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15

Copyright and Content Aggregation: Competition Law as an Engine of Licenses

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Introduction

Competition law can support the creative work of authors and the constant evolution of new literary and artistic works by facilitating the inclusion of a broad spectrum of existing works in digital content repositories and content aggregation services. The term 'aggregator' refers to a party, such as a (dedicated) search engine, which provides an overview of available resources – including literary and artistic works – together with a short indication of contents and a link to the primary source. A 'repository', by contrast, holds information resources, such as literary and artistic works, and makes them available from its own server. A library, for example, could be qualified as a content repository in this sense. The focus is thus on digital content services 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.[1]

In this regard, competition law may have a central role to play in the evolution of licensing practices for the digital use of copyrighted material. It could ensure broader access to literary and artistic works by limiting the market power of copyright owners vis-à-vis content repositories and aggregators, i.e. libraries and search engines. Broader access to the

* This chapter is a slightly modified version of earlier work that has already been published. See Martin Senftleben, 'Impacts of Competition Law: Monolithic Copyright, Market Power and Market Definition', in K.-C. Liu and R.M. Hilty (eds), *Remuneration of Copyright Owners – Regulatory Challenges of New Business Models* (Springer 2017), pp. 257–278. Helpful comments from Antony Taubman and Hannu Wager are gratefully acknowledged.

[1] See the analysis of research on the social psychology of creativity; J.E. Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain', in L. Guibault and P.B. Hugenholtz (eds), *The Future of the Public Domain – Identifying the Commons in Information Law* (Kluwer Law International, 2006), pp. 154–155.

cultural landscape, in turn, could support the creation of new works as well as offer secondary authors the opportunity to use a wider spectrum of pre-existing literary and artistic expressions as sources of inspiration and building blocks for their own derivative works. Competition law could thus contribute substantially to the unlocking and renewal of the cultural landscape in the digital environment.

Against this background, the following analysis explores the maximum impact which competition law could have on licensing agreements between the creative industry and providers of content repositories and content aggregation services. It is a thought experiment raising the question 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 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 the former in line with the objectives of the latter.

To lay groundwork for this analysis, it is important to clarify the objectives of the copyright system that serve as a reference point for the discussion of competition law instruments. This reference point is the insight that copyright law, by its design and conception, is a cyclic inspiration system. It is the core function of copyright law to further the incessant creation process of fresh, original human expression on the basis of pre-existing sources of inspiration. The author's essential trait is the ability to find new ways of individual expression in a given cultural environment. For this purpose, the author extracts sources of inspiration and building blocks for new cultural creations from existing expressions, forms and traditions.[2] As Jessica Litman pointed out:

> The very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all

[2] Ibid.

> engage in the process of adapting, transforming, and recombining what is already 'out there' in some other form. This is not parasitism: it is the essence of authorship.[3]

Hence, the exploration of the potential impact of competition law on licensing practices in the field of digital content services concerns not only consumptive use but also – and in particular – productive use (the study, remix and reuse of existing, protected material for the purpose of creating fresh literary and artistic works). Given the dependence of new acts of creation on access to existing works, the whole process of incessant renewal of the cultural landscape – and the pace of this process – depends on appropriate legal solutions that foster the evolution of information products and services that offer users, including secondary authors seeking to create new works, the most advanced search technology and the broadest range of information resources.

The particular importance of access to rich and diverse information for cultural follow-on innovation clearly comes to the fore, for instance, in Pierre Bourdieu's sociological analysis of the process of creation.[4] According to Bourdieu, each new generation of authors must first 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.[5] Therefore, a rich and diverse information infrastructure is not only crucial to access to knowledge in a general sense. It is also essential to the maintenance of the cyclic process of cultural innovation. As internet users in general, secondary authors depend on data sorting, evaluation and enrichment services to cope with the diversity of online information.

The increasing need for content repositories and content aggregation services, however, challenges existing business models and changes the

[3] Jessica Litman, 'The Public Domain' (1990) *Emory Law Journal*, 39: 966–967.

[4] Martin Senftleben and Lotte Anemaet, 'Het verleidelijke gezang van een Griekse Sirene – Auteursrecht in het licht van Bourdieus sociologische analyse van het literaire en artistieke veld' (2015)*Tijdschrift voor auteurs-, media- en informatierecht*, 39(1): 1–8.

[5] Pierre Bourdieu, *Die Regeln der Kunst. Genese und Struktur des literarischen Feldes* (Suhrkamp, 1999), p. 385. French original: Les règles de l'art. Genèse et structure du champ littéraire (Éditions du Seuil, 1992).

landscape of the incumbent creative industry, such as the publishing industry.[6] With the emergence of the internet, societal demand for value-added information products and services of content repositories and aggregators has increased considerably.[7] Owners of large copyright portfolios – the traditional creative industries – have to cope with content-related services of new entrants, such as search engines and social media.[8] The availability of these services increases the competitive rivalry in the market and changes the competition climate. Traditional creative industries, such as book and music publishers, phonogram and film producers, can no longer play the role of an indispensable intermediary offering access to information. Instead, they must compete with content repositories and content aggregators, and add particular value to their own offer of information in order to attract users who are looking not only for individual information items, but also for well-functioning and user-friendly search functionality and tailor-made information offers.

[6] In this regard, see in particular the current debate in EU copyright law about the grant of a new neighbouring right for press publishers with regard to the digital use of their publications 'to ensure quality journalism and citizens' access to information'. As to the underlying legislative proposed, see European Commission 2016, Article 11(1) and Recital 31. For (predominantly critical) comments, see Martin Senftleben, Maximilain Kerk, Miriam Buiten and Klaus Heine, 'New Rights or New Business Models? An Inquiry Into the Future of Publishing in the Digital Era' (2017) *International Review of Intellectual Property and Competition Law*, 48: 538–561; Mireille Van Eechoud, 'A Publisher's Intellectual Property Right – Implications for Freedom of Expression, Authors and Open Content Policies' (2017) Study conducted on commission from OpenForum Europe, Amsterdam: Institute for Information Law; Alexander Peukert, 'An EU Related Right for Press Publishers Concerning Digital Uses – A Legal Analysis' (2016) *Faculty of Law Research Paper No. 22/2016*, Frankfurt/Main: Goethe University Frankfurt; Reto M. Hilty, Kaya Köklü and Valentina Moscon, 'Position Statement of the Max Planck Institute for Innovation and Competition on the "Public consultation on the role of publishers in the copyright value chain"' (2016). *Max Planck Institute for Innovation and Competition*. Available at: www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/MPI_Position_ statement_15_6_2016_def.pdf; Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, 'Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law' (2016) *Strasbourg: Centre for International Intellectual Property Studies*.

[7] Martin Senftleben, Maximilain Kerk, Miriam Buiten and Klaus Heine, 'New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era' (2017) *International Review of Intellectual Property and Competition Law*, 48: 539–540.

[8] Martin Senftleben, Maximilain Kerk, Miriam Buiten and Klaus Heine, *From Books to Content Platforms – New Business Models in the Dutch Publishing Sector* (2016) Amsterdam: Centre for Law and Internet, Vrije Universiteit Amsterdam 19–36. Available at: ssrn.com/abstract=2904116.

Given this fierce competition, the incumbent creative industry may succumb to the temptation to use copyright in books, articles, music, films and photos – indispensable sources of inspiration for new literary and artistic works – as a tool to impede the evolution of the best-functioning and most user-friendly data sorting, evaluation, enrichment and presentation systems. Refusing to provide licences for copyrighted content may hamper the development of an information infrastructure that offers both: the most advanced search and customization technology, and the broadest spectrum of information resources.

To some extent, it may be the task of competition law to serve as an external balancing tool that polices the way in which a copyright owner exercises control over the supply of information by content repositories and aggregators. This does not mean that competition law should erode the exclusive right to copy and disseminate works. 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.

A central hurdle to be surmounted in this context is the traditional market definition used in competition law. As long as the assessment of market power is based on substitutability from the perspective of consumers enjoying a literary or artistic work (consumptive use), copyright to an individual work – or even a portfolio of works – will hardly ever be sufficient to assume a dominant position that could give rise to competition scrutiny. By contrast, an individual work or portfolio of works is not substitutable for a secondary author who looks for sources of inspiration and building blocks for new works (productive use). An analysis based on productive use by secondary authors thus allows a much wider application of competition law instruments to exercise control over licensing practices vis-à-vis content repositories and aggregators.

The remainder of the chapter is organized as follows. The first section traces the conceptual contours of the aforementioned alternative approach, while paving the way for an examination of the potential impact of competition law on licensing practices in the following section. The last section, drawing conclusions, will show that competition law, indeed, could constitute an important external balancing tool in the field of content repositories and content aggregation services.

Market Definition

A substantial obstacle to a broader application of competition law in a copyright context is the need to establish that the copyright owner has indeed market power, allowing the erosion of competitive market structures. In the European Union (EU) legislation (which serves as a reference point for the following examination), 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.[9]

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.[10]

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.

Traditional Focus on Consumptive Use

According to the traditional definition used in EU competition law cases, the relevant product market underlying the investigation comprises 'all those products and/or services which are regarded as interchangeable

[9] Article 102 of the Treaty on the Functioning of the European Union (TFEU). Available at: eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[10] Case C-85/76, Hoffmann-La Roche *v.* Commission [1979] ECR 461, paragraph 38.

or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.[11] 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.[12]

In addition to demand-side substitutability, supply-side factors may be taken into account.[13] 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.[14] 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'.[15] 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.[16] 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.

[11] European Commission, 'Commission Notice on the definition of the relevant market for the purposes of Community competition law' (1997) Official Journal No. C 372, paragraph 7. Available at: eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1997.372.01.0005.01.ENG.

[12] Ibid., para. 13.

[13] Ibid., para. 20.

[14] See Commision's decision in COMP/M.3197, *Candover/Cinven/BertelsmannSpringer* (2003) para. 14–15. Available at: ec.europa.eu/competition/mergers/cases/decisions/m3197_en.pdf; Commission Decision IV/M.1377, *Bertelsmann/Wissenschaftsverlag/Springer* (1999), paragraphss 9–12. Available at: eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999M1377&from=DE.

[15] European Commission, above note 11, paragraph 20.

[16] Reto M. Hilty, 'Renaissance der Zwangslizenzen im Urheberrecht? – Gedanken zu Ungereimtheiten auf der urheberrechtlichen Wertschöpfungskette' (2009) *Gewerblicher Rechtsschutz und Urheberrecht*, 111(7): 639.

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.[17]

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, both a considerable degree of substitutability and a very limited degree of substitutability are 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 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'.[18] 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.

[17] Josef Drexl, 'Copyright, Competition and Development' (2013) *Report by the Max Planck Institute for Intellectual Property and Competition Law* at 75. Available at: www.wipo.int/ip-competition/en/.

[18] European Commission, above note 11, paragraph 41.

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.

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 about copyright as an engine of cyclic cultural innovation – 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. As already explained in the previous section, copyright law is a cyclic inspiration system furthering the incessant process of creation on the basis of pre-existing sources of inspiration.[19] State-of-the-art content repositories and content aggregation services are likely to support this artistic work and contribute to the constant evolution of new literary and artistic material.

From an economic perspective, the resulting need for appropriate licensing schemes can be explained as follows: on 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[20] and non-excludability in use,[21] they are unlikely to be created in sufficient quantities in the absence of appropriate incentives.[22]

[19] See the analysis of research on the social psychology of creativity by Cohen, above note 1 at 154–155.

[20] Use by one actor does not restrict the ability of another actor to benefit as well.

[21] Unauthorized parties ('free riders') cannot be prevented from use.

[22] William Fisher, 'Reconstructing the Fair Use Doctrine' (1988) *Harvard Law Review*, 101: 1700; William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) *Journal of Legal Studies*, 18: 326; Neil Netanel, *Copyright's Paradox* (Oxford University Press, 2008), pp. 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;

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 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.[23]

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.[24]

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 must be factored into the equation as well.[25] This detriment to users becomes relevant to authors when they embark on the creation of a new work and require access to pre-existing

Cf. Richard Posner, 'Intellectual Property: The Law and Economics Approach' (2005) *Journal of Economic Perspectives*, 19:58–59; Steve P. Calandrillo, 'An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System' (1998) *Fordham Intellectual Property Media & Entertainment Law Journal*, 9: 301.

[23] Richard Posner, 'Intellectual Property: The Law and Economics Approach' (2005) *Journal of Economic Perspectives*, 19: 57; Guy Pessach, 'Copyright Law as a Silencing Restriction on Non-Infringing Materials – Unveiling the Real Scope of Copyright's Diversity Externalities' (2003) *Southern California Law Review*, 76: 1077. Available at: dx.doi.org/10.2139/ssrn.354420; Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) *New York University Law Review*, 74: 392–393.

[24] Guy Pessach, 'Copyright Law as a Silencing Restriction on Non-Infringing Materials - Unveiling the Real Scope of Copyright's Diversity Externalities' (2003) *Southern California Law Review*, 76: 1077. Available at: dx.doi.org/10.2139/ssrn.354420.

[25] Lloyd Weinreb, 'Copyright for Functional Expression' (1998) *Harvard Law Review*, 111: 1231; Calandrillo, above note 22 at 304. See in respect of the 'deadweight loss' that results from the grant of exclusive right: Fisher, above note 22, pp. 1700–1702.

works as sources of inspiration and building blocks for their own creativity. It also becomes relevant to content repositories and content aggregators seeking to provide products and services that offer users – including authors turning to the creation of a new work – broad access to the cultural landscape.

In this manner, 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.

Interestingly, this shift to a productive use perspective leads to a much less 'speculative and unreliable'[26] 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.

With regard to this production perspective, Bourdieu's aforementioned sociological analysis of the field of literary and artistic production again offers an important insight: it would be wrong to assume substitutability of literary and artistic works in the context of the production of new works.[27] 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.[28] For a new generation of authors to

[26] Drexl, above note 17 , p. 75.
[27] Bourdieu, above note 5.
[28] Ibid., p. 370.

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.[29] 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.[30]

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.

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.[31] 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.

[29] Ibid., pp. 372 and 379–380.
[30] For examples in the field of literature and music, ibid., pp. 379–384.
[31] Reference to 'single source' situation, as described by Hilty.

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 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*,[32] a case concerning market concentration in the academic and professional publishing sector as a consequence of a

[32] COMP/M.3197, *Candover/Cinven/BertelsmannSpringer*, above note 14.

proposed merger, 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.[33]

This statement points in the direction of distinguishing between various, relatively small markets and 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/BertelsmannSpringer*. It feared that, at least in the context of merger control, the 'multitude of relevant markets' would not allow an appropriate appreciation of market power. Preference was therefore given to an analysis based on supply-side considerations.[34]

Refusal to License

In *Candover/Cinven/BertelsmannSpringer*, 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.[35] 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

[33] Ibid., paragraph 13.
[34] Ibid., paragraph 14.
[35] Ibid., paragraphs 14–15; Commission Decision IV/M.1377, above note 14, paragraphs 9–12.

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.[36]

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.[37]

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 reuse: 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.

[36] See broad discussion about refusal to license as an abuse of market dominance in Matthias Lamping, 'Refusal to Licence as an Abuse of Market Dominance – From Commercial Solvents to Microsoft', in R.M. Hilty and K.-C. Liu (eds), *Compulsory Licensing – Practical Experiences and Ways Forward* (Springer, 2015).

[37] Lamping, above note 36, p. 133; B. Conde Gallego, 'Die Anwendung des kartellrechtlichen Missbrauchsverbots auf "unerlässliche" Immaterialgüterrechte im Lichte der IMS Health-und Standard-Spundfass-Urteile' (2006) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* , 55: 27–28; Josef Drexl, 'Intellectual Property and Antitrust Law: IMS Health and Trinko – Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-To-Deal Cases' (2004) *International Review of Intellectual Property and Competition Law*, 35: 806–807.

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 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.

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.[38]

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*,[39] the Court explained that the refusal to grant a licence, even if it was the act of

[38] Drexl, above note 17, p. 42; Hilty, above note 16, p. 639.
[39] Case C-418/01, IMS Health *v.* NDC Health [2004] ECR I-5039.

an undertaking holding a dominant position, could not in itself constitute abuse of a dominant position. Only in exceptional circumstances did the exercise of copyright amount to abusive conduct.[40] 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.[41]

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 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 licences. A library can hardly offer direct access to a wide variety of works stemming from different copyright owners if it cannot obtain the

[40] Ibid., paragraphs 34–35.
[41] Ibid., paragraph 38 and operative part.

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 liability privilege.[42] Decisions on image search services illustrate the complexity of the legal framework in which content aggregators may have to operate.[43]

To a certain extent, the situation is comparable with the facts underlying the *Magill* decision of the Court of Justice.[44] 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.[45] 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.[46]

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.

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

[42] Martin Senftleben, 'Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions' (2013) *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 4: 87–103.

[43] Martin Senftleben, 'Internet Search Results – A Permissible Quotation?' (2013) *Revue Internationale du Droit d'Auteur*, 235: 85–91.

[44] C-241/91 P and C-242/91 P, *Magill TV Guide/ITP, BBC, and RTE* [1995] ECR I-743.

[45] Ibid., para. 7.

[46] Ibid., para. 91.

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.

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.[47] 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.[48] 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* v. *Wegener*,[49] 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.[50] 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.[51]

[47] *IMS Health*, above note 39, paragraph 38.
[48] Lamping, above note 36 , p. 139.
[49] Case C-202/12, Innoweb BV *v.* Wegener ICT Media BV, Wegener Mediaventions BV [2013] ECLI:EU:C:2013:850.
[50] Ibid., paragraphs 8–14.
[51] Ibid., paragraph 41.

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.

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',[52] 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.[53]

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

[52] *IMS Health*, above note 39, paragraph 38 and operative part.

[53] Lamping, above note 36, pp. 133–134; Karl-Nikolaus Peifer, 'Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen' (2006) *Zeitschrift für Urheber- und Medienrecht*: 7; T. Dreier, 'Primär- und Folgemärkte', in G. Schricker, T. Dreier and A. Kur (eds), *Geistiges Eigentum im Dienste der Innovation* (Nomos, 2001), pp. 53, 60 and 70–71.

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.[54]

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 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

[54] Conde Gallego, above note 37 at 20; Thomas Höppner, 'Missbräuchliche Verhinderung "neuer" Produkte durch Immaterialgüterrechte – Zur Anwendung von Art. 82 EG auf Lizenzverweigerungen' (2005) *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* : 462–463.

in the light of competition law 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.

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 license 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 and absence of objective justification – are only one set of criteria that are evolved in jurisprudence. In fact, the Court's assumption that these tests must be applied cumulatively has been criticized heavily in literature.[55] Against

[55] Andreas Heinemann, 'Gefährdung von Rechten des geistigen Eigentums durch Kartellrecht? Der Fall "Microsoft" und die Rechtsprechung des EuGH' (2006) *Gewerblicher Rechtsschutz und Urheberrecht*, 705–713; Conde Gallego, above note 37 at 25–26.

this background, the *Microsoft* decision of the General Court is often regarded as a departure from the dogma of cumulative application in the EU.[56] 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.[57]

Apart from this option to apply the *IMS Health* tests as independent factors, it is also possible to embark on a more general 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. Following the functional approach to copyright protection outlined above (copyright as a means to support cyclic innovation in the cultural domain), 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 and services that have a conducive effect on cultural follow-on innovation. 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.[58] 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.[59]

Even if a content repository offers direct access to copyrighted material and thus develops activities on the primary market for literary and artistic works, 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

[56] Lamping, above note 36, pp. 135–136; Drexl, above note 17, p. 122.
[57] Lamping, above note 36, pp. 135–136; Höppner, above note 54, pp. 463–464.
[58] Conde Gallego, above note 37, p. 27.
[59] Ibid., p. 28.

new, value-added products[60] that can have a positive effect on the creation of new works, the competition law intervention appears as a justified correction of copyright exclusivity.

Conclusion

In sum, competition law could become an important external balancing tool that limits the market power of copyright owners vis-à-vis 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 competition law 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 seeking to use pre-existing material as reference points for new cultural productions, each individual repertoire of works in a given sector of creativity can be seen as an indispensable facility.

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 or service for which there is potential demand: an information product or service that combines the best-functioning and most user-friendly system for data sorting, evaluation, enrichment and presentation with the broadest range of information resources. 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.

However, it is to be pointed out that the present inquiry focused on the possibility of enhancing the impact of competition law on licensing practices of copyright owners. If the application of competition law is

[60] With regard to this particular form of compulsory licensing, see Reto M. Hilty and Martin Senftleben, 'Rückschnitt durch Differenzierung? Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte' in T. Dreier and R. Hilty (eds), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz* (C.H. Beck, 2015), pp. 330–337.

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 repertoires stemming from different copyright owners.