

Beyond “Essential Facilities”: Innovation, Intellectual Property and Competition Policy across the Atlantic

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Abstract

In September 2007, the Court of First Instance (CFI) affirmed the European Commission’s 2004 decision finding that Microsoft has abused its dominant position by refusing to supply interoperability information to its competitors, and affirmed that in addition to the imposition of a fine, forcing Microsoft to disclose such information is an appropriate remedy even if this information is protected by intellectual property rights.¹ In this decision the CFI continued a line drawn in several previous decisions, which found that a refusal to license intellectual property may amount to an abuse of a dominant position in violation of the EU competition law, and that a duty to license such intellectual property may be an appropriate remedy. Doctrinally, these decisions developed and implemented the “Essential Facility Doctrine”.² Although controversial in the EU itself, these decisions seem to be even more controversial in the eyes of many American antitrust scholars and commentators. Generally, these decisions have been seen as undercutting the very basic principle underlying IP rights: the right to exclude others.³ Thus, in response to the decision in the *Microsoft* case, the US Assistant Attorney General for Antitrust has taken the unusual step of issuing a same-day press release criticizing the decision of the CFI, expressing the concern that “the standard applied ... by the CFI, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.”⁴ For some critics, the decisions signal an unhealthy European appetite for interventionist regulation and disrespect for the fundamental principles of a free economy. For others, the decisions reflect a short-sighted approach that favours short-term benefits of competition over the long-term benefits of innovation. Under all of these accounts, serious divergence, perhaps a chasm, appears to exist between the EU and the US. According to this view, the US supposedly protects IP rights more vigorously, does not exhibit the same regulatory appetite as the EU, and embraces a better long-term pro-IP and pro-innovation approach. Even commentators who approve of applying the

¹ Case T-201/04 *Microsoft v. Commission* (17 Sept. 2007).

² See generally, John T. Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law*, in *Antitrust, Patents and Copyright: EU and US Perspectives* 56 (François Lévêque & Howard Shelanski eds. 2005).

³ See e.g., Herbert Hovenkamp et al., *Unilateral Refusals to License*, 2 J. Competition L. & Econ. 1, 12 (2006).

⁴ Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision, available at http://www.usdoj.gov/atr/public/press_releases/2007/226070.htm.

essential facilities doctrine to intellectual property in appropriate cases share the view that on this point the EU and the US clearly diverge.⁵

While these commentators have correctly identified a doctrinal difference in the way the essential facility doctrine is applied on both sides of the Atlantic, this paper argues that this perceived divergence between the two jurisdictions is quite simplistic. It overlooks various other facets of convergence and divergence, the understanding of which is no less important for evaluating how each of the jurisdictions effectively treats the interface between competition law and intellectual property. For example, the focus on essential facility doctrine ignores the fact that in many of the cases applying the doctrine, the IP rights covered subject matter that would not be protected by IP rights in the US in the first place. Naturally, this complicates attempts to determine which jurisdiction protects intellectual property rights more strongly. I will demonstrate how US copyright law, more radically than any other copyright system, has traditionally incorporated pro-competition, pro-innovation and pro-compatibility rules that address many of the concerns which EU competition law sporadically attempts to address by applying the essential facilities doctrine.⁶ Thus, for example, the Fair Use defence and its wide and flexible application in the US, the way US courts have applied the distinction between ideas, facts, and expressions, or applied the merger doctrine, all reflect a systematic attempt by US copyright law to prevent the abuse of copyrights to stifle competition and innovation. Moreover, I will suggest that these unique features of US copyright law, together with the prevalence of private antitrust litigation in the US, and coupled with the IP misuse doctrine, represent much more profound divergence, which made the US simultaneously both *less* “respectful” to IP owners’ interests, *more* aggressive in applying antitrust to IP-related conduct, but probably also *more* conducive to innovation.

Generally, the paper will advance four main arguments, and one hypothesis. It will argue that:

- 1) Focusing only on how antitrust doctrine treats IP rights is at best incomplete and at worst incorrect. Any comparison of the relative strengths of intellectual property protections in different jurisdictions requires consideration not only of those jurisdictions’ antitrust doctrine but also of doctrines internal to intellectual property law which limit IPRs for pro-competitive reasons.
- 2) Focusing principally on copyright protection, this paper argues that American copyright law contains doctrines internal to that regime which limit the scope of copyright protection, often for the purpose of preventing anti-competitive uses of those works, in ways that European copyright laws generally do not. Thus, this paper posits that, even accepting that European competition law places greater constraints on the acceptable use of copyrighted works than does American antitrust law, overall protection for copyrighted works is no stronger in the United States than it is in Europe. To the contrary, copyright protection may in some respects be weaker in the United States than it is in Europe, particularly in those circumstances when stronger copyright protection could create anti-competitive effects.

⁵ François Lévêque, *Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case*, 26 *World Competition* 71 (2005), at 72; Eleanor M. Fox, *A Tale of Two Jurisdictions and an Orphan Case: Antitrust, Intellectual Property, and Refusals to Deal*, 28 *Fordham Int'l L. J.* 952 952 (2005).

⁶ For an informative treatment on such various US doctrines see Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, *Wm. & Mary L. Rev.* 483 (2006).

- 3) In addition to understanding the substantive rules and how they respond to each other, it is also crucial to understand how they work within a larger legal and institutional matrix. It is also important to grasp how the substantive IP and antitrust rules interact with other procedural and evidentiary rules, how they frame and are framed by the available remedies, and how they are situated within other aspects of institutional design, such as the division of rule-making authority between state and federal courts in the US, or between member states and EU institutions in Europe. Thus, for example, the wide availability of private antitrust lawsuits, treble damages and active antitrust bar in the US, effectively create a more significant antitrust check on IP related conduct than that available in the EU, where the enforcement of competition law is predominantly public.
- 4) The combination of all of these considerations reveals that overall, driven by pro-innovation and pro-competition impetus, the US system has tended to circumscribe copyrights more closely and to subject them to antitrust law scrutiny more aggressively than the EU. Effectively, the US has adopted “less is more” approach to copyright.
- 5) Finally, I will raise the hypothesis that this “less is more” approach is one of the factors that have made the US more conducive to innovation than any other jurisdiction in the world.

If this observation is correct, its insights may be useful for the EU and other countries in choosing the optimal rules relating to the IP/competition interface. It may also be useful for the US in evaluating whether it is interested in adhering to or moving away from its historical course.