First published in World eBusiness Law Report, November 11, 2003

Opinion suggests compulsory licensing for copyrighted software

Advocate-General Tizzano of the European Court of Justice (ECJ) has rendered his opinion in the long-running *IMS Case*. The opinion makes recommendations regarding the conditions for the compulsory licensing of intellectual property (IP) rights in Europe.

IMS Health provides wholesale pharmaceutical sales data in Germany according to a geographic segmentation or 'brick structure' that divides the country into 1,860 areas or bricks. The raw input data from wholesalers is freely available - IMS holds copyright only in relation to the method of presenting the data in a commercially useful way.

In 2000 IMS discovered that its competitors were using its brick structure, and obtained preliminary injunctions from the Frankfurt Regional Court. The competitors complained to the European Commission on antitrust grounds, and the commission imposed a compulsory licensing obligation on IMS (see ECJ favours IP rights over competition law). However, this decision was later suspended by the president of the European Court of First Instance. In 2001 the German courts referred several questions to the ECJ in an attempt to resolve the conflict between their judgments and the commission's decision. The advocate general's opinion is the last step in this process before the ECJ judgment is given.

The opinion suggests a more expansive interpretation of the criteria for compulsory licensing of IP rights under Article 82 of the EC Treaty, which prohibits the abuse of a dominant position. According to the opinion, a dominant company must share its IP rights with its direct competitors whenever (i) the IP right is an *input* that is *indispensable* for competing in a certain market, and (ii) the competitors intend to offer goods or services with *different characteristics* from those offered by the dominant company and that meet specific (unsatisfied) consumer needs.

If followed by the ECJ, this test for compulsory licensing could have far-reaching consequences by making any dominant undertaking's refusal to license its IP rights illegal if the right is sufficiently successful. Often, the innovative or creative step that is subject to IP protection is not the end-product or the service, but a process or component that enables or improves the end-product. The 'input' requirement contained in the opinion may thus be met by an IP right with an industrial application. The opinion therefore opens the door to compulsory licensing of copyrighted software that functions as an input, as well as process patents, intermediate products and many kinds of know-how. The second requirement of 'different characteristics' does little to limit the application of the compulsory licensing rule as new functions or characteristics can often be added to software applications, and online and telecommunications services.

It is not clear whether the advocate general has fully considered the implications of the test: if it were to be applied without additional limiting principles, it would no longer be possible for companies to use their IP rights to preserve a leading market position, which would in turn seriously discourage innovation. It is hoped that the ECJ's judgment - which is expected in the next few months - will take account of the wider implications of the case and identify with greater precision the limits of the compulsory licensing doctrine under EU antitrust law.

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