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Editor-in-chief: Juha Vesala, TTLF Fellow

Contributors: Béatrice Martinet Farano, Gabriele Accardo and Juha Vesala, TTLF Fellows

Overview

Agreements

Unilateral conduct

Ohio state court dismisses antitrust claims against Google [Juha Vesala]

European Commission closes investigation into alleged abuse by Boehringer Ingelheim [Gabriele Accardo]

Complaints against IBM dropped [Gabriele Accardo]

Italian Competition Authority fines Bayer Cropscience for refusing to provide access to studies required for market authorization of fungicides [Gabriele Accardo]

Finnish court of appeals finds collecting society's royalties unfair [Juha Vesala]

Simfy withdraws complaint against Apple before the German Cartel Office [Gabriele Accardo]

Spanish Competition Authority opens formal proceedings against Oracle [Gabriele Accardo]

Mergers

UK Office of Fair Trading clears acquisition of BeatThatQuote.com by Google [Gabriele Accardo]

General

ECJ addresses online marketplaces' liability for trademark infringements committed by their users [Béatrice Martinet Farano]

UK Competition Commission's provisional report shows lack of competition in the pay-TV market [Gabriele Accardo]

UK Court of Appeal confirms end-users need license to access on-line news services [Béatrice Martinet Farano]

U.S. DEVELOPMENTS

U.S. District Court dismisses antitrust claims on licensing arrangements for SD Cards

On 25 August 2011 the U.S. District Court for the Northern District of California dismissed claims by Samsung that standardization activities and licensing arrangements concerning Secure Digital Memory Cards ("SD Card") were anti-competitive.

Samsung claimed that Panasonic, SanDisk and Toshiba unlawfully gained monopoly power in the market for SD Card technology by undermining existing open standard-setting efforts and, instead, forming their own group (SD Group) and creating a proprietary standard (SD Card) artificially formulated to be covered by the patent rights of the SD Group's members. In addition, Samsung claimed that the companies unlawfully maintain and exploit the acquired monopoly power by licensing the essential technologies exclusively through a joint entity (SD-3C LLC) under terms that raise costs of rival producers of SD Cards and reduce their incentives to create alternative SD Card technologies. According to Samsung these agreements do not constitute legitimate standard-setting or patent pooling and violate Sections 1 and 2 of the Sherman Act.

In its decision, the court did not address the antitrust claims in substance, because the court found them to be time-barred. However, the court gave Samsung the opportunity to amend its complaint to state a claim that subsequent acts of Samsung and SD-3C caused new antitrust injury not barred by the statute of limitations.

The court also dismissed Samsung's claim that charging royalties based on the total price of a finished product constitutes patent misuse as royalties are collected on parts of the cards (memory capacity) not covered by the granted license. The court explained that charging royalties for unlicensed features does not meet the current requirements for patent misuse established by the Federal Circuit and can be distinguished from U.S. Supreme Court case law concerning royalties demanded for unpatented, rather than unlicensed, products. According to the court, charging royalties based on a percentage of the price of a finished product is a widely accepted method of calculating royalties for products that include parts or components covered by other patents or are unpatented. [Juha Vesala]

Ohio state court dismisses antitrust claims against Google

On 31 August 2001 the Franklin County Court of Common Pleas (Civil Division) in Ohio dismissed an antitrust claim under Ohio state law that Google unlawfully raised prices for AdWords keywords used by myTriggers.com, a vertical search site, to promote its price comparison services.

The court dismissed the claim for lack of antitrust standing, because myTriggers.com failed to allege injury to competition, in addition to itself, in the complaint. The court held that myTriggers.com not only failed to specify any other vertical search site that was harmed by Google's alleged conduct but also claimed that this conduct actually favored some vertical search sites. In addition, myTriggers.com also failed to allege that sites were blacklisted by Google and its partners. [Juha Vesala]

U.S. District Court dismisses antitrust claims on royalty-free license to an invention

On 17 August 2011 the U.S. District Court for the District of Delaware dismissed an antitrust action, holding that a standards-development organization for financial accounting standards unlawfully claimed a royalty-free license to and refused to release its ownership interest in a patented accounting method.

The dispute arose when a patent holder (Silicon Economics) submitted comments on the website of the defendant (Financial Accounting Standards Board, below "FASB") and also shared, by other means, information about its invention with the defendant without realizing that the terms of FASB's website provided FASB and its affiliates a royalty-free right to use the invention. FASB later refused to release their royalty-free ownership interest in the invention. According to Silicon Economics, these practices, by creating uncertainty over the ownership of the patent, harm innovation and competition and constitute monopolization and unreasonable restraints of trade.

The court dismissed the antitrust claims on the grounds that the harm alleged by Silicon Economics, which resulted from the uncertainty remaining as to the ownership interest in the invention, did not meet the requirement of antitrust harm. The court held that Silicon Economics did not establish actual or imminent harm resulting from the royalty-free interest in the patent. In addition, the court held that Silicon Economics did not establish that the alleged conduct in the context of development of financial accounting standards was even subject to antitrust scrutiny by being commercial in its nature. However, the court allowed Silicon Economics to amend its complaint with respect to these two issues and reserved its decision on other arguments raised by FASB until after the amended complaint that addresses the above grounds for dismissal is filed. [Juha Vesala]

New York Court sets legal framework for cloud music platform

On 22 August 2011 the United State District Court for the Southern District of New York handed down a decision regarding a cloud music platform's entitlement to a safe harbor under the Digital Millennium Copyright Act ("DMCA").

MP3tunes is a cloud music platform that operates two different websites:

- Mp3tunes.com, a locker service allowing its users to upload music from their personal collections and play it from any computer,
- Sideload.com, a download service allowing its users to search for free song files on the Internet and download them directly to their locker. The songs are typically stored on the user's personal lockers, while sideload.com only keeps an index of the different songs uploaded on its user's locker and a link to the source of such songs.

In September 2007, EMI sent MP3tunes a notice and takedown letter asking for the removal from MP3tunes websites of 350 song titles, as well as "any other material infringing their copyrights." MP3tunes responded by removing links to the specific web addresses listed in EMI's letter but did not remove infringing songs from its users' locker, which caused EMI to sue MP3tunes in court.

The court held that, as for the content hosted on its website, MP3tunes had satisfied the threshold requirements to qualify for a safe harbor under the DMCA to the extent that it had set up a procedure for responding to DMCA takedown notices and a policy for dealing with repeat infringers. Thus, the court granted in part MP3tunes' motion for summary judgment on its entitlement to the DMCA safe harbor.

However, with respect to the songs, also a subject of EMI's takedown notice, that were stored on their users' accounts, the court found that MP3tunes had not done enough to respond to EMI's notice. Consequently, the court partially granted EMI's motion for summary judgment of contributory infringement against MP3tunes for not removing specific infringing material from their user's accounts. [Béatrice Martinet Farano]

U.S. In brief

- FTC publishes final report on authorized generic drugs (31 August 2011)
- U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights to have hearing on Google on 21 September 2011
- Google acknowledges that it is being investigated by the FTC (24 June 2011)

EU DEVELOPMENTS

European Commission closes investigation into alleged abuse by Boehringer Ingelheim

On 6 July 2011 the European Commission issued a press release announcing that it decided to close its investigation into Boehringer Ingelheim's alleged misuse of the patent system, in relation to combinations of three broad categories of active substances in the area of chronic obstructive pulmonary disease ("COPD") drugs, in breach of Article 102 of the Treaty on the Functioning of the European Union. The Commission launched an antitrust investigation in 2007 amid allegations by Spanish pharmaceutical company Almirall that Boehringer had acted to keep competitors out of the market where it is the market leader with its blockbuster drug Spiriva (see Newsletter 4/2009 p.6 for background information).

In particular, Almirall had raised concerns that Boehringer's patent applications relating to combinations of active substances (one of which was discovered by Almirall) for new treatments of CODP were not only without merit but would also have the potential of blocking or considerably delaying market entry of Almirall's innovative combination medicines along with the active substance discovered by Almirall (so called mono-product). While Boehringer did obtain a European patent for one of the combination products, the UK High Court of Justice revoked the UK patent in 2009. The European Patent Office followed suit and later revoked the patent granted (decision subsequently appealed by Boehringer). Boehringer had also filed so called divisional patent applications that were based on the main patent application.

Following discussions with the European Commission in 2010, Boehringer and Almirall agreed to a mutually acceptable solution to their dispute in which:

- the applications allegedly blocking entry will be removed in Europe;
- a license will be granted in two countries outside Europe; and
- pending litigation between the parties will be ended.

Almirall will therefore be able to launch its combination medicines after obtaining marketing authorization from the competent bodies.

The Commission deemed the settlement between the parties the most efficient way to ensure that consumers will be able to benefit from Almirall's product. Consequently, the case will be closed without imposing any fine on Boehringer. This result differs significantly from a recent case in which the Commission fined the pharmaceutical company AstraZeneca Euro 60 million - the fine was later reduced by the EU General Court to Euro 52.5 million, and further appeal is pending before the European

Court of Justice - for misusing both the patent system and the procedures for marketing pharmaceuticals (see Newsletter 5/2010 p. 7 and Newsletter 4/2010, p. 6 for background information on this and other related cases). [Gabriele Accardo]

ECJ addresses online marketplaces' liability for trademark infringements committed by their users

On 12 July 2011 the European Court of Justice ("ECJ" or the "court") handed down its long awaited decision in L'Oreal v. eBay clarifying several key aspects of the potential liability faced by online marketplaces for infringement committed by their users.

In this case, L'Oreal claimed that eBay had engaged in direct or contributory trademark infringement by: (1) displaying its trademarks on eBay's website (through the display of its sellers/customers' offer for sale of infringing goods bearing L'Oréal's trademarks), (2) selecting L'Oreal trademarks on Google AdWords services, and (3) not implementing appropriate means to stop or prevent the sale of goods infringing its trademarks despite having knowledge of such infringement or, at least, of facts and circumstances from which these infringement were apparent.

Additionally, L'Oreal claimed that even if eBay was held not liable under the e-commerce Directive - because shielded by the "hosting defense" of article 14 - it should still be subject to an injunction under the IP Enforcement Directive to implement appropriate means to stop and prevent the occurrance of existing and future infringement on its platform.

In May 2009, the High Court of Justice of England and Wales, before which the case is pending on the merits, issued a preliminary decision and referred a number of questions to the ECJ relating, notably, to the liability and obligations of online marketplaces for their customer's behavior.

The ECJ decision provides several insights, most notably on: (1) the issue of keyword advertising, (2) the availability of the "hosting defense" for online marketplaces, (3) the standard of "awareness" entailing liability under article 14(1) of the e-commerce Directive, and (4) the availability of injunctive measures against online intermediaries under the IP Enforcement Directive.

1) Clarification on keywords advertising

With regard to the selection by eBay of L'Oréal's trademarks as AdWords to trigger advertisements leading to its online selling platform or to its customer's offers, the court first confirmed its findings in its Google France (see Newsletter 2/2010 p. 7) and Portakabin rulings that such use:

- is a **use in the course of trade** in so far as it is aimed at promoting eBay's online marketplace services,

- may **affect one of the essential functions** of L'Oreal's trademarks if it does not enable reasonably well-informed users - or enables them only with difficulty - to ascertain whether the goods or services referred to by the advertisement originate from the proprietor of the Trademarks or from an undertaking economically linked to it or from a third party.

In line with the Advocate General's opinion (see Newsletter 6/2010 p. 6), the ECJ added that such AdWords use should also be considered "in relation to identical goods or services" with those for which L'Oréal's trademarks are registered, insofar as eBay used those keywords to promote its customers' offers.

2) Availability of the "hosting defense" for online marketplace

On this point, the ECJ ruled that a service provider, such as a marketplace, is entitled to the exemption of liability of article 14 only to the extent that it confines itself to "providing an **intermediary service**, neutrally, by a merely technical and automatic processing of the data provided by its customers." If, by contrast, this operator "plays an **active role** of such a kind as to give it knowledge of, or control over, those data," it will lose the benefit of this exemption. For the court, an active role can be characterized, for instance, "where the operator has provided assistance to its customers which entails, in particular, **optimizing the presentation of the offers for sale in question or promoting those offers."**

3) *Clarification regarding the standard of "awareness" entailing liability under Article 14(1) of the e-commerce Directive.*

The court held that the standard of duty required for an operator to rely on the exemption from liability under article 14 of the e-commerce Directive is that of a "**diligent operator.**"

Moreover, the court added that the relevant awareness "of facts and circumstances from which the illegal activity is apparent" - a factor in creating liability for the service provider under article 14(1) of the e-commerce Directive - can arise as a result of (1) an investigation undertaken at the marketplace's own initiative or (2) a notification from the right holder.

4) Clarification on the measures available under the IP enforcement Directive

Finally, the court held that national courts with jurisdiction in relation to the protection of IP rights should be allowed to order an online marketplace to take any effective, proportionate and dissuasive measures, which would contribute to not only stopping infringements already committed on their platform but also to preventing further infringements of that kind. [Béatrice Martinet Farano]

European Commission finds less problematic patent settlements in the pharmaceutical sector in 2010

On 6 July 2011 the European Commission published a report that summarizes its monitoring of patent settlements in the pharmaceutical sector in 2010. The Commission's efforts focus on potentially problematic agreements, such as those that may limit generic entry due to payments from the originator to the generic company, or so-called "pay-for-delay" agreements (see Newsletter 1/2011 p. 6 Newsletter 1/2010 p. 6, and Newsletter 4/2010 p. 7, for more background).

The report shows that while the number of patent settlement agreements between originator and generic companies increased in 2010, the number of potentially problematic agreements decreased significantly. According to the Commission, only 3 out of 89 of the settlements in 2010 fell into the category that might attract scrutiny. This result shows that EU competition law does not prevent companies from settling their disputes amicably.

The Commission will undertake a similar monitoring exercise in 2012. [Gabriele Accardo]

European Commission investigates luxury watch repairers following General Court ruling

On 5 August 2011 the European Commission opened formal proceedings to investigate an alleged refusal by several luxury watch manufacturers to supply spare parts to independent repairers. Such refusal may be in breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), which covers restrictive agreements and abuse of a dominant market position, respectively.

The opening of proceedings follows a General Court judgment, which annulled the Commission's 2008 decision to reject a complaint lodged by the European Confederation of Watch & Clock Repairers' Associations ("CEAHR"). In 2004, the CEAHR lodged a complaint against several luxury watch manufacturers, alleging the existence of an agreement or a concerted practice between those manufacturers and the abuse of a dominant position that resulted from their refusal to continue to supply spare parts to repairers that did not belong to their selective systems for repair and maintenance. Previously, luxury watches had traditionally been repaired by independent multi-brand repairers. CEAHR contended that since there were no alternative sources for most of these spare parts, such practice threatened to drive independent repairers out of business.

On 10 July 2008 the Commission rejected the complaint for lack of community interest based on four main considerations, including: (1) the market or market segment affected by the complaint was of limited size and economic importance, (2) the information available did not give the Commission reason to conclude that an anti-competitive agreement or concerted practice existed, (3) the absence of a dominant market position since repair and maintenance did not appear to constitute separate after-markets that were distinct from the primary market for luxury watches; and (4) the allocation of further resources to investigate the complaint would have been disproportionate as national competition authorities and courts, having jurisdiction to apply EU competition rules, appeared to be well placed to deal with such alleged infringements.

The General Court annulled the Commission's decision to reject CEAHR's complaint, because the lack of Community interest to pursue the investigation was not sufficiently motivated and/or contradictory. Accordingly, the Commission will now further investigate the allegations in conformance with the General Court ruling. [Gabriele Accardo]

Complaints against IBM dropped

On 30 June 2011 IBM submitted its Form 10-Q with the U.S. Securities and Exchange Commission (the "SEC Form", p. 33), providing, *inter alia*, information relating to antitrust proceedings in Europe. In particular, according to the SEC Form, T3 Technologies and Neon Enterprise Software, LLC ("Neon") withdrew their complaints concerning alleged illegal tying of IBM's mainframe hardware products to its dominant mainframe operating system, following both the conclusion of litigation on the same matter in the US - where action by T3 Technologies had been dismissed - and a settlement with IBM.

On 26 July 2010 the European Commission issued a press release stating that it commenced formal investigations against IBM for two alleged abuses of dominant position on the market for mainframe computers under Article 102 of the Treaty on the Functioning of the European Union ("TFEU") (See Newsletter 4/2010 p.7 for background information).

The first investigation concerned alleged illegal tying of IBM's mainframe hardware products to its dominant mainframe operating system. This investigation was prompted by various complaints, most notably by T3 Technologies (January 2009) and TurboHercules SAS (March 2010), which was later joined by Neon in July 2010. The complaints contended that the tying would keep emulating technology out of the mainframe market, ultimately preventing consumers from using certain applications on non-IBM hardware. While the SEC Form only states that T3 and Neon have withdrawn their complaints, it also appears that TurboHercules done so as well.

The second investigation, which the Commission started on its own initiative, focuses on IBM's alleged discriminatory behavior aimed at foreclosing the market for maintenance services by restricting or delaying access to spare parts for which IBM is the only source.

The European Commission has not yet made a formal decision on whether it plans to close any of the investigations. At present, the investigations are still ongoing. [Gabriele Accardo]

Italian Competition Authority fines Bayer Cropscience for refusing to provide access to studies required for market authorization of fungicides

On 5 July 2011 the Italian Competition Authority ("ICA") issued a decision (the decision is only available in Italian, but ICA's press release is also in English) that fined Bayer Cropscience Srl and Bayer Cropscience AG (together "Bayer") Euro 5,124 million for abuse of dominant position in the market for the production and commercialization of fosetyl-based fungicides in breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

In particular, Bayer refused to provide Sapec Agro S.A. ("Sapec"), and other companies grouped under the European Union Fosetyl-Aluminium Task Force (the "Task Force", i.e. a group of companies formed to share the costs of the fosetyl-based products dossier required to obtain the market authorizations in Italy and in other EU countries), access to certain studies in its possession ("Bayer's studies") that are necessary to acquire market authorization for fosetyl-based products, which protect grapevines from peronospora.

The ICA's investigation showed that Bayer holds a dominant position in the Italian fosetyl-based fungicide market based on: (1) Bayer's high market share (in 2007, approximately 46% in direct sales alone), (2) the fact that Bayer was the only producer in Italy to both produce/sell finished products and supply its own competitors with pure fosetyl as an active ingredient and with fosetyl-based formulas, (3) Bayer's high degree of pricing policy independence, and (4) administrative barriers (e.g. marketing authorization). The ICA further found that:

1. EU and Italian laws prohibit duplication of studies on vertebrate animals where such studies have already been carried out. According to the ICA, competent national authorities may ultimately deny market authorization where such studies have been duplicated in breach of the law;
2. In 2007, Bayer had already made its studies available to Helm, a German company active in the same market;
3. Sapec and the Task Force did not have other viable alternatives to accessing Bayer's studies to obtain marketing authorization for the production and marketing of fosetyl-based products since a supply or licensing relationship with Bayer or Helm would have limited their commercial freedom;
4. Bayer's refusal could not be deemed objectively justified based on Intellectual Property Rights ("IPRs") claims, because under EU competition law a refusal to grant access to a product that is protected

by IPRs amounts to an abuse where (1) the input is essential for other competitors to stay in the market; (2) there is actual demand for that input; and (3) the refusal prevents the launch of a new product for which there is potential demand. Similarly, the refusal could not be deemed justified on economic grounds as the relevant legislation makes access to data conditional to the payment of a reasonable compensation (e.g. cost-sharing) and the Task Force had offered to pay the full costs borne by Bayer for the studies. Rather, the investigation found evidence of a strategy to keep competitors out of the fosetyl-based fungicides market and that Bayer was well aware of the anti-competitive nature of its own tactics;

5. Sapec and the Task Force could only introduce "new" products, provided that they could still be active in the fosetyl-based fungicides market;
6. Bayer's conduct actually drove Sapec and the Task Force out of the market, insofar as their market authorizations in Italy had expired/been withdrawn pending lengthy negotiations with Bayer Bayer and Helm, on the other hand, could increase their market share and, at the same time, achieve higher prices, which would ultimately harm consumers.

Accordingly, the ICA held that, under the current legislative framework, Bayer's studies are an "essential facility" in accordance with the criteria of EU case law, and Bayer's refusal amounted to an abuse in breach of Article 102 TFEU. Bayer may choose to appeal before the Italian administrative courts. [Gabriele Accardo]

UK Competition Commission's provisional report shows lack of competition in the pay-TV market

On 19 August 2011 the UK Competition Commission (the "CC") published its provisional findings report, which indicates that Sky's control over pay-TV movie rights in the UK is restricting competition between pay-TV providers and is ultimately leading to higher prices and reduced choice and innovation for subscribers.

The provisional report states that Sky has, for many years, held exclusive rights to the movies of all six major Hollywood studios in the first subscription pay-TV window ("FSPTW"). Sky's control over the FSPTW movie rights of the major studios, and, consequently, over the movie channels incorporating this content, would contribute to a lack of effective competition in the overall pay-TV retail market.

In particular, due principally to its large base of subscribers, would-be rivals are unable to bid successfully against Sky's incumbency advantage for these rights. By contrast, Sky's control of this content on pay-TV enables it to attract more pay-TV subscribers than its rivals, which further increases its advantages when bidding in the next round for pay-TV movie rights. According to the CC, although Sky supplies its movie channels ("Sky Movies") to some other pay-TV retailers, this supply has not enabled these retailers to compete effectively with Sky for movie channel subscribers.

The CC has also analyzed both how technology is changing the options available to consumers and the ways in which many firms are now seeking to offer consumers Internet-distributed movie services. However, despite several significant developments taking place in the market, the CC found that the importance to many pay-TV subscribers of being able to watch recent movies makes other means of watching movies insufficient substitutes to Sky movies due to the value attached to Sky's FSPTW rights with major studios.

As a result of this lack of effective competition, subscribers to Sky Movies are paying more than they otherwise would. What is more, there is less innovation and choice than in a market with more effective competition.

The CC would like to encourage greater competition by enabling more firms to secure the pay-TV rights of the major studios. The CC hopes that doing so will offer movie fans new choices in competition with Sky's movie offerings. As such, the CC is consulting on possible remedies which might achieve such an outcome. In particular, the possible remedies on which the CC would like to invite views are:

- restricting the number of major studios from which Sky may license exclusive FSPTW rights, which would lower barriers to the acquisition of FSPTW rights by enabling other parties to license rights from those major studios with whom Sky was prevented from contracting;
- restricting the nature of the exclusive FSPTW rights that Sky can license from the major studios, so as to enable other parties to license rights from those major studios with whom Sky was prevented from contracting and, therefore, to offer linear and/or subscription video on-demand movie products in competition with Sky's movie products.
- requiring "must retail" measures, where Sky must acquire on a wholesale basis and offer to its subscribers any movie channel containing FSPTW movie content created by a rival, reducing the risks faced by firms bidding for FSPTW rights by increasing the size of the customer base across which they could potentially monetize any rights they acquired.

The CC is seeking comments to its provisional findings and possible remedies by mid-September 2011. The deadline for its final report is 3 August 2012. [Gabriele Accardo]

Finnish court of appeals finds collecting society's royalties unfair

On 30 June 2011 the Helsinki Court of Appeal held that a collecting society of music copyright holders, Teosto, abused its dominant position by introducing a new pricing model.

The suit concerns a new rate structure that eliminated separate tariffs for certain types of live music venues by introducing a single tariff, resulting in an overall increase in prices for music use.

The Helsinki Court of Appeals noted that, fundamentally, Teosto has the right to raise prices for objective reasons. However, the court found that Teosto did not establish that the new pricing model resulted from such objective reasons. In particular, while the reasons set forth by Teosto would, in theory, be valid, the court found that Teosto did not provide sufficient evidence to support these reasons for increasing prices. For instance, Teosto failed to prove either that substantial changes had occurred in the live venue marketplace or that the level of compensation for music use had fallen over time. Accordingly, the court affirmed that Teosto had abused its dominant market position by imposing unfair prices. [Juha Vesala]

Simfy withdraws complaint against Apple before the German Cartel Office

On 3 June 2011 simfy AG, a German cloud-based music streaming service provider, said in a corporate statement that it submitted a complaint to the Federal Cartel Office ("FCO"), Germany's antitrust authority, against Apple amid allegations that Apple delayed approval of the simfy iPad app without any stated reason in breach of EU and German competition laws.

Simfy alleged that Apple was exploiting its dominant position in the digital application market and blocking applications from its App Store marketplace to benefit its own strategy, namely, its iTunes Match service, which allows users to access their own private music collections remotely via PCs and Apple devices by placing copies on Apple servers.

However, Apple has now, after some delay, cleared simfy's iPad app. As a result, the complaint appears to have been withdrawn. [Gabriele Accardo]

UK Court of Appeal confirms end-users need license to access on-line news services

On 27 July 2011 the English Court of Appeal confirmed the High Court's controversial decision in the Meltwater case, which covered the issue of whether users of a media monitoring service need a "Web End User License" in order to receive and use newspapers' titles, headlines and extracts from such newspaper company.

In this action, the claimants - various newspaper publishers and a company managing their right - claimed that customers of Meltwater, a media monitoring company, infringed the newspapers' copyrights any time they accessed Meltwater's emailed reports (including headlines, opening texts, extracts and links to various newspaper sources that matched the keywords selected by the customers) or downloaded these reports from Meltwater's website. Meltwater's conduct was not at issue as it had agreed to enter into a Web Database License scheme with the Newspaper Licensing Agency.

The Court was asked to rule on the following issues:

1. Is a newspaper headline capable of being considered an independent "literary work" from the article to which it relates?
2. Are the extracts from the articles reproduced in Meltwater's news report capable of being considered a substantial part of the literary work as a whole?
3. Do the customers of a media monitoring agency need a Web End User License in order to lawfully use and receive the news to which they have subscribed?

Confirming the High Court findings, the UK Court of Appeal held, in line with the ECJ's Infopaq case, that headlines and extracts of an article are entitled to copyright protection - independently from the article to which they relate - as soon as they are the expression of the intellectual creation of their author. Moreover, according to the court, "originality," instead of "substantiality," should be the test for assessing copyright protection.

The court also affirmed the findings of the High Court on the third controversial question; the end user needs a second license, in addition to the first license already entered into by the media monitoring company, to access these newspaper articles. The court reasoned that since the customers of the media monitoring service copy the headlines and relevant copyrighted extracts of these articles any time they view or access Meltwater's reports, and such use is neither consented to by the rights holders nor covered by a fair dealing or other type of defense, the High Court was right in finding a *prima facie* copyright infringement. [Béatrice Martinet Farano]

UK Office of Fair Trading clears acquisition of BeatThatQuote.com by Google

On 11 August 2011 the UK Office of Fair Trading (the "OFT") issued its decision on the merger between Google and BeatThatQuote.com ("BTQ"), a provider of consumer finance price comparison services ("PCS") in the UK, clearing the transaction without referring it to the Competition Commission.

Prior to the merger, Google and BTQ overlapped in consumer finance PCSs in the UK. For instance, Google supplied general internet search to users, and BTQ supplied "white label" PCS platform technology to third parties (such as newspapers, supermarkets and other branded PCSs) that integrate price comparison functionality on their websites. The transaction raised both horizontal and vertical issues. Consequently, the OFT first assessed its effects on a number of markets where the parties compete or were in a vertical relationship, including:

- the supply of online advertising space on consumer finance PCSs in the UK;
- the supply of overall online advertising space in the UK;
- the supply of consumer finance PCS search services to users in the UK; and
- the supply of "white label" PCS technical platforms in the UK.

At the horizontal level, the OFT assessed the effects of the merger on the loss of competition in the supply of the above services in the UK and concluded that the merger did not raise a realistic prospect of decreased competition due to, *inter alia*, (1) the parties' combined market share post-merger (the parties higher market share in the supply of overall online advertising space in the UK was almost all attributable to Google, and the increment from BTQ was very limited), (2) the competition that the merged entity will face from large consumer finance PCSs, and (3) the low barriers to entry.

With respect to vertical concerns, the OFT assessed whether the combined entity Google/BTQ would have both the ability and the incentive (i.e. in terms of economic profitability) to totally or partially foreclose traffic from unpaid (natural) search and paid search (sponsored links) to rival consumer finance PCSs. Third parties suggested that the merged firm would have both the ability and the incentive to foreclose BTQ's rival consumer finance PCSs as natural and paid search results from Google's search engine are a key source of traffic to consumer finance PCSs. However, according to the OFT, the merged firm would have the ability, but not the incentive, to foreclose rivals.

In particular, the merged firm may have the ability to pursue a foreclosure strategy on the basis that: (1) there is evidence to suggest that Google is an important source of traffic from which rival consumer finance PCSs may not easily be able to switch away, (2) there are examples of alterations in the ranking in Google's results of consumer finance PCSs and evidence that these materially affect traffic to the sites, and (3) Google accounts for a significant share of traffic to consumer finance PCSs.

However, the evidence did not suggest that the merger added to any incentive that Google may have had to foreclose rival consumer finance PCSs; it would be foregoing greater upstream profits on lost advertising than it would be gaining on extra PCS sales downstream. In this respect, the OFT also took into account the deterrent effect of the current antitrust investigations against Google in some jurisdictions and their impact on the incentive to carry out the behavior in question. [Gabriele Accardo]

Spanish Competition Authority opens formal proceedings against Oracle

On 29 July 2011 the Spanish National Competition Commission ("CNC") stated that it opened formal proceedings against Oracle Corporation and Oracle Ibérica, SRL ("Oracle") in relation to an alleged abuse of dominant position in the area of relational databases in breach of article 2 of the Spanish Competition Act 15/2007 and Article 102 of the Treaty on the Functioning of the European Union. The investigation was prompted by a complaint filed by Hewlett Packard ("HP").

According to the CNC, there appears to be *prima facie* evidence that Oracle abused its dominant position. In particular, Oracle's 22 March 2011 decision to suspend all software development for the Intel Itanium processor, chiefly used in HP's Integrity family of servers, may give rise to an unjustified refusal to provide services and abusive discrimination. What is more, Oracle's modification of the price policy for its enterprise relational database management systems may also give rise to an abusive discrimination claim.

The CNC has a maximum period of 18 months to close the investigation. [Gabriele Accardo]

Swiss Competition Authority closes investigation against V-Zug and Electrolux

On 11 July 2011 the Swiss Competition Commission ("COMCO") issued its decision (only in German, but the COMCO press release is available in Italian and French) concerning Electrolux's and V-Zug's restrictions of online home appliance sales.

Electrolux imposed a total ban on online sales while V-Zug strictly limited online sales. COMCO held that both restrictions of online sales violated competition law, because, in principle, online sales may be restricted only in exceptional circumstances (See Newsletter 5/2010 p. 8 for background information). But even legitimate online restrictions cannot prevent parallel import from other countries or impose retail prices.

Electrolux and V-Zug agreed to modify their distribution practices during the investigation to adhere to COMCO's prescriptions. [Gabriele Accardo]

EU In Brief

- Almunia speech "New challenges in mergers and antitrust" (16 September 2011)

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