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Editor-in-chief: Juha Vesala, TTLF Fellow

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

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U.S. DEVELOPMENTS

U.S. District Court dismisses claims of anti-competitive exclusion of positioning technology from standards

On 6 January 2012 the U.S. District Court for the Eastern District of Pennsylvania granted motions to dismiss claims that manufacturers of mobile telecommunications products conspired to exclude the plaintiff's (TruePosition, Inc., "TruePosition") positioning technology (Uplink Time Difference of Arrival, "UTDOA") from a standard developed in two standard setting organizations ("SSOs"), the Third Generation Partnership Project ("3GPP") and the European Telecommunications Standards Institute ("ETSI").

According to TruePosition, the manufacturers engaged in various improper acts and omissions in the 3GPP meetings in order to prevent or delay the inclusion of the UTDOA technology into the Long Term Evolution ("LTE") standard. TruePosition claims that the SSOs participated in the conspiracy by failing to properly monitor and enforce their rules.

The court held, however, that TruePosition failed to allege the existence of a conspiracy among the manufacturers. The court explained that TruePosition did not present direct evidence of an agreement between the manufacturers, nor did it present circumstantial evidence of a conspiracy sufficient to rule out independent, parallel conduct. Thus, the court dismissed the complaint; however, the court did allow TruePosition to amend its complain to address the deficiencies. The court also held that TruePosition did not establish personal jurisdiction over ETSI, but it allowed for discovery on that issue (3GPP has not yet been served in the action). [Juha Vesala]

U.S. District Court rejects theory of antitrust liability for patent infringement

On 5 December 2011 the U.S. District Court for the Southern District of New York dismissed Eatoni Ergonomics, Inc.'s ("Eatoni") claims that Research in Motion Corporation and Research in Motion Ltd. ("RIM") engaged in unlawful monopolization by, among other things, infringing Eatoni's patent on a "Reduced QWERTY" keyboard and related software (*Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, Docket 08-Civ. 10079 (WHP) (S.D.N.Y. Dec. 5, 2011)).

Specifically, Eatoni alleged that RIM attempted to monopolize the "Reduced QWERTY" keyboard market by misappropriating Eatoni's patent through a course of conduct that included, in particular, infringing Eatoni's patent. The court refused to apply such a doctrine as it could not find any case in which patent infringement had been considered anti-competitive conduct. The court also held that, in any case, Eatoni did not plausibly allege that RIM's patent infringement imposed such substantial costs or entry barriers that have been recognized in legal scholarship as factors that can facilitate the maintenance of monopoly power. The court also determined that provisions in Eatoni's agreement with RIM to settle patent infringement claims precluded the related antitrust claim.

The court also dismissed Eatoni's other antitrust claims against RIM. [Juha Vesala]

Ninth Circuit Court of Appeals affirms that a music video platform was protected by the DMCA's safe harbor provision

On 20 December 2011 the US Ninth Circuit Court of Appeals affirmed a decision from the Central District of California holding that video-sharing platform Veoh was entitled to protection under the DMCA hosting safe harbor.

In this case, Universal Music Group (UMG), one of the world's largest recorded music and music publishing companies, brought action against Veoh and its investors for direct, vicarious and contributory copyright infringement after deciding that Veoh's efforts to combat infringement of UMG's catalogue on Veoh's website were "too little, too late." On 3 November 2009, the District Court granted summary judgment to Veoh after determining that it was protected under the DMCA hosting safe harbor.

On appeal, UMG first asserted that Veoh was not eligible under the hosting safe harbor since its activity, especially when facilitating user access to third party infringing videos, goes beyond mere storage. Veoh further claimed that UMG should, in any case, be excluded from the benefit of the DMCA's hosting safe harbor since: (i) it had knowledge (or at least sufficient awareness) of infringing activity, and (ii) it financially benefited from and controlled such infringing activity within the meaning of Section 512(c)(1)(B) of the DMCA.

The 9th Circuit first affirmed the District Court's interpretation that Veoh was eligible under the DMCA's hosting safe harbor by holding that the language and structure of the statute, as well as the legislative intent behind the law, clearly shows that Section 512(c) of the DMCA (the hosting safe harbor) was meant to cover more than mere electronic storage lockers and specifically encompasses the access-facilitating processes that automatically occur when a user uploads a video to Veoh.

On the question of the knowledge standard that triggers liability under the hosting safe harbor, the court held that merely hosting a category of copyrightable content, such as music videos, with the general knowledge that one's services could be used to share infringing material was insufficient to impute knowledge to a service provider.

Lastly, the Ninth Circuit rejected UMG's assertion that Veoh exercised control over this activity by holding that "control" implied "specific knowledge" of an infringing activity. [Béatrice Martinet Farano]

EU DEVELOPMENTS

European Commission investigates companies active in the e-book publishing sector

On 6 December 2011 the European Commission opened an investigation into alleged anticompetitive practices by five EU and US publishers, possibly with the help of Apple, in relation to the sale of e-books in the European Economic Area in breach of Article 101 of the Treaty on the Functioning of the European Union, which encompasses the EU antitrust rules prohibiting cartels and restrictive business practices.

Besides possible anticompetitive agreements between the publishers and Apple, the Commission is also investigating agency agreements between the publishers and retailers for the sale of e-books.

In March 2011, the Commission carried out unannounced inspections at the premises of several companies active in the e-book publishing sector. At the same time, the UK Office of Fair Trading ("OFT") also investigated the same practices in a parallel investigation. The OFT has since closed this investigation, but it will continue to work closely with the Commission. In a press release, the OFT stated that it "may reconsider its decision, in consultation with the European Commission, if it has reasonable grounds to suspect that there is an infringement of competition law, which may have an impact on UK consumers."

A class action filed in the U.S. in August 2011 alleges that the same publishers and Apple colluded to increase prices for popular e-book titles to boost profits and force e-book rival Amazon to abandon its pro-consumer discount pricing; more specifically, the action alleges that the defendants colluded to force Amazon to abandon its discount pricing and adhere to a new agency model in which publishers set prices. The U.S. Department of Justice appears to have joined the European Commission in investigating the pricing practices of digital books for e-readers, but details of the probe have not been disclosed. [Gabriele Accardo]

European Commission investigates DuPont and Honeywell practices in relation to new refrigerant

On 16 December 2011 the European Commission opened proceedings to investigate alleged anti-competitive practices relating to the development of a new generation refrigerant for air conditioning systems in cars, known as 1234yf. The new refrigerant will replace the previous refrigerant, R134a, which does not meet new EU rules with respect to its global warming potential.

Specifically, the Commission will investigate whether joint development, licensing and production arrangements between Honeywell and DuPont in relating to these refrigerants may infringe Article 101 of the Treaty on the Functioning of the EU ("TFEU").

The investigation further concerns Honeywell's alleged deceptive conduct during the evaluation of 1234yf between 2007 and 2009. In fact, the selection of 1234yf was the result of a process conducted under the auspices of the Society of Automotive Engineers, which represents the interests of all groups involved in the automotive sector. According to the Commission, in the context of the standardization process, Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed and later failed to grant licenses on fair, reasonable and non-discriminatory (so called "FRAND") terms, allegedly in breach of Article 102 TFEU.

The Commission stresses that this investigation highlights the importance of ensuring that arrangements involving IP should contribute to innovation rather than hold it back, a message further underlined by Commissioner Almunia in a recent speech. [Gabriele Accardo]

ECJ holds that EU Law rules out broad ISP filtering system

On 24 November 2011 the ECJ released its long awaited judgment (Case C-70/10) on the question of whether a broad ISP preventive filtering system complies with EU law.

The case arose after the 2004 discovery by SABAM, the Belgian Society of Authors, Composers and Publishers, that customers of Scarlet, an Internet Service Provider, were downloading works in SABAM's catalogue without authorization and without paying any royalties. As a result of this discovery, SABAM moved for prohibitory measures against Scarlet and was granted a broad injunction by the President of the Brussels Court of First Instance that ordered Scarlet, in its capacity as an ISP, to make it impossible for customers to send or receive files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.

Scarlet, claiming that such an injunction was both impractical and contrary to Article 15 of the Directive 2000/31, (the E-Commerce Directive prohibiting the imposition of general monitoring obligations on an ISP) and the provisions of EU law that protect personal data and secrecy of communication, appealed against this decision to the Court of Appeal of

Brussels. Consequently, the Court of Appeal of Brussels referred the question to the ECJ.

In a somewhat expected decision, the ECJ held that the injunction would be at odds with Article 15 of Directive 2000/31, because it would require an ISP to install a filtering system of all electronic communications passing via its services, for an unlimited period of time, at its own expense in order to prevent any future infringement of the rights held by members of SABAM. Indeed, such a decision is in line with the opinion issued by the ECJ's Advocate General (not available in English). Moreover, the ECJ held that such a broad injunction would also infringe the ISP's customers' fundamental rights to protection of their personal data and freedom to receive or impart information.

However, the Court did not exclude the possibility for domestic Courts in Europe to impose specific injunctions on ISPs aimed at stopping or preventing specific types of infringement, in accordance with certain provisions of Directive 2000/31 (the E-Commerce Directive), Directive 2004/48 (the Enforcement Directive) and Directive 2001/29 (the Copyright Directive). [Béatrice Martinet Farano]

Thomson Reuters offers commitments to close investigation by European Commission

On 14 December 2011 the European Commission published a notice inviting comments on commitments offered by Thomson Reuters that address concerns about whether its licensing practices, in relation to the Reuters Instrument Codes ("RICs"), may be in breach of Article 102 of the Treaty on the Functioning of the EU, which proscribes the abuse of a dominant position (See Newsletter 6/2009 p. 11 for background information).

RICs are codes that identify securities and are used by financial institutions to retrieve data from Thomson Reuters' real-time data feeds. The Commission is concerned that Reuters' customers or competitors are prevented from translating RICs to alternative identification codes of other data feed suppliers (so called "mapping"). If customers cannot perform such mapping, they are de facto forced to work with Reuters unless they can reconfigure or rewrite their software applications; not surprisingly, such reconfiguration can take a long time and be quite costly (customers would have to remove RICs from all internal applications and replace them with alternative codes). According to the Commission, this conduct may amount to an abuse of dominance in the market for consolidated real-time data feeds.

In essence, Thomson Reuters has offered to allow customers to license RICs for the purpose of either switching codes or retrieving data from other providers. Licensees would also be provided with regular RIC updates.

Competition Commissioner Joaquín Almunia commented that the commitments "proposed by Thomson Reuters should allow financial institutions to switch more easily between different providers of financial data and stimulate competition between data vendors." However, it is necessary for the market test to confirm that the proposed commitments will remedy the competition concerns before the Commission can actually adopt a decision that would make the commitments legally binding on Thomson Reuters and, consequently, close the investigation. [Gabriele Accardo]

European Commission makes Standard & Poor's commitments legally binding

On 15 November 2011 the European Commission announced it has decided to make the commitments offered last May 2011 by Standard & Poor's ("S&P"), to abolish the licensing fees that banks pay for the use of U.S. International Securities Identification Numbers ("ISINs") within the European Economic Area, legally binding (see Newsletter 3/2011 p. 5 and Newsletter 6/2009 p. 10 for additional background). Moreover, for direct users, information services providers and service bureaus (i.e. outsourced data management service providers), S&P committed to distribute the US ISIN record separately from other added value information on a daily basis for $15,000 USD per year, to be adjusted each year in line with inflation.

Competition Commissioner Joaquín Almunia noted that the "commitments offered by S&P will abolish licensing fees that banks had to pay for the mere use of US ISINs in Europe and significantly reduce their cost for other users such as information services providers. This will improve the efficiency of European financial markets." [Gabriele Accardo]

European Commission makes IBM's commitments in the mainframe maintenance market legally binding

On 14 December 2011 the European Commission stated that it has made commitments offered by IBM Corporation in the mainframe maintenance market legally binding (see Newsletter 6/2011 p. 6, Newsletter 4/2010 p.7 and Newsletter 4-5/2011 p.10 for background information).

IBM commits to make spare parts and technical information swiftly available, under commercially reasonable and non-discriminatory terms, to independent mainframe maintainers.

Commissioner Joaquín Almunia noted that IBM offered a swift solution to the Commission's concerns and stressed that, "timely interventions are crucial in fast moving technology markets."

A non-confidential version of the Commission decision will be available as soon as possible. [Gabriele Accardo]

Italian Competition Authority fines Pfizer for abuse of dominance relating to visual glaucoma drugs

On 11 January 2012 the Italian Competition Authority ("ICA") issued a decision fining Pfizer Euro 10.6 million for abusing its dominant position in the market for products for that treat visual glaucoma under Article 102 of the Treaty for the Functioning of the EU (see Newsletter 3/2011 p. 7 and Newsletter 6/2010 p. 8 for background information). Last October 2011, the ICA stated that it had rejected Pfizer's proposed commitments, because they were considered manifestly incapable of removing the anticompetitive effects of Pfizer's conduct.

In particular, the investigation confirmed that Pfizer's conduct to prolong patent protection for its active ingredient *latanaprost* in order to obstruct or delay the introduction of generic drugs competing with *Xalatan*, Pfizer's branded product for the treatment of visual glaucoma, constituted an abuse of its dominant position by blocking or delaying market access to generics. The investigation was prompted by a complaint lodged by Ratiopharm, a generics producer.

In essence, Pfizer abused the administrative procedure by obtaining an extension to patent protection in Italy until July 2011, and again until January 2012, in order to align the duration of the patent protection for its product *Xalatan* with the rest of Europe. Pfizer did so by obtaining a divisional patent (a type of patent application containing matter from a previously filed application, known as the parent application) as well as a Complementary Patent Certificate, but never launched a new product as a result. The European Patent Office in Munich declared the divisional patent invalid. Thus, the unduly obtained extension of patent protection in Italy impaired investments made by generics companies in light of the possibility to enter the Italian market. Pfizer further increased legal uncertainty by undertaking civil and administrative actions based on counterfeit claims. The ICA found internal documents showing that Pfizer was fully aware that its strategy to foreclose competitors could raise competition issues. [Gabriele Accardo]

Italian Court rejects Samsung's request for injunction against Apple in Italy

On 5 January 2012 an Italian Court rejected Samsung's request for an injunction against Apple in relation to the sale of the iPhone 4S in Italy. Samsung alleges that Apple is violating a number of its patents, which Samsung claims are essential to implement the 3G/UMTS standard used in smartphones like the iPhone 4S.

According to the Court's order (the Court issued a second order in relation to a different patent), the injunction to stop marketing of the iPhone 4S cannot be granted, mainly because Apple (albeit unsuccessfully) requested that Samsung grant a license for certain patents on FRAND terms. Apple even set aside an amount in the event that Samsung was deemed to be entitled to royalties, notwithstanding the fact that Apple disputes Samsung's entitlement to any royalty at all.

The Milan Court further noted that, as a result of an agreement between Samsung and Qualcomm that relates, *inter alia*, to the contested patents, Samsung agreed not to sue "Qualcomm's customers." According to the Milan Court, Apple would appear to fall within such a definition to the extent that its iPhone 4S incorporates Qualcomm's chips (using Samsung technology), even though the chips are actually bought by the intermediary that assembles the iPhone.

The Milan Court will address Apple's claims on the merits, which state that Samsung abused its dominant position by setting the 3G/UMTS standard ("a patent ambush") and by refusing to license its "essential" standards on FRAND terms. [Gabriele Accardo]

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