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Editorial

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EC competition law and intellectual property law are two legal regimes that can and do conflict. In the EC context that conflict has historically been compounded by the multilevel governance of the EC with intellectual property a matter for national law and competition law an area of shared competence but where in practice national competition law regimes remained largely under-developed. In recent years, this governance landscape has changed with change largely prompted by the re-invigoration of market integration through the single market program. EC legislation has harmonised many aspects of intellectual property rights notably copyright and the development of a Community trademark.[1] The emergence of an EC patent has continued to prove elusive mainly because of the extent and scope of language requirements.[2] On the competition law side, the European-wide trend towards the voluntary adoption of competition regimes based largely on Articles 81 and 82 EC was part of a process culminating in Regulation 1/2003[3] with its decentralisation of enforcement of the EC rules and a more explicit articulation of the relationship between the EC and national regimes. The changing governance picture is echoed in the historical development of legal doctrine with the bald no-interference rule for property law systems in Article 295 EC decisively curtailed in a steady flow of judgments in relations to free movement of goods and competition law where both sets of rules are tools of market integration in a world where IPRs divided markets on national lines. Intellectual property rights became subject to the competition rules and have to co-exist with those rules. As Steve Anderman argues, competition law imposes public law limits on the exercise of private rights including intellectual property rights. He suggests that patents and copyright are more akin to carefully defined leasehold interests or licences rather than constituting an absolute form of property right. Haracoglou sees the creation of a market for information goods that would not otherwise be established, as the raison d'être for the IPRs. On this basis, IPRs are not so much exemptions from competition law as a sub-system of law that depends on well-functioning competition. IPRs in her view are not so much protection *from* competition as protection *for* competition in the market of intangibles. Thus intellectual property rights can be seen as located in competition law – just as they are located in other public laws. While a hierarchical relationship between these two legal sub-systems

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1 Directive 2001/29 on the harmonisation of copyright and related rights, OJ 2001, L167/10, Regulation 40/94 on the Community Trademark, OJ 1994, L11/1.

2 Commission Proposal for a Community Patent, COM(2000) 412 final.

3 OJ 2003, L1/1.

is apparent in *IMS*[4] and *Microsoft*[5] - the two cases that are the focus of the articles in this issue - it is clear that this relationship is complex with the European Courts continuing to develop tests to establish the boundaries between the two systems which share the common objective of promoting innovation. The exact location of these boundaries will continue to be disputed and negotiated especially where – as Haracoglou discusses - the rate of innovation in high tech industries like biopharm is dynamic.

Compulsory licensing which is required by Article 82 EC where refusal would constitute an abuse of market dominance is analysed in the quite different disputes of *IMS* and *Microsoft*. The former concerns a (questionable) copyright and the latter concerns information some of which was IP protected but all of which represents considerable R&D by Microsoft. The non- or dis-application of the 'exceptional circumstances' test and the issue of access to what has become an industry standard are the main concerns of the authors. There are four articles. First, Steve Anderman in a conceptual piece grounded in doctrine, discusses the extent to which the two cases represent two different paradigms in the area of compulsory licensing, with the *IMS* judgment largely following and refining the exceptional circumstances test while the Commission decision in *Microsoft* represents a new paradigm more in the line of the refusal to supply cases starting with *Commercial Solvents*.[6] James Killick in a rigorous doctrinal analysis argues that the Commission decisions in *IMS* and *Microsoft* fail to follow the four-stage exceptional circumstances test set out in *Magill*. Hence, he concludes that neither can pass muster when viewed in the light of the EC judgment in *IMS*. The last two articles have a wider focus with Carsten Reimann exploring the scope of R&D investment protection in the light of competition law in general and in the light of *IMS* and *Microsoft* in particular while Irina Haracoglou addresses concerns for innovation in the field of biotech arguing that competition law has a role to play – complimenting that of patent law.

The purpose of Steve Anderman's article is to examine *Microsoft* in the light of existing case law to consider the scope for the Commission to order a compulsory licence under Article 82. At the outset, Anderman notes that the granting of IPR is protected from the competition rules, as is their normal exercise although what constitutes normal exercise is unclear – especially in relation to the question of refusal to licence and when this constitutes an abuse under Article 82. In *Magill,*[7] the European Court of Justice indicated that only in exceptional circumstances will a copyright holder be required to licence but the boundaries of this safe haven are unclear – hence the current spate of litigation. Anderman's argument is that while *IMS* seems to confirm the *Magill* paradigm, the Commission decision in *Microsoft* seems to require a new and different paradigm. Where an IP product becomes the industry standard, there is still no obligation to supply *per se* but where there is a dependent secondary market then the IPR holder cannot use those rights to exclude competitors from the aftermarket. Under *Magill* (as refined in *IMS*) the cumulative test is that compulsory licensing is only

[4] Case C-418/01, [2004] 4 CMLR 2.

[5] C(2004) 900 final, 24 March 2004.

[6] Cases 6 & 7/73 *ICI and Commercial Solvents v Commission* [1974] ECR 223.

[7] Cases C-241 & 242/91P *RTE and ITV v Commission* [1995] ECR I-743.

required where the IP-protected product is indispensable in the secondary market, there is a new product with potential consumer demand, there is no objective justification for refusal and the refusal eliminates all competition on the secondary market. The test is sufficient but not necessary hence Anderman argues that the Commission missed the chance to view *Microsoft* as a new paradigm that could be fitted into the (non-exhaustive) exceptional circumstances test. Thus where a producer has been providing a product in an aftermarket and enters that market itself, it must continue to supply its now-competitor unless it can provide an objective justification for its refusal. Microsoft had argued that it was objectively justified in refusing access, as it would stifle its incentive to innovate. The Commission rejected the argument by balancing the negative effect on Microsoft against the positive impact on the level of innovation in the entire industry. Anderman notes that in granting a remedy, the Commission's focus is on ensuring interoperability; i.e. the question of remedy is paramount with IP protection viewed almost as incidental to the provision of information. This he sees as a legacy from the 1980s IBM settlement. These issues of the balancing exercise and the scope of the remedy are further explored by James Killick.

Killick in his analysis of the *IMS* judgment notes that while the Court provided some clarification of the exceptional circumstances test it was unfortunate that it left it to the national court in this case to decide whether or not there was such a market in this case. This is because it will be difficult to draw the line between primary and secondary markets if a hypothetical market for the IP itself is accepted by the Court. Killick suggests the secondary market criteria would become meaningless in those circumstances, as it would be met in almost all cases.

Killick enriches the discussion of *IMS* by revisiting the controversial decision of the Commission granting interim relief by way of compulsory licence where the Commission did not consider the new product requirement and the need for elimination of competition on the secondary market in its decision. He suggests that the case should not have been approached from an essential facilities/exceptional circumstances perspective but instead on the basis that the IP-protected system was originally an open industry standard. Given it was originally open, the IMS refusal to supply would be abusive as it prevented competitors from using the standard (which has been devised with IMS customers). In other words, the case can be seen as the appropriation of an open standard by a dominant undertaking. Such appropriation would then constitute an exceptional circumstance under *Magill.* This approach would then see both *IMS* and *Microsoft* as refusal to supply access to formerly open industry standards by dominant undertakings and hence both within the new paradigm suggested by Anderman. Killick is critical of the nature of the remedy in *IMS* insofar as the Commission delegates almost entirely a part of the decision-making powers (setting the terms of the licence) to an expert. On *Microsoft* he is critical of the uncertainty of the loose application of the exceptional circumstances test where a lower threshold for elimination of competition and for indispensability was set; and of the balancing test applied in finding there was no objective justification for the refusal to supply. His concern is that the decision will have a chilling effect on innovation in the longer term. The lack of an identifiable new product in *Microsoft* also differs from *IMS* – something welcomed by Haracoglou but not Killick. Critical of the scope of the remedy in

Microsoft he notes that it is not so much a compulsory licence as compulsory standardisation and once again there is major delegation by the Commission of its monitoring role to a trustee.

Carsten Reimann while adopting the wider lens of R&D investment in high-tech industries echoes Killick's concerns about innovation chill after *Microsoft*. Before reaching his succinct discussion of *IMS* and *Microsoft*, he provides a taxonomy for EC competition law in relation to R&D – noting that there is no 'law of R&D'. He outlines the competition law norms governing early R&D: state aid, Article 81 and the relevant block exemptions and joint ventures. He briefly outlines how R&D is treated in merger cases and the horizontal merger guidelines before turning to the final market stage of investment where recoupment is sought and it is here that *IMS* and *Microsoft* become relevant. He notes AG Jacobs in *Bronner*[8] and his suggestion that the nature of the IPR in a compulsory licence case be assessed. On Microsoft's argument that it was objectively justified in not granting access because disclosure would breach the essential function of its IPR and reduce incentives to innovate, Reimann, like Killick, is critical of the 'free-style' balancing test. He sees the approach as something akin to the application of the essential facilities test (which applies to tangible property and in EC case law where the term has never been used, is a similar test to that found in *IMS* but for the new product requirement) where interoperability is seen as an essential facility – this would in part explain the scope of the remedy – but warns that the boundary between needing a facility in order to compete and needing it to make life easier is difficult to draw. In relation to innovation, he suggests that it should be an objective justification to show that the IPR holder has not yet amortised its up front costs in relation to the IP product and second, that the obligation to share would have diminished its initial incentive to invest. In other words, regard has to be had to the past rather than the future. Unless this test is adopted, there is a risk that the IPR holder will not secure adequate return for disclosing interface information.

Finally, Haracoglou locates her discussion of the relationship between competition and IP law in the biopharm industry. With a focus on patents, she explores the debate surrounding the use of patents to restrict access to upstream markets concluding that the evidence is ambivalent as to effect but nonetheless industry participants perceive there to be a problem. Patent law itself she suggests while offering some means of ensuring access, addresses only to a limited degree the issue of upstream/downstream dependency. This issue can be resolved through compulsory licensing where there are anticompetitive practices that in effect moves the issue to the interface of IP law and competition. She sees IPR as just another type of property at least in the context of competition law. Both IP law and competition law address the common dilemma of balancing monopoly privilege – albeit in different ways. Thus even IP law itself, e.g. in TRIPS and the draft Community Patent, recognise a role for competition law. She sees the essential facilities doctrine as an important legal tool in resolving the issue of dependent downstream markets in the biopharm sector welcoming what were the more controversial elements of the test for Killick. Thus the fact hypothetical markets are enough to meet the secondary market requirement would allow, for example, a research

[8] Case C-7/97 *Bronner v Mediaprint* [1998] ECR I-817.

tool to be seen as upstream of the downstream product. Second, the Court in *IMS* refers to the intention to produce a new product – the emphasis on intention would be important where access to a research tool was required to see if its use were likely to lead to new products; i.e. potential innovation might be enough. This interpretation might seem very wide and loose especially in the light of the criticisms of *Microsoft* offered by Carstein and Killick but Haracoglou queries the importance of patents in ensuring returns pointing to other factors such as lead time, reputational advantage and costly copying. In other words, having debunked the innovation monopoly argument, a wide interpretation of 'new product' is unproblematic for her. In essence she advocates a more explicit consideration of follow-on innovation in the application of competition law analysis through what in the US is called the innovation markets approach in the field of mergers.

What emerges from this discussion is that the judgment in *Microsoft* is needed to clarify the scope of the exceptional circumstances test and whether the vague balancing test used to determine whether protection of IPR and innovation is appropriate when determining if there is an objective justification for refusal to supply. These doctrinal questions are linked to the broader issue of protection of innovation as a common denominator for both sub-systems of law with one advocating a temporary monopoly to ensure returns for investment and the other seeing competitiveness as the spur for innovation. The dynamics of what Haracoglou calls this inter-dependent and inter-determinate relationship means that competition law and IP law can and should compliment each other in the search for the most appropriate route to innovation.