

Copyright in Perspective External Limitations

Competition Law

Valérie-Laure Benabou

Professeur Université de Versailles
Saint Quentin

Directrice du Laboratoire DANTE

vbenabou@club-internet.fr

Can we really consider Competition Law as
External Limitation of Copyright ?



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Considering Competition Law as an external limit to Copyright stresses the elements of contradiction between both systems



Competition Law versus Copyright

Can we really consider Competition Law as External Limitation of Copyright ?

But both systems may appear complementary because they share the same philosophy (II)



Competition Law infiltrates Copyright

Competition Law as a Limitation to Copyright (I)



Competition Law controls the exercise of exclusive right when it unduly increases exclusivity in agreements between undertakings or leads to abuse of a dominant position

Competition Law as a Limitation to Copyright (I)

Theoretical foundations

- **Competition Law as an « ex post » system**
 - Distinction Existence/Exercise or Rights
 - « Exceptional circumstances » theory :
- **Regulation by Competition Law**
 - Essential Facilities doctrine ; [IMS Heath](#); [Microsoft](#)
 - Exemption by Regulation on technology transfers : threshold system

Competition Law as a Limitation to Copyright (I)

From Exceptional Circumstances to Essential Facilities Doctrine

CJCE 1995 Magill

Exceptional circumstances in Magill case

- ❑ refusal to license prevents the emergence of a new product
 - ❑...For which there is a potential demand of the consumers
 - ❑ Refusal is unjustified by objective reasons
 - ❑ It prevents any competition on the secondary market

Competition Law as a Limitation to Copyright (I)

Essential Facilities Doctrine

CJCE 29th april 2004 IMS Health

The refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled:

Competition Law as a Limitation to Copyright (I)

- the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, **new products or services not offered by the owner** of the intellectual property right and for which there is a **potential consumer demand**;
- the refusal **is not justified** by objective considerations;
 - the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by **eliminating all competition on that market**.

Competition Law as a Limitation to Copyright (I)

What are the remaining conditions of essential facilities doctrine after IMS Health and Microsoft Cases ?

- IMS Health Case does not seem to require the existence of a derivative market
- Microsoft Case enjoins an obligation to display some elements of the « code » without requiring the condition of the new product or service by the applicant
- What is in the end considered as an essential facility : the notion of *market standard*? (IMS)
 - What costs the undertaking is supposed to stand to duplicate the structure ?
- Is any structure duplicable regarding a work, which by nature, is hardly substitutable ?

Competition Law versus Copyright

Results



- Refusal to license : Magill ; IMS (en France : Sirene, France Télécom, NMPP)
- Price control : CJCE 1989 Tournier, Commission 2002 Simulcasting, Recommandation of october 2005 (en France, France Télécom),
- Bundling or tied sales : Microsoft (Windows media player)
- Refusal to Display information necessary for interoperability : Microsoft (en France Apple/Virgin –non)

Competition Law versus Copyright

Results



- **Behaviour** : Refusal to license : Magill ; IMS (en France : Sirene, France Télécom, NMPP)
- **Answer** : *to put an end to that breach, in particular "by supplying ... third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties". It was also provided that, if the three organizations chose to grant reproduction licences, any royalties requested should be reasonable.*

Competition Law infiltrates Copyright (II)

Both systems may converge as they share the same philosophy



Competition Law infiltrates Copyright (II)

- *“American courts recognize that the antitrust and copyright laws both promote the same goal of consumer welfare and, therefore, must be read together and harmonized. Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1186-87 (1st Cir. 1994).”*
- *Canada : “d’aucuns estiment que la Loi sur le droit d’auteur et la Loi sur la concurrence « tendent essentiellement au même objectif : la maximisation des ressources économiques »*

Competition Law infiltrates Copyright (II)

Two patterns

- *Delegation : Competition Law relies on Copyright to manage the market*
- *Integration : Copyright incorporates provisions inspired by Competition considerations*

“Neutrality”

U.S. DoJ & FTC : Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (Apr. 6, 1995)

-“Agencies will not presume that patent, copyright, or trade secret necessarily confers market power upon its owner,” and that “there will often be sufficient actual or potential close substitutes” for an IP-protected “product, process, or work to prevent the exercise of market power”);

-“Intellectual property is . . . neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.”

Refusal to License

Refusal to License does not constitute *per se*
a breach of article 82



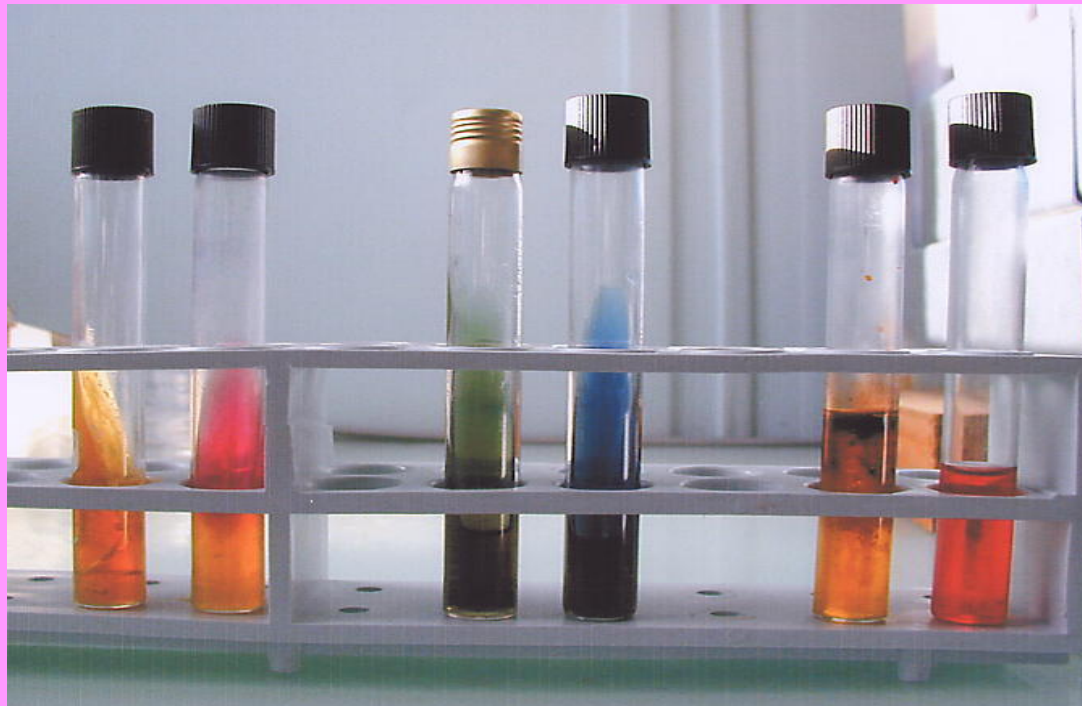
CJCE 1988 Volvo
C. Cass 12 juillet 2005 NMPP

Mutual references to the other body of rules

ex. Canada, Allemagne, Suisse

- Express reference in Competition Law to exclusive jurisdiction of Copyright Law to regulate certain behaviours (ex. internal control of collective societies)
- Copyright Law might refer to certain mechanisms of regulation from Competition Law (tariffs for uses in Canada)

Copyright Inoculates Itself Doses of Competition Law : Vaccine Effect ?



Integration scheme

- *Abuse of Copyright, misuse*
- *Control of Collective Societies by specialized commissions*
- *Legal licences (global licence ?)*
- *Restrictions of the exclusive right definition*
 - *CJCE 9 november 2004 Fixtures for databases protection (substantial investment)*
 - *Non-protection of ideas or raw material (information)*
- *Exceptions (Interoperability.....)*

When Copyright Law achieves more interoperability than application of Competition Law : the Future French Law ??

Beware
Apple might
leave the
French
Market !

