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Overview

Agreements

U.S. Department of Justice remains concerned over antitrust issues raised by "Google Books" settlement [Juha Vesala]
U.S. 2nd Circuit remands suit alleging record label conspiracy in Internet music sales [Juha Vesala]
European Commission launches monitoring of reverse patent settlements between pharmaceutical companies [Gabriele Accardo]
U.S. FTC publishes study on costs of reverse-payment settlements [Juha Vesala]
U.S. District Court dismisses antitrust claim by RealNetworks [Juha Vesala]

Unilateral conduct

U.S. 9th Circuit affirms judgment that incompatibility of products did not constitute monopolization [Juha Vesala]

Mergers

U.S. Department of Justice requires licensing, divestment and behavioral remedies in Ticketmaster/Live Nation [Juha Vesala]
UK Competition Appeal Tribunal quashes clearance of Ticketmaster/Live Nation merger [Gabriele Accardo]
U.S. Department of Justice closes investigation into Microsoft-Yahoo! agreement [Juha Vesala]
European Commission clears Microsoft–Yahoo search deal [Gabriele Accardo]
Commission clears Oracle's acquisition of Sun Microsystems [Gabriele Accardo]

U.S. DEVELOPMENTS

U.S. Department of Justice remains concerned over antitrust issues raised by "Google Books" settlement

On 4 February 2010 the U.S. Department of Justice filed a statement of interest regarding the proposed amended settlement agreement in *The Authors Guild Inc. et al. v. Google Inc.* with the U.S. District Court for the Southern District of New York.

According to the Department, while the parties have made substantial progress on concerns raised by it (see Newsletter 5/2009 p. 2 for the Department's first statement of interest), several antitrust and other issues remain.

As to the *horizontal price competition concerns*, the Department, first, remains concerned over the industry-wide revenue sharing that would be established by the settlement among publishers and authors. While the amended settlement would give Google the right to renegotiate bilaterally with rightsholders on how wholesale revenue is shared among them, this remedy is too limited because it would not apply to all works and because renegotiations would be limited to the prices of works, not their qualitative aspects such as usage restrictions or digital rights management.

Second, the Department continues to object to the agreement among publishers and authors to allow Google price their works using an algorithm. The Department is also concerned about the ability of rightsholders to block Google from agreeing on jointly funded discounting with individual rightsholders.

Third, the Department considers that the creation of "Unclaimed Works Fiduciary" ("UWF") - while a welcome effort - is in its current form insufficient to address the concern raised by rightsholders of known works pricing the works of unknown rightsholders. The powers and independence of the UWF may be too limited for it to be able to depart from default prices set by a board that primarily consists of commercial publishers and authors.

According to the Department, the amended settlement does not address the concerns raised by the settlement conferring *Google de facto exclusivity* in orphan and unclaimed works, thus "producing less than optimal result from a competition standpoint." The Department rejects as "poor policy and not something antitrust laws required a competitor to do"

the suggestion that a competitor could engage in copying of books in the hope of prompting a class action suit and a subsequent settlement.

The Department also notes that the de facto exclusivity could strengthen Google's dominance in its online search business, as being able to offer content exclusively would give Google at least some protection from competition. The Department argues that this protection is not gained by Google's technological advances in search or the operation of normal market forces, but the use of class action settlement to gain a result Google could not achieve in the marketplace.

Despite the concerns the Department, however, continues to believe that a settlement would be beneficial and that its concerns can be addressed by further revisions. [Juha Vesala]

U.S. Department of Justice requires licensing, divestment and behavioral remedies in Ticketmaster/Live Nation

On 25 January 2010 the U.S. Department of Justice announced that it, along with 17 state Attorney Generals, filed a proposed settlement in the U.S. District Court in Washington D.C. that would allow the merger of Ticketmaster Entertainment Inc. with Live Nation Inc. to proceed.

In order to overcome the competition concerns raised by the merger, Ticketmaster is, first, required to license its ticketing software and divest ticketing assets to two companies in order to allow them to compete with Ticketmaster. Second, Ticketmaster has agreed not to retaliate against venue owners who choose to use another company's ticketing or promotional services. Third, the settlement prohibits Ticketmaster from using its clients' ticketing data in its other functions and requires Ticketmaster to give to its clients their ticketing data when a client switches to another ticketing service.

The Department considers that absent the remedies, the merger would have substantially lessened competition for primary ticketing in the United States and resulted in higher prices and reduced innovation. [Juha Vesala]

U.S. Department of Justice closes investigation into Microsoft-Yahoo! agreement

On 18 February 2010 the U.S. Department of Justice announced the closing of its investigation into the proposed Internet search and search advertising agreement between Microsoft Corporation and Yahoo! Inc. (see below p. 9 for the simultaneous clearing of the transaction by the European Commission).

The Department stated that in view of the evidence it has gained, the agreement is not likely to substantially lessen competition in the United States to the detriment of Internet search users, paid search advertisers, Internet publishers, or distributors of search or paid search advertising technology. The agreement is instead seen to allow quicker development of Microsoft's search and search advertising technology.

By combining Yahoo!'s and Microsoft's technologies the agreement is seen by customers to create a more competitive rival to Google, the currently dominant company. Customers view Google imposing the most significant competitive constraint on Microsoft and Yahoo!, not one on each other.

The Department also notes the relationship between scale and competitive performance in the search industry. By increasing Microsoft's access to search queries, the agreement will increase Microsoft's performance by accelerating automated learning and enabling Microsoft to serve better search results. The greater query data pool may also allow more effective testing and development of new and improved features to search products, which if realized should result in more competitive pressures in the marketplace. [Juha Vesala]

U.S. 9th Circuit affirms judgment that incompatibility of products did not constitute monopolization

On 6 January 2010 the U.S. Court of Appeals for the 9th Circuit affirmed a U.S. District Court (Central District of California) grant of summary judgment on a monopoly maintenance claim brought against Tyco Health Care Group LP ("Tyco"). The claim was based on Tyco making its pulse oximetry monitors (OxiMax) incompatible with generic sensors and discontinuing its earlier monitors (R-Cal) that could be used with such sensors.

The Court noted that while as a general rule success achieved through innovation does not raise antitrust concerns, product design is not immune from antitrust, such as when 1) a product design only serves to protect monopoly power without any pro-competitive justification such as an improvement of the product, or 2) the when an improved product design is associated with other anti-competitive conduct. However, the Court rejected the plaintiffs' argument that the benefits and anti-competitive effects of product design should be balanced as contrary to the purpose of antitrust laws as well as unadministrable.

The Court affirmed the District Court dismissal under these two tests. First, focusing on whether OxiMax lacked any benefits, the Court agreed with the District Court that there was no genuine issue whether OxiMax was a genuine improvement. This was because of OxiMax's additional features

and reduced costs for consumers, and the fact a patent was granted on the new product, suggesting an improvement over previous designs.

Second, examining whether associated anti-competitive conduct was involved, the Court agreed with the District Court that there was no evidence that Tyco forced consumers to adopt the OxiMax system. In particular, given the presence of competing monitor products on the market, the discontinuation of the R-Cal monitors by Tyco could not force consumers into purchasing OxiMax monitors. [Juha Vesala]

U.S. 2nd Circuit remands suit alleging record label conspiracy in Internet music sales

On 13 January 2010 the U.S. Court of Appeals for the 2nd Circuit remanded a suit alleging a conspiracy among major record labels in Internet music distribution back to the U.S. District Court for the Southern District of New York. The District Court had dismissed the suit for failing to overcome Twombly pleading requirements.

The 2nd Circuit held sufficiently alleged that major record labels fixed prices and terms for online distribution of their music in violation of Section 1 of the Sherman Act. Allegedly, such a conspiracy took place, in particular, through the labels' joint ventures MusicNet and pressplay and concerned the availability and distribution of music on the Internet as well as the pricing and other terms of purchase.

Starr et al. v. Sony BMG et al., Docket No. 08-5637-cv, 13 January 2010 (no link available, but opinion is available through the 2nd Circuit search). [Juha Vesala]

U.S. FTC publishes study on costs of reverse-payment settlements

On 13 January 2010 the U.S. Federal Trade Commission announced a study on settlements between brand and generic pharmaceutical companies. The study examines settlement agreements filed with the FTC in 2004 - 2009 pursuant to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (see below p. 6 for a similar mechanism recently introduced by the European Commission).

According to the study, a total of 218 final settlement agreements between brand and generic companies were filed during the examined period. Compensation from the brand company to the generic company was involved in 66 settlements. Out of these 66 agreements, 51 were with the first generic company to seek entry to the market.

On average, settlements involving compensation delayed entry 17 months in comparison to agreements without payments to generic companies. The study estimates that the settlements currently protect $20 billion in brand-name pharmaceutical sales and that they cost American consumers $3.5 billion per year.

While the FTC states it has investigations and litigation pending over reverse-payment settlements, it recommends that Congress pass legislation. The FTC also criticizes certain appeals courts for misapplying the antitrust laws to uphold reverse-payment settlement agreements. [Juha Vesala]

U.S. District Court dismisses antitrust claim by RealNetworks

On 8 January 2010 the U.S. District Court for the Northern District of California granted motion to dismiss RealNetworks, Inc. and RealNetworks Home Entertainment, Inc.'s ("Real") complaint that alleged that DVD Copy Control Association, Inc. and several major motion picture studios violated antitrust laws.

Real essentially argued that the motion picture studios collectively agreed to boycott Real's plans to market a software product ("RealDVD") that would have allowed DVDs to be copied on hard drives for viewing. The Court, first, held that Real did not allege enough facts to support such an alleged conspiracy to overcome pleading requirements. Second, the Court held that Real did not, in any case, allege antitrust injury, in particular, because the alleged injury (delayed introduction of RealDVD) primarily results from a preliminary injunction entered by the Court against Real on the basis of likely violation of the DMCA's anti-circumvention provisions.

RealNetworks Inc., et al. v. DVD Copy Control Association Inc., et al., No. 08-4548 MHP and C 08-4719 MHP, 2010 WL 145098, N.D. Cal., 8 January 2010. [Juha Vesala]

EU DEVELOPMENTS

European Commission launches monitoring of reverse patent settlements between pharmaceutical companies

On 12 January 2010, the European Commission published a press release confirming it addressed requests for information to a selected number of pharmaceutical companies asking them to submit copies of their patent settlement agreements concluded in the period from 1 July

2008 to 31 December 2009 and relevant for the EU/EEA market. More targeted requests for information may follow in specific cases, the Commission stated.

The aim of the Commission is to monitor patent settlement agreements concluded between originator and generic pharmaceutical companies. In particular, the monitoring concerns patent settlements where an originator company pays off a generic competitor in return for delayed market entry of a generic drug (so called "reverse payment settlements").

This monitoring exercise has been launched in the light of the findings of the competition inquiry into the pharmaceutical sector published on 8 July 2009. The Commission is concerned that this type of patent settlements may have negative effects on European consumers by depriving them of a broader choice of medicines at lower prices and indicated that the Commission could monitor such patent settlements.

Following this first round of information gathering, the Commission will publish a short report providing a statistical overview. Depending on the outcome of the exercise, the Commission may repeat it annually for as long as the Commission considers that there is a potential problem.

This is probably an area where coordination between the two sides of the Atlantic may be needed, since patent litigation on the same drug is often pursued in multiple jurisdictions around the world. In the U.S., for instance, parties to similar patent settlements must file the terms of their settlements with the Federal Trade Commission and the U.S. Department of Justice (see above p. 5 for a recent FTC Study on these filings). [Gabriele Accardo]

Commission clears Oracle's acquisition of Sun Microsystems

On 21 January 2010, the Commission approved Oracle's acquisition of Sun Microsystems after an in-depth investigation launched last 3 September 2009 (See Newsletter 6/2009 p. 13 for background). The Commission has now concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. In fact, (former) Competition Commissioner Neelie Kroes stated that "Oracle's acquisition of Sun has the potential to revitalize important assets and create new and innovative products."

Sun provides network computing infrastructure solutions that include computer systems, software, storage and services. In 2008, Sun acquired the open source database, MySQL.

The Commission's main concern was whether the acquisition of the world's leading open source database Sun's MySQL by Oracle, the leading proprietary database vendor, would lead to a significant impediment of effective competition within the EEA. This concern was based on the premise that database market is highly concentrated with the three main proprietary database vendors, Oracle, IBM and Microsoft, accounting for approximately 85% of the market in terms of revenue. In this context, the Commission's investigation confirmed MySQL's position as the leading open source database, despite Sun's low share of the database market in terms of revenue (due to the fact that users of MySQL can download and use the database for free, given its open source nature).

Accordingly, the in-depth investigation focused on the nature and extent of the competitive constraint that MySQL exerted on Oracle and whether this would be affected by the proposed acquisition. In this respect, the Commission's investigation showed that MySQL and Oracle are not close competitors in parts of the database market, such as the high-end segment.

The Commission further found that after the merger, PostgreSQL, another open source database, could be expected to replace to some extent the competitive force currently exerted by MySQL on the database market. In addition, other new products created from the MySQL code base (so called "forks") which continue to be compatible with the core MySQL Server release might also develop in future, thereby exercising a competitive constraint on Oracle in a sufficient and timely manner.

The Commission has also taken into account Oracle's public undertaking of 14 December 2009 of a series of pledges to customers, users and developers of MySQL concerning issues such as the continued release of future versions of MySQL under the open source license. Third parties will be allowed to continue to develop storage engines to be integrated with MySQL and to extend the functionality of MySQL.

The Commission also excluded that Oracle would have the ability and the incentive to deny its competitors access to important intellectual property rights connected to the Java development platform. This conclusion was based on the functioning of the Java Community Process (which is a participative process for developing and revising Java technology specifications involving numerous other important players in the IT industry, including Oracle's competitors), and the fact that a restriction of its competitors' access to the Java IP rights would jeopardize the gains derived from broad adoption of the Java platform.

Finally, the Commission also concluded that no competition concerns would arise on the market for middleware and in the "IT stack" in the light

of the merged entity's market shares and prevailing competition in the markets. [Gabriele Accardo]

European Commission clears Microsoft–Yahoo search deal

On 19 February 2010, the European Commission approved the proposed acquisition of the internet search and search advertising businesses of Yahoo! Inc. by Microsoft.

The transaction concerns Yahoo's search business, notably its internet search and the online search advertising businesses, including its online search advertising platform Panama. Microsoft will thus acquire a 10-year exclusive license to Yahoo's search technologies, and will become the exclusive internet search and search advertising provider used by Yahoo.

The Commission's first phase market investigation has indicated that scale is an important element to be an effective competitor in search advertising. Currently, Yahoo's market shares in internet search and online search advertising are generally below 10%, whereas Google, by contrast, enjoys market shares above 90%.

Different market players, namely internet search users, advertisers, online publishers and distributors of search technology, do not expect the transaction to have any negative effects on competition or on their business but they also expect it to increase competition in internet search and search advertising by allowing Microsoft to become a stronger competitor to Google. [Gabriele Accardo]

UK Competition Appeal Tribunal quashes clearance of Ticketmaster/Live Nation merger

On 11 February 2010, the UK Competition Appeal Tribunal ("CAT") quashed the unconditional clearance of the merger between ticketing agency Ticketmaster and music promoter Live Nation granted by the Competition Commission ("CC").

In its report published on 22 December 2009, the CC cleared the merger, concluding it would not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK, including live music promotion and live music venues (see Newsletter 5/2009 p. 11 for details).

The CAT's order refers the matter back to the CC to reconsider the questions raised by the Office of Fair Trading and make a new decision, amid claims that the CC denied rival ticketing agent CTS Eventim ("CTS")

its right to a fair hearing and in particular deprived it of the chance to comment on the CC's adverse provisional findings on the merger.

The CC accepted that CTS's claim was "arguable", at least in the particular circumstances of the case. In fact, as the CAT's orders points out, CTS was not only an interested third party to the investigation: CTS's strategy and entry into the UK market formed a key part of the CC's assessment of the effects of the merger. The CC has thus recognized that the matters upon which CTS seeks to comment could affect the findings contained in its report and in particular the conclusion that the merger was not anti-competitive.

In fact, in its provisional findings report, the CC was of the view that as a result of the merger, the merged entity would have both the ability and the incentive to impede CTS's position in the UK market for primary retailing of live music tickets in several ways, notably by restricting the number of tickets CTS could offer and its range of events. According to the CC, this would have the direct and significant effect on CTS's ability to attract consumers and consequently, on its ability to gain ticket allocations from other promoters and venues. The CC recognized that this "chicken-and-egg" problem means that becoming a large supplier is very difficult without a preferred agreement with one of the large source of tickets (e.g. like the agreement between Live Nation and CTS, under which, in the UK, CTS would supply Live Nation with a managed ticketing service, enabling Live Nation's ticket to be sold by CTS or any other ticket agent).

The CC has now three months from the date of the CAT's order to make a new decision, giving it a deadline of 11 May 2010. The merger of Ticketmaster and Live Nation was approved by the U.S. Department of Justice (subject to conditions) on 25 January 2010 (see above p. 3), and the parties have completed the merger. Accordingly, this means that the CC will be concerned with a completed merger, rather than an (so called) anticipated merger. [Gabriele Accardo]