Impacts of Competition Law: Monolithic Copyright, Market Power and Market Definition

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Monolithic Copyright, Market Power and Market Definition

The Impact of Competition Law on the Licensing of Copyrighted Content

Martin Senftleben

Abstract A monolith can be described as a geological feature "consisting of a single massive stone or rock, such as some mountains." In architecture, it may refer to "a single large piece of rock placed as, or within, a monument or building."[1] A literary or artistic work may constitute a monolith in its own right. As a single large piece of information, it may stand out from works of the same category. Similarly, collections of works may become so dense that they resemble a single massive information monolith. In both cases, the market power resulting from copyright ownership may be considerable. Hence, the question arises whether competition law can serve as a vehicle to ensure reasonable access conditions and prevent an artificial supply shortfall.

Keywords content aggregation, market definition, new product test, market leveraging, cultural follow-on innovation, competition law and human rights

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[1] See https://en.wikipedia.org/wiki/Monolith, last visited on 19 January 2016.

1. Introduction

The scope of the exclusive rights of copyright owners can be recalibrated in different ways. Inside the copyright system, the adoption of limitations can lead to an appropriate balance between the exclusive rights of copyright owners on the one hand, and competing economic, social and cultural interests on the other.[2] Additional balancing tools are available outside the copyright system.[3] If the delicate balance between rights and freedoms is lost, human rights may be invoked as an external balancing tool.[4]

In the EU, the impact of fundamental freedoms on the configuration of copyright's balance has been enhanced in recent years. In *Painer*, the Court of Justice of the European Union (hereinafter: "Court of Justice") underlined the need for an interpretation of the right of quotation in Article 5(3)(d) of the Information Society Directive [5] that enables the effectiveness of the provision and safeguards its purpose.[6] More specifically, the Court clarified that Article 5(3)(d) was

> intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.[7]

In its further decision in *Deckmyn*, the Court followed the same path with regard to parody. It underlined the need to ensure the effectiveness of the parody exemption in Article 5(3)(k) of the Information Society Directive[8] as a means to balance copyright protection against freedom of expression.[9] In practice, courts may thus give copyright limitations a relatively broad scope even though the underlying copyright statute, such as the Information Society Directive in the EU, does not qualify these limitations as rights but includes them in the catalogue of exceptions to exclusive rights instead.

A relatively broad scope may be given at least to limitations supporting the creation of a new work, such as the quotation right and the exemption of parody.[10] As the examples taken from the jurisprudence of the Court of Justice demonstrate, the fundamental guarantee of freedom of expression plays a crucial role in this context. Relying on Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights, the Court of Justice could interpret the quotation right and the parody exemption less strictly than limitations without a comparably strong freedom of speech underpinning. In both the *Painer*

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[2] As to the room available for the introduction of exceptions and limitations, see Geiger / Gervais/ Senftleben 2014, 581; Gervais 2009-2010, 510-511; Kur 2009, 307-308; Geiger / Griffiths/ Hilty 2008, 707; Senftleben 2004, 243-244.
[3] Geiger 2004, 391-412; Dreier 2001, 295-316.
[4] Geiger 2006, 371; Strowel / Tulkens / Voorhoof 2006; Hugenholtz 2002, 239; Macciacchini 2000; Benkler 1999, 355; Netanel 1996, 283.
[5] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, 10).
[6] Court of Justice, 1 December 2011, Painer, C-145/10, ECLI:EU:C:2011:798, para. 132-133.
[7] Court of Justice, ibid, para. 134.
[8] Court of Justice, 3 September 2014, Deckmyn, C-201/13, ECLI:EU:C:2014:2132, para. 22-23.
[9] Court of Justice, ibid., para. 25-27.
[10] Senftleben 2012, 395-398.

and the *Deckmyn* decisions, the Court emphasized the need to achieve a "fair balance" between, in particular, "the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other."[11] The Court thus referred to quotations and parodies as user "rights" rather than mere user "interests".

External balancing tools, such as the fundamental guarantee of freedom of expression, can thus have a deep impact. In particular, the guarantee of freedom of expression can broaden areas of freedom that are relevant to the creative process leading to a new literary or artistic work. The question whether a quotation or parody requires the authorization of the copyright owner will often arise during the process of making a new work. It may be said that the quotation right and the parody exemption concern the possibility of control over creative use: they limit the copyright owner's power to exert control over the creation and dissemination of transformative, derivative works.[12]

With regard to the supply market – understood as the market for the dissemination of protected works without transformative modifications – a recourse to the fundamental guarantee of freedom of expression and information is less common. In *Technische Universität Darmstadt*, the Court of Justice recognized that the copyright limitation for offering reading terminals in publicly accessible libraries laid down in Article 5(3)(n) of the Information Society Directive

> would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question.[13]

As in *Painer* and *Deckmyn*, the Court thus sought to enable the effectiveness of the copyright limitation and safeguard its purpose. However, it refrained from directly referring to fundamental rights and freedoms in this context. Nonetheless, content repositories, such as libraries, and content aggregators, such as (dedicated) search engines, are central to offering an information infrastructure that is conducive to the making of new literary and artistic works. In contrast to the quotation right and the parody exemption, the contribution of content repositories and aggregators does not concern the final process of creation but the preliminary stage of finding and studying potential sources of inspiration. In this context, the term "aggregator" can be understood to refer to a party which provides an overview of available literary and artistic works together with a short indication of contents and a link to the primary source. A "repository", by contrast, holds literary and artistic works and makes them available from its own server.

The particular importance of access to information offered by content repositories and aggregators clearly comes to the fore, for instance, in Pierre Bourdieu's sociological analysis of the process of creation.[14] According to Bourdieu, each new generation of authors must first

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[11] Court of Justice, 1 December 2011, Painer, C-145/10, ECLI:EU:C:2011:798, para. 132; 3 September 2014, Deckmyn, C-201/13, ECLI:EU:C:2014:2132, para. 26.
[12] Hilty / Senftleben 2015, 326-330; Geiger 2010, 532-533.
[13] Court of Justice, 11 September 2014, Technische Universität Darmstadt, C-117/13, ECLI:EU:C:2014:2196, para. 43.
[14] Senftleben / Anemaet 2015, p. 6.

learn of the aesthetic positions that have already been taken by previous creators in order to be capable of creating new works on the basis of pre-existing material. Unless newcomers master the history of their particular art and know the heritage of former generations, they are inhibited from detecting structural gaps that allow them to take a legitimate and plausible next step in the evolution of literary and artistic works.[15] Therefore, the guarantee of freedom to use pre-existing material for new creations, as in the case of the right of quotation and the exemption of parody, is only one way of encouraging the incessant renewal of the cultural landscape. In addition, support can be offered by encouraging the use of existing works for the purpose of establishing content repositories and (dedicated) search engines – measures that allow new generations of authors to explore pre-existing creations and find starting points for the formulation of new aesthetic positions and the making of new literary and artistic works.[16]

In this latter regard – the provision of a rich and diverse information infrastructure – competition law may have a crucial role to play. If freedom of expression is invoked to offer sufficient room for the final creative process as such, it may be the task of competition law to serve as an external balancing tool with regard to a copyright owner's control over supply in the form of content repositories and aggregators. This does not mean that competition law should erode the exclusive right to copy and disseminate works altogether. However, a competition law investigation may be appropriate when a copyright owner systematically refuses to contribute to content repositories and aggregation systems that offer enhanced access to the cultural landscape and support the creation of new works in this way. Hence, it is worthwhile to explore the potential impact of competition law on the power of copyright owners on supply markets.

Against this background, the following examination focuses on the *potential* impact which competition law could have in a copyright context. It is a thought experiment raising the question of whether the control mechanisms of competition law could be aligned with the objectives of copyright law to such an extent that competition law would finally become a tool to influence the licensing practices of copyright owners in a way that can be deemed desirable from a copyright perspective. On its merits, the following analysis thus views competition law through the lens of copyright law. It seeks to recalibrate competition law in line with the objectives of copyright law. For this purpose, the analysis rejects the traditional market definition used in competition law and traces the conceptual contours of an alternative approach (following Part 2) before embarking on an examination of the potential impact of competition law on licensing practices in the area of content repositories and aggregation systems (Part 3). Drawing conclusions, it will be shown (Part 4) that competition law, indeed, could constitute an important external balancing tool that complements the corrective function which human rights fulfil already in the case of an overly restrictive exercise of copyright.[17]

[15] Bourdieu 1992/1999, 385.
[16] In this sense also Cohen 2006, 154-155.
[17] As to a potential combination of human rights and competition considerations, see Mylly 2013, 115-117.

2. Market Definition

A substantial hurdle to be surmounted when seeking to apply competition law more broadly in a copyright context is the basic requirement of market power allowing the erosion of competitive market structures. In EU legislation, Article 102 of the Treaty on the Functioning of the European Union (TFEU) reflects this requirement by referring to an abuse of a dominant position:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

In this context, market dominance is understood to refer to a position of economic strength which enables an undertaking

> 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.[18]

Evidently, the crux of this definition lies in determining the correct reference point for the assessment: the "relevant market". A broad reference point, such as a whole segment of literary or artistic creativity, may allow even powerful market participants to escape more thorough scrutiny in the light of competition law. A narrow reference point, which brings the market for an individual work into focus, will pave the way for relatively strict control under competition law standards. Traditionally, it has been particularly difficult to arrive at this focus on the market for an individual work in copyright cases because literary and artistic productions will often be deemed substitutable from the perspective of consumers.

2.1 Traditional Focus on Consumptive Use

According to the traditional definition used in competition law cases, the relevant product market underlying the investigation comprises "all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[19] In the identification of the relevant market, the question of substitutability thus plays a central role. As the European Commission explains,

> for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere.[20]

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[18] Court of Justice, 13 February 1979, Hoffmann-La Roche, C‑85/76, 1979 ECR 461, para. 38.
[19] European Commission 1997, para. 7.
[20] European Commission 1997, para. 13.

In addition to demand-side substitutability, supply-side factors may be taken into account.[21] In the field of literary and artistic productions, this may include the particular expertise of a record label, book publisher or film producer in a given area, an established reputation, long-standing relations with authors, knowledge of the customer base, and access to sales channels and customers directly.[22] A confinement of the analysis to supply-side substitutability, however, implies a departure from the basic consideration that, because of their elasticity, supply-side factors should only be considered if their effects are "equivalent to those of demand substitution in terms of effectiveness and immediacy."[23] Moreover, a focus on supply-side factors may soften the standard of review to such an extent that a dominant position will hardly ever be found.[24] Therefore, demand-side factors offer a more solid basis for the development of an alternative approach seeking to employ competition law as an external instrument to encourage the inclusion of protected works in content repositories and aggregation systems.

Hence, it is of crucial importance to identify the particular problems arising from a demand-based analysis. Josef Drexl describes the dilemma of demand-side substitutability in copyright cases as follows:

> Based on the copyright concept of originality, works are certainly different. But this does not mean that they are not substitutable in terms of competition law. […] To be substitutes, products do not have to be fully identical. The question rather is whether certain factors become so important that from a consumer's perspective works cannot be considered substitutable. The problem in the entertainment industry is that consumer perceptions are not defined by objective needs – as, for instance, in the case of patented pharmaceuticals – but by highly individual tastes and preferences. For some movie fans, a science fiction film may be a substitute to a love story; for others it is not. This seems to make the application of the concept of demand-side substitutability very speculative and unreliable.[25]

The central problem, therefore, is the absence of objective needs. Consumer tastes may vary considerably. For some consumers, almost every work in a certain category may be substitutable – even bestsellers, literary milestones and unique works of art – while for others hardly any work may be substitutable because of a refined taste. Depending on the degree of sophistication of the consumer group chosen as a reference point, a considerable degree of substitutability and a very limited degree of substitutability are both plausible outcomes of a demand-based inquiry.

Traditionally, however, the competition law analysis does not focus on connoisseurs of a particular work or repertoire. By contrast, importance is attached to consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed

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[21] European Commission 1997, para. 20.
[22] European Commission, 29 July 2003, COMP/M.3197, Candover/Cinven/Bertelsmann-Springer, para. 14-15; European Commission, 15 February 1999, IV/M.1377, Bertelsmann/Wissenschaftsverlag Springer, para. 9-12.
[23] European Commission 1997, para. 20.
[24] Hilty 2009, 639.
[25] Drexl 2013, 75.

by retailers and more generally, market research studies submitted by the parties and their competitors to establish whether "an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question."[26] Hence, the traditional analysis brings a broader consumer group into focus. In many cases, this broader, "economically significant" group of consumers will be more willing to consider copyrighted works substitutable than an individual aficionado of a given work or repertoire. The room for exerting competition law control is thus likely to be curtailed in comparison with an analysis based on the refined taste of a connoisseur.

2.2 Alternative Focus on Productive Use

To broaden the field of application of competition law in copyright cases, it is thus necessary to change the perspective. Instead of considering an "economically significant proportion of consumers" interested in consumptive use of literary and artistic works, it is preferable – in line with the introductory remarks made above (Part 1) – to focus on end-users who seek access to protected material for the purpose of finding inspiration for the creation of new literary and artistic works. As a result, an emphasis can be put on the productive study, remix and reuse of pre-existing material for the purpose of cultural follow-on innovation.

This alternative focus on productive reuse corresponds with the societal goals underlying copyright protection. For an adequate understanding of the copyright system, it is important to bear in mind that copyright law, on its merits, is a cyclic inspiration system. It is the core function of copyright law to further the incessant process of the creation of fresh, original human expression on the basis of pre-existing sources of inspiration. The author's essential trait is her ability to find new ways of individual expression in a given cultural environment. Building blocks for a new cultural creation are extracted from existing expressions, forms and traditions.[27]

On the one hand, copyright protection generates the economic incentives necessary to achieve the desired production and dissemination of literary and artistic works. At the core of this incentive rationale lies the economic insight that literary and artistic works constitute "public goods". Because of non-rivalry in consumption[28] and non-excludability in use,[29] they are unlikely to be created in sufficient quantities in the absence of appropriate incentives.[30]

On the other hand, however, the grant of exclusive rights as part of a strategy to ensure the required incentives involves considerable costs in terms of access to information and cultural follow-on innovation. Once copyright holders obtain exclusive rights, consumers may be inhibited from access to copyrighted works, and future creators may be inhibited from basing

[26] European Commission 1997, para. 41.
[27] See the analysis of research on the social psychology of creativity by Cohen 2006, 154-155.
[28] Use by one actor does not restrict the ability of another actor to benefit as well.
[29] Unauthorized parties ("free riders") cannot be prevented from use.
[30] Fisher 1988, 1700; Landes/Posner 1989, 326; Netanel 2008, 84-85. The grant of property rights is only one strategy for providing these incentives. A system of public subsidies could solve the problem as well. Cf. Posner 2005, 58-59; Calandrillo 1998, 301.

new creations on pre-existing ones. The incentive scheme intended to spur the creation and dissemination of works inevitably becomes a burden on the creation and dissemination of secondary works.[31]

To achieve optimal results for society as a whole, copyright law thus requires a constant effort to strike a proper balance between costs and benefits. As summarized by Guy Pessach, the conceptual contours of protection are to be drawn

> in a manner that concurrently maximizes the incentive for investing resources in the production and dissemination of diversified, socially valued creative works; and to minimize the costs and burdens that copyright imposes on the public and on other creators.[32]

Hence it follows that, besides the beneficial effect of copyright which consists, at least theoretically, of the incentive to create for authors, the detriment to the users of literary and artistic works who have to seek the authorization of the copyright holder if they want to enjoy or modify a copyrighted work must be factored into the equation as well.[33]

Against this background, it makes sense to broaden the perspective when it comes to competition law cases involving copyrighted material. The full potential of competition law to serve as a safeguard against the abuse of exclusive rights relating to literary and artistic works will only come to light when productive use is taken into consideration. The traditional focus on an "economically significant proportion of consumers" is thus doubtful in copyright cases. Instead, the substitutability of a work or repertoire should be assessed from the perspective of a productive user who seeks access to an existing work because it may be an important source of inspiration for the creation of a new work. In this way, the overarching objective of copyright law – the incessant renewal of the cultural landscape – can be integrated in the competition law analysis, and competition law can be aligned with the rationales of copyright protection. As a result, it becomes an important additional instrument to support the incessant renewal of the cultural landscape.

Interestingly, this shift to a productive use perspective leads to a much less "speculative and unreliable"[34] outcome of the inquiry into substitutability. As explained, an argument based on substitutes for the consumption of a particular literary and artistic work misses the point because it does not focus on the needs of authors seeking to use pre-existing material for the purpose of creating new works. It is not the vulnerability of the process of consumption but the vulnerability of the process of production that must be considered when assessing the potential corrosive effect of the abuse of a dominant position in the field of copyrighted material.

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[31] Posner 2005, 57; Pessach 2003, 1077; Benkler 1999, 392-393.
[32] Pessach 2003, 1077.
[33] Weinreb 1998, 1231; Calandrillo 1998, 304. See in respect of the 'deadweight loss' that results from the grant of exclusive rights Fisher 1988, 1700-1702.
[34] Drexl 2013, 75.

With regard to this production perspective, Pierre Bourdieu's sociological analysis of the field of literary and artistic production again offers important insights. According to Bourdieu, it would be wrong to assume substitutability of literary and artistic works in the context of the production of new works. His analysis shows that the room for the evolution of new directions in the creation of literature and art depends on the range of options that is available in the light of positions that have already been taken by previous creators.[35] For a new generation of authors to challenge the leading avant-garde, it must detect the structural gaps within the texture of already known literary and artistic positions. It must formulate an alternative position against the background of the weaknesses and contradictions of the present state of the art.[36] The positions that have already been taken in the literary and artistic field thus determine the room for new positions and new impulses for the creation of literary and artistic works. In other words, all taken positions predetermine the room available for cultural follow-on innovation.[37]

For an author seeking to formulate a new literary or artistic position in the light of a position reflected in a particular pre-existing work, this has far-reaching consequences. If the work is not available for this purpose, the envisaged cultural innovation step will simply not take place. Hence, *every* pre-existing literary or artistic position that is not available for cultural follow-on innovation reduces the range of options which later generations of authors have at their disposal to find and formulate new positions. It can thus be said that every literary and artistic work that is unavailable because of the abuse of a dominant position on the market for literary and artistic works reduces the resources available for cultural follow-on innovation and, potentially, thwarts the evolution of a new work.

2.3 Resulting Concept of Relevant Market

Practically speaking, this insight need not lead to the conclusion that, by definition, every literary or artistic work is non-substitutable and constitutes a relevant market of its own when it comes to the assessment of market dominance. By contrast, an individual work can only be deemed a separate market if it is clear, from the outset, that the work will be indispensable for the creation of a particular new work.[38] Considering the creative process leading to a new work, however, this focus on a particular pre-existing work is likely to arise only at the final stage of making the new work. As long as an author is in the preparatory phase of exploring sources of inspiration to identify a potential catalyst that could serve as a basis for the creation of a new work, it is crucial to have access to a broad repertoire of works that may potentially offer the required creative stimulus.

Hence, the creative process remains "speculative and unreliable" at least to some extent. Nonetheless, the outlined production perspective allows a more concrete delineation of the relevant market. Taking the needs of a secondary creator as a starting point instead of aligning the inquiry with the consumption patterns and preferences of the end consumer, the relevant market can be described as the pool of works that might function as a source of inspiration for

[35] Bourdieu 1992/1999, 370.
[36] Bourdieu 1992/1999, 372 and 379-380.
[37] For examples in the field of literature and music, see Bourdieu 1992/1999, 379-384.
[38] Reference to "single source" situation, as described by Hilty.

the particular type of literature or art of the secondary author concerned: jazz music in the case of a jazz composer, scientific publications in the case of an academic writer, comic books in the case of a comic-strip artist, or horror movies in the case of a director in this film genre. This is not to say that artists only look for inspiration in their own field of creativity. By contrast, they may have a particular interest in other disciplines. The potential contribution of sources of inspiration outside their own discipline, however, does not seem concrete and foreseeable enough to justify their inclusion in the determination of the relevant market. This is different in the case of pre-existing works in the same field of literary or artistic production. A contribution to the creation of a new work belonging to the same discipline seems much more likely. Apart from mere inspiration, this contribution may consist of an example of a particular technique or style. Within the relevant field of creativity, each individual repertoire of works can then be deemed non-substitutable because it is not foreseeable which collection of pre-existing works contains the required creative input for the creation of a new work.

Non-substitutability is thus to be assumed with regard to all repertoires of creative sources that could potentially become important for the creative activities of an individual author in a particular field of literature or art. Apart from the exceptional case where an individual work appears non-substitutable from the outset, each collection of potential sources of inspiration thus forms an individual relevant market. Each collection can be deemed non-substitutable from the perspective of the secondary author.

This approach to the identification of the market relevant to the dominance analysis is not entirely new. In *Candover / Cinven / Bertelsmann-Springer*, the European Commission came close to the outlined approach by explaining:

> From a demand-side point of view, it is rare that two different publications be viewed as perfect substitutes. There usually are differences in the coverage, comprehensiveness and content provided by two different publications. From the point of view of functional interchangeability, two different publications could hardly be regarded as substitutable by the end-users, the readers. This applies to publications pertaining to different areas of professional publishing and addressed to different customer groups as well as within professional categories. Therefore, Consumers will rarely substitute one publication for another in reaction to their relative prices. In this case, a strict demand approach would lead to the definition of a multitude of relevant markets of imprecise boundaries and small dimensions. This would not allow to properly assess the competitive relations between the different publishers and the impact of the notified merger on competition.[39]

This statement points in the direction of distinguishing between various, relatively small markets – potentially even distinguishing between markets for individual works. Given this fragmentation of the reference point for the assessment of market dominance, the Commission rejected this approach in *Candover / Cinven / Bertelsmann-Springer*. It feared that, at least in the context of merger control, the "multitude of relevant markets" would not allow an

[39] European Commission, 29 July 2003, COMP/M.3197, Candover/Cinven/Bertelsmann-Springer, para. 13.

appropriate appreciation of market power. Preference was therefore given to an analysis based on supply-side considerations.[40]

3. Refusal to License

In *Candover / Cinven / Bertelsmann-Springer*, this rejection of the demand-side approach seemed understandable. In fact, supply-side factors, such as the aforementioned criteria of a particular expertise, an established reputation, long-standing relations with authors, knowledge of the customer base, and access to sales channels and customers directly, may allow a better assessment of the potential corrosive effect of a merger.[41] However, the same caution seems unnecessary in other cases, such as a refusal to license. When it comes to the question whether a refusal to license amounts to an abuse of a dominant position in the marketplace, the focus on each individual repertoire in a given area of literary and artistic creativity can pave the way for an improvement of the overall information infrastructure that is available for secondary authors and cultural follow-on innovation.

3.1 Special Responsibility as a Starting Point

To achieve this result, the special responsibility of the right holder vis-à-vis the dominated market can serve as a useful starting point. Matthias Lamping described this responsibility as follows:

> The mere fact that there are no or at least no substantial competitors does not oblige the monopolist to create competition at the expense of its well-acquired market position. However, despite the lack of actual competition, the dominant company will be expected to behave as if it were operating in a perfectly competitive market environment. This includes not only its general responsibility towards satisfying market needs but also its pricing and innovation behaviour. If not only competition by imitation but also competition by substitution is eliminated, as is the case where an intellectual property right constitutes an indispensable facility, it follows that the right holder must either himself exploit the market opportunities protected by the intellectual property right or enable others to do so. If he fails on both ends, competition law must intervene.[42]

When each individual repertoire of literary and artistic works is seen as a non-substitutable, indispensable facility, this special responsibility thus imposes the obligation on the right holder to offer sufficient access to the repertoire for the purpose of productive re-use: the right holder must either himself exploit the market opportunity to offer an information infrastructure that allows secondary authors to study the pre-existing repertoire and find sources of inspiration for the creation of a new work, or enable others to do so and develop appropriate information portals.

To escape the verdict of an abuse of dominant position, the right holder is thus bound to refrain from behaviour that blocks access to the non-substitutable repertoire at issue. As a

[40] European Commission, 29 July 2003, COMP/M.3197, Candover/Cinven/Bertelsmann-Springer, para. 14.
[41] European Commission, 29 July 2003, COMP/M.3197, Candover/Cinven/Bertelsmann-Springer, para. 14-15; European Commission, 15 February 1999, IV/M.1377, Bertelsmann/Wissenschaftsverlag Springer, para. 9-12.
[42] Lamping 2015, 133; Conde Gallego 2006, 27-28; Drexl 2004, 806-807.

sword of Damocles, the assumption of special responsibility following from the copyright holder's dominant position can have the effect of spurring investment in modern access and supply tools. In case of reluctance to support the development of a modern information infrastructure, the right holder would have to fear that competition law will intervene and pave the way for a broader dissemination of the repertoire.

3.2 Support of Content Aggregation Services

More concretely, the special responsibility following from the identification of individual collections of works as relevant markets for the assessment of market dominance implies an obligation to play an active role in the development of content repositories and aggregation services. This particular aspect of a collection of works constituting an indispensable facility is often underlined with regard to scientific publications. Josef Drexl, for example, refers to library services in this context:

> Yet there are cultural and creative products where one can seriously consider whether a certain product constitutes a proper market. One example of this may be scientific journals, access to which is indispensable both for the author of an article who depends on access to the journal for his academic career and scientific academic libraries and institutes for which the subscription of such "must-have" journals is mandatory.[43]

The above-described dominance analysis based on the needs of secondary authors allows the generalization of this statement: not only in the area of scientific journals but also in other areas of literary and artistic production, it can be assumed that a given repertoire of works that may offer impulses for cultural follow-on innovation is indispensable both for secondary authors and for content repositories and aggregators in the literary and artistic sector concerned.

This broadened obligation to support the activities of content repositories and aggregators can also be placed in the context of the refusal-to-license criteria developed by the Court of Justice. In *IMS Health*, the Court explained that the refusal to grant a licence, even if it was the act of an undertaking holding a dominant position, could not in itself constitute abuse of a dominant position. Only in exceptional circumstances, the exercise of copyright amounted to abusive conduct.[44] Such exceptional circumstances came to the fore where the refusal to grant a licence prevented the emergence of a new product for which there was potential consumer demand, the refusal was not justified by objective considerations, and it was likely to exclude all competition in the secondary market.[45]

3.2.1 New Product Requirement

In general, content repositories and aggregators in the field of literary and artistic works may be described as providers of information platforms that offer an overview of works in a particular area of creativity. They add value by combining as many available repertoires as possible. As a result, they support the activities of secondary authors embarking on the

[43] Drexl 2013, 42; Hilty 2009, 639.
[44] Court of Justice, 29 April 2004, IMS Health, C-418/01, [2004] ECR I-05039, para. 34-35.
[45] Court of Justice, 29 April 2004, IMS Health, C-418/01, [2004] ECR I-05039, para. 38 and operative part.

creation of a new work. They offer unprecedented – and thus "new" – possibilities of browsing and identifying pre-existing works that may contain the required creative input for the envisaged new work. Within this broad understanding of relevant activities, the products of content repositories and the services of content aggregators may range from the provision of direct access to a wide variety of works stemming from different copyright owners, as in the case of libraries, to mere listings and short indications of the contents of works from diverse sources, as in the case of (dedicated) search engines.

Quite clearly, these new products – information repositories and aggregation systems – can function as catalysts for creative processes by bringing pre-existing works to the attention of secondary authors – works that may otherwise have been overlooked. It thus seems safe to assume that there is "potential consumer demand" in the sense of the first condition developed by the Court of Justice in *IMS Health* – at least when "consumer demand" is understood as "secondary author demand" in line with the focus on cultural follow-on innovation underlying the present inquiry. It also seems clear that the emergence of new information repositories and information search engines will often depend on licenses. A library can hardly offer direct access to a wide variety of works stemming from different copyright owners if it cannot obtain the necessary licences. Similarly, a search engine may have difficulty justifying the display of content snippets in the case of literary works, or entire works in the case of artworks, on the basis of copyright limitations, an implied licence or a safe harbour provision. Decisions on image search services illustrate the complexity of the legal framework in which content aggregators may have to operate.[46]

To a certain extent, the situation is comparable with the facts underlying the *Magill* decision of the Court of Justice. At the time of the *Magill* judgment, no comprehensive weekly television guide was available on the market in Ireland or in Northern Ireland. Each television station published a television guide covering exclusively its own programmes and claimed copyright protection for its own weekly programme listings to prevent their reproduction by third parties.[47] Against this background, the Court of Justice confirmed that the application of competition law was legitimate to allow the emergence of a comprehensive weekly television guide which Magill sought to publish.[48]

In this vein, it can be argued that it should be possible to invoke competition law to ensure that copyright owners do not prevent the emergence of rich and diverse information repositories and aggregation systems capable of satisfying the information needs of secondary authors in a given area of literary or artistic creativity. Even if each copyright owner offers a repository or search function in respect of its own repertoire of pre-existing works, secondary authors seeking to find creative source material for a new work would still be deprived of an information platform providing an overview of a wide variety of pre-existing repertoires stemming from different copyright owners.

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[46] Senftleben 2013, 85-91.
[47] Court of Justice, 6 April 1995, "Magill", C-241/91 P and C-242/91 P, [1995] ECR I-743, para. 7.
[48] Court of Justice, 6 April 1995, "Magill", C-241/91 P and C-242/91 P, [1995] ECR I-743, para. 91.

To further the evolution of content repositories and aggregators, it thus makes sense to expose copyright holders to the risk of competition law imposing an obligation to grant a licence. It is to be considered in this context that the underlying concept of "refusal to license" includes not only an outright refusal – general unwillingness to grant a licence – but also the constructive refusal where contractual terms and conditions offered by the right holder are too burdensome to be acceptable. The Damocles sword of a competition law intervention is thus likely to have a desirable, disciplining effect on the licensing practices of copyright owners.

3.2.2 No Objective Justification

The second condition in the test following from *IMS Health* is the absence of an objective justification for the refusal of a licence.[49] Despite the dominant position which a right holder has in respect of a collection of pre-existing literary or artistic works, a refusal to license may be admissible if it serves a legitimate objective that is in the public interest, such as a public health objective or the protection of consumers. A refusal to license is also admissible when it constitutes legitimate business behaviour.[50] This can be understood to prevent an overbroad application of competition law constraints. While the copyright owner may be under an obligation to grant a licence, this does not imply that he must accept whatever terms and conditions the prospective licensee considers appropriate. With regard to search engine services, the case *Innoweb / Wegener*, for instance, sheds light on the outer limits of inroads into exclusive rights which the right holder would have to accept. The case concerned a so-called "meta search engine" bundling offers of second hand cars that could be found on several online sales platforms. Offering this overview of available second hand cars, Innoweb reduced the need to visit the individual source websites, such as Wegener's online database of second hand cars. Nonetheless, Innoweb was reluctant to pay for the use of source data stemming from Wegener's platform.[51] Against this background, the Court of Justice underlined the legitimate interest of the right holder to recoup investment:

> That activity on the part of the operator of a dedicated meta search engine such as that at issue in the main proceedings creates a risk that the database maker will lose income, in particular the income from advertising on his website, thereby depriving that maker of revenue which should have enabled him to redeem the cost of the investment in setting up and operating the database.[52]

If this rule is applied to copyright cases by analogy, the copyright owner thus has a legitimate interest in redeeming the investment made in his repertoire of pre-existing literary and artistic works. The obligation to grant a licence which may result from the application of competition law must not frustrate the business activities of the copyright owner altogether. Hence, there is no obligation to accept a licence not offering a fair remuneration for the investment made by the copyright owner. In a case trespassing this threshold of fair remuneration, the right holder would have an "objective justification" to deny the conclusion of a licensing agreement in spite of his dominant position with regard to a non-substitutable repertoire of works.

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[49] Court of Justice, 29 April 2004, IMS Health, C-418/01, [2004] ECR I-05039, para. 38.
[50] Lamping 2015, 139.
[51] Court of Justice, 19 December 2013, C-202/12, ECLI:EU:C:2013:850, para. 8-14.
[52] Court of Justice, 19 December 2013, C-202/12, ECLI:EU:C:2013:850, para. 41.

3.2.3 Market Leveraging

The final condition in the test following from *IMS Health* raises the question of market leveraging. Asking whether the refusal to license would exclude "all competition in a secondary market",[53] the Court of Justice, on its merits, requires an inquiry into whether the right holder obtains an unjustified competitive advantage because the refusal to license allows him to extend his dominant position to a downstream market that is economically self-contained. The crucial question, then, is whether the market opportunities in the secondary market can still be seen as part of the specific subject matter of the intellectual property at issue, or rather as an incidental by-product of the exclusive rights of the right holder.[54]

At least with regard to content repositories, this is a delicate question. On the one hand, the control over the reproduction and dissemination of literary and artistic material clearly constitutes the very substance of copyright. Insofar as content repositories offer direct access to pre-existing works (as in the case of libraries), the refusal to license, therefore, does not appear as an attempt to exclude competition on a downstream market. The copyright owner does not seek to expand its dominant position to a further, dependent market. By contrast, the refusal to license reflects the aim to keep control over the primary market for the repertoire of works at issue. The copyright owner seeks to prevent a content repository from providing a substitute for his own offer of literary and artistic works.

On the other hand, the development of an information platform offering a rich and diverse overview of available resources for cultural follow-on innovation can also be qualified as a downstream product with added value. The copyright owner can hardly claim that this additional product still belongs to the specific subject-matter of his copyright. Copyright relates to a literary or artistic work as such. It offers an exclusive right to exert control over the use of this specific cultural creation. This does not imply control over related information platforms which integrate repertoires from diverse sources and offer browsing and search functions with regard to individual works enjoying copyright protection. Viewed from this perspective, the possibility to integrate a wide variety of works in an information repository or search system can be regarded as a by-product of literary and artistic works. It is not the very substance of the intellectual property concerned. The literary and artistic works included in a content repository or aggregation system are pre-products and building blocks. The more complex repository or aggregation system, however, has individual characteristics and distinct functions which constitute a separate market.[55]

With regard to this secondary market for information platforms, the additional question arises as to whether the copyright owner is capable of excluding "all competition". The answer to this question depends on the degree of content density that is taken as a reference point. If it is deemed sufficient to enable competition between information platforms merely reflecting the works available in some selected repertoires of different right holders, it may be said that the refusal to grant a licence by only one right holder would not exclude competition in the

[53] Court of Justice, 29 April 2004, IMS Health, C-418/01, [2004] ECR I-05039, para. 38 and operative part.
[54] Lamping 2015, 133-134; Peifer 2006, 7; Dreier 2001, 53, 60, 70-71.
[55] Conde Gallego 2006, 20; Höppner 2005, 462-463.

market for content aggregators altogether. It remains possible to compete with regard to repertoires of other right holders who are willing to enter into a licensing agreement. As a result, the control of licensing practices on the basis of competition law would become a toothless tiger: each owner of a repertoire of literary and artistic works could escape more thorough scrutiny in the light of competition law standards by arguing that, despite his refusal to license, competition remains possible with regard to repertoires of other right holders who may be willing to make their content available.

Hence, it is more convincing to take as a reference point the aim to establish information platforms which provide an overview of all available repertoires of literary and artistic works that may be relevant to follow-on innovation in a particular area of cultural creativity. Competition between providers of these platforms would then be possible at the level of the individual user experience, depending on the classification and arrangement of literary and artistic works, the ease of operation, the availability of support tools, the efficiency of the search algorithm etc. A competitive advantage could only be obtained by offering a particularly user-friendly system that further enhances the added value for users.

3.3 Contribution to Follow-On Innovation

In the light of the criteria set forth by the Court of Justice in *IMS Health*, it is thus possible to arrive at the application of competition law to prevent a copyright owner from refusing to grant a licence for the inclusion of his repertoire of literary and artistic works in a content repository or aggregation system. The application of the *IMS Health* criteria, however, raises difficult questions. In particular, the criterion of market leveraging may cast doubt upon the applicability of competition law. If a content aggregator offers direct access to literary and artistic works, the conclusion seems inescapable that the primary, upstream market for literary and artistic works is affected even though the content aggregator adds features, such as search and browsing functions, that constitute a secondary, downstream element.

Nonetheless, this amalgam of upstream and downstream features need not pose an insurmountable hurdle. The discussed tests developed by the Court of Justice – new product, market leveraging, absence of objective justification – are only one set of criteria that evolved in jurisprudence. In fact, the Court's assumption that these tests must be applied cumulatively has been criticized heavily in literature.[56] Against this background, the *Microsoft* decision of the General Court is often regarded as a departure from the dogma of cumulative application in the EU.[57] Following a relaxed standard of independent application of the new product and market leveraging criteria, market leveraging only constitutes one factor in the analysis. If this factor does not weigh clearly in favour of exercising competition law control, an exceptional circumstance justifying the invocation of competition law may still be based on the fact that the refusal to license frustrates the evolution of a new product for which there is potential demand.[58]

[56] Heinemann 2006, 713; Conde Gallego 2006, 25-26.
[57] Lamping 2015, 135-136; Drexl 2013, 122.
[58] Lamping 2015, 135-136; Höppner 2005, 463-464.

Apart from this option to apply the *IMS Health* tests as independent factors, it is also possible to embark on a re-conceptualization of the relationship between copyright protection and competition law control. The starting point for this is the above-described, overarching function of the copyright system to ensure the incessant renewal of the cultural landscape. As already explained above, copyright law can be seen as an inspiration system. It is the core function of copyright law to further the continuous process of the creation of fresh, original human expression on the basis of pre-existing sources of inspiration.

Following this functional approach to copyright protection, it is consistent to allow the application of competition law in cases where the exercise of copyright would block the evolution of a market for products that have a conducive effect on cultural follow-on innovation. As Beatriz Conde Gallego argued, an intervention by virtue of competition law need not always be confined to a refusal to license that concerns a downstream market. In the absence of competition by substitution, it can also be legitimate to employ competition law as a means of enabling certain forms of competition by imitation.[59] In particular, such an extension of competition control seems appropriate when the copyright owner's refusal to license is contrary to the overarching goal of copyright law to stimulate cultural follow-on innovation.[60]

Even if a content repository offers direct access to copyrighted material and thus develops activities on the primary market for literary and artistic work, it may thus still be possible to assert competition law against the copyright owner's refusal to license. This is plausible at least when the overarching function of copyright to stimulate cultural follow-on innovation is better served by obliging the right holder to grant a licence. If the compulsory licensing paves the way for the development of new, value-added products[61] that can have a positive effect on the creation of new works, the competition law intervention appears as a justified correction of copyright exclusivity.

4. Conclusion

In sum, it is thus conceivable to enhance the mitigating effect of competition law on restrictive licensing practices of copyright owners. Competition law could become an external balancing tool that limits the market power of copyright owners with regard to content repositories, such as libraries, and aggregation systems, such as (dedicated) search engines. To attain this goal, the identification of the relevant market underlying the analysis would have to be aligned with the needs of productive users looking for sources of inspiration instead of taking mere consumptive use as a reference point. Considering the information needs of secondary authors, each individual repertoire of works in a given sector of creativity can be seen as an indispensable facility.

[59] Conde Gallego 2006, 27.
[60] Conde Gallego 2006, 28.
[61] With regard to this particular form of compulsory licensing, see Hilty/Senftleben 2015, 330-337.

An obligation to grant a licence for the integration of a non-substitutable repertoire of works in a content repository or aggregation system can be inferred from the consideration that, otherwise, the copyright owner could thwart the emergence of a new, more advanced information product for which there is potential demand. The added value of content repositories and aggregation systems for secondary authors would be lost. The denial of a licence would also be in conflict with the overarching objective of copyright law to further cultural follow-on innovation. It may be added that search and browsing functions of content repositories and aggregators form a downstream market to which the copyright owner could expand his market dominance if control on the basis of competition law were unavailable.

The application of competition law as a safeguard against overly restrictive licensing practices in the area of content repositories and aggregation systems would also lead to a more robust arsenal of external balancing tools that can be used to prevent dysfunctional effects of copyright protection. Human rights and competition law would become complementary instruments to ensure a well-functioning information infrastructure: while the fundamental guarantee of freedom of expression can be invoked to exempt the use of protected material as building blocks for a new literary or artistic work, the scrutiny based on competition law prevents copyright owners from developing licensing practices that impede the development of rich and diverse information portals. Hence, competition law ensures the availability of appropriate information resources in the preliminary phase of studying pre-existing works and identifying potential sources of inspiration that may ultimately lead to a new literary or artistic production.[62]

However, it is to be pointed out that the present inquiry focussed on the possibility to enhance the impact of competition law on licensing practices of copyright owners. If the application of competition law is aligned with copyright objectives, it becomes possible to create additional room for compulsory licensing in favour of content repositories and aggregators. This does not mean, however, that content repositories and aggregators should not be subject to the same scrutiny in the light of competition law once they have acquired a dominant position on the market for information portals offering an overview of a wide variety of work repertoires from different copyright owners.

[62] For an in-depth analysis of a potential interplay of human rights and competition law, see Mylly 2009, 431-464 (with particular reference to copyright at 452-454).

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