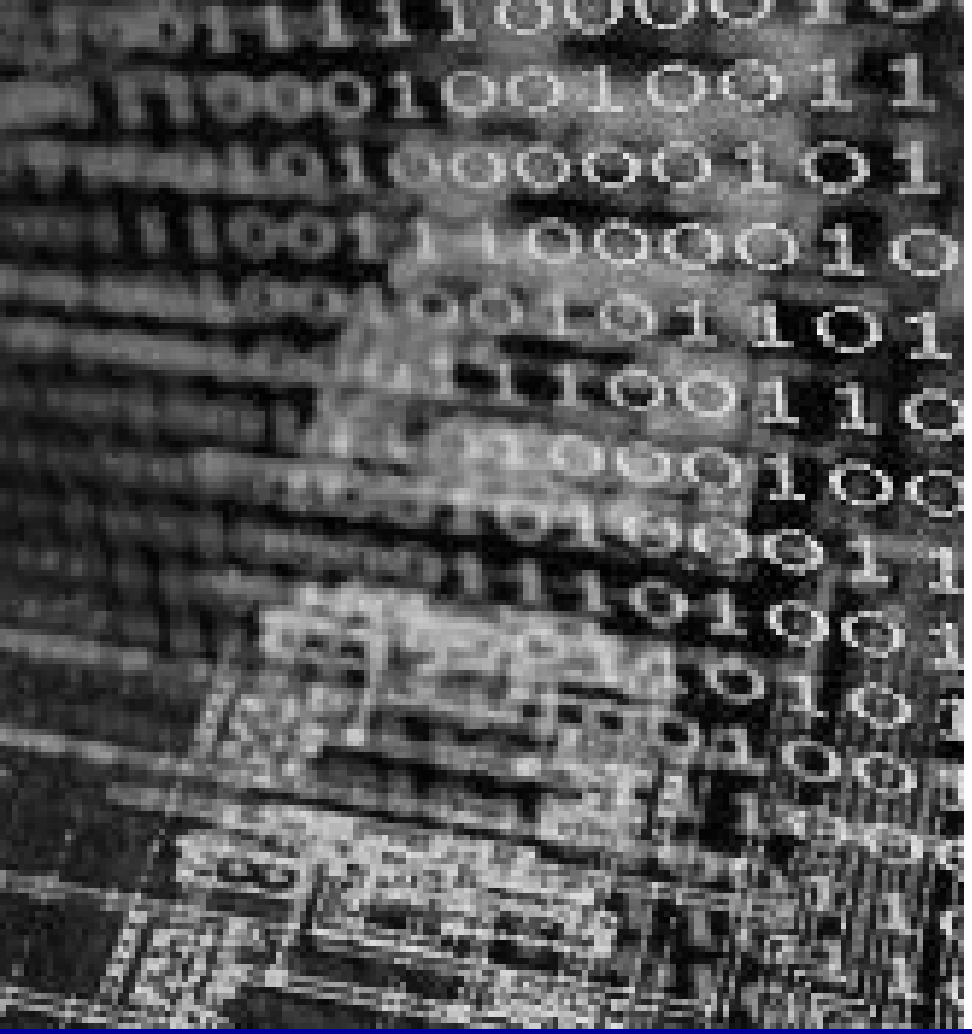

The EU Microsoft Judgment

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Overview

- Background: how we got here
- The 2004 decision
- The CFI judgment
- What the case means for you
- What the future holds

Background: How we got here

1998

- **September 1998: Sun Microsystems requests interoperability information from Microsoft to make Solaris interoperable with Windows**
- October 1998: Microsoft refuses
- **December 1998: Sun files complaint with the European Commission**
- February 2000: Commission launches own initiative investigation into Windows 2000 and Windows Media Player
- August 2000: First Statement of Objections
- August 2001: Second Statement of Objections
- April-June 2003: market enquiries
- November 2003: Hearing
- December 2003: Third Statement of Objections
- December – March 2004:
  - "Devil's advocate panel" review
  - Unanimous approval by the Member State Advisory Committee
- **24 March 2004: Commission issues Decision**
- June 2004: Microsoft appeals Decision and requests suspension of the remedies
- **December 2004: Court of First Instance rejects Microsoft application for interim measures**
- **17 September 2007: Court of First Instance issues its judgment on main appeal**

2007

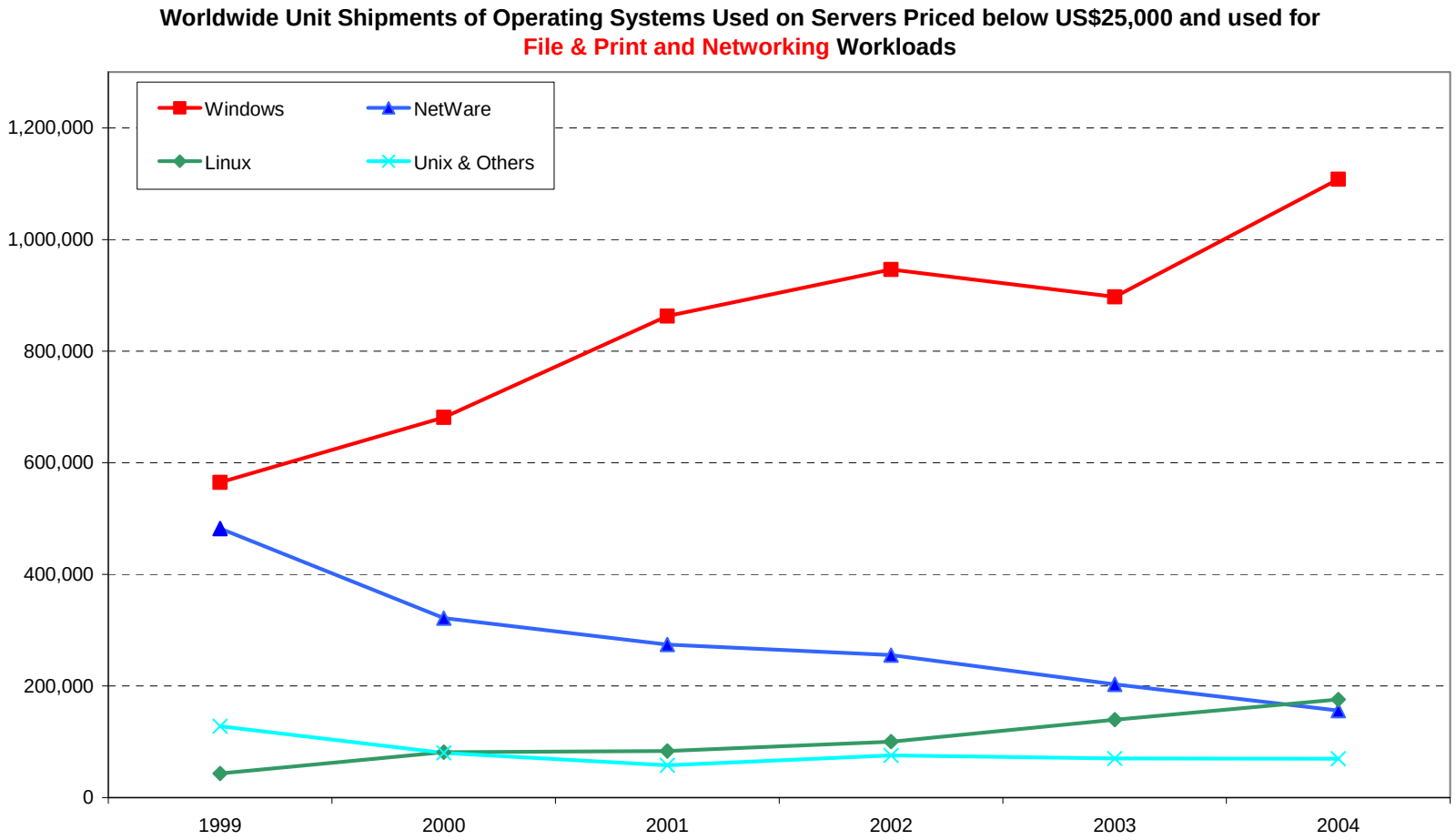
24 March 2004 Decision

- The European Commission
  - Commissioner Monti (now Kroes)
  - Directorate General for Competition
  - Director General Philip Lowe
  - Head of Unit Cecilio Madero (now Hellström)
  - Case team

24 March 2004 Decision

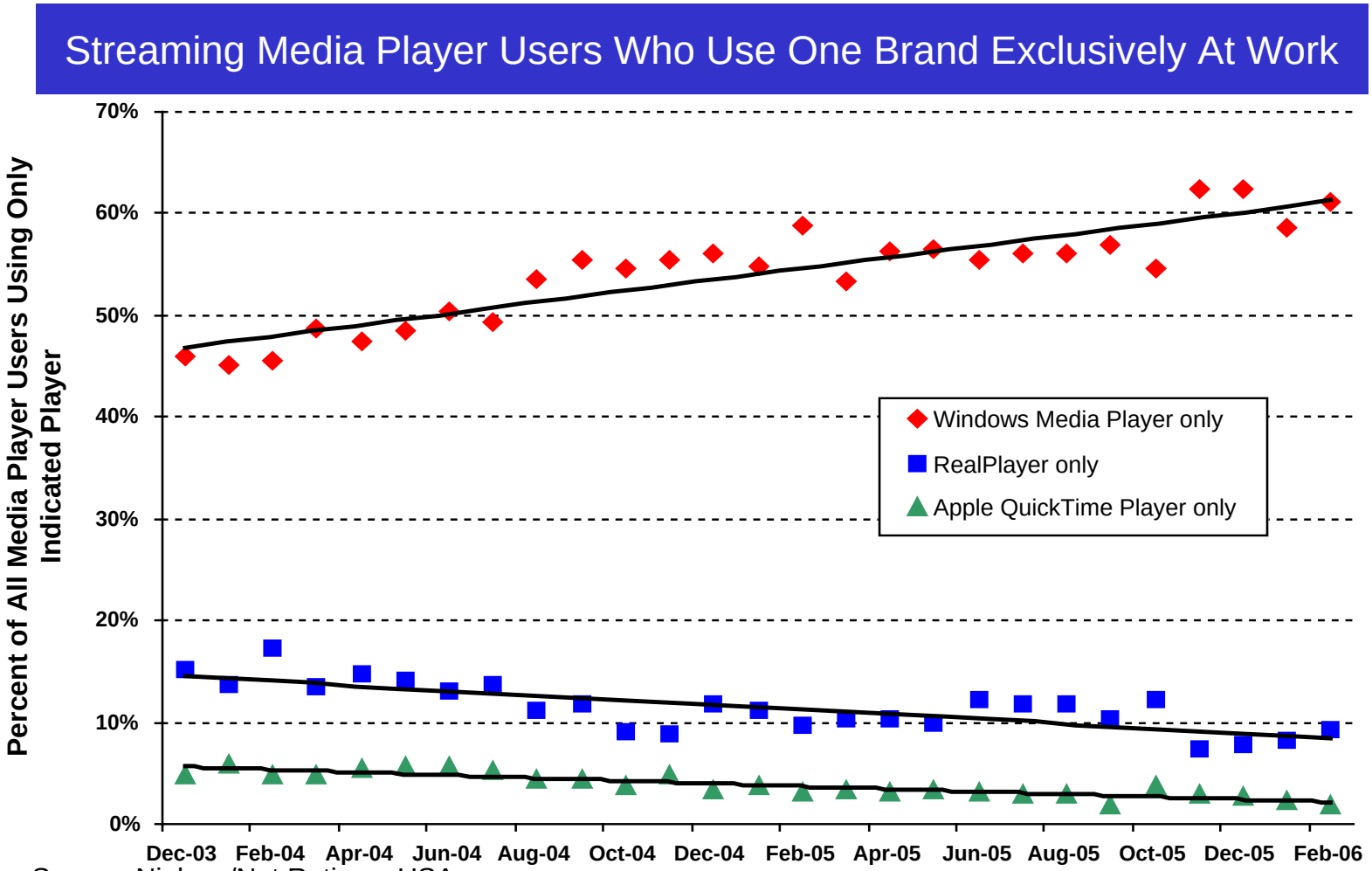
- Microsoft abused its PC operating system (OS) dominant position by
  - refusing interoperability information required for interoperability with Windows client PC OS and work group server OS
    - Leveraging of PC OS quasi-monopoly into the workgroup server OS market
  - tying Windows Media Player with Windows
    - Leveraging of the PC OS quasi-monopoly into the media player market
- Remedies imposed on Microsoft
  - provide interoperability information
  - provide an unbundled version of Windows
  - Pay a fine of 497 million Euro for “very serious infringement”
- Imposition of a trustee monitoring mechanism

Foreclosure in the WGSOS market



Sources: IDC Server Workloads Models in 2000 and 2005.

The 2004 Decision on Tying



Source: Nielsen/Net Ratings: USA

Microsoft's Appeals

- Application to suspend the remedies
  - Order of the President of the Court of December 2004 denies Microsoft suspension of the remedies
    - Unsuccessful in showing irreparable harm
    - Microsoft has put an unbundled version of Windows on the market and offered (incomplete) specifications
    - Disputes over remedies (accuracy and completeness, royalties, open source)
- Appeal of the EC Decision ("Main Appeal")
  - Microsoft sought
    - Annulment of the Decision on interoperability and tying and on the trustee mechanism
    - Reduction of the 497 million Euro fine

The Main Appeal

- The players
  - The Grand Chamber of the Court of First Instance in Luxembourg
    - Presided by Bo Vesterdorf
  - Main parties
    - Microsoft
    - The Commission:
      - Legal Service
      - Directorate General for Competition
  - Interveners
    - On Microsoft's side
      - CompTIA, ACT, TeamSystem, Mamut, DMDSecure, Tandberg
    - On the Commission's side
      - ECIS, SIIA, Free Software Foundation, VideoBanner
      - Settlements with Real, CCIA

The Main Appeal: the Result

- Judgment by the Grand Chamber
- Unprecedented clarity
- Appropriate deference to the Commission, yet detailed and thorough
- Reasons from assumptions most favorable to Microsoft

The Main Appeal: the Result

- Microsoft's Application to Annul the Decision is almost entirely rejected
  - Commission upholds 2004 Decision's findings on refusal to supply interoperability information and tying
  - The record fine of 497 million Euro stands
  - Microsoft is ordered to pay the costs
- Exception: Court annuls part of the trustee mechanism
  - Microsoft does not have to pay for the system
  - Trustee does not have as many powers as the Commission initially conferred to him

The Court's findings on interoperability

- EC Decision correctly found Microsoft unlawfully refused interoperability information
  - CFI determines the degree of interoperability required in light of the competitive conditions
  - Assumes Microsoft has valid intellectual property protection claims
  - Applies traditional case law analysis
    - CFI determines the interoperability information is indispensable
    - Finds refusal of information risks eliminating all effective competition
      - Microsoft share now nearing 80%, from less than 30% in 1998
    - Finds refusal limits innovation on the work group server market to the prejudice of consumers
    - Finds Microsoft has no objective justification
      - Existence of IPRs cannot in and of themselves justify a refusal

The Court's findings on tying

- EC Decision correctly found Microsoft engaged in illegal tying
  - Windows and WMP separate products
  - Microsoft dominant with Windows
  - Microsoft does not offer tying produc (/Windows) without tied product (WMP) – technical and contractual coercion
  - Microsoft has no objective justification for the tie
    - Offering a common standard platform is not a justification in and of itself – and may not be imposed by a monopolist through tying
  - Microsoft forecloses competition by foreclosing the OEM distribution channel
    - OEMS disincentivized from including alternative media players
    - Market share figures bear this out

What does the judgment mean for you?

- To what extent does it set a more broadly applicable precedent?
- When may you / may you not refuse to supply interoperability information? When may you refuse to license IP rights?
- When may you bundle products? What's the line between bundling separate products and adding features / improving a product?
- How might the judgment impact your relationship with Microsoft?
- Does the judgment heighten any differences between EU and US antitrust law?
- What does the judgment not address? What issues remain for the future?

To what extent does Microsoft judgment a precedent?

- In theory no law of precedents in continental or EU law / practice is different
- But judgment does set a precedent, like any judgment
- Very significant precedent for antitrust cases involving Microsoft
- Limited significance for other cases, other sectors
  - Largely applies existing precedents - no change
  - Very fact-specific
  - Google, IBM, Apple, Intel, Qualcomm?
- Time will tell

To what extent is the judgment relevant to other companies?

- Highly relevant to Microsoft
- Relevant to companies facing Microsoft's behavior
- Clearly limited to behavior of dominant companies
- CFI findings suggest reliance on
  - Very significant dominance -- omnipresence
  - Interoperability and disclosures as characteristics of the software industry
  - Network effects

When may one refuse to supply interoperability information?

- You are not dominant
- There exists real, vibrant competition
- Your competitors can achieve the an adequate level of interoperability through other means such as reverse engineering
- But note
  - Be careful about dismissing requests as overbroad
  - Be careful in the way you communicate about requests
  - It does not matter that all the facts are taking place in the U.S., far from Brussels

Lawful bundling and product improvement versus illegal tying

- Mainly an issue if you are dominant
  - Theoretically can also be an “Article 81” violation
- Based on current EU law, even if you are dominant you may bundle products as long as you also offer them separately
  - Bundling products previously operated separately (or still offered separately by other providers) as a dominant supplier could be considered tying, especially if you achieve ubiquity in markets subject to network effects
- Even if you are dominant, you can always add features to your products even if you do not offer those features separately as long as they were not offered as separate products previously (or are offered separately by other companies)
  - Separate product: separate demand, separate supply, other factors

Impact on your relationship with Microsoft

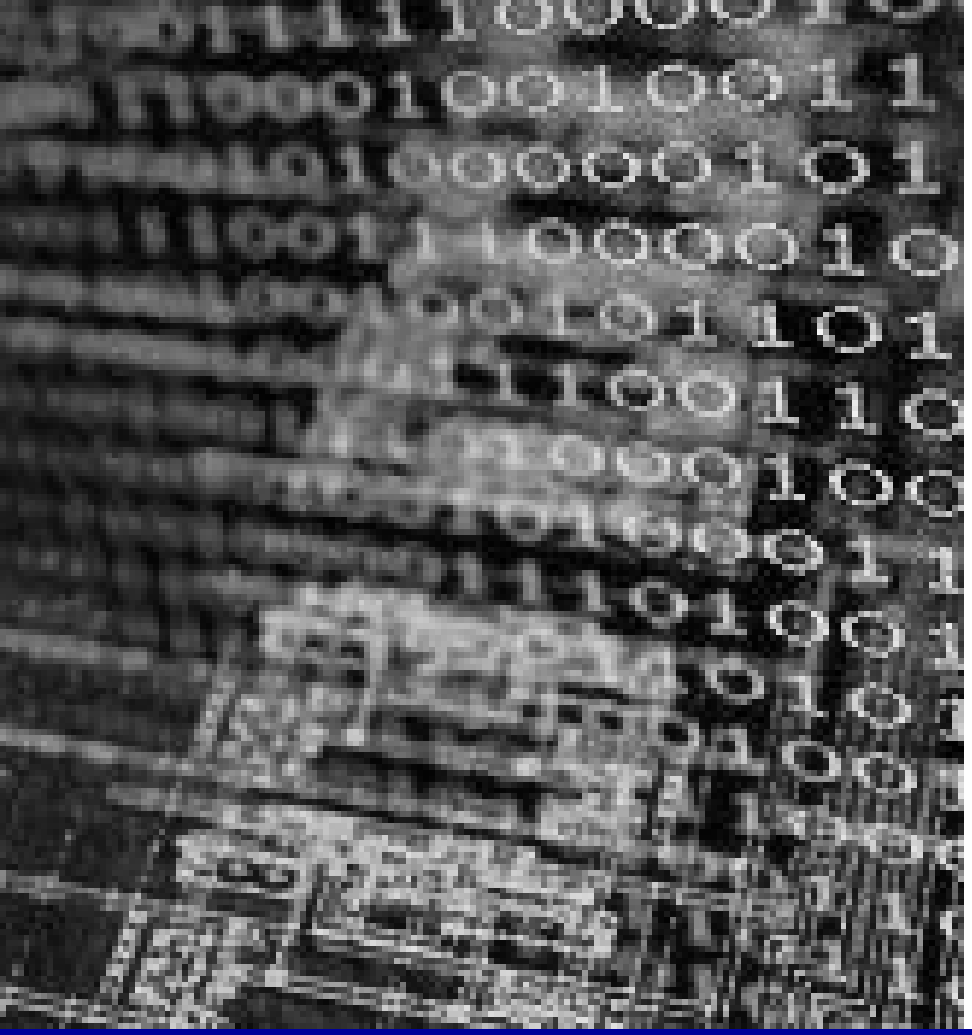
- Likely of limited relevance, but Microsoft will be required to supply Windows without WMP, and interoperability information regarding file & print, user and group administration tasks
- To be seen whether Microsoft will comport its behavior to principles enunciated in CFI judgment, especially outside directly affected markets
- Commission now has solid precedents to pursue similar Microsoft behavior in other markets
  - Showing of foreclosure will still be important part of analysis

US / EU differences

- Main overall difference is enforcement policy, especially vis-a-vis Microsoft
- Outcomes broadly similar so far
  - Finding of abusive tying in EU / tying remanded by US Court of appeals but commingling upheld and tying remanded under rule of reason approach broadly similar to approach adopted by CFI
  - Imposition of WSPP disclosure regime / MCPP disclosure regime tagged on in US
- Some legal differences remain
  - Refusals to license more likely to be deemed abusive in EU than in US (but highly unlikely to see many cases in EU either)
  - Commentators suggest U.S. Trinko case moves in different direction
- U.S. criticisms badly received

What does *Microsoft* not address?

- Other cases against Microsoft alleging refusal to supply interoperability information and tying infringements can rely on CFI precedent, but must still be proved on the facts
  - Risk of foreclosure must be shown
  - *E.g.*, ECIS complaint, possibly other complaints
- Can Microsoft be required to offer untied products with a price differential?
- Are there circumstances in which Microsoft can be required to offer products only separately?



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Thomas specializes in European Union competition and intellectual property law, especially in high-technology matters. Advises major corporations regarding mergers, joint ventures, distribution systems, licensing, and competition and intellectual property litigation. He has particular experience in advising in relation to the information and communications technology industries.

Thomas speaks regularly on European Union intellectual property and antitrust law, and has authored numerous articles and contributions to books on those topics. He chairs the U.S. Board of Editors for Droit de l'Informatique et des Telecoms and sits on the Board of Editors for both Computer und Recht and Computer und Recht International and on the Correspondents Panel for the Computer Law and Security Report. He chairs the Education Committee of Licensing Executives Society International and lectures for the International Business Law Postgraduate Program at the University of Zurich and at the Faculty of Law of the University of Namur in Belgium.

Thomas received his education at the University of Washington (B.A. in Political Science and Norwegian (1977)) and Columbia Law School, where he was a Harlan Fiske Stone Scholar and James Kent Scholar (1982)

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Dieter holds degrees from the University of Leuven (J.D.) and George Washington University (LLM, Patent and Intellectual Property Law).

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