**Stanford – Vienna**
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# Transatlantic Antitrust and IPR Developments

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# U.S. DEVELOPMENTS

**C.A. 5th Cir.'s judgment in Golden Bridge Technology, Inc. v. Motorola, Inc.**

On 23 October 2008 the U.S. Court of Appeals for the Fifth Circuit affirmed the grant of a summary judgment in favour of defendants by the District Court for the Eastern District of Texas. The Fifth Circuit held that the plaintiff did not by direct or indirect evidence establish the existence of a conspiracy by the defendants participating to a standard setting organization 3rd Generation Partnership Project to remove the defendant's technology from an industry standard.

While the District Court would have applied the per se prohibition to such a conspiracy, had the existence thereof been shown by the plaintiff, the Fifth Circuit explicitly notes that its opinion should not be construed to endorse the lower court's conclusion of per se liability.

**C.A. Fed. Cir.'s judgment In re Ciprofloxacin Hydrochloride Antitrust Litigation**

On 15 October 2008 the U.S. Court of Appeals for the Federal Circuit affirmed the grant of a summary judgment for federal antitrust claims and dismissal of state antitrust claims by the U.S. District Court for the Eastern District of New York in a case concerning reverse payments to generic manufacturers of pharmaceuticals by a patent holder as part of settlement agreements.

According to the Federal Circuit, the District Court did not err in its rejection of per se liability for reverse payments or in its rule of reason analysis of the agreements finding no anti-competitive effects outside of the "exclusionary zone" of the patent. In particular, the Federal Circuit held that in the absence of evidence of fraud before the PTO or sham litigation, the court need not consider the validity of the patent in the antitrust analysis of a settlement involving a reverse payment, citing agreement with the Second and Eleventh Circuits. The Federal Circuit thus refused to follow the suggestions by the FTC and the U.S. Solicitor General to take account of the strength of patent by considering the expected value of the lawsuit at the time of the settlement or the ex ante relative likelihood of success of the parties' claims.

**DOJ’s Response to RFID Consortium LLC's Request for Business Review Letter**

On 21 October 2008 the Department of Justice issued a business review letter in which the DOJ announced will not challenge the proposed joint licensing of patents essential to UHF RFID standards by RFID Consortium LLC that is formed by a group of companies holding at least one such essential patent.

In its analysis the DOJ considered the proposed arrangement as reasonably likely to yield pro-competitive benefits, including, by lowering overall royalty rates by limiting the threat of hold-up and royalty stacking, and by lowering transaction costs of both licensors and licensees. The DOJ also indentified safeguards in the proposed arrangement that reduce concerns about harm to competition, including the removal of patents found invalid from the pool and limiting the pool to essential patents by using an independent expert. Further, the DOJ considered it unlikely that the arrangement results in the foreclosure of downstream rivals or collusion among pool licensors, or harm to follow-on innovation.

**FTC’s Final Consent Order in Matter of Negotiated Data Solutions, LLC**

On 22 September 2008 the Federal Trade Commission issued the final consent order in the matter of Negotiated Data Solutions LLC (vote 3-1, Chairman Kovacic dissenting).

According to FTC’s complaint, Negotiated Data Solutions LLC violated Section 5 of the FTC Act by seeking to break a licensing commitment its predecessor made to the standard-setting organization Institute of Electrical and Electronics Engineers as to an Ethernet standard to which the industry subsequently became locked in.

The FTC relied on a theory of a stand-alone violation of Section 5 of the FTC Act that the challenged conduct constitutes both 1) unfair methods of competition and 2) unfair acts or practices, rather than a violation based on a Sherman Act theory. Apart from immediate injury to consumers and competition resulting from the royalties exceeding the level committed to, the complaint also identified harm to the development, reliance and adoption of industry standards as anti-competitive effects.

**FTC’s Workshop on Section 5 of The FTC Act As A Competition Statute**

On 17 October 2008 the FTC held a public workshop on Section 5 of the FTC Act. In addition to three panels focusing on the history, interpretation

and application of Section 5 to business practices, the final panel of the workshop was devoted to the application of Section 5 to standard-setting issues.

The agenda of the workshop, as well as a webcast and transcripts of the panel sessions are available on the FTC's website.

# EU DEVELOPMENTS

**ECJ Advocate General Trstenjak's Opinion in Kanal 5 Ltd, C-52/07**

The ECJ Advocate General Trstenjak's opinion (currently not available in English) was published on 11 September 2008 in the Kanal 5 Ltd, C-52/07 case. The case concerns a request of the Swedish Market Court for a preliminary ruling on the interpretation of the prohibition of the abuse of a dominant position to pricing models applied by a music copyright holders' collecting society in licensing music to television broadcasters.

According to the opinion, if in such pricing model the relationship between the economic value of the license and the price paid for it is disproportionate, the use of such a model may constitute an abuse under Article 82 (a) EC Treaty's prohibition of unfair prices and terms, unless such a pricing model can be justified by efficiencies.

The Advocate General considered that it would not be an abuse to use a pricing model that is based on a variable part of the advertising and subscription income of the television channel if the model takes into how much copyright protected music is used by the television channel.

However, if a more accurate pricing model exists for identifying the income associated with specific television programs or times of broadcast, it may constitute an abuse to use a model that disregards such information and thus distorts the relationship between the income associated with the use of music and the price paid for it. That may be the case if particular programs generate substantial advertising or subscription income but use little music. Nevertheless, a cruder model may be justified by efficiencies (e.g. lower costs of administrating and monitoring the use of music).

No information is currently available on when the actual ECJ judgement is due.

**ECJ's Judgement in Sot. Lelos kai Sia EE, Joined Cases C-468/06 to C-478/06**

On 16 September 2008 the ECJ ruled on a request for a preliminary ruling from a Greek court on whether the refusal by a dominant pharmaceutical producer to meet orders from wholesalers that is intended to limit parallel exports by the wholesalers constitutes an abuse of a dominant position.

According to the ECJ, it is an abuse of a dominant position to refuse to meet orders that are ordinary in the light of the 1) size of the orders in relation to the requirements of the market in the originating Member State and 2) the previous business relations of the dominant undertaking and the wholesalers.

In associating the abuse only with orders that are not out of the ordinary, the ECJ recognized that even a dominant firm is allowed to take steps that are reasonable and in proportion to protecting its commercial interests. However, the ECJ did not consider it necessary to examine the argument raised in the case that it would be necessary for pharmaceutical companies to limit parallel exports in order to avoid the risk of reducing investment in the research and development of medicines. Such a justification was rejected in the opinion of the Advocate General (Ruiz-Jarabo Colomer) in this case, whereas in an earlier reference in the same national dispute (Syfait, Case C-53/03), in which the ECJ held it lacked jurisdiction, Advocate General Jacobs considered in his opinion a refusal intended to limit parallel exports capable of being objectively justified given, in particular, the negative consequences of parallel trade in the pharmaceutical industry for the incentives to innovate.

**European Commission's Revised Merger Remedies Notice**

On 22 October 2008 the European Commission announced its revised notice on merger remedies and related changes to the Merger implementing regulation.

The revised notice reflects the accumulated experience of the Commission with merger remedies which often involve the transfer or licensing of intellectual property rights, including from recent cases involving specific technology or brand related remedies and from the Commission's Merger remedies study (2005) that identified problems in the effectiveness of remedies granting access to intellectual property rights.

**European Commission to present preliminary findings of its pharmaceutical sector inquiry**

The European Commission has announced that it intends to present a preliminary report on its findings of its inquiry of the pharmaceutical sector launched in an event to be held on 28 November 2008.

The inquiry is according to the Commission intended to examine various to intellectual property rights related issues, including whether patent dispute settlements have delayed or blocked entry into markets and whether entry barriers have be created by vexatious litigation or the misuse of patent rights.