Articles

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Essential Interfaces

Exploring the Software Directive's equilibrium between intellectual property rights and competition law

In accordance with its aim of promoting interoperable systems, the European Software Directive provides that, in addition to its internal reverse engineering provisions, competition law be used should a dominant software developer refuse to make interoperability information available to its competitors. The recent Microsoft-ruling of the Court of First Instance demonstrates an application of this mechanism. This article examines what role competition law can fulfill in addition to the Software Directive's reverse engineering provisions. In particular, this article examines whether mandated access to interface information is indispensable as required by European case law on refusals to deal. It concludes that for access to interface information, competition law can probably accomplish less than the Software Directive's reverse engineering provisions due to the very existence of these provisions. However, competition law may remain valuable in case use of successfully reverse engineered yet protected interface specifications is impossible due to a refusal to license them.

I. Introduction

On 17 September 2007, the Court of First Instance (CFI) delivered its opinion in the *Microsoft*-case,[1] after the European Commission, in its 2004 Decision, had found Microsoft to abuse a dominant position in the market for Workgroup Server Operating Systems by refusing to supply interoperability information to competitors.[2]

According to the Commission, Microsoft's refusal to provide interface specifications of its Workgroup Server Operating System Software prevents competitors, including Sun Microsystems, from creating interoperable workgroup server software. Consequently, innovation in this market is impeded and consumers are left with no choice but to implement a homogeneous Microsoft-solution. Relying on earlier case law on refusals to deal, the Commission argued that the interface specifica-

tions were indispensable to competition since there were no viable alternatives for creating fully interoperable workgroup server software. Significantly, it dismissed reverse engineering as a feasible means of obtaining the specifications due to their complexity, the time it would require, and the fact that the interface specifications could easily be changed after any fruitful reverse engineering efforts.[3] In addition, the Commission found that the refusal risked substantially eliminating such competition, that it impeded innovation and that Microsoft could not objectively justify the refusal.[4]

Microsoft's appeal to the CFI was mostly unsuccessful. The court confirmed the Commission's finding of indispensability of the interface specifications. Referring to the Commission's discussion, it largely ignored the question of whether reverse engineering constituted a viable alternative.[5] It is expected that Microsoft will appeal the CFI's ruling.

This article examines to what extent mandatory sharing of interoperability information through competition law is possible in the light of the Software Directive's internal reverse engineering provisions.

The *Microsoft*-case involves a complex issue at the interplay between software development, intellectual property and competition. Computer programs communicate through their respective interfaces. Such communication takes place according to the interface specification, which determines the format of communication. Without these specifications, a developer cannot create a program that is interoperable with existing programs. Consequently, competition may be impeded and users may be faced with software that does not communicate with their previously purchased software.[6]

If the interface specifications are not made available by the original developer, there are generally two means to obtain the specifications. One is reverse engineering,[7] and the other, colorfully demonstrated in the *Microsoft* case, is forced disclosure by means of competition law.

Reverse engineering of a computer program is complicated by the fact that these programs are protected by copyright, as reverse engineering may involve the making of temporary copies as well as translations of the program's object code. To solve the problem of authorization for these reproductions, a number of specially designed limitations have been incorporated into European software copyright law. These provisions will be discussed in Part II.

In addition, the refusal to supply interface information could, in exceptional circumstances, be construed as an abuse of a dominant position and, therefore, as a

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1 *Microsoft Corporation v. Commission of the European Communities (Case T-201/04)*. (Court of First Instance 2007).
2 *Commission Decision of 24.3.2004 relating to a proceeding under Article 82 of the EC Treaty*, at article 2(1). (European Commission 2004).
3 Id., at 685–686.
4 Id., at 5.3.1.5.
5 *Microsoft Corporation v. Commission of the European Communities (Case T-201/04)*, at 435. (Court of First Instance 2007).
6 T.C. *Vinje*, "Magill: its impact on the information technology industry", 14(11) *European Intellectual Property Review* 397, 401 (1992).
7 A. *Johnson-Laird*, "Software Reverse Engineering in the Real World", 19 *University of Dayton Law Review* 843, 846 (1994).