Relations between copyright and competition law have become commonplace for European lawyers: the impact of the landmark decisions of the Commission or of the ECJ on the subject is such that not a day passes without comments or expectations on the topic in the press: it has become a sort of ‘trendy’ subject. The condemnation of Microsoft to the highest fine ever pronounced in a competition case for abuse of a dominant position whilst using its intellectual property right shows that the encounter between the two sets of rules can be anything but superficial.

Yet, the history of this relationship is not old, nor are the rationales on which it has so far been grounded unmovable. If we look back, it appears that the relationship between those two bodies of regulations in Europe has been changing since the beginning. In the very early 1960s, competition law and copyright regarded each other with mutual neutrality. Various reasons underlay this peaceful coexistence; uncertainty about the Community’s jurisdiction on copyright issues; competition law being a new concept within Europe. The key to the application of competition rules was based for a while on the distinction between the existence and exercise of the monopoly, only the latter being subject to application of competition rules. But in fact, case law went further in the neutrality attitude; even exercise of copyright by the right holder was set aside from the direct application of competition prohibitions.

Comparative law reveals that a number of States more or less still ignore any head-on relationship between copyright and competition law. Most often, one notes a partitioning of legislation, which results in a lack of interpenetration between legal provisions from one field to another. Thus, the competition

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2 We will only refer in the present contribution to the application of articles 81 and 82 of the EC Treaty.
authorities are not referred to in the mechanisms for settling disputes under copyright law. Conversely, the rules governing competition law do not appear to cater for any specific copyright law regime. The two sets of laws totally ignore one another. Thus, quite logically, litigation involving both laws occurs only rarely or by way of exception. Copyright and competition law keep themselves at a mutually agreed distance, each obeying a closed set of rules which never cross over within the scope of their respective application.

That is not to say that there is no element of inter-relationship between those two fields, for the very structure of the exclusive right which induces a monopolistic exploitation of copyrightable work cannot but arouse the interest of competition law.

Most often, the main reason for such indifference is paradoxically due to a converging economic conception, which runs through these two fields of regulation. The sets of rules each trace a parallel course driven by one and the same end objective.

Leaving aside autarchic behaviour and starting from the basis of this fundamental convergence, several legal systems have allocated a specific place to each field of law, avoiding a normative head-on confrontation. In that respect, competition law, although bathed in the holy light of the hierarchical authority attached to the public order which it is intended to serve, has often shown a certain benevolence to copyright by honouring it with a favourable bias.

This is, for example, the attitude adopted in North American law. Indeed, in the United States, a country which is a forerunner in competition law, case law considers that since consumer welfare is the common goal uniting copyright and competition laws, these laws must be read together and harmonized. ‘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.’\(^3\) Hence, it is not unusual for the competition authorities to abandon their conceptual tools in favour of giving reign to more adequate intellectual property instruments in order to arrive at their intended goals. In the guidelines published by the Department of Justice and the Federal Trade Commission relating to intellectual property licences, those two bodies felt that the authorities should not assume that patent, copyright or trade secrets necessarily conferred market power on its or their owner but that, on the contrary, there would often be an actual or potential substitute for a product, process or work protected by intellectual property law to prevent the exercise of market power. They also added that ‘intellectual property is [. . .] neither

particularly free from scrutiny under the antitrust laws, nor particularly suspect under them’.4

Nevertheless, for several years now, the two bodies of rules have embarked on a conflicting course in European law and competition law always seems to have to be brandished ‘against’ copyright.5 Following a period of benevolent neutrality, European competition law has recently traded in its affability for a much more cautious attitude with regard to copyright. In order to understand the relationship between copyright and European competition rules and to envision its prospects, it is necessary to review the scheme of the encounter between the two bodies of regulations and analyse the results which have ensued so far.

1. Evolution of the relationship between copyright and European competition law

One might primarily recall that the starting premises of European Law had little in common with the rationales of copyright. Long discussions have even been held on the core question of jurisdiction of European Law over copyright issues. The first goal of the Community Law being to achieve an economic common market between member states, the rather ‘cultural’ notion of copyright seemed to fall within the scope of the application of the Treaties. However, copyright monopoly based on territorial restrictions has no such aim as to promote the common market but is focused on giving inputs for cultural expansion, education and, more recently, innovation at large. But as the economic dimension of copyright could not be totally neglected, the uncertainties about the applicability of European law were quite quickly swept away. Thus, through the hierarchy of norms within European treaties, rules dedicated to free movement of goods and fair competition appeared to be superior to the national provisions on copyright.

Yet, the encounter between both bodies of rules was not to be solved as simply as by a mere affirmation of the superiority of European law. Even if early decisions had copyright regulations comply with the free movement of

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   • ‘Agencies will not presume that patent, copyright, or trade secret necessarily confers market power up on 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’.

5 ECJ, 6 April 1995, RTE & ITP; 16 December 1999, Micro Leader; CFI, 26 November 2001, IMS Health, 184/01, but this concept of exceptional circumstances has already been seen in the Deutsche Grammophon ruling, in 1971.
goods principle, article 30 (ex 36) of the Treaty dealing with exceptions provides a restriction on the principle based on protection of intellectual property. Case law has since then developed the exhaustion of rights principle, reconciling both objectives and delineating the specific subject matter of copyright in such a way that exhaustion of right is reduced to its smallest expression.

Competition law has also naturally to be applied in order to foster the single market. One may even say that since the Treaty did not provide any intellectual property exception to competition rules, the rationales for its plain application are even stronger.

**Competition law encompassing copyright as any economic field**

The broad definition of economic market participants for whom competition law rules are intended is sufficiently wide to encompass any entity exploiting or managing intellectual property rights, including therein the original author. The competition authorities have for a long time now held that an artist performing a work constitutes a business undertaking. The fact that the author officiates within a sector which is not exclusively related to economy, but also has a social and cultural impact, is therefore not taken into consideration at this level. Competition law has an irrefutable authority to concern itself with such undertakings.

Collective management companies are also naturally included amongst the economic players falling within the scope of competition law. Despite certain social functions for which they are responsible, the European Commission, and subsequently the Court of Justice, have refused to characterize them as undertakings managing a service for the good of the general public, which characterization would have been likely to have kept them outside the undifferentiated application of the law on concerted practices and abuse of a dominant position. The fact that collective management societies for the most part collect and redistribute remuneration on behalf of the beneficiaries is only very indirectly taken into account.

There is no specific provision in the Treaty or in the European regulations intended to draw a particular balance between competition rules and protection of copyright. The contractual organization of rights does not enjoy any specific form of exemption mechanism. The only trace of copyright being specifically taken into account in the category-based block exemption regu-

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lations appears in the legislation devoted to technology transfer agreements, and only with regard to rights concerning software.\(^8\) There are no interpretation guidelines which postulate that a particular regime must be reserved for contracts between business undertakings making transfers of rights. Given the silence of the texts, the competition authorities had no choice but to apply competition prohibitions to copyright when the monopoly was used as a tool for anti-competitive agreements or when it was instrumental in abuse of a dominant position.

**Period of benevolence**

Yet, through their initial binding decisions, namely, by drawing a distinction between the existence and the exercise of the right, the European courts have been able to allow a certain indulgence in the application of competition law.\(^9\) Although the applicability of competition law is reaffirmed via this distinction, a certain level of immunity was established in favour of copyright’s legal status such as delineated by the domestic legislator. Thus, in principle, all misuse of a structure or automatic abuse is avoided, since the existence of the right and its monopolistic character do not, in principle, provide any grounds for the application of competition law.\(^10\)

Furthermore, the Court of Justice, for example in its *Volvo* ruling,\(^11\) considered that a refusal to grant a licence for an intellectual property right, a form of exercising the said right, did not *per se* constitute an offence under competition law. It held, on the contrary, that the exclusive right leads to the possibility of such a refusal, being the only way for a right holder to freely choose the organization modalities of the markets he is likely to occupy by virtue of its monopoly.

The main objective of the case law thus consisted of finding some form of equilibrium aimed at establishing a ‘balance of interests’ between the restricted competition inherent in the monopoly position and benefit for the end consumer. In this perspective, the application of competition law appears essentially peripheral, being more concerned with the contractual organization of the monopoly than with the principle of exclusivity.

Even within this ‘mediate’ application, competition law often shows itself to be lenient. Thus, whereas so-called absolute territorial protection clauses have always been considered as mortal sins against the market, they would

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\(^8\) Regulation no. 772/2004 of 7 April 2004 relating to technology transfer agreements.

\(^9\) ECJ, 8 June 1971, *Deutsche Grammophon*, Matter 78/70.

\(^10\) In its *Sirena* ruling, the Court was able to consider that the holding of an intellectual property right did not necessarily create a dominant position in favour of the holder of that right; ECJ, 18 February 1971, *Sirena/Eda*.

\(^11\) ECJ, 5 October 1988, *Volvo*.
appear to have been ratified in the Coditel II decision, in that such a restriction is necessary to protect the specific subject matter of the copyright, namely guaranteeing the right to be fully associated with the royalties generated from each public performance. This landmark decision established the capacity of competition authorities to take into account the very rationales for copyright based on the definition of specific subject matter defined by the ECJ and not only to transpose the principles applicable to industrial property.

By moving away from the hard core of copyright, the Court of Justice has also considered that reciprocal transmission agreements forged between collective management societies may be looked on in a positive manner by the law on concerted practices, to the extent that the territorial restrictions to which they give rise, justified by the constraints of collective management, nevertheless allow the holder’s rights to be better complied with.

Modern period: tensions and absorption
Recently, however, the relationship between competition rules and copyright has evolved on two different levels which both demonstrate the growing impregnation of competition considerations into the copyright field. First, copyright law itself now integrates rules targeted at increasing competition. Secondly, the last ten years’ application of the competition rules in copyright cases by the ECJ has pushed aside the classical conception of exclusive right, the exercise of which has become precarious in case of ‘exceptional circumstances’.

TIMID INCORPORATION OF COMPETITION GOALS WITHIN COPYRIGHT EUROPEAN STATUS
Instead of ignoring one another, the legal fields may be able to collaborate on the sidelines. There are actually various ways in which competition concepts are invading copyright. In some national legislation competition law is able to waive its authority to govern an issue by delegating to copyright law the responsibility of applying certain rules which have the same aims as its own, but in respect of which the methods of application are ‘internalized’. This is, for example, the trend followed by the French intellectual property code, which increasingly monitors collective management societies and regulates the activities of such bodies via the issuing of approvals or certain account-auditing-procedures.12 The law implementing theInfosoc Directive has also

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12 Such a tendency is induced by the Infosoc Directive: ‘whereas 17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules’.
chosen to establish a new administrative authority in charge of determining the extent to which the right holder of technical protection measures has to open his systems to competitors for purposes of interoperability. The domestic legislator will sometimes prefer to integrate the goals of competition inside the provisions dedicated to copyright and to create ad hoc institutions rather than leaving the solving of difficult matters to competition authorities.

Even though such an ‘inclusion’ choice has not been clearly made by the Community institutions in the bunch of directives adopted on copyright, competition considerations are not completely absent from the secondary legislation adopted so far. Deferring to the hierarchy of norms, most of the directives mention the possible application of competition rules within their scope. Thus, without any actual interpenetration, the directives are a reminder that competition law rules may always be applied in order to foster the single market. But by expressly referring to these rules, the directives not only evoke respect for the superiority of primary law but also promote certain of their own definitions as potential criteria for the application of competition rules. One might take for example some recitals of the EC Software Directive which states: ‘Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive’. Such a provision can be understood as a clear signal given by the Directive to the competition authorities to refer to the notion of interoperability provided under its own provisions rather than to define another concept. The manner in which the ECJ interprets interoperability may even rebuff the potential application of prohibition of abuse of dominant position. If a competitor can use such an exception to exclusive right without prior consent from the right holder, the latter’s refusal will no longer be an issue. But one might suggest that it is precisely because the definition of the exception of interoperability is too narrowly sketched within the Directive that the Court of Justice had to use the concept of abuse of a dominant position in order to condemn Microsoft to deliver the information necessary to achieve actual interoperability.

The best example of the ‘upstream influence’ of harmonization on the application of competition prohibition may be found in the Database Directive and the interpretation thereof given by the ECJ. One might remember the huge concerns about the risks for the market of the creation of a new ‘sui generis’ right for non-original databases during the process of discussion of the 1996 Directive. In the preliminary versions of the text, the suggestion was made to enforce a mere right to remuneration instead of a quasi exclusive right in order to avoid potential abuses of a dominant position. The final text rejected
proposal but was scattered with provisions, which underlined the necessity for this new monopoly to comply with the competition rules. It also invited the European legislator to examine in a short-term perspective (three years from the date of implementation), whether it would be likely to establish non-voluntary licensing arrangements in case of interference with free competition. In its first evaluation of Directive 96/9/EC, made on December 2005, the Commission, though skeptical about the benefit of the *sui generis* right for economic growth, nevertheless decided to wait longer before removing the monopoly. One of the reasons for this cautiousness lies in the ECJ decisions in November 2004, which had interpreted some of the core notions of the *sui generis* right such as ‘substantial investment’ in order to establish the perimeter of the protection. As the Commission pointed out, though questionable, the ECJ’s narrow interpretation of the *sui generis* protection for ‘non-original’ databases where the data were ‘created’ by the same entity as the entity that establishes the database would put to rest any fear of abuse of a dominant position that this entity would have on data and information it ‘created’ (so-called ‘single-source’ databases).

These examples show that the existence and interpretation of a Directive

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13 Yet not binding as in recital 47, Directive 96/9/EC on the legal protection of databases, OJ L 77/20, 27 March 1996: ‘(47) Whereas, in the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules; see also, binding article 16 paragraph 3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the *sui generis* right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.’


may influence the (non) application of competition law, like two communicating vessels. By delineating precisely the outlines of the exclusive right, the Directive and the related case law reduce the risks of application of competition law, while competition aims are always more embedded within copyright status. The introduction of a large number of provisions on copyright since 1991 in European Law might therefore induce a new reading of the existence/exercise distinction so far applied by the Court as a line of competence between the domestic legislator on the one hand and the Community on the other hand. The harmonization of copyright actually reduces the antagonisms mentioned above between the aims of competition law and national exclusive rights, which both currently share achievement of economic union as a common goal. Future ECJ case law on the interpretation of the European concepts of copyright might consequently be decisive for the application of competition rules, limited to the mere control of the wrong exercise of the monopoly. This might balance the actual situation in which competition prohibitions challenge more and more the nature and exercise of the exclusive right. The European legislator could also set common objectives of competition law and copyright law within directives, and so reduce the risk of an a posteriori application.

**Competition law reshaping copyright**

Today is without doubt a time at which competition law has a firm hold over copyright. However, the phenomenon of direct application of the prohibition of competition law is not new, and even if it seems to take on a greater importance these days, it still remains exceptional from a quantitative perspective. Yet, for the last ten years case law has deeply disturbed the scheme in which traditional copyright monopoly is exercised as demonstrated by a quick overview of landmark decisions by European courts in this field.

As regards concerted agreements between undertakings, article 81 has already been applied in a very traditional manner to the restraints on trade arising from, for example, the so-called shared publishing practice relating to books, showing that literary work status carried very little weight in the analysis of the market. In the absence of any exemption regulation encompassing all kinds of protected works, the prohibition of article 81 indifferently applies subject to the respect for the specific subject matter designed by the ECJ. The previous benevolence towards agreements between collective management societies has been rebutted by a new policy coming from the Commission. In the famous Tournier\(^{16}\) case the Court decided, in a rule of reason approach, that the restriction of competition, namely territorial exclusivity, resulting from

reciprocal agreement was necessary to achieve the goal of better protection of copyright and better access to the repertoires by the public. But this favourable a priori attitude was no longer on the agenda in the Commission’s decision about the Simulcasting agreements where the European authority considered void an exclusivity clause requiring a multiterritorial-multirepertoire licence only for the collective society governing the territory on which the user was established. Since then, the Commission has pushed for a deep reorganization of the competition between collective societies throughout the Community, quick to consider that the principles arrived at in relation to traditional collective management were no longer necessarily applicable in the era of digital broadcasting over open networks. In a later recommendation of October 2005, the Commission proposed to introduce such competition by increasing the mobility of authors but clearly repelled any attempt from the collective societies to maintain territorial exclusivity. The outcome of the recommendation is still uncertain as to the expected goal followed by the Commission. One need only observe the huge concern among stakeholders about the future of collective management and cultural diversity in Europe.

In the field of the prohibition of abuse of a dominant position, recent ECJ case law has also deeply evolved into a more intrusive application of article 82 to the individual behaviour of the right holders. The landmark decision is without a doubt the *Magill* case. Unlike the *Volvo* case, the ECJ (after the Court of First Instance (CFI) and Commission) condemned the refusal to grant a licence by the copyright owner to an undertaking wishing to develop a weekly

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TV programmes magazine. No such magazine existed in Ireland at that time, the national TV companies supplying their own information journal limited to their own programmes. The television companies also supplied their television listings to media outlets for free but on a limited basis and had refused to license Magill to produce an integrated television listings magazine with programme listings for all the television stations then broadcasting in Ireland. This prevented a new product coming onto the secondary market.

The Court acknowledged that holding an IPR does not automatically confer a dominant position but the television companies were dominant in both markets because they were the sole source of information on programme listings. While acknowledging the author’s exclusive right of reproduction, the Court held that a refusal to license could constitute an abuse in ‘exceptional circumstances’ under Article 82(b), as it limited production and markets to the prejudice of consumers. Such exceptional circumstances arise where:

1. there are no substitutes so access is indispensable;
2. there is a new product for which there is a potential consumer demand;
3. there is no objective justification for the refusal;
4. the copyright holder reserves the secondary market to itself by excluding competition on that market through its refusal to supply.21

At the time of the decision, the weakness of copyright protection for television listings appeared to be a key explanation for the justification of the intrusion of competition rules against the refusal of the right holder to deliver mere information. Yet, since then, Magill has appeared to be a landmark case and the so-called ‘exceptional circumstances’ a kind of guideline for the application of competition rules to right owners’ behaviour.

In the IMS22 case, the right holder refused access to his competitors to a brick structure for reporting information on sales and prescriptions of pharmaceutical products whereby the German territory was divided into 1,860 zones. Until 1999 IMS was, with the active help of pharmaceutical companies, the sole provider of regional data, and subsequently two new market entrants found that their information system met with resistance because of the routine

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of territorial divisions already in use by pharmaceutical companies. In other words, customers were not able or willing to make the switching costs. NDC and AzyX, sued by IMS for having started to use the IMS brick system without licence, were condemned by the national court. The European Commission, however, required IMS to grant a compulsory licence on the brick system. The European Court of Justice was asked for guidance on this very question of compulsory licence. In its decision, the ECJ considered that the refusal to license an industry standard in the absence of a reasonable alternative may constitute an abuse of a dominant position. Whether a refusal to license an intellectual property right constitutes an abuse of a dominant position should, according to the ECJ, be addressed according to the three cumulative criteria of its Magill decision, namely that the refusal: (1) prevented the emergence of a new product for which there was a potential consumer demand; (2) was not justified by objective considerations; and (3) was likely to exclude all competition in the secondary market.

More recently the Microsoft case confirmed the wide applicability of prohibition of abuse of a dominant position, inter alia, to the refusal to deliver information necessary for interoperability of software programs with the Microsoft operating system. On this occasion, the CFI even expanded the exceptional circumstances concept beyond the boundaries of Magill, revealing its ability to be applied to all kinds of new propositions. Contrary to optimistic comments, the case law reveals that competition rules practise poor self-restraint when applied to copyright.

The fact that copyright law is indeed ‘subject’ to competition law is not in question. The competition authorities need no benediction from the copyright experts on their competence. The growing importance of the targets assigned to competition law has even begun to invade copyright status itself. So what? This application must nevertheless be discussed, notably with regard to the virtues of such a ‘head-on’ approach, partially ignoring all the common elements between both institutions.


24 CFI, 17 September 2007, Microsoft, Matter T-201/04.

25 Paragraph 336: ‘In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in Magill and IMS Health, paragraph 107 above, as described at paragraphs 332 and 333 above, are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission (see paragraph 317 above).’
2. Inadequacy of a standard application of competition law to copyright: abuse of competition rules on copyright?

Competition law and copyright follow, to a certain extent, the same aims, that is to say, the final benefit for the consumer and/or the public. In principle, the goal of competition law is to preserve the general interest through optimal economic activity whilst still ensuring the best possible allocation of resources for consumers. Copyright can also be viewed as a legal tool shaped to foster culture, education and innovation, therefore increasing the public welfare. But where competition law intervenes by way of *ex post* regulation and is used to remedy distortions in the market on the basis of observed market player conduct, copyright tries to structure the exercise of monopoly rules using *ex ante* mechanisms: definition of the scope of the right – purpose, duration – extent of the monopoly – exceptions, limitations, right to remuneration.

Because of these structurally different approaches, and the uncertainty of its application criteria, the systematic primacy of competition law over copyright rules may weaken the security of the market players. The balance of interests which competition authorities try to accommodate is not a static element and may be envisaged differently depending on the evolution of the market and certain technologies. It has a fairly precarious nature which renders the outcome of the closer relationship between the two fields uncertain. It appears, from the above-mentioned illustrations, that the application of competition law to copyright can go through ‘sudden changes of mood’.

Two types of observation can be made regarding the treatment of copyright by competition law. The first concerns the methods used by the relevant courts, which sometimes seem to forget the orthodoxy of the competition law criteria or ignore the absence of rationality in their application to copyright. The second stems from the mixed consequences of such application for the achievement of the shared goals in competition law and copyright.

### 2.1 Nonsense concepts

Several recent rulings which have analysed the exercise of copyright in terms of an abuse of a dominant position are laying themselves open to criticism in so far as they seem to depart, with a certain amount of liberty, from the more traditional interpretation of competition law. Occasionally, even, criteria are applied without any thought being given to whether they are really appropriate to the matter under review. Two examples may reveal the inadequacy of unconditional application of competition law to copyright.

### MARKETS AND ESSENTIAL FACILITIES

Tough market definition lies at the heart of many an analysis of competition law and is of considerable importance in the European system. One cannot but note the low level of market analysis underlying certain competition decisions.
involving copyright issues. In the IMS case, for example, the market analysis has stirred up much confusion on the definition of the primary and secondary markets as regards the application of the essential facilities doctrine. In this much-referred-to case,²⁶ the European competition authorities ended up differentiating between a primary ‘upstream’ modular structures market and a downstream market relating to the exploitation of data created through such structures. They thus rather artificially identified the upstream market as the product or service to which access is sought and the downstream market as uses of that product for another product or service. The Court concluded that once a potential or even hypothetical market can be identified, that is sufficient to apply the standards of Magill. But such an approach is barely consistent with traditional competition reasoning as I. Maher²⁷ outlines it, ‘doctrinally and practically how is a potential market to be defined? There is a notion of potential competition but not potential markets in competition law.’

With regard to this point, the Court of Justice followed the findings of the Advocate General, considering it enough that one is able to identify an ‘upstream input market’, even where the market in question is only a ‘potential’ one, inasmuch as the undertaking holding a monopoly in that market decides not to market the input concerned independently, but to exploit it in an exclusive manner on a derivative market, thus totally restricting or eliminating competition on that secondary market. The Court of Justice practically had to resort to artificial reasoning in order to retain a distinction between a primary market and a derivative market, thereby placing at risk a distinction which is nevertheless of primary importance to the application of the essential facilities theory in the real world.

Despite its fragility, the concept of ‘potential’ market was used again by the CFI in the Microsoft case where the judges said

The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market (see, to that effect, IMS Health, paragraph 107 above, paragraph 43). Thus, the Court of Justice held, at paragraph 44 of IMS Health, paragraph 107 above, that it was sufficient that a potential market or even a hypothetical market could be identified and that such was the case where the products or services were indispensable to the


conduct of a particular business activity and where there was an actual demand for them on the part of undertakings which sought to carry on that business. The Court of Justice concluded at the following paragraph of the judgment that it was decisive that two different stages of production were identified and that they were interconnected in that the upstream product was indispensable for supply of the downstream product. (para. 335)

Yet, this distinction between a rights’ market and an exploitation market does not really make any sense since the economic value of a right lies precisely in its ability to be transferred for any exploitation purposes notwithstanding their order. According to Maher,

the difficulties with having a potential market are that it minimizes or removes the leverage requirement, making it look like an obligation to share competitive advantage, in effect making it an obligation for the dominant firm to create competition in the only real market. From a policy perspective, if there is an obligation to allow competition in the only real market, this could stymie innovation and creativity. If investment in the core market is threatened by the risk of obligation to deal, this could have a dampening effect.28,29

Nor is that distinction any more coherent in relation to intellectual property law, which does not stipulate any difference in treatment based on the market in which the monopoly is exploited. The exercise of an exclusive right – most especially in copyright where the original holder of the right is under no obligation to do so – pertains to the right holder’s intention to invest in a market, according to that holder’s own timetable. The first market to be exploited will not necessarily be the most significant one, so that markets exploited second are not to be characterized as ‘derivative’ markets. This demonstrates that competition law fundamentally refutes copyright’s traditional contractual organization of rights.30

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28 I. Maher, ibid.
29 See also A. Strowel and W. Hull, ‘Encroaching on Exclusive Rights: Compulsory Licensing of IP Rights: The ECJ’s Judgment in the IMS Case and its Impact on the Microsoft Case’, Exploring the Sources of Copyright, ALAI, Paris, 2005, p. 687: ‘While the ECJ pays lip service to the need to establish a secondary market, it is clear that, under the current case law, a dominant firm may be required to license its technology in its own market as long as the competitor is able to show that it intends to introduce a new product. This approach could well chill innovation because firms will not have the incentive to invest in research and development if they face the prospect of having to make those technologies available to competitors.’
30 See the control exercised by the Conseil de la Concurrence (Competition Council) and the French Cour de Cassation (Supreme Court of Appeal) over a clause contained in TF1’s co-production contracts which reserved video production rights to one of its subsidiaries. The Council considered that the purpose and effect of the exclu-
The issue of market power is also often skirted around by the European competition authorities. Whenever the market concerned is inaccurately identified, it is all the more difficult to determine a player’s position in that market. In particular, where emphasis is placed on the ‘essential’ nature of the authorization to penetrate a downstream market, there is an almost automatic assumption of a dominant position. In such cases as IMS, ‘this would happen because if a facility were found indispensable, it would constitute the potential market. The controller of that facility would be dominant in that market and the fact that the facility was indispensable could also be a feature in finding abuse.’

Yet, in principle, the existence of such a position should be determined through an analysis of the substitutability of products or services, such analysis being however sometimes lacking. Paradoxically, the innovative nature and the creativity of the subject matter protected by copyright can lead to an assumption of its ‘indispensable nature’ and through that, to an eventual characterization of the owner’s dominant position. It is only through a careful examination of the indispensable nature of the protected work that the hypothesis of an abuse of dominant position may be excluded. If any work is considered an essential facility, an agreement relating to a copyright might never be able to benefit from the new policy of applying prohibitions according to certain

31 I. Maher, op. cit.

32 See for example, ECJ, 12 June 1997, Tiercé Ladbroke SA, Matter T-504/93, where the CFI considered that a refusal to grant a licence in relation to sounds and pictures of races did not constitute an abuse where the televised broadcasting of horse races, whilst constituting an additional and even fitting service offered to betters, is not in itself indispensable to the exercise of the principal activity of taking bets. See also for a national illustration, Cour de Cassation, Chambre commerciale, 12 July 2005 re: CA Paris, Ire ch., 12 February 2004: BOCRF 2004, p. 422; Contrats, conc., consom., 2004, comm. no. 111, obs. M. Malaurie-Vignal. On this matter, see S. Lemarchand, ‘L’affaire NMPP: s’oriente-t-on vers une nouvelle limite au droit d’auteur du logiciel au nom de la libre concurrence?’, Propriétés Intellectuelles 2004, no. 11, p. 626.
thresholds which have been incorporated into European competition law, as shown by the *de minimis* notice or the category-based block exemption regulations.

**PRICING**

Competition law is still being applied to copyright without any consideration being given to the methods used to evaluate the price of access to a work according to intellectual property rules. Where the economic value of an asset is principally due to certain restrictions placed on its availability (the law thereby having created an artificial scarcity of that item), it seems absurd to try to determine the price, as certain competition decisions tend to do, on the basis of costs. In French law, disturbing rulings, after having found that an economic market participant was making access to its database conditional on certain inequitable terms, required the latter to allow such access at prices ‘in line with costs’. Yet the introduction of that requirement goes against the economics of copyright, which are essentially based on demand. Moreover, Advocate General Mayras, in his findings presented under the SABAM ruling, emphasized very early on the logical impossibility of transposing traditional excessive price reasoning, as derived from the *United Brands* case, to determining the right price of royalties in the field of copyright.

Under no circumstances can the concept of production costs give a true indication of the value of an intellectual property asset, such value being independent of the number of hours worked or the cost of materials used to produce, for example, a painting. It is rather a function of the reputation of the author, of the exploitation potential of the work, or of the spirit of the age! It is therefore particularly tricky to characterize, within this context, what constitutes an excessive price. Only a standardized product, which is eminently substitutable, may conform to such reasoning. Where the work is an original, unique and coveted, the cost of the materials with which it is made is irrele-

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vant, so too the price of works in the same category. If it finds itself an interested buyer, the price will be fixed on the basis of demand.

No doubt recourse must also be had to economic analysis in order to clarify thought on the concept of what constitutes a ‘reasonable price’. It is out of the question to allow an economic market participant freedom to make an arbitrary evaluation, irrespective of whether that participant relies on an intellectual property right. Nevertheless, defining what constitutes an excessive price is obviously fraught with difficulty in this field since it involves works containing original material. An argument based on discriminatory prices could probably be made where the matter concerns a comparison of prices applied to the medium incorporating the work, as outlined in the *Micro Leader* case before the Court of First Instance of the European Communities.\(^\text{34}\) The court considered that the price applied within the European Community to Microsoft software could constitute evidence of abuse of a dominant position, in so far as it was higher than the price at which it was marketed in Canada, and to the extent that such price (i.e. that applied within the European Community) was also excessive. However, the Court was not more specific about this last point.

Should the reference to costs be reserved solely for works involving an upstream investment of funds or can one extend it to all types of creation? How should the amount of the licence fee be fixed when it is impracticable to apply the concept of price being in line with costs? Determining the excessive nature of a licence fee is difficult because there is no such thing as a unique price of reference. The question of the price is also mostly addressed in those cases ending up with compulsory licences. Upstream, no one has the intention of aligning the amount of royalties owed to authors for their literary or artistic works. It is even customary for authors to receive very different levels of remuneration despite having contributed to the creation of the same work. At the distribution stage, the diversification of tariffs constitutes a material component in the economics of certain sectors. Thus, a film may be auctioned at very different prices according to the medium, version, territory of distribution, the time at which the marketing takes place, the number of scheduled

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\(^{34}\) CFI, 16 December 1999, *Micro Business Leader v. Commission*, Matter T-198/98, ‘[free translation] A copyright may be sanctioned on the grounds of an abuse of a dominant position where the holder of that right charges lower prices on one market than on the European Community market for equivalent transactions and where the European Community prices are excessive.’ It considered that the difference in price between the Canadian market and the French market constituted evidence according to which ‘Microsoft was charging lower prices on the Canadian market than on the European Community market for equivalent transactions and that the European Community prices were excessive’. 
screenings, and even the time of broadcast. Under such circumstances, an authoritarian, univocal and permanent fixing of the price for auctioning a joint work would have a lethal effect. It is therefore important that the price fixed for a compulsory licence be confined to a given type of use and that it has no influence on other potential methods of exploiting a work. As A. Kamperman Sanders puts it,\textsuperscript{35} ‘it is not yet clear how to calculate a reasonable royalty for the compulsory licence. Cross-licensing practices have not yet fully developed in the copyright and database domain to the same extent as in the patent area.’

More generally, the competition authorities should balance the outcomes of their potential decisions against the long-term objectives of stimulation of innovation promoted by intellectual property rights. It is only through such a prospective reasoning that the results of application of competition prohibitions will be consistent with this goal.

UNPROMISING RESULTS

The recent application of competition law to copyright by European authorities, because of or despite the uncertainty of the criteria has led to results subject to criticism. As regards the essential facilities doctrine, the progressive abandonment of the condition of ‘the new product’ is endangering the monopoly of the right holder without guaranteeing to society any cultural benefit or progress in innovation. Though we will not develop the subject in the present chapter, let us point out, concerning the collective management societies, that the quite dogmatic view of free competition taken by the Commission has also upset the landscape of music distribution.\textsuperscript{36}

ABOLITION OF THE NEW PRODUCT CONDITION: WHAT KIND OF PROGRESS IS PROMOTED?

The transposition of the essential facilities theory, which stemmed from American antitrust law, to the field of intellectual property rights, is not easy as is demonstrated by the reluctance of American competition law to apply it.\textsuperscript{37} Yet, since the \textit{Magill} ruling, that reasoning has made a resounding


\textsuperscript{36} The effects of the above-mentioned recommendation of October 2005 have raised huge concerns, from among others, the European Parliament with regard to the respect for cultural diversity.

\textsuperscript{37} See M. Leaffer, \textit{Exploring the Sources of Copyright}, ALAI, Paris, 2005. The
entrance into European Community law, in relation to the exercise of copy-
right. It could nevertheless be concluded from a comparative study of the Magill and Oscar Bronner cases that a compulsory licence could be granted by the competition authorities in the field of copyright when the refusal to grant a voluntary licence is preventing the emergence of a ‘new product’ for which potential demand by consumers could be identified, this ‘new product’ condition not being required in the presence of ‘material facilities’.

In its Oscar Bronner ruling, the ECJ did not in fact mention the ‘new prod-
uct’ condition, considering that (recital 41):

Therefore, even if that case law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse [. . .]. not only that the refusal of the service comprised in home deliv-
ery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person’s business, in as much as there is no actual or potential substitute in existence for that home delivery scheme.

In other words, the exceptional circumstances motivating the intrusion of competition rules within the field of copyright were limited to the situation where the right holder was hindering innovation by a mere passive exercise of his monopoly.

Yet, the IMS case showed that such a ‘copyright-friendly’ approach was not to be generalized, because the right holder was indeed exploiting the protected work on the very market where competitors wanted to enter. The ECJ was not very precise on the new product condition; it seems to have been put aside, in so far as the competitor who was demanding a compulsory licence completely failed to show that access to the infrastructure would allow him to develop a product that was different from that already marketed by the creator. Even though the Court declined to follow Advocate General Tizzano’s invitation to transform the new product requirement into a ‘different’ product requirement under which it would only be necessary to show that the competitor intended

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Essential Facilities Doctrine in US Law, p. 628: ‘the doctrine runs counter to the fundamental tenets of U.S. antitrust and intellectual property law. Antitrust’s purpose is not to force firms to share their monopolies, but to prevent monopolies from occurring or to break them down when they do occur. Forcing a firm to share its monopoly is inconsistent with antitrust goals for two reasons. First, consumers are no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone. Second, the right to share a monopoly discourages firms from developing their own alternative inputs or innovations.’

38 ECJ, 26 November 1998, Oscar Bronner, Matter C-7/97.
to introduce a product with ‘different characteristics’ from the dominant company’s product, it remained difficult to identify the new product the competitors intended to offer to the consumers. As underlined by A. Strowel and W. Hull, ‘Clearly, the ECJ’s approach leaves much to be desired in terms of legal certainty’. 39

In the Microsoft case, 40 dealing with the interoperability of the Windows operating system with server software, the European Community authorities based their reasoning on the essential facilities theory without requiring that the unlocking of the monopoly be contingent upon the emergence of a new product proposed by a competitor. In such respect, the relevant software existed in spite of the restriction on market outlets and there was nothing to guarantee that the setting up of interoperability systems would necessarily lead to the emergence of such a product. Moreover, in its decision the CFI held that (recital 647),

The circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health, paragraph 107 above, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

In the light of this last decision, not only is the emergence of a new product no longer required, but neither is the condition regarding the potential demand of consumers. 41 It is sufficient to demonstrate, in a rather abstract way

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39 Strowel and Hull propose ‘To avoid this uncertainty, a better approach may be to limit compulsory licences to cases where the licence relates to a market entirely separate from that on which the dominant company is exploiting its IP rights and on which it is not active. Thus, a dominant company could not be forced to create competition in its own market – which would go to the very heart of its IP right – but only in an adjacent market where it is not exploiting its right’, op. cit.


41 Microsoft, recital 648: ‘It was on that last hypothesis that the Commission based its finding in the contested decision. Thus, the Commission considered that Microsoft’s refusal to supply the relevant information limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC (recitals 693 to 701 and 782 to the contested decision) and it rejected Microsoft’s assertion that it had not been demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).’
that the behaviour of the right holder might possibly chill ‘technical development’.

The concept of a new product had nevertheless been previously reaffirmed in French case law. Similarly, the Conseil de la Concurrence\textsuperscript{42} considered that Apple’s Fair Play digital rights management system (DRM), the only system compatible with the iPod personal stereo, did not constitute an essential facility, owing to the fact that other technical processes, such as rewriting, enabled songs and music to be downloaded from the Virgin Mega platform to an iPod personal stereo. That being the case, access to that DRM was not indispensable to Virgin Mega. Furthermore, the Council emphasized that the risk of competition being eliminated had not been established and that Virgin Mega had not declared any intention of offering a new product or service. Apple’s refusal to grant Virgin Mega a licence over that system was therefore not sanctioned. It is unclear whether, after Microsoft\textsuperscript{,} such reasoning is likely to be held by the Commission, which has recently opened proceedings against Apple.

Consequently, it is currently extremely difficult to determine the moment as of when the refusal by a right holder to issue, here, a licence, or grant access rights to a work, will expose that holder to censure under competition law and to the transformation of his exclusive right into a mere right to remuneration.

What advantages have been gained by confiscating monopoly rights? As we have seen from the IMS\textsuperscript{564} case, if a compulsory licence is granted where a competitor does not even claim the intention of producing a new product, that denial of an exclusive right will subsequently encourage the stowaway phenomenon. It would be better to wait and see a product’s growth on the market before committing to such denial. When a compulsory licence is granted by the competition authorities, one might first wonder for whom and at what price? Should all competitors have access to the work on the same terms and conditions where the principle of a compulsory licence has vested? Should one, on the contrary, reserve such access solely to competitors capable of evidencing a contribution in terms of a new product? The consumer might possibly, in such circumstances, get a better price for the same service, since the competitor will have spared a certain commercial risk. But for all that, will that short-term advantage for the consumer counterbalance the ice age effect on innovation in the medium term? Even without mentioning innovation, one must acknowledge the fact that consumer gain is not confined to getting a product at the cheapest price; the consumer is likely to prefer being given a choice, to enjoy the persistence of a certain form of cultural diversity, and having access to multiple expressions both artistic and political.

\textsuperscript{42} Decision 04-D-54 of 9 November 2004.
Such reasoning may also lead to severe market disruption. Indeed, if a right holder operating on the market has to allow access to the work for a price fixed by the competition authorities, there is no longer any point in having a monopoly. Not only is the creator taking a commercial risk in entering the market, but he will not even be certain of being able to demand the amount of remuneration that he would normally have been able to fix with no other constraint than of finding a demand for it.43

Where the act of creation implies a considerable investment of funds, as can be the case with film production, the lack of any guarantee as to sole rights would then act as a very potent deterrent. It is difficult for market players to play a game in which the rules on arrival are different from those at the start. Yet competition law, as a means of ex post regulation, is virtually incapable of being fully foreseeable by market participants in terms of both scope and conditions of application.

Some maintain that competition law will only intervene for specific works of a markedly functional nature.44 In fact, key judgments have concerned software and databases or even elements of cartography. This principle of limited application should be treated with reservation. Indeed, there is nothing in the aforementioned judgments which indicates that their reasoning only applies to functional works. The concept of informational assets which has also been relied on to limit the intrusion of competition law, is not more convincing in so far as all works will contain a certain element of information of which an economic market participant might wish to extract the substance. Moreover, unlike the Magill ruling, the IMS case related to an original structure enabling the computation of information and not to the information itself, which was freely available to all. Incidentally, this reliance on a differentiation in treatment according to category of work has found little to match it in copyright law, which postulates a principle of indifference with regard to the type or form of the subject matter. So there is therefore nothing to prevent a publisher of a catalogue of works by a well-known painter from relying on competition law, rather than on an abuse of right, to counter a refusal by the right holders to authorize the appearance of a work in such a catalogue. A new product will indeed have been created, for which there is a potential demand, and a refusal may appear unjustified where it arbitrarily deprives the public of scientific access to a painter’s work.

Conclusion
The major drawback in the current application of competition law is, as already pointed out, that it plunges copyright into great legal insecurity. Creators and their transferees are operating with a sword of Damocles over their heads. In their efforts to challenge the monopoly, users/competitors are often driven by rather trivial motives and essentially call on competition law in order to . . . pay less! This situation in which unpredictability prevails is increasing the fragility of the interested parties and is one which may act as a deterrent against funds being invested in creation and cause the stowaway phenomenon to develop, both of which will ultimately be detrimental to the economy.

To combat that negative impact of competition law, several avenues may be explored.

As said, one can think about ‘internalizing’ certain constraints under competition law within copyright law in order to remove the risk of an a posteriori application.45 A second possibility might consist of developing instruments to assess the consequences of the decisions delivered by the competition authorities on the markets, in terms of innovation and redistribution to the end-user. Where the competition authorities recognize certain ‘potential’ markets to justify their findings, it would seem reasonable to require them to sketch an outline of such potential markets, once the obstacle has been removed, and to consider at that time the repercussions of removing the monopoly on the basis of a comparative ratio of short-term/long-term advantages. Finally, it would seem appropriate for experts from both fields to get together for the purposes of jointly promoting a suitable method of interpretation enabling certain market definition guidelines to be determined, as has already been done in certain other sectors. Attention must also be given to the emergence of an ‘industry standard work’ such as appears in the IMS case. In such connection, careful thought must be given to the indispensable nature of a creation in order to determine, amongst other things, the impact of the customer’s participation in the creation of the final work, the technical impossibility of producing an alternative, and the economic viability of creating a substitutable work. Considerable attention must, especially, be paid to that condition of substitutability of products and/or services. It is time for economic and law analyses to create tools specific to copyright and not rely any more on economic patent models.

45 It is with this in view that certain mechanisms such as management company review panels or certain statutory licences have been envisaged; restrictions on the scope of an exclusive right, the application of abuse of law or the ‘misuse’ concept or even the plea (exception) of interoperability which accompanies the establishing of an exclusive right over software.