

# ADDITIONAL DEVELOPMENTS—COPYRIGHT

## *IMS HEALTH GMBH & Co. OHG v. NDC HEALTH GMBH & Co. KG*

2004 E.C.R. C-418/01, 4 C.M.L.R. 28

The European Court of Justice (ECJ) applied a strict interpretation of the criteria for compulsory licensing of intellectual property under Article 82, an antitrust provision, of the European Community Treaty. The ECJ also articulated a three-part market effects test for when compulsory licensing is required.

IMS Health GmbH & Co. OHG (“IMS”) brought a copyright infringement action in German national court against Pharma Intranet Information AG (“PII”) and NDC Health GmbH & Co. KG (“NDC”), who acquired PII, for offering data services in a format to which IMS owned the copyright. After the national courts granted and affirmed interlocutory orders barring the defendants from using data structures similar to IMS’s copyrighted format, NDC filed a complaint with the European Commission alleging that IMS’s refusal to license the data format constituted an antitrust violation. The commission issued an interim decision ordering IMS to license its data format to the competitors, but the order was later withdrawn when the Commission determined that the competitors did not need a license to compete with IMS. At the same time, the German court that was adjudicating the copyright dispute requested a preliminary ruling from the ECJ on the requirements for compulsory licensing under Article 82.

In making its decision, the ECJ sought to harmonize past ECJ decisions. The ECJ viewed the German court’s referral as asking essentially two questions: (1) whether the refusal to license the intellectual property (IP) in the case constituted an abuse of a dominant position within the meaning of Article 82, and (2) what factors are relevant in the determination of whether an IP is “indispensable” to market entry. On the latter question, the ECJ held that a court must consider whether there are other alternatives and whether technical, legal, or economic obstacles impair the viability of those alternatives, assuming a similar level of output. In this assessment, a court must consider customer participation in the development of the original IP and the likelihood of future purchases of the alternative product or service.

As for the first question, the ECJ answered that a refusal to license IP is an antitrust violation only under “exceptional circumstances.” The circumstances are deemed exceptional when access to the IP is indispensable for carrying out a particular business and three additional conditions are met: (1) the refusal to license bars the emergence of a new product—one that is not offered by the IP owner and for which there is potential consumer demand; (2) no objective justifications exist for the refusal; and (3) the refusal eliminates all competition in the relevant market. National courts must assess these conditions on a case-by-case basis, considering potential or even hypothetical markets as relevant to the question. The Court reiterated the rule that the market analysis compels a court to identify an upstream market (composed of the original product or service) and a downstream or secondary market (one in which the original product or service is used to make another product or supply another service) and to find that the upstream product or service is indispensable to the downstream product or service.

The ECJ remanded the case to the national court for a judgment in accordance with its answers and a determination of costs.