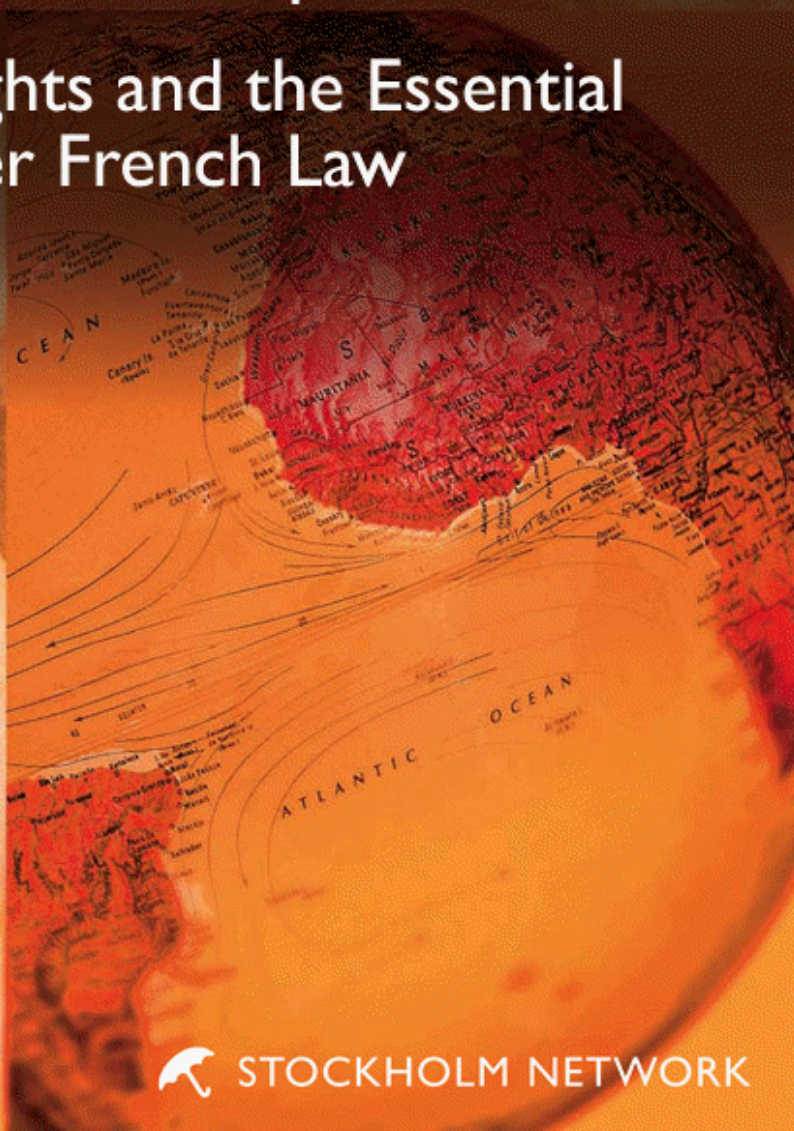


## Stockholm Network Experts' Series on Intellectual Property and Competition

### Intellectual Property Rights and the Essential Facilities Doctrine Under French Law



By Aurélien Condomines



STOCKHOLM NETWORK

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By Aurélien Condomines

Aramis Société d'Avocats

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## Introduction

Intellectual property rights are, by essence, of an exclusive nature and thus a legitimate obstacle to competition. However, in certain circumstances, where the legitimate interests of protecting intellectual property rights and of promoting competition are in conflict, competition authorities may prohibit certain uses of intellectual property rights. This is in particular the case, under both French and European Community competition law, for dominant companies, which have a special obligation not to cause any further deterioration of an already fragile competitive situation.

The exercise of its intellectual property rights by a company in a dominant position may, in certain circumstances, create a barrier to the entry of new competitors or eliminate existing competitors who are not able to use the protected technology or information. Under European Community competition law, this issue has been raised in many cases and the decisions of the European Commission and courts have been much debated (*Magill*, *IMS Health* and *Microsoft* cases<sup>1</sup>). It is now settled case law, under European Community competition law, that the refusal by a dominant company to provide access to an essential intellectual property right can be prohibited as an abuse, in certain circumstances, under the so-called 'essential facilities' theory. We will not go into further details concerning the implementation of this theory under European law in this article. It should only be remembered that the application of this theory leads competition authorities and courts, when certain conditions are met, to oblige dominant companies to give access to an infrastructure or resource that is considered essential for third parties in order to provide certain products or services.

Under French competition law, the question of the application of the essential facilities theory to technology or information covered by intellectual property rights has been raised on several occasions before the French Competition Council (hereafter 'the Council') and the Court of Appeals of Paris<sup>2</sup>. In a 2001 decision the Council made a general statement according to which the possession of an intellectual property right is not illicit by itself<sup>3</sup>. It thus considered that the registration of a patent could not be considered, *per se*, as an abusive conduct affecting competition, even for a dominant company. Nevertheless, there are several situations in which the use that is made of such intellectual property rights has been identified by case law as potentially abusive. We will focus, in this article, on cases where the French competition authorities and courts ruled on claims that a dominant company should provide access to its intellectual property rights, considered as an 'essential facility' to a third party.

Classically, the 'essential facilities' theory under French law provides that access to the facility concerned must be granted when the following conditions are met: (1) the facility is owned by a company in a dominant position or in a situation of monopoly, (2) access to the facility is strictly necessary or indispensable for third parties in order to compete on the market, (3) the facility cannot be duplicated under economically reasonable conditions by competitors of the owner, (4) access to the facility is either denied, or granted under restrictive conditions that are not justified,

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<sup>1</sup> Cases C-241 & 242/91P *Magill-Radio Telefio Eirann (RTE)/Commission*, 6 April 1995, E.C.R. 1995 p.I-743 ; Commission decision of August 13, 2003, in the matter *IMS Health*, OJ L 268 of October 18, 2003 ; judgement of European Court of Justice of April 29, 2004, C-418/01, E.C.R. 2004, p. I-05039 ; Commission decision of March 24, 2004, in the matter *Microsoft*, COMP/C-3/37.792 ; Order of President of the Court of First Instance of 22 December 2004, T-201/04R, E.C.R. 2004 p.II-04463

<sup>2</sup> The Court of Appeals of Paris is the appeals court for the Council's decisions

<sup>3</sup> French Competition Council, decision n°01-D-57 of September 21, 2001, BOCCRF n°16 of October 30, 2001

(5) access to this facility is possible<sup>4</sup>. In the light of European Community case law, the Council and the Court of Appeals of Paris have adapted this theory, which is generally used in relation to infrastructure and equipment rather than immaterial goods, in the field of intellectual property rights and more particularly of computer software protected by French copyright rules. The three main relevant French precedents, the *NMPP* case, the *Apple* case and the French *Microsoft* case, will be described in further detail.

## Cases

In the *NMPP* matter, the French competition authorities adopted several decisions during the period 2002-2006, relating to the conduct of NMPP, the leading French provider of services for the distribution of newspapers. NMPP's main competitor, the MLP group, requested access to some of the components of a software solution owned by NMPP, in order to make it compatible with its own software and thus compete efficiently against NMPP. In a first opinion, given in 2002, the Council considered that software may, in certain circumstances, be qualified as an 'essential facility', provided that the software concerned is indispensable in order to compete on the market with the patent owner, without being duplicable under reasonable economic conditions<sup>5</sup>. In 2003, the Council then considered that accessing NMPP's software was indispensable to compete on the market and enjoined NMPP, as an interim measure, to create a form of interconnection between its software and MLP's software<sup>6</sup>. The Council considered that it could not be excluded that NMPP's software was not duplicable and that the denial of access to such software was creating a competitive handicap which could compromise MLP's activity. The Court of Appeals confirmed this decision<sup>7</sup>. However, the French Supreme Court annulled the decision of the Court of Appeals, because it considered that MLP could have used economically reasonable alternatives<sup>8</sup>. The Supreme Court specified that such alternatives should be "economically reasonable" without having to be as advantageous as using the NMPP software. During an earlier hearing, MLP had admitted being financially able to duplicate the software. The Court of Appeals, to which the matter was referred back by the Supreme Court, eventually considered that MLP should not be granted access to NMPP's software. First, it considered that the interconnection between the two software solutions could be made "manually" without unreasonable efforts, MLP's clients being able to type the data issued by NMPP's software manually into MLP's software<sup>9</sup>. Secondly, it considered that the costs generated by the duplication of the software by MLP would not be unreasonable, assessing the economic efficiency of such duplication not on the basis of NMPP's activity but based on "a service provided at a comparable scale". Finally, the Court of Appeals ruled that, in any case, MLP would be able to set up its own chain of distribution of newspapers competing with NMPP, in complete independence from NMPP.

In the *Apple* case, the owner of a website dedicated to the downloading of music was requesting access to technology developed by Apple in order to enable owners of Apple's portable media player, the iPod, to download music from its website<sup>10</sup>. The claimant pointed out the very high market share of Apple on the French market for portable media players and claimed that it needed access to Apple's technology in order to provide its services efficiently. The Council, quoting recent European law precedents and in particular the *IMS Health* and *Microsoft* cases, insisted on the necessity of demonstrating the "essential" nature of the resource to which access is requested and the absence of

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<sup>4</sup> French Competition Council, decision n°03-MC-04 of December 22, 2003, BOCCRF n°1 of February 13, 2004

<sup>5</sup> French Competition Council, opinion n°02-A-08 of May 22, 2002, not published.

<sup>6</sup> French Competition Council, decision n°03-MC-04 of December 22, 2003, BOCCRF n°1 of February 13, 2004.

<sup>7</sup> Court of Appeals of Paris, decision of February 12, 2004, Jurisdata n°2004-235805.

<sup>8</sup> Court of Cassation, decision of July 12, 2005, BOCCRF n°11 of December 16, 2005.

<sup>9</sup> Court of Appeals of Paris, decision of January 31, 2006, Jurisdata n°2006-298119.

<sup>10</sup> French Competition Council, decision n°04-D-54 of November 9, 2004, BOCCRF n°3 of March 31, 2005.

alternative solutions. It considered that having access to the technology developed by Apple was not essential for the claimant: transferring music on to a portable media player is not the only business outlet for an online music website and there are economically reasonable technical alternatives enabling the transfer of downloaded files onto iPods. The Council also took into account the fact that numerous competitors of Apple had recently launched portable media players that were compatible with the claimant's website solution. Finally, the Council stated that one of the conditions required by the European courts in the *IMS Health* case was not met in this case; access to the technology concerned was not required in order to launch a new product or service, which could not be commercialised without this technology, but merely to compete with the owner of the technology.

In the French *Microsoft* case, the French authorities had to deal with practices of the Microsoft group regarding the software suite Pack Office Pro<sup>11</sup>. A computer manufacturer claimed that Microsoft abusively refused to grant it a licence for pre-installing the software suite on its computers. Microsoft had finally agreed to grant the licence, but allegedly imposed excessive and discriminatory prices on the manufacturer. The council held that the conduct of Microsoft was not abusive. The sales of the claimant had increased considerably during the period concerned and the Council considered that a licence on Microsoft's software was not essential for the activity of the claimant, because the pre-installation of the software on computers was not systematically required by its clients. As to the alleged price discrimination, the Council considered that the profits made by the claimant were high enough to absorb the software's license fees. The Council concluded that the conduct of Microsoft had no effect on competition and was not abusive. The Court of Appeals of Paris eventually annulled this decision and referred the case back to the Council, because it considered that the effects of the discriminatory pricing on the relevant market had not been sufficiently assessed<sup>12</sup>.

## Conclusion

As the above precedents show, French competition authorities and courts have adopted the same cautious approach that generally prevails under European law concerning the use of the essential facility theory to oblige dominant companies to grant access to technology and information protected by intellectual property rights. As a matter of fact, this approach is rather in favour of intellectual property rights and it will be difficult, under French competition law, to demonstrate that an intellectual property right is an essential facility that must be licensed to third parties because there is no reasonable alternative on the market. In the three milestone cases described above, French courts have tended to favour a pragmatic, fact-driven analysis of the effects that a refusal to license would have on the relevant markets, rather than a theoretical approach. While the analysis made by French competition authorities is rarely based on a very sophisticated economic assessment, it generally relies on the basic idea that competition law is not there to protect or provide advantages to the competitors of a dominant company but to ensure that a certain degree of competition is preserved on the relevant markets. This approach has been a growing trend in France in recent years, as the French authorities and especially the Council, have been increasingly influenced by modern economic theory. As a result, in all three cases described above, it was considered that the dominant company did not have to license its intellectual property, because alternative solutions were available to preserve competition.

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<sup>11</sup> French Competition Council, decision n°04-D-76 of December 22, 2004, BOCCRF n°3 of March 31, 2005.

<sup>12</sup> Court of Appeals of Paris, decision of May 24, 2005, Jurisdata n°2005-277952.

French law is naturally influenced by European law and most decisions of the French competition authorities nowadays refer explicitly to precedents of the Commission or of the European Court of Justice. This results from the fact that French authorities have to enforce European competition law as well as French competition law in most cases that are brought before them. In such situations, according to general principles of European law, European competition law should prevail. Nevertheless, it should be noted that, in the *Apple* case described above, the Council has taken an approach that is more favourable to intellectual property rights than the European Commission's approach in the well-known *Microsoft* case. The Council opted, in the *Apple* case, for an interpretation of the essential facilities doctrine that limits the cases where dominant companies must grant a license on intellectual property rights to situations where a license is needed for the provision of new services or products that will ultimately benefit to consumers, and not merely in order to compete with the owner of the intellectual property rights. Under European law, the Commission has considered that Microsoft should grant access to protected information to competitors, even though this would not necessarily lead to creating a new product or service. Interestingly, this particular issue is currently one of the important aspects of the *Microsoft* case that is still pending before the European court in Luxembourg.