



Going in the wrong direction

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The European Commission is getting carried away in its intellectual property dispute with Microsoft and neglecting to consider what consumers want, argues *Meir P Pugatch*.

Fans of the classic UK television comedy series *The Benny Hill Show* are probably familiar with the concept of two or three 'gentlemen' trying to help an old lady cross a busy street, without ever asking her if this is her intention. When the old lady objects, the gentlemen force her to cross the street, extremely pleased to do a good deed for the day. And the old lady is left quite helpless – all she had wanted to do was rest a bit before going in the opposite direction.

A quick policy lesson from this scenario is that it would be nice once in a while to try to understand what people want before acting on their behalf. The European Commission (EC) seems to think that it knows exactly what the public wants and needs, which may explain why the ongoing arm-wrestle between it and Microsoft seems so peculiar from an ordinary consumer's point of view.

But in an age of slogans and catchy titles, every power struggle is taking place supposedly 'on behalf of consumers'. Thus, the latest 'statement of objections' by the EC (December 21, 2005), Microsoft's 'response to the statement of objections' (February 15, 2006) and the commission's formal 'receipt of the response to the statement of objections' must be read in this context. Yet how many consumers are really interested in the hundreds, possibly thousands, of pages of 'consumer-friendly' debates on interoperability, source code, technical specifications, technical documentation, internal architecture, functionality, and so on?

When European Commissioner Neelie Kroes argues that she has "given Microsoft every opportunity to comply with its obligations", it is tempting to ask: which opportunities and, more importantly, which obligations is she talking about?

EC remedies

In its statement of objections in December 2005, the EC argued: "One of the remedies imposed by the decision was for Microsoft to disclose complete and accurate interface documentation, which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers."

In other words, it would seem that for the commission there are two major obligations with which Microsoft should comply: to give up its intellectual property (be it patents or any other type of proprietary technologies and know-how) and to hand this proprietary information (so-called interoperability information) to its competitors more or less on a silver platter.

But is sacrificing one company's intellectual property (be it Microsoft's or any other company's, perhaps even a more European one) for other companies' commercial interest ultimately good for consumers?

The debate over interoperability concerning which technical information and documentation should be disclosed or licensed, and under what conditions, is secondary to a more fundamental issue: the EC's decision to sacrifice one principle – the protection of intellectual property rights – over another –

competition. Is that bad? That depends on one's perspective and understanding of the highly delicate relationship between antitrust and intellectual property rights.

Everything boils down to the question of monopoly or, more accurately, the tension between a bad monopoly and a good monopoly.

A monopoly is a market condition in which there is only one provider (the monopolist) of a certain article or service. Basic economic theory concludes that a monopoly will sell a lower quantity of goods or services at a higher price than other firms would under purely competitive conditions. Economists tell us that monopoly is usually bad for consumers. Since government authorities are alert to market monopolies – and in many cases justifiably so – they put in place legal and regulatory mechanisms (antitrust) aimed at increasing competition in the market.

Good or bad monopoly

However, although antitrust mechanisms may be appropriate for combating anti-competitive and monopolistic practices in general, the use of these tools in the case of proprietary knowledge-based products is highly problematic. This is because the establishment of property rights in knowledge products (such as software, medicines, processors, etc) is based on a different type of monopoly: intellectual property rights (or what may be called a 'good' monopoly).

Patents, copyrights, trademarks, trade secrets and other forms of intellectual property rights establish (time-delimited) exclusive ownership (monopoly) of varying types of knowledge. The monopoly deriving from intellectual property rights provides a powerful incentive for innovation by allowing inventors, both firms and individuals, to secure commercial returns for their work, thereby increasing their incentive to invest in future inventive activities.

True, the market exclusivity that derives from the intellectual property system can sometimes restrict the rapid dissemination of existing knowledge products. The system of intellectual property rights has, therefore, a built-in trade off: the incentive to innovate and to create new knowledge for the future in exchange for a temporary monopoly on this knowledge at present.

Legal protection

Intellectual property rights are probably the most unique form of monopoly that is legally protected by the regulator. As such, a proper balance should be maintained between the protection of intellectual property rights on the one hand and competition-based rules, especially antitrust, on the other hand.

European practices in this area are based on Article 82 of the EC Treaty, which prohibits companies from using their dominant (monopolistic) position in an abusive and non-competitive manner. In recent years, the EC has been following a more active policy, which goes beyond the McGill Principle of 1995 (in which it was decided that intellectual property rights were abused in such a way that prevented the introduction of a completely new product to the market).

In the case of Microsoft, the commission has essentially forced it to release its intellectual property rights to its competitors, who were not seeking to design a new product or technology but wanted to provide the same products to consumers.

Not a noble cause

The issue here is not about sacrificing intellectual property rights for the noble cause of providing new products to consumers (that otherwise would not have been developed) but about the profits of competing companies.

Invoking antitrust rules with regard to intellectual property rights should be limited to extreme cases, wherein such rights' existence blocks the market's ability to experiment with new ground-breaking technologies. This should be the exception rather than the rule. Nevertheless, the EC seems to be so entangled in its power games with Microsoft that it is treating the entire policy dimension as a technical issue. Nothing could be further from the truth.

By adopting a more hawkish position on the issue of using antitrust remedies over the protection of intellectual property rights, the commission is making a policy choice on behalf of all the consumers in Europe. And, as with all policy choices, the consequences must be faced.

Similar to the case of the old lady in the busy street, nobody is interested in asking European consumers about their policy choices, even if the direction they seek is the opposite one. But, hey, nobody really cares about the Lisbon Agenda either. Or do they?

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