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. 3/2011 (June 10, 2011)

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

Overview

U.S. DEVELOPMENTS

U.S. District Court refuses to dismiss antitrust claims against Motorola

On 7 June 2011, the U.S. District Court for the Western District of Wisconsin refused to dismiss allegations by Apple, Inc. ("Apple") that Motorola Mobility, Inc. ("Motorola") engaged in anti-competitive conduct in standard-setting cooperation (*Apple v. Motorola*, docket 11-cv-178-bbc).

Apple alleges that Motorola has engaged in anti-competitive conduct in violation of Section 2 of the Sherman Act, first, by failing to timely disclose essential patents before various standard-setting organizations and, second, by also failing to offer licenses to the patents on fair, reasonable and non-discriminatory terms.

The court rejected Motorola's contention that Apple failed to allege anti-competitive conduct and resulting monopoly power. Citing *Broadcom v. Qualcomm,* 501 F.3d 297 (3d Cir. 2007), in support, the court found that Apple sufficiently alleged that by means of its false licensing commitments and failure to disclose patents Motorola engaged in anti-competitive conduct and achieved thereby monopoly power. Apple's allegations were also sufficiently specific to meet the heightened pleading standards applied by the court.

The court also denied Motorola's motions to dismiss Apple's breach of contract, patent misuse, and promissory estoppel claims which also rely on Apple's allegations that Motorola failed to disclose and license its patents appropriately. [Juha Vesala]

U.S. DOJ announces proposed settlement concerning Google acquisition of ITA

On 8 April 2011, the U.S. Department of Justice ("DOJ") announced a proposed settlement concerning the acquisition by Google Inc. ("Google") of ITA Software, Inc. ("ITA"). ITA is the leading producer of airfare pricing and shopping systems with its QPX software that powers various flight search services offered by online travel intermediaries (online travel agents and travel meta-search engines).

According to the DOJ, the acquisition of ITA would give Google the means and incentive to foreclose or disadvantage its prospective comparative flight search rivals by denying or degrading the rivals' access to QPX, which would by reducing choice and innovation ultimately harm consumers of comparative flights search services.

In order to ensure that online travel intermediaries that use the ITA's QPX software will be able to compete against any airfare website Google may introduce, the proposed settlement seeks to ensure that online travel intermediaries continue to have access to QPX. To that end, under the proposed settlement Google will be required to license the QPX software to airfare website on existing terms to current licensees and on fair, reasonable, and non-discriminatory terms to new licensees.

The settlement also aims to ensure that Google continues to develop QPX after the acquisition. Google will be required to make available ordinary upgrades to QPX at same price to all its customers and is required to fund research and development of the QPX software at similar levels as done by ITA in recent years. Google will also be required to offer ITA's yet commercially unavailable next generation InstaSearch product to online travel intermediaries.

Finally, the proposed settlement also, in particular, establishes a mechanism for reporting to the DOJ complaints that Google violates the settlement or treats online travel intermediaries in an unfair manner in connection with flight search advertising. This brings an aspect of Google's search advertising services under DOJ's antitrust oversight. [Juha Vesala]

U.S. FTC files amicus brief in reverse payment suit before 3rd Circuit

On 18 May 2011 the U.S. Federal Trade Commission ("FTC") filed an amicus brief before the U.S. Court of Appeals for the Third Circuit ("3rd Circuit") in support of plaintiffs in a private antitrust suit that challenges settlements of patent disputes between branded and generic manufacturers of K-Dur 20.

In its amicus brief the FTC argues that the 3rd Circuit should reverse the district court's decision and remand it for reconsideration.

According to the FTC, the district court's approach conflicts with basic antitrust principles as well as with patent law and the policies of Hatch-Waxman Act to promote the entry of generics drugs. According to the FTC, reverse payment settlements should be considered presumptively illegal and condemned unless established that they do not harm competition (see also Newsletter 4/2009 p. 2 for an earlier amicus brief by the U.S. Department of Justice). [Juha Vesala]

U.S. FTC to hold workshop on hold-up concerns in standard-setting

The U.S. Federal Trade Commission ("FTC") is engaged in a project to examine issues raised by patent hold-up as to technologies incorporated in collaboratively developed standards. Hold-up can undermine the competitive process of selecting technologies and threaten the integrity of standard-setting activities and ultimately harm consumers.

In its project the FTC examines ways to prevent hold-up by means of patent disclosure rules, licensing commitments and ex-ante licensing negotiations. These issues will be considered from practical and legal perspectives and under antitrust, contract, patent and consumer protection laws. The FTC will also consider whether certain practices of patent holders are deceptive or unfair.

The FTC will hold a workshop on 21 June 2011 and invites written comments on the issues related to the workshop as part of its policy project by 8 July 2011. The Agenda and a Federal Register Notice are available for further details on the project and the workshop on the FTC website. [Juha Vesala]

U.S. In brief

- U.S. Department of Justice announces changes to patent acquisition deal by CPTN Holdings and Novell Inc (see p. 5 below for details of the changes) (20 April 2011)
- FTC staff report finds increase in reverse payment settlements in the pharmaceutical industry (3 May 2011)
- FTC staff finds pharmaceutical companies failed to inform about their drug patent agreements (10 May 2011)
- Novell antitrust suit against Microsoft remanded back to district court (see Newsletter 2/2010 p. 4 for the lower court ruling) (3 May 2011)
- Federal Circuit (en banc) limits inequitable conduct defense to patent infringement (25 May 2011)
- 9th Circuit affirms dismissal of television channel bundling suit (3 June 2011)
- Microsoft antitrust final judgment expires (11 May 2011)
- U.S. Department of Justice files amicus brief in support of carve-out rate structures in licensing of music performing rights (6 May 2011)
- Rosch (FTC) speech, "The Intersection of Antitrust and Intellectual Property: The Quest for Certainty in an Uncertain World" (18 May 2011)
- Rosch (FTC) speech, "Patent Settlements, Patent Reform, and Mergers: Recent Developments in Pharmaceutical Antitrust" (11 May 2011)

EU DEVELOPMENTS

European Commission market tests S&P's commitments

On 16 May 2011, the European Commission published the proposed commitments offered by Standard & Poor's ("S&P") to close the investigation into its alleged violation of Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), which bans abuses of dominant positions.

The Commission set out its preliminary view in a Statement of Objections issued in November 2009, indicating that S&P's conduct could be in breach of Article 102 TFEU by setting unfairly high prices for the distribution in the European Economic Area of International Securities Identification Numbers ("ISINs") issued in the US (see Newsletter 6/2009 p. 10 for additional background).

ISINs are based on the international standard ISO 6166 set by the International Organization for Standardization ("ISO"), which was developed as a public service to the financial services industry. The American Bankers Association entrusted S&P as the designated numbering agency for US securities. Accordingly, S&P has a legal monopoly for the issuance and the first-hand distribution of US ISINs, which it distributes to Information Service Providers ("ISPs", like Reuters or Bloomberg) for redistribution and to some financial institutions that choose to source ISINs directly from S&P (direct users). Most financial institutions, however, prefer to obtain ISINs from ISPs (indirect users).

According to the principles set by ISO, which the Commission regards as a benchmark for fair prices, there should be no charges in the absence of a direct supply (i.e. to indirect users), whereas the prices charged for a direct supply (i.e. to direct users and ISPs) should not exceed the distribution costs incurred.

The Commission's preliminary view was that, contrary to the principles of the ISO "benchmark", S&P applied charges vis-à-vis indirect users and its prices to ISPs and direct users seemed to have exceeded the costs incurred in distribution.

To address the Commission's concerns, S&P offered the following commitments:

- Abolition of all charges to indirect users for the use of US ISINs within the European Economic Area ("EEA"). Indirect users will, however, have to conclude an agreement with S&P that prohibits the extraction, use or resale to third parties of the numerically similar securities identification numbers for use in the US.

- The distribution of ISINs to ISPs and direct users will be done for a maximum total price of USD 15,000 (approximately € 10,101) per year. ISIN records will be distributed separately from other added value information. US ISIN records will be delivered through a data-feed on a daily basis. ISPs and direct users will also have to comply to the same restrictions as those with indirect users, namely the non-extraction use or resale to third parties of the numerically similar securities identification numbers for use in the US.

Once the Commission will make the commitments binding on S&P, they will be valid for five years. S&P also offered to submit to the Commission a yearly report on the implementation of the commitments. [Gabriele Accardo]

Bundeskartellamt clears CPTN joint venture for acquisition of Novell's patents

On 20 April 2011, the German Federal Cartel Office (Bundeskartellamt or "FCO") cleared the creation of the joint venture CPTN established by Microsoft Inc., Oracle Inc., Apple Inc. and EMC Corp as a vehicle to acquire a portfolio of 882 software patents and patent applications from Novell, which can now merge with Attachmate after CPTN has obtained clearance. The joint venture will be then dissolved after three months.

The project had already been notified to the US Department of Justice ("DOJ") and the FCO in December 2010, but later withdrawn at the end of December 2010 in response to competition concerns expressed by both authorities (see Newsletter 1/2011 p. 6 and Newsletter 2/2011 p. 7 for background information).

The parties addressed these concerns, particularly to protect competition and innovation in the markets for operating systems, notably Linux's open source operating system, and virtualization software, in which Microsoft and EMC/VMware have strong presence. According to the FCO, on these markets, there is a general possibility to apply so-called FUD strategies ("Fear, Uncertainty, Doubt") against smaller competitors, which can be pursued by means of patent actions, as pointed out by numerous complaints by the open source community.

In particular, the parties agreed that:

- Microsoft will sell back to Attachmate all of the Novell patents that Microsoft would have otherwise acquired, but will continue to receive a license for the use of those patents, the patents acquired by the other three participants and any patents retained by Novell;

- EMC's share of the patents will not include a number of patents that appear to be of relevance on the market for virtualization software.

The FCO and the DOJ have cooperated during the investigation and have shared information and views about the effect of the proposed transaction. The DOJ also cleared the acquisition of the patents and patent applications but it indicated that it will continue to investigate the distribution of the patents to the individual owners. [Gabriele Accardo]

European Commission investigates Cephalon/Teva settlement

On 28 April 2011, the European Commission communicated that it is investigating whether an agreement between US-based Cephalon and Israel-based generic drugs firm Teva may have had the object or effect of hindering the entry of generic Modafinil (a drug used for sleeping disorders) in the European Economic Area ("EEA") in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

The investigation relates to a December 2005 settlement between Cephalon and Teva about patent infringement disputes in the United Kingdom and the United States concerning Modafinil. Under the settlement agreement, Teva undertook not to sell its generic Modafinil products in the EEA markets before October 2012. The settlement agreement is also subject to antitrust litigation in the United States initiated by the US antitrust authority FTC.

In 2008 and 2009 the Commission carried out a broad inquiry of the pharmaceutical sector, pointing out in particular the potential anticompetitive effects arising from certain business practices, notably certain types of patent settlements between originator and generic companies aimed at delaying the arrival into the market of cheaper generic medicines (sometimes also referred to as "pay-for-delay" settlements). [Gabriele Accardo]

Italian Competition Authority market tests Pfizer's commitments to close investigation into alleged abuse of dominance case

On 16 May 2011, the Italian Competition Authority ("ICA") published the proposed commitments offered by Pfizer to close the investigation into its alleged breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") relating to latanoprost, an active ingredient for treating visual glaucoma.

According to the ICA, Pfizer acted to prolong its patent protection for latanoprost by employing strategies to obstruct or delay the introduction of generic drugs competing with *Xalatan*, Pfizer's branded product for the treatment of visual glaucoma, into the Italian market (see Newsletter 6/2010 p. 8 for background information).

In particular, depending on the comments received by third parties, the ICA will make the following commitments binding on Pfizer:

- Pfizer will commit to grant a royalty-free license concerning its divisional patent covering latanoprost in Italy and will also refrain from seeking further patent protection thereby allowing for the immediate opening/liberalization of the Italian market;
- Pfizer will drop any legal action against generics manufacturers; and
- Pfizer will publish on its website information regarding medicines containing the same active ingredient so that consumers and doctors will be able to choose among similar products.

The investigation was prompted by a complaint lodged by Ratiopharm, a German generics producer. [Gabriele Accardo]

Neelie Kroes's speech on net neutrality

On 19 April 2011, Neelie Kroes, EU's commissioner for the Digital Agenda, reiterated her support for "net neutrality" at a press conference in Brussels.

This statement was released at that time notably in view of the application of the new EU telecoms rules due to come to force in all Member States on May 21.

For Kroes, net neutrality can only be guaranteed through the respect of three milestones (i) service transparency (customers should get clear and accurate information about the service, notably as regard to their speed connection and possible restrictions of their Internet services) (ii) quality of service and (iii) ability to switch operator within one working day and to keep the same phone number.

While Kroes acknowledged that traffic management can be useful, notably when it is done in the interest of the consumers (for instance prioritizing video calls over emails so that they can run smoothly, even if that means that emails can be delayed by a few second), she condemned firmly the practice of "throttling" (slowing down certain types of traffic, such as video streaming provided by a competitor) or the one of degrading or blocking the use of website or technology provided by certain companies for anti-competitive purposes.

She therefore asserted that the Commission will closely look at these market practices and publicly name operators engaging in such practices by the end of 2011. She added that these practices could even be regulated by specific legislation, should the market fail to find a system that would guarantee an open and neutral Internet for everyone. [Béatrice Martinet Farano]

Belgian court upholds Google News copyright infringement

On 5 May 2011, the Court of Appeal of Brussels ("Court") upheld a lower court ruling that had ordered Google.com and Google.be to remove from their Google News service snippets of articles from French and German language Belgian newspapers. In its decision (unofficial, in French only), the Court confirmed that Google was liable for copyright infringement by (i) copying and making available to the public in its "cache memory" copies of these copyrighted articles and by (ii) reproducing in its "Google News" service titles and relevant excerpts from these articles.

The Court first established that Belgium law, rather than American law, was applicable in accordance with the Berne Convention, on the ground that the infringement was committed and the harm was suffered in Belgium.

The Court then held that the reproduction (i) of whole articles in the cache memory of the Google website and (ii) of relevant portion of these articles in the "Google News" section, had not been authorized by any of the authors and could not benefit from any exceptions to the author's exclusive rights provided for in the Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. In particular, the Court established that the snippets of the articles reproduced in the Google News section – protected by copyright as long as they were original – could "substitute" or at least exempt the reader from reading the original articles since it gave in a few sentences the main ideas of the article, and therefore harmed a normal exploitation of the work.

The Court also stated that Google could not rely on the safe harbor provisions provided in the e-commerce Directive since (i) its liability resulted from its own practice of selecting and copying excerpt of copyrighted article and not from third party's content and (ii) Article 21 of the e-commerce Directive would in any case exclude search engines from these safe harbor provisions.

The Court also rejected the application of a "news reporting exception" on the ground that Google provided no commentary on the news, as well as the claiming by the defendant of an "implied license" on the ground that copyright license had to be *express* and should not become a right to *opt out* of a particular use. [Béatrice Martinet Farano]

French court clears YouTube from copyright liability

On 28 April 2011, the Paris regional Court (Tribunal de Grande Instance) cleared (unofficial, in French only) YouTube from all liability for copyright infringement in relation to music and videos hosted on its platform without the consent of the copyright owners.

The dispute was brought by Société des Producteurs de Phonogrammes en France ("SPPF"), the company managing the rights of independent record producers, after they sent YouTube requests to withdraw 233 unauthorized music videos but claimed that 123 of them were still visible on the video platform after their notifications, generating nearly 50 million viewings. YouTube, on the other hand, claimed that it had withdrawn all the infringing videos upon reception of the notifications from the right holder and that it could not be held liable for the recurrence of infringing videos. YouTube also maintained that it had offered SPPF to use free of charge its "content identification" technology in order to prevent the infringement of their music/video content and that SPPF had refused to follow up on this offer. The Paris Court based its decision on the latter argument holding that "*by refraining from following up on the proposal of YouTube, the SPPF had deprived it from carrying its content identification program which would have made impossible the access to the already identified content*."

The Paris Court however held that as soon as the hosting provider had the technical means to prevent the recurrence of an infringing content, already notified by the right holder, it had the duty to make sure that this content would not be posted again in the future. For the Paris Court, such obligation cannot be assimilated to a "general monitoring obligation", prohibited by the e-commerce Directive, since the obligation is limited to a content already notified by the right holder that will additionally be detected automatically by said technology. [Béatrice Martinet Farano]

European Commission announces a new Intellectual Property Rights Strategy

On 24 May 2011, the European Commission announced a new blueprint for Intellectual Property Rights aimed to boost creativity and innovation in the European Union. The Commission's specific proposals cover a series of policy actions in various areas, including:

- **Patents**: According to the Commission, work is underway to create a unitary patent protection for twenty-five Member States (all except for Italy and Spain) and a "unified patent litigation system" allowing patents of any member states to be enforced or revoked throughout the EU territory. Proposals also include the simplification of administrative procedure for getting a patent and the development of machine translation systems in order to save time and money and make patents more affordable for companies of all sizes.

- **Trademarks**: Inspired notably by the result of the Max Planck study on European trademarks (see Newsletter 2/2011 p. 8), proposals include the modernization of the system at both European and national levels by (i) simplifying and speeding up the registration procedure, notably through digital means, (ii) increasing legal certainty (notably through a common definition of what should constitute a trade mark at European level), (iii) clarifying the scope of trade marks notably in the customs seizure procedure, (iv) increasing cooperation between the Office of Harmonization for the Internal Market ("OHIM"), the trademarks and designs registry for the European Union, and national trademarks offices.
- **Copyrights**: the proposal includes inter-alia the creation of a European legal framework for the collective management of copyright to enable multi-territorial and pan-European licensing, notably through the creation of European "rights brokers" able to license and manage the world's musical repertoire on a multi-territorial level. The Commission is also willing to promote the digitization and on-line availability of the collections of European cultural institutions (libraries, museums and archives), notably by (i) promoting collective licensing schemes for works still protected by copyright but no longer commercially available and (ii) creating a European legislative framework to make available "orphan works" (whose rights holders are not known or cannot be located to obtain copyrights permission).
- **IP rights violations**: the Commission is willing to intensify its efforts in this area notably by (i) entrusting the tasks assigned to the European Observatory on Counterfeiting and Piracy to the OHIM allowing it to benefit from a more sustainable structure in terms of resources and expertise, (ii) modifying the Intellectual Property Rights Enforcement Directive 2004/48 to tackle online infringement more effectively and (iii) revising Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights to strengthen enforcement with streamlining procedures. [Béatrice Martinet Farano]

OFT's Reckit Benckiser decision issued

On 13 April 2011, the UK Office of Fair Trading ("OFT") published its decision fining Reckit Benckiser £ 10.2 million for abuse of dominance (See Newsletter 5/2010 p. 4 and Newsletter 2/2010, p. 12 for more information).

Reckitt Benckiser admitted infringing UK and European competition law by withdrawing and delisting Gaviscon Original Liquid from the National Health System ("NHS") prescription channel in 2005, after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid, which is patent protected until 2016, and is not subject to competition from equivalent generic medicines.

The publication of the decision brings the OFT's investigation to a conclusion. [Gabriele Accardo]

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.