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ARTICLES

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. PGA Tour, Inc.*,[1] 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...."[2] 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 U.S. law at odds with developments in the European Union.

I.
THE HOT FACTS[3]

The *Morris* case deals with information, specifically real time golf scores in tournaments sponsored and organized by the Professional Golf Association (PGA), a private organization in the United States. Since golf is played over a vast course, the collection and reporting of real time scores poses a challenge, aggravated by the fact that the PGA rules prohibit cell phones and other electronic forms of communication during game play. To resolve this dilemma, the PGA created, in the early 1980's, 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.

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1 364 F.3d 1288, 1292-93 (11th Cir. 2004).

2 *Id.*

3 The facts are summarized from the district court opinion, *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d. 1269 (M.D. Fla. 2002).

News gathering organizations, both traditional and web-based, like to report the scores as soon as possible, especially 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 credentialed 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 the PGA.

Morris Communications Corporation (hereinafter, 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 the PGA for planning to sell 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 the PGA's refusal to deal constituted a monopolization of the market for real-time golf scores.

II.
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.[4] A monopolization claim is established by

[4] 15 U.S.C. § 2 (2004).

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."[5] 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 the PGA of its market power.

Morris argued that the PGA had engaged in two bad acts. The first was intent to monopolize based on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[6] a famous U.S. Supreme Court case holding that a monopolist had a duty to cooperate with competitors in certain situations.[7] The second was control of an essential facility based on a number of appellate decisions holding that a monopolist cannot deny a competitor access to a facility that was essential to competition.[8] 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.

III.
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 enunci-

[5] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[6] 472 U.S. 585 (1985).

[7] *Id.*

[8] 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 nor repudiating it).

ated 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.[9] 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*[10] and *Xerox*[11] cases, the photocopier company claimed that they could deny access to 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 U.S. 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.

A. Expanding Intellectual Property through Antitrust Law

First, the use of antitrust law to expand intellectual property is

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[9] *See Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991) (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).

[10] *See Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990).

[11] *See In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed.Cir. 2000).

contrary to the analysis of *Verizon Communications v. Trinko*,[12] a case that deals with the relationship between antitrust law and another federal statutory scheme, the Telecommunications Act of 1996.[13] 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 "[t]he 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."[14]

What this statement means has been a source of controversy among commentators.[15] 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 the 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.

B. The Constitutional Dimension

The Eleventh Circuit creates a potential constitutional conflict by using antitrust law to expand the boundaries of intellectual property. Congress enacted the antitrust laws pursuant to its commerce clause powers, which permits Congress, "to regulate Commerce...among the several States."[16] Copyright and patent laws, on the other hand, were

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[12] *See Verizon*, 540 U.S. 398.

[13] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 26 (codified as amended in scattered sections of 47 U.S.C.).

[14] *Verizon*, 540 U.S. at 415-16.

[15] *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).

[16] U.S. Const. art. I, § 8, cl. 3.

enacted pursuant to Congress' power, "[t]o promote Progress in Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[17] In its decision in Feist, the Supreme Court held that facts, such as the real time golf scores at issue in *Morris*, are not protected under Congress' power to enact copyright and patent laws because facts are not "writings" under the Constitution. In *Morris*, however, facts are allowed to be protected through the antitrust laws, which flow from Congress' commerce clause powers. However, in expanding intellectual property protection through the antitrust laws, the Eleventh Circuit ignored the implied limitation that the intellectual property clause places on the commerce clause. In other words, Congress cannot enact legislation under its commerce clause powers that it would be unable to enact under its intellectual property clause powers.

The academic argument for implied limitations flowing from the intellectual property clause has been made recently by Professors Heald and Sherry.[18] As the authors point out, the problem with the implied limitation argument is that it may prove too much. For example, if the intellectual property clause implies a limitation on the commerce clause power, then by symmetry the commerce clause power implies a limitation on the intellectual property clause. But, copyright and patent law protects writings and inventions that are created wholly intra-state and never commercialized inter-state. But no one is suggesting that extending copyright and patent to wholly intra-state writings and inventions is unconstitutional. Similarly, while the Court has held that trademark legislation cannot be enacted under the intellectual property clause, because trademarks are not "writings,"[19] the Lanham Act, which is the current legislation protecting trademarks, is a perfectly constitutional exercise of the commerce clause power.[20] The implied limitations, the authors conclude, have to be based on the policies underlying the specific enumerated power and that inform legislation enacted under the respective power. They identify four policies that inform the implied limitation analysis under the intellectual

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[17] U.S. Const. art. I, § 8, cl. 8.

[18] *See* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: the Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119 (2000) [hereinafter Heald & Sherry].

[19] *See* The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

[20] *See* Heald & Sherry, *supra* note 14, at note 181.

clause: the Suspect Grant Principle, the Quid Pro Quo Principle, the Authorship Principle, and the Public Domain Principle.

Each of these four principles is implicated by the *Morris* decision. By extending intellectual property-like protection to data under the antitrust law, the Eleventh Circuit is creating a suspect grant, one that creates a monopoly in real time golf scores. On this point, there is a potential circularity since the very point of the Eleventh Circuit's decision is to conclude that there is no illegal monopoly. The point, however, is that the court should have addressed the intellectual property issues more closely in order to avoid a conflict between intellectual property and competition policies. More saliently, the Eleventh Circuit's extension of protection to data violates the Quid Pro Quo and Authorship Principles. The intellectual property clause clearly states that the exclusive grant is given in exchange for "progress to Science and Useful Arts." It is not clear how the public benefits by protecting the PGA's exclusive rights, especially when denying access to the media potentially limits the public's access to the information. Furthermore, the authorship principle rests on the need for intellectual property to protect creative efforts, as opposed to the sweat of the brow. In the case of real time golf scores, the PGA is not creating anything new; it is simply reporting information produced as a by-product of the tournaments. Finally, the extension of intellectual property rights to data through antitrust law violates the Public Domain Principle. The Supreme Court in *Feist*[21] held that facts are relegated to the public domain for all to use. By making the real time golf scores private, the Eleventh Circuit is narrowing the scope of the public domain as defined by the intellectual property clause. For these reasons, the Eleventh Circuit's decision in *Morris* creates a constitutional conflict by ignoring the implied limitations on Congress' commerce clause powers from the intellectual property clause.

Precedent from bankruptcy law illustrates the potential problem created in *Morris*. The Supreme Court, in *Railway Labor Executives Ass'n. v. Gibbons*,[22] invalidated legislation enacted by Congress under its commerce clause powers to protect employees of the reorganized Chicago, Rock Island and Pacific Railroad Company.[23] The Court found that the legislation was in conflict with the uniformity requirement of the Bankruptcy Clause, which grants Congress the auto-

[21] *See Feist*, 499 U.S. 340.
[22] 455 U.S. 457 (1982).
[23] *Id.*

rity to pass bankruptcy law as long as it is uniform across all the states. As the Court stated:

> We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause.[24]

The Court's logic in *Gibbons* applies with equal force to *Morris*. Antitrust law cannot expand intellectual property law. If antitrust law conflicts with intellectual property law, the application of antitrust law must give way to the limits of Congress' intellectual property powers. By allowing the PGA to protect data through an intellectual property-like justification, the Eleventh Circuit ignored the implied limits from the intellectual property clause. At the minimum, the court should have considered these limits in assessing the PGA's business justification.

C. Rethinking Business Justifications

The Eleventh Circuit relied principally on two cases in assessing and ultimately affirming the PGA's asserted business justification: *Continental TV., Inc. v. GTE Sylvania, Inc.*,[25] and *Consultants & Designers, Inc. v. Butler Service Group, Inc.*[26] The court relied on each of these cases to establish the proposition that the prevention of free riding can be a valid business justification for refusing to deal. However, each of these cases is factually distinguishable from *Morris* and involves a very different free riding problem.

At issue in *Sylvania* was a territorial restraint imposed by a manufacturer on retailers of a product. The Supreme Court upheld the restraint and established that vertical territorial restraints were subject to the rule of reason as opposed to the per se rule that applies to horizon-

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[24] *Id.* at 468.

[25] 433 U.S. 36 (1977).

[26] 720 F.2d 1553 (11th Cir. 1983).

tal territorial restraints. The Court justified the relaxed standard of review for vertical restraints that there were valid economic reasons why retailers should be subjected to territorial restrictions while there was no economic reason, except as a means of restricting supply and raising price, for agreements among competitors to restrict sales based on territory. The primary economic justification was the prevention of free riding in the provision of services by the retailer to customers. If retailers of a product were not divided territorially, the Court reasoned, one retailer would have the incentive to free ride on the service and advertising efforts of other retailers. Territorial restrictions would reduce this incentive by making it more difficult for one retailer to steal customers from another retailer by being able to reduce price by skimping on service. A manufacturer could use territorial restrictions to standardize services across all retailers. The Court further reasoned that these restrictions within brand promoted competition across brands by allowing manufacturers to establish good will and a customer base for a given brand. Given this justification for vertical territorial restrictions, the Court concluded that it would be economically counterproductive to strike down all vertical territorial restrictions under a per se rule.

The Eleventh Circuit decision in *Butler* also centered on the need to prevent free riding, but in the context of the enforceability of covenants not to compete. The court upheld restrictions imposed by a placement agency on its employees from accepting permanent employment from a company with which they were placed as temporary employees.[27] As in *Sylvania*, the Court applied a rule of reason analysis to the restriction on the grounds that there was a valid business justification for the restriction in preventing free riding.[28] Since the placement agency invested in identifying the employee's skills and matching the employee with the employer, the restriction, according to the Court, allowed the placement agency to recoup its investment in the recruitment of the employee by preventing the employer from free riding on the agency's efforts.

Although there is a superficial similarity between the free riding at issue in *Morris* and the free riding justifications in *Sylvania* and *Butler*, there are two critical distinctions that required different treatment of the business justification in *Morris*. First, the facts of both *Sylvania* and *Butler* dealt with free riding on a service. Absent the restri-

[27] *Id.*
[28] *Id.* at 1561.

ctions, neither defendant would have had the incentive to provide services that were critical for the development of the relevant market. In *Sylvania*, the loss of service would weaken inter-brand competition; in *Butler*, the loss of service would vitiate the value-added provided by the placement agency. By contrast, in *Morris*, it is not clear that allowing access to data would have negated the provision of the service by the PGA in establishing the RTSS. Admittedly, the system may have become less profitable, but it is far from clear that the value-added from the service would have vanished as it almost certainly would have in *Butler*. The key difference is that the restriction in *Morris* may have prevented free riding of a sort but it also would have denied access to data. Neither the restriction in *Sylvania* nor that in *Butler* had a dual effect.

More critically, neither *Sylvania* nor *Butler* touched upon intellectual property. While an argument could be made that the restriction in *Sylvania* was indirectly connected to the development of a trademark through its effect on the promotion of a brand, the key concern for the Court was customer service and advertising. In *Butler*, there was no intellectual property at issue, and the sole issue was the agency's investment in a certain type of effort. Therefore, neither case implicated intellectual property in the same way as *Morris*, in which the central issue was the extent to which antitrust law could be used to expand intellectual property. As a result, the reliance by the Eleventh Circuit on the *Sylvania* and *Butler* cases was inappropriate. Instead, the court should have more carefully considered the business justification in light of the intellectual property policies at stake.

D. Comparison with the European Union

The Eleventh Circuit's expansion of intellectual property to protect data contrasts with the treatment in the European Union, particularly in the *Magill*[29] and *IMS*[30] cases. This pair of cases demonstrates 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 relevance to rights over data.

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[29] *Radio Telefis Eireann and Indep. Television Publ'ns Ltd.* (Intellectual Property Owners Inc. intervening) v. The Comm'n of the *European Cmtys.* (Magill Television Guide Ltd. intervening), [1995] All E.R. (EC) 416, [1995] 4 C.M.L.R. 718 [*hereinafter* Magill].

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

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 to the embargo of the European Commission as a violation of European competition law led to the imposition of a compulsory license for the use of the scheduling information.[31] The license was upheld by the European Court of Justice (ECJ), which found the television stations had a de facto monopoly over the information itself[32] and held that the stations' failure to license the information was an abuse of dominant position.[33]

The ECJ'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 a 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.[34]

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 extra-ordinary, 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

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[31] *Magill*, [1995] All E.R. (EC) 416, 4 C.M.L.R. 718.

[32] *Id.*, [1995] All E.R. (EC) 416, 4 C.M.L.R. 718, at Decision-1, ¶ 47.

[33] *Id.* at Decision-1, ¶ 57.

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

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.

IV.
Conclusion

Contrary to the Eleventh Circuit's assessment, the dispute in *Morris* is not just "a straightforward antitrust case."[35] 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.

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[35] *Morris*, 364 F.3d at 1293.