**Stanford – Vienna**
**Transatlantic Technology Law Forum**

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# Transatlantic Antitrust and IPR Developments

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# U.S. DEVELOPMENTS

### FTC files a petition for certiorari with the U.S. Supreme Court in Rambus

On 24 November 2008 the FTC filed a petition for a certiorari with the U.S. Supreme Court that seeks the review of the D.C. Circuit decision in Rambus v. FTC. The D.C. Circuit granted Rambus's petition for review and vacated the Commission's order to cease and desist.

The petition argues that the D.C. Circuit erred in its analysis of required causation between Rambus's conduct and subsequent acquisition of monopoly power and in rejecting that the ability of Rambus to avoid a RAND commitment constitutes harm to competition.

### 9th Cir. remands Walker Process claims in Kaiser v. Abbott

On 13 January 2009 the 9th Circuit remanded a monopolization claim of fraud at the PTO brought by Kaiser against Abbott, while affirming and reversing on other issues.

The 9th Circuit found that there was enough evidence to avoid summary judgment, and thus remanded the question to the district court.

### N.D. Cal. grants motion to dismiss in Apple v. Psystar

On 18 November 2008 the District Court of N.D. Cal. granted Apple's motion to dismiss Psystar's antitrust claims. Psystar claimed that Apply has engaged in unlawful tying, monopoly maintenance and exclusive dealing in the Mac OS specific markets for operating system and computer hardware.

The District Court found that Psystar did not plausibly allege that Mac OS alone constitutes a relevant product market or that Mac OS compatible computer hardware constitutes a distinct submarket or aftermarket.

### FTC posts staff working papers on Section 2

The FTC has posted four working papers by its staff on Section 2 of the Sherman Act. The papers address the enforcement of Section 2, different analytical frameworks for assessing single-firm conduct and the meaning of monopoly power, as well as issues raised by "cheap exclusion".

# EU DEVELOPMENTS

### ECJ's judgment in Kanal 5 Ltd, C-52/07

On 11 December 2008 the ECJ gave a preliminary ruling in Kanal 5 Ltd (C-52/07) requested by the Swedish Market Court on whether certain remuneration models applied by a copyright management organization for the use of copyright-protected music in television broadcasts are compatible with Article 82 EC Treaty.

According to the ruling, a remuneration model in which the royalties for the use of copyright-protected musical works correspond partly to the revenue of the television channels does not amount to an abuse of a dominant position, provided that part is proportionate to the quantity of music actually or likely to be broadcast. However, that conclusion does not apply if another method exists that allows the use of the music and the audience to be identified more precisely without resulting in a disproportionate increase in the costs for the management of contracts and the supervision of the use of those works.

The ECJ reasons that it is appropriate to ascertain whether the royalties imposed are reasonable in relation to the economic value of the service provided by the rights management organization and to seek an appropriate balance between the interests of the composers and of the television broadcast companies.

The ruling also considers whether the application of different remuneration models to commercial companies and public service undertakings amounts to discrimination prohibited under Article 82 (c) EC Treaty.

### European Commission issues guidance on the application of Article 82 EC Treaty to exclusionary abuses

The European Commission has published a guidance paper on its enforcement priorities in applying Article 82 EC Treaty to exclusionary abuses. The paper establishes an effects-based analytical framework that focuses on the likely consumer harm resulting from anti-competitive foreclosure.

The paper also provides guidance on the assessment of certain common types of exclusionary conduct, including exclusive dealing, tying and bundling, predation and refusals to deal and margin squeeze.

The guidance paper is limited to exclusionary conduct, which remains the Commission enforcement priority in Article 82 enforcement. The

Commission has recently stated that it is preparing guidance also on so-called exploitative abuses which include for instance the imposition of unfair prices and terms by a dominant undertaking.

**European Commission publishes preliminary report on pharmaceutical sector inquiry**

On 28 November 2008 the European Commission published its preliminary report on its inquiry into the pharmaceutical sector. The report finds evidence on originator companies having engaged in practices aimed at delaying or blocking the entry of competing medicines. Practices aimed against the entry of generics include multiple patent applications for a particular medicine, initiation of disputes and litigation, settlements constraining generic entry and interventions before national authorities against regulatory approval. Defensive patenting strategies primarily aimed at blocking the development of new medicines by competitors were also identified in the report.

The report finds that competition in the pharmaceutical industry does not work as well as it should, and suggests that the practices identified contribute to the delays in generic entry. However, being a sector inquiry, the preliminary report does not draw conclusions on whether the practices identified amount to antitrust infringements. The report also notes the concerns raised by stakeholders about the regulatory framework, including the European patent system.

The Commission has invited stakeholders to submit their views on the preliminary report in a public consultation. The final report is expected in spring 2009.

**European Commission reviews the framework for horizontal cooperation agreements**

The European Commission has opened a public consultation on the regime for the assessment of horizontal cooperation agreements. The current rules include a block exemption regulation on specialization agreements and another one on research and development agreements, as well as guidelines on horizontal agreements of various types. The consultation seeks experiences from the business community and other stakeholders on how these current rules have worked in practice. The current specialization and R&D block exemption regulations will expire at the end of 2010, and the Commission is preparing the regime to be applied thereafter.

**European Commission workshop on intellectual property rights and ICT standards**

On 19th November 2008 the European Commission organized a workshop on intellectual property rights and standards. Topics addressed included the interface between standards, intellectual property rights and competition law.

**European Commission initiates proceedings on licensing practices of Standard & Poor's**

The European Commission has decided to initiate proceedings against Standard & Poor's on a possible abuse of a dominant position under Article 82 EC Treaty.

The investigation examines Standard & Poor's alleged practices of demanding licensing fees from financial institutions for the use of US International Securities Identification Numbers (ISIN) and certain descriptive elements attached to them, even when the financial institutions do not use the Standard & Poor's US ISIN database as such but access value-added financial information provided by information service providers using them as identifiers.

According to the Commission, US ISINs are the only universal or common identifier for US securities.

**Commission sends a statement of objections to Microsoft on the tying of Internet Explorer to Windows**

On 17 January 2009 the European Commission confirmed that it has sent a statement of objections to Microsoft. The Commission's preliminary view is that Microsoft has abused its dominant position by tying the web browser Internet Explorer to the PC operating system Windows.

The Commission believes that the tying (which makes Internet Explorer available on 90% of the world's PCs) distorts competition on the merits between web browsers by proving Internet Explorer an artificial distribution advantage that others cannot match, thus shielding it from competition. The Commission is concerned that, as a result, not only web browser innovation and quality is harmed, but also that the ubiquity of Internet Explorer risks undermining competition and innovation in the provision of services to consumers by creating artificial incentives for content providers and software developers to design websites primarily for Internet Explorer.

In a recent SEC filing Microsoft informs that the Commission is considering a remedy that would order Microsoft and OEMs to obligate users to

choose a particular web browser when setting up a new PC, which could entail OEMs being required to distribute multiple browsers on new Windows PCs.