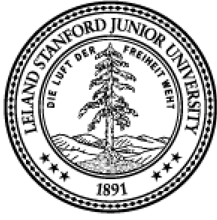

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U.S. DEVELOPMENTS

U.S. Supreme Court applies first sale doctrine to copies of copyrighted work lawfully made abroad and imported into the U.S.

On 19 March 2013, the U.S. Supreme Court issued a landmark decision in *Kirtsaeng v. John Wiley*, holding that the first sale doctrine in U.S. copyright law extended to copies of a copyrighted work lawfully made abroad.

In this case, Kirtsaeng, a University of California Student from Thailand, started selling on eBay in the U.S., the low-cost foreign edition of English-language textbooks published by John Wiley and Sons in Thailand that had been shipped to him by his family and friends, thereby making a substantial margin.

Publisher John Wiley & Sons brought an action against Kirtsaeng based on U.S.C. § 602(a)(1), which provides that the importation into the U.S. of a work acquired outside the U.S. without the copyright owner's authorization constitutes an infringement of the copyright owner's exclusive rights.

Kirtsaeng defended his action on the basis of the first sale doctrine under 17 U.S.C. § 109(a), according to which the owner of a legally acquired copy of a copyrighted work "lawfully made under this title" may sell or distribute such copy without the copyright holder's permission.

Both the District Court and Appellate Court rejected this argument on the ground that this doctrine would not apply to copy of a work manufactured abroad, notably as a result of the copyright owner's exclusive right to control the importation of his work.

The Supreme Court, in a 6-3 decision, reversed the lower courts' decisions, holding that the first sale doctrine did apply to copy of a work lawfully made abroad. To reach this conclusion, the Court held that the words "lawfully made under this title" in section 109(a) were not "geographically restricted". The Court therefore concluded that a first authorized sale of a work, even outside the U.S., would limit the copyright owner's exclusive rights to control the further distribution and importation of his work. [Béatrice Martinet Farano]

U.S. Appeals Court for the 9th Circuit finds BitTorrent operator liable for contributory infringement on an inducement theory (Columbia Picture v. Fung)

On 21 March 2013, the U.S. 9th Circuit affirmed in part and vacated in part the California Central District Court decision that Gary Fung, the operator

of several BitTorrent websites featuring infringing materials, was liable for contributory copyright infringement on an inducement theory.

To reach this conclusion, the Court, heavily relying on the U.S. Supreme Court decision in Grokster, found that Fung had not only distributed a service enabling infringement, but had done so with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement. Specifically, the Court found that Fung had (i) encouraged the uploading of torrent files that referred to copyrighted content, (ii) helped in localizing infringing content and (iii) deliberately avoided taking any steps to “develop any tools or other mechanisms to diminish third party users’ infringing activity” (although the Court stressed that this element alone may not support a finding of liability).

The Court then rejected the affirmative defenses raised by Fung, based on three of the four DMCA safe harbors (namely the routing, linking and hosting safe harbors). The Court first observed that in view of the overwhelming presence of infringing content, Fung had at least “sufficient awareness” (or “red flag” notice) of infringing activity. The Court then held that Fung directly received a financial benefit from this infringing activity - notably through higher advertising revenues “predicated on the broad availability of infringing material” - and also had the right and ability to control this activity, since he “organized” and “described” torrent files on his sites with specific search terms describing material likely to be infringing.

The Court however rejected the argument that inducement liability was inherently incompatible with protection under the DMCA safe harbors and reversed the district court’s permanent injunction on the basis that certain provisions of the injunction were too vague or unduly burdensome. [Béatrice Martinet Farano]

U.S. District Court for the Southern District of New York holds that the first sale doctrine does not apply to the resale of digital music files

On 30 March 2013, the U.S. Southern District of New York has held that the first sale doctrine was not applicable to the resale of digital music.

In this case, ReDigi offered a service allowing owners of legally acquired digital files to upload and resell them to other users, while deleting the original file from their hard drives. ReDigi argued that since the first copy of the file was legally acquired and deleted once acquired by another user, the first sale doctrine should apply and insulate the original owner of the file – and therefore ReDigi which provided such service – from any liability for copyright infringement.

Capitol Records however sued ReDigi for direct, contributory and vicarious infringement, notably for providing a service whose purpose was to infringe copyright.

The Court held that because transferring these digital files necessarily involved copying them on a new material object (i.e. a new hard disk), without the authorization of the copyright owner, ReDigi was violating the copyright owner's distribution right. The Court also rejected ReDigi's fair use defense, observing that the service was not capable of substantial non-infringing use.

This decision presents an interesting contrast with that issued in *UsedSoft v. Oracle* (see Newsletter 4-5/2012 p. 7-8) where the CJEU held that the "right of first sale" did in fact apply to a "used" software online marketplace. [Béatrice Martinet Farano]

U.S. District Court for the Western District of Washington makes determinations of RAND licensing terms

On 25 April 2013 Judge Robart issued the non-confidential version of his Findings of Fact and Conclusions of Law in the *Microsoft Corp. v. Motorola Inc.* case. This is the first time that a U.S. court has made determinations of the RAND licensing terms for a standard essential patent ("SEP") portfolio license between two parties.

This case regards Motorola patents covering the IEEE's 802.11 (WiFi) standards and the ISO/IECS's and ITU's H.264 video codec standards. Motorola offered Microsoft in 2010 to license these patens at a royalty rate of 2.25% of the end product, i.e. each smart phone, PC/laptop or Xbox 360 implementing them. Microsoft then sought declaratory judgment that Motorola breached its FRAND obligations to the Standards Development Organizations ("SDOs"). Motorola in turn sued Microsoft for patent infringement. Microsoft argues that the absolute value of the royalty demand is unreasonable and far exceeds what it pays to other standard-essential patent holders. Importantly, the royalty offer is also unreasonable because it is not tied to the value of Motorola's technical contribution and assesses the royalties in relation to the kind of product and not to Microsoft's contribution to the product. Motorola argues that the royalty rate is within the industry norms, is offered for many years now and that Microsoft did not negotiate in good faith and therefore repudiated its right to receive a FRAND license.

Judge Robart determined a specific RAND royalty and a RAND royalty range. He noted that "more than one rate could conceivably be RAND". However, more important than the amount of rates determined in this case is the methodology Judge Robart used as his order may serve as a precedent for the determination of RAND terms for a patent portfolio. Interestingly Judge Robart seems to have sided with Motorola regarding

the methodology even though the rates he determined were much closer to those urged by Microsoft than Motorola.

Judge Robart analyzed what would happen in a hypothetical negotiation between the parties to the case using the factors outlined in *Georgia-Pacific Corp. v. U.S. Plywood Corp.* in a modified way. He modified those factors due to the unique aspects of this case, i.e. the standard-essential patent RAND licensing situation. In such a hypothetical negotiation the parties would look at the importance of SEPs to the standard as well as the importance of SEPs and standards to the product. Furthermore Judge Robart laid out the "economic guideposts" constraining the negotiations in the context of RAND cases.

On 1 May 2013 Motorola filed a letter motion asking the court to limit theories on which Microsoft may base its claims for damages. According to Motorola Microsoft has significantly expanded its claims by violating the Federal Rules of Civil Procedure and prejudicing Motorola in its preparation of their own case. [Nicole Daniel]

U.S. FTC files amicus curiae brief supporting generics' claim in patent dispute

On 11 March 2013 the U.S. Federal Trade Commission ("FTC") filed an amicus curiae brief in the case *Actelion Pharms Ltd. V. Apotex Inc.* which is being heard in the U.S. District Court for New Jersey supporting the defendants' claim of the plaintiff's anticompetitive use of Risk Evaluation and Mitigation Strategies ("REMS").

This case is about the generic access to branded products for making Hatch-Waxman patent challenges. Actelion sued Apotex, Actavis and Roxane ("Apotex") for a declaratory judgment to affirm the legality of its practice of not supplying generics that prevented Apotex from preparing an Abbreviated New Drug Application ("ANDA") to the U.S. Food and Drug Administration ("FDA") (an application for approving bioequivalent generic drugs under the Hatch-Waxman Act). Actelion claimed that the drugs in question were under a REMS program restricting access to the drug and therefore it had the near absolute right to refuse to sell even without the FDA mandate. The defendants countered by claiming that the plaintiff violated Sections 1 and 2 of the Sherman Act.

REMS programs allow certain drugs with known risks to be approved by the FDA, if their use is closely monitored in patients. One of the drugs in question (Tracleer) is under a REMS program including an ETASU (Elements to Assure Safe Use) provision which imposes drug handling restrictions on distributors and pharmacies. For the other drug in question, Zavesca, Actelion voluntarily implemented distribution restrictions, as it has a potential side effect concerning birth defects.

The FTC filed its amicus curiae brief when Actelion asked the courts to dismiss the counterclaims. The FTC makes three important points:

1. The Hatch-Waxman Act's primary goal was to balance innovation and competition in that industry sector. Access to the branded product is necessary for generic firms since they need to reverse engineer and perform studies on the drug in question to demonstrate to the FDA the bioequivalence of the generic drug to the branded product. This mechanism provides for accelerated approval of generic drugs and has been successful in generating large savings for consumers and facilitating generic competition.

2. Refusing to sell a product to rivals may be regarded as exclusionary conduct which on the one hand does not serve the goal of balancing innovation and competition. On the other hand Section 2 of the Sherman Act cases may apply. More importantly, the FTC does not say whether there has actually been a violation of Section 2 of the Sherman Act. However, both the FTC and the Generic Pharmaceutical Association ("GPhA"), which also filed an amicus curiae brief, point out that according to the 2007 FDA Amendments Act a drug patent holder may not block or delay the approval of an ANDA by using safety assurances.

3. Distribution arrangement should not be immune from the application of antitrust rules because of REMS restrictions.

It will be interesting to see how the courts resolve this issue as the Supreme Court is reluctant to expand the application of antitrust rules where the conduct in question is already covered by sector-specific regulation.

The FTC will probably continue to assert the views it expressed in this amicus curiae brief in other similar cases. [Nicole Daniel]

U.S. District Court for the Southern District of New York rejects Meltwater's fair use defense

On 21 March 2013, the U.S. Southern District of New York held that the publication by Meltwater of excerpts from Associated Press articles was copyright infringement for which the fair use defense was not available.

Meltwater is an online media monitoring service that offers its clients reports about news articles published on different topics, based on keywords selected by the client. To that end, Meltwater uses different algorithms to scrape content from different sources on the Internet. After noticing that Meltwater had distributed to its client various excerpts – most notably the headlines and the lead paragraphs - of several of its articles without asking for any licenses or authorization to use this content, AP sued Meltwater for copyright infringement. Meltwater primarily claimed that the publication of these excepts was transformative and therefore covered

by the fair use defense since, akin to a search engine, it only provided a limited amount of copyrighted material in response to client's queries.

The Court rejected this defense based on the four statutory fair use factors. In particular, the Court rejected the fair use defense based on three of the four fair use factors:

(i) Purpose and character of the use:

The Court observed that the use made by Meltwater of AP's article was commercial and competitive, rather than transformative. In particular, the Court quoted limited evidence which showed that customers clicked through to the original AP articles only 0.08% of the time!

(ii) Amount of work used in relation to the work as a whole:

The Court stressed that Meltwater had copied a significant portion of AP's articles (between 5 and 60%) and most importantly the title and lead paragraph of each article, allowing users to abstain from clicking on the original article.

(iii) With regard to the fourth factor, i.e. effect of the use on the potential market, such a use had a significant effect on AP's potential market for his work since Meltwater's excerpts effectively replaced the AP articles, depriving AP of substantial licensing revenues.

The Court concluded that Meltwater's use of AP's articles was not covered by fair use, emphasizing that Meltwater's business model relied on the systematic copying of protected expression and that the sale of collections of these copies as reports competed directly with the copyright owner. [Béatrice Martinet Farano]

U.S. Appeals Court for the 9th Circuit redefines the notion of control under the DMCA (UMG v. Veoh)

On 14 March 2013, the U.S. Court of Appeals for the 9th circuit withdrew its decision in *UMG Recordings* (see Newsletter 1/2012 p.4-5) and replaced it with a new superseding opinion which included some useful guidelines regarding the application of the DMCA safe-harbor to third party content websites.

By way of background, Veoh operated a video-sharing platform where users could upload and share videos with other users. Although Veoh had implemented various procedures to prevent infringement, UMG noticed that many of their copyrighted works had been uploaded on this website without their authorization. UMG therefore filed suit against Veoh for direct and secondary copyright infringement but the District Court granted summary judgment to Veoh after determining that although Veoh may have had generalized awareness of infringement on its service, it was not

aware of any specific infringing content which it would have failed to take down. The District Court therefore found that Veoh was protected by the DMCA hosting safe harbor defense.

The Ninth Circuit, in its original decision, affirmed this judgment, not only on the ground that Veoh arguably lacked "knowledge" but also "control" over specific infringing activity. The Ninth Circuit held that Veoh's lack of control over infringing activity derived from Veoh's lack of knowledge of specific infringing content. After the Second Circuit held last year in *Viacom v. YouTube* (see Newsletter 1/2013 p. 5) that this definition of the control requirement was incorrect, the 9th Circuit called for additional briefing and issued this revised decision.

In its new opinion, the 9th Circuit abandoned its earlier holding that item-specific knowledge was required in order to show the required "control over infringing activity" which disqualified a service provider from DMCA protection. Rather, the 9th Circuit adopts the Second Circuit's holding in *Viacom v. YouTube* that the requisite control, for DMCA purpose, can be shown by a service provider's "substantial influence on the activities of users, irrespective of whether it also has knowledge of such activity". For the 9th Circuit, such a situation can notably occur where the service provider exercises "high levels of control over activities by users" or where he adopts a "purposeful conduct" as in Grokster.

Although the 9th Circuit essentially affirmed its earlier decision in UMG Recording v. Shelter, this new opinion introduces further guidelines and brings much welcomed consistency to the conditions of the DMCA safe harbor defenses. [Béatrice Martinet Farano]

EU DEVELOPMENTS

German Court makes reference for a preliminary ruling to the CJEU on standard-essential patents

On 21 March 2013, the Landgericht Düsseldorf ("Düsseldorf Regional Court") made a reference (the order is only available in German) for a preliminary ruling to the Court of Justice of the European Union ("CJEU") in the context of the dispute between Huawei and ZTE on 4G/Long-Term-Evolution ("LTE") technologies, notably in relation to the conditions of the compulsory license defense in standard-essential patents ("SEPs") cases, and conversely, on the availability of remedies to the SEPs' holder who has pledged to license them on Fair, Reasonable and Non-Discriminatory ("FRAND") terms.

The Düsseldorf Regional Court considers that a preliminary ruling is needed in the circumstances because there are conflicting legal opinions

on this issue, notably the German Supreme Court decision in the *Orange-Book-Standard* case (see Newsletter 3/2009, p. 4 for more background) and the statement of objections issued by the European Commission against Samsung on 21 December 2012 (see Newsletter 6/2012, p. 11 for more background). While in the *Orange-Book-Standard* case, the German Supreme Court held that a defendant in a patent infringement case may successfully raise an antitrust defense against the issue of an injunction provided that certain requirements are met (in very broad terms, if a user pays or deposits a reasonable license fee), on the other hand the Commission's preliminary view in the Samsung case is that for such a defense to be successful it suffices that the defendant is "willing to negotiate" a license on FRAND terms.

Accordingly, the CJEU has been asked to clarify five questions as to whether a SEPs holder abuses its dominant position by requesting an injunctive relief, even if the infringer is willing to negotiate a license on FRAND terms, or whether the infringer is further required to comply with the contractual obligations that would exist under a FRAND license. [Gabriele Accardo]

CJEU and U.S. Court issue contrasting decisions on the legality of streaming video/remote DVR services

In less than a month, the CJEU and the U.S. Court of Appeal have issued two contrasting decisions with regard to the validity of two streaming video/remote DVR services.

The case pending before the CJEU deals with TVCatchup, a service offering any person who has already subscribed to certain terrestrial TV broadcasts to watch them online at the time of her convenience. Arguing that such retransmission infringed their exclusive right to authorize any "communication to the public" of their work, various UK broadcasters sued TVCatchup for copyright infringement.

Relying on the CJEU precedents in SGAE (case C-306-05) and FAPL (joined case C-403/08 and C-429/09) TVCatchup argued that their service was not a "communication" but a mere "technical mean insuring the reception of terrestrial television broadcast to its catchment area", thus not requiring any authorization from the copyright holder. TVCatchup further argued that such a retransmission could not be considered a "communication to the public" since the service was limited to a group of users already "licensed" by the copyright holder.

In a decision issued on 7 March 2013, the Court of Justice of the European Union (CJEU) held that the online streaming of free-to-view terrestrial television broadcasts on a different platform (i.e. online) was in fact an unauthorized communication of the plaintiff's work to the public (defined as an "indeterminate number of potential recipients, regardless of

whether they already owned a license to this material") and therefore infringed the author's right to control communication of his work.

By contrast, on 1 April 2013, the U.S. Court of Appeal for the Second Circuit affirmed a District Court decision denying a group of broadcasters' motion for preliminary injunction against a similar streaming video/remote DVR service run by Aereo, rejecting the argument that such a service infringed their public performance rights.

Like TVCatchup, Aereo offers its users access to broadcast television programs over the Internet for either live or for later viewing, after storage on a digital storage system. Differently from TVCatchup however, Aereo re-transmits these broadcasts through mini-antennas, individually assigned to paying subscribers on a dynamic basis.

Here again, the broadcast networks brought an infringement action against Aereo, arguing that the retransmission of their copyrighted content violated their "public performance" rights.

Relying heavily on its precedent in Cablevision, the Second Circuit held that Aereo was basically providing subscribers with three lawful services (i) a standard TV antenna for receiving TV broadcast, (ii) a remote storage DVR for recording and playing back these broadcasts and (iii) a device for accessing these programs on Internet. The Court also observed that Aereo's targeted single subscriber transmission could not qualify as a public performance and concluded that a license was therefore not needed. The Court concluded that Aereo's service did not infringe the plaintiffs' public performance rights with respect to their copyrighted broadcast. The TV broadcasters have appealed the decision. [Béatrice Martinet Farano]

European Commission market tests commitments offered by Penguin to close probe on e-books

On 19 April 2013 the Commission issued a press release stating that it is market testing the commitments offered by Penguin, an international publisher, in relation to the sale of e-books in the European Economic Area ("EEA"). The commitments are substantially the same as those offered by other international publishers last December 2012 (see Newsletter 6/2012 p. 12 , Newsletter 1/2012 p. 5 and Newsletter 4-5/2012 p. 10 for more background).

It may be recalled that the Commission was concerned that the joint switch from a typical wholesale model to an agency model may have been the result of collusion between competing publishers helped by Apple, and may have been aimed at raising retail prices of e-books in the EEA or preventing the emergence of lower prices, in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

In essence, Penguin will terminate the agency agreements that include price restrictions and "most-favored customer" clauses, and will not enter into such agreements for the next five years. Retailers will be entitled to offer discounts during a two-year "cooling-off" period, provided the aggregate value of price discounts granted by retailers did not exceed the total annual amount of the commissions that the retailer received from the publisher over a one year period.

Under the agency model, if any retailer sold an e-book at prices lower than that on Apple's iBookstore, Penguin (like the other publishers involved) would have to match that lower price on Apple's store, thus making it very costly for the publisher (in terms of lower revenues) to allow other retailers to sell at lower prices than Apple. [Gabriele Accardo]

European Commission market tests Google commitments in relation to online search and search advertising

On 25 April 2013 the European Commission published a press release and a memo seeking observations from third parties on the commitments offered by Google in order to address the Commission's competition concerns that Google may be abusing its dominant position in the markets for web search, online search advertising and online search advertising intermediation in the European Economic Area ("EEA"), in breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

Based on its preliminary conclusions, the Commission considers that Google is dominant in web search and search advertising, and that in four areas it may be abusing its dominant position. As a result, Google has made proposals to try to address the Commission's four competition concerns.

Specialized search. First, the Commission is concerned about the favorable treatment, within Google's horizontal Web search results, of links to Google's own specialized web search services as compared to links to competing specialized Web search services (i.e. services allowing users to search for specific categories of information such as restaurants, hotels or products). According to the Commission, this practice may unduly divert traffic away from Google's competitors in specialized search towards Google's own specialized search services, ultimately reducing the ability of consumers to find a potentially more relevant choice of specialized search services.

In order to address such concerns, Google proposes to clearly label its "promoted" links, so that users are made aware of their different "nature", and even separate them from other web search results by clear graphical features (such as a frame). In addition, Google proposes to display links to

three rival specialized search services close to its own services, in a place that is clearly visible to users.

Content usage. The second concern relates to the use by Google without consent of original content from third party web sites in its own specialized web search services, which may reduce competitors' incentives to invest in the creation of original content for the benefit of Internet users. According to the Commission, if users know that Google's specialized search services contain all the relevant information that is posted on the web, their incentive to visit other sites which contain only a part of that information will be significantly reduced, even if these were the sites from which that information originated.

Google will offer all websites the option to opt-out the use of all their content from Google's specialized search services, without directly affecting their natural search ranking. Moreover, specialized search web sites that focus on product search or local search will be able to mark certain information so that it is not indexed or used by Google. Finally, newspaper publishers will be able to control on a web page by page basis the display of their content in Google News.

Exclusivity agreements for the provision of online search advertising. Thirdly, the Commission is also concerned about the agreements that oblige third party web sites ("publishers") to obtain all or most of their online search advertisements from Google, insofar as, as a result of contractual or *de facto* exclusivity, publishers would be able to display no or only a limited amount of online search advertisements from Google's competitors. In turn, Google's competitors would face reduced incentives to innovate since Google's conduct limits their access to customers.

In order to address such a concern, Google will no longer include in its agreements with publishers any written or unwritten obligations that would require them to source online search advertisements exclusively from Google.

Restrictions on the portability and management of online search advertising campaigns. The fourth competition concern relates to Google contractually restricting the possibility of transferring online search advertising campaigns away from Google's AdWords and to simultaneously manage such campaigns on competing online search advertising platforms. According to the Commission, these restrictions create artificial switching costs that discourage advertisers using Google's AdWords from running parallel online search advertising campaigns on competing platforms, thereby reducing consumer choice, while at the same time, stifle the development of innovative campaign management tools.

In order to address such a concern, Google will no longer impose obligations that would prevent advertisers from managing search advertising campaigns across competing advertising platforms.

The Commission clarified that the position of Google in the USA is different than in Europe, where it does not seem likely that another Web search service will replace Google as the European users' web search service of choice. Web sites therefore rely more on traffic from Google in Europe than in the USA. Given the resulting commercial significance of Google for specialized search services, the way Google presents its web search results therefore has a much more significant impact on users and on the competitive process in Europe than in the USA. This explains why the Commission is seeking to ensure that Google's prominent market position does not affect the possibility for other competitors to innovate in neighboring markets.

The commitments are now subject to a market test of one month (till 27 May 2013).

If, following the market test, the commitments form the basis for a satisfactory solution to the Commission's competition concerns, the Commission may make them legally binding on Google by way of a decision for a period of 5 years. Such a decision will not conclude that there is an infringement of EU antitrust rules, but would legally bind Google to respect the commitments offered. In principle. If a company breaks such commitments, the Commission can impose a fine of up to 10% of its annual worldwide turnover. [Gabriele Accardo]

European Commission sends charges to Motorola Mobility on misuse of standard-essential patents

On 6 May 2013 the European Commission stated that it has issued formal objections to Motorola Mobility, alleging that the company's seeking and enforcing of an injunction against Apple in Germany on the basis of its mobile phone standard-essential patents ("SEPs") for the GPRS standard amounts to an abuse of a dominant position prohibited by Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

While the Commission does not question the availability of injunctive relief for SEPs for patent infringements, for example in the case of unwilling licensees, however, in the circumstances the Commission's view is that recourse to injunctions harms competition based on Motorola's previous commitment to license SEPs on Fair, Reasonable and Non-Discriminatory (so-called "FRAND") terms, and the agreement of Apple to accept a binding determination of the terms of a FRAND licence for SEPs by a third party.

In general, the FRAND commitment is designed to ensure effective access to those patents which are standard-essential, as a precondition for any

company to sell interoperable products in the market. Such access allows consumers to have a wider choice of interoperable products while ensuring that SEPs holders are adequately remunerated for their intellectual property. The Commission is concerned that the threat of injunctions, which generally involve a prohibition to sell the product infringing the patent, can distort licensing negotiations and lead to licensing terms that the licensee of the SEP would not have accepted absent this threat. This would lead to less consumer choice. [Gabriele Accardo]

European Commission closes preliminary investigation into E5

On 7 March 2013 the European Commission announced that it had closed its preliminary investigation into E5, i.e. Europe's five leading telecom operators (Deutsche Telekom, France Telecom, Telefonica, Vodafone and Telecom Italia), regarding the way standards for future mobile communications are developed.

On 15 March 2012 the Commission confirmed that it had requested information from the E5 and GSMA, the mobile sector association. This was after the Financial Times reported about the periodic meetings between the bosses of these five companies from 2010 onwards.

The Commission investigated whether the standardization process for future mobile communications services was being improperly used to strategically foreclose competitors.

The Commission noted that "the standardization work formerly conducted by the E5 has been transferred to the GSMA and other industry associations" as this allows for more stakeholder participation. This transfer is welcomed by the Commission which describes it as a positive step to reduce the risk of standard setting work affecting competition negatively. Accordingly, the Commission decided to close its preliminary investigation.

However, it has to be noted that GSMA represents the interests of mobile operators worldwide and of more than 100 mobile operators in the European Union. Accordingly, GSMA's primary objective will be to support its members. In its press release the Commission therefore writes that it will remain watchful of the evolvement of the standardization process in the telecommunications sector. [Nicole Daniel]

UK OFT investigates GSK and generics manufacturers over pay for delay deals

On 19 April 2013 the UK Office of Fair Trading ("OFT") issued a Statement of Objections to GlaxoSmithKline ("GSK") and three generics manufacturers (Alpharma Limited, Generics UK Limited and Norton

Healthcare Limited) alleging that they concluded anticompetitive agreements over the supply of paroxetine in the UK, notably to delay effective competition in the UK supply of paroxetine, a prominent antidepressant medicine, in breach of both the UK Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The OFT also alleges GSK's conduct amounted to an abuse of a dominant position in the same market in breach of both the UK Competition Act 1998 and Article 102 TFEU.

In particular, according to the OFT, while the generics companies were each attempting to supply a generic paroxetine product in competition to GSK's branded paroxetine product, Seroxat, GSK challenged the generic companies with allegations that their products would infringe GSK's patents, and to resolve these disputes, each of the generic companies concluded one or more agreements with GSK. These agreements, so called "pay for delay" agreements, included substantial payments from GSK to the generics manufacturers in return for their commitment to delay their plans to supply paroxetine independently.

OFT's Ann Pope noted that "The introduction of generic medicines can lead to strong competition on price, which can drive savings for the NHS, to the benefit of patients and, ultimately, taxpayers." [Gabriele Accardo]

Italian Competition Authority finds that Sky Italia did not abuse of its dominant position

On 23 April 2013 the Italian Competition Authority ("AGCM") decided (the decision is only available in Italian) to close the proceedings against Sky Italia S.r.l. ("Sky Italia") of The News Corporation Ltd. Group, finding that Sky Italia's acquisition of exclusive pay-tv rights to broadcast the FIFA World Cup of 2010 and 2014 on all pay-tv platforms (satellite, digital terrestrial television/DTT and internet) did not amount to an abuse of dominant position under Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

The investigation was prompted by RTI, a company of the Mediaset Group, based on the complaint that Sky Italia's acquisition of exclusive pay-tv rights to broadcast the FIFA World Cup on pay-tv and refusal to resell the DTT rights was a breach of the commitments it undertook to the European Commission in 2003, when the Commission authorized, subject to conditions, a merger by News Corporation of two Italian pay-tv companies to create Sky Italia. In August 2011 the scope of the AGCM investigation was expanded to include Sky Italia's acquisition of certain rights to UEFA's Champions League 2012-2015 seasons.

In 2010, ahead of the FIFA World Cup, RTI initiated arbitration proceedings before the ICC International Court of Arbitration ("ICC tribunal"). In an award dated 20 February, 2012, the ICC tribunal rejected

RTI's claims and confirmed the legitimacy of Sky Italia's behaviour. In particular, the ICC tribunal held that the broadcasting rights of the FIFA World Cup did not fall within the commitments since the FIFA World Cup was beyond the remit of "world-wide sports rights." The ICC tribunal further found that the FIFA World Cup was not essential for the competitiveness of a competing pay-TV television operator since it occurred only once every four years.

The AGCM essentially followed the same reasoning of the ICC tribunal, although it made its own further findings as regards the number of new subscribers that the FIFA World Cup would account for, i.e. in order to confirm whether holding such sport rights confers a particular advantage. The AGCM found that it did not, also noting that the main world cup matches are broadcasted on the free to air TV under the Television without borders Directive.

The AGCM further ruled that Sky Italia's acquisition of rights to the UEFA's Champions League 2012-2015 seasons did not constitute an abuse, having found, inter alia, that such sport rights have been assigned following an open bidding procedure which allows for the sub-licensing of such rights, and the fact that Sky Italia actually sub-licensed 2 out of the 3 seasons to RTI, noting that the last season may still be sub-licensed to RTI. The AGCM thus concluded that, at this stage, holding exclusive rights for one season may not necessarily lead to a finding of an abuse by Sky Italia. [Gabriele Accardo]

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