



Stanford – Vienna Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law



Transatlantic Antitrust and IPR Developments

Bimonthly Newsletter
Issue No. 1/2011 (March 3, 2011)

Editor-in-chief: Juha Vesala, TTLF Fellow
Contributors: Gabriele Accardo and Juha Vesala, TTLF Fellows

Overview

Agreements

Antitrust suit against defensive patent purchasing organization dismissed [Juha Vesala]

European Commission launches a second round of patent settlements monitoring [Gabriele Accardo]

European Commission statement on joint acquisition of Novell's patents by Microsoft, Apple, Oracle and EMC [Gabriele Accardo]

Parallel investigations into the e-book publishing sector [Gabriele Accardo]

Unilateral conduct

Italian Competition Authority accepts Google's commitments and closes investigation [Gabriele Accardo]

Mergers

U.S. Department of Justice allows Comcast-NBCU joint venture with conditions [Juha Vesala]

European Commission grants conditional approval of McAfee acquisition by Intel [Gabriele Accardo]

U.S. DEVELOPMENTS

U.S. Department of Justice allows Comcast-NBCU joint venture with conditions

On 18 January 2011, the U.S. Department of Justice (“DOJ”) [announced](#) a proposed [settlement](#) with Comcast Corp. (“Comcast”) and NBC Universal, Inc. (“NBCU”) that allows the parties to proceed with their joint venture. The settlement is conditioned, however, on the parties, among other things, licensing their programming to competitors of Comcast’s cable TV services. The conditions will, according to the DOJ, preserve competing content distribution models – particularly emerging online distribution competitors – which the joint venture would have threatened.

The settlement is accompanied by a Federal Communications Commission (“FCC”) [order](#) allowing the transaction with conditions, some of which pertain to the same issues as the settlement with the DOJ and complements it in others.

Under the settlement and the FCC’s order, the joint venture must make available to online video distributors the same broadcast and cable channels (i.e. video feeds from NBCU) that it sells to traditional video programming distributors as well as certain broadcast, cable, and film content that is comparable to the content the online video distributor receives from its programming peers. Licensing disputes between the joint venture and online video distributors are subject to resolution under specific mechanisms.

The settlement also includes several provisions that seek to prevent Comcast from evading the objectives of the settlement. In particular, Comcast must adhere to certain Open Internet requirements the FCC has recently promulgated. Under these requirements, which prevent Comcast from discriminating against its online content competitors, Comcast is prohibited from unreasonably discriminating in the transmission of an online video distributor’s lawful network traffic to its broadband customers and is obliged to maintain its existing high-speed Internet services in certain markets. Comcast is also required to give other firms’ content equal treatment under its broadband services involving usage-based pricing.

As to the other protections in the settlement, Comcast may not impose terms limiting content owners in their dealings with Comcast’s competitors or retaliate against certain companies that license their content to Comcast’s competitors. Comcast must also relinquish its management right in Hulu and continue to make certain NBCU content available to Hulu.
[Juha Vesala]

Antitrust suit against defensive patent purchasing organization dismissed

On 29 December 2010, the U.S. District Court for the Southern District of New York [dismissed](#) an antitrust suit brought by Siti-Sites.com, Inc. (“Siti”) against Allied Security Trust (“AST”) and allegedly associated entities and individuals (all collectively referred to as “defendants” below) due to the lack of antitrust standing.

AST purchases patents, provides licenses to its members (and sometimes to third parties as well), and then sells the patents again (“catch and release”). Siti alleged that, through their cooperation, the defendants violated Section 1 of the Sherman Act by preventing non-practicing entities who own patents in the telecommunications industry from licensing or selling their patents at fair market value. According to Siti, the defendants’ unlawful conduct consists of collusion to achieve devaluation of patents, concerted refusals to deal with selected non-practicing entities, and deceptive price-fixing through the use of brokers in patent acquisition.

However, the court held that Siti lacked standing to sue for the alleged antitrust violations. This is because Siti is not a direct victim of the alleged violations, as Siti does not own the patents at issue. Siti’s economic interest in receiving payments from the actual owner of the patents on the basis of a contract with the latter was considered too remote to confer antitrust standing.

In view of the lack of standing, the court did not (need to) address the defendants’ motion to dismiss the antitrust claims on the bases that, first, the alleged agreement is not unlawful *per se* and Siti failed to allege adverse effects on competition or market power possessed by the defendants, and, second, that Siti’s allegations of an illegal agreement among the defendants to refuse dealings are too conclusory. [Juha Vesala]

U.S. In brief

- U.S. Supreme Court [denies certiorari](#) in music price-fixing suit (see [Newsletter 1/2010](#) p. 5 for the ruling below) (10 January 2011)
- Reverse payment settlement bill ([S. 27](#)) introduced in the Senate (25 January 2011)
- Attorney General of California [settles](#) online resale price maintenance case brought under state law (14 January 2011)
- Rosch (FTC) speech “[The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?](#)” (29 January 2011)

- Rosch (FTC) speech "[Some Thoughts on the Role of Intellectual Property in Innovation Market Cases and Refusals to License](#)" (31 January 2011)

EU DEVELOPMENTS

European Commission grants conditional approval of McAfee acquisition by Intel

On 26 January 2011, the European Commission [approved](#) the proposed acquisition of McAfee, Inc. ("McAfee") by Intel Corporation ("Intel") subject to [interoperability remedies](#). As a result, Intel, the leading manufacturer of central processing units ("CPUs") and chipsets, will be able to acquire McAfee, a leading security technology company active in the design and development of security products and services focused on ensuring that internet connected devices are protected from malicious content.

As Intel and McAfee are active in neighboring and complementary products markets, the Commission was concerned with the conglomerate effects of the merger in the field of computer security rather than with overlaps of products and services. In particular, the Commission looked at the negative effects of the merger resulting from possible bundling of CPUs and chipsets with McAfee's security solutions.

In fact, while Intel would be able to directly embed its own (i.e. McAfee's) security solutions into its chips and chipsets, security solutions vendors would still need access to specific information regarding CPUs to be able to develop new solutions. Additionally, Intel's competitors would suffer if McAfee solutions were no longer compatible with non-Intel CPUs and chipsets. Without a proper remedy, IT security products, as well as competing CPUs and chipsets could be excluded from the marketplace given Intel's strong presence in the world markets for computer chips and chipsets.

In order to address the Commission's concerns, Intel committed to ensuring the interoperability of the merged entity's products with those of competitors. In particular, vendors of rival security solutions will have access to all necessary information to use functionalities of Intel's CPUs and chipsets, while Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets. Finally, Intel will avoid hampering the operation of McAfee's security solutions when running on personal computers containing CPUs or chipsets sold by Intel's competitors. [Gabriele Accardo]

Italian Competition Authority accepts Google's commitments and closes investigation

On 17 January 2011 the Italian Competition Authority ("AGCM") [communicated](#) that it accepted the commitments (available on the [AGCM website](#) only in Italian) offered by Google to close the investigation into Google News service under Article 102 of the TFEU (see [Newsletter 5/2009](#) p. 10, [Newsletter 2/2010](#) p. 11, and [Newsletter 3/2010](#) p. 10, for background information).

With its [decision of 22 December 2010](#), the AGCM made the following commitments formally binding on Google:

- First, publishers will be able to decide whether to provide Google News with access to their own sites, to selectively exclude specific articles or images, and to display article titles without any text excerpts. This solution is now possible because Google has implemented a crawler (i.e. a computer program used by search engines to process and index web pages) for the Google News service which runs independently from the crawler of Google's main search engine.
- Second, under the new terms of Google's AdSense program, revenue sharing of proceeds from advertising sales will be more transparent. In brief, publishers will be able to check the economic terms and conditions that determine the amount of compensation they are entitled to receive. In future, publishers will have to be notified of prospective modifications prior to their implementation.

The AGCM also submitted a [report](#) (available only in Italian) to Government and Parliament requesting a review of copyright laws to address the issue of how to compensate businesses that produce the content which is later (economically) exploited by other parties on the internet. The AGCM points to the objective discrepancy between the value that the content contributes to the internet system as a whole and the actual proceeds received by online publishers for their contributions. According to the AGCM, antitrust inquiries are not the appropriate means to address those issues; instead, a national law would be needed to define a system of intellectual property rights that could promote virtuous forms of cooperation between the holders of exclusive rights and the providers of innovative internet services.

The AGCM encourages the Italian institutions to promote discussion on this issue in the appropriate international venues. [Gabriele Accardo]

European Commission launches a second round of patent settlements monitoring

On 17 January 2011, the European Commission [announced](#) a new round of selected patent settlements review. The monitoring exercise concerns patent settlement agreements concluded by a limited number of originator and generic companies between 1 January 2010 and 31 December 2010.

The Commission carried out a first monitoring exercise in early 2010, following a broader competition inquiry in the pharmaceutical sector which showed that certain patent settlements between originator and generic companies may cause consumer harm because they delay the market entry of cheaper generic medicines (see [Newsletter 1/2010](#) p. 6, and [Newsletter 4/2010](#) p. 7, for more background).

The Commission will publish a report providing a statistical overview in the first half of 2011. [Gabriele Accardo]

European Commission statement on joint acquisition of Novell's patents by Microsoft, Apple, Oracle and EMC

On 17 January 2011, European Competition Commissioner Joaquin Almunia [addressed](#) the concerns expressed on 20 December 2010 by [Mrs. Emma McClarkin](#), a Member of the European Parliament, as regards possible competition issues arising from the joint acquisition of a portfolio of 882 patents (concerning the open-source software space) from Novell by CPTN Holdings, a consortium of technology companies led by Microsoft that also includes Apple, Oracle, and EMC. The question submitted to Mr. Almunia indicated Microsoft as the source of concerns about possible infringement of EU competition law.

Commissioner Almunia stated that, on the basis of the information available, the proposed transaction appears to fall outside the jurisdiction of the European Commission under the Merger Regulation, whereas the Commission has no indication that the mere acquisition of the patents in question by CPTN Holdings may lead to an infringement of EU competition rules. [Gabriele Accardo]

Parallel investigations into the e-book publishing sector

On 2 March 2011, the European Commission issued a [press release](#) confirming that on 1 March Commission officials carried out inspections at the premises of companies that are active in the e-book (electronic or digital books) publishing sector in several Member States in order to investigate a possible violation of EU antitrust rules that prohibit cartels

and other restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union).

The Commission investigation follows the announcement of a parallel investigation in the UK. In January 2011, the UK Office of Fair Trading issued a [press release](#) stating that, following a significant number of complaints, it opened an investigation into whether arrangements that certain publishers have put in place with some retailers for the sale of e-books may breach competition rules.

The two press releases (of the Commission and the OFT) provide no other information on the ongoing investigations. [Gabriele Accardo]

EU In Brief

- ECJ Advocate General Kokott's [opinion](#) relating to territorial exclusivity of English football (soccer) transmissions (3 February 2011)
- Belgian minister [asks](#) (not available in English) Belgian competition authority to investigate conditions for iPad newspaper and magazine subscriptions (17 January 2011)

This and the previous issues of the *Transatlantic Antitrust and IPR Developments* can be accessed via its [webpage](#) on the Transatlantic Technology Law Forum website.