



Stanford – Vienna Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law



Transatlantic Antitrust and IPR Developments

Bimonthly Newsletter

Issue No. 6/2014 (December 16, 2014)

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Contents

ANTITRUST	5
United States	5
FTC settlement bars patent assertion entity from using deceptive tactics.....	5
U.S. District Court for the Northern District of Texas dismissed Second Consolidated Amended Complaint against hotel chains and online travel agencies	6
Apple e-books settlement gets final court approval	8
Reverse payments can be non-cash according to appellate judges	9
Google says that its agreement with Android device makers on installing Google as default search engine do not violate antitrust rules	11
European Union	12
Commission sends formal charges to Honeywell and DuPont regarding cooperation on car air conditioning refrigerant.....	12
EU Parliament passes resolution calling on the Commission to unbundle [Google's] search engines from other commercial services	14
Advocate General hands down opinion on Huawei's alleged SEP abuse	16
INTELLECTUAL PROPERTY	19
United States	19
Rockstar and Google and its Android partners are apparently close to a settlement.....	19
European Union	20
EU Court: Embedding copyrighted videos that are freely available online does not constitute a copyright infringement.....	20
The Juncker Commission's plans for EU copyright	22
Polo Ralph Lauren Successfully Opposes Bicycle Polo Mark in EU General Court	24
UK Court orders 6 main UK ISPs to take down infringing websites based on trademark infringement	27
The Orphan Works EU Directive is Being Slowly Implemented	29
French Court holds ISP liable for not promptly taking down infringing content	32
French Court issues blocking orders against The Pirate Bay	33

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Antitrust

United States

FTC settlement bars patent assertion entity from using deceptive tactics

By Gabriele Accardo

On 6 November 2014, the Federal Trade Commission [communicated](#) that MPHJ Technology Investments (“MPHJ”) and its law firm have agreed to [settle](#) Federal Trade Commission charges that they used deceptive sales claims and phony legal threats in letters that accused thousands of small businesses around the United States of patent infringement. The settlement would bar MPHJ and its law firm from making deceptive representations when asserting patent rights.

The settlement with MPHJ is the first time the FTC has taken action using its consumer protection authority against a patent assertion entity (“PAE”), which is a company that obtain patent rights and try to generate revenue by licensing to or litigating against those who are or may be using patented technology.

According to the FTC’s [administrative complaint](#) MPHJ bought patents relating to network computer scanning technology, and then told thousands of small

businesses that they were likely infringing the patents and should purchase a license. In several thousand letters sent under the names of numerous MPHJ subsidiaries, MPHJ appears to have falsely represented that many other companies had already agreed to pay thousands of dollars for licenses.

MPHJ’s law firm authorized letters on the firm’s letterhead that were sent to more than 4,800 small businesses, warning them that the firm would file a patent infringement lawsuit against the recipient if it did not respond to the letter. The letters also referenced a two-week deadline and attached a purported complaint for patent infringement, usually drafted for filing in the federal court closest to the small business receiving the letter. In reality, the complaint alleges, the senders had no intention—and did not make preparations—to initiate lawsuits against the small businesses that did not respond to their letters. No such lawsuits were ever filed.

The Commission vote to accept the proposed consent order was 5-0. The proposed consent order will be subject to public comment through early December 2014, after which the Commission will decide whether to make the proposed consent order final.

Antitrust

United States

U.S. District Court for the Northern District of Texas dismissed Second Consolidated Amended Complaint against hotel chains and online travel agencies

By Gabriele Accardo

On 28 October 2014 the U.S. District Court of the Northern District of Texas dismissed with prejudice a class action against hotel chains and Online Travel Agencies (“OTAs”), insofar as class action’s plaintiffs have not overcome the pleading deficiencies following the first judicial review of their pleadings which the Court originally dismissed without prejudice on 18 February 2014 (see [Newsletter 1/2014](#), p. 3, for additional background).

The plaintiffs asserted a conspiracy amongst hotels and online travel agencies to impose “rate parity” across hotel booking websites so that the price of a room is the same on a hotel chain’s website as it is on any of the other websites where it may also be sold.

Yet, the Court found that the plaintiffs had

not plausibly alleged a conspiracy in violation of the antitrust laws, and concluded that plaintiffs’ attempts to re-plead were futile.

Nonetheless, the Court noted that plaintiffs appear to have made some significant changes to their antitrust complaints.

Most noticeably, rather than allege an industry-wide conspiracy to fix prices, the amended complaint dropped the hotel chains as defendants and asserted a *per se* price fixing agreement between OTAs, an agreement which caused hotel prices to rise in 2003 and afterwards.

In support of this new theory, plaintiffs emphasized new allegations that the OTAs competed vigorously on price in the period 1999-2002 until an abrupt halt in price competition came in 2003 as a result of the horizontal OTA conspiracy.

Plaintiffs also alleged that the rate parity agreements followed the cessation of price competition between the OTAs as a necessary means of stamping out the OTA’s last remaining source of price competition: their hotel room suppliers.

Likewise, plaintiffs alleged that the OTAs were dominant retailers by 2002 capable of imposing unreasonable vertical restraints.

From this, plaintiffs argued that the rate parity agreements were *not* the “nub” of amended complaint but rather a necessary tool to effectuate the underlying agreement not to compete between OTAs.

Plaintiffs also made one noticeable change to address proximate causation for their

consumer protection claim, namely, the amended complaint explicitly tied harm to the alleged price-fixing scheme, rather than the rate guarantees alone.

The Court noted that dropping the hotel defendants removed an inherent contradiction in the first complaint's theory, as hotels were no longer simultaneously victims and willing participants in the scheme.

However, the deficiencies of the first complaint were not overcome by the mere re-configuration of the culpable actors. More likely factual allegations did not materially differ from the assertions that the court had already found insufficient.

In addition, the court did not allow the plaintiffs to add a claim that the online travel agencies' RPM agreements with the hotels were *per se* unlawful vertical restraints under California state law.

Antitrust

United States

Apple e-books settlement gets final court approval

By Nicole Daniel

On 21 November 2014 US District Judge Denise Cote gave her final approval to a settlement of the Apple e-book class action.

The class action against Apple arose from allegations that Apple and five publishers conspired on the publishing industry's e-book pricing model in order to drive up prices. Ahead of the related trial the five publishers settled for approximately \$ 167 million in total. Apple however decided to defend its actions in court.

In [July 2013](#) Judge Cote found Apple liable under the antitrust rules and imposed a court-monitor responsible for reporting on the antitrust policies of Apple.

In August 2014 Judge Cote gave her preliminary approval to the settlement which resolves the claims by states as well as class action plaintiffs.

When giving her final approval Judge Cote noted that the form of the settlement is "highly unusual". Indeed the settlement is comprised of three scenarios. In case Apple loses its appeal it will pay \$400

million and another \$50 million in attorney's fees. If the appeals court vacates Judge Cote's earlier decision but sends it back to her or if her decision is reversed and also sent back to her or if a retrial is ordered than Apple pays \$50 million to consumers and a further \$20 million in attorney's fees. However in case Judge Cote's decision is completely reversed by the appeal court and survives a further appeal then Apple does not owe consumers, states or their attorneys anything.

Judge Cote also said that the settlement deal makes sense given Apple's "delaying tactics" since if they continued they would have forced consumers to wait to receive any money from Apple.

On 15 December 2014 a federal appeals court hearing is scheduled to hear Apple's appeal. It remains to be seen which scenario will apply after the appeal court hands down its decision.

Antitrust

United States

Reverse payments can be non-cash according to appellate judges

By Nicole Daniel

On 19 November 2014 in a hearing regarding the possible reopening of a lawsuit over whether GlaxoSmithKline (GSK) unfairly extended the monopoly on its drug Lamictal, an appellate panel of the Third Circuit suggested that reverse payments may be something other than cash.

The issue on appeal has its roots in the US Supreme Court [decision](#) in the *Actavis* case where it was held that a large and unjustified payment to a generic rival by the original brand of the drug in question to stay out of the market can be scrutinized under antitrust rules.

The main issue is therefore whether reverse payment settlements, also called pay-for-delay deals that do not include cash payments, can be deemed a type of payment that comes under the rule of reason analysis according to *Actavis* to determine whether the reverse payment settlement comes under the scrutiny of antitrust rules.

Drug buyers want the appeals court to

reopen a lawsuit against GSK regarding its settlement deal with generic drug manufacturer Teva over the Lamictal drug. In 2005 GSK and Teva agreed that when Teva's version of Lamictal will be marketed, GSK will not sell its own generic version of the drug, i.e. the authorized generic, for six months. In exchange Teva agreed not to market its generic version of Lamictal until July 2008.

The plaintiffs allege that this reverse payment led to higher prices for the buyers of Lamictal. The defendants argue that there was no payment at all. In [2012](#) and in [2014](#) a district court judge agreed with the defendants and threw the case out twice.

So far the courts have differed on the term "payment". In the Lamictal case in Newark, New Jersey, US District Judge William H. Walls ruled that the *Actavis* decision made a cash payment a requirement. Another US District Judge, this time in Trenton, New Jersey, ruled that payments need not take the form of cash.

The FTC urged the court not to limit its definition of the word payment to cash alone. Furthermore law professors, consumer unions and 28 states filed briefs urging the Third Circuit to reverse the decision of the lower court.

In the hearing on 19 November 2014 the judges on the Third Circuit questioned the ruling of the lower court which held that a reverse payment need to be in cash to put the patent settlement under the scrutiny of antitrust laws. This is so since a payment is some sort of consideration. Accordingly why is something that is valuable not

deemed to be a payment?

Furthermore limiting reverse payment settlements that come under the scrutiny of antitrust rules to cash payments only creates an undesirable loophole for drug manufacturers to elide liability under antitrust rules.

It remains to be seen how the Third Circuit decides on this very important issue.

Antitrust

United States

Google says that its agreement with Android device makers on installing Google as default search engine do not violate antitrust rules

By Nicole Daniel

In a proposed class action against Google where it is alleged that Google's agreements with Android device makers to install Google as the default search engine, Google asked US District Judge Beth Labson Freeman to dismiss the class action thereby stating that these agreements do not violate antitrust rules.

In its motion to dismiss the lawsuit which was filed on 7 November 2014 Google stated that the Mobile Application Distribution Agreements (MADA) it had signed with Android device makers such as Samsung and HTC neither violate the Sherman or Clayton Act nor state laws such as the Cartwright Act in California.

Google distinguished the case from the famous Microsoft case. The MADAs are not exclusive agreements; they are quite the opposite as they require manufacturers to make their products an "open

environment" for the software of other companies. The Android devices can also be easily customized to change the default search engine to e.g. Microsoft's Bing search engine. In contrast in the Microsoft case the PC makers were obliged to make Internet Explorer the machine's only browser in exchange for using Microsoft's Windows operating system. Furthermore, Google states that the MADAs do not oblige the manufacturers to apply the agreement to every single device they make.

They previously secret MADAs between Google and its Android partners were revealed in 2012 during a copyright trial between Google and Oracle. Also in the second US patent litigation between Apple and Samsung previously secret MADAs were brought up as evidence.

What followed was a [lawsuit](#) by a consumer right's plaintiffs' firm alleging that Google illegally leveraged its monopoly in order to dominate the mobile market by forcing manufacturers to enter into MADAs. The plaintiffs have to prove that the already installed default apps on their smartphone and tablets are not easily replaceable. They further have to prove that the consumers paid more for the affected smartphones and tablets than they would have but for Google's allegedly anticompetitive conduct. In its motion to dismiss the case Google said that the plaintiffs failed to prove the above.

It remains to be seen how the Judge will decide on Google's motion to dismiss the class action.

Antitrust

European Union

Commission sends formal charges to Honeywell and DuPont regarding cooperation on car air conditioning refrigerant

By Gabriele Accardo

On 21 October 2014 the European Commission issued [formal charges](#) to Honeywell and DuPont, based on allegations that the cooperation agreement they entered into in 2010 on the production of a new refrigerant for use in car air-conditioning systems (R-1234yf) may have limited its availability and technical development, in breach of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) which prohibits anticompetitive agreements.

As it may be recalled (see [Newsletter 1/2012](#), p. 5, for additional background), in December 2011, the Commission opened an investigation over the refrigerant R-1234yf, which was chosen under EU law as a more environmentally friendly product. In fact, in 2006, the EU adopted new standards on air conditioning systems in motor vehicles with the aim of reducing harmful emissions and combating global

warming ([Directive 2006/40/EC](#) or MAC Directive). R-1234yf is currently the only commercially available refrigerant with a sufficiently low global warming potential to comply with the requirements of the MAC Directive, whereas Honeywell and DuPont are the only two suppliers of R-1234yf to carmakers.

The Commission’s provisional finding is that the cooperation between Honeywell and DuPont on production of R-1234yf has reduced their decision-making independence and may have resulted in restrictive effects on competition, notably limitation of the available quantities of the new refrigerant that would have otherwise been brought to the market, as well as a limitation of related technical development.

Interestingly, the Commission appears to have narrowed down the scope of its [original investigation](#) which also concerned Honeywell’s allegedly deceptive conduct during the evaluation of R-1234yf between 2007 and 2009, which resulted in that refrigerant being the only one selected in accordance with the requirements of the MAP Directive.

The selection of R-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. When the Commission launched the investigation in 2011, it had originally stated that in the context of the standardization process, Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed. Subsequently, the Commission alleged that Honeywell failed

to grant licenses on fair, reasonable and non-discriminatory (so called “FRAND”) terms, allegedly in breach of Article 102 TFEU. The preliminary investigation appears to have addressed that concern.

Antitrust

European Union

EU Parliament passes resolution calling on the Commission to unbundle [Google's] search engines from other commercial services

By Gabriele Accardo

On 27 November 2014 the European Parliament has passed a [non-binding resolution](#), which called on the Commission to “*properly enforce the EU competition rules in order to prevent excessive market concentration and abuse of dominant position and to monitor competition with regard to bundled content and services*”.

In fact, the resolution approved by the Parliament is more explicit than that, as it actually called on the Commission to consider proposals aimed at unbundling search engines from other commercial services as one potential long-term means of achieving the aforementioned aims. In short, the Parliament would not mind if the Commission were to break up Google.

The premise is that, according to the Parliament, online search market is of particular importance in ensuring competitive conditions within the digital

single market, given the potential development of search engines as gatekeepers and the possibility that they have of commercializing secondary exploitation of information obtained.

The resolution further stresses that, when using search engines, the search process and results should be unbiased in order to keep internet searches non-discriminatory, to ensure more competition and choice for users and consumers and to maintain the diversity of sources of information. Accordingly, that indexation, evaluation, presentation and ranking by search engines must be unbiased and transparent, and that, for interlinked services, search engines must guarantee full transparency when showing search results.

The Parliament further calls on the Commission to prevent any abuse in the marketing of interlinked services by search engine operators.

This resolution comes just a couple of weeks after newly appointed Competition Commissioner Margrethe Vestager actually addressed the European Parliament with a [statement](#) on the Google antitrust investigations.

In fact, last 11 November, Commissioner Vestager, stated that these investigations focused on questions about access to markets that are of vital interest to many players, big and small alike, and that have a significant impact on consumers.

Yet, she duly noted also that the Commission has to be sure to have all the

facts up to date to get it right, because “we are talking about fast moving markets”, whereas the issues at stake have a big potential impact on many players, and are multifaceted and complex.

Vestager recalled that the sheer amount of data controlled by Google gives rise to a series of societal challenges, but not all of these challenges are primarily economic in nature and not all of them are competition related, and therefore cannot be addressed in the investigations into the company’s alleged anticompetitive practices.

Antitrust

European Union

Advocate General hands down opinion on Huawei's alleged SEP abuse

By Gabriele Accardo

On 20 November 2014 Advocate General Wathelet delivered a much-awaited opinion in the case concerning a [reference for a preliminary](#) ruling by the Landgericht Düsseldorf (“Düsseldorf Regional Court”) in the context of the dispute between Huawei and ZTE on 4G/Long-Term-Evolution (“LTE”) technologies (see [Newsletter 2/2013](#), p. 9, for additional background).

The issues at stake in the main case concerned the conditions of the compulsory license defense in standard-essential patents (“SEPs”) disputes, or, 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 considered that a preliminary ruling was 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 case

brought by the European Commission against Samsung (The case was recently closed with a commitment decision. See [Newsletter 2/2014](#), p. 14 and [Newsletter 6/2012](#), p. 11 for more background).

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 **i)** it has made an unconditional offer to license under terms that cannot be rejected by the patent holder without abusing its dominant position, and **ii)** it actually acted as if it had entered into a valid patent license (thus in very broad terms, when a user pays or deposits a reasonable license fee).

On the other hand in the Samsung case the Commission basically held that for such a defense to be successful it suffices that the defendant is “willing to negotiate” a license on FRAND terms.

Incidentally, it is recalled that the Commission recently found that Motorola Mobility’s seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone SEP constituted an abuse of a dominant position in breach of Article 102 TFEU (see [Newsletter 2/2014](#), p. 12 and [Newsletter 2/2013](#), p. 14 for more background). In particular, the Commission held that seeking of injunctions may be abusive when two conditions are met: **i)** a SEP holder has given a commitment to license on FRAND terms during standard-setting, and **ii)** the potential licensee is *willing to* enter into a licence on FRAND terms, i.e.

the potential licensee has agreed to a determination of FRAND terms by a court or arbitrators and also agreed to be bound by such a determination in case of dispute.

Accordingly, the CJEU has been asked by the German Supreme Court to clarify five questions as to whether, and in what circumstances, a SEP holder abuses its dominant position by requesting 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.

In his Opinion, Advocate General Wathelet first points out that the fact that a company owns an SEP does not necessarily mean that it holds a dominant position and that it is for the national court to determine, on a case-by-case basis, whether that is the case.

That said, Advocate General Wathelet opined that it constitutes an abuse of a dominant position for a SEP holder to request corrective measures or to seek an injunction against a company that has infringed the SEP (“the infringer”) where it is shown that the SEP holder has not honored its commitment even though the offending company has shown itself to be objectively ready, willing and able to enter into such a licensing agreement.

In particular, the SEP-holder must, given the importance of what is at stake, take certain specific steps before bringing an action for a prohibitory injunction in order to honor its commitment and discharge its special responsibility under Article 102

TFEU:

First, unless it has been established that the alleged infringer is fully aware of the infringement, the SEP holder must, before making a request for corrective measures or seeking an injunction, alert the infringer to the infringement at issue in writing, giving reasons, and specifying the SEP concerned and the way in which it has been infringed by that company.

Secondly, the SEP holder must, in any event, present the alleged infringer with a written offer of a license on FRAND terms and that offer must contain all the terms normally included in a license in the sector in question, including the precise amount of the royalty and the way in which that amount is calculated.

What are the obligations of the infringer?

The infringer must respond to that offer in a diligent and serious manner. If it does not accept the SEP holder’s offer, it must promptly present the latter with a reasonable counter-offer, in writing, in relation to the clauses with which it disagrees. An application for corrective measures or for an injunction does not constitute an abuse of a dominant position if the conduct of the infringer is purely tactical and/or dilatory and/or not serious.

According to Advocate General Wathelet, the timeframe for the exchange of offers and counter-offers and the duration of the negotiations must be assessed in the light of the “commercial window of opportunity” available to the SEP-holder for securing a return on its patent in the sector in

question.

Yet, if negotiations are not commenced or are unsuccessful, the conduct of the alleged infringer cannot be regarded as dilatory or as not serious if it requests that FRAND terms be fixed either by a court or by an arbitration tribunal. In that event, it is legitimate for the SEP holder to ask the infringer to either provide a bank guarantee for the payment of royalties or deposit a provisional sum with the court or arbitration tribunal in respect of its past and future use of the patent.

The same would apply if, during negotiations, the alleged infringer reserves the right, after entering into an agreement for such a license, to challenge before a court or arbitration tribunal the validity, use and essential nature of that patent. Such a possibility is, according to Advocate General, in the public interest because the wrongful issue of a patent may constitute an obstacle to the legitimate pursuit of an economic activity. Moreover, if undertakings supplying standard-compliant products and services cannot call into question the validity of a patent declared to be essential to that standard, it could prove effectively impossible to verify the validity of that patent because other undertakings would have no interest in bringing proceedings in that regard.

Advocate General Wathelet further considered that in taking legal action to secure the rendering of accounts in order to determine what use the infringer has made of the teaching of an SEP with a view to obtaining a FRAND royalty under that patent, the SEP holder does not abuse

a dominant position.

Similarly, in bringing a claim for damages in respect of past use of the patent, for the sole purpose of obtaining compensation for previous infringements of its patent, the SEP holder does not abuse a dominant position.

Intellectual property

United States

Rockstar and Google and its Android partners are apparently close to a settlement

By Nicole Daniel

In November 2014 Rockstar and Google have reached an agreement in principle in order to settle all patent litigation claims between them over the operating system Android. They also appear to move towards a settlement of Rockstar's other patent claims against the makers of smartphones and tablets which are Android-powered.

Rockstar is a joint-venture of Apple, Microsoft, Blackberry and other mobile companies via the purchase of patents owned by Nortel Networks, which went bankrupt, for \$4.5 billion in 2011. These companies outbid Google for these patents.

In [October 2013](#) Rockstar sued Google and a few Android device makers such as Samsung, LG, Asus and others in the Eastern District of Texas. In turn Google [filed](#) a suit in the Northern District of California and asked for a ruling holding that Google does not infringe Rockstar's patents. In April 2014 Rockstar's motion to

transfer the latter suit from California to Texas was denied. In July 2014 the defendants' request to transfer the Texas case to California was also denied.

In October 2014 however the Federal Circuit ordered a stay of the Texas litigation which means that the patent litigation will be decided in California.

On [4 November 2014](#) Rockstar and Google told US District Judge Claudia Wilken in Oakland that their mediation session with a retired chief judge of the Eastern District of Texas on 20 October 2014 had failed.

However, it appears that settlement talks moved on quickly after that mediation session since in a [filing](#) in November 2014 for a 45-day-stay, Rockstar and Google wrote that on 12 November 2014 a binding term sheet was executed settling the matters of controversy between the parties. The terms of this pending settlement were not disclosed. Whether the settlement would apply to Google's partners too who were also sued by Rockstar was also not disclosed. Nevertheless a second filing with the US Court of Appeals for the Federal Circuit indicated that a settlement between Rockstar and the other Android device makers was also close.

It remains to be seen whether settlements between all parties to the patent suits will be finally agreed upon in the next few weeks.

Intellectual Property

European Union

EU Court: Embedding copyrighted videos that are freely available online does not constitute a copyright infringement

By Gabriel M. Lentner

On 21 October 2014 the Court of Justice of the European Union (“CJEU”) issued in an accelerated procedure (pursuant to Article 99 of the Court’s Rules of Procedure) an order in the case of *BestWater International GmbH v Michael Mebes and Stefan Potsch* ([Case C-348/13](#)). The accelerated procedure was possible since the CJEU considered that the question at issue as already been resolved from existing case law, notably *Svensson* (C-466/12). Nevertheless, the German Bundesgerichtshof requested a preliminary ruling asking the Court whether the embedding, within one’s own website, of another person’s work made available to the public on a third-party website constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain

aspects of copyright and related rights in the information society (“[Directive 2001/29/EC](#)”).

Facts of the Case

The case at hand relates to a dispute between the water filtering company ‘BestWater International’ and two independent commercial agents working for a competitor. A short commercial video produced by BestWater was uploaded on YouTube (presumably) without the company’s consent. The two agents embedded this YouTube video on their website. BestWater claimed that by doing so the two agents had infringed its copyright.

The Findings of the Court

In mere 8 paragraphs the CJEU held that making available to the public another person’s work by means of embedding a YouTube video on a third-party website does not by itself constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29 insofar as the work concerned is neither directed at a new public nor communicated by using different technical means than in the initial communication. In other words, embedding videos, which are freely available on online platforms such as YouTube into one’s own website does not constitute a copyright infringement. Thus, the court’s finding clarifies that the embedding does not by itself constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29 since in such cases, the work concerned is neither directed at a new public nor communicated by using

specific technical means that differ from that used for the initial communication.

Conclusion

This decision is consistent with the CJEU's previous ruling in *Svensson* ([C-466/12](#)) in which it upheld the lawfulness of providing clickable links to works freely available on another website. Hence, cases where the work is communicated by the same technical means and not communicated to a new public (i.e. all Internet users could have free access to it) do not constitute an act of communication to the public as referred to in Article 3(1) of Directive 2001/29. This presupposes that the initial communication to the public (uploading on YouTube) was authorized by the rightholder. If the work concerned however is in fact directed at a new public e.g. works behind a paywall, for subscribers only, in login areas or has applied to it other technological measures designed to prevent or restrict acts not authorized by the rightholder, copyright rules would be infringed.

Intellectual Property

European Union

The Juncker Commission's plans for EU copyright

By Mark Owen

With a new EU Commission taking up the reins in early November 2014 and copyright reform at the top of its agenda, 2015 is set to be a year of impressive noise and heat around EU copyright. How much light - and real reform - is generated, remains to be seen.

The three men now leading copyright reform are Andrus Ansip (Vice President for the Digital Single Market), Guenther Oettinger (Commissioner for digital economy and society) and of course President Juncker. Their stated primary goal is the completion of an EU digital single market, with a vision of EUR 250 billion of additional growth by 2020, hundreds of thousands of new jobs for the young, and "a vibrant knowledge-based society".

The timetable is ambitious, Juncker claims he expects significant progress towards modernising copyright (not to mention reforming telecoms laws, making online consumer regulation simpler and agreeing the controversial Data Protection Regulation) within six months.

But what does this really mean, and do the plans indicate a real break with the previous Commission and in particular the views of Neelie Kroes? The outgoing Commission had only just finished working on a still unpublished (but heavily leaked) draft copyright White Paper. Has that been discarded, or is the new plan really the old plan in new clothes? The early signs are mixed. On the one hand the new Commission talks about greater rights and compensation for copyright owners. On the other it intends to facilitate the pan-EU licensing of rights, a particular bugbear of digital services.

But there seem to be several guiding principles:

- responding to the needs of consumers. (For example: "They should be offered access to services, music, movies and sports events on their electronic devices wherever they are in Europe and regardless of borders");
- fair remuneration for creators;
- being pluralistic, respectful of fundamental values such as freedom of speech and "taking full account of Europe's rich cultural diversity"; and
- promoting creative industries in Europe so they can "reach out to new audiences, adapt to the digital era and thrive in the connected Digital Single Market".

So far so good and there is something for everyone, but such aims could be attributed to any attempt at reforming copyright over the last decade. Recent pronouncements suggest that some more

radical moves are planned.

Harmonisation: Mr Oettinger recently stated that he intends to harmonise copyright legislation within the EU. He did not provide much detail of what he had in mind other than that it should extend both to the term and the scope of copyright.

Geo-blocking and pan EU licensing: Mr Ansip has described geo-blocking as being against the core principles of Europe's single market and that enabling consumers to have easier access to content across borders is a key priority. To assist with this, Mr. Oettinger intends to promote a one-stop shopping system so collecting societies can grant licences for the entire European market.

Levies: Perhaps more unexpectedly, Mr. Oettinger has stated that he is planning to introduce a new copyright levy relating to use on the web, something likely to be highly controversial. His plans seem to be based on concepts of mandatory levies recently discussed in the German news publishing industry. The copyright levy system was invented in the 1960s in Germany in order to compensate authors for damage and losses caused by a market failure due to the actual and legal impossibility of controlling private copying. The absence of any such market failure has been one of the economic arguments raised in the debate around creating a neighbouring right in Germany.

National silos and greater harmonisation: A recurring theme is the concept of national copyright silos, and their incompatibility with borderless digital

technologies. It is true that copyright law is only partially harmonised across the EU. Important differences exist between which works are protectible and what may be done with the without the copyright owner's permission. But greater harmonisation is not an easy goal. It would inevitably necessitate a fundamental review of the balance between rights-owners and users, which may lead to changes which may have a profound and possibly existential effect on some current digital business models. The last time this was attempted, with the introduction of the Information Society Directive in 2001, the effort took nearly a decade from start to finish and was at the time the most heavily ever lobbied piece of EU legislation.

The plan is ambitious and the clock is ticking.

Intellectual Property

European Union

Polo Ralph Lauren Successfully Opposes Bicycle Polo Mark in EU General Court

By Marie-Andrée Weiss

The General Court of the European Union (the General Court) ruled in favor of U.S. company Polo Ralph Lauren which opposed the registration of a mark it found similar to its figurative mark representing a player on a horse holding a mallet. The case is [The Polo/Lauren Company LP v. Office for Harmonisation in the Internal Market, T-265/13](#).

British company FreshSide Ltd., which operates under the name Chunk Clothing, sells clothes and accessories to bicycle polo aficionados. It filed an application for a Community figurative mark, representing a player on a bicycle holding a mallet, with the Office for Harmonisation in the Internal Market (OHIM), in class 18 for travel bags and umbrellas, class 25 for clothing, footwear and headgear, and class 28 for gymnastic and sporting articles. Chunk Clothing's goods prominently carry this figurative mark, which was published on February 15, 2010.

Polo/Lauren (the Applicant) filed a notice of

opposition on April 28, 2010, based on its two senior Community figurative marks representing a polo player on a horse holding a mallet, in classes 9, 18, 20, 21, 24 and 25. The Applicant's marks are also affixed on apparel and accessories.

OHIM Opposition Division rejected the opposition in its entirety on October 28, 2011. The Applicant then filed a notice of appeal with OHIM which was dismissed on March 1, 2013. The Second Board of Appeal of OHIM found there could be no likelihood of confusion as the marks were dissimilar overall. The Applicant brought its claim to the General Court, claiming violation of Article 8(1)(b) and Article (8)(5) of the Community Trademark Regulation (CTR).

On September 18, 2014, the General Court ruled in favor of Applicant and annulled the decision of the Second Board of Appeal, finding the two marks to be similar.

No Likelihood of Confusion as the Marks are Visually Similar

Article 8(b) of the CTR gives the owner of a senior trademark the right to oppose a junior trademark if it is identical or similar to the senior trademark and there is thus a likelihood of confusion between the two marks. The Board of Appeal carried out a global assessment of the likelihood of confusion between the marks, focusing on the differences between the representation of the bicycle and of the horse. For the Board of Appeal, the fact that the player in the junior mark was riding a bicycle whereas the player in the senior mark was riding a horse was a difference "*clearly and*

immediately noticeable” that would “*remain in the relevant public’s memory*” (paragraph 24). It found the two marks dissimilar overall.

The General Court noted that, for the Board of Appeal, “*the graphic representation of a bicycle in a mark... constituted, at last, a dominant element of that mark. There is, however, nothing to support such a conclusion.*” The General Court explained that “*the average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details*” (paragraph 22), and that, according to EU case law, “*two marks are similar where, from the point of view of the relevant public, they are at least partially identical as regards one or more relevant aspects, namely the visual, phonetic and conceptual aspects*” (paragraph 23).

The General Court then examined other elements of the marks. A mallet is raised by the rider in both the junior and the senior mark and is thus a “*clearly visible,*” not “*negligible*” element, even though the bicycle is “*an appreciable difference.*” The General Court also noted that both players were represented “*at quite similar angles*” (paragraph 25 and 26). For all these reasons, the marks were not visually dissimilar.

No Likelihood of Confusion as the Marks are Not Conceptually Different

As explained by the General Court, “*conceptual differences may, to a large degree, counteract phonetic and visual similarities between the marks at issue, provided that at least one of those marks*

has, from the point of view of the relevant public, a clear and specific meaning, so that the public is capable of grasping it immediately” (paragraph 30). However, neither OHIM nor FreshSide Ltd, which intervened before the General Court, could convince the General Court that bicycle polo is a sport known by the public.

FreshSide argued that bicycle polo is “*an emergent urban sport, which is played on tennis courts or in school playgrounds. That sport is therefore different visually and conceptually from the traditional sport of polo*” (paragraph 18). But for the General Court, “*no evidence has been put out... to suggest that bicycle polo is a sport of a game that is sufficiently known to the relevant public*” (paragraph 30). As bicycle polo is not generally known, seeing a player with a mallet on a bicycle would not have the clear and specific meaning of “bicycle polo” for the relevant public. The marks were found to be not conceptually different by the General Court.

Is the Junior Mark a Parody?

Article 8(5) of the CTR provides a cause of action to the owner of the senior mark against a junior mark owner, if the registration of the junior mark “*would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trademark.*” For OHIM, if the marks are not similar under Article (1) (b), then there is no similarity under Article 8(5) either, a view shared by the intervener.

The applicant argued that the Board of Appeal should have found the marks to be similar and also argued that FreshSide’s

mark was a parody. The intervener denied this. But the General Court was not convinced and it annulled the Board of Appeals' decision which had rejected the Article 8(5)-based opposition solely because it found the two marks to be dissimilar. The General Court upheld Applicant's arguments, including the parody claim.

This is an interesting case, because it is the Applicant which claimed the junior mark to be a parody as a defense. Conversely, the Intervener claimed its mark was a mark representing an average bicycle polo player. It provides on its website "[The History of the Bicycle Polo](#)" which explains that it was first conceived in 1891, that it is a "*direct descendant*" of the traditional polo game, and that it was presented in the 1908 Olympics games as an exhibition sport.

However, it is the similarity between the two marks which convinced the General Court, not the similarity between the two sports, but it is surprising that the General Court did not at least dismiss the parody argument. As such, it signals that it is not likely to entertain parody defenses in future trademark infringement and opposition cases.

Intellectual Property

European Union

UK Court orders 6 main UK ISPs to take down infringing websites based on trademark infringement

By Béatrice Martinet Farano

On 17 October 2014, the UK High Court issued a landmark [decision](#), ordering the 6 main UK ISPs (including Sky, British Telecom and Virgin Media) to block a series of websites which were apparently dedicated to the advertising and sale of products infringing the Richemont group's (including Cartier's) trademark rights.

While there have been a number of decisions in Europe issuing blocking orders against copyright infringing websites (see e.g. Newzbin and The Pirate Bay, [Newsletter No 2/2012 p. 9-10](#) and FirstRow, [Newsletter No 5-6 2013, p. 26](#)), blocking orders based on trademark infringement remain extremely rare.

In this decision, the Court held that the threshold conditions to issue a blocking order under article 11 of the Enforcement Directive were met, and specifically that:

1. The 6 ISPs were *intermediaries* whose

services were being used to infringe IP rights (thereby adopting a broad definition of “intermediaries”);

2. Richemont's trademarks rights had been infringed by the targeted website, stressing among other facts that the currency (English pound available), language (English), and shipment availability in England, all pointed to the occurrence of a trademark infringement in the UK

3. That the operator of the target website had *used the ISPs services to infringe*; and

4. The ISPs had *knowledge* of such infringement (through cease and desist letters from the rights holders and through the application for the injunction).

The Court then balanced the opportunity of such order against the principles of necessity, effectiveness, dissuasiveness, cost effectiveness, obligation to avoid barriers to legitimate trade, fairness and equity, as well as the principle of proportionality (as discussed in [L'Oreal v. eBay, see Newsletter 4-5 2011 p. 7-8](#)) to conclude, in a lengthy analysis, that none of these principles raised a substantial bar to the principle of issuing blocking orders against websites dedicated to infringement.

While the decision did not discuss either the potential liability of these ISPs for trademark infringement (the decision makes clear from the first paragraph that “*for the avoidance of doubt, there is no suggestion that the ISPs have infringed the trademark or are liable for infringement by the operators of the target website*”), nor their obligations to take down content upon

receipt of a notice and take down identifying an infringing website or content, this confirmation from a European court that blocking orders are now available to trademarks holders may have a decisive impact.

Intellectual Property

European Union

The Orphan Works EU Directive is Being Slowly Implemented

By Marie-Andrée Weiss

Orphan works are works protected by copyright which right holders cannot be identified or located. This prevents interested parties from seeking permission to use them, but if the orphan work is nevertheless used, there is a risk that the copyright owner will eventually become aware of the unauthorized use and come forward to sue the infringer.

There are many “orphans,” as, unlike trademark and patent protection, copyright protection is provided automatically without registration or formalities. Therefore, many authors may be “mothers” or “fathers” of a work without even remembering they created and published it. Some may even have died without their heirs knowing about the work. As the length of copyright protection in the U.S. and in the European Union (EU) is usually seventy years after the death of the author, with some exceptions granting even longer protection, an orphan work may be protected for a long time before entering the public domain. Also, as its author is not known, it even makes it impossible to calculate when it will enter the public domain.

The EU Orphan Works Directive

While the EU has addressed the issue of orphan works in a Directive which is slowly being implemented by Member States, the U.S. Copyright Act still does not address it, even though there have been several attempts at legislating them, such as H.R.5439, the Orphan Works Act of 2006, which would have provided a limitation on remedies in copyright infringement cases involving orphan works.

The Directive 2012/28/EU of the European Parliament and of the Council of October 25, 2012 on certain permitted uses of orphan works (the Directive) addresses the issue of orphan works which have been first published or broadcast in a Member State and which are “*contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions*” (Article 1.2(a)). The Directive aims at allowing these institutions to build online libraries, which, in turn, “*open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analog search method*” (Recital 1).

Pursuant to Article 3 of the Directive, after these cultural institutions have conducted a “*diligent search*,” orphan works can be recorded in an [online database created and administered by the Office for Harmonization in the Internal Market](#) (OHIM) and may then be reproduced by these institutions. However, Article 5 of the Directive gives right holders the possibility of putting an end to the orphan work status

anytime.

Implementation of the Directive by Member States

While the Directive had to be implemented by the Member States before October 29, 2014, only a few of the Member States have implemented it so far.

Italy barely beat the deadline by implementing it on October 10, 2014 by legislative decree.¹ It is a particularly interesting law as its article 69-quater details how a “*diligent search*” must be conducted by using the various resources enunciated by article 69-septies. It makes it mandatory to first search for all the works in the General Public Registry of Protected Works at the Ministry of culture and tourism, then to search the numerous databases enumerated further in the article. So the legislative decree provides much-needed guidelines while setting the bar high for a particular search to be indeed “*diligent*.”

Ireland implemented the Directive on October 29, 2014 by enacting the [\(Certain Permitted Uses of Orphan Works\) Regulations 2014](#), but the law does not provide nearly as much information on how to conduct a “*diligent search*” as does the Italian law.

Fleur Pellerin, the French Ministry of culture, presented on October 22, 2014 a bill which would implement the Directive. The French Representatives voted in favor of the bill on November 20 and it will now

¹ [Decreto Legislativo, Nov. 10, 2014, no. 163 Attuazione della direttiva europea 2012/28/UE su taluni utilizzi consentiti di opere orfane.](#) (14G00179) (GU Serie Generale n.261 del 10-11-2014).

be debated in the Senate on December 18, 2014. An Amendment to the bill, presented by Representative Isabelle Attard, which would have provided a positive definition of the public domain, was rejected. It read that “*creations belong in principle to the public domain, with the exception of a work of the mind [which is,] under this code, an original creation bearing the imprint of the personality of its author and which has been fixed in a support. A creation that does not meet these criteria belongs to the public domain.*” The amendment would also have immediately placed works created by public servants in the public domain, as it is the case in the U.S.

Licensing Scheme

The United Kingdom (UK) took a slightly different route, as it opened a licensing scheme database for orphan works on October 29, 2014, the last day to implement the EU Directive. It is managed by the Intellectual Property Office (IPO) and only applies for works in the UK. It lasts for seven years, but can be renewed. It is the applicant who must conduct the diligent search of the right holder, following [guidance](#) provided by the UK government.

The licensing scheme and the Directive are, however, “*complementary but separate*.”² Indeed, licensing orphan works is different than providing an exception to copyright infringement, as does the Directive because providing a licensing scheme allows everyone, not only public libraries or museums, to use the orphan works. One can regret that the Directive does not address the issue of the use of orphan works by individuals wishing to

² [Press release: UK opens access to 91 million orphan works.](#)

either reproduce or use them to create a new transformative work.

The route taken by the United Kingdom is original. In the U.S., the Copyright Office published a [Report on Orphan Works](#) in January 2006 which rejected the idea of creating compulsory license managed by the government. Instead, it recommended that the issue of orphan works be addressed by an amendment to the Copyright Act's remedies section, and recommended language for this purpose.

There is no orphan works bill introduced in U.S. Congress as of now. Meanwhile, the EU Member States continue to slowly implement the Directive.

Intellectual Property

European Union

French Court holds ISP liable for not promptly taking down infringing content

By Béatrice Martinet Farano

In a [decision](#) of 2 December 2014, the Paris court of appeal confirmed a judgment issued a couple of years ago (see Newsletter No 4-5/2012 p. 14-15) by the Paris trial Court holding video-platform Dailymotion, (“The French Youtube”) liable for failing short of its obligation as a hosting provider.

In this case, TF1 and other French TV broadcasters brought a copyright infringement action against Dailymotion after they found some of their videos posted on Dailymotion without their authorization.

While the appellate court rejected the claimants’ first contention that Dailymotion was liable as the “publisher” of their videos because they had allegedly played an “active role” in the selection and highlighting of such videos (see [Google France, Newsletter No 2-2010 p. 7](#) and [L’Oreal v. eBay, Newsletter 4-5 2011 p. 7-8](#) for further discussions on the “active role” criteria), the court however affirmed the trial court's decision that Dailymotion was

nevertheless liable as an intermediary for not taking down promptly enough infringing content and for not having taken any measures against repeat infringers.

To reach this conclusion, the court examined closely the number of days elapsed between the reception of each take down notices and the effective date each notified content was effectively taken down, holding that a failure to take down infringing content for a time period as short as four days was a breach to the hosting provider's obligation to take down content promptly.

To assess the damages suffered by TF1, the Court took into consideration the money invested by the TV broadcaster in each of these programs to assess the damage at \$2000 by videos. The court then listed a total of 166 links that had not been taken within a period of 4 days to two months from the right holder’s notification to get to a total damage of 1.3 million euros to be paid by Dailymotion to TF1. This very substantial indemnification for a mere delay in taking down infringing content will remind intermediaries of the importance of taking down content promptly upon the reception of compliant take down notice.

Intellectual Property

European Union

French Court issues blocking orders against The Pirate Bay

By Béatrice Martinet Farano

On 4 December 2014, The Paris High Court issued, at the request of a French right management company called the SCPP, a [blocking order](#) against The Pirate Bay, ordering the four main French Internet Service Providers (ISPs), including Bouygues, Free, Orange and SFR, to block access to this website and all its mirror sites and proxies to any of their customers

To answer Free's objections that these measures may be circumvented, the Court observed that while such risk could not be excluded, such measures appeared to be the most efficient way to thwart infringement. However, the Court held that the ISPs remained free to use whatever measures they deemed fit to block this website and expressly stated that the costs of these measures should be borne by the claimant(s), rather than the ISPs.

Such measures, requested directly against ISPs and intermediaries giving or facilitating access to infringing content - rather than against content providers - are more and more popular in Europe, as it

appears to be an efficient and relatively cost-effective way to cut off any infringing activity at its source.

Because the main party involved in the diffusion of the infringing content (here The Pirate Bay) is often not represented in these actions though, it raises some serious issues about the protection of free speech. Similar blocking orders were recently issued against The Pirate Bay in the UK, Ireland, Italy, Belgium, Denmark and Finland.

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