

Know IP – The Stockholm Network’s Monthly IPR Journal Volume 3: Issue 1. January 2007

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Commentary

Predictions or Prophecies: How Will the Microsoft Case End? – Helen Disney and Dr Meir P. Pugatch¹

There is an old saying in the Jewish Talmud: at the time the old Temple was destroyed, prophecy was taken from the prophets and was given to fools and babies.

Taking the above into account, and at the risk of being foolish, it is nevertheless intellectually intriguing to try and predict the outcome of the ruling of the Court in the case of Microsoft vs. the European Commission. After all, almost three years have passed since the investigation against Microsoft was concluded by the European Commission and 8 years since it began – overall, a sufficient period of time for us to ask where we are heading.

In this brief commentary we are not going to say what we think the ruling ought to be, but rather what we think the ruling will look like. And there is a big difference here! Mainly because we think that although the Microsoft case is fundamental and critical to the relationship between competition rules and IPRs, the European Court of First Instance will intentionally seek to avoid going into the difficult questions and rather choose to stick with the technical realm.

To spell it out – we believe that the European Court of First Instance will passively back the European Commission by refraining from providing any meaningful ruling. We believe that the ruling will be based not only on the intentional decision to focus on some of the technical aspects of the case (while trying to avoid the larger legal issues at stake), but also on the political understanding that the fallout from such a ruling against the Commission will simply be too difficult to digest.

What is the legal dispute between Microsoft and the European Commission in a nutshell?

It involves (a) the dispute on whether Microsoft's refusal to licence its intellectual property to its competitors (such as Sun Microsystems) constitutes an abuse of a dominant position and (b) the extent to which Microsoft should be fully cooperative in disclosing its know-how under the terms of the compulsory licence (so-called interoperability information). There are other aspects of course, such as the issue of bundling, but we will not address these here.

Arguably, the legal battle between Microsoft and the European Commission re-introduced (or at least amplified) three major questions that require interpretation and decisions by the courts. All these refer to Article 82 of the EC treaty – abuse of dominant position.

The first question concerns the scope of Art. 82. To be more specific, in the case of a clash between IPRs and competition rules: which should make way? In the Microsoft case this question has been brought into the spotlight and now requires the intervention of the courts.² Other cases, such as the case of *McGill* or *IMS Health*, started and accelerated this debate but it seems the Microsoft case brings it to its climax.

The second question focuses on the degree to which trade-secrets and know-how should be treated and respected as a 'true' form of IPR – like patents, for example. The entire dispute about the complete and accurate disclosure of Microsoft's interoperability information is in fact a manifestation of this question.

The third question deals with the criteria for evaluating an abuse of dominant position in general and by an entity that holds an IPR in particular. While the discussion on the criteria for evaluating this behaviour is economic in

² For a review of these cases see Curley, D. Innovation, Intellectual Property and Competition- a Legal and Policy Perspective, Stockholm Network Experts Series on Intellectual Property and Competition (2006).

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nature¹, the European Court of Justice (ECJ) has outlined the legal test to examine this issue (albeit for copyrights). The principle used by the ECJ stipulates that the refusal to license an IPR by a company with a dominant position to a third party could violate Article 82 and be considered an abuse only under "exceptional circumstances". In its ruling in the case of IMS Health vs. NDC Health² of 2004 the ECJ outlined three steps to examine the existence of an abuse of dominant position:

1. That the refusal was preventing the emergence of a new product for which there was a potential consumer demand.
2. That the refusal to licence by the copyright owner was not justified by objective considerations.
3. That refusal was such as to exclude any competition on a secondary market.³

Potentially, the Court of First Instance has much to say about the above questions: are IPRs supreme to competition rules? Are trade secrets a legitimate form of IPRs? And is there a need to make the criteria for testing the abuse of a dominant position looser?

The manner in which the court would choose to answer these questions is likely to have a significant effect on the battle between the European Commission and Microsoft.

If the answers to the above are negative, then the ruling will bolster and legitimise the rather hawkish steps taken by the Commission. In this case Microsoft will have to pay all the heavy fines imposed on it by the Commission as well as being subject to even more pressure by the authorities about the disclosure of interoperability information.

¹ Hindley, B. An Economic Analysis of DG Competition's Discussion Paper on the Application of Article 82, Stockholm Network Experts Series on Intellectual Property and Competition (2006); Etro, F. The Economics of Competition Policy and Dominant Market Position, Stockholm Network Experts Series on Intellectual Property and Competition (2007)

² Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (2004) (Judgment of the Court (Fifth Chamber) of 29 April 2004

³ Curley, 2006, p. 10

But if the answers to the above are positive then the European Commission will be facing a huge practical as well as political problem. Besides having to significantly tone down its campaign against Microsoft (not to mention the risk of damages), the Commission will need to justify to Europeans why it has chosen to make this battle so visible and distinct compared to other anti-trust battles.

The decision to answer these questions will require some strong political will, especially given the implications for the European Commission. We therefore predict that the Court will choose to focus on the technical issues, such as the level of documentation given to third parties under the obligation to disclose interoperability information. Such a ruling will not end with any meaningful results other than the clarification of some technical aspects. As such it will allow the European Commission to continue to pursue its agenda.

But since prophecy was given to the fools, we can only hope that our prediction is wrong and that the Court of First Instance is much more determined to make its mark on this fascinating debate.

Topic of the Month

Nongovernmental Organisations, Developing Countries, and the Globalisation of IPRs: A Network Approach - Ben Prickril⁴

The past five years have seen an enormous growth of globalisation, and there are few signs that this growth will slow anytime soon. Intellectual property rights have played an important part in enabling this growth, especially in the areas of trade, health and agriculture. However, the landscape with respect to IPRs is uneven between developed and developing countries, and serious efforts at all levels – most

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notably through the WTO and the TRIPS Agreement – have attempted to deal with these differences. A number of international nongovernmental organisations (NGOs) have long been involved with these issues at the policy and advocacy levels in important areas such as access to medicines.¹ Disparities between developed and developing countries are also being addressed by a number of newer and innovative NGOs specialising in providing IPR services directly to developing countries. This article focuses on the growing influence of these newer NGOs, and suggests that they develop a more globalised and networked approach to the use of IPRs to benefit developing countries.

Before looking at NGOs and IPRs for developing countries in any detail, it is worth briefly discussing why it is important for developing countries to address intellectual property issues within the framework used by intermediate and developed economies. There is currently much debate about the need within indigenous communities and, more generally within developing countries, for intellectual property systems, when these countries are ill-equipped to implement and enforce such systems. Although there are compelling arguments for some restriction of IP protection in developing countries when it is in the public interest (compulsory licensing, for example), it is essential that the international norms for IP protection are generally consistent between developed and developing countries. But as the TRIPS debate and WIPO development agenda have shown, striking this overall balance is extremely difficult.

In order to address the real IPR needs of developing countries, world bodies such as the WIPO, WTO, WHO and the World Bank have implemented policies and promulgated rules. These inter-governmental organisations are often ill-equipped to serve the immediate IPR needs of communities and individuals in developing countries, and a range of organisations including foundations, NGOs and private sector participants have stepped in to fill the gap.

A number of NGOs have been particularly effective in directly addressing IPR disparities between developed and developing countries due to their ability to mobilise and adapt quickly to a wide range of needs at a practical, project-oriented level. Examples of this include Public Interest Intellectual Property Advisors (PIIPA), which provide direct legal services on a pro bono basis to developing countries; Centre for the Management of Intellectual Property in Health and Development (MIHR), which provides developing country training and outreach services; and the International Intellectual Property Institute (IPI), a think tank which promotes awareness of IPRs in developing countries. Several other NGOs are involved in developing country IPRs, and hundreds more are directly affected by IPR issues in developing countries.

There are two major challenges to meeting the growing need for effective IPR systems in developing countries. The first is simply the enormity of the task of addressing these needs. IPRs play an essential role within developing countries, as well as within a very large number of organisations having a direct impact on them, but are at times seen as not helping to improve the lives of the poor. One example is provided in the context of the anti-malarial drug artemisinin. This drug, derived from a wormwood bush (*Artemisia annua*) native to China, is now the preferred anti-malarial. Artemisinin and certain derivatives are highly effective, and are administered in combination with another anti-malarial drug in order to prevent disease recurrence and possible drug resistance. These drugs are being produced at a low cost, and therefore being made available to developing countries through innovative initiatives by Novartis, the Drugs for Neglected Diseases Initiative, Sanofi-Aventis, and others.² Although artemisinin itself cannot be patented, the IPR issues surrounding the introduction of the combination therapy remain significant because pharmaceutical companies producing the drugs still depend on patents to derivatives and combination therapies to maintain a market in

¹ For a listing of many of these international NGOs see Matthews, D. “NGOs, Intellectual Property Rights and Multilateral Institutions” published Dec. 2006 online at <http://www.grain.org/bio-ipr/?id=499>.

² Gozner, M., “Beating Malaria”, *The Scientist* 20, 26-33 (2006).

developed countries. Controversy will surely continue to surround artemisinin-based anti-malarials, and IPR issues will just as surely form a backdrop to this controversy. Unfortunately, misunderstandings and controversy surrounding IPRs in this and other examples tends to obscure the advantages derived from robust intellectual property systems, especially in developing countries, including greater transparency and the ability to challenge intellectual property practices viewed as unfair or illegal. Indeed, helping developing countries to increase their own IPR capacity, that is, a strong and viable system of IPRs, is an universal goal for NGOs involved in IPRs for developing countries.

The second challenge to meeting the IPR needs of developing countries is changing the current paradigm under which NGOs operate in parallel in a networked and globalised world. Put another way, NGOs are working to accomplish their mission and become self-sustaining in an environment which cries out for closer cooperation with similar organisations. The reasons for this disparity are primarily the following:

- Many of these organisations are less than five years old and have insufficient resources to develop effective networks with similar organisations.
- The field of IP is inherently complex, and it takes time to find, educate, and partner with other organisations, especially with those whose mission does not address IPRs directly. NGOs in the IP field occupy a narrow niche compared with most NGOs, whose services are readily understood and accepted as ‘good’ for developing countries.
- Funding for NGOs that concentrate on developing country IPRs is sparse, perhaps due to a lack of clarity regarding the benefits that accrue from strengthening the IP capacity in developing countries.

Despite these obstacles, NGOs addressing IPR issues are increasingly working together in areas where their missions overlap. Examples of this

include cooperation in assembling written training materials, sharing advice concerning contacts and organisations dealing with IPRs in developing countries, and cooperative initiatives on targeted projects. In addition to increasing these types of cooperation, it is likely that these organisations will be looking to partner with individuals and organisations within developing countries as well in order to attract funding from a wider variety of sources, including those within the developing countries. This approach offers the advantage of leveraging resources from both the NGO and the partner organisation, but also allows the NGO to establish a presence and a global network through which they are able to provide services with greater sensitivity to local and national needs.

The need for IPR training and services in developing countries is increasingly recognised as essential, and as a result new channels have arisen to facilitate communication among IPR stakeholders, and between these stakeholders and the countries and communities benefiting from them. Only the last two years have witnessed developments which help strengthen IPR systems in developing countries. These include IPR-related resources and training materials made available through the OECD Directorate, the WHO’s Commission on Intellectual Property in Health (CIPIH), large foundations such as the Bill & Melinda Gates Foundation, the NGOs mentioned above, and many others.¹ As many developing countries are experiencing increased access to electronic and web-based resources, the arrival of free IPR-related web-based resources such as the searchable worldwide database from Cambia’s Patent Lens (<http://www.bios.net/daisy/bios/patentlens.html>) and the New York Academy of Sciences ‘Scientists Without Borders’ web portal consolidating research-based and capacity-building projects in the developing world (information at <http://www.nyas.org/programs/borders.asp>) will spur development of even greater IPR capacity.

¹ See, for example, overview of OECD activities in IPR at http://www.oecd.org/topic/0,2686,en_2649_34797_1_1_1_37437,00.html or the CIPIH website at <http://www.who.int/intellectualproperty/en/>

There is no doubt that the increased worldwide attention and resources devoted to IPR in developing countries contribute substantially to the ultimate goal of improving the livelihood of citizens in developing countries.

Experts' Corner

Lack of Communication? Competition Rules and IPRs in the Telecom Sector – Michael Einhorn¹

On December 12, 2006, the U.S. International Trade Commission (ITC) ruled that Qualcomm infringed claims on a Broadcom patent, upholding a ruling by an administrative law judge issued on October 10. The ITC is now expected to issue a ruling regarding remedy by February 9, 2007.

The U.S. ruling follows in the wake of an EC lawsuit instituted in 2005 against Qualcomm by Broadcom, Nokia, Ericsson, Panasonic Mobile Communications, and Texas Instruments. The plaintiffs requested that the EC stop Qualcomm's anti-competitive conduct in the licensing of essential patents for mobile technology in third generation cell phones, which combine voice and data capability. Qualcomm here purportedly failed to meet prior commitments made to international standard bodies where the company agreed to license its technology on fair, reasonable and non-discriminatory terms.

The history of the matter is as follows: In 1989, Qualcomm publicly introduced the concept that a digital communication technique called CDMA could be commercially successful in wireless communication applications. Along with TDMA and GSM, CDMA became one of three voice-only digital wireless technologies that displaced first generation analogue techniques in prior use. Subsequently, the International Telecommunication Union (ITU) received several proposals for third generation wireless standards that would carry both data and voice traffic at faster speeds. These proposals include both CDMA- and TDMA-based technologies.

In May 2000, the ITU adopted the 3G standard known as IMT-2000, which encompasses five terrestrial operating modes. The three alternative CDMA - CDMA 2000 (also known as Multi-Carrier), W-CDMA (aka Direct Spread or UMTS), and Time Division Duplex (aka TDD or TD-SCDMA) are based on Qualcomm's intellectual property. These three 3G CDMA wireless operating modes require separate implementations and are not interchangeable from a technological perspective. The U.S. and Asia have moved to implement CDMA-2000, where it is the dominant digital technology as well. By contrast, the European Community (where the dominant digital technology is GSM) has focused on the W-CDMA alternative.

As a lead developer of CDMA, Qualcomm now licenses to other companies in the CDMA operating modes a complete menu of 1000 patents, and has over 1700 patent applications pending in the U.S. For W-CDMA, licensees include Siemens, Nokia, Ericsson, Motorola, Lucent, Samsung, and LG Electronics. Qualcomm receives license fees, royalties (payable as a percentage of the selling price of the integrated circuits) and/or royalty-free cross-licenses that allow use of other technologies. In every case, phone manufacturers (such as Nokia and Ericsson) pay royalties for integrated circuits that use Qualcomm technology. Qualcomm committed to the ITU to license its essential patents for each operating mode on a fair and reasonable basis free from unfair discrimination.

In the plaintiffs' eyes, Qualcomm's licensing practices are anti-competitive for two reasons. First, the company refused to license essential patents to potential chipset competitors on fair, reasonable and non-discriminatory terms. The matter of price discrimination revolves around Qualcomm's decision to offer lower royalty rates to handset customers who buy chipsets exclusively from Qualcomm. Second, the company charged royalties for its WCDMA essential patents that are excessive and disproportionate. The matter emerged as the company charges the same royalty rate on W-CDMA 3G handsets as it does for CDMA2000 3G handsets in which it has contributed more technology.

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The above accusations assume that Qualcomm behaves in a predatory mode that seek to exploit its IP monopoly. However, that this is not necessarily the case. Some economic analysis has been missed here. If Qualcomm lowers the price of its licensed technology to buyers who agree to purchase its chipsets, Qualcomm could evidently expand its market share in the chipset market, in which it is a relatively small provider. However, the action does not increase the company's market share of any part of the W-CDMA technology; each component technology in W-CDMA is part of a standard that must be deployed regardless of the chipset manufacturer. Qualcomm's ambition here is to grab customers in a competitive market in which the company must fight for market share. Qualcomm has no realistic chance of monopolising the affected chipset market.

As a second matter, Qualcomm's licensing practices are presumably unfair because the company charges higher rates for each technology used in W-CDMA products than in CDMA-2000 products, where more Qualcomm technologies are used.

This view here does not take into account Qualcomm's need to recover total R&D costs, which are incurred at moment prior to the commercialisation of a technology (one should also note that the extent of use of the W-CDMA standard is lower since it is used only in Europe. Once these costs are sunk, the company must necessarily determine a way to recover or monetise total investments over the sales of all CDMA equipment and phones to which it contributes. Qualcomm's overall revenues would be deficient if the company were to allow W-CDMA producers the right to 'cream skim' their favoured technologies without compensation for the wider R&D costs that actually made the whole portfolio possible in the first place.

Whatever the outcome may be, economically sensible competition analysis would suggest that this case ends quickly.

News Flashes

1) In an interview with *The Financial Times*, German Chancellor Angela Merkel, announced that one of the priorities for Germany's EU Presidency would be to strengthen transatlantic economic ties. Merkel told the FT that she wanted ever closer economic co-operation with the US because "our economic systems are based on the same values". Concrete plans were mentioned, such as an idea for closer integration of the intellectual property systems. "It causes unnecessary friction for patent rules in the US to be structured differently from those in the EU", Merkel argued.

To read more go to *The Financial Times* www.ft.com

2) The IFI Claims Patent Services recently released the United States Patent and Trademark Office (USPTO) annual list of the top 35 patent winners. With 3,621, IBM surpassed its own record and earned more U.S. patents than any other company for the 14th year in a row. In fact, the closest competitor for the number one spot was 1,170 patents behind IBM. According to IFI's analysis, 2006 saw 173,772 corporate patents issued, which is a USPTO record and marks a 20.8% increase over 2005.

To read more go to The US Patent and Trademark Office, www.uspto.gov

3) Earlier this week, the US drug industry came under attack when chairman of the Senate judiciary committee, Patrick Leahy, introduced a bipartisan bill that would stop branded drug makers from making deals with their generic rivals to stay out of the drug market. According to Leahy, US drug laws create more incentives for generic manufacturers and branded producers to settle lawsuits for money than for generic manufacturers to challenge patented products.

To read more go to *The Financial Times* www.ft.com

4) Last week, the Swiss Justice Minister Christoph Blocher launched a nationwide campaign to raise public awareness of the damage counterfeit products cause to the country's economy (piracy

of branded products is estimated to cost the Swiss economy about \$1.6 billion every year). The initiative, which is a joint effort by the Federal Institute of Intellectual Property and the Swiss chapter of the International Chamber of Commerce, was named 'Stop Piracy', and will be kick-started by a billboard campaign across the country's largest cities.

To read more go to the Swiss Federal Institute of Intellectual Property, www.ige.ch

5) Earlier this month, the Beijing No 1 Intermediate Court Beijing court ordered two local drugs companies, Beijing Health New Concept Pharmacy and Lianhuan Pharmaceuticals, to stop selling fake Viagra and to pay Pfizer, the inventor and rights holder of Viagra, \$38,000 in damages. The court decision concludes a more than two-year long legal battle over Viagra in China and has been seen by observers as a test case for the country's IP regime.

To read more go to *The Financial Times*, www.ft.com

New and Notable

Upcoming event – MIP Gowers Review Discussion, 30 January 2007

Managing Intellectual Property Magazine, in association with Lovells and in collaboration with the Stockholm Network, is organising a discussion on the **Gowers Review of Intellectual Property Policy** on Tuesday January 30 2007, starting at 5.30.

The discussion will feature panellists from industry and the law as well as Andrew Gowers himself. They will examine how the recommendations in the Gowers Review will be implemented and how they will affect IP owners in the UK. Panellists will also address questions raised by members of the audience.

The Gowers Review, published last month, proposes a fundamental review of IP protection in the UK, making 54 recommendations affecting issues such as copyright term, fair use,

enforcement, patent and trade mark protection and the role of the Patent Office.

But how will these recommendations be implemented and how will they affect IP owners, practitioners and those responsible for registering and enforcing rights? What impact will they have on IP protection in the UK and beyond? And to what extent do they address the problems in innovation in the UK?

Chaired by James Nurton, managing editor of MIP, the discussion will feature Andrew Gowers, author of the Gowers Review; Mr Justice Pumfrey, Patents Court; Robert Anderson, partner, Lovells; Roger Burt, IP counsel, IBM Europe; Dominic McGonigal, director of government relations, PPL/VPL; Steve Rowan, The Patent Office and Dr Meir P. Pugatch, Stockholm Network.

Places are limited so please register ASAP here: <http://www.managingip.com>

New Publication - *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices*

By Anatole Krattiger, Richard T. Mahoney, Lita Nelsen, Jennifer A. Thomson, Alan B. Bennett, Kanikaram Satyanarayana, Gregory D. Graff, Carlos Fernandez, Stanley P. Kowalski (editors).

Prepared for policy makers, leaders of public sector research establishments, technology transfer professionals, licensing executives, and scientists, this book offers information and strategies for utilising the power of both intellectual property (IP) and the public domain. It illustrates how IP can be judiciously leveraged to forge stronger partnerships and usher in a new age of collaboration and sharing.

The book puts aside ideological debates to focus on pragmatic considerations and practical opportunities. Written by practitioners in the field, its 135 chapters are a comprehensive resource on current IP management issues and approaches.

To download free sample chapters please visit www.ipHandbook.org