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## **UNFAIR COMPETITION AMONG BUSINESSES IN THE MARKETPLACE -Abuse of a Dominant Position-**

*Ovaj rad je naučna studija koja pokazuje pravno i direktno predstavljanje Evropske Komisije, sa ciljem ukazivanja na beztakmičarski pristup ponašanja na tržištu, na osnovu zakona i procedura koja se nalaze u Zakonu za zaštitu konkurencije Evropske Unije. U ovom specifičnom slučaju protiv Majkrosofta, koje prikazuje monopolističko ponašanje i zloupotrebu pozicije od strane ove kompanije na tržištu, rezultirace do različitih mišljenja i procena u definisanju pravog značenja termina zakona o antipoverenju, posebno povrede Člana 82 Zakona o konkurenciji, i pitanja granica ponašanja vodećih kompanija, u relaciji sa zloupotrebom dominantne pozicije na tržištu. **Ovaj naučni rad je podeljen u II dela, deo koji se nastavlja u sledećem članku u formi praktičnog slučaja.***

**Ključne reči:** *Zakon o konkurenciji, Evropska Komisija, Zloupotreba dominantne pozicije, Intelektualna svojina, povreda Člana 82, Slučaj zakona o nepoverenju protiv Majkrosofta.*

### **Introduction**

*'Businesses with significant market shares must take care not to exploit their strong market positions in an anti-competitive way. The abuse by a business of its dominant position is prohibited under competition law.'*

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*Having a dominant position per se is not a breach of competition law. It is the abuse of that dominant position that is prohibited.*<sup>3</sup>

The aim of the Term Paper is to present the conduct of businesses in the market by focusing on the unfair conduct to the competition from companies on a position of high dominance regarding the infringement of the Article 82 of the EC Treaty.

In a free market, business is a competitive game. Sometimes, companies may be tempted to avoid competing with each other and try to set their own rules for the game. At times, a major player in the game may try to squeeze its competitors out of the market. This type of game in the market is known as the anti-competitive behavior, or abuse of a dominant position.

Guidelines:

The Paper will first focus on theoretical part by defining and elaborating on the term intellectual property, specifically copyright as a field of intellectual protection and computer programs as copyright term, as an amount owned, and traded by the companies in the market. Then, in the second part of the Paper the focus will switch on the rules and guidelines concerning conduct in the market and specification of the unfair competition and the legislations that prohibit this type of behaviour, specifically the abuse of dominant position, also known as monopolist conduct leading Corporations. At the end of the term paper, practical part will present a specific case involving the unfair competition practices.

## **Chapter 1 - The Theory of Intellectual Property**

### ***1.1 HISTORICAL BACKGROUND***

The term Intellectual Property has been used for almost one hundred and fifty years to refer to the general area of law that encompasses copyright, patents, designs, and trade marks, as well as a host of related rights.<sup>4</sup>

The term Intellectual Property as the law did not accept a distinct and non-controversial form of property until late 18<sup>th</sup> century, early 19<sup>th</sup>

3 Note: text is a part of the press release of the stated by the European Commission regarding the Competition Policy, [www.ec.europa.eu](http://www.ec.europa.eu), May 2006

4 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*. Oxford University Press, New York, 2001, p.2

century. In granting property status to intangibles, the question arose as to how and where the boundary lines of the intangible property were to be determined. That is, once it was accepted that the law should grant property rights over intangibles, the question arose: how was the object of the property to be identified and its limits defined? While in real and personal property law, questions of this nature were answered by reference to the boundary post and physical markers of the object in question, one of the defining features of intangible property was that these reference points did not exist. As a result, each area of intellectual property law had been forced to develop its own techniques in order to define the parameters of intangible property. These included schemes of deposit and registration; techniques of representation (such as the patent specifications and claims), statutory rules and legal concepts such as the requirement of sufficiency of disclosure (in patent law) and the originality requirement (in copyright law).<sup>5</sup>

According to BENTLY & SHERMAN [2001]<sup>6</sup> the reasons for establishing intellectual property as a field of protection during the 18th century late 19th were falling in two categories of justifications:

First, was that commentator often relying upon instrumental justifications that focused on the fact that intellectual property induced or encouraged desirable behavior? For example, the patent system was justified on the basis that it provided inventors with an incentive to disclose valuable technical information to the public, which would have otherwise remained secret. Similarly, the trademark system was justified on the basis that it encouraged of providing information to the public about those attributes. Secondly, commentators often called upon ethical and moral arguments to justify their intellectual property rights. For example, it is often said that the copyright is justified because the law recognized an author's natural or human rights over the products of their labor.<sup>7</sup>

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5 Information available BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*. Oxford University Press, New York, 2001, p.2-3

6 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*. Oxford University Press, New York, 2001

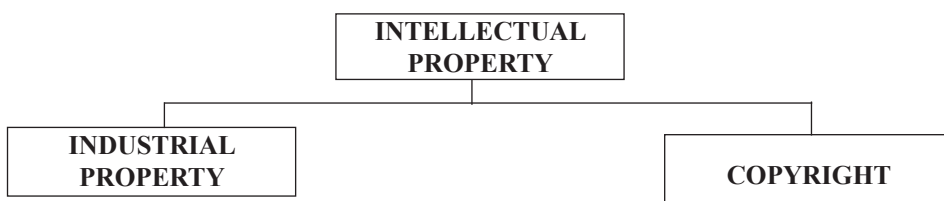
7 Information available BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*. Oxford University Press, New York, 2001, p.2-3

## 2.2 CONTEMPORARY PROTECTION OF INTELLECTUAL PROPERTY

Based on the World Trade Organization, the term Intellectual Property is defined as:

The legal rights, which result from intellectual activity in the industrial, scientific, literary, and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair-trading which would contribute to economic and social development.<sup>8</sup>

Intellectual property is traditionally divided into two branches: industrial property and copyright (Picture 1.1).



Picture 1.1

The Convention Establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on July 14, 1967 (Article 2(viii)) provides that intellectual property shall include rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of endeavor, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations and protection against unfair competition.

According to the WTO's structure in classification of the term Intellectual Property,

Industrial property covers inventions and industrial designs. The inventions are referred as new solutions to technical problems and industrial

<sup>8</sup> The definition available at the WTO's site: *General Information, WIPO Pub.No.400*, [www.wto.org](http://www.wto.org)

designs as visual creations determining the appearance of industrial products. The areas mentioned as inventions, industrial designs, trademarks, service marks and commercial names and designations constitute the industrial property branch of intellectual property. The area mentioned as protection against unfair competition may also be considered as belonging to that branch, the more so as Article 1(2) of the Paris Convention for the Protection of Industrial Property (Stockholm Act of 1967, the Paris Convention) includes the repression of unfair competition among the areas of the protection of industrial property; the said Convention states that any act of competition contrary to honest practices in industrial and commercial matters constitutes an act of unfair competition(Article 10*bis*(2)).<sup>9</sup>

Here, the aspect of intellectual creations—although existent—is less prominent, but what counts here is that the object of industrial property typically consists of signs transmitting information to consumers, in particular as regards products and services offered on the market, and that the protection is directed against unauthorized use of such signs which is likely to mislead consumers, and misleading practices in general.<sup>10</sup>

The Copyright Branch includes literary, artistic, and scientific works of intellectual property. The areas mentioned as performances of performing artists, phonograms and broadcasts are usually called related rights, that is, rights related to copyright.

Scientific discoveries are the remaining area mentioned in the WIPO Convention, are not the same as inventions. The Geneva Treaty on the International Recording of Scientific Discoveries defines a scientific discovery as ‘the recognition of phenomena, properties, or laws of the material universe not hitherto recognized and capable of verification. Inventions are new solutions to specific technical problems. Such solutions must, naturally, rely on the properties or laws of the material universe (otherwise they could not be materially or technically applied), but those properties or laws need not be properties or laws not hitherto recognized. An invention puts to new use, to new technical use, the said properties, or laws, whether they are recognized or discovered simultaneously with the making of the invention, or whether they were already recognized before, and independently of, the invention.<sup>11</sup>

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9 Information provided at the official site of WTO, at [www.wto.org](http://www.wto.org)

10 See the information in the WIPO Intellectual Property Handbook: *Policy, Law and Use*, at the site [www.wto.org](http://www.wto.org)

11 See the information at site of WTO, at [www.wto.org](http://www.wto.org)

Following the second definition argued by the UK Intellectual Property Office:

‘Intellectual property (IP) is defined as a process that allows you to own things you create in a similar way to owning physical property. You can control the use of your IP, and use it to gain reward. This encourages further innovation and creativity.’<sup>12</sup>

The four main types of IP according to the UK Office are: copyright (protects material, such as literature, art, music, sound recordings, films and broadcasts), designs (protect the visual appearance or eye appeal of products), patents (protect the technical and functional aspects of products and processes), trade marks (protect signs that can distinguish the goods and services of one trader from those of another). However, IP also covers trade secrets, plant varieties, geographical indications, performers’ rights and so on.

Thirdly, the Australian Government provides that:

Intellectual property represents the property of your mind or intellect. In business terms, this also means your proprietary knowledge as a key component of success in business today. It is often the edge, which sets successful companies apart, and as world markets become increasingly competitive, protecting your intellectual property becomes essential.<sup>13</sup>

The types of intellectual property include patents for new or improved products or processes; trade marks for letters, words, phrases, sounds, smells, shapes, logos, pictures, aspects of packaging or a combination of these, to distinguish the goods and services of one trader from those of another; designs for the shape or appearance of manufactured goods; copyright for original material in literary, artistic, dramatic or musical works, films, broadcasts, multimedia and computer programs; circuit layout rights for the three-dimensional configuration of electronic circuits in integrated circuit products or layout designs; plant breeder’s rights for new plant varieties; and confidentiality/trade secrets including know-how and other confidential or proprietary information.<sup>14</sup>

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12 See the information at the site of the UK Intellectual Property Office, [www.ipo.gov.uk/whatis.htm](http://www.ipo.gov.uk/whatis.htm)

13 See the General Information at the site of Australian Government, [www.ipaaustralia.gov.au](http://www.ipaaustralia.gov.au)

14 Data of types of IP available at the site of the Australian Government, at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

Based on the three definitions of Intellectual Property term provided by three sources, The World Trade Organization, UK Intellectual Property Office and the Australian Government Patent Department, it is argued that all three sources, when it comes to defining the Intellectual Property as a specific term, are being focused on the industrial, scientific, literary, and artistic fields and the works contained in it.

### 2.3 FIELD OF INTELLECTUAL PROPERTY: COPYRIGHT

According to BENTLY & SHERMAN [2001]<sup>15</sup>, it is said that in British legal terms, copyright is the area of intellectual property law that regulates the creation and use of the goods such as books, songs, films, and computer programs. The intangible property protected by the copyright law is distinctive in that it arises automatically and usually for the benefit of the author.<sup>16</sup> The Copyright is defined by European Council<sup>17</sup> as a set of exclusive rights that regulate the use of a particular expression of an idea or information. At its most general, it is literally the rights to copy an original creation. In most cases, these rights are of limited duration. The symbol for copyright is “©”, and in some jurisdictions may alternatively be written as either (c) or (C).<sup>18</sup>

European Council presents copyright as a statutory right covered by the umbrella term intellectual property that deals with the privileges of intellectual creators in their creations. Copyright may subsist in a wide range of creative, intellectual, or artistic forms or works. These include poems, theses, plays, and other literary works, musical compositions, audio recordings, paintings, drawings, sculptures, photographs, software, radio and television broadcasts of live and other performances, and, in some jurisdictions, industrial designs. Designs or industrial designs may have separate or overlapping laws applied to them in some jurisdictions.<sup>19</sup>

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15 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001

16 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.33

17 Note: It is a European Union directive in the field of copyright law, made under the internal market provisions of the Treaty of Rome, [www.law.com](http://www.law.com)

18 Official symbol for Copyright, see the sign at [www.wikipedia.com](http://www.wikipedia.com).

19 See information at the site of European Council, [www.europa.eu/european\\_council/index\\_en.htm](http://www.europa.eu/european_council/index_en.htm)

Pointed out as a difference by the World Trade Organization, the Copyright law, however, protects only the form of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors and shapes. It is not designed or intended to cover the actual idea, concepts, facts, styles, or techniques, which may be embodied in or represented by the copyright work. For example, the copyright which subsists in relation to a Mickey Mouse cartoon prohibits unauthorized parties from distributing copies of the cartoon or creating derivative works which copy or mimic Disney's particular anthropomorphic mouse, but does not prohibit the creation of artistic works about anthropomorphic mice in general, so long as they are sufficiently different to not be deemed imitative of the original.<sup>20</sup> Copyright law protects the owner of rights in artistic works against those who copy, that is to say those who take and use the form in which the original work was expressed by the author.<sup>21</sup> Copyright laws are standardized through international conventions such as the Berne Convention<sup>22</sup> in some countries and are required by international organizations such as European Union or World Trade Organization from their member states.<sup>23</sup>

Concerning the criteria or requirements for Copyright Protection, the universal idea that all countries tend to argue, is that in order to qualify for a copyright, minimal requirements must be met. Different countries impose different tests within those requirements, although generally, the requirements that are imposed by states are low<sup>24</sup>.

In United Kingdom and Australia for instance, there has to be some skill, labor, and judgment that has gone into it. In addition, it has been held that a single word is insufficient to comprise a copyright work<sup>25</sup>.

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20 Note: Mickey Mouse is an [Academy Award-winning comic animal cartoon character](#) who has become an icon for [The Walt Disney Company](#). The [anthropomorphic mouse](#) has evolved from being simply a character in [animated cartoons](#) and [comic strips](#) to become one of the most recognizable symbols in the world. See the information at [www.mickeymouse.com](http://www.mickeymouse.com)

21 See General Information posted on the WTO's site at [www.wto.org/wto/](http://www.wto.org/wto/)

22 Note: The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, is an international agreement about copyright, which was first adopted in Berne, Switzerland in 1886, [www.wipo.int/treaties/en/](http://www.wipo.int/treaties/en/)

23 Information available at the site of the European Commission, *Information Management*, [www.europa.eu](http://www.europa.eu)

24 See information at [www.wikipedia.org](http://www.wikipedia.org)

25 Note: UK Copyright law argues that four main requirements are needed for a work

In opposite to UK and Australia, in the United States, copyright has been made automatic based on Berne Convention, which has had the effect of making it appear to be more like a property right. Thus, as with some forms of personal property, copyrights need not to be granted or obtained through official registration with any government office. Once an idea has been reduced to tangible form, for example by securing it in a fixed medium such as a drawing, sheet music, photograph, videotape or a letter, the copyright holder is entitled to enforce his or her exclusive rights.<sup>26</sup>

The notations that are required by UK Copyright Law<sup>27</sup> consist of four main requirements that need to be fulfilling in order for a work to be granted a copyright protection. The first requirement demanded by UK Copyright Law is that the particular work such as musical, literary, or dramatic work must be recorded in a material form. However, since the types of forms as musical, dramatic, or literary works are already established in this form, it is impossible for someone to create or say, a sound recording or a film in a way in which is not fixed.<sup>28</sup> Second requirement demanded under UK Law on Copyright Protection is the 'originality'. According to the UK Intellectual Office, such works cannot be copied from previous works of the same sort. That means as referred in a UK Copyright Law, it does not mean that the work done by author is inventive, novel or unique, instead, when Law on Copyright says that a work must be original, this means that the author must have exercised the requisite labor, skill, or effort in producing the work.<sup>29</sup> Third requirement is connected to a law applicable in specific country. This means that in order for a work to be protected, it is necessary to show that the work is sufficiently connected to the country where the work should be protected and with the law of the country in question.<sup>30</sup> Moreover, the last basic requirement under the UK

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to be granted a copyright protection; this will be explained in the next paragraphs.

26 See information at the site of the United States Copyright Office, at [www.copyright.gov/](http://www.copyright.gov/)

27 Note: data of the requirements available in BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.78-79

28 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.79

29 Note: In determining whether a work is original, copyright law focuses on the input-labor, skill, or effort in the way the specific work of an author is expressed. See explanation available: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.82-83

30 Note: example for UK Law on Copyright, a work in order to be approved for

Law on Copyright Protection argues that the work is not excluded from the protection on public policy grounds. This is referred to occasionally cases where the courts have stated that works that are immoral, blasphemous, or libelous or are infringing copyright will not be granted a copyright protection due to these characteristics.<sup>31</sup>

### **1.1.1 Subject matter of Copyright Protection**

The subject matter or the object of copyright protection is a work, an intellectual creation in the fields of art, literature, music, or science. Particular examples of works covered are provided in many national copyright laws, and all of them generally include: literary works: novels, short stories, poems, dramatic works and any other writings, irrespective of their content, length, purpose (amusement, education, information, advertisement, propaganda), form (handwritten, typed, printed; book, pamphlet, single sheet, newspaper, magazine), in most countries oral works, that is, works not reduced to writing, are also protected by the copyright law; musical works: whether serious or light; songs, choruses, operas, musicals, operettas; if for instructions, whether for one instrument (solos), a few instruments (sonatas, chamber music, etc. ), or many (bands, orchestras); artistic works: whether two-dimensional (drawings, paintings, etchings, lithographs) or three-dimensional (sculptures, architectural works), irrespective of content (representational or abstract) and destination ("pure" art, for advertisement); maps and technical drawings, photographic works: irrespective of the subject matter (portraits, landscapes, current events, etc.) and the purpose for which they are made; motion pictures (cinematographic works), their genre (film dramas, documentaries, newsreels, etc.), length, method employed (filming "live," cartoons), or

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protection, it needs to be connected to the UK to qualify for protection under UK Law. BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.79

31 Note: This sentence is explained by BENTLY & SHERMAN[2001], through a case *Glyn v Weston Film Feature* where a Weston Film Feature was granted an injunction for infringement of a copyright in the claimant's dramatic work, for the reason of being described as a sensual adulterous, intrigue and condemned on the ground that it advocated free love. The party argued that it was clear that copyright could not subsist in a work of a tendency as immoral as this. Short description of a case mentioned by: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001

technical process used (pictures on transparent film, videotapes, DVDs, and computer).<sup>32</sup>

### **1.3.2 Rights Comprised in Copyright**

According to the definition provided by the WTO, the owner of copyright in a protected work may use the work as he wishes—but not without regard to the legally recognized rights and interests of others—and may exclude others from using it without his authorization.<sup>33</sup> Most copyright laws define the acts in relation to a work, which cannot be performed by persons other than the copyright owner without his/hers authorization.

Such acts, requiring the authorization of the copyright owner, include copying or reproducing the work as an exclusive right of an author to make multiple copies of a copyrighted work; performing the work in public presenting the right of an author to communicate a copyrighted work to the public; making a sound recording of a form protected by copyright; making a motion picture of the work (“cinematographic work” or an audiovisual work); broadcasting the work; translating the work as a major category of acts restricted by copyright consists of the acts of broadcasting works and of communicating works to the public by means of wires or cables; adapting the work, the acts of translating or of adapting a work protected by copyright require the authorization of the copyright owner (translation means the expression of a work in a language other than that of the original version, and adaptation is generally understood as the modification of a work from one type of work to another, for example adapting a novel so as to make a motion picture); moral rights (independent of the usual economic rights and to remain with the author even after he has transferred his economic rights); related rights referred to as rights that are related to, or neighboring on, copyright.<sup>34</sup>

### **3.3.3 Ownership of Copyright**

An author is the first owner of copyright if the work is a text work, music, a dramatic work, a computer program, or an artistic work.<sup>35</sup>

32 See General Information posted on the WTO’s site at [www.wto.org](http://www.wto.org)

33 See General Information posted on the WTO’s site at [www.wto.org](http://www.wto.org)

34 See General Information posted on the WTO’s site at [www.wto.org](http://www.wto.org)

35 Note: the term author has a universal meaning in all countries legally.  
[www.europa.eu](http://www.europa.eu)

As stated by the UK Copyright Law, the author of literary, musical, or artistic work is the person who creates it, in terms of fixing or recording the actual work<sup>36</sup>. As similar to the UK Law on Copyright, the Australian Copyright Council<sup>37</sup> defines the author in a same sense but, by explaining that an author is a person who gives expression to the ideas or information in a work, for example by writing an instruction manual, or drawing a graph, or writing a computer program.<sup>38</sup>

In order for someone to be classified as an author, it is necessary for them to be able to show that the labor, skill, and effort are being contributed to the work as a type that is protected by copyright, which means that it would be sufficient to confer originality on the relevant work.<sup>39</sup>

In addition, both Countries in question argue that there is a one more term connected with the ownership that needs to be considered, when deciding on the owner of a copyrighted work, also known in both Copyright Laws as non-author.

The Australian Copyright Council clearly describes no author as a person who contributes ideas, information, or suggestions, but does not in any way contribute to the expression of a work itself.<sup>40</sup> The relation to the UK Copyright Law, the same meaning is appearing in defining the nonauthorship, in which the UK Council is connecting the explanation with the first criteria or requirement of originality stating that: a person that has expanded labor in the creation of a particular work, does not actually mean that the resulting work is original or that a person is an author if it is the wrong type of labor. This means according to the UK Law on Copyright, that although a person may play an important role in the production process, person may still not be treated as an author.<sup>41</sup>

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36 BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.110-112

37 Information about Australian Copyright Council available at [www.copyright.org.au](http://www.copyright.org.au)

38 [www.copyright.org.au](http://www.copyright.org.au)

39 Information about Australian Copyright Council available at [www.copyright.org.au](http://www.copyright.org.au)

40 Information about Australian Copyright Council available at [www.copyright.org.au](http://www.copyright.org.au)

41 Note, example: In a case of a book, while the copy-editor plays an important role in giving a shape to a final product, he/she will not be treated as an author of the resulting literary work. Source: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.110-112

Australian Copyright Council provides a couple of rules that apply on defining who is not regarded as an original author of a copyrighted work.

It is sought as an exemption rule under the Australian Copyright Act, that the general rule of referring a person as an author, owner of copyright may not apply if: the author has signed a document which says that someone else will own copyright (transfership agreement); or there has been no agreement about ownership of copyright (unknown authorship), and the author was an employee (rather than a freelancer or volunteer) and created the work as part of his or her usual duties or the work was made by, or under the direction or control of, the Commonwealth Government, or a State or Territory government;<sup>42</sup>

As Australian Copyright Council relates the no authorship with the exceptions defined and followed, UK Copyright Law determines the rule of applying the authorship or no authorship based on different types of work. As it is seen in the relation to the originality requirement, the mere fact that a person expanded labor in the creation of work will not necessarily mean that the resulting work is original or that a person is an author if it is wrong type of labor. For example, in the case of literary dramatic, musical or artistic works that have been computer-generated, the creator is the person by whom the arrangement necessary for the creation of the work is undertaken.<sup>43</sup> Or in the case of entrepreneurial works, for instance films, the producer of a film is defined as the person by whom arrangements necessary for the making of the film are undertaken. The same definition is used for describing the producer of sound recording.<sup>44</sup>

Arguably, it can be concluded that the term author even if represents the same meaning in the sense of creation and engagement in the actual work in all countries, each member is free to determine the rules and exceptions within it will distinguish as a legal party from other member states in defining the real authorship in a particular work or labor as stated by UK Copyright Law.

42 The exceptions of the general rule on authorship are provided at the site of the Australian Copyright Council, at [www.copyright.org.au](http://www.copyright.org.au)

43 This means that a person who operates the computer, as well as person who provides or has programmed the computer may be classified as an author of that work. See: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p.11

44 See: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p. 113-115

### **1.3.4 Duration of a Copyright**

Based on the revision of the Berne Convention that was established in 1948, the duration of the copyright is 50 years *post mortem auctoris* (i.e., 50 years following the author's death). The WTO has adopted an Agreement on Trade-Related Aspects of Intellectual Property Rights that follows this precedent, requiring WTO member states to provide the copyright protection of at least 50 years.<sup>45</sup>

### **1.3.5 Computer Programs**

According to BENTLY & SHERMAN [2001], they contend that in 1991, the question was addressed by the Computer Programs Directive<sup>46</sup>. As whether the computer programs should be viewed and treated as matter of protection by copyright, patents, or a *sui generis* right.

It was adopted that the computer programs should be considered as a literary works falling under the supervision of the Berne Convention.<sup>47</sup> Berne Convention demands that members are required to provide a minimum standard of protection to copyright owners and authors, who include the right to reproduce the work<sup>48</sup>, to perform the work publicly<sup>49</sup>, to translate the work, to adapt the work, and to broadcast the work.<sup>50</sup> In addition, the members are to give the authors (rather than the copyright owners) the moral rights of attribution and integrity.

Under the Computer Programs Directive the primary criteria members have to comply with is to protect the computer programs as long as they are original in the sense they are their author's own intellectual creation. Also, it requires member states to counter certain rights on the

45 Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 12, 1994.

46 The first European Initiative in the copyright field was the Computer Programmers Directive, which was implemented in 1993. See source BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p. 43-44

47 Berne Convention on the Protection of Literary and Artistic Works was drawn up in 1886 as a small treaty allowing for mutual recognition of rights amongst a few largely European countries. See Explanation at the site of the Department of trade and Industry, [www.dti.gov.uk](http://www.dti.gov.uk)

48 Article 9

49 Article 11

50 Data provided in the BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p. 2-3.

owners of copyright in computer programs, including the right to control the temporary reproduction, the running and the storage of the programs, the translation or adaptation of the programs, the distribution or rental of the programs<sup>51</sup>

The Computer Programmers Directive also requires recognizing certain four exceptions to the exclusive rights: First, as regards acts done by a lawful acquirer of a program, which are necessitated by the use of a program for its intended purposes. Second, to allow the making of back-up copies. Third, to permit the studying and testing of the program. Fourth, and most controversially, to permit in very limited circumstances, the decompilation of programs.<sup>52</sup>

## **Chapter 2 - Competition Law in the EU**

### **2.1 COMPETITION POLICY IN THE EU**

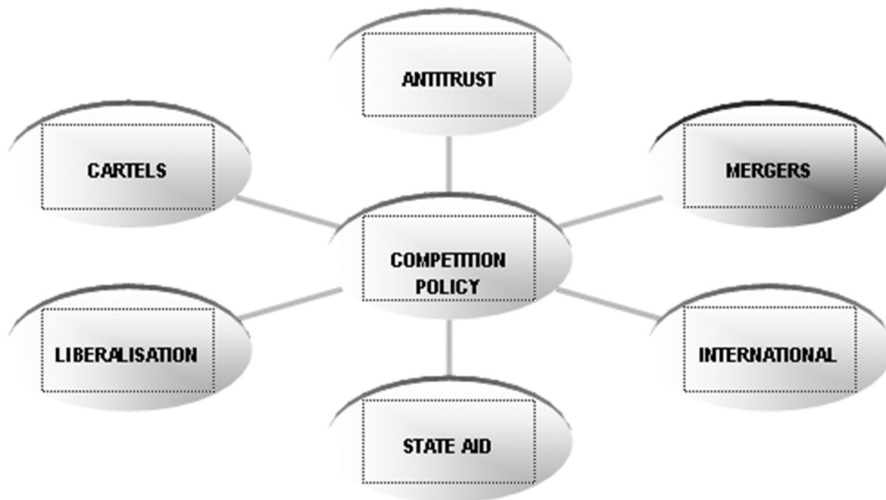
European Commission defines the term Competition a basic mechanism of the market economy that encourages companies to provide consumers products that consumers want. They also point out that it encourages innovation, and pushes down prices. In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others. European Commission States that Competition Policy is applying rules to make sure that companies compete with each other and, in order to sell their products, innovate and offer good prices to consumers. The risk if there's no competition policy is that companies will do deals with each other to split up the market between them, or will act in a way which doesn't allow competitors on to the market; and in either case the result can be that consumers are denied access to innovative products and pay higher prices.<sup>53</sup>

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51 Rental and lending involve the making of the original or a copy of a work available for the use on terms that it will or may be returned. The distinction is that the act of rental involves a commercial advantage, whereas lending does not. See Explanation: BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, Oxford University Press, New York, 2001, p. 132

52 Data provided in the BENTLY L. & SHERMAN, BRAD. *Intellectual Property Law*, "Oxford University Press, New York, 2001, p. 3-4.

53 See The detailed explanation of the Competition Policy at the site of the European Commission, *Competition makes markets work better*, [www.competition-commission.org.uk](http://www.competition-commission.org.uk)



Competition Law in the European Union and its process is seen in the segments of its key competition policy and the areas in which the policy is applicable. Those areas include:

- Antitrust area
- Mergers
- Cartels
- Liberalization
- State Aid
- International

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### **Antitrust**

The European Commission states that the antitrust rules are contained in various legal instruments. The basic provisions are contained in the EC Treaty itself. The Antitrust area covers two prohibition rules set out in the EC Treaty: in which Article 81 of the Treaty prohibits agreements between two or more firms, which restrict competition (Example: is a cartel between competitors that may involve price-fixing or market sharing), and the second one where firms in a dominant position may not abuse that position, prohibited by the Article 82 of the EC Treaty (Example:

the case for predatory pricing aiming at eliminating competitors from the market).<sup>54</sup>

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## **Mergers**

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The Commission also defines the second policy area, Mergers as Companies combining forces that have a primary goal, expanding markets, and bringing benefits to the economy.<sup>55</sup>

Now, combining the activities of different companies may allow the companies, for example, to develop new products more efficiently or to reduce production or distribution costs. Through their increased efficiency, the market becomes more competitive and consumers benefit from higher-quality goods at fairer prices.

However, if a company by any chance creates a dominant player in the specific market place, then this action would lead to the reduction of the competition, resulting in higher prices and reduced choice or less innovation that would in the end harm the target they serve, the consumers.

The objective of examining proposed mergers is to prevent harmful effects on competition. Mergers going beyond the national borders of any one Member State are examined at European level. This allows companies trading in different EU Member States to obtain clearance for their mergers in one go.<sup>56</sup>

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## **Cartels**

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‘It is an illegal secret agreement concluded between competitors who in coordination fix or increase their prices, restrict supply by limiting their sales or their production capacities, and/or divide their markets or consumers.’<sup>57</sup>

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54 See The detailed explanation of the Antitrust as a policy area at the site of the European Commission, *Competition makes markets work better*, [www.competition-commission.org.uk](http://www.competition-commission.org.uk)

55 See The detailed explanation of the Mergers as a policy area at the site of the European Commission, *Competition makes markets work better*, [www.competition-commission.org.uk](http://www.competition-commission.org.uk)

56 See The detailed explanation of the Cartels as a policy area at the site of the European Commission, *Competition makes markets work better*, [www.competition-commission.org.uk](http://www.competition-commission.org.uk)

57 See The detailed explanation of the Cartels as a policy area at the site of the European Commission, *Competition makes markets work better*, [www.competition-commission.org.uk](http://www.competition-commission.org.uk)

Cartels shield their participants from competition. This allows the participants to charge higher prices and to remove the pressure on them to improve the products they sell or find more ways that are efficient in which to produce them. Their customers (companies and consumers) end up paying higher prices for lower quality and narrower choice. This also adversely affects the competitiveness of the economy as a whole. Article 81 of the Treaty establishing the European Community, prohibits agreements and concerted practices between firms that distort competition within the Single Market. Fines of up to 10% of their worldwide turnover may be imposed on the guilty parties.

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### **Liberalization**

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Services such as transport, energy, postal services, and telecommunications have not always been as open to competition as they are today. The European Commission has been instrumental in opening up these markets to competition (also known as liberalization).

The good side of the Liberalization is that at one side, services like these have previously been provided by national organizations with exclusive rights to provide a given service. By opening up these markets to international competition, consumers can now choose from a number of alternative service providers and products. At the other side, opening up these markets to competition has also allowed consumers to benefit from lower prices and new services, which are usually more efficient and consumer-friendly than before. This helps to make our economy more competitive.<sup>58</sup>

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### **State Aid**

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The objective of State aid control is, as laid down in the founding Treaties of the European Communities, to ensure that government interventions do not distort competition and intra-community trade. In this respect, State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities. The EC Treaty pronounces the general prohibition of State aid,

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org.uk

58 Information available at the site of European Commission, Competition Policy, [www.ec.europa.eu](http://www.ec.europa.eu)

leaving room for a number of policy objectives for which State aid can be considered compatible. By complementing the fundamental rules through a series of legislative acts that provide for a number of exemptions, the European Commission has established a worldwide unique system of rules under which State aid is monitored and assessed in the European Union. This legal framework is regularly reviewed to improve its efficiency and to respond to the call of the European Councils for less but better targeted State aid in order to boost the European economy.<sup>59</sup>

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### **International**

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With increasing globalization, more and more companies, mergers and cartels are international. As a result, the activities of companies based outside the EU may affect competition within the EU. This has made international cooperation on competition policy essential.

The EU has established bilateral agreements on competition, in particular with its main trading partners. It has also been at the forefront of multilateral cooperation efforts, for example, being among the first to propose the inclusion of competition policy as a subject for discussion in the World Trade Organization, and playing a key role in the International Competition Network and at the OECD Competition Committee.<sup>60</sup>

### *2.2 THE DOMINANT POSITION IN THE MARKETPLACE*

‘The dominant position or often referred as dominance is a position of economic strength enjoyed by an undertaking<sup>61</sup> which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.’<sup>62</sup>

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59 See the Information at the site of European Commission, [www.ec.europa.eu](http://www.ec.europa.eu)

60 See the Information at the site of European Commission, Mergers, [www.ec.europa.eu](http://www.ec.europa.eu)

61 According to the Community Law it covers any natural or legal person engaged in economic activity regardless of its legal status and the way in which it is financed (companies, partnerships, firms), ”*Competition Law Guide*”, December 2004.

62 Information available on the European Commission site [www.ec.europa.eu](http://www.ec.europa.eu), “*DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*”, Brussels, December 2005

Dominance can exist on the part of one undertaking also known as a single dominance or two or more undertakings acting together on a particular market as a collective entity known as collective dominance. Whether resting on a single or collective combination the dominance consist of three elements, of which two are closely linked: (a) there must be a position of economic strength on a market, (b) enables the undertaking (s) in question to prevent effective competition being maintained on that market, (c) affording it the power to behave independently to an appreciable extent.<sup>63</sup>

By arguing that a position of economic strength must be defined on the market, the first element mentioned implies that dominance exist in relation to a market. It cannot exist in abstract. It also implies that an undertaking either in its own or together with other undertakings must hold a leading position on the market compared to its rivals. The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process (presents the way in which the undertaking and other players act and inter-act on the market).<sup>64</sup>

### **1.1.1 Dominant Position in relation to the Article 82 of the EC Treaty**

The European Commission defines the term dominant position as the ability to prevent effective competition being maintained on the market. When a Company conducts this type of conduct it is considered as an entity that contains a substantial market power. That means that it is empowered to influence market prices, output, innovation, the variety, or quality of goods and services, or other parameters of competition on the market for a significant period.<sup>65</sup>

Open and healthy competition is good for both consumers, and

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63 Information available on the European Commission site [www.ec.europa.eu](http://www.ec.europa.eu), “*DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*”, Brussels, December 2005

64 Information available on the European Commission site [www.ec.europa.eu](http://www.ec.europa.eu), “*DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*”, Brussels, December 2005

65 See the information about the Competition Policy at the official site of the European Commission, *Competition Overview*, at [www.ec.europa.eu/comm/competition](http://www.ec.europa.eu/comm/competition)

for businesses. If businesses compete on a level playing field, they will flourish, and consumers are more likely to pay lower prices, and get better quality and more choice.

The European Commission for Competition argues that businesses whatever legal status they possess need to be aware of competition law not only for the reason of being able to meet their obligations as a undertaking in the market under the competition law, but also to be able to protect their rights and their position in the specific market place.<sup>66</sup>

As regarded by the European Commission, the negative side of the fair competition among the business, the anti-competitive behavior is prohibited by two Articles of the EC Treaty: Article 81/ Chapter I of the EC Treaty and Article 82/ Chapter II of the EC Treaty.<sup>67</sup>

Based on the EC Competition law two main types of the anti-competitive activity are prohibited: Anti-competitive agreements between businesses, which are prohibited by Article 81 of the EC treaty, and businesses abusing their dominant market position that are prohibited by Article 82 of the EC Treaty.<sup>68</sup>

The focus of the term paper will be orientated towards the Article 82 of the EC Treaty, thus the abuse of a dominant position in the market place, which will be setting the grounds for a case, which will be later discussed in the upcoming chapter [Case No. T-201/04, Antitrust Microsoft Case].

#### Article 81 (ex Article 85) of the EC Treaty

‘All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention’

#### Article 82 (ex Article 86) of the EC Treaty

‘Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade

<sup>66</sup> See the information about the Competition Policy at the official site of the European Commission, *Competition Overview*, at [www.ec.europa.eu/comm/competition](http://www.ec.europa.eu/comm/competition)

<sup>67</sup> Article 82 of the EC Treaty is known as Chapter II in the UK Office of Fair Trading terms, see the both articles related as one at the site of Office of Fair Trading at [www.of.gov.uk](http://www.of.gov.uk)

<sup>68</sup> The Objections of the unfair competition provided at the site of the European Commission, *Legislations*, at [www.ec.europa.eu](http://www.ec.europa.eu)

between Member States.<sup>69</sup>

According to the UK Office of Fair Trading, the Chapter II and Article 82 prohibit a business, which holds a dominant position in a market from abusing that position. UK Office of Fair Trading defines a dominant position in means of a business that is generally able to behave independently of competitive pressures, such as other competitor's behavior, in that market.<sup>70</sup>

Conduct which may be considered an abuse by a business in a dominant position based on Article 82 of the EC treaty includes: charging excessively high prices by one business to another, limiting production, refusing to supply an existing long standing customer without good reason and charging different prices to different customers where there is no difference in what is being supplied.<sup>71</sup>

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- Australian Copyright Council [www.copyright.org.au](http://www.copyright.org.au)

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**UNFAIR COMPETITION AMONG BUSINESSES  
IN THE MARKETPLACE  
-Abuse of a Dominant Position-**

*The paper is based a case study, presenting the legal and direct approach  
by the European Commission of addressing the non-competitive behaviour in the  
marketplace within the rules and procedures of European Competition Law. In*

*this specific Anti-Trust Microsoft case, arguing Microsoft's monopolistic direction and abuse in the market, leads to different opinions and evaluations by both, business and legal bodies, in defining the right application of the antitrust rules, specifically the breach of the Article 82 of the EC Treaty and their boundaries regarding giant companies, in relation to the abuse of a dominant position in the marketplace. **This paper has been divided in II parts, to be continued in part II in the form of the practical case study.***

**Key words:**

*Competition Law, European Commission, Dominant position, Intellectual property, breach of the Article 82 EC, Anti-Microsoft Case.*