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Case Commentary

A Rose Is A Rose Is . . . : The Thorny Case of Morris Communications Corp. v. Professional Golf Association Tour, Inc.

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When is an antitrust case not just an antitrust case? In *Morris Communications Corp. v. Professional Golf Association Tour, Inc.*, the United States Court of Appeals for the Eleventh Circuit emphasized: "[T]his case is not about copyright law, the Constitution, the First Amendment, or freedom of the press in news reporting. This case is a straightforward antitrust case. . . ."[1]

By stressing this point, the court ignored important policy issues at the intersection of intellectual property and competition policy. As a result, the *Morris* decision creates troubling precedent for antitrust and intellectual property law and puts US law at odds with developments in the European Union.

The Hot Facts[2]

The *Morris* case deals with information, specifically real time golf scores in tournaments sponsored and organized by the Professional Golf Association (PGA),

1 364 F.3d 1288, 1292-1293 (11)th Cir. 2004).
2 The facts are summarized from the district court opinion, 235 F. Supp. 2d. 1269 (M.D. Fla. 2002).

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a private organization in the United States. Since golf is played over a vast course, the collection and reporting of real time scores pose a challenge, aggravated by the fact that PGA rules prohibit cell phones and other electronic forms of communication during game play. To resolve this dilemma, the PGA in the early 1980's created the Real-Time Scoring System (RTSS), which consists of a group of volunteer workers that follow the players during the game, writing down the scores at the end of each green and then relaying the scores via hand-held wireless radios. Because of the large number of players in a tournament, the scores are trickled out to the public through posted scoreboards around the greens and eventually on the Internet at the PGA website.

News gathering organizations, both traditional and web-based, like to report the scores as soon as possible, especial when a local hero may be playing in the tournament. The PGA controls the access of news organizations and the dissemination of the scores by permitting only credentialed news organizations to have access to the collected scores. Prior to 1999, any credential news organization could view the scores as they were gathered through the RTSS and retransmit them directly through their Internet servers. In 1999, the PGA entered into an exclusive arrangement with USA Today for the retransmission of the scores. Other news organizations were subject to the Online Service Regulations (OLSR), enacted in 1999, which stated that scoring information could appear on a non-PGA related website either no sooner than 30 minutes after the actual occurrence of the shots or when the information became legally available as public information. In 2000, the OLSR were amended to include a prohibition against any distribution or transfer of scoring information to any party other than a credentialed news organization without the written consent of PGA.

Morris Communications Corporation (Morris), a corporation from the State of Georgia, publishes several traditional and Internet based newspapers. Prior to 1999, Morris gathered golf scores from RTSS and disseminated them to many local newspapers that sought to report on local heroes playing in PGA tournaments. In 2000, Morris was reprimanded by PGA for selling golf scores to The Denver Post in violation of the OLSR. The PGA consented to Morris' sales on the condition that it obtained the information from the PGA web site rather than through RTSS. Because of the delays in posting scores to the PGA web site, Morris requested that it have access to RTSS information for sale to third parties. The PGA refused stating that Morris could have access to the RTSS only for use by Morris publications under the timing and sale restrictions of the OLSR. Morris subsequently sued the PGA for antitrust violations, claiming that PGA's refusal to deal constituted a monopolization of the market for real-time golf scores.

The Cold Disposition

Morris claimed that the PGA's OLSR constituted monopolization of the market for real- time golf scores under Section Two of the Sherman Act. A monopolization claim is established by showing that the defendant has monopoly power in the relevant market and engaged in "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[3]

Since the PGA had exclusive access to the real-time scores, establishing market power was not an issue. The question was identifying the bad acts which constituted "willful acquisition or maintenance" by PGA of its market power.

Morris argued that PGA had engaged in two bad acts. The first was an intent to monopolize based on *Aspen Skiing v. Aspen Highlands Skiing Company*, a famous US Supreme Court case holding that a monopolist had a duty to cooperate with competitors in certain situations.[4]

The second was control of an essential facilities based on a number of appellate decisions holding that a monopolist cannot deny a competitor access to a facility that was essential to competition.[5]

As a defense to a section two claim, the PGA could present a valid business justification for its acts. The district court found a valid justification in the PGA's interest in recouping its investment in creating the RTSS system for collection and disseminating real time golf scores. Allowing companies like Morris to "free-ride" off these efforts by posting and selling the golf scores undercut the PGA's investment, the district court reasoned. Therefore, the PGA had a valid business justification in adopting and enforcing the OLSR and was not in violation of Section Two of the Sherman Act. The United States Court of Appeals for the Eleventh Circuit affirmed the decision.

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3 United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966).

4 472 U.S. 585 (1985).

5 Although the Supreme Court has not adopted the essential facilities doctrine, several lower federal courts have appealed to the doctrine. For a discussion, see Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)(describing the doctrine but neither endorsing or repudiating it).

Coloring a Carte Blanche

The business justification accepted by the Eleventh Circuit is reminiscent of arguments justifying intellectual property. The court reasoned that the RTSS required extensive investment of resources by the PGA to create, and in order to recoup its investment, the PGA had to limit access by preventing free riding of the real-time golf scores. The high fixed cost, low imitation cost argument that the court enunciated is often the justification for copyright and patent restrictions on imitation and other uses. The problem, however, is that while the RTSS is arguably protectable under patent law, as a process patent, Morris was not copying the mechanism of collecting data, but the data itself. Data, however, are unprotected under copyright and patent law.[6] The troubling result of the Morris decision is that the PGA is able to create a business model to protect something that is in the public domain under intellectual property law.

Usually, the conflict between antitrust and intellectual property entails the intellectual property owner asserting his patents and copyrights as a shield to antitrust. For example, in both the Kodak[7] and Xerox[8] cases, the photocopier company claimed that they could deny access of their machines to independent service providers of photocopying machines in order to protect the patented and copyrighted technologies. Within the United States, the circuits are split on the use of intellectual property as a shield, with the Ninth Circuit not accepting intellectual property as a defense in the Kodak cases, and the Federal Circuit coming very close to creating an antitrust immunity based on intellectual property in the Xerox case. In Morris, by contrast, the PGA does not have a patent or copyright in its product or service, but obtains quasi-intellectual property protection under the court's application of antitrust law. Instead of intellectual property law limiting antitrust, antitrust law is being used to expand the scope of intellectual property law. There are two reasons why we should be suspicious of this move: (1) the expansion conflicts with the Supreme Court's case law on the relationship between antitrust and other federal statutes and (2) the expansion puts US law in conflict with European law. I address each of these and present a simple solution to resolve the dilemma posed by the *Morris* decision.

6 See Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 506 U.S. 984 (1992) (holding that copyright protection in a database does not extend to data); Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that a patent can be obtained for anything under the sun that is manmade except for laws of nature, natural phenomena, and abstract ideas).

7 Image Technical Service, Inc. v. Eastman Kodak Co., 903 F.2d 612 (9)th (Cir. 1990).

8 In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed.Cir. (Kan.) 2000).

First, the use of antitrust law to expand intellectual property is contrary to the analysis of *Verizon Communications v. Trinko*[9], a case that deals with the relationship between antitrust law and another federal statutory scheme, the Telecommunications Act of 1996. The *Trinko* decision was relied upon heavily by the Eleventh Circuit in Morris. In *Trinko*, the Court rejected an antitrust claim brought by a local telephone carrier against Verizon for failure to comply with the interconnection rules of the Telecommunications Act. The plaintiff had argued that Verizon's failure to allow interconnection was an illegal act of monopolization. The Court failed to find a claim, stating that "the Sherman Act . . . does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[10]

What this statement means has been a source of controversy among commentators.[11]

On its face, the Court seems to be saying that the Sherman Act requires judges to defer to monopolists to further the goals of competition, an interpretation at odds with the pro- competition purpose of the Act. A more limited reading of *Trinko*, one consistent with the antitrust laws, would deny judges carte blanche to second guess Congress' decision on how to structure certain industries, such as telecommunications, as monopolies. The problem is that the Eleventh Circuit does second guess Congress' judgments on the scope of the monopoly protection granted under intellectual property laws. By allowing PGA to protect real-time scores using a business justification analogous to that used for intellectual property, the Eleventh Circuit expands the scope of the intellectual property grant to include what Congress exempted: data.

The Eleventh Circuit's expansion of intellectual property to protect data contrasts with the treatment in the European Union particularly in the *Magill*[12] and *IMS*[13] cases. These pair of cases demonstrate an alternative tack to reconciling the tensions between intellectual property and competition policy. The two cases are particularly relevant to an understanding of the Morris case because of their

9 See supra note 5.

10 540 U.S. at 409.

11 See, e.g., Simon Genevaz, Against Immunity for Unilateral Refusals to Deal in Intellectual Property: Why Antitrust Law Should Not Distinguish Between Ip and Other Property Rights, 19 Berkeley Tech. L. J. 741 (2004).

12 *Radio Telefis Eireann and Independent Television Publications Limited (Intellectual Property Owners Inc. intervening) v. The Commission of the European Communities,* (1995) F.S.R. 530 ECJ.

13 IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG [2004] E.C.D.R. 23 ECJ (5th Chamber).

relevance to rights over data.

In Magill, the data at issue was television broadcast schedules and their distribution by television stations to the local newspapers and other media. The distribution of scheduling information was subject to an embargo on the timing and use of the data, much like the contractual restrictions on the real-time golf scores under the OLSR. Magill obtained and published the data in violation of the embargo and was threatened with a suit for copyright infringement. His subsequent challenge of the embargo to the European Commission as a violation of European competition law lead to the imposition of a compulsory license for the use of the scheduling information. The license was upheld by the European Court of Justice, which found the television stations had a de facto monopoly over the information itself and held that the stations' failure to license the information was an abuse of dominant position. The European Court of Justice's 2004 decision in the IMS case strengthens the rights of access to information secured by the Magill decision. In IMS, the ECJ held that the use of brick structure to organize and present pharmaceutical data by two distributors of pharmaceutical data was "indispensable" and that failure to license the data structure was an abuse of dominant position. The ECJ added that the indispensability of a data structure could be shown by reference to the costs and efforts needed to create an alternative structure.

The ECJ's decisions in *Magill* and *IMS* contrast with the decision in *Morris* on the identical issue of the treatment of information as a product. While the ECJ decisions limit the ability of a monopolist to control access to indispensable data, the *Morris* decision allows such monopoly control in order for a company to recoup fixed costs and prevent free riding. The ECJ decisions do not ignore the fixed costs issue, but allow for their recoupment through the use of compulsory licensing. Under United States law, by contrast, compulsory licensing is extraordinary, imposed by courts as a remedial measure in unusual circumstances or if mandated expressly by Congress. As a result, courts like the Eleventh Circuit that are confronted with disputes over monopoly control over data are left with two options: either to find a violation of the antitrust law and permit access or to take the tack in the Morris decision itself and find no violation. The middle ground of compulsory licensing is unavailable in the United States, except in extraordinary cases or in the event Congress creates a special remedy.

Nonetheless, the ECJ cases provide some guidance for how to analyze cases like *Morris*. The source of the problem in Morris is the deference the court gives to the business justification offered by the monopolist. Specifically, the court allows the monopolist to use intellectual property rationale to expand the scope of copyright and patent law beyond what Congress and the Constitution allows. To avoid this conflict, the court should have carefully scrutinized the business justification presented by the defendant. In the IMS case, for example, the ECJ requires scrutiny of the indispensability of the information structure through consideration of the costs of creating alternatives to the structure. In Morris, by analogy, the court should have required the defendant to demonstrate a closer connection between the business justification offered and the actual business plan used. Under my proposal, if the business plan that the PGA used allowed it to recoup more than its fixed costs or to earn, what economists call, extra-normal rents through its limitations on access to data, then the court would show less deference to the business justification. Short of Congress acting decisively to limit the misuses of antitrust law in cases like Morris, my proposal will work to properly balance intellectual property and competition policy within the current framework for antitrust analysis in the United States.

Conclusion

Contrary to the Eleventh Circuit's assessment, the dispute in *Morris* is not just "a straightforward antitrust case." By reducing the case to a simple matter of antitrust law, the court upsets the balance between intellectual property and competition policy in favor of the former. More troublesome is the expansion of intellectual property rights beyond the scope of copyright and patent through the court's application of the business justification doctrine. Less deference to the business justification of a monopolist, particularly one of data, would help to avoid the nettlesome problem created by the Eleventh Circuit. Sometimes an antitrust case is not just an antitrust case, especially when intellectual property is involved.