



# Stanford – Vienna Transatlantic Technology Law Forum

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## Transatlantic Antitrust and IPR Developments

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# U.S. DEVELOPMENTS

## **U.S. DOJ clears Google's acquisition of Motorola Mobility and other transactions involving standards-essential patents**

On 13 February 2013 the U.S. Department of Justice ("DOJ") [announced](#) the closing of investigations concerning the acquisition of Motorola Mobility Holdings Inc. ("Motorola Mobility") by Google Inc. ("Google").

The DOJ focused the investigation on whether Google could use standards-essential patents acquired through the transaction to foreclose competition or raise rivals' costs. The DOJ concluded that the transaction is not likely to substantially lessen competition in such a way. According to the DOJ, even though Google may have the ability to hold up its rivals and harm competition, the DOJ determined that the transaction will not materially change the competitive situation, because Motorola Mobility already has an "aggressive history to capitalize on its intellectual property." The DOJ made special note of Google's licensing commitments concerning its policy of licensing the acquired standards-essential patents; because of the ambiguity in these commitments, the DOJ remains concerned about how Google may exercise its patents in the future. Thus, the DOJ stated that it will continue to monitor how standards-essential patents are exercised in the wireless device industry.

The DOJ simultaneously announced the closing of investigations into two other transactions involving patents: (i) a partnership to acquire patents of Nortel, and (ii) Apple's acquisition of patents from CPTN that originate from Novell (See [Newsletter 3/2011](#) p. 6 for the clearance of the creation of CPTN by DOJ). The DOJ also determined, with respect to these transactions, that they would not materially change the competitive situation, and low market shares of the acquirers would not even provide an incentive to exercise the patents to foreclose competition. The DOJ also found it important that licensing commitments were provided by the acquirers with respect to the use of the patents in the wireless industry and against Linux-systems.

On the same day as the U.S. DOJ announcement, the European Commission also [cleared](#) the acquisition of Motorola Mobility by Google, following an analysis of foreclosure concerns similar to those undertaken by the DOJ. The [decision](#) contains extensive discussion of the analysis of these foreclosure concerns as well as the general competitive concerns raised by abuse of standards-essential patents. The European Commission also considered and cleared concerns about Motorola Mobility using the standards-essential patents to engage in exclusionary practices to strengthen its market position in mobile search and advertising. [Juha Vesala]

## **U.S. ITC ALJ rejects Barnes & Noble allegations of patent misuse as a matter of law**

On 31 January 2012 an administrative law judge of the U.S. International Trade Commission (“U.S. ITC”) found that Microsoft’s conduct did not amount to patent misuse as a matter of law (*In the Matter of certain handheld electronic computing devices, related software, and components thereof*, Investigation No. 337-TA-769).

Barnes & Noble has recently introduced an e-book reader called Nook, which uses the Android mobile operating system. According to Microsoft, Barnes & Noble is infringing Microsoft’s patents, so Microsoft has demanded that Barnes & Noble discontinue such infringement. Microsoft has offered licenses to Barnes & Noble and operates a general licensing program for manufacturers using the Android operating system.

In pending U.S. ITC proceedings against Barnes & Noble initiated by Microsoft, Barnes & Noble invoked the patent misuse defense against Microsoft. Barnes & Noble argued that Microsoft’s licensing program, unfair licensing terms and related patent transactions were part of an overall scheme to eliminate the competitive threat posed by the Android mobile operating system to Microsoft’s monopoly in PC operating systems.

The administrative law judge rejected the patent misuse defense as a matter of law. The judge found that Barnes & Noble’s theory of patent misuse fails, because the alleged course of conduct bears no relation to the patents-in-suit (see U.S. Federal Circuit’s decision in *Princo* discussed in [Newsletter 4/2010](#) p. 3). Moreover, the judge noted that even if it was established that Microsoft had the intention to eliminate Android as a competitor, this point alone would not be sufficient to establish patent misuse.

In addition, the alleged licensing practices concerning the patents in suit do not amount to patent misuse, as they do not expand the scope of the patents. In particular, the administrative law judge rejected claims that the allegedly prohibitively high level of licensing fees or limitations on the scope of license could constitute patent misuse.

The U.S. ITC recently [determined](#) that it will not review the administrative law judge’s order. [Juha Vesala]

### **U.S. In Brief**

- California Supreme Court [grants certiorari](#) in reverse payment case (15 February 2012)
- Several U.S. states [settle](#) antitrust claims concerning reverse payment settlements (31 January 2012)
- U.S. Supreme Court [delineates](#) scope of unpatentable laws of nature (20 March 2012)

- U.S. Supreme Court holds ([Golan et al. V. Holder et al](#)) that § 514 of the Uruguay Round Agreement Act - which restored copyright protection to foreign works in the public domain - does not violate either the “limited time” language of the US Constitution’s copyright clause or the First Amendment; thus, foreign works that were once in the public domain in the U.S. will be granted the same protection that they enjoy abroad (18 January 2012).

## EU DEVELOPMENTS

### **ECJ declines to impose general filtering obligations upon social network operator**

On 16 February 2012 the European Court of Justice issued its long-awaited decision in *Sabam v. Netlog* (Case [C-360/10](#)).

In this case – whose facts are similar to those in *Scarlet* (Case [C-70/10](#), see [TTLF Newsletter 1/2012 p.6](#)) – the Belgian Society of Authors, Composers and Publishers (SABAM) filed an injunction against social network website Netlog that required Netlog to implement a filtering system to prevent any copyright infringement of their rights by its users. Like in the *Scarlet* decision, the Belgian Court referred the case to the ECJ for a preliminary ruling.

In line with its *Scarlet* decision, the ECJ held that the owner of an online social network could not be subject to any obligation to install a general filtering system covering all its users in order to prevent copyright infringement.

In holding against general filtering obligations, the Court stressed that the defense of intellectual property rights, effected through Article 17(2) of the [Charter of the Fundamental Rights of the European Union](#) (“the Charter”), had to be balanced against the hosting providers’ fundamental freedom to conduct their business (Article 16 of the Charter) and against Internet users’ fundamental rights to protection of their personal data and freedom to receive or impart information.

As a result, in ordering filtering obligations to social networks and/or other Internet intermediaries (as permitted by Article 8 (3) of the [Copyright Directive](#)), national courts and authorities will have to make sure that such filtering obligations: (i) do not impose upon the targeted service provider any general monitoring obligation forcing it to install a complicated, costly and permanent system at its exclusive expense and (ii) respect users’ privacy and fundamental rights to receive and/or impart (lawful) information. [Béatrice Martinet Farano]

## **ECJ denies database copyright protection for Football fixtures list**

On 1 March 2012 the European Court of Justice (ECJ) issued a landmark decision in *Football Dataco v. Yahoo! Inc* ([case C-604/10](#)), stating that football-fixture lists are not subject to database copyright protection unless they reflect the original expression of the creative freedom of their authors.

In this decision, Football Dataco, claiming it owned the copyright (both under the UK Copyright law and under Article 3 of Directive 96/9) and “sui generis” right, pursuant to Article 7 of Directive 96/9 (the Database Directive), with respect to the English and Scottish football league fixture lists it publishes each year, sued Yahoo! for using these lists in its own database without paying any financial compensation.

In the first instance, the UK Court held that these fixture lists were eligible for copyright protection under Article 3 of Directive 96/9, but the Court refused to grant Football Dataco any protection under the “sui-generis” right of Article 7. Confirming the first instance decision on this last point (no protection under the sui-generis right of Article 7), the UK Court of Appeal referred the question of whether protection should exist under copyright law for the database to the Court of Justice.

In a much anticipated decision, the Court of Justice stated, in line with the [opinion](#) of Advocate General Mengozzi, that the intellectual effort, significant labor, and skills required for setting up a database were insufficient to justify its protection by Copyright unless the selection and arrangement of data amounted to an original expression of the creative freedom of its author.

This decision may have an important impact on the business of companies whose business is to collect, organize and sell data. [Béatrice Martinet Farano]

## **European Commission investigates alleged abuse of dominance by Samsung**

On 31 January 2012 the European Commission opened an [investigation](#) into Samsung’s practices relating to the use of certain of its standards-essential patent rights, which may distort competition in European mobile device markets in breach of Article 102 of the Treaty on the Functioning of the European Union (the EU competition rules on abuse of dominance).

The investigation seeks to determine whether Samsung is using such essential patents in contravention to its commitment given to the European Telecommunications Standards Institute (ETSI) to license any standards-essential patents relating to third generation (“3G”) mobile and wireless telecommunications system standards on fair, reasonable and non-discriminatory (FRAND) terms. In particular, the Commission is investigating Samsung’s legal actions in various EU Member States

(Germany, France, and Italy). Last year, Samsung sought injunctive relief against competing mobile device makers, including Apple, based on alleged infringements of certain of its patent rights that it declared were essential to implement 3G standards.

Thus, the Commission will examine whether such behavior, while apparently legitimate, amounts to an abuse of a dominant position insofar as Samsung has failed to honor its FRAND commitments. Standard setting organizations, including ETSI, require the owners of patents that are essential for the implementation of a standard to commit to license these patents on FRAND terms in order to ensure effective access to the standardized technology.

The Commission notes that, in order to guarantee undistorted competition and to reap the positive economic effects of standardization, it is important that FRAND commitments be fully honored by the concerned undertakings. [Gabriele Accardo]

### **European Commission investigates alleged abuse by MathWorks**

On 1 March 2012 the Commission launched an [investigation](#) into allegedly abusive behavior by the software company MathWorks. The investigation seeks to determine whether MathWorks' refusal to provide competitors with end-user licenses and interoperability information, which would allow competitors to lawfully reverse-engineer MathWorks' software in order to achieve interoperability with its widely used products, amount to an abuse of a dominant position in breach of Article 102 of the Treaty on the Functioning of the European Union. The investigation has been prompted by a competitor's complaint.

MathWorks software products, such as "Simulink" and "MATLAB," are widely used for designing and simulating control systems that are deployed in many innovative industries, including in cruise control or anti-lock braking systems (ABS) for cars.

In a recent [speech](#), EU Competition Commissioner Almunia recalled that this case is similar to the *Microsoft* case, where the issue of software interoperability was also of central importance. In *Microsoft*, the Commission found that a dominant company limits innovation to the detriment of consumers if it does not provide interoperability information for its products. Issues of access and interoperability are closely linked to the use – and abuse – of patents and intellectual property rights. In the present case, the Commission appears to have also taken into account the recent European Directive 2009/24/EC on the legal protection of computer programs, which aims to foster interoperability by allowing for reverse-engineering for interoperability purposes provided that the software at issue has been lawfully acquired. [Gabriele Accardo]

## **Apple files complaint with the European Commission against Motorola Mobility over FRAND abuse**

On 17 February 2012, in its [Form 10-K](#) (annual report), Motorola Mobility (“MMI”) stated that it received a letter from the European Commission notifying it that Apple submitted a formal complaint against MMI regarding the enforcement of certain standards-essential patents against Apple allegedly in breach of MMI's FRAND commitments. Apple’s complaint seeks the Commission's intervention with respect to standards-essential patents.

While the Commission has not yet opened a formal investigation against MMI, EU Competition Commissioner Almunia did state in a recent [speech](#) from 8 March 2012 that even if the Commission [cleared](#) the Google/Motorola transaction on 13 February 2012, “this merger clearance does not bless all actions by Motorola in the past or all future action by Google with regard to the use of these standard essential patents.” One may recall that one of the potential competition issues the Commission investigated in that case was whether, post-merger, the threat of injunctions could be used by Google to extract patent cross-licenses from competitors on terms to which they otherwise would not have agreed. The Commission ultimately came to the conclusion that the market situation was not significantly changed by the transaction.

Almunia also stated that he is determined to use antitrust enforcement whenever necessary to prevent any anti-competitive conduct by holders of standards-essential patents in the future. [Gabriele Accardo]

## **Google ordered to pay damages in France for abuse of dominance in the API**

On 31 January 2012 the Commercial Tribunal of Paris (CTP) [found](#) that Google (namely Google France and Google Inc.) abused its dominant position in the French market for “online mapping allowing for the geolocalisation of sales points on company websites,” in breach of Article L.420-2 of the French Commercial Code, and ordered Google to pay damages, amounting to Euro 500,000, to its French competitor Bottin Cartographes (Bottin). In essence, the CTP held that Google abused its dominant position insofar as it offered its geographic search engine “Google Maps” for free with the goal to exclude competition from the market and, ultimately, to further exploit its dominant position in the commercialization of targeted advertising.

First, the CTP found that Google (Google Maps) and Bottin offer identical mapping products, which allow users to locate addresses, create itineraries and find point of interests in the proximity of a given address. Such mapping products may be inserted into an internet website. Google search engine users are able to use Google Maps for free or via the



Google Maps API (Application Programming Interface) on a company website. In turn, Bottin offers its mapping product in exchange for an annual subscription and fees subject to actual consumption.

Second, the CTP found that Google indisputably holds a *de facto* monopoly in France in the search engine market, and that, as a result, Google is also dominant in two connected markets for online advertising and online mapping. In the case at hand, the online mapping market in question is the market for online mapping that allows for the geolocalization of sales points on company websites.

Subsequently, the CTP held that sale at no charge (for free) of the Google mapping program (Google Maps API) does not allow for the production costs, inevitably required to develop and distribute the product, to be recouped. In fact, the CTP noted that both Google and Bottin have to acquire the rights for the geographic data (or aerial view) necessary for the mapping products from specialized companies, such as Teleatlas or Navteq.

In accordance with the case-law of the Cour de Cassation (French Supreme Court), the CTP held that abnormally low pricing practices can, on their own, be characterized as exploitative abuses when carried out by a company with a dominant position in the market. Further, while exclusionary intention can be established when a dominant company sells its products below variable costs, the CTP found that, in the case at issue, Google's conduct drove all competitors (Maporama) out of the market, making it part of a wider exclusionary strategy.

According to the CTP, Google's practice of offering the product for free manifestly had the objective of maximizing commercialization of targeted advertising, namely in relation to advertising on online maps obtained for free via Google Maps API.

The CTP rejected Google's defense. Google claimed that Bottin did not prove the conditions required for predatory practices to be established as set out in the Commission's guidance relating to the application of Article 102 of the Treaty on the European Union. These conditions include: the relevant market(s) in question, the fact that Google holds a dominant position, the supposedly abusive practices and, in particular, the fact that Google was sacrificing profits in the short term, as well as the probability of anticompetitive exclusion from the markets. [Gabriele Accardo]

### **UK High Court finds The Pirate Bay jointly liable for copyright infringement**

In a landmark [decision](#) handed down on 20 February 2012, the UK High Court (EWHC) found that not only the Internet users, but also the operators of well-known file-sharing website The Pirate Bay, were liable for

copyright infringement (*Dramatico Entertainment Ltd & Others v. British Sky Broadcasting Ltd*).

In this decision, the Claimants - several major record companies acting on their behalf and on behalf of other members of the British Record Music Industry (BPI) - were seeking an injunction against six major UK Internet Service Providers (ISPs) that would require the ISPs to block their users' access to unauthorized file-sharing website "The Pirate Bay" (pursuant to section 97A of the Copyright, Designs and Patents Act 1988, implementing Article 8 (3) of the [Copyright Directive](#)).

However, the claimants diverged from the prior landmark case, [Twentieth Century Fox et al. v. Newzbin Ltd](#), by not bringing any claims for copyright infringement against either the users or the operator of The Pirate Bay.

Thus, the Court first considered whether the Claimants had an obligation to join the third party website that was targeted by the blocking order as a defendant. Next, the Court considered the possible liability of the users and operators of The Pirate Bay.

*(1) Obligation to join the third party infringer?*

On the first issue, the Court held that Article 8(3) of the Copyright Directive did not create any jurisdictional requirement to join or serve the third party using the services of the service provider (targeted by the injunction) to infringe copyright.

The Court added that, in the case of The Pirate Bay, such a requirement would have been impracticable, or at least disproportionate, as the operators of this website were impossible to locate and had never answered previous notifications of infringement sent by the Claimants.

*(2) Liability of the users of the Pirate Bay*

With regard to the question of the infringement committed by The Pirate Bay users, the Court confirmed, not surprisingly, that by uploading and/or downloading copyrighted sound recordings, without the authorization of the right holder, The Pirate Bay users had infringed the copyright owner's exclusive rights of reproduction and communication to the public.

*(3) (Joint) liability of the operators of the Pirate Bay*

The Court further considered the liability of the operators of The Pirate Bay for infringement committed by their users under the theory of "authorization" and "joint tortfeasance."

The Court first considered that The Pirate Bay had not only provided the means for the users to infringe (user-friendly environment facilitating the location, uploading and downloading of infringing content), but The Pirate Bay had also facilitated and promoted copyright infringement by its users.

The Court also clarified that The Pirate Bay could have exercised control over its users and/or over the content uploaded on its website, but it had deliberately declined to take any steps to prevent or stop infringement.

The Court thus concluded that the operators of The Pirate Bay were jointly liable for the infringement committed by the site's users, as the operators induce, incite or persuade users to engage in copyright infringement.

The question of the availability and wording of a possible injunction against the six ISPs defendants in this proceeding to block their users' access to the Pirate Bay should thus be determined at a further hearing, later this year. [Béatrice Martinet Farano]

### **EU In Brief**

- European Commission [opens](#) in-depth investigation into acquisition of EMI recorded music business by Universal (23 March 2012)
- European Commission [closes](#) investigation into suspected joint or unilateral conduct to delay market entry of generic medicines (1 March 2012)
- German court [suspends enforcement](#) (decision only available in German) of a standards-essential patent on grounds of an antitrust defense (27 February 2012)
- U.K High Court [decision](#) in Premier League (see ECJ ruling in [Newsletter 6/2011](#) p. 5) (3 February 2012)

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