Loyola University Chicago Law Journal

Volume 37
Issue 4 *Summer 2006*

Article 3

2006

When Exclusionary Conduct Meets the Exclusive Rights of Intellectual Property: *Morris v. PGA Tour* and the Limits of Free Riding as an Antitrust Business Justification

Shubha Ghosh
Southern Methodist University Dedman School of Law

When Exclusionary Conduct Meets the Exclusive Rights of Intellectual Property:

Morris v. PGA Tour and the Limits of Free Riding As an Antitrust Business Justification*

*Shubha Ghosh***

I. INTRODUCTION: STATING THE PROBLEM

Under antitrust laws, a frequent business justification for exclusionary conduct is the prevention of free riding. Free riding is the unauthorized benefit from the efforts of someone else, usually in the form of a service or intangible asset, and is considered a problem because the free rider obtains a benefit for which someone else pays the cost. The benefit obtained by the free rider is sometimes argued to be a value that the creator of the benefit is entitled to license. Vertical restraints on retailers,[1] unilateral refusals to deal,[2] and horizontal agreements[3] are, in various contexts, allowed to ensure that relevant

---

* This article expands on *A Rose is a Rose is . . . : the Thorny Case of* Morris Communications Corp. v. Professional Golf Association Tour, Inc., 1 ERASMUS L. & ECON. REV. 287 (2004) *available at* http://www.eler.org/index.php. Portions of the original article are reprinted with permission of the Erasmus Law and Economics Review subject to ELER Public License 1.0.

** Professor of Law, Southern Methodist University Dedman School of Law. The author would like to thank the editors of the Loyola Law Journal, particularly Jan Stewart, for their hard work on this article and their incredible patience in accommodating his overseas travel plans. Thanks also go out to Spencer Waller for his organization of the 2005 Loyola Antitrust Colloquium, where an early version of this paper was presented and to Matthew Sag and Michael Carrier for their comments at the colloquium.

1. A vertical restraint is a contractual restriction placed by a company on another company in the chain of distribution, such as a restriction imposed by a manufacturer on a retailer dictating where or to whom the retailer can sell. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 43–44 (1977).

2. A unilateral refusal to deal is a decision by a company not to contract with another company. Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 463 n.8 (1992). Such a refusal can give rise to an antitrust violation if the refusal is anticompetitive. *Id.* at 483 n.32.

3. A horizontal agreement is an agreement among competitors that affects some aspect of the market, such as the price, distribution arrangements, or product and service standards. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 99 (1984).

parties do not misappropriate service or quality investments. For example, the Supreme Court allows territorial restraints if they provide incentives to retailers to invest in necessary add-on services for informationally constrained customers.[4] These restraints are consistent with the goals of antitrust law and comply with the important "rule of reason" because they promote inter-brand competition, albeit at the expense of intra-brand competition.[5] Antitrust law arguably allows both vertical and horizontal restraints to prevent free riding and it is now safe to say that the right to exclude is protected from antitrust scrutiny when the right is exercised to cure the threat of free riding.[6]

This rule, however, creates the potential for conflict with the right to exclude recognized under intellectual property law. Intellectual property law also justifies exclusionary restraints as responses to free riding, but that justification developed out of the desire to prevent the misappropriation of creative and innovative efforts rather than the desire to promote trade. The Eleventh Circuit's recent decision in *Morris Communications Corp. v. PGA Tour, Inc.*[7] illustrates the results of this conflict. In *Morris*, the free riding justification was successfully evoked to prevent a newspaper from reporting real-time golf scores. While patent law may have protected the PGA's data collection system, Morris Communications did not want to copy that system but instead wanted to copy the data itself, which is not subject to copyright protection.[8] The *Morris* decision thus resulted in the unnecessary, and avoidable, use of the business justification to expand intellectual property law at the expense of antitrust law principles. This holding conflicts with the Supreme Court's caution that "only Congress should make a decision to 'sacrifice competition in one portion of the economy for greater

4. *Sylvania*, 433 U.S. at 57–58.

5. *Id.* at 54.

6. Initially, the Supreme Court was reluctant to allow horizontal restraints as a response to free riding as seen from the decision in *United States v. Topco Associates*, 405 U.S. 596 (1971). Soon after *Topco*, however, the Court implicitly recognized the magnitude of free riding issues associated with the creation of a new product. Then, in *Sylvania* the Court expressly allowed the use of vertical restraints as a means to prevent free riding. Cont'l T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). This holding causes some thinkers to suggest that the prevention of free riding may now also give wide justification for horizontal restraints.

7. 364 F.3d 1288, 1295–96 (11th Cir. 2004).

8. *Id.* at 1291–92. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding that factual compilations are not copyrightable unless the facts are organized in an original manner); Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (holding that a patent can be obtained for anything under the sun that is man-made except for laws of nature, natural phenomena, and abstract ideas). Data is generally unprotected under copyright and patent law. *See also* Shubha Ghosh, *A Rose is a Rose is . . . : the Thorny Case of* Morris Communications Corp. v. Professional Golf Association Tour, Inc., 1 ERASMUS L. & ECON. REV. 287, 290 (2004) (arguing that the Court allowed the PGA to protect information that is in the public domain).

competition in another portion,' not the courts or private parties."[9] However, the Eleventh Circuit in *Morris* allowed private parties to make this questionable sacrifice, which illustrates the problem with the free riding business justification analysis in antitrust law.[10]

This Article builds on and expands the author's earlier analysis of *Morris* and concludes that in resolving the conflict between antitrust and intellectual property law, the Eleventh Circuit improperly and unnecessarily expanded the scope of intellectual property law.[11] First, Part II of this Article provides a brief introduction to antitrust and intellectual property law and explains how exclusionary restraints have been allowed under each regime to respond to the problem of free riding.[12] Part II also discusses case law considering the relationship between antitrust and intellectual property law in both the United States and Europe.[13] Parts III and IV of this Article discuss *Morris* itself and analyze the court's holding.[14] Finally, Part V provides guiding principles for future courts to use in order to properly adjudicate cases with this dynamic and argues that rather than following the steps of the *Morris* court, courts should instead more carefully scrutinize business justifications presented by defendants in order to avoid the unnecessary expansion of intellectual property law at the expense of antitrust law.[15]

II. FREE RIDING AS AN ANTITRUST BUSINESS JUSTIFICATION

The conflict in *Morris* developed in part from the overlap of the antitrust and intellectual property regimes. In order to best evaluate the Eleventh Circuit's resolution of that conflict it is necessary to first understand the underlying antitrust and intellectual property interests themselves. This Part provides an introduction to antitrust and intellectual property law and shows how each body of law has responded to the problem of free riding.[16] This Part then describes key

---

9. KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 118–19 (2003) (quoting *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 611 (1971)).

10. *Morris*, 364 F.3d at 1298.

11. Ghosh, *supra* note 8, at 289–90.

12. *See infra* Part II.A–B (introducing antitrust and intellectual property law and addressing free riding in both areas of law).

13. *See infra* Part II.C (describing the relationship between antitrust and intellectual property law in the United States and the European Union).

14. *See infra* Parts III–IV (discussing *Morris* and analyzing the Court's holding).

15. *See infra* Part V (presenting an alternative to the *Morris* approach to allow scrutiny of business justifications by defendants to avoid expanding intellectual property law at the expense of antitrust law).

16. *See infra* Part II.A (introducing antitrust and intellectual property law).

cases at the intersection of antitrust and intellectual property, including some cases from the European Union.[17]

A. Antitrust and Intellectual Property Law

Antitrust and intellectual property laws provide a scheme for the regulation of markets and innovation at the federal level. Federal antitrust laws were first enacted in 1890 with the passage of the Sherman Antitrust Act.[18] There have been several revisions since 1890, the most prominent being the passage of the Clayton Act and the Federal Trade Commission Act in 1914.[19] Together, these various federal laws police anticompetitive behavior in the marketplace. The behavior may be either unilateral (undertaken by one firm) or collusive (undertaken by a group of firms acting in concert).[20] Unilateral conduct is usually termed monopolization, which is illegal if the firm has market power and acts in a way harmful to competition.[21] Collusive behavior is illegal if the firms enter into an agreement that is *per se* illegal, such as an agreement to fix the price of a product or service, or if the firms enter into an agreement whose anticompetitive harms outweigh any procompetitive benefits.[22] The weighing of these harms and benefits is called the rule of reason.[23]

Intellectual property laws are a century older than federal antitrust laws. Congress enacted the first patent and copyright laws in 1790 with several revisions thereafter.[24] Congress enacted federal trademark laws

17. *See infra* Parts II.A–C (describing the business justification defense and free riding; and comparing United States and European Union cases).

18. ELEANOR M. FOX ET AL., U.S. ANTITRUST IN GLOBAL CONTEXT 11 (2d ed. 2004). *See also* Sherman Act, 15 U.S.C. § 1 (2000 & West Supp. 2005) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

19. FOX ET AL., *supra* note 18, at 49–50 (noting that the Clayton Act had many similar goals of the Sherman Act but was worded more precisely to prohibit mergers with an anticompetitive effect). *See also* Clayton Act 15 U.S.C. § 12 (disallowing mergers with an anticompetitive effect); Federal Trade Commission Act, 15 U.S.C. § 41 (2000) (creating the Federal Trade Commission and empowering it to bring suit for unfair methods of competition).

20. See *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984), for an example of unilateral anticompetitive behavior. See *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), for an example of anticompetitive behavior undertaken by a group.

21. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 112.

22. *See* Maricopa County Med. Soc'y, 457 U.S. at 344 (stating that the price agreement was *per se* illegal); *see also* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 241 (1918) (using a broad analysis to determine whether the harm to trade outweighed any benefits to trade).

23. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62 (1911) (announcing the rule of reason).

24. *See* Eldred v. Ashcroft, 537 U.S. 186, 194 (2003) (stating that Congress's first copyright statute, adopted in 1790, provided a fourteen year term of protection of any publications). The

in the late nineteenth century, but these were challenged as unconstitutional under the narrow interpretation of the Commerce Clause that existed at the time.[25] Congress passed modern trademark statutes in 1946 through the Lanham Act.[26] Patents, copyrights, and trademarks form a cohesive package of federal intellectual property laws. Each set of laws gives the owner of intellectual property the right to exclude others from using, making, selling, or importing the subject matter protected by the relevant statute.[27] For example, patent law allows the owner of a patent to exclude others from using, making, selling, or importing the novel, useful, and nonobvious invention protected by the patent.[28] Copyright law allows the owner of a copyright to exclude others from using, making, selling, or importing an original work of expression.[29] Finally, trademark law protects the rights of the trademark owner to brand his or her product or service in the marketplace.[30] A trademark owner is allowed under law to prohibit an actual or potential competitor from using the trademark on a product or service in a way that is likely to confuse consumers.[31]

Antitrust and intellectual property laws are complementary at one level, but at tension on another level. Both bodies of law police the marketplace and structure competitive behavior in the development and distribution of products and services.[32] However, the right to exclude given by intellectual property can be the basis for anticompetitive behavior that can give rise to an antitrust violation.[33] Yet, what is important to recognize is that intellectual property is not inherently anticompetitive. Rather, the way in which intellectual property rights

authority to pass this law derives from the Copyright and Patent Clause of the Constitution. *Id.* *See also* U.S. CONST. art. I, § 8, cl. 8 stating: "[Congress shall have Power] To promote the Progress of Science . . . by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

25. *See In re* Trade-Mark Cases, 100 U.S. 82, 97–98 (1879) (striking down Congress's amended 1876 trademark statute as outside of the authority bestowed upon Congress in the Commerce Clause).

26. Lanham Act, 15 U.S.C. § 1126 (2000 & West Supp. 2005).

27. PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES, pt. 3 (5th ed. 2004).

28. *Id.* at 396–97.

29. *Id.* at 585–87.

30. *Id.* at 220.

31. *Id.* at 265–66.

32. A. Douglas Melamed & Ali M. Stoeppelwerth, *The* CSU *Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law*, 10 GEO. MASON L. REV. 407, 414–15 (2002).

33. *See* FOX ET AL., *supra* note 18, at 91 (discussing the use that patents play in cartels and allowing patent holders to "pool their patents as a strategy to avoid competition").

are exercised is what creates tensions with antitrust law.

Although trademark law does not give the creators of brands the right to divide markets territorially, trademark law does recognize and promote the value of distinguishing marks to consumers.[34] The concept of secondary meaning is particularly important to the goals of trademark law.[35] Secondary meaning is established through brand identification by consumers and is essential to establish trademark rights when a brand name is not particularly arbitrary or suggestive.[36] In order to create secondary meaning, the user of a brand name must heavily market the brand in conjunction with particular goods and services and establish consumer identification.[37] In this way, brands are like quality or product service, a dimension of a product that consumers demand and value in their purchasing decisions. The free riding arguments that justify exclusionary conduct necessary to ensure quality and product servicing also support exclusionary conduct necessary to promote brands.[38]

B. The Business Justification in Antitrust and Intellectual Property

The concept of free riding plays an important role in antitrust and intellectual property laws. Free riding occurs when someone captures a benefit without paying for it. This definition may sound like theft and certainly all theft is a form of free riding. But free riding as a concept is controversial when property rights are not as clearly defined as in the case of theft.[39]

---

34. *See* Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2028 (2005) (discussing trademark law and the value of branding).

35. *Id.* at 2029.

36. *Id.*

37. *Id.* at 2036.

38. HYLTON, *supra* note 9, at 25–26.

39. For example, suppose I work hard on an idea for a better design for an automobile cup holder. I come up with the idea, and before I patent it, I tell someone my design. If the person I told makes use of my idea, then he is arguably free riding. He has obtained the benefit of the idea without expending any cost to obtain it. Whether this form of free riding is legally actionable depends upon my rights in the idea. If it has not been patented nor the subject of a confidentiality agreement, there may be no legal claim against the person who is allegedly free riding. Take another more subtle example. Suppose you own a retail outlet selling computer hardware. A customer comes into your store and asks about state-of-the-art equipment and pricing. He takes the information you give him and uses it to buy what he needs from another store. In this case, both the customer and the competitor have free ridden on your efforts. Each has obtained and made use of the information that neither has paid for. The customer has benefited from the information without paying for it (except for the time spent listening to you). The competitor has benefited from the sale without having to inform the customer about the product. Most likely this will not be a violation of law unless the information is somehow protected, meaning that you were given a property right in the information shared with the customer.

Free riding informs antitrust and intellectual property law in several ways. In antitrust law, free riding is often a business justification for agreements that are arguably anticompetitive. The free riding rationale usually accepted within antitrust law is to allow restrictions that promote the creation of valuable services, such as the collection and publishing of real-time golf scores. For example, a restriction on a former employee preventing him from competing directly with the former employer is arguably anticompetitive. But it is often justified as a way of keeping the employee from free riding off of the information and training obtained from the previous employer.

Free riding justifications for exclusionary conduct rest on the self-regulation of an information-based market failure. In past cases like *Continental T.V., Inc. v. GTE Sylvania Inc.*,[40] *Consultants & Designers, Inc. v. Butler Service Group*,[41] *United States v. Topco Associates*,[42] and others,[43] restrictions on private behavior are designed to resolve problems of asymmetric information in the marketplace.[44] An exclusionary restriction, such as a territorial restraint on trade or a covenant not to compete, creates the incentive to provide a service that may not otherwise exist because of the possibility of rent dissipation.[45] Antitrust law tolerates such exclusionary restrictions as long as the benefits of creating positive incentives for the provision of services are not outweighed by anticompetitive effects on the marketplace.[46] This formulation restates the classic rule of reason in terms of the free riding rationale.[47]

Of course, not all free riding rationales provide a justification for

40. 433 U.S. 36 (1977).

41. 720 F.2d 1553, 1562 (11th Cir. 1983).

42. 405 U.S. 596, 606–07 (1972).

43. *See* Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 464 (1941) (ruling that textile manufacturers rules against dealings with "style pirates" was a violation of the Sherman Act); *see also* Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49–50 (1990) (stating that an agreement not to enter the Georgia market was not allowable under antitrust laws).

44. *See* JACK HIRSHLEIFER & JOHN G. RILEY, THE ANALYTICS OF UNCERTAINTY AND INFORMATION 295 (1992) (discussing informational asymmetry and contract design).

45. *See* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 334–337 (2004) (arguing that exclusive contracts might be efficient because they can stimulate the investments in services provided by a retailer).

46. There are many types of asymmetric information, including information differences between consumers and sellers, among searchers in a matching market, and among collaborators in a business enterprise. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977) (adopting a rule of reason approach that requires consideration of pro- and anticompetitive effects).

47. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1979) (explaining the rationale behind the rule of reason).

anticompetitive conduct. The classic price cartel[48] is riddled with problems of free riding and rent dissipation, but restrictions designed to promote a price cartel are *per se* illegal under the antitrust laws.[49] Price cartels are presumed not to have economic justifications since price, as the Court stated in *Socony-Vacuum,* is the "central nervous system" of a market economy.[50]

In intellectual property law, free riding is often given as the justification for granting the right to exclude to the intellectual property owner. The most common justification for the exclusive rights granted under intellectual property law is the prevention of the misappropriation of creative and innovative effort that results in products, whether original writings or novel, non-obvious, and useful discoveries.[51] For example, the inventor of a new drug, the producer of a movie, and the creator of a new brand have each expended time and money in their respective creations. By giving each a right to exclude under patent, copyright, and trademark laws respectively, the law prevents the second comer from simply copying the drug, movie, or brand without paying the costs of development.

But just as the possibility of a free riding problem does not mandate the laxity of antitrust laws,[52] so the free riding justification should not be used to expand intellectual property. In some instances, what may be deemed free riding is important for the dissemination of knowledge and products. In some ways, private agreements among parties can realize the goals of intellectual property law in preventing free riding. Antitrust law similarly allows private agreements by recognizing the prevention of free riding as a business justification for an anticompetitive agreement.

Although at a very basic level the prevention of free riding seems sensible, the problem can be exaggerated. The concept of free riding masks a more pertinent question: should the creator have the right to exclude others from use of the creation? Patent, copyright, and trademark laws have answered this "should" question within the structures of the respective statutory schemes that provide extensive conditions for when the right to exclude should be granted and when it should be limited. The question posed by the decision in the *Morris*

48. *See* HYLTON, *supra* note 9, at 68 (defining a cartel as "a group of firms that seeks to increase profits by restricting price and output competition amount themselves").

49. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

50. *Id.* at 224 n.59.

51. *See* GOLDSTEIN, *supra* note 27, at 17–19 (stating that intellectual property law encourages investment by prohibiting misuse of one's ideas).

52. *See supra* notes 48–50 and accompanying text (discussing the example of price cartels).

case is to what extent intellectual property law should allow the free riding justification to create a legal right to exclude that may potentially be in conflict with antitrust law.

C. Cases Considering the Intersection Between Antitrust and Intellectual Property

The tension between intellectual property and antitrust that the Eleventh Circuit ignored in *Morris* can better be understood by first considering other cases in which free riding issues arose in the context of exclusionary conduct. To emphasize this point, this Part will first discuss the Supreme Court's decision in *Topco*[53] to show how the Court misunderstood the relationship among antitrust law, intellectual property and the free riding problem.[54] Then this Part will turn to three cases cited in *Morris* as precedent.[55] This Part will conclude with a description of a circuit split concerning the intersection of antitrust and intellectual property law and a brief introduction to European Union law on the subject.[56]

1. The Trouble with *Topco*

When intellectual property is implicated, the free riding justification for exclusionary conduct should be scrutinized. The Supreme Court's decision in *Topco*,[57] however, illustrates the danger of following this proposition without completely a critical analysis.

At issue in *Topco* was a consortium of small grocers who, in order to develop a strong national brand to compete with the larger chains, agreed to restrict territorial competition and wholesaling among its members.[58] The intellectual property problem at issue in *Topco* was the creation of a new brand.[59] The consortium expended much time and money in the creation of the brand. Creation of a brand requires the creation of brand identification with consumers.[60] Brand identification, in turn, is created by limiting the sources for the branded product in

53. United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).

54. *Id.* at 596.

55. *See infra* Part II.C.2 (discussing the cases cited in *Morris* as precedent).

56. *See infra* Parts II.C.3–4 (describing the circuit split concerning the intersection between antitrust and intellectual property law and introducing European Union law).

57. *Topco*, 405 U.S. at 596.

58. *Id.* at 598–600.

59. *Id.* at 602.

60. *Id.* at 604–05. National retailers are at an advantage because they have a greater opportunity to create a brand awareness with which consumers can identify. *Id.*

order to create loyalty between the customer and the company.[61] Territorial restrictions on where the branded product is sold and by whom are necessary to create customer loyalty. Furthermore, free riding by one retailer of the branded product of quality and services provided by another retailer of the same branded product may be a problem in creating customer loyalty.[62] Therefore, it is often argued that territorial restrictions are important as a tool to limit the possibility of free riding.[63]

The Court, however, struck down the agreement as a horizontal agreement in restraint of trade that was a *per se* violation of the antitrust laws.[64] The Court did not accept the grocers' argument that the restrictions were necessary to enforce the consortium and create effective competition against larger grocers.[65] Such competition-enhancing restrictions on competitive behavior were for Congress to decide and not the subject of self-regulation, according to the Court.[66] The *Topco* case, in short, illustrates a case where intellectual property free riding arguments were rejected in favor of antitrust laws, albeit inappropriately according to some scholars and jurists.[67]

Cases subsequent to *Topco* illustrate the special place of trademarks for the application of the free riding justification in antitrust jurisprudence. In *Palmer v. BRG of Georgia*,[68] the Supreme Court applied *Topco* to a covenant not to compete that was part of a franchising agreement.[69] The Court held that the covenant was a horizontal territorial division that *per se* violated antitrust law.[70] The covenant allowed the franchisee to use the trademark, but not to sell the branded service within the state of Georgia. While the agreement in *Topco* prevented use of the mark when competitors sold goods in the same territory,[71] the agreement in *Palmer* prevented all competition

61. *Id.*

62. *See* Matter of Polygram Holding, Inc., 5 Trade Reg. Rep. (CCH) ¶15,453 (FTC 2003) (rejecting the argument that free riding would harm competition).

63. *Topco*, 405 U.S. at 605.

64. *Id.* at 608–09.

65. However, in his dissent, Justice Burger did recognize that the restrictions were necessary and accepted as a justification for the restrictive arrangement. *Compare id.* at 608–09 (applying a *per se* rule to the restraint), *with id.* at 623–24 (Burger, J., dissenting) (recognizing a collective action problem as justification for the restrictive arrangements).

66. *Id.* at 611.

67. *See* HYLTON, *supra* note 9, at 118–19 (criticizing the Court's analysis in *Topco*).

68. 498 U.S. 46 (1990) (per curiam).

69. *Id.* at 49–50.

70. *Id.* (citing *Topco*, 405 U.S. at 608).

71. *Topco*, 405 U.S. at 597–600.

within the same territory, regardless of the use of the mark.[72] The key difference between the agreement in *Topco* and that in *Palmer* is that the latter severed the use of the brand from the sale of the service and therefore was a restriction on competition unrelated to promotion of the mark.[73]

This distinction is also illustrated by *Rothery Storage & Van Co. v. Atlas Van Lines*.[74] In *Rothery*, the court upheld a territorial restriction, which was part of an agreement for the promotion of a brand.[75] The court recognized that territorial restrictions could be necessary for brand development and the creation of customer loyalty and expressed skepticism with the viability of the *Topco* decision.[76] The court stated that the *per se* illegality of horizontal restraints was overruled by later cases.[77]

In conclusion, free riding justifications seem to allow some horizontal territorial divisions implemented for the purposes of brand development and promotion. This result is consistent with the goals of trademark law.[78] This result also demonstrates that antitrust free riding justifications should be closely scrutinized when intellectual property is implemented. In the case of trademark law, free riding justifications do not create a subject matter conflict and, in general, are consistent with Congress's purpose in enacting federal trademark protection.

2. Precedent Cited in *Morris*

The Eleventh Circuit cited three prior cases in assessing and ultimately affirming the PGA's asserted business justification for refusing to deal with *Morris*: *Sylvania*,[79] *Butler*,[80] and *Trinko*.[81] 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

72. *Palmer*, 498 U.S. at 47.

73. *Id.*

74. 792 F.2d 210 (D.C. Cir. 1986).

75. *Id.* at 212.

76. *Id.* at 226. The petitioners in this case cited *Topco* for the proposition that all horizontal restraints are *per se* illegal. *Id.* The court then proceeds to state that to the extent *Topco* stands for this proposition it has been overruled. *Id.*

77. *Id.*; *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979) (foregoing the *per se* rule in recognition that partnerships can require horizontal restraints).

78. *See, e.g.*, Stacey L. Dogan & Mark Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–88 (2004) (discussing the goals of trademark law).

79. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

80. Consultants & Designers, Inc. v. Butler Serv. Group, 720 F.2d 1553 (11th Cir. 1983).

81. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004).

refusing to deal.[82]

At issue in *Continental T.V. Inc. v. GTE Sylvania Inc.* was a territorial restraint imposed by a manufacturer on retailers of a product.[83] The Supreme Court upheld the restraint and established that vertical territorial restraints were subject to the rule of reason as opposed to the *Topco per se* rule that applies to horizontal territorial restraints.[84] The Court justified the relaxed standard of review for vertical restraints by reasoning that there were valid economic reasons for vertical restrictions while there was no economic reason, except as a means of restricting supply and raising price, for horizontal agreements among competitors to restrict sales based on territory.[85]

The primary economic justification was the prevention of free riding in the provision of services by the retailer to customers.[86] 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.[87] Vertical 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.[88] A manufacturer could use territorial restrictions to standardize services across all retailers.[89] The Court further reasoned that these restrictions within a brand promoted competition across brands by allowing manufacturers to establish good will and a customer base for a given brand.[90] 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.[91]

The Eleventh Circuit's decision in *Consultants & Designers, Inc. v. Butler Service Group* also centered on the need to prevent free riding, but in the context of the enforceability of covenants not to compete.[92] The court upheld a placement agency's restrictions that prevented the

82. Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295–96 (11th Cir. 2004).

83. *Sylvania*, 433 U.S. at 42.

84. *Id.* at 59.

85. *Id.* at 54–56.

86. *Id.* at 55.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 57.

92. Consultants & Designers, Inc. v. Butler Serv. Group, 720 F.2d 1553, 1561 (11th Cir. 1983).

agency's employees from accepting permanent employment with a company at which they were placed as temporary employees.[93] As in *Sylvania*, the *Butler* 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.[94] Since the placement agency invested in identifying an employee's skills and matching an employee with an employer, the restriction, according to the court, allowed the placement agency to recoup its investment in the recruitment of an employee by preventing an employer from free riding on the agency's efforts.[95]

Finally, the Eleventh Circuit in *Morris* analyzed the *Trinko* decision.[96] 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 of 1996.[97] The plaintiff argued that Verizon's failure to allow interconnection was an illegal act of monopolization.[98] The Court failed to find a claim, stating that the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[99] What this statement means has been a source of controversy among commentators.[100] 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 Sherman Act.[101] A more limited reading of *Trinko*, one consistent with antitrust law, would deny judges *carte blanche* to second guess Congress's decision on whether to identify certain industries, such as

93. *Id.* at 1564.

94. *Compare Sylvania*, 433 U.S. at 59 (applying the rule of reason analysis to vertical territorial restraints), *with Butler*, 720 F.2d at 1562 (applying a rule of reason analysis to the restriction).

95. *Butler*, 720 F.2d at 1558.

96. Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004).

97. 47 U.S.C. § 152 (2000); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004).

98. *Trinko*, 540 U.S. at 398.

99. *Id.* at 415–16.

100. *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) (arguing against the immunity rule for unilateral refusals to deal in intellectual property).

101. *See* John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. CHI. L. REV. 289, 289 (2005) (stating that the Court held that an entire type of conduct could not meet the anticompetitive conduct element of Section 2).

telecommunications, as monopolies.[102]

3. Circuit Split

Usually, the conflict between antitrust and intellectual property entails the intellectual property owner asserting his patents and copyrights as a shield to the antitrust regime. For example, in both the *Kodak*[103] and *Xerox*[104] cases, a photocopier company claimed that it could deny independent service providers access to its machines in order to protect the patented and copyrighted technologies. In the Ninth Circuit case, Eastman Kodak Company refused to sell replacement parts to independent service organizations (ISOs) to prevent the ISOs from competing with Kodak's own service offerings.[105] Likewise, in a Federal Circuit case, Xerox Corporation sought to enforce its company policy of not selling parts unique to its copiers to ISOs unless they were end-users of the copiers.[106]

However, despite the similarities in the factual circumstances of both cases, the courts differed in their holdings, splitting on whether the invocation of intellectual property rights acts as a shield to the antitrust laws.[107] At one end of the split is the Ninth Circuit ruling in *Kodak*, which refused to accept Kodak's intellectual property protections as a defense to the antitrust claim.[108] At the other end is the Federal Circuit, which came very close to creating an antitrust immunity based on intellectual property in the *Xerox* case.[109] This circuit split illustrates the differing outcomes that can occur when antitrust law implicates intellectual property concerns.

4. European Union Examples

Finally, two European Union cases deal with conflicts between antitrust and intellectual property law. In *Magill*[110] and *IMS*[111] the

102. *Id.* at 289 (stating that *Trinko* arose in the specialized context of telecommunications).

103. Image Technical Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 614 (9th Cir. 1990).

104. *In re* Indep. Serv. Org. Antitrust Litig. (*Xerox*), 203 F.3d 1322, 1324 (Fed. Cir. 2000).

105. *Kodak*, 903 F.2d at 614.

106. *Xerox*, 203 F.3d at 1324.

107. *Compare Kodak*, 903 F.2d at 617 (holding that intellectual property is not a defense to the antitrust laws), *with Xerox*, 203 F.3d at 1329 (considering creating an antitrust immunity based on intellectual property law).

108. *Kodak*, 903 F.2d at 619. The court found that Kodak's refusal to sell parts to ISOs was pretextual and that a recovery of investment costs could not justify its policy. *Id.*

109. *Xerox*, 203 F.3d at 1329. The court found that an "'author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification . . . .'" *Id.* at 1329 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)).

110. Joined Cases C-241/91P & C-242/91P, Radio Telefis Eireann and Indep. Television

European Court of Justice (ECJ) demonstrates an alternative tactic used to reconcile the tensions between intellectual property and competition policy. The two cases are particularly pertinent to an understanding of the *Morris* case because of their relevance to rights over data.

In *Magill*, the data at issue was television broadcast schedules and their distribution by television stations to the local newspapers and other media.[112] Magill, a publisher, obtained and published the data in violation of an embargo and was threatened with a suit for copyright infringement.[113] His subsequent challenge of the embargo to 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.[114] The license was upheld by the European Court of Justice, which found the television stations had a de facto monopoly over the information itself and held that the stations' failure to license the information was an abuse of dominant position.[115]

The European Court of Justice's 2004 decision in the *IMS* case strengthens the rights of access to information secured by the *Magill* decision. In *IMS*, the ECJ held that the use of brick structure, which divided Germany geographically into zones, or bricks, for the purposes of marketing and selling, 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.[116] 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.[117]

III. THE CASE OF *MORRIS V. PGA TOURS*

The Eleventh Circuit's decision in *Morris* provides an important example of the misuse of the free riding analysis in antitrust law. This Part presents the *Morris* case and its context in the jurisprudence of free riding.

Publ'ns Ltd. v. Comm'n of the European Cmtys. (*Magill*), 1995 E.C.R. I-743.

111. Case C-418/01, IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG (*IMS*), 2004 E.C.R. I-5039.

112. *Magill*, 1995 E.C.R. I-743. 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.

113. *Id.*

114. *Id.*

115. *Id.*

116. *IMS*, 2004 E.C.R. I-5039.

117. *Id.*

A. The Hot Facts

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.[118] Since golf is played over a vast course, the collection and reporting of real-time scores poses a challenge, aggravated by the fact that PGA rules prohibit cell phones and other electronic forms of communication during game play.[119] To resolve this dilemma, the PGA in the early 1980s created the Real-Time Scoring System (RTSS), which consists of a group of volunteer workers that follow the players during the game, writing down the scores at the end of each green, and then relaying the scores via hand-held wireless radios.[120] 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.[121]

Newsgathering organizations, both traditional and web-based, like to report the scores as soon as possible.[122] 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.[123] 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.[124] In 1999, the PGA entered into an exclusive syndication arrangement with USA Today for the retransmission of the scores.[125] Other news organizations were subject to the Online Service Regulations (OLSR), also enacted by the PGA 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.[126] 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

118. Morris Commc'ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d. 1269, 1273 (M.D. Fla. 2002).

119. *Id.* at 1273–74.

120. *Id.* at 1273.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1274.

125. *Id.*

126. *Id.* at 1274–75.

without the written consent of the PGA.[127]

Morris Communications Corporation (Morris), a Georgia corporation, publishes several traditional and Internet-based newspapers.[128] Prior to 1999, Morris gathered golf scores from the RTSS and disseminated them to many local newspapers that sought to report on PGA tournaments.[129] In 2000, Morris was reprimanded by PGA for selling golf scores to *The Denver Post* in violation of the OLSR.[130] The PGA consented to Morris' sales on the condition that it obtained the information from the PGA web site rather than through RTSS.[131] 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.[132] 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.[133]

B. The District Court's 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.[134] A monopolization claim is established by showing that the defendant has monopoly power in the relevant market and engaged in "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[135] Since the PGA had exclusive access to the real-time scores, establishing market power was not an issue.[136] The question was identifying the bad acts that constituted "willful acquisition or maintenance" by the PGA of its market power.[137]

Morris argued that the PGA had engaged in two bad acts in violation

127. *Id.* at 1275.
128. *Id.* at 1272.
129. *Id.* at 1274.
130. *Id.* at 1275.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* *See also* Sherman Act, 15 U.S.C. § 2 (2000) (prohibiting monopolization and attempts at monopolization).
135. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
136. Morris Commc'ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d. 1269, 1283 (M.D. Fla. 2002).
137. *Id.* at 1283–84 (discussing the two tests used to establish the existence of "willful acquisition or maintenance").

of the statute. The first was an intent to monopolize based on *Aspen Skiing v. Aspen Highlands Skiing Co.*, a famous Supreme Court decision holding that a monopolist had a duty to cooperate with competitors in certain situations.[138] The second was control of essential facilities based on a number of appellate decisions holding that a monopolist cannot deny a competitor access to a facility that is essential to competition.[139]

As a defense to a Section Two claim, the PGA presented a business justification for its acts.[140] The district court found this justification to be a valid one in that the PGA had an interest in recouping its investment in creating the RTSS for collecting and disseminating real-time golf scores.[141] Allowing companies like Morris to free ride off these efforts by posting and selling the golf scores undercut the PGA's investment.[142] 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.[143]

C. The Eleventh Circuit

The United States Court of Appeals for the Eleventh Circuit affirmed the decision.[144] The business justification accepted by the Eleventh Circuit is reminiscent of free riding justifications for intellectual property.[145] 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.[146] The high fixed cost, low imitation cost argument that the court enunciated is often the justification for

138. *See generally* Aspen Skiing v. Aspen Highlands Skiing Co., 472 U.S. 585 (1985) (holding that a monopolist had a duty to cooperate with competitors in certain situations).

139. Although the Supreme Court has not adopted the essential facilities doctrine, several lower federal courts have appealed to the doctrine. *See* Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (describing the doctrine but neither endorsing or repudiating it).

140. *PGA Tour*, 235 F. Supp. 2d at 1278.

141. *Id.* at 1281.

142. *Id.* at 1280.

143. *See id.* (reasoning that Morris does not expend its own resources but instead free rides on the PGA's compilation of golf scores).

144. Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1298 (11th Cir. 2004).

145. *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–1036 (2005) (discussing the arguments justifying intellectual property); *see also supra* notes 27–30 and accompanying text (outlining the difference between patent, copyright, and trademark law).

146. *Morris*, 364 F.3d at 1296.

copyright and patent restrictions on imitation and other uses.[147]

IV. ANALYSIS OF *MORRIS*: THE ELEVENTH CIRCUIT SHOULD HAVE REVERSED THE LOWER COURT'S HOLDING

A. Morris*'s Free-Riding Rationale Varied Significantly from that in* Butler & Sylvania

Each of the cases the *Morris* court relied on is factually distinguishable and involved a very different free riding problem. Although there was a superficial similarity between the free riding at issue in *Morris* and the free riding justifications in *Sylvania* and *Butler*, there were 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.[148] Absent the restrictions, neither defendant in those cases 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 have weakened inter-brand competition by making it more difficult for new brands to be established.[149] In *Butler*, the loss of service would have vitiated the value-added provided by the placement agency by allowing potential employees to use the agency to find permanent rather than temporary jobs.[150]

By contrast, in *Morris*, it is not clear that allowing access to data would have eliminated the provision of the service by the PGA in establishing the RTSS. Admittedly, the system may have become less profitable, but it was far from clear that the value added from the service would have vanished. For instance, had Morris been allowed access, the PGA would still be able to market their golf scores on their own website.[151] The key difference was 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 that dual effect.

147. *Id.*

148. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977); Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1556 (11th Cir. 1983).

149. *Sylvania*, 433 U.S. at 54 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.").

150. *Butler*, 720 F.2d at 1555. The benefit provided by the agency was that it had a supply of workers for short-term jobs. *Id.* If it were declared unreasonable to protect this benefit the agency would be unable to provide any value. *Id.*

151. *Morris*, 364 F.3d at 1291.

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 there 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 did the *Morris* case, 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.

B. Reconciling Topco*'s Improper Rejection of Free Riding Justifications with* Morris*'s Uncritical Acceptance*

In *Morris*, the free riding justification should have been rejected because its application created a conflict with copyright subject matter. The contractual exclusion by the PGA allowed it to protect subject matter that is expressly excluded from copyright protection. On the other hand, allowing a free riding justification in *Topco* would not have created such a conflict with trademark law or any other body of intellectual property law since the type of free riding at issue was not prevented by either patent, copyright, or trademark laws. The intellectual property issue in *Topco* was the use of the Topco name for branding.[152] As a result, the Supreme Court's acceptance of the free riding justification raised in *Topco* would not have interfered with the Congressional policy of intellectual property. But a lack of conflict with intellectual property subject matter is not a sufficient condition for accepting a free riding justification for exclusionary conduct. The problem with *Topco* was that the Court's rejection of the free riding justification created a possible conflict with the policy goals of trademark law to foster strong marks and brand names in order to avoid consumer confusion and stimulate competition.

C. The Eleventh Circuit Ignored the Rule of Trinko

The use of antitrust law to expand intellectual property is contrary to

152. *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 602 (1971) (striking down an agreement among independent grocers to restrict competition through the creation of a new brand); *see also* GOLDSTEIN, *supra* note 27, at 221 (discussing the origins of trademark law). The use of trademarks is a method producers use to protect their brands. *Id.*

the analysis of *Trinko*.[153] As discussed above, the Supreme Court indicated in *Trinko* that judges may not second-guess Congress's legislative decisions regarding whether or not an industry is a monopoly.[154] The problem was that the Eleventh Circuit did exactly this in *Morris* when it second-guessed Congress's 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 implicitly expanded the scope of the intellectual property grant to include what Congress exempted: data.

D. The Morris *Decision Raises Constitutional Problems*

In *Morris*, the Eleventh Circuit created a potential constitutional conflict by using antitrust law to expand the boundaries of intellectual property. Congress enacted antitrust law pursuant to its Commerce Clause powers, which permit Congress "to regulate Commerce . . . among the several States."[155] Copyright and patent laws, on the other hand, were enacted pursuant to Congress's power "to 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."[156] 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's power to enact copyright and patent laws because facts are not "writings" under the Constitution.[157] In *Morris*, however, facts were allowed to be protected through the antitrust laws, which flow from Congress's Commerce Clause powers. 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: 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

---

153. *See supra* notes 97–101 and accompanying text (discussing *Trinko*'s narrow analysis of the Sherman Act).

154. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

155. U.S. CONST. art. I, § 8, cl. 3. *See* United States v. E.C. Knight Co., 156 U.S. 1, 11–12 (1895) (recognizing Congress's power to enact antitrust laws under its Commerce Clause powers).

156. U.S. CONST., art. I, § 8, cl. 8. *See* Eldred v. Ashcroft, 537 U.S. 186, 192 (2003) (discussing Congress's power to create copyright and patent statutes).

157. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

Heald and Sherry.[158] As they point out, the problem with the implied limitation argument is that it may prove too much.[159] 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.[160] However, copyright and patent law protects writings and inventions that are created wholly intra-state and never commercialized interstate, 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,"[161] the Lanham Act,[162] which is the current legislation protecting trademarks, is a perfectly constitutional exercise of the Commerce Clause power.[163] The implied limitations, Professors Heald and Sherry conclude, have to be based on the policies underlying the specific enumerated power and that inform legislation enacted under the respective power.[164] They identify four policies that inform the implied limitation analysis under the Intellectual Property Clause: the Suspect Grant Principle, the Quid Pro Quo Principle, the Authorship Principle, and the Public Domain Principle.[165] The Suspect Grant Principle states that monopoly grants should be based on the merits. The Quid Pro Quo Principle states that society should be getting something in return for the monopoly grant. The Authorship Principle states that the grant should be given to reward true originality and creativity. Finally, the Public Domain Principle states that the grant should be limited and enrich the public domain.

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 created 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 was to conclude that there was no illegal monopoly. The court

158. *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) (arguing that the intellectual property clause absolutely constrains Congress's power).

159. *Id.* at 1125.

160. *Id.* at 1160.

161. *See In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879) (distinguishing trademark registration from writings and discoveries).

162. 15 U.S.C. § 1051 (2000 & West Supp. 2002).

163. *See* Heald & Sherry, *supra* note 158, at 1159 (addressing intellectual property and constitutional law).

164. *Id.* at 1160.

165. *Id.* at 1160–66.

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 of Science and useful Arts."[166] It is not clear how the public is benefited 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* held that facts are relegated to the public domain for all to use.[167] By making the real-time golf scores private, the Eleventh Circuit narrowed the scope of the public domain as defined by the intellectual property clause. For these reasons, the Eleventh Circuit's decision in *Morris* created a constitutional conflict by ignoring the implied limitations on Congress's 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*, invalidated legislation enacted by Congress under its Commerce Clause powers to protect employees of the reorganized Chicago, Rock Island and Pacific Railroad Company.[168] The Court found that the legislation was in conflict with the uniformity requirement of the Bankruptcy Clause, which grants Congress the authority to pass bankruptcy law as long as it is uniform across all the states.[169] 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

166. U.S. CONST., art. I, § 8, cl. 8.

167. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

168. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 469–71 (1982).

169. *Id.* at 458.

required by the Commerce Clause.[170]

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's 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.

V. PROPOSAL: A CAUTIOUS REVIEW OF EXCLUSIONARY CONDUCT IS NECESSARY

There are two reasons for a more cautious antitrust review of exclusionary conduct when intellectual property is involved. First, intellectual property has its own free riding rationale.[171] Intellectual property law recognizes the value of appropriation through doctrines that promote the public domain: limited terms, fair use, and non-appropriable subject matter.[172] Since intellectual property contains its own balancing of the benefits and costs of free riding, this balancing should be taken into consideration when antitrust law intersects with the territory of intellectual property, as it almost certainly did in *Morris* and implicitly in *Topco*.

Second, intellectual property law and antitrust law are tools created by Congress to address innovation policy and competition respectively.[173] When antitrust law encroaches on what has traditionally been the domain of intellectual property, care must be taken that competition and innovation policy are promoted consistently.[174] The decision in *Morris* seemingly reconciles the two by allowing an exclusionary restriction in order to promote the creation of innovative services by the PGA. The problem with this logic is that the alleged reconciliation struck by the court conflicts with the policy decision to place data in the public domain.[175] Striking down the

170. *Id.* at 468.

171. *See supra* Part II.A (outlining the history and purposes of intellectual property law).

172. *See* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 44–52 (2004) (discussing the balance between free speech and copyright protection).

173. Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1053 (2003).

174. *Id.* at 1052–53.

175. *See* Wendy Gordon, *Reality as Artifact: From* Feist *to Fair Use*, LAW & COMTEMP.

restriction as making data proprietary would have been more consistent with the balance within intellectual property law.[176]

The dilemma posed by *Morris* can be stated succinctly. The free riding rationale usually accepted within antitrust law is to allow restrictions that promote the creation of valuable services, such as the collection and publishing of real-time golf scores. The free riding rationale within intellectual property law, specifically copyright law, leaves data in the public domain unless they are arranged, coordinated, and selected in a creatively original manner. The dilemma can be resolved just as readily. If copyright law applied to the product created by the PGA, then the contractual restrictions would be unnecessary. Antitrust law should not permit what copyright law excludes.

This Part presents some general legal principles to structure the balance between antitrust and intellectual property in the treatment of free riding.

A. *Courts Should Follow the Analysis of the* Lexmark *Decision*

Often antitrust concerns arise within the context of an intellectual property dispute. For example, in many of the peer-to-peer (P2P) cases, the copyright defendant unsuccessfully raised antitrust claims that the music industry was bringing the copyright claims as a means to limit competition for the distribution of music by shutting down alternative distribution outlets.[177] These claims have been controversial because these alternatives entail the distribution of free music, an alternative that clearly threatens the established market for music.[178] A more subtle version of the antitrust argument is that shutting down P2P networks precludes the development of alternatives for pay distribution mechanisms that compete with overpriced CDs.[179] The antitrust claims have been unsuccessful because courts have found that the copyright policies outweigh the spurious competitive benefits of P2P.[180]

PROBS., Spring 1992, at 93, 94 (addressing the Supreme Court's determination that allowing facts to be privately owned "is simply more costly than society can afford[]").

176. *Id.* at 105.

177. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) (holding that plaintiffs must first provide notice to Napster of the availability of copyrighted works before Napster has a duty to disable access to the copyrighted material).

178. *See* Shubha Ghosh, *Turning Gray into Green: Some Comments on Napster*, 23 HASTINGS COMM. & ENT. L.J. 563, 572–579 (2001) (discussing Napster, file-sharing and the distribution of music). *See also* Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005) (discussing the evolution of music copyright law).

179. Ghosh, *supra* note 178, at 575.

180. *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 923 (N.D. Cal. 2000) (rejecting antitrust defense against preliminary injunction), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

Admittedly, when framed in terms of free music, the antitrust claims are vexing and not persuasive. But this does not mean that antitrust claims are not viable. In fact, within copyright law, specifically in the analysis of market effects under fair use, there is room, and arguably a mandate, to consider the competitive effects of not allowing the alleged infringement of copyright.

An excellent example of such an analysis is provided by the Sixth Circuit in the *Lexmark* case,[181] in which a printer manufacturer attempted to enjoin the manufacturer of a competing cartridge by alleging that the software within the cartridge, designed to be compatible with the software in the printer, violated the printer manufacturer's copyright. Lexmark's purpose for installing the software was so that only they could refill their ink cartridges.[182] Static Control Components then produced a microchip which could be used so that Lexmark ink cartridges could be recycled and refilled by third parties at a reduced cost.[183] The Court agreed that Lexmark's software was protected as a "literary work" under the copyright laws.[184] However ultimately, the Sixth Circuit rejected Lexmark's claim on several grounds, including the argument that the cartridge manufacturer's use of the software was fair use.[185] The court's fair use analysis expressly relied upon the rationale that enjoining the use of the software would have anticompetitive effects in the cartridge industry.

B. The ECJ Decisions Also Provide Guidance to U.S. Courts

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.[186] Under United States law, by contrast, compulsory licensing is extra-ordinary, imposed by courts as a remedial measure in

---

181. Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 528 (6th Cir. 2004).

182. *Id.* at 529–30.

183. *Id.*

184. *Id.* at 533.

185. *Id.* at 551.

186. *See supra* Part II.C.4 (discussing the decisions of the European Court of Justice addressing antitrust and intellectual property disputes).

unusual circumstances or if mandated expressly by Congress.[187] As a result, courts like the Eleventh Circuit that are confronted with disputes over monopoly control over data are left with two options: either to find a violation of the antitrust law and permit access or to take the tack in the *Morris* decision itself and find no violation. The middle ground of compulsory licensing is unavailable in the United States, except in extraordinary cases or in the event Congress creates a special remedy.[188]

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.[189] 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 this 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*, this proposal will work to properly balance intellectual property and competition policy within the current framework for antitrust analysis in the United States.

187. *See* Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853, 862–64 (2003) (describing uses of compulsory licensing in the United States).

188. Congress has created compulsory licensing in the music and television industries as part of legislative compromises within copyright law. 17 U.S.C. § 104 (2000); 17 U.S.C. § 119 (2000 & West Supp. 2005). Special provisions of the Atomic Energy Commission Act also permit compulsory licensing if necessary for the public interest. 42 U.S.C. § 2183 (2000) (providing special procedures for patents involving nuclear material or atomic energy). For a discussion of the use of compulsory licensing as an antitrust remedy, see generally Lawrence Schlam, *Compulsory Royalty-Free Licensing as an Antitrust Remedy for Patent Fraud: Law, Policy and the Patent-Antitrust Interface Revisited*, 7 CORNELL J.L. & PUB. POL'Y 467 (1998).

189. *IMS*, 2004 E.C.R. I-5039.

VI. CONCLUSION

The relationship between intellectual property and antitrust is intricate. While on the one hand intellectual property law grants federally created rights to exclude to inventors and authors, antitrust places restrictions on exclusionary conduct that is harmful to competition. The *Morris* case presents a fresh variation on the intellectual property-antitrust conundrum by illustrating that antitrust law may permit the expansion of intellectual property rights by allowing free riding as a business justification for exclusionary conduct. This Article has made the argument against such an expansion of intellectual property rights by the recommendation that courts pay special attention to the application of the free riding rationale when intellectual property law is implicated.

The use of free riding as a business justification in antitrust raises broader issues of the appropriateness of free riding as a justification for legal protections accorded to business in the competitive process. To say that a person requires legal protection because of free riding is a seductive argument. Claims that certain activity steals the fruit of someone's labor or is an illegal misappropriation of someone's gains, however, disguise the question of entitlement and assumes that the creator is entitled to completely appropriate the value of what she has created. This broad claim of entitlement conflicts with the spirit of creative destruction in competition and the benefits of sharing in an intellectual property commons. Once the prevention of free riding is recognized as the granting of the legal right to exclude, the focus of the inquiry becomes better directed to the more difficult question of whether someone should be given the absolute right to prevent someone from using the fruits of her creation. In a case like *Morris*, this difficult question translates into who should control and have access to information. If access to information is being excluded, the justification should not be limited solely to considerations of the costs of producing the information. Such a narrow consideration ignores the benefits to society from open access and the more specific beneficial uses of the party seeking access.

The facts of *Morris* are unique, but the legal issues raised by the case are far from idiosyncratic. At the same time that information "wants to be free," information has been modified and channeled through the marketplace. It is important that a judicious reading and application of intellectual property and antitrust laws prevent the market from becoming an iron cage for information. The decision in *Morris* provides the materials for such a cage. Hopefully, this Article's proposal can serve as a key to ensure that information finds some degree of freedom within the structures of the marketplace.