

Compulsory Licensing and Interoperability under EC Competition Law

**Carel Maske
Microsoft**

Geneva, 10 February 2006

Overview

- Summary of the case law on compulsory licensing
 - The principle and the exception
 - The Microsoft decision
- Compulsory licensing of interoperability information
 - Intellectual property at stake
 - Policy concerns
- Limits for compulsory licensing

The starting point

- **Volvo (1988)**: refusal to license protected design rights for the manufacture of spare parts
 - A compulsory license (in return for a reasonable royalty) would deprive the proprietor of the protected design of the substance of its exclusive right
 - Refusal to grant a license does not in itself constitute an abuse
 - Exercise of the exclusive right may be contrary to Article 82 if it involves “*certain abusive conduct*”
 - Examples for certain abusive conduct (direct consumer harm):
 - arbitrary refusal to supply spare parts
 - excessive pricing
 - discontinuation of production of spare parts to the prejudice of consumers

The principle and the exception

- **Magill (1995)**: exercise of copyright in TV program listings to prevent publication of comprehensive weekly TV guide
 - *Volvo* restated
 - Compulsory licensing only under “exceptional circumstances” and absence of any “objective justification”
 - Exercise of exclusive right (refusal to license IPRs) may, “*in exceptional circumstances*”, involve abusive conduct:
 - Copyright-protected material is indispensable to conduct business in secondary market
 - IPR holder excludes all competition in secondary market
 - Refusal to grant license prevents introduction of new product for which there is potential consumer demand (Article 82(b))
 - Refusal goes beyond what is necessary to fulfill the essential function of copyright

The principle and the exception

- **IMS Health (2001)**: refusal to grant copyright license regarding a format for reporting pharmaceutical data (1860 brick structure)
 - *Volvo* and *Magill* restated
 - Abuse only under “exceptional circumstances”
 - Copyright-protected material is indispensable for carrying on a particular business (ref. *Bronner*)
 - Refusal to license is such as to exclude any competition in secondary market
 - Refusal to license prevents emergence of a new product for which there is a potential consumer demand (Article 82(b))
 - Refusal is unjustified

Volvo / Magill / IMS

- Refusal to license is abusive only under “exceptional circumstances”
 - license is indispensable to conduct business in a secondary market (i.e., IPR confers market power in secondary market)
 - Refusal to license goes beyond what is necessary to fulfill the essential function of the intellectual property (i.e., there is no objective justification)
 - Refusal to license causes “abuse” - beyond the elimination of competition - in secondary market (i.e., excessive prices, discrimination, prevention of emergence of new product for which there is potential demand)

The exception or the principle?

- **Microsoft (2004)**: refusal to supply interoperability information
- Finding of abuse despite:
 - Availability of alternative means of achieving interoperability, including right to decompile protected technology (no indispensability; cf. *Bronner*)
 - Evidence of entry and growth of competitors in secondary market
 - No evidence of possible emergence of new product to satisfy potential consumer demand in secondary market
 - No demonstration that refusal to grant license goes beyond protection of essential function of IPR

Intellectual property at stake

- Patents in Europe and elsewhere
- Copyrights
- Know-how and trade secrets
- Right to decompile pursuant to Software Directive does not affect existence and enforceability of IPRs

Policy concerns

- Risks of going beyond principle and exception
 - Conflict with the existence of IPRs and their protection under national laws
 - Adverse effect on ex ante incentives to innovate
 - Courts/regulators manage competition

Limits for compulsory licensing

- Compulsory licensing as an antitrust remedy if, at least:
 - Access to IPR is indispensable to conduct business in secondary market
 - Access to IPR is indispensable to remedy abuse in secondary market
 - Compulsory licensing preserves the essential function of IPR
 - There is no less intrusive remedy, whether under antitrust or IP law

Thank you