ECJ, paras 30-3, 36-7. See Torremans, P. L-C & Stamatoudi, I. A. "Merck is Back to Stay: The Court of Justice's Judgement in Merck v Primecrown" [1997] E.I.P.R. 545.
[1355] Ghidini Innovation, **n13** 39-41; Govaere **n433**, 80-3, 217-19; Kallay, **n18** 10.
[1356] See section 3.2. See also Govaere **n433**, considering different approaches at 83-4, 92, 98, 100, 141-50, 154-6, 208-216, 252-8, 266-7, 301-7.
[1357] *Commission Magill* **n788**, 770. See also Anderman Regulation **n392**, 206-8.
[1358] *Independent Television Publications Ltd v Commission of the European Communities* [1991] E.C.R. II-575, para 56.
[1359] See **p124**
[1360] *Magill*, **n454** paras 27-32, 38, 40, 53, 57-8, 72-88.
[1361] *Magill*, **n454** paras 33-38

upon the essential function. [1362] Similar points were made by Advocate General Tizzano in *IMS*.[1363]

Although the ECJ in these cases took an approach which focused on competition rather than on IP,[1364] these comments suggest again that restrictions can be imposed on a patent owner, albeit not in respect of its inner core. But if there is to be an inner core, what might it be?

6.3.2.2 Creating an inner core - the innovation balance

This received some attention in the decision of the EC Commission in *Microsoft*. In terms of whether IP could form part of an objective justification for a refusal to license, the EC Commission's approach suggests that there is a point in the term of each IP right when the limits of its useful contribution in encouraging innovation have been reached; and once this is so, that questions of competition should prevail over the reward of the IP owner.[1365]

A commentator noted that "[a]t first glance, the newly introduced incentives balancing test has the merit to touch on the core of the controversial debate at the intersection between intellectual property and competition law".[1366] At the annulment hearing, Microsoft argued that the EC Commission has indeed introduced a new test.[1367] The CFI has been seen to have rejected that this was so, considering that the EC Commission had rather followed an established approach to objective justification

[1362] *Magill*, **n454** paras 46-51, 61, 98.
[1363] *IMS*, **n495** para AG 39
[1364] See also Anderman Paradigm **n823**, 8-9.
[1365] See **p131**. See also Hogan, J. "Competition Policy for Computer Software Markets", Refereed article, 2001 (2) *The Journal of Information, Law and Technology (JILT)*: http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/hogan/, advocating a dynamic compatibility approach to minimise the negative impact of IP rights in the computer software industry.
[1366] Vezzoso **n849**, 386.
[1367] See **p132-3**

by taking into account the impact on Microsoft's innovation of it being required to supply information, as well as the impact on innovation in the industry as a whole if this was, or was not, done. [1368] The CFI did not comment, therefore, on whether such a "new" test could be adopted.

The interventionist approach of the EC Commission was echoed in its Article 82 Review, notably regarding limits on the term of exclusive rights.[1369] The new approach which may have been suggested by the EC Commission in *Microsoft* is also similar to a prior suggestion by a commentator, that analysis of objective justification could involve an "innovation defence". He argued that further attempts should be made to combine innovation and competition in industries such as ICT, with decisions made which balance the impact on future innovation of requiring sharing of the proceeds of innovation with the stifling of innovation which would otherwise result.[1370]

In summary, therefore, a patent may have an inner core; and outside of this, restrictions could be imposed by competition law - for example regarding when it could be enforced. Yet how is the optimal measure of intervention to be identified, as part of an innovation balancing process?[1371] Is the inner core the essential function or the specific subject matter of the patent – and what are these? Thus, although the inner core appears more confined than the open and flexible "common approach,"[1372] its scope and contribution is still unclear. A new structured approach is required still to the question of when it can be abuse of a dominant position to enforce a patent.

[1368] See **p134**
[1369] See **p138**
[1370] Monti **n470** in Graham/Smith **n470**, 48-50, see section heading. See also Montagnani, **n433** 306-7.
[1371] Ridyard **n835**, 671
[1372] See **p236**

6.4 A new role for competition

This work will return, therefore, to the basic principles of competition. Given the focus of this chapter on interpreting the prohibition on abuse of a dominant position as it relates to patent enforcement, significant regard has been paid to the relationship between competition and patents. Yet competition can be argued to be a more fundamental doctrine than IP.[1373] This suggests that, notwithstanding the complex relationship between IP and competition (not least within the EC Treaty),[1374] the new approach should be founded in competition. This would also be consistent with the need, in the light of the HRA, for a proposed new interpretation to be consistent with a fundamental feature of legislation. Here, this is preventing abuse of a dominant position rather than respecting patents.

6.4.1 The nature of the technology

It is well established that the more power which is held by a patent owner, the greater the restrictions which can properly be placed on its conduct.[1375] The EC Commission decision in *Microsoft* has been criticised as taking this to an extreme and creating a new category of "superdominant" undertakings, subjected to overly onerous restrictions.[1376] This has been argued to be inconsistent with the focus of article 82 on conduct, rather than on the nature of the dominant entity.[1377] The CFI in *Microsoft* confirmed the additional responsibility of powerful undertakings and noted that

[1373] See **n518**
[1374] See **section 3.2.1**
[1375] *Nederlandsche Banden Industrie Michelin NV v Commission of the European Communities* (322/81) [1983] E.C.R. 3461, para 57, *Promedia*, para 139. See also Whish, **n392** 183-4.
[1376] See Whish, **n392** 184-6.
[1377] Appeldoorn, J. "He who spareth his rod, hateth his son? Microsoft, super-dominance and Article 82 EC." E.C.L.R. 2005, 26(12), 653-658, from 655.

Microsoft was considered to be in an extraordinary market position.[1378] Given the focus of its decision, however, the CFI did not address this further.[1379]

Concern in respect of high levels of dominance has been seen in respect of technology, and IP in respect of it, which has become an industry standard[1380] or which could be an essential facility.[1381] A commentator has suggested that the key question should be whether "entrenchment" of technology has occurred or whether competition by others on the merits of their offering is still possible.[1382] The Staff Discussion Paper in relation to the Article 82 Review considered whether technology has become a standard or is indispensable for interoperability.[1383] These concerns can also be identified in case law. For example, in *Oscar Bronner,* Advocate General Jacobs considered that refusal to supply could be abuse where the dominant undertaking had a "genuine stranglehold" on the market;[1384] in *IMS* the material which was the subject of copyright had been developed as a standard by working with the industry;[1385] and *Microsoft* considered information which was argued to be indispensable for interoperability.[1386] Rambus (in both the EC and the United States) is a further example of competition concerns in respect of standards and patents in communication and networked industries.[1387]

Courts, competition decision makers and policy makers appear, therefore, to recognise a need to intervene if technology is very important – although once again this has not been the key focus of the decisions reached. But how important must

[1378] *CFI Microsoft* **n489** para 229
[1379] Eagles/Longdin **n871**, noting at 206 and 207 the focus in the CFI decision in Microsoft on the extraordinary levels of Microsoft's power and Howarth/McMahon **n865**, 130-1
[1380] See **p78**
[1381] See **p81**. See also Anderman Aftermath **n876** in Barendt Yearbook **n599**, 243 and also Anderman Regulation **n392**, 150, 176-9, 203, 209, 247
[1382] Montagnani, **n433** 304 and see also Anderman Paradigm **n823**, 9, 10, 11, 13, 16.
[1383] See **p138**
[1384] Advocate General Jacobs in *Oscar Bronner,* **n413** paras AG 65-6.
[1385] See **pp 82 and 128**
[1386] See **p130**
[1387] See **pp79 and 146** see also Dreyfuss, R. "Unique Works/Unique Challenges at the Intellectual Property/Competition Law Interface" 119 ("Dreyfuss Unique") in Ehlermann/Atanasiu, **n10** 131

technology be, such that it could be argued that the ability to enforce a patent in respect of it should be restricted?

6.4.2 Unique technology and patent enforcement

The technology which is the subject of a patent and the ability of the patent owner to control it are unlikely to be sufficiently important if others supply, or would be able to supply, alternative technologies to meet needs in a particular situation. If this is so, then those wishing to use the patented technology should instead pursue the other opportunities: for example, use a first generation mobile phone to call an ambulance, rather than one which uses, or comprises, a patented fifth generation communications system. This may be more expensive or less readily available – but this does not justify "destroying" a patent.[1388]

But there may not always be alternatives. This chapter is considering competition because the other arguments developed in this work could still lead to findings of infringement when a patent action involved the only technology which could be used for a particular purpose.[1389] Commentators have noted the potential for the technology the subject of a patent to be unique,[1390] over and above the "novelty" which meant that it was patentable in the first place;[1391] they have also suggested a lack of tolerance when a position of power affected the development of substitutes for a work.[1392]

[1388] See **p230**
[1389] See **section 5.5**.
[1390] Panel Discussion Session 1 Panel I "To What Extent Does IP Require/Justify A Special Treatment Under Competition Rules" 3 at 12- 15 and 29 and Dreyfuss Unique **n1387** at 120, 127 in Ehlermann/Atanasiu **n10**, albeit with a focus on the power of the patent to control activities in a different market.
[1391] See **n16**
[1392] See p117, **n754**

If technology which is the subject of patent is unique and indeed there are no substitutes, this could mean that not only is the owner of the patent in a position of dominance, or super dominance, in respect of the technology the subject of the patent; but that this technology is the only member of a market, with 100% market share. Network effects, innovation levels and dynamic competition may mean that this may not be so for long. When it is so, however, the owner of the patent would be in a position of entrenched power.[1393] In such circumstances, it should be "possible" for it to be abuse of a dominant position to enforce the patent.

6.4.3 The Human Rights Emphasis

The argument that it can be abuse of a dominant position to enforce the patent, when the technology which is the subject of the patent is a market itself, may be "possible". Given the weight of contrary and more established arguments in respect of abuse and IP actions, however, this is unlikely to be the only, or most persuasive, argument before the court. As a result, it will only be adopted if the Human Rights Emphasis is against the patent owner.

When EC fundamental rights were taken into account to reflect consideration of abuse of a dominant position, the Human Rights Emphasis was against the patent owner in respect of the first Shetlands Islands example, when no injunction was sought.[1394] Thus, if the argument is advanced in respect of those allegations regarding that patented technology for use in air ambulances, the court must find that it was abuse of a dominant position to raise the action. If the Human Rights Emphasis taking into account fundamental rights is not against the patent owner, however, it would not be abuse of a dominant position to raise the action. The argument should not mean, therefore, that patents will be destroyed.

[1393] See also Drexl Max Planck, **n904** 568.
[1394] See **section 4.3.5**

A final issue is that when a national court considers this argument, it may make a reference to the ECJ, in respect of whether it would involve a correct interpretation of article 82 and section 18 CA.[1395] Courts in the UK have made references in IP and competition cases, notably in *Volvo v Veng.* The Court of Appeal in *Intel v Via* also indicated that Euro-Defences should be considered by the ECJ, although it felt it to be premature in that case. [1396] If a reference is made, it is likely that the argument developed here would be viewed favourably. It is developed not only from existing EC IP and competition (and IP and free movement) decisions but also takes into account fundamental rights. Thus, although the argument is novel, if a court does consider a reference to be necessary then it is likely that the argument would be supported by the ECJ – and if it is, this will support its use in future cases.

6.5 Summary: patent actions and abuse

This chapter has shown that it can be argued, on the basis of existing competition and IP case law, to be abuse of a dominant position to enforce a patent even if the facts involve the use of technology which is clearly the subject of the patent and which would lead to no new product or technical development. The legal basis for this view is weak, however and it also provides no guidance as to when it should actually be abuse to raise an infringement action.

Support for restrictions on the patent owner, but again no detailed guidance as to how this can be done, comes from other areas of IP and competition and also free movement, the public interest and IP itself. This chapter turned, therefore, to more basic questions of competition and concerns at significant levels of control and entrenched power, particularly in relation to standards. It has proposed that if the technology which is the subject of the patent is the only means of meeting particular

[1395] See **p70**
[1396] *Intel v Via*, **n25** para 90.

needs at the relevant time, then it is "possible" for it to be abuse to raise an infringement action. In such cases, if the Human Rights Emphasis (taking into account fundamental rights) is against the patent owner, then the court must find that it is abuse of a dominant position to raise the action.

The essence of this argument, although it is based in concerns at entrenchment and the extent of dominance, is ultimately one of market definition. The issue is not the abuse of the patent, but the abuse of a dominant position in a market as properly defined.[1397] Thus the question of the appropriate approach to abuse of a dominant position has come full circle: from a rigid three stage analysis, to a focus on abuse in respect of enforcement, to a proposal based in market definition. It is this proposal which is the innovative element of this work from the competition perspective.

The next chapter will consider market definition, therefore, from the perspective of patents, patent infringement and construction of patents. It will argue that, combining established principles and the Human Rights Emphasis, in some cases the technology the subject of the patent can indeed be a market in itself, as properly defined.

[1397] Cf Torremans, P.L-C. "Copyright as a Human Right" 1 in Torremans, P.L-C. (ed) (2004) *Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands , 15 referring to "abuse of the right".

7 Market definition

7.1 Introduction

The key concern of this work has been the right of the patent owner to control the use by others of the technology which is the subject of the patent. The arguments developed have culminated in the proposal that it is "possible" in terms of the HRA for it to be abuse of a dominant position for a patent owner to raise a patent action. This could only be so, however, if the technology which is the subject of the patent is the only means by which needs could be met, such that this technology is a market in itself – with the patent and the market "coinciding".[1398]

The scope of a market, as properly defined, is not necessarily the same as that of a patent, as properly construed. The two issues are to be determined according to different principles and courts have stressed that they should not be elided.[1399] The extent to which the technology which is the subject of the patent can be a market in itself will be explored here, with reference to established principles of market definition, construction of patents and the HRA.

7.2 Patents and markets

7.2.1 Preliminary points

This work has so far concentrated on decisions as to when reliance on an IP right may be abuse, once an IP owner has been found to be in a dominant position in a market.

[1398] Anderman Regulation,**n392** 150 considering first a coincidence in respect of a position of dominance and secondly in respect of a monopoly which was an essential facility.
[1399]See *Ingman,* **n25** paras 25-6, 41-3, 49-51.

The assessments of these preliminary issues would have involved matters other than IP - from the EC and UK perspective, the relevant factors have been seen to be substitutability and geography, in respect of market definition; and market share, barriers to entry (such as IP), network effects, standards, dynamic competition and innovation levels, in respect of dominance.[1400]

The focus of market definition upon products (or services) and geography is logical, given that competition law is based in the interaction of suppliers and consumers, in relation to the production and acquisition of goods and services. The focus on products has continued when competition considers IP, for example in the TT Guidelines[1401] regarding the licensing of IP.[1402] Commentators have also noted that "[t]he effect that a patent may have on the market must be analysed in connection with the product in which it is embodied. It is not often the case that the patented invention constitutes the whole relevant market"[1403]and also, in terms of a plant technology example, that "the legal 'breadth' of the patent is 'spread' across a large number of relevant product markets".[1404]

Products rather than patents appear, therefore, to be key in market analysis, or at least to be the starting point. The nature of the starting point is important, even if it has been termed "arbitrary"[1405] - just as a wide approach to market definition may be less likely to lead to a dominant position,[1406] a very specific approach taken to "product" may be less likely to lead to identification of substitutes. This could in turn be more likely to lead to a finding of dominance.[1407] This was seen in *Hilti AG v Commission of the European Communities* ("*Hilti*"),[1408] in relation to cartridge strips and in *Hugin*

[1400] See also Monti **n470** in Graham/Smith **n470**, 18-24.
[1401] See **n435**
[1402] TT Guidelines, **n435** paras 19-24.
[1403] Forrester Ten **n10** in Ehlermann/Atanasui **n10**, 66.
[1404] Regibeau/Rockett **n433** in Anderman Interface **n4** 526.
[1405] Kallay, **n18** 149, in the context of a dynamic approach to competition and innovation.
[1406] See **pp76-80**
[1407] Anderman Regulation **n392**, 161, 164-5.
[1408] *Hilti AG v Commission of the European Communities* (T-30/89) [1991] E.C.R. II-1439 ("*Hilti*") paras 66, 68

Kassaregister AB v Commission of the European Communities,[1409] in relation to spare parts for cash registers.

A key issue in *Hilti* in relation to dominance and, it has been suggested, to market definition was that there was a patent in respect of the cartridge, but not in respect of other parts which had been argued to be part of the same market.[1410] This is consistent with views that combining IP and a narrow view of the "product" is more likely to lead not only to a narrow market, but to a single product market in which the IP owner has a monopoly.[1411] IP has also been considered in relation to market definition in respect of its impact on future innovation,[1412] for example with innovation markets addressed in the TT Guidelines.[1413] Further, the Staff Discussion Paper for the Article 82 Review[1414] considered that if a licence of IP was sought, the IP could be a separate hypothetical market, even if the IP is not marketed separately from the goods to which it relates.[1415]

This discussion suggests that the boundary between products and patents is more blurred in relation to market definition than might appear to be so from the initial market definition criteria.[1416] The potential for account to be taken of IP in market definition is particularly important for this work. When questions of abuse are considered, the market is to be assessed in the light of the alleged abuse.[1417] Here, this involves the patent and the enforcement of the patent owner's right to exclude and

[1409] *Hugin Kassaregister AB v Commission of the European Communities* [1979] E.C.R. 1869 paras 3-8
[1410] See reference to patents at *Hilti*, **n1408** para 52. See also consideration of product market by the CFI in *Magill*, paras 47-8. Also Govaere **n433**, 132-3; Anderman Regulation **n392**, 154-60, 173; and Anderman/Schmidt **n441** in Anderman Interface **n4** 42, 43. See also *Intel v Via*,**n25** para 91 regarding a dominant position being buttressed by patents.
[1411] Govaere **n433**, 132, 136, Anderman Regulation, **n392** 159-160, 173, 177-9.
[1412] Dreyfuss Unique in Ehlermann/Atanasiu **n10**, 135-6. See also Anderman Regulation, **n392** 149-50 noting the importance of the product element of market definition in respect of IP.
[1413] See **n435**
[1414] See **n889**
[1415] Staff Discussion Paper, **n889** para 227
[1416] And also in respect of network effects, with a corresponding unwillingness to consider dynamic competition and innovation levels: Monti **n470** in Graham/Smith **n470**, 25-7,28-31;Kallay, **n18** 149.
[1417] See **n452**

to control use of technology which is the subject of the patent.[1418] The starting point in market definition should be, therefore, the patent, rather than any products which may, or may not, be supplied to consumers as a result[1419] - although these will form part of the analysis.

7.2.2 Consideration so far

There has been limited analysis of patents in the context of market definition, although it is well established that an IP owner does not exist necessarily in a market of its own.[1420] The Euro-Defence cases of *Pitney Bowes*[1421] and *Intel v Via*[1422] involved patents but, given the nature of the applications before the court, the patent owners were assumed to have a dominant position in the market.[1423] In *Chiron (No. 2)*,[1424] the court again considered the market without reference to patents, although it did note, but reject on the facts before it, the argument that there could be a market for licences of the patent.[1425]

There has been some consideration of patents and markets outside the Euro-Defence and refusal to license cases. The CFI in *Tetra Pak* and the EC Commission in *Astra Zeneca* considered market definition in some depth, before making the findings of abuse which have been discussed.[1426] Yet patents were not part of the market

[1418] See also Anderman Regulation **n392**, 158.
[1419] Cf Anderman/ Schmidt **n441** in Anderman Interface **n4** 41.
[1420] P**76** *Sirena Srl v Eda Srl* (40/70) [1971] E.C.R. 69, para 16; *Deutsche Grammophon*, para 16.
[1421] See **n510**
[1422] See **n25**.
[1423] Eg *Pitney Bowes*, **n510** para 4, *Intel v Via*, **n25**.paras 1, 16(b), 18 and 30 (1) and (3) (these last quoting from points of appeal before the court), *Sandisk*,**n505** para 14.
[1424] See **n511**
[1425] *Chiron (No. 2),* **n511** paras 12-16, para 13 regarding licence market and see p74 regarding technology markets. Note also the decision of the FTC in Rambus **p146-7**, which identifies four technology markets. The initial analyses proceed without reference to patents, with it then noted that Rambus claims that it has a patent over the technology (pp7, 10, 11, 12). The market and the monopoly power of Rambus were indeed not disputed (72-3). See also the decision of the court, **p147 n947**, paras 16-17.
[1426] See **p234**

definition analyses. In *Tetra Pak*,[1427] the CFI referred to the products (technology for sterilising milk containers), possible market shares and businesses of the companies involved in the licence.[1428] It referred to the patent licence only in relation to abuse.[1429] In *Astra Zeneca*,[1430] the EC Commission considered treatments for digestive disorders and found there to be a product market for proton pump inhibitors. It took into account the regulation of the pharmaceutical industry, economic evidence and uses of treatment products. It did not consider patents,[1431] although Astra Zeneca's ownership of a patent was considered in relation to dominance[1432] and patents have been seen to have formed part of the abuse analysis.[1433]

Given this lack of guidance from authority, this chapter will consider the relationship between patents and market definition using the established principles from each field. An example will be used which builds on that previously considered.

7.2.3 An example

[1427] See **n444**
[1428] *Tetra Pak*, **n444** paras 3-5.
[1429] *Tetra Pak*, **n444** para 6.
[1430] See **n1317**
[1431] *Astra Zeneca*, **n1317** paras 329-504. See commentary from the Commission perspective, see Fagerlund, **n1317**Section 4 and Negrinotti, **n1317** 448-50
[1432] *Astra Zeneca*, **n1317**paras 505-601, see in particular paras 526, 533-4, 562-6
[1433] See **p234-5**

A private health provider in the UK is engaged in apparently infringing conduct in respect of a newly granted UK patent for communications technology for use in air ambulances. The patent has just been granted to a large multinational company. The patent covers the only technology presently available which is effective for use in extreme conditions, and the patent owner has quickly built a very successful business in the UK based on its supply of this technology.
The health provider, through other parts of its company, has manufactured technology the same as that subject of the patent by carefully following the patent specification. Its employees use this throughout the UK to communicate with the health provider's hospitals, and this assists them in delivering initial treatment. In particular, the health provider and its employees use the technology in their work in the Shetland Islands, which the patent owner has refused to service although it does supply the rest of the UK. The health provider makes a great deal of money from providing its services. The health provider is also using the technology as part of its advance planning to deal with a possible pandemic, and it is clear that the patent owner would be unable to meet the high demand which would arise across the UK.
The health provider's hospitals are very well equipped and the provider wishes to extend some of the comforts to those en route. The health provider is pleased, therefore, that the patented technology will also enable those patients able to pay, or who have insurance, to call friends and family, to connect to the internet to play games and even to communicate with their workplace and business contacts. These opportunities are also available to the staff of the health provider on the air ambulance and staff are allowed to use them for private purposes.
The patent owner offers all of these services in its own business. The health provider's engineers have also been working, however, on their own improved system to meet these same needs of health professionals and patients. Websites and confirmed industry gossip suggest that a new product should be launched in 6 months time and that there is a high level of interest. Present indications from health experts are that the pandemic may hit in 3 months time.
The patent owner sues the health provider in England and seeks damages in relation to the use of the technology in Shetland for medical and more personal purposes but does not seek an injunction.

7.2.3.1 Substitutability

7.2.3.1.1 Basic points

According to established principles of market definition, actual and potential substitutability must be considered from the perspective of suppliers and users. Given

the approach taken here, this should be carried out in the light of the technology which is the subject of the patent. The technology put on the market by the patent owner and the technology which had been made by the health provider following the patent will be also considered.

Regard should be had to the characteristics, price and intended use of the different sets of technology.[1434] Given the present focus on the right to exclude of the patent owner, it will be assumed that any substitutable technologies would be readily available to customers and for a similar price. The key questions, therefore, are the characteristics and use of the technologies.

As was seen in the EC decisions made in *Microsoft,* consideration of this can involve collection of evidence from consumers, potential competitors and surveys. [1435] From the information available, however, it appears that the technology the subject of the patent, the technology made by the health provider following the patent and the technology used by the patent owner elsewhere in the UK can all meet the same communications needs. This suggests that they are substitutable from the demand side.

Other potentially substitutable technologies on the demand side might be those used by other forms of emergency services, such as mountain rescue or life boats, or, in terms of the communications opportunities offered on board for work and for pleasure, mobile phones, laptops or portable computer game players. Technologies of interest are at present supplied by Team Simoco[1436] Joton,[1437] Orange,[1438] Apple[1439] and Nintendo, respectively.[1440] There is no one product available which would meet

[1434] See **n443**
[1435] See summary of Commission approach in *CFI Microsoft,* **n489** paras 23-28, 480-664
[1436] See website http://www.teamsimoco.com/.
[1437] See website http://www.jotron.com/.
[1438] See website http://www.orange.co.uk/.
[1439] See website http://www.apple.com/.
[1440] See website http://www.nintendo.com/countryselector.

the full range of needs. This suggests that users may have to purchase and use several products, to fill the needs met by the technology which is the subject of this patent.

From the supply side, from the facts it seems likely that the patent owner and the health provider are both able to manufacture the technologies discussed in the example. The manufacturers of all the other technologies mentioned in the demand analysis may be able to adapt to offer these technologies. Yet as in respect of demand, the diversity of possible substitutes and their sources may suggest that others would struggle to offer a single product which serves all these needs, without incurring significant expense in terms of resources and expertise.

The market must be defined in respect of each abuse[1441] – here, the making of the allegation of infringement in the action. This suggests that within the same action, more than one conclusion could be reached in respect of market definition. Consider an allegation in respect of medical activities, say, a health professional employed by the health provider who uses the technology on board a helicopter to contact the base hospital in Inverness and to obtain details of the patient's health records from Lerwick on the Shetland Islands. It could be argued that substitutable technologies on the demand side could be radios used in mountain rescue - although these may perhaps not be able to work over long distances and from the supply side there may be questions as to whether their manufacturers could adapt. In respect of more personal activities, say, use of technology by a patient to communicate with her workplace, wireless lap tops may be substitutes – although there may be questions of whether or not these could work in extreme conditions and as to their manufacturers' ability to adapt.

7.2.3.1.2 Preliminary views

The health provider has made its technology by following the patent specification. The technology which the health provider offers can be assumed, therefore, to be identical to the technology in respect of which the patent owner has its exclusive

[1441] See **n452**

rights and to be part of the same market. The technology supplied by the patent owner also seems to meet the same needs - but it is not necessarily the same as that which is the subject of the patent. It seems likely, therefore, that the technology supplied by the patent owner is part of the same market as the technology which is the subject of the patent. But if the product put on the market by the patent owner is nonetheless different from the technology which is the subject of the patent, the technology which is the subject of the patent will not be in a market of its own.

If the possible substitutes identified in the initial wider discussion or in respect of the two instances of infringement were considered, after full investigation, to be substitutable from the supply and demand sides, they would also be part of the same, wide, market as the patent and the existing products. This does, however, seem to be unlikely.

7.2.3.1.3 More substitutes?

The health provider is making its own improved technology, to meet the same needs as met by the technology which is the subject of the patent and it hopes to complete this in 6 months. This suggests that there is yet another potential substitute. The very development of this and the high levels of innovation and dynamic competition in ICT related markets[1442] might also suggest that there could be more potential substitutes to form part of the analysis.

Yet the market is to be defined at the time of the alleged abuse - the raising of the court action which makes the specific allegations. This is earlier than the relevant time in respect of the Human Rights Emphasis[1443] but this is not problematic, as

[1442] See **pp77-80**
[1443] See **p168**

assessment of key matters at different dates is already part of patent litigation.[1444] For present purposes, however, this technology will not be developed for 6 months after the alleged abuse. It should not, therefore, form part of the analysis. The same would be so in respect of other potential substitutes, given that no details are available. Thus, only the actual substitutes mentioned in the example should be considered.

7.2.3.2 Geography

Regarding the geographical market, the Commission Market Definition Notice[1445] notes a role for regulatory barriers.[1446] This could cover patents. Patents are national rights. Nonetheless in innovative areas, notably ICT, businesses often operate at a transnational level, with products found to exist in global markets, albeit supported by national patents .[1447] This was so in *Intel v Via* [1448] and also in *Microsoft*[1449] although the market analysis had been carried out without reference to patents.[1450] Separate national geographical markets were identified in *Astra Zeneca*.[1451]

The geographical analysis must also look beyond patents. According to the Commission Market Definition Notice, the geographic market will be the area in which the technology which is the subject of the patent is available, in which there are competitive conditions which are similar and which can be distinguished from those

[1444] for example, date of grant, publication and priority date Sections 2, 3, 5, 60(1) and 69 PA. See also Terrell **n171**, chapter 5, para 6.13, para 8.06.
[1445] See **n449**
[1446] See **n449** Third paragraph under geographic dimension
[1447] See also Anderman/Schmidt **n441** in Anderman Interface **n4** 43 cf from the development perspective Drexl, J. "The Critical Role of Competition Law in Preserving Public Goods in Conflict with Intellectual Property Rights" 709 in Maskus/ Reichman **n3**, 720-1.
[1448] *Intel v Via*, **n25** paras 1, 8, 16, 18, 12, 91.
[1449] *CFI Microsoft*, **n489** para 29.
[1450] See detail in Commission Microsoft **n403,** para 427
[1451] *Astra Zeneca*, **n1317** para 503. For a similar outcome in respect of copyright, see *Tierce Ladbroke*, paras 96-106. See discussion of IP and geographical markets in Anderman/Schmidt **n441** in Anderman Interface **n4** 43.

in other geographic areas.[1452] Here, the patent owner refuses to supply its (apparently substitutable) technology to the Shetland Islands. This suggests that there is a separate market in the Shetland Islands. If questions were to arise in due course in relation to the pandemic, then there may be a wider geographical market, likely UK wide or possibly more global, depending on the nature of the pandemic and response to it.

The question of geography is not of significant importance here. If the market is considered to be the technology which is the subject of the patent, then it is immaterial whether the geographical market is the UK as a whole or the Shetland Islands - the patent owner has the power to control in respect of the UK as a whole, including the Shetland Islands. Conversely, if this market is wider than the technology the subject of the patent, the arguments developed in the last chapter could not be pursued.

7.2.3.3 Possible definitions

The market could consist of the technology which is the subject of the patent; the technology made, following the patent, by the health provider; the technology made by the patent owner; the improvement by the health provider which will be avialable in 6 months time; and, perhaps, other technologies considered likely to be developed and other means of workplace and emergency communication. If so, the market would be wider than the patent and the arguments relating to abuse could again not be pursued.

The substitutability analysis can also suggest a market comprising only the technology which is the subject of the patent; the technology made by the health provider following the patent; and the technology made by the patent owner. The

[1452] See also section 3 Commission Market Definition Notice **n443**

issue is then whether these technologies are all within the patent. If so, then the technology which is the subject of the patent would be in a market in itself. It would be "possible" for it to be abuse of a dominant position to enforce the patent.

The key issue, therefore, is the patent. The question of how a patent is to be construed has not yet arisen in this work, given its focus on technology which has been assumed to infringe, with reference frequently made to "technology which is the subject of the patent". But what is this? The exclusive rights of a patent owner set out in section 60 PA refer to the "invention". The next section will introduce patent construction in the UK jurisdictions.

7.2.4 Patent construction in the UK

7.2.4.1 Basic principles

Section 60 PA may refer briefly to "invention", but patents are detailed documents. They include a specification which provides an overview of the technical field, of the problem to be solved and consideration of how this is to be done; possibly drawings; and at the end, claims. These which may be numerous, are very important, as they set out the invention claimed by the patent. Patents can be lengthy. For example, in an application by Nokia Corporation for "Power Control for a Transmitter" which was under examination in the EPO at the time of writing in 2008, the underlying US patent application[1453] is 50 pages long and the most recent claims submitted are 20 pages long.[1454]

[1453] from which priority is claimed – articles 87 and 89 EPC.
[1454] EP1636902 available via esp@cenet via the UK Intellectual Property Office http://gb.espacenet.com/search97cgi/s97_cgi.exe?Action=FormGen&Template=gb%2Fen%2Fhome.hts

The manner in which a patent is construed will determine the scope of the invention in respect of which the patent owner has exclusive rights.[1455] In the air ambulance example, construction of the patent will determine whether or not the patent does indeed cover the only technology presently available which is effective for use in extreme conditions or if there is other technology manufactured for use in these conditions, by the patent owner and by others, which falls outside the invention.

7.2.4.2 The correct approach

The question is should patent claims be approached literally, on the basis of the language used (in an old example, does "extending vertically" cover variations of 6 or 8 degrees) or should there be a more flexible, purposive approach, notably looking to the drawings and the specification.[1456] Before the PA, patent construction has been said to have been based on common law principles, similar to the general principles of statutory interpretation which have been considered.[1457] Section 125(1) PA provides that the invention is to be that specified by the claims, as interpreted by the drawings and description in the specification, unless the context otherwise requires.

Section 125(1) PA is subject to the interpretative obligations of section 130(7) PA[1458] and section 125(3) PA states that courts are to have regard to article 69(1) EPC and its Protocol. Article 69(1) EPC provides that the extent of the protection conferred shall be determined by the terms of the claims and "nevertheless, the description and drawings shall be used to interpret the claims". Since December 2007, the Protocol states that "due account shall be taken of any element which is equivalent to an element specified in the claims." [1459]

[1455] Section 60 PA
[1456] *Catnic Components Ltd v Hill & Smith Ltd (No.1)* [1981] F.S.R. 60 . For consideration of the appropriate approach, see pp64-9 cf *Improver Corp v Remington Consumer Products Ltd* [1990] F.S.R. 181.
[1457] See **section 4.2.2.2**.
[1458] See **n1003**
[1459] For details of EPC 2000 see http://www.epo.org/patents/law/legal-texts/epc2000.html.

The Protocol and the process of its revision[1460] represent a long period of discussion and divergence of views, including on the part of courts in different member states of the EPC, as to the proper approach to patent construction and claims.[1461] Courts in the UK jurisdictions had tended to favour a more literal approach based on the strict wording of the claim and German courts to favour a more purposive approach and also the question of equivalents, which comes from the United States and can lead to an invention encompassing something equivalent to the words used, but quite different from their literal meaning.[1462]

In *Kirin-Amgen -Amgen Inc v Transkaryotic Therapies Inc (No.2)* ("*Kirin-Amgen*") in 2004, [1463] the House of Lords reviewed authorities and tests in a range of EPC jurisdictions and the United States, including some decisions made prior to the EPC.[1464] The House of Lords concluded that notwithstanding the well established potential for divergence of views and quite apart from the proposals for the new Protocol, it could no longer be said that there was a substantive difference of approach to patent construction in the EPC states.[1465] The House of Lords also expressed concern at an over-reliance on tests developed by courts and on the Protocol,[1466]

[1460] The previous Protocol had stated "should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties"

[1461] Regarding revision of article 69 and the Protocol, Basic Proposal for the Revision of the EPC (MR/2/00) http://documents.epo.org/projects/babylon/eponet.nsf/0/43F40380331CE97CC125727A0039243C/$File/00002a_en.pdf p59 et seq.

[1462] For detailed analysis of approaches taken to interpretation in different countries, see Fisher, **n8** chapters 1, 6, 7. For a critical overview of claims and their construction and function in a historical context, see Brennan, D. "The evolution of English patent claims as property definers". I.P.Q. 2005, 4, 361-399.

[1463] *Kirin-Amgen* **n17**

[1464] *Kirin-Amgen*, **n17** paras 18, 27. The House of Lords summarised relevant case law at paras 18-26, 42-48, 51, 52.

[1465] *Kirin-Amgen*, **n17** paras 20, 27-35, 42-50, 72-5.

[1466] *Kirin-Amgen*, **n17** paras 49, 51, 52, 69 and 139.

considering the key question to be what the person skilled in the art would have understood the patentee to have used the language of the claim to mean.[1467]

Once again, therefore, there is significant legal uncertainty in an area important to this work. The implications of this are considered below.

7.2.4.3 Patent construction and the example

The example refers only to a "patent" and to "technology". To consider further patents and construction, another example is required. Given the available space, a highly simplistic one is used here, as opposed to the detail which is more likely in reality, such as in the Nokia patent referred to above. From the facts, one claim of the patent could be:

a means of delivering communications to remote areas which does not utilise existing communications systems

This could be construed in a range of ways.

7.2.4.3.1 "Remote areas"

This could mean that the invention was technology for use in air ambulances which was effective in extreme conditions, be they in rural, urban or remote areas, for

[1467] *Kirin-Amgen*, **n17** para 71. See analysis and criticism, Whitehead, B., Jackson, S., and Kempner, S. "Patent construction after Amgen: are patent claims construed more widely or narrowly than previously?" J.I.P.L.P. 2006, 1(5), 332-337; Holder, N. "Exogenous equals endogenous? Claim construction after the Amgen decision" IIC 2006, 37(6), 662-669; and Fisher, M. "New Protocol, same old story? Patent claim construction in 2007; looking back with a view to the future" I. P.Q. 2008, 2, 133-162. For more detailed analysis, see Fisher, **n8** chapters 9 and 10 and also consideration in Terrell **n171**, chapter 6, 128-196.

communications for a range of purposes. This would encompass all the activities considered in the example.

This claim could also be construed more narrowly, as a new means of delivering communications which could only be used in "remote areas". This would not cover, say, use of technology to supply Glasgow or a nationwide response to the pandemic.[1468] Further, "remote areas" could be considered to limit implicitly the invention to technology enabling only emergencies to be dealt with – and not use for, say, entertainment use.

7.2.4.3.2 "Not utilise"

This could mean that the technology is not capable of working with existing communications technologies. Construed more widely, it could cover situations where communications providers recognise that consumers using existing technologies would not use this one, akin to a network effect, or where the operators of existing technologies would not permit this new technology to operate with their technologies.

The outcome in respect of all these matters would depend upon information not available here, such as drawings, the narrative in the specification, products and practices in the field and the views of the person skilled in the art.[1469] For present purposes, however, it can be noted that, applying established principles of patent construction, there may be more than one construction of the invention.

[1468] See facts
[1469] See **p262-5**

7.3 Patents, markets and human rights

7.3.1 Another role for the Human Rights Emphasis

The discussion of established principles of market definition revealed that there was more than one outcome. Each of these would have been "possible", in terms of the HRA and key factor as to which would be preferred was the construction of the patent. This has also been seen to give rise to more than one outcome – and as these were identified on the basis of established principles, without the need for the new opportunities of the HRA, they would also be "possible". This diversity could lead, however, to courts once again being "cast adrift on a sea of interpretative uncertainty" in a patent action.[1470]

The solution lies in the Human Rights Emphasis. The court must adopt the "possible" decisions which are supported by the relevant Human Rights Emphasis – even if the arguments in support of them, though legitimate, are weaker than others before the court. This is explored in the example below.

7.3.2 The Human Rights Emphasis and the example

The Human Rights Emphasis, for the first Shetland Islands example in relation to an infringement allegation regarding the use of the technology for medical purposes,

[1470] *Kirin-Amgen*, **n17** para 71 referring to construction of patents

taking into account EC fundamental rights,[1471] was **minus 1**. This is against the patent owner.

7.3.2.1 Patent construction

In terms of construction, it is in the interests of the patent owner for the patent to be narrowly construed, as this will suggest that there may be substitutable products which are outside the invention. The market and the invention would therefore not be the same.

Given the Human Rights Emphasis, however, the construction should be adopted which is most likely to lead to the patent being a market in itself. This would be one which includes the technology of the heath provider which follows the specification and also includes the existing technology of the patent owner. For this, the following amalgam of proposed constructions of the invention must be adopted:

Technology for use in air ambulances which is capable of working with existing communications systems and which is effective in extreme conditions, in rural, urban or remote areas, for communications for a range of purposes

7.3.2.2 Market definition

In the market definition discussion, the technology of the heath provider which follows the specification and the existing technology of the patent owner were found to be substitutable. These have both now been found to be within the invention. In addition to these three technologies, other potential substitutes have been considered. Including these in the market definition would lead to a wide market –

[1471] See **section 5.5.2.1.1**

wider than the invention. This would be in the interests of the patent owner, as the patent would not be in a market in itself. But the Human Rights Emphasis is against the patent owner.

Here, therefore, **this element of the market should comprise only the invention, the technology made by the health provider following the specification and the technology of the patent owner. As all of these have been found to be within the invention, the product element of the market "coincides" with the patent.**[1472]

In terms of geography, the infringement allegation concerns the activities of the health provider in the Shetland Islands, where the patent owner will not operate. **This suggests the geographical market to be the Shetland Islands.** The patent owner has exclusive rights in respect of the invention in the Shetland Islands. This definition should therefore be adopted.

7.3.2.3 Some variables

This market definition was assessed in relation to a particular infringement allegation, made now, in the light of the relevant Human Rights Emphasis. The same decision would not necessarily follow if an action was raised in 3 months in respect of response to the pandemic, as there may be a different Human Rights Emphasis.

Even if there is no pandemic, if an action is raised in 6 months time when the improved technology of the health provider is available, there may be a different analysis in respect of the Human Rights Emphasis and market definition, depending upon the nature of the improvements and the extent to which they are indeed welcomed, for example in the light of network effects. There may also be further

[1472] See **p251**

substitutes which emerge, given the levels of dynamic competition and innovation which have been identified in ICT related industries.

This potential for a range of decisions in relation to market definition arises from the need for the market to be defined bearing in mind the abuse in question. This follows from the regulatory guidance[1473] with its aim of reflecting the commercial realities of a particular industry. These matters do not apply, however, to the construction of patents. This suggests that although principles of patent construction have been seen to have their uncertainties, once the invention has been established it will be a fixed factor, to contribute to the wider market definition analysis.

Courts have confirmed this to be so on the basis of issue estoppel, in respect of disputes between the same parties regarding the patent.[1474] There is also the question of future disputes involving the patent between different parties. A court has indicated that construction of patents involves both fact and law and that it may be prepared to reconsider a construction if there is new material or a different question before the court.[1475] There is also the impact upon precedent of the HRA.[1476] As a result, there is some scope for variation in terms of patent construction, but this will be of a limited nature.

7.3.3 Another possibility

This chapter has argued that it can be abuse of a dominant position to raise an infringement action in respect of use of technology for medical activities in the Shetland Islands. This has been based in the existing ability for a court, combining

[1473] See **n452**
[1474] Cornish/Llewelyn, **n171** 93-5. See also *Coflexip*, paras 39-54 (especially 50-1).
[1475] *Novartis AG v Dexcel-Pharma Ltd [2008] EWHC 1266* (Pat) 2008 WL 2311293 paras 1, 5, 15-23 (especially 22).
[1476] See **p218**

established principles of market definition and patent construction, to find it to be arguable that the invention which is the subject of the patent is a market in itself. As noted, these were "possible" decisions for the court to reach, without need for the new approaches which have been developed in respect of infringement and abuse; and as the relevant Human Rights Emphasis was against the patent owner, the court made these decisions. In some cases, indeed, these may be the only decisions open to the court, say if a patent results from a groundbreaking and disruptive innovation.[1477]

This means only, however, that the market is the same as the patent. It does not mean that it is abuse of a dominant position to raise a patent action – just that it is "possible" for it to be so. As was noted when the abuse argument was developed,[1478] it is highly unlikely that this argument would be the most persuasive one before the court in relation to abuse and enforcement, given the more established ones which have been reviewed.

For this argument to be adopted here or in any other case, therefore, the Human Rights Emphasis must again be against the patent owner. In some cases, this will be a straightforward step, as the argument will only be "possible" because of the Human Rights Emphasis. It will be more important in respect of groundbreaking innovation and patents arising from innovation markets.[1479] This further role for the Human Rights Emphasis will avoid the patent owner necessarily being prevented from benefiting from its hard won success.[1480] Other interests will form part of the Human Rights Emphasis but, as seen, so will those of the patent owner. It will not, therefore, become an "outlaw"[1481] unable to enforce the patent and its property rights will not be "destroyed".[1482]

[1477] See eg *Biogen Inc v Medeva Plc* [1997] R.P.C. 1 49, 52.
[1478] See **p248**
[1479] See **pp67 and 74**
[1480] Dreyfuss Unique in Ehlermann/Atanasui **n10** 119-135; AstraZeneca Brief on Alleged Infringement of Article 82 EC http://www.astrazeneca.com/sites/7/imagebank/typearticleparam511187/astrazeneca-ec-omeprazole-investigation-brief.pdf under heading "Astra Zeneca Response to Allegations".
[1481] Eg *Chiron (No. 2)*, **n511** para 27.
[1482] See **p230**

The next chapter is the conclusion, which reviews and draws together the arguments of this work. It will also briefly consider the extent to which they may be considered, by other decision making bodies, to be consistent with regional and international obligations of the UK.

C Conclusion

C.1 Thesis overview

This work has developed a means to restrict the ability of IP owners to enforce their rights in some cases.

C.1.1 Problem and solution

This work began with a discussion of the power of IP owners and the potential for enforcement of their rights to have a negative impact upon the education, health or business of others. IP and its enforcement may also, of course, have a positive impact upon the business, innovation and right to property of the IP owner. But the more negative implications of IP are still recognised and steps have been taken to address them. Examples are the One Lap Top per Child and HINARI projects in which IP owners have been involved[1483] and at policy level the Doha Declaration[1484] and WTO Decision of 2003,[1485] the WSIS[1486] and some resolutions and General Comments of UN human rights bodies.[1487] These steps have had some success, particularly at a practical level, but the policy contribution may be better viewed from the longer term perspective - for example, the WTO focus on access to medicines and IP which began prior to the Doha Declaration in 2001, led to a proposed amendment to TRIPS in 2005 and at the time of writing in 2008 the process for this to be formally adopted has not yet been completed.[1488]

[1483] See **pp 20 and 62**
[1484] **See pp23-4**
[1485] See **pp24-5**
[1486] See **p20-21**
[1487] See **pp52-5**
[1488] See **nn108 and 109**

These initiatives have also not removed, or indeed sought to address, the right of the IP owner to object to a valuable project, completed or ongoing, which may infringe its IP. The objection to a project can have serious consequences for those involved. If this is to be addressed and by a means which IP owners will respect, rather than choose to embrace, a legal solution is required. The experience at policy level suggests that an attempt to revise IP legislation, even if ultimately successful, will take some time. This may be too late for those involved in contemporary projects. A legal solution is required, therefore, which can be used now. A solution based on existing licensing structures may take time, money and energy away from projects and control would remain in any event ultimately with the IP owner. A new legal solution was required.

C.1.2 Approach adopted

In pursuing this solution, the starting point was the existing IP framework. Yet the right to exclude inherent in IP[1489] means that although IP legislation at national and international level has its internal limits and balances and the IP owner will not always be able to prevent activities, it will be able to do so in some cases. In respect of these, this work has looked elsewhere within the legal framework, to human rights and to competition. These fields were chosen for two reasons: their (arguably) more fundamental nature than IP,[1490] albeit that all three are now part of legislation and treaties; and because concerns arising from enforcement of IP could be described in the language of human rights and competition – for example, the impact upon rights to life and expression and the alleged misuse of power by the IP owner.

This work has reviewed human rights and competition with an emphasis on their relationship with IP (both in theory and through case law), their own enforcement

[1489] See **p11**
[1490] See **pp23, 40, 86**

systems and the extent to which they could be used to challenge the enforcement of IP. It was noted that, like IP, each of them exists to an extent at national, regional and international level and provides some form of enforcement or monitoring system. It was then concluded that from a structural perspective, the most effective means of proceeding would be to develop of a solution for use within national IP infringement actions raised by the IP owner.

In developing this solution, this work has concentrated on IP actions in the UK jurisdictions, with a focus on England and Wales. This was done in the light of the wealth of case law in the UK, particularly in England and Wales, in respect of the relationship of IP with each of human rights and competition; the obligation upon courts in the UK jurisdictions, as a result of the HRA, to have regard to human rights in interpretation and decision making in respect of the pleaded case before them; and the potential for those faced with an IP action in the UK jurisdictions to raise arguments based on the prohibition of abuse of a dominant position in section 18 CA and article 82.

There has also been a focus on patent actions and on the use of technology which appears clearly to infringe. Arguments have been tested throughout using examples based on communications technology. From this foundation, five key points have been developed.

C.1.3 Proposals and arguments developed

Firstly, this work noted, on the basis of sections 3 and 6 HRA, that courts in the UK jurisdictions hearing patent infringement actions are obliged to have regard to Convention rights, which have been argued here to cover those of non parties. **Secondly**, it was argued, on the basis of sections 18 and 60

CA, article 82 and EC competition enforcement legislation, that when abuse of a dominant position is pleaded in response in a patent action the court should have regard to both Convention rights and EC fundamental rights when considering this.

Taken together, sections 3 and 6 HRA require courts, so far as it is possible to do so, to reach decisions which are compatible with Convention rights. The first point, and also the range of human rights which can arise in patent cases particularly in relation to health and ICT, suggest that the meaning of "Convention rights" will not always be straightforward. **Thirdly**, therefore, this work has proposed that courts considering "Convention rights" should assess the impact of an allegation of infringement on each right engaged and then combine the outcomes to produce a Human Rights Emphasis. The Human Rights Emphasis should then determine the decisions to be adopted when there is more than one option properly before the court - even if the argument consistent with the Human Rights Emphasis would not otherwise have been preferred. For example, if the Human Rights Emphasis is against the patent owner, an argument that there is no infringing act should be preferred.

Fourthly, to increase the prospects of there being more than one option before the court, this work looked to section 3 HRA as interpreted by the House of Lords in terms of what is meant by "possible", to established principles of statutory interpretation and to the accepted new place of precedent in the light of the HRA. From these, this work developed a new approach to statutory interpretation. This considers the extent to which the PA can properly be modified and then takes a questioning approach to the PA and its benefits, which draws on international obligations of the UK, legal policy and concerns at the impact of IP.

These arguments could result in apparently infringing conduct being found not to be so. But this will not always be the case. **Fifthly**, therefore, it has been argued that new "possible" interpretations can also be developed in respect of abuse of a dominant position. It is already "possible" for it to be abuse of a dominant position to

enforce a patent; yet no guidance is available as to when this may be so. This broad starting point was considered in the light of the approach of basic principles of competition law in relation to entrenched technology. As a result, a narrower argument has been made, that it is "possible" for it be abuse of a dominant position to enforce a patent if the technology which is the subject of the patent is a market in itself, as properly defined from the competition perspective. It was also seen that this can be so in some cases, according to established principles of market definition and patent construction. Finally, if the relevant Human Rights Emphasis is against the patent owner, the court must then find that it is indeed abuse of a dominant position to raise the action. There could therefore be no finding of infringement.

C.2 Some challenges and responses

C.2.1 The best relationship amongst the three fields?

Courts adopting the arguments developed could find that there is no infringement or that an action should not have been raised, even if it would have found there to be infringement. This may seem appealing to opponents of patents, to competition advocates uncomfortable with the exclusive rights of patent owners and to supporters of human rights.

It could be argued in turn, however, that the proposals would have a negative impact on the human rights of patent owners, on encouragement of innovation and on the longer term fulfilment of the human rights of those who may benefit from the innovation. The proposals could also be argued to be inconsistent with the PA in terms of infringement and too remote from existing case law regarding when competition and human rights could prevail over IP, even from *Ashdown* with its "rare" cases [1491] and from *Volvo v Veng* [1492] and *Intel v Via*[1493] with their openness.

[1491] See **p93**

Yet the proposals made are strongly based in existing case law, legislation and regulatory practice and have been developed on the basis of the obligations imposed on courts by the HRA. Each decision made by a court will ultimately be based on the Human Rights Emphasis, which will have taken into account the rights to property and any rights to reward of the patent owner and the public interest in encouragement of innovation, in addition to the rights of the infringer and those whom it has been shown would benefit from the activities. Further, the Human Rights Emphasis and also the market definition will be assessed in the light of each allegation of infringement. Thus, one finding of non infringement or abuse will not mean that the patent owner will necessarily be unable to enforce the patent in the future.

C.2.2 Too slow and uncertain?

It can take a long time for policy initiatives to come to fruition[1494] and a solution has been sought for immediate use. Yet the proposals of this work will require detailed analysis, evidence, legal argument and expert evidence. This could be argued to introduce further delay into litigation, particularly if there is a reference to the ECJ, and to require a new range of expensive expertise in competition, economics, innovation theory and policy and human rights.

Yet patent litigation is expensive,[1495] lengthy[1496] and uncertain. [1497] Competition and human rights are part already of IP litigation[1498] and can involve complex facts and

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[1492] See **p93**
[1493] See **p151**
[1494] See **pp25, 27**
[1495] See Fulbright & Jaworski Fourth Annual Litigation Trends Survey Findings of survey of corporate counsel in the UK and the US. The costs of patent litigation are the primary concern of over 80% - see 48. Available on application via http://www.fulbright.com/index.cfm?fuseaction=correspondence.littrends07.
[1496] Eg *Sportswear,* **n509** paras 71, 72, 75, 76.
[1497] Weatherall, K.G. and Jensen P.H. "An Empirical Investigation into Patent Enforcement in Australian Courts" IPRIA Working Paper No. 07/05 and Federal Law Review, Vol 32, No. 2; Geradin,

differing theories of economics, competition and innovation.[1499] This work has also sought to provide structures and tests to be applied by courts and has included examples which may assist them. Applying complex legal tests to facts is an inherent part of litigation – and more detail is proposed here than was available in the aftermath of key developments discussed in this work, such as *Ashdown* and *Volvo*.

Further, the proposals of this work are based in existing infringement actions and do not propose involving patients or pupils as parties to them. There is unlikely, therefore, to be a significant increase in the time and cost which may be involved in a patent action by those who choose to defend it. More of an issue is the very length and cost of patent litigation. Yet provided an interim injunction or interdict is avoided, persons should be able to benefit from the project while the litigation continues; and as noted in the introduction[1500], the prospects of interim orders being refused is likely to increase as courts become more familiar with the arguments proposed.

There is still the question of whether or not those involved in project planning, be it in respect of charitable activities, corporate benevolence or commercial risk taking will be prepared to embark upon initiatives which will inevitably give rise to novel, costly and lengthy litigation. Yet it is clear that some people are prepared to engage in groundbreaking litigation - consider *Levi*, *Laugh it Off* and *Eldred*. And once the arguments have been adopted in one case, they become part of the more conventional decision making of project planners and also of patent owners in deciding whether or not to raise an action.

D. "Limiting the Scope of Article 82 EC: what can the EU learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom" CML Rev 41: 1519 -1553, 2004 , 1539-43; Killick, J. "IMS and Microsoft Judged in the Cold Light of IMS" 2004 1(2) Comp LRev 23, 48 42-3 available via http://www.clasf.org/CompLRev/Issues/Vol1Issue2Article2.pdf; Derclaye**, n136** 278.

[1498] See chapters 2 and 3

[1499] Eg *Intel v Via*, **n25** para 96.

[1500] See **p15**

C.2.3 A national solution to a global problem?

Every piece of work must have parameters and the reasons for the present focus on the UK jurisdictions have been seen.[1501] The issue remains that concerns in respect of enforcement of IP arise not only in the UK. The arguments of this work can have an impact in the UK; yet this does not mean that this solution can be applied to the same effect elsewhere, particularly given its focus on national and EC legislation.

Nonetheless, this work may provide a starting point for those considering work in other jurisdictions in the light of their own forms of dispute resolution,[1502] attitudes to other jurisdictions[1503] and international law,[1504] constitutions[1505] and national IP legislation. It has identified consistencies across a range of countries in respect of national and regional competition legislation,[1506]and judicial and regulatory approaches to the relationships between IP and competition[1507] and between IP and human rights.[1508] There is also some substantive similarity between the ECHR and other regional human rights instruments in respect of the human rights relevant to IP and its enforcement.[1509] Further, at international level there are the obligations under TRIPS and human rights treaties. There is also the Vienna Declaration and

[1501] See **p36**
[1502] Sward, E.E. "Values, Ideology, and the Evolution of the Adversary System" Spring, 1989, 64 Ind. L.J. 301.
[1503] See eg Ginsburg, R. Bader "'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication" [2005] CLJ 575; and Reed, R. "Foreign precedents and judicial reasoning: the American debate and British practice" L.Q.R. 2008, 124(Apr), 253-273.
[1504] See Waters, M.A. "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" January, 2005 93 Geo. L.J. 487 and Dinwoodie, G.B. "Symposium on Constructing International Intellectual Property Law: The Role of National Courts: The Architecture of the International Intellectual Property System" 2002 77 Chi.-Kent. L. Rev. 993
[1505] See eg Havel, B.F. "The Constitution in an Era of Supranational Adjudication" January, 2000 78 N.C.L. Rev. 257.
[1506] See **p71**
[1507] See chapter 3
[1508] See chapter 2
[1509] See **p45**. For consideration of the impact of human rights on a range of other countries, the contributions in Part I of Friedman/ Barak-Erez.

Programme of Action from the World Conference on Human Rights in 1993, which sees human rights as being indivisible and of universal application,[1510] notwithstanding ongoing debate as to whether they can be separated from cultural environment and history.[1511]

The question of obligations under international and regional treaties is also important for this work. Although unincorporated treaties are not part of the laws of the UK, courts have regard to them in their decision making.[1512] Thus, if it can be argued that the proposals are inconsistent with TRIPS, the ECHR or international human rights treaties, courts may be less willing to adopt them. Further, if courts should nonetheless adopt the proposals, complaints could follow elsewhere. Complaints are unlikely to occur, or to have any substantive effect, in respect of international human rights treaties given the limits seen of the enforcement and monitoring systems;[1513] more relevant is that there may be complaints in respect of TRIPS or the ECHR.[1514]

If these complaints were to be successful, the UK could be required to remedy the breach.[1515] Further, courts in the UK and elsewhere would be unlikely to adopt the arguments in the future. If the complaints were unsuccessful, however, the proposals would be more attractive to advisers and decision makers in the UK and elsewhere. Indeed, the decisions of the other bodies would form part of future arguments before courts in the UK jurisdictions, as part of their consideration of international law.[1516] These complaints and their prospects of success are now considered.

[1510] Vienna Declaration **n234** See also Eide **n227** in Donders/Volodin **n227**, 31-2 regarding education, 32-3 regarding the benefits of science, 33-5 regarding cultural rights and 35-6 regarding communication.
[1511] See eg Tay, A. E-S. "Human Rights Problems: Moral, Political, Philosophical" 23 and Bayefsky, A. F. "The UN and the International Protection of Human Rights" 74, both in Galligan/Sampford **n233**.
[1512] See **p208**
[1513] See **p58**
[1514] a state may not invoke internal law as justification for failure to comply with a treaty. Article 27 Vienna Convention and see also *Greco-Bulgarian Communities Case* – Perm Court of International Justice Advisory Opinion 1930 PCIJ, Ser. B., No. 17, 1930 http://www.worldcourts.com/pcij/eng/decisions/1930.07.31_greco_bulgarian/, points 5 and 36
[1515] See pp**31** (WTO DSS) and **60** (ECTHR)
[1516] See p206

C.3 The extra-territorial perspective: threats and opportunities

C.3.1 Overview

A court in England may find that a patent was not infringed by its use for purposes which were considered to be private and non commercial, or that raising an action had been abuse of a dominant position

These decisions could lead to complaints by the patent owner[1517] to the ECtHR, once all national appeals have been exhausted, that the courts had acted in breach of the UK's obligations to protect, in the UK, the human right to property of the patent owner.[1518]

Complaints could also be made by any WTO member state[1519] to the WTO DSS that the UK, [1520] by the national courts' decisions, had acted inconsistently with its obligations under TRIPS and that benefits accruing to other states were impaired.[1521] These complaints could not be made by the patent owner, although it has been argued that complaints are frequently made by states at the behest of aggrieved patent owners based in that state.[1522]

[1517] Or conversely by a patient or health professional if the arguments are not adopted if they can established that they are victims see **p57**
[1518] Articles 1 and 34 ECHR. See also generally Leach, **n353** in particular chapters 2, 3 and 4 considering applications to the ECtHR.
[1519] See **p30**
[1520] It is likely, notwithstanding the lack of EC patent legislation, that any complaint would in fact be made by a state against the EC, rather than the UK. See *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* DS 135 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm where complaint was made against the EC regarding conduct by France and see **n1220**
[1521] article 28 TRIPS, subject to the exceptions permitted in article 30 TRIPS. article 3.3 DSU
[1522] Eg complaints by Antigua arising from the convictions of individuals in the United States *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* DS 285 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm. See Shaffer, G.C. (2003) "*Defending Interests: Public-Private Partnerships in WTO Litigation*" Brookings Institution Press, Washington, USA; Macdonald-Brown, C. "First WTO decision on TRIPs: India - patent protection for pharmaceutical and agricultural chemical products." E.I.P.R. 1998, 20(2), 69-73, 70; Charnovitz, S.

The question in each case would be whether the decision of the English court is inconsistent with the obligations of the UK under the ECHR and under TRIPS, as they are interpreted by the ECtHR and WTO DSS. A detailed analysis of this cannot be carried out within the confines of this work, particularly given that some new material would need to be introduced and considered. Some preliminary conclusions can be drawn, however, from the discussion so far and this will be developed to an extent, particularly in respect of the WTO DSS.

C.3.2 Strasbourg

The ECtHR, which has been prepared to recognise human rights in respect of IP,[1523] will determine the proper scope of the UK's obligations under the ECHR in respect of the right to property of the patent owner. [1524] The ECtHR will have regard [1525] to limits on the right to property and also to any other human rights raised in the case – thus in the example of the Shetland Islands and air ambulance technology, the ECtHR would have regard to rights to life and expression. The ECtHR is not[1526] bound by its previous decisions[1527] and will likely seek to deliver outcomes which reflect prevailing societal norms,[1528] taking into account its experience in balancing human rights and considering what would be a proportionate encroachment upon one by another.[1529]

"The WTO and the Rights of the Individual" available at <http://www.worldtradelaw.net/articles/charnovitzindividual.pdf> (published in 36 Intereconomics 98 (2001) esp 6, 22-3; Breining-Kaufmann, C. "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations" ("Breining-Kaufmann") 95 in Cottier **n524**,102-6; Abbott Asymmetric,**n93** 5-7.

[1523] See **p50**

[1524] The points made would apply if a different complaint was made, see **n1517**

[1525] See eg **p63**

[1526] See **p164**

[1527] But does consider them, eg *Budweiser* para 6 **n288 r**efers to *Smithkline* **n292**

[1528] See **n1045**

[1529] although the meaning is unclear, see **n1056.** See also Leach, **n353** 172-3.

It is arguable, therefore, that the ECtHR may consider that the decisions of the English court were consistent with the human right to property of the patent owner. This is particularly likely given the important role of the Human Rights Emphasis in the decisions of the English court. This would have been based on a proportionate and parallel analysis of the ECHR rights (and of EC fundamental rights in respect of abuse) engaged by the action and in carrying out these analyses some regard will likely have been had to the case law of the ECtHR.

The ECtHR may also consider that the questioning approach taken to identifying new possible interpretations of the PA is consistent with its own approach to decision making. It takes into account a broad range of human rights sources[1530] and has also supported creative interpretation of national legislation, to ensure state compliance with ECHR obligations in respect of private life.[1531]

In respect of abuse of a dominant position, the ECtHR has noted the place of fundamental rights in the EC legal framework[1532] and considered there to be a rebuttable presumption that states did not depart from their ECHR obligations when complying with the EC Treaty.[1533] The arguments here have been a development of established principles regarding IP and abuse and it is unlikely, therefore, that the ECtHR would consider the presumption to be rebutted here.

Finally, even if the ECtHR were minded to consider the decisions to be inconsistent with the right to property, the margin of appreciation must be considered. This term reflects the reluctance of the ECtHR to intervene in a state's internal affairs, which

[1530] Eg *Bladet Tromso v Norway* (21980/93) (2000) 29 E.H.R.R. 125 referring to the ICCPR
[1531] *Von Hannover v Germany (59320/00)* (2005) 40 E.H.R.R. 1 para 72 arguing for a narrow approach to image protection legislation.
[1532] See **n271**
[1533] See **pp48-9**

will be overcome only if the court decisions were considered not to be proportionate and to be illegitimate.[1534] The discussion above suggests that this is again unlikely.

C.3.3 Geneva

C.3.3.1 A complaint

Complaints can be made to the WTO DSS regarding the extent to which member states have complied with their obligations and the WTO DSS must hear the complaints.[1535] The PA as drafted is likely to be consistent with articles 28 and 30 TRIPS, in terms of the exclusive rights of the patent owner[1536] and the limited exceptions to these.[1537] The measure[1538] the subject of a complaint to the WTO DSS is likely, therefore, to be that as a result of the courts' decisions,[1539] the UK has acted inconsistently with its obligations under TRIPS and that benefits accruing to other states are being impaired.[1540]

The question for the WTO DSS would be whether the UK failed to confer exclusive rights on the patent owner (article 28 TRIPS), which were limited only in ways which did not "conflict with a normal exploitation" and not "unreasonably prejudice the

[1534] See examples of this as applied in *Handyside* **n1122** and *Bowman*, **n1060** paras 40-7. See also Clayton/Tomlinson **n258**, 273-286; Leach,**n353** section 6.6; and Koering-Joulin, R. "Public Morals" 83, at 86, Ost, F. "The Original Canons of Interpretation of the European Court of Human Rights" 283 at 305, Delas-Marty, M. "A "Reasoned" Conception of the Reason of State" 281in Delas-Marty **n1045.**
[1535] Article 6(1) DSU **n151**
[1536] Section 60(1) PA
[1537] Section 60(5) PA
[1538] See *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* DS 294 *http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds294_e.htm* para 188 regarding measure, also articles 3.3 and 6.2 DSU **n151.** It is well established that a state is responsible in terms of international law for decisions of its courts, see eg Denza, E. "The Relationship between International Law and National Law" 423, at 425 in Evans, M. (ed) (2006) (2nd edn) *International Law* Oxford University Press, Oxford, UK and Brownlie, **n245** 34 and 38
[1539] Note that if an established body of law should build up adopting the proposals of this work, this could then lead to a complaint based on the PA as approached by courts, as in *US Homestyle* **n154**, paras 6.136-6.141, 6.144 and 6.159
[1540] Article 3.3 DSU **n151**

legitimate interests of the patent owner, taking account of the legitimate interests of third parties" (article 30 TRIPS).[1541] The WTO DSS cannot add to or diminish the obligations in TRIPS[1542] and article 30 should not be interpreted any more narrowly than article 28.[1543]

C.3.3.2 The issue

The key issue will be the meaning of "unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties". This was considered by the WTO DSS *Canada Patent Pharmaceuticals,*[1544] which took an approach was taken more open to interests other than the patent owner than was done in respect of the similar provision in respect of copyright.[1545] The decisions which would be considered by the WTO DSS in this example have been developed taking into account the interests of the patent owner and of third parties, which have been combined in an open and structured way. The WTO DSS may still find, however, that the decisions did unreasonably prejudice the legitimate interests of the patent owner within article 30 TRIPS.

C.3.3.3 A wider approach?

The prospects of this may be reduced by using artices 7 and 8 TRIPS. The role of these provisions in interpretation of article 30 TRIPS, although they may not be determinative, was seen in *Canada Pharmaceutical Patent.*[1546] Article 7 refers to "social and economic welfare and promotion of technological innovation" as having a place in the objectives of TRIPS and article 8(2) TRIPS states that, subject to the rest

[1541] See **n149**
[1542] Article 3.2 DSU **n151**
[1543] *European Communities — Measures Concerning Meat and Meat Products (Hormones)* DS 48 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm Appellate Body report, section IV. See Harrison**, n183** 206-7.
[1544] See **n154**
[1545] See Senftleben, M. "Towards a horizontal standard for limiting intellectual property rights? - WTO panel reports shed light on the three step test in copyright law and related tests in patent and trade mark law" IIC 2006, 37(4), 407-438, 409, 412, 413, 417-9, 422-3, 428-31.

[1546] *Canada Pharm Patent*, **n154** paras 7.23-6 p**231** Frankel **n139**, 394-7, Anderson/ Wager, 723-6n**136**

of TRIPS, appropriate measures may be needed "to prevent the abuse of IP or practices which unreasonably restrain trade or adversely affect the international transfer of technology".

This suggests that there is a place for human rights and competition in the WTO DSS' interpretation of article 30 TRIPS - and that an approach by national courts which looks to these may be consistent with the legitimate interests of all involved. Further, the WTO DSS is able to clarify (although again not diminish) article 30 TRIPS "in accordance with customary rules of interpretation of public international law", [1547] which the WTO DSS has found to include the Vienna Convention.[1548] There have been some instances of the WTO DSS using this to look to material other than the WTO Agreement to assist in interpreting it, [1549] although the precise basis for this is often unclear and has been the subject of significant discussion. [1550]

At the time of writing in 2008, the case most on point is that of the WTO DSS panel in 2006 in *EC – Measures Affecting the Approval and Marketing of Biotech Products* ("*EC Biotech*"). [1551] There, it was argued that the panel could look to the Cartagena Protocol on Biosafety when considering the "ordinary meaning" of WTO provisions,[1552] even though not all parties to the dispute were signatories to it. The panel considered that it could look to this as informative of widely (although not wholly) accepted intentions of nations but it considered that this was not required here.[1553] The panel considered this approach to other sources to be consistent with

[1547] Article 3.2 DSU **n151**
[1548] *United States — Standards for Reformulated and Conventional Gasoline* DS2 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm, see also discussion of the Vienna Convention in eg *Korea — Measures Affecting Government Procurement* DS 163 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds163_e.htm.
[1549] See generally Frankel **n139** in particular 368 and also Shanker, **n103** 721-736 and 771-2 cf Irwin, D.A. and Weiler, J.H. "Measures affecting the cross-border supply of gambling and betting services (DS 285)" World T.R. 2008, 7(1), 71-113, 90.
[1550] See also generally on this issue Hestermeyer, **n4** 169-90
[1551] *EC – Measures Affecting the Approval and Marketing of Biotech Products* DS291 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm ("*EC Biotech*").
[1552] Within Vienna Convention article 31(1)(a)
[1553] See *EC Biotech* **n1551** paras 7.92-5

that of the WTO DSS Appellate Body in *United States — Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp/ Turtle*") in 1998.[1554]

The Appellate Body in *Shrimp/ Turtle* considered whether restrictions on imports of shrimp, caught using methods which could endanger turtles, were measures in relation to "conservation of exhaustible natural resources" within Article XX GATT.[1555] The Appellate Body considered that this term must be read as part of the "contemporary concerns of the community of nations".[1556] In establishing these concerns, the Appellate Body looked to several instruments, including the listing of turtles as endangered in the international Convention on International Trade in Endangered Species of Wild Fauna and Flora.[1557]

This approach to interpretation has been termed "evolutionary"[1558] and "brave"[1559]and gave rise to significant debate, including regarding its legal basis.[1560] In the example proposed, the WTO DSS may be minded to take a similarly brave and evolving

[1554] *United States — Import Prohibition of Certain Shrimp and Shrimp Products* DS 58 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm ("*Shrimp/Turtle*").

[1555] An Annex to the WTO Agreement
[1556] *Shrimp/Turtle*, **n1554** para 129 and see para 131 and footnote 116.
[1557] *Shrimp/Turtle*, **n1554** paras 130-132. See Marceau, G. "WTO dispute settlement and human rights." E.J.I.L. 2002, 13(4), 753-814 ("Marceau"), 781-2.
[1558] Marceau, 784.
[1559] See Trachtman Domain **n1229** in Mavroidis/Sykes **n158** at 361/106
[1560] For discussion, see Trachtman Domain **n1229** in Mavroidis/Sykes **n158** 361/106, 363-4/108-9; Kulovesi, K."A link between interpretation, international environmental law and legitimacy at the WTO dispute settlement?" Int. T.L.R. 2005, 11(6), 188-196; Francioni, F. "WTO Law in context: the integration of International norms on human rights and environmental protection in the dispute settlement process." 143 and Weiss, F. "The limits of the WTO: facing non-trade issues" 155 in Sacerdoti, G. et al (eds) (2006) *The WTO at Ten: the Contribution of the Dispute Settlement System* Cambridge University Press, Cambridge, UK. cf Esserman, S. and Howse, R. (2003), 'The WTO on Trial' *Foreign Affairs*, **82**(1), January/February, 130-40, **288** in Mavroidis/Sykes **n158** at 291-3/133-5; Howse, R. "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power" 11 in Cottier, T and Mavroidis, P.C.(eds) (2003) *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO* University of Michigan Press, Ann Arbor, USA; Howse, R. "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate", available at <http://www.worldtradelaw.net/articles/howseshrimp.pdf> published at 2002 27 Colum. J. Envtl. L. 491. Regarding *EC Biotech*, see Henckels, C. "GMOS in the WTO: a Critique of the Panel's Legal Reasoning in EC — BIOTECH - [2006] MelbJIL 12; (2006) 7(2) Melbourne Journal of International Law 278, ("Henckels") Section IV, A, D and E. and Young, M.A. "The WTO's use of relevant rules of international law: an analysis of the Biotech case." I.C.L.Q. 2007, 56(4), 907-930 ("Young") 908, 909, 918 et seq, 924, 926, 950

approach.[1561] If so, it could look outside[1562] articles 7, 8 and 30 TRIPS and consider instruments such as the draft A2K Treaty,[1563]the Adelphi Charter[1564] and the WSIS Geneva Declaration[1565] to establish the "ordinary meaning" of "unreasonably prejudice" and "legitimate interests".[1566] This would be an unusual approach in any event, however, and this would be particularly so here - given the ongoing discussion as to the proper place of IP, [1567] it would be difficult to argue that these sources could be informative of an international consensus as to the meaning of the words.

The place of the Vienna Convention in interpreting TRIPS could also provide a role for international human rights treaties.[1568] The relationship between human rights and the WTO is controversial,[1569] notwithstanding the developments in respect of patents and health.[1570] The Vienna Convention provides that treaties are to be interpreted in good faith, which suggests that the WTO DSS should also have regard to obligations

[1561]See Boyle/Chinkin **n1212**, 244-7 and Harrison, **n183** 207-8.
[1562] See also Shaffer, G. "Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patents Protection" 884 in Maskus/ Reichman,**n3** 893-4 arguing for a wider outward looking approach to sources and interpretation.
[1563] See **n84**
[1564] See **n45**
[1565] See **n70**
[1566] See consideration of a similar issue in Ruse-Khan, H.G. "Proportionality and Balancing within the Objectives for Intellectul Property Protection" 161 in Torremans, P.L-C. (ed) (2008) *Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights* Kluwer Law International, The Hague, The Netherlands, 179-181 and 187-191
[1567] See **pp11-32**
[1568] Marceau, section 2, esp 777-778, 791 and 795. The WTO DSS could not enforce or apply the human rights treaties - see Pauwelyn, J. (2003) *Conflict of Norms in Public International Law* Cambridge University Press, Cambridge, UK 440-486, 490-2; and Pauwelyn, J. "Human Rights in WTO Dispute Settlement" 205 in Cottier **n524**.

[1569] Petersmann, E-U. (2002) 'Constitutionalism and WTO law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law' in Daniel L.M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, Chapter 2, Cambridge: Cambridge University Press, 32-67, **641** in Mavroidis/ Sykes, **n158** 641/32, 655-6/46-7, 659/50, 663-4/54-5,673-4/64-5; Alston, P. "Resisting the Merger and Acquisition of Human Rights by World Trade Law: A Reply to Petersmann" E.J.I.L. 2002, 13(4), 815-844 Petersmann, E-U. "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston" E.J.I.L. 2002, 13(4), 845-851; Cottier, T. "Trade and human rights: a relationship to discover." J.I.E.L. 2002, 5(1), 111-132; Petersmann, E-U. "Human Rights and International Trade: Defining and connecting the Two Fields" 29 and Ranjan, S. "International Trade and Human Rights: Conflicting Obligations" 311, both in Cottier **n524**; and Dommen, C. "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" Human Rights Quarterly 24.1 (2002) 1-50.
[1570] Rott, P. "The Doha Declaration – good news for public health?" I.P.Q. 2003, 284 – 311; Abbott Hydra **n4** in Maskus/ Reichman **n3**; Marceau, providing examples in respect of interpretation of the Doha Declaration in relation to patents and public health, 786; Shanker, **n103** 737-758 and 764-771; **n136**, 727-30; and Hestermeyer, **n4** 197-206, chapter 5, 85-94 and 102-22.

of states in respect of human rights.[1571] Further, article 31(3)(c) Vienna Convention[1572] provides that relevant rules of international law applicable in the relations between the parties shall be taken into account. There is debate about the need for identical memberships (which there are not in respect of the international human rights treaties and the WTO Agreement).[1573] At international level, commentators have argued that the better approach is whether the parties to a dispute are bound by both treaties considered, rather than anyone else.[1574] In *EC Biotech*,[1575] however, the panel declined to look to international environmental agreements [1576] as not all WTO members were parties to them.[1577]

This discussion suggests that if the WTO DSS combines articles 30, 7 and 8 TRIPS then it may consider that the approach taken to infringement and enforcement of the patent is not inconsistent with the UK's obligations under TRIPS. The prospects of this would be stronger if the WTO DSS also looked to international human rights treaties (although these also include rights of the patent owner) and the A2K treaty, but this would be unlikely.[1578]

In summary, therefore, both the ECtHR and the WTO DSS may find that the proposals of this work are consistent with the obligations of the UK under the ECHR and TRIPS. This provides support for the use of the arguments in the UK and elsewhere. Inevitably, this is not the end of discussion of the impact of enforcement of IP and the place of competition and human rights in this regard.

[1571] Article 31 (1) Vienna Convention and see Frankel **n139**, 387-9.
[1572] Considered at **p214**
[1573] See **n1232**
[1574]See McLachlan **n1231** and French **n1231**; Marceau, 780 et seq; Breining-Kaufmann **n1522** in Cottier **n524**, 114-7; and Harrison, **n183** 200-5.
[1575] See **n1551**
[1576] *EC Biotech*, **n1551** paras 7.49 – 7.96, esp 7.68.
[1577] See Henckels, Section VI, A and Young, 907, 911-7.
[1578] See also Frankel **n139**, considering the possible combination of a range on sources on the basis of object and purpose and article 31(3)(c) in terms of interpretative approach, albeit with a different focus – see 412, 421-428, noting conclusion in respect of arguments made there at 428.

C.4 Beyond this work

Notwithstanding the novel and controversial nature of some of its proposals, for example the WTO DSS regard to human rights treaties and the A2K Treaty, a new approach to abuse and enforcement and the Human Rights Emphasis, this work could be argued to be too narrow. It remains based in the rights of the patent owner; the infringement arguments are inextricably linked with the PA; and the human rights of those other than parties, say unidentified ultimate patients, cannot always be taken into account as part of the Human Rights Emphasis. The Human Rights Emphasis has also been seen to be based strongly upon the pleaded allegations of infringement before the court; the stance of the patent owner in relation to remedies; and whether or not an approach has been made to the patent owner. The Human Rights Emphasis will frequently be in favour of the patent owner, irrespective of the value of the project. Further, the competition arguments require there to be no other technology which could be used for the purposes in question. Finally, the arguments as a whole can only be used if there can be infringement in the first place (difficult in respect of pharmaceuticals but less so in respect of software) and the alleged infringer is minded to defend the action, such that these questions are considered by a court.

These criticisms are valid. Yet they flow unavoidably from the decision to develop a solution focused on court actions and upon existing law, rather than on practical projects or wider policy change. It is possible that if it becomes established that patent actions will be determined not only by reference to the PA, this may influence some future decisions by patent owners as to whether or not to raise an action.[1579] Otherwise, however, it must be accepted that a proposal based upon court actions within the existing legal framework will have its limits.

C.4.1 Wider activity

[1579] This could be through strategy or social responsibility concerns, see **p56**

The proposals of this work must exist, therefore, and be pursued, in parallel with policy based measures. These may culminate in an Access to Knowledge Treaty,[1580] in revisions to TRIPS in terms of the rights to be granted and limits thereon,[1581] in international instruments regarding unilateral conduct by IP owners[1582] and in clear statements in TRIPS and by human rights bodies or others[1583] as to the proper relationship between IP, human rights and economic concerns.[1584] This could lead to changes to national IP legislation throughout the world.

Even if this could be achieved, past experience suggests that notwithstanding careful negotiation and drafting by policy makers and legislators, legal uncertainty will continue as to the scope of treaties and legislation.[1585] Litigation is a fact of life. People will always wish to exercise their rights, ignore the rights of others, collect payments and avoid making payments; and to these ends, at least some are likely to pursue in court whichever tenable legal argument can best advance their own agenda. There will still be a place, therefore, for a court based approach.[1586] This work has sought to provide this.

C.4.2 Further research

Within this court based approach, there are issues which have arisen which have been unable to be fully explored here and others which have been deliberately excluded from the outset and which merit future attention. In addition to exploration in relation to other jurisdictions, there is the question of how the proposals may be adapted to IP

[1580] See **p22**
[1581] See Ghidini Innovation, **n13** 111; Suthersanen Public Interest **n136** in Griffiths/Suthersanen **n136**, 118-9; and Derclaye **n136**, 278.
[1582] Possibly within the WTO if attempts to introduce competition are revived –see **p70** and Anderson/ Wager, n**136** 730 et seq.
[1583] See call for activity by the International Law Commission in Petersmann, E-U. "The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms: Trade and Human Rights" 281 in Bartels, L. and Ortino, F. (eds) (2006) *Regional Trade Agreements and the WTO Legal System* Oxford University Press, Oxford, UK .
[1584] See Abbott, F.M. "The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in TRIPS" 279 and Misungu, S.F. "The Right to Health, Intellectual Property, and Competition Principles. Commentary on Frederick M. Abbott" 301 both in Cottier **n524**; Ullrich Harmony **n431** in Dreyfuss Expanding **n9**.
[1585] See Brown Curb 31 **n163**
[1586] See criticism of litigation as a solution in MacQueen Copyright **n178**, 94.

rights other than patents,[1587] particularly given the key roles of market definition and of patent construction in relation to abuse. New questions will arise in interpreting the proper scope of the rights conferred by, say, copyright and trade marks and regarding the extent to which they could be a market in themselves.[1588]

Further, this work has focused on technology which, being identical to that the subject of the patent, would clearly infringe, subject to other matters. A role for the proposals could be considered where technology or work is not identical, such that there may be initial arguments as to whether there could be infringement. In relation to patents, this would again involve construction of the patent and also assessment of the alleged infringing technology, which could in turn lead to questions of the interpretation of the patent over the prior art.[1589] Moving beyond the exclusive rights of the IP owner, the contribution of this work could also be explored in relation to what has been termed para intellectual property, such as anti-circumvention measures.[1590]

The discussion in terms of the ECtHR and WTO DSS concluded that the proposals may be found to be consistent with the obligations of the UK under the ECHR and TRIPS. If these bodies were not to reach this view, there is the question of how, other than payment, the UK may remedy its breach of its international obligations[1591] and bring it to an end.[1592] Here, given the key role of the Human Rights Emphasis, this

[1587]Eg *Ingman*, **n25** 65-6 commenting on *Magill* **n454** and the difference between copyright and other IP rights. See also Drexl Max Planck **n904**, 562-03 and Meinberg **n914**, 399, 402-3.
[1588] See eg Netanel Marketplace **n23** in Leveque/ Shelanski **n23,** in particular 163 et seq and Netanel Marketplace 2 **n23** in Macmillan Directions 4 **n23**, in particular 22 et seq; also Griffiths, A. "The trade mark monopoly: an analysis of the core zone of absolute protection under Art.5(1)(a)." I.P.Q. 2007, 3, 312-349.
[1589]See consideration in Terrell **n171**, paras 8.75-6.
[1590] See **pp94-5, 111**. Also Ciro, T. and Fox, M. "Competition v copyright protection in the digital age" E.I.P.R. 2006, 28(6), 329-334 and Brown, I. "The evolution of anti-circumvention law" I.R.L.C.T. 2006 (20) 239-260.
[1591] See also Council of Europe Recommendation of the Committee of Ministers to member states on the improvement of domestic remedies Rec 2004(6) https://wcd.coe.int/ViewDoc.jsp?id=743317&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75
[1592] See article XVI(4) WTO Agreement and Charnovitz Rethinking **n158** in Mavroidis/Sykes, **n158** 279/824

may involve a review of the place of the HRA in respect of the PA - another controversial area.

Finally, this work has sought to combine three legal fields by focussing on patent actions in the UK jurisdictions with some analysis of the ECtHR, EC decision makers and WTO DSS. This approach was compared to neutralising regime shifting.[1593] There may be a more direct role for the proposals of this work in this regard. It should be considered whether the proposals may have some use in national competition actions, in more direct decision making of the ECtHR and WTO DSS and also that of any new bodies established to consider patent litigation in Europe.[1594] All this should form part of wider work regarding the linkages between fields of law.[1595]

C.5 Closing thought

"No man is an island, entire of itself"[1596]

This work has developed a solution based on national legislation dealing with each of competition, human rights and patents and on regional instruments dealing with human rights and competition. The wider regional and international legitimacy of the arguments developed has been confirmed by reference to these and to TRIPS and to the likely approach to the arguments by the relevant supranational decision makers. Throughout, the work has combined IP, competition and human rights by building

[1593] See **p87**
[1594] See **n186**
[1595] For analysis of this, see contributions in Cottier **n524,** in particular Cottier, T., Pauwelyn, J. and Burgi Bonamoi, E "Introduction" at 1, Petersmann, E-U. "Human Rights and International Trade: Defining and connecting the Two Fields" at 29, Helfer Mediating **n524**, Breining-Kaufmann and Cottier, T. and Khorana, S. "Linkages between Freedom of Expression and Unfair Competition Rules in International Trade: The *Hertel* Case and Beyond" at 246. See also Helfer, L.R and Slaughter, A-M. "Toward a Theory of Effective Supranational Adjudication". November, 1997 107 Yale 273; Posner, R. A. Yoo, J.C. "Reply to Helfer and Slaughter" May, 2005 93 Calif. L. Rev. 957; Helfer, L.R and Slaughter, A-M "Why States Create International Tribunals: A Response to Professors Posner and Yoo" May, 2005 93 Calif. L. Rev. 899.
[1596] Meditation XVII John Donne

upon existing practices of consideration by national courts of IP, competition and human rights (albeit not altogether); by EC decision makers of IP, competition and EC fundamental rights; by the WTO DSS of matters other than the WTO Agreement; and by the ECtHR of human rights, IP and the EC Treaty.

The final message is straightforward: patents, competition and human rights are strongly intertwined. This work has reviewed these legal principles together and, without overly restricting innovation and the rights of the patent owner, it has developed a means for valuable conduct to be beyond the reach of the patent owner. Sometimes.

A legal solution to a real problem: the interface between intellectual property, competition and human rights

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Degree of PhD
The University of Edinburgh
2008

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Note: all weblinks were accurate when tested between 20 and 30 September 2008

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