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Transatlantic Antitrust and IPR Developments

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Gabriele Accardo is a lawyer and scholar who, after nearly twelve years of professional and academic experience, has developed a strong expertise in competition law and other complex areas of law that deal with business and innovation. In the early stages of his career he spent ten years in Brussels (until 2011), where he practiced EU and competition law at two leading international firms, Lovells and WilmerHale. Currently, he practices law in Rome, Italy. In 2009, his passion for research on international technology laws brought him to start collaborating as a Research Fellow at the TTLF. He recently co-founded Innoventually, a start-up that acts as the one-stop-shop for assisting public and private entities and individuals in the creation, management, protection, promotion, development and monetization of innovative solutions. Gabriele is a non-governmental advisor to the Italian Competition Authority in the ICN (Merger working group), and Director for Italy of the European Mediterranean Competition Forum.

Mark Owen is a partner with Taylor Wessing LP in London. He has been an IP litigator and transactional lawyer for some 25 years. He has a particular focus on digital rights, use of data and e-commerce. Mark is an English solicitor and a member of the California Bar. Before joining Taylor Wessing he worked with Clifford Chance, with Brown & Bain in Palo Alto and with Harbottle & Lewis. Mark is a member of the International Trade Mark Association and its internet sub-committee, the Society for Computers and Law, the Law Society’s IP Committee and is on the editorial broad of E-Commerce Law Reports. He speaks and writes widely, and teaches IP rights to students on the University of Oxford IP Diploma and to digital media students at Ravensbourne College in London's East End.

Nicole Daniel is an associate with DLA Piper Weiss Tessbach Attorneys at Law, Vienna, where she joined the Litigation & Regulatory Department in 2010. In 2015 she completed her Ph.D. with distinction at the University of Vienna School of Law. She wrote her doctoral thesis on the treatment of regulated networks in EU and U.S. antitrust law. Nicole earned her LL.B. degree from King’s College London in Law and German Law in 2009. As part of her bachelor's degree, she spent an Erasmus year abroad at Humboldt University in Berlin in 2007-2008. Nicole also enrolled a number of antitrust related courses as part of her LL.M. degree in Competition Law at King's College London in 2010. In 2008, she obtained a Mediator Certificate on Alternative Dispute Resolution at the International Summer School organized by Tulane Law School, New Orleans, and Humboldt University, Berlin. Her previous work experience included internships in a bank and several law firms in Vienna, Berlin and London. Nicole became a TTLF Fellow in October 2012.

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Antitrust

United States

U.S. FTC reaches consent agreement over alleged online collusion

By Gabriele Accardo

On December 16, 2015 the U.S. Federal Trade Commission approved a final order settling charges that Step N Grip, LLC, a company that sells rug accessories designed to keep rugs from curling at the corners, illegally invited its closest competitor to collude on prices of products sold on Amazon.com where both companies sell most of their respective inventory, according to the FTC.

Step N Grip generally sold one of its rug accessories on Amazon.com for $13.95 per package, whereas its closest competitor sold its competing product on Amazon.com for $16.99 per package.

The FTC's complaint alleges that in June 2015 Step N Grip and its closest competitor reduced prices to compete with each other and gain sales. After a week of rivalry where Step N Grip's competitor would lower its price on Amazon.com in order to compete more aggressively with Step N Grip, Step N Grip sent an email message to its closest competitor that read: "We both sell at $12.95? Or, $11.95?"

After that communication, Step N Grip raised the price of its rug device to $12.95. However, Step N Grip's competitor reported the communication received from Step N Grip to the FTC.

According to the FTC, Step N Grip's invitation to collude was an unfair method of competition that violated Section 5 of the Federal Trade Commission Act.

Under the settlement agreement, Step N Grip is required to stop communicating with its competitors about prices. It is also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices; and from urging any competitor to raise, fix, or maintain its price or rate levels or limit or reduce service. The order is in effect for 20 years.

This is yet another case where U.S. antitrust authorities tackle an alleged antitrust violation in the online environment, showing features of traditional violations, such as direct contacts between competitors. Online marketplaces such as Amazon.com and eBay are very powerful sales channels, which allow small sellers to reach a large number of potential customers.

An inherent feature of such online platforms, and generally of the Internet, is that they enhance market transparency, allowing customers to easily compare prices and pick the product of their choosing at the best price. Sellers too have the possibility to monitor more easily what their competitors do, even with the use of customized software. Last 6 April 2015, the U.S. Department of Justice's Antitrust Division announced the first criminal prosecution against an online conspiracy, in which certain companies selling posters on the Amazon Marketplace adopted specific pricing algorithms with the goal of coordinating changes to their respective prices and wrote a computer code that instructed algorithm-based software to set prices in line with the agreement (see Newsletter 2/2015 for additional background, as well as the following article "U.S. DOJ announces second criminal prosecution into online price fixing").

Antitrust

United States

U.S. DOJ announces second criminal prosecution into online price fixing

By Gabriele Accardo

On December 4, 2015, the U.S. Department of Justice's Antitrust Division announced (see also the FBI statement) the second criminal prosecution against a conspiracy targeting e-commerce.

Last April 6, 2015, the U.S. Department of Justice's Antitrust Division announced the first criminal prosecution against certain companies selling posters on the Amazon Marketplace that coordinated changes to their respective prices via specific pricing algorithms and a computer code that instructed algorithm-based software to set prices in line with the agreement (see Newsletter 2/2015 for additional background).

Details arising from the new indictment show how seriously the U.S. DOJ will pursue such violations. The DOJ's announcement comes after U.K. law enforcement and the US's FBI successfully conducted searches at the headquarters of a Trod Ltd (doing business as Buy 4 Less, Buy For Less, and BuyForLessOnline), a U.K. company headquartered in Birmingham, England, and the residence of Daniel William Aston, the indicted executive, in West Midlands, U.K.

While the felony charges in this case are similar to those raised in April 2015, i.e. price fixing of certain posters sold online through Amazon Marketplace (see Newsletter 2/2015), the DOJ is now going after companies and their executives outside the US. Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division stated "U.S. consumers deserve competitive markets when they shop online…. It doesn't matter whether pricefixers operate from an office in California or a warehouse in England. We will continue to prosecute conspiracies that subvert online competition".

According to the charge, Mr. Aston and his coconspirators discussed the prices of certain posters sold in the United States through Amazon Marketplace and agreed to adopt specific pricing algorithms for the sale of certain posters, with the goal of offering online shoppers the same price for the same product and coordinating changes to their respective prices.

Price fixing in violation of Section 1 of the Sherman Act carries a maximum sentence of 10 years and a fine of $1 million for individuals.

Antitrust

United States

U.S. FTC urges the Appeals Court to revive the Loestrin Suit

By Nicole Daniel

On December 7, 2015, during oral argument, the U.S. FTC urged the Court of Appeals for the First Circuit to revive the *Loestrin* suit.

The case concerns a so-called reverse payment settlement. In 2009 Watson Pharmaceuticals agreed drop a challenge to a patent serving to protect Loestrin, which is a contraceptive pill, as long as it could market its own version six months before expiration of the patent. Warner Chilcott in turn agreed not to market its generic version of the drug for six months. Both companies are now owned by Actavis.

A number of drug buyers sued and argued that these companies essentially had agreed to divide up the market for Loestrin at the expense of the consumer. In September 2014 a district court judge threw out these suits, holding that a reverse payment not made in cash or in a very close analogue is not illegal.

Reverse payment settlements in the pharmaceutical sector have long been targeted by the FTC and others involved, e.g. drug buyers. In 2013 the Supreme Court made an important decision in the *FTC v. Actavis* case in this regard, holding that reverse payment deals can be challenged under antitrust laws. However, there is still debate on how to interpret "pay". Accordingly, an ultimate decision in the *Loestrin* suit could help determine what counts as "pay" and set limits on what pharmaceutical companies can do to settle with their rivals that challenge their patents.

At the oral arguments a lawyer for the FTC said that the district court in this case elevated form over economic substance, and argued that a reverse payment need not be in cash.

The three judges on the panel seemed to be critical of the district court's decision. Judge Juan R. Torruella said that in the dictionary the word payment is defined as the delivery of money or something equivalent. He also questioned the difference between a settlement including cash and a settlement including something other than cash.

Judge O. Rogeriee Thompson said that payment is "*nothing but consideration*". Judge Sandra Lynch noted that the amount of profit for the generic company seemed "*awfully large*".

A lawyer for Actavis argued that the court should not adopt a broad definition of payment, since payments should be quantifiable.

A decision from the Court of Appeals is expected next year.

Antitrust
United States

U.S. DOJ does not challenge Expedia's acquisition of Orbitz

By Gabriele Accardo

On September 16, 2015, following a six-month investigation, the U.S. Department of Justice antitrust division concluded that Expedia's acquisition of Orbitz is not likely to substantially lessen competition or harm U.S. consumers. The DOJ was not concerned that that the transaction would lead to a duopoly in the market for online travel booking, the other main operator being Priceline.

First, the DOJ found no evidence the merger is likely to result in new charges being imposed directly on consumers for using Expedia or Orbitz.

Second, since Orbitz is only a small source of bookings for most of airlines, car rental companies and hotels, the DOJ considered that Orbitz actually has had no impact in recent years on the commissions Expedia charges. Many independent hotel operators, for example, do not contract with Orbitz, and those hotels that do often obtain very few bookings from its site. In addition, beyond Expedia and Orbitz, the DOJ noted that travel service providers have alternative ways to attract customers and obtain bookings, including Expedia's largest online travel agent rival, Priceline.

Finally, according to the DOJ, evidence suggests that the online travel business is rapidly evolving. In the past 18 months, for example, the industry has seen the introduction of TripAdvisor's Instant Booking service and Google's Hotel and Flight Finder with related booking functionality.

Online travel agencies have been under scrutiny by several competition authorities in Europe with regards to clauses in the contracts with hotels that obliged hotels to offer certain online travel agencies the same or better room prices and conditions as the hotels made available on all online and offline distribution channels (so-called "Most Favored Nation" or "MFN" clauses) (see, Newsletter 2/2015, p. 14 Newsletter 1/2015, p. 17 Newsletter 3/2014, p.12 Newsletter 1/2014, p.15, Newsletter 5-6/2013, p.9 and 11, Newsletter No. 4-5/2012, p. 15, for additional background).

Antitrust

European Union

Paris Court of Appeal overturns Google abuse of dominance ruling

By Gabriele Accardo

On November 25, 2015, the Paris Court of Appeal (PCA) reversed the December 2012 ruling of the Commercial Tribunal of Paris (CTP) , which found that Google (specifically Google France and Google Inc.) abused its dominant position in the French market for "online mapping allowing for the geolocalisation of sales points on company websites," in breach of Article L.420-2 of the French Commercial Code, and ordered Google to pay damages, amounting to Euro 500,000, to its French competitor Evermaps (formerly Bottin Cartographes).

The CTP essentially held that Google abused its dominant position insofar as it offered its geographic search engine "Google Maps" for free with the goal to exclude competition from the market and, ultimately, to further exploit its dominant position in the commercialization of targeted advertising (see Newsletter 2/2012, p. 8 for additional background).

Evermaps damage claim chiefly concerned Google's predatory pricing of its mapping service Google Maps API, which allows companies to embed maps on their website (companies can either choose an upgraded paid version or a free version of Google Maps). Evermaps claimed that the offering of free services by Google constituted a form of predatory pricing.

However, the PCA actually followed the opinion of the French Competition Authority handed down in December 2014. The French Competition Authority was of the view that Google did not pursue a predatory or exclusionary strategy by offering a free version of Google Maps API.

In particular, the PCA found that Google's pricing policy could not be considered as predatory, after taking into account the results of twenty tests on pricing. The Court held that although Google offered some of its mapping products for free, income from other sources, such as advertising should also be taken into account to determine whether its pricing conduct can be deemed predatory. Accordingly, eighteen out of twenty of the costs tests carried out indicated that the revenue Google generated from its online mapping services were above long-run average incremental costs and thus fully covered costs, including those generated by the free version.

The two tests that "failed" to meet that standard actually showed that although revenue generated by its online mapping tools were below long-run average incremental costs, they were nonetheless above average avoidable costs.

In addition, the PCA found that Google did not have the intention of forcing competitors out of the market, since for operators that are active on multisided markets “…It may be rational to offer products or services for free on a market not to oust competitors but to increase the number of users on another market” whereas “the free business model is quite widespread on electronic markets”, as the French Competition Authority had noted in its opinion.

The PCA also held that, in any case, Google did not have the ability to keep competitors out of the market given the presence of strong competition, as well as the possibility that other strong competitors, such as Amazon or Apple may enter the market.

Antitrust

European Union

Dawn Raids in the EU: Inspections take a new spin

By Nikolaos Theodorakis

The European Commission recently issued an explanatory note on inspections pursuant to Article 20(4) of Council Regulation No 1/2003.[1] This marks the most updated version of the previous note, published in 2013. The note provides that data from, *inter alia*, private smartphones, external hard drives and cloud-computing services can be seized during an unannounced investigation.

The revised guidance relates to the conduct of inspections at business premises, also known as dawn raids. It is a codification of how the Commission plans to treat certain data found during an inspection. The note allows the search of private devices and cloud services, apart from office computers and company servers, and describes the process of handling and reviewing the data collected.

The note further widens the options of data storage and introduces the concept of technical entirety, which means that a sequence of data can be collected (e.g. an entire e-mail thread). Finally, the note allows the inspectors to gather personal data included in business documents. It is the first time that the Commission has included private data as part of its raid procedure.

What Does the Note Include?

First, the note reiterates that inspectors may search the IT-environment, including servers, desktop computers, laptops, tablets and other mobile devices of the undertaking. Inspectors are also entitled to search all storage media, including CD-ROMs, DVDs, USB-keys, external hard disks, backup tapes and cloud services. This power now extends to private devices and media used for professional reasons when found on the premises (para. 10).

The note also includes a more detailed explanation on how the regulator may handle data copied from servers (para. 14). The data can be collected to continue the inspection at a later time, secured in a sealed envelope. Previously, two options were available: opening the envelope with the undertaking present at the Commission's premises, or returning the envelope as is. Now, the Commission can also ask the undertaking to store the data in a safe place so that the Commission can continue to search the premises in a future announced visit.

The note also introduces the term "technical entirety" (para. 16), which in practice means that the inspectors may retrieve the entire sequence of an e-mail, attachment, and/or embedded data items.

[1] The explanatory note can be found here: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf

For instance, even if only one e-mail attachment is selected in the investigation, the data exported will comprise the cover email and all the attachments included in that thread. Subsequently, the Commission can choose to isolate any individual component, list it individually, and assign individual reference numbers.

Lastly, the note suggests that inspectors can gather personal data found in business documents. This includes information that would otherwise classify as private, like staff names, telephone numbers and e-mail addresses. Such data can, therefore, become part of the Commission file (para. 20). The guidance however clarifies that this is aligned with the EU Data Protection rules (Regulation No. 45/2001) and that EU antitrust rules apply only to undertakings. Hence, personal data of individuals do not constitute *per se* an antitrust investigation target.

What Does this Mean in Practice?

The updated note means that companies have an insight on how the Commission will treat data searches from on. The inclusion of data found in private devices is a significant leap from the previous note, which expands an investigation's scope. Further, companies are notified of the additional option to securely store the data in their own premises prior to the continuation of the investigation, and must familiarize themselves with the concept of technical entirety and the possibility of personal data being included in the Commission file.

Even though the note is not legally binding, failure to comply with the above may result to heavy fines. Besides, the Commission has already stressed the importance of compliance in the previous note and has levied fines for non-compliance. Companies should consider training their staff in accordance to the abovementioned changes and to update their own dawn raid manuals and checklists to reflect the updated note. Finally, one should not forget the broad powers that the Commission has when investigating, including the power of inspection under Article 20(4) of Regulation 1/2003. Any data collection and handling must, however, comply with Regulation 45/2001 that pertains to data protection rules.

Beyond the assertions of the revised note, the compatibility of such wide-ranging powers with data protection rules and the procedural guarantees enjoyed by investigated companies remains to be confirmed. The most recent case law illustrates that undertakings concerned by an inspection do enjoy certain safeguards.[2] In fact, the search and seizure of electronic data may be in breach of Article 8 of the European Convention on Human Rights ("ECHR") if certain standards are not met. For instance, the collection of data that is unrelated to the investigation, or covered by legal professional privilege, may be disproportionate to the purposes of the investigation, and therefore illegitimate.[3] Given the sensitivity of personal devices

[2] *Deutsche Bahn and Others v Commission*, cited above.
[3] See *Vinci Construction and GMT genie civil and services v France* App no 63629/10 abd 60567/10 (ECtHR, 02 April 2015)

and personal data, it is possible that this novel issue will be litigated before EU Courts in the near future. Additionally, member-state specific legislation provides safeguards that would likely not allow the seizure and search of a personal device. It is thus expected that further litigation will occur on a domestic level.

Antitrust

European Union

Germany's Federal Cartel Authority imposes further fines in mattress case

By Gabriele Accardo

On October 22, Germany's Federal Cartel Authority ("FCA") fined mattress producer Tempur Deutschland GmbH, Steinhagen, 15.5 million euros for imposing resale price maintenance on retailers selling its products, in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The alleged anticompetitive conduct took place between August 2005 and July 2011.

According to the FCA, due to the price transparency in the online channel, Tempur agreed with (or rather "forced") the company's retailers that they should offer various mattresses both online and in their brick-and-mortar stores only at the sales prices recommended by Tempur.

If prices of products sold online by retailers were below 5% the price recommended by Tempur and retailers did not subsequently alter their sales prices or repeatedly undercut the minimum sales prices set, they would experience delays in supply or even a discontinuation of supply. Tempur would also withdraw the retailer's right to use the Tempur brand name for online search advertising on Google.

This is the third case concerning resale price maintenance issues in the mattress market (see Newsletter 1/2015, p. 20 for further background). However, the FCA stated that the investigations did not reveal any indication of anticompetitive horizontal agreements between mattress manufacturers. In August 2014 and February 2015 fines were also imposed on Recticel Schlafkomfort GmbH and Metzeler Schaum GmbH on account of resale price maintenance. After evaluating the evidence the Bundeskartellamt terminated the proceedings against two other manufacturers, two purchasing cooperatives and one online retailer for discretionary reasons.

Antitrust

European Union

Apple and Amazon.com face antitrust probe into audiobooks in Germany

By Nicole Daniel

In Germany the Bundeskartellamt has opened an investigation into Apple and Amazon.com's long-term agreement on audiobook distribution as it might impede competition.

In Germany, Audible - an Amazon subsidiary - is the leading supplier of audiobook downloads and one of the largest audiobook producers in Europe and Germany. Through its iTunes store Apple operates one of the largest digital media trading platforms, which includes audiobooks for download.

Through Audible, Amazon sells books in Apple's iTunes store, and the agreement at issue which has lasted several years, gives these companies a strong position in the German audiobook market, suggesting a need for closer scrutiny.

The investigation was triggered by a complaint from the German Publishers and Booksellers Association. This association had previously complained, *inter alia*, about the exclusive distribution terms between Audible.com and the iTunes store.

In its November 16, 2015 statement, the German Bundeskartellamt said that audiobook publishers need sufficient alternatives for selling their digital audiobooks.

The German Bundeskartellamt is in close contact with the European Commission, which also received the complaint.

Antitrust
European Union

National Competition Authorities take position on regulatory measures for online transport platforms

By Gabriele Accardo

In May 2015, the European Commission committed to assess the role of online transportation platforms, such as Uber, as it launched a public consultation to better understand the social and economic role of platforms, market trends, the dynamics of platform development and the various business models underpinning the platforms. According to the Commission, knowledge gained through this exercise will also contribute to various legislative initiatives—including online platforms regulation—which the Commission plans to launch to boost the Digital Single Market.

Currently there is a heated discussion as to whether online platforms should be subject to regulation at all.

While the European Commission may still take some time to elaborate on the contributions to the public consultation and eventually to state whether and to what extent some form of regulation may be warranted, recently, two national competition authorities, namely the UK Competition and Market Authority (CMA) and the Italian Competition Authority (ICA), made their view public.

The Position of the ICA

On September 29, 2015, the ICA issued an opinion on the legality of activities carried out by companies like Uber, which are carried out by either professional (e.g. *Uber Black*) or non-professional (e.g. *Uber Pop*) drivers through digital platforms accessible by tablets and smartphones.

The ICA first noted that it is not clear yet whether acting as an intermediary between the owner of a vehicle and a person who needs to make a trip by managing IT resources, is merely a transport service or, must be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of Directive 98/34/EC.

The ICA noted that the Court of Justice of the European Union shall rule on this specific issue, and that until then it cannot be ruled out that the activity falls within the second category (i.e. an electronic intermediary service), which is not regulated, and therefore totally legitimate.

That said the ICA made the following findings, taking into account the characteristics of the activities carried out by Uber.

First, the ICA recognized that even traditional taxi services are more and more adopting technologies similar to those embraced by Uber. Yet, the ICA stressed that services such as Uber ensure a greater ease of use of the mobility service, a better response to a public need for which there is no current offering, and the ensuing reduction of the costs for users of such services. Last but not least, to the extent that it discourages the use of private means of transportation, Uber-like services also contribute to the decongestion of urban traffic.

Second, with regards to the activity of *UberBlack* or *UberVan*, i.e. transport services carried out by professional drivers, the ICA considers the current regulation (Italian Law No. 21 of 1992 concerning the non-linear public transport of people) as restrictive of competition insofar as its provisions restrict the geographic scope of the activity of vehicles to the municipality that has granted them a license, and further require that after each trip, each car must return to the base.

Third, with regards to the services such as those provided by *UberPop*, consisting of acting as an intermediary between the owner (non-professional driver) of a vehicle and a person who needs to make a journey within a city, the ICA observed that the Court of Milan ordered the blocking of *UberPop* throughout the national territory allegedly because this services would breach the rules regulating the taxi industry and may be characterized as an act of unfair competition. In that respect, the Court held that *UberPop*'s activity cannot be carried out to the detriment of people's safety, in terms of cars used for the service, the suitability of drivers, as well as insurance coverage.

Yet, the ICA held that, even so, any form of regulation of such new services, if at all necessary, should be the least invasive as possible. In that respect, the ICA eventually singled out measures such as a registry for online platform providing such services and the provision of certain requirements for drivers.

The Position of the CMA

The position held by the UK Competition and Market Authority is even firmer than that of its Italian counterpart.

Preliminarily, while it recognized that "private hire vehicles" need the protection of appropriate regulation, the CMA considered that consumers also benefit from effective competition exerting downward pressure on prices and upward pressure on service quality and standards.

The CMA takes the view that innovative services (which include app-based booking systems) may drive efficiencies through which it is possible to offer benefits such as lower prices and greater responsiveness to demand. The introduction of new services also has an inherent benefit in the form of greater choice for consumers.

From a general stand point, the CMA thus considers that competition should only be compromised or restricted by regulatory rules to the extent that doing so is absolutely necessary for consumer protection. Above all, regulation should not favor certain groups or business models over others and any measures that restrict the choices available to consumers should be minimized.

The CMA focused on a number of regulatory proposals (made by the

Authority Transport for London or “TfL”) that might have the greatest impact on competition.

5-minute wait requirement. TfL proposes that operators must provide booking confirmation details to the passenger at least 5 minutes prior to the journey commencing.

According to CMA, this proposal reduces the competitiveness of alternative services than black cabs by artificially hampering the level of service that new services can provide.

Approval for changes to operating models. TfL proposes that operators will be required to seek TfL approval before changing their operating model. The CMA considers that *ex ante* regulation of business models is liable to reduce incentives for innovation (a key competitive parameter) and by extension to restrict competition.

Mandatory pre-booking facilities. In the CMA’s view, mandating ancillary functions (such as a facility to pre-book up to seven days in advance) can place undue burdens on some providers, leading to increased costs for private hire vehicles and thus distorting competition, as those unable or unwilling to provide these functions will be excluded from the market. The CMA notes that in instances where consumers find ancillary facilities useful, they are likely to be provided by a competitive market where different offerings proliferate.

***Fixed landline telephone requirement*. **Similarly, the CMA believes that TfL’s proposal whereby operators must have a fixed landline telephone number which must be available for passenger use at all times, could raise barriers to entry (entrants would have to provide both a number and staff to handle calls) as well as restricting innovation (including platform-based business models) and could therefore lead to reduced competition between private vehicle operators. Moreover, it is not clear that it is necessary to make this functionality mandatory, as consumers may not value having a landline number to contact to choose private hire vehicle operators that provide one.

***Requirement to specify the fare in advance*. **Another proposal that the CMA rejects is mandating operators to specify the fare for each journey prior to the commencement of that journey. According to the CMA, the supply of a precise and fixed fare at the time of booking would effectively prohibit innovative pricing models that could be more efficient than pre-calculated fares (e.g. by varying according to supply and demand). This would remove another parameter of competition among private hire vehicle operators.

Drivers to only work for one operator at a time. TfL further proposed a requirement that licensed private hire vehicle drivers can only work for one operator at a time, claiming that this is necessary to reduce the risk of drivers working excessive hours for a number of different operators.

The CMA notes that this proposal may not be suitable or necessary to meet the stated objective. First, TfL’s proposal seems to address only excessive hours among drivers working for multiple operators, and not the risk of excessive hours among drivers working for a single operator, or the danger of black cab drivers working excessive hours.

More interestingly, the CMA believes that ‘multi-homing’ (i.e. the ability of drivers to work for multiple platforms) can allow drivers to switch their supply to where it is needed in the market. Mandatory single-homing can create a strong network effect, as it gives drivers the incentive to only work for the platform with the most customers. The consequence could be fewer private hire vehicle operator platforms, or even a single dominant platform, with the potential for all the consumer harm that platform dominance might bring.

Intellectual property

United States

Samsung/Apple update: Samsung will pay $548 million in patent damages to Apple

By Nicole Daniel

On December 3, 2015 Samsung and Apple submitted a joint filing in which Samsung agreed to pay $548 million in patent damages to Apple to satisfy a partial judgment.

In August 2012, a jury had awarded $ 1.05 billion in damages to Apple; however this amount changed a number of times during the appeals process over the last three years.

In September 2015 District Judge Lucy Koh entered a partial final judgment of $548 million for Apple after Samsung's appeal of the damages award was denied by the Court of Appeals for the Federal Circuit. In that ruling the Federal Circuit vacated the trade dress damages.

The final amount of damages to be paid to Apple is not yet known as a second damages retrial is scheduled to start on March 28, 2016 before District Judge Lucy Koh in San Jose, California. In this retrial a jury will set the patent infringement damages for five smartphone models by Samsung which were found to infringe Apple's patents and trade dress.

The joint filing acknowledges that Samsung is now at a point where it has to pay as there is no other legal avenue left to go. This brings a close to over three years of appeals in the patent and antitrust proceedings between Samsung and Apple.

In their joint filing Samsung informed Apple that they are ready to make the payment 10 days after the receipt of Apple's original invoice.

Intellectual property

European Union

Developments in the Digital Single Market Strategy

By Mark Owen

The European Commission has announced the first major legislative developments in the DSM Strategy, aimed at modernizing and harmonizing EU copyright rules, as well as modernising digital contract rules to simplify and promote access to digital content and online sales across the EU.

The Commission has published:

1. A draft Regulation on ensuring the cross-border portability of online content services in the internal market;

2. A draft Directive on certain aspects concerning contracts for the online and other distance sales of goods; and

3. A draft Directive on certain aspects concerning contracts for the supply of digital content.

Additionally, the Commission has published an action plan for the coming year, which includes a review of the Satellite and Cable Directive and possible legislative proposals on EU exceptions, closing the so-called "value gap" and remedies available for copyright infringement.

Portability of Online Audiovisual Media Services

The proposal for a Regulation on ensuring cross-border portability of online content services in the EU aims to remove barriers to cross-border portability to more effectively meet the needs of travelling consumers whilst at the same time maintaining high levels of protection for rights holders. The proposal concerns various audiovisual media content services, including for films, sports, news and debates, but not other types of creative content services, such as music streaming services or e-books.

One of the key aims of the DSM strategy is to allow cross-border portability of online content services to which consumers currently have lawful access in their country of habitual residence, through on-going subscription, purchase or rental, and to which they want to have continued access when they are "temporarily present" in other EU Member States.

Under certain conditions, service providers will be obliged to enable cross-border portability but will not be required to obtain the relevant rights in each Member State in which the subscriber is temporarily present. This is achieved by stipulating that access to online content provided by the service provider when the subscriber is visiting another Member State will be deemed to occur in the Member State of the subscriber's habitual residence. Relevant service providers are those that are in a position to verify the Member State of residence of their subscribers, whether the subscribers pay the service provider for access to content or not, although it is presumed that service providers who charge their subscribers will always be in a position to verify this information.

The scope of the Regulation is limited to online audiovisual media services within the meaning of the Audiovisual Media Services (AVMS) Directive (*2010/13/EU*) or defined as "a service the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organizations, whether in a linear or an on-demand matter". The recent decision in *Media Online GmbH v Bundeskommunikationssenat*, in which the CJEU ruled that the concept of a programme within the AVMS Directive includes video under the sub-domain of a newspaper website, has the potential to broaden this definition considerably.

The Regulation will apply to pre-existing contracts and rights acquired before its date of application, but does not require re-negotiation of existing contracts between service providers and consumers. Instead, the Regulation will simply render unenforceable any contractual provisions which are contrary to the obligation to provide for cross-border portability. In order to allow sufficient time for rights holders and service providers to adapt to the new regime and, in the case of service of providers, to amend the terms of use of their service, the Regulation will not be applicable until 6 months following its publication in the Official Journal of the European Union, though it will come into force twenty days after publication.

The Regulation also expressly confirms that service providers will not be obliged to undertake any level of quality control on their services when accessed in other Member States, as the costs of this would be wholly disproportionate.

Directives on Harmonization of Aspects of Digital Content Supply and Online and Distance Sale of Goods to Consumers

The Commission has also published two draft Directives, the first on certain aspects concerning consumer contracts for the supply of digital content (Digital Content Directive) and the second on certain aspects concerning consumer contracts of the online and other distance sales of goods (Online Goods Directive). The Commission is concerned that a lack of harmonization (and in many cases, a lack of applicable legislation) creates lack of consumer trust and hampers cross-border sales.

The key proposals are:

Digital content

- supplier liability for defects – the consumer can request a remedy in relation to defective digital content. This will not be subject to a time limit as digital content is not subject to wear and tear;
- reversal of burden of proof – the consumer will not have to prove that a defect existed at the time of supply. It will be up to the supplier to prove that was not the case;
- termination rights – consumers will have the right to terminate long-term contracts and contracts to which the supplier makes major changes;
- data as consideration – personal data given in exchange for digital content, beyond what is necessary for performance of and to ensure conformity with the contract, is considered to be "counter-performance other than money" and treated in the same (or similar) way to financial consideration. In addition, where the consumer gives the supplier personal data in order to obtain digital content, the supplier must stop using the data when the contract is terminated.

Goods

- reversal of burden of proof – under current EU rules, for a certain period of time after supply, the consumer is not required to prove a defect was present on delivery; it is, instead, up to the supplier to prove it was not. This period of time will be harmonized to a standard two years;
- no duty to notify – the consumer will not lose the right to a remedy if they fail to report a defect within a certain period of time as is currently the case in a number of Member States;
- minor defects – if the seller is unable to repair or replace a defective product, consumers will have the right to terminate the contract and be reimbursed. This will apply in case of minor as well as major defects;
- second-hand goods – consumers will have rights in relation to second-hand goods purchased online for a period of two years rather than the current one-year period which applies in some Member States.

While the introduction of harmonized rules in these situations makes sense, these Directives are unlikely to be welcomed by the UK which recently introduced the Consumer Rights Act 2015 (CRA) to deal with rights and remedies in relation to the supply of goods, digital content and services. Some of the rules proposed by the Commission are broadly in line with the CRA, others are not.

In terms of the digital content Directive, even the definition of "digital content", which was taken from the Consumer

Rights Directive, is different to the one used in the CRA. The supply of non-essential personal data is treated in more or less the same way as financial consideration for digital content in the new draft Directive but not in the CRA which is particularly relevant as much of the CRA applies only to paid-for digital content. This, therefore, looks likely to extend the scope of the regime significantly in the UK and will affect a broad range of businesses (although there is a certain lack of clarity to the provisions).

There is a presumption that digital content is to be supplied immediately after conclusion of the contract, whereas under UK law (derived from the Consumer Rights Directive), the consumer must explicitly request immediate supply and acknowledge that they will lose their cooling off period as a result. While the two provisions are not mutually incompatible, they do appear to be pulling in different directions.

Crucially, the rules on burden of proof are different. Under the CRA, the digital content is only presumed not to have conformed to the contract on point of delivery, for a period of six months after supply. Under the draft Directive, this presumption applies permanently. There is also a statutory termination right which does not exist under the CRA. In addition, under UK law, remedies may only be claimed up to six years from supply. Under the draft Directive, there is no time limit.

The draft Online Goods Directive on the online and distance sale of goods is going to cause similar issues in the UK if adopted in its current form. While the remedies available are similar, there is no short-term right to reject as under the CRA. Instead, the consumer moves straight to repair or replacement and can only terminate if repair or replacement is unsuccessful. And again, the burden of proof rules are different.

Both these Directives require Member States to implement equivalent provisions of a standard which must be no higher and no lower than those in the Directives.

Of course, it is a long way from initial publication to enactment and these drafts may well change significantly. If they do not, UK consumer law, which has recently undergone major change, will have to change again.

Next Steps for Cross-border Distribution of AV Media Services and Closing the "Value Gap"

When announcing the proposal on portability, Günther H. Oettinger, EU Commissioner for Digital Economy and Society, described it as being the "appetizer", with the proposals to follow next year being "the main course". The remaining legislative proposals are expected to require intense deliberation in Council and in Parliament and with the disparity between the interests and arguments of the Member States and the creative sector, could take up to two years to finalize.

The Commission is currently considering legislative proposals for adoption in spring 2016 aimed at enhancing cross-border distribution of television and radio programmes online, possibly through a review of the Satellite and Cable Directive, and supporting negotiation of cross-border content access. There has been suggestion that this may prove necessary, at least in part, in order to effectively implement the Commission's broader portability proposals.

In order to provide enhanced access to knowledge, education and research, the Commission will consider legislative proposals on other EU exceptions to increase harmonization between and across the borders of Member States. For example, it will look at allowing public interest research organizations to carry out text and data mining of content, to which they have lawful access, for the purpose of scientific research and will clarify the "panorama exception" (i.e. permitting the use of works made to be permanently located in the public space) to take into account new dissemination channels.

The Commission will consider measures in respect of the sharing of the value created by new forms of online distribution of copyright-protected works, in particular, addressing the unintended "value gap", which, in the Commission's view, needs to be closed. The term "value gap" refers to the disparity between revenue generated by content sharing platforms and royalties paid to the owners of the copyright-protected works making up that content. Closing the "value gap" is intended to ensure fair remuneration for authors, thereby contributing to economic growth, competitiveness and the full development of the DSM. The idea is to achieve this by clarifying that those who distribute or intervene in distribution are active and responsible for obtaining licences, so are not neutral carriers who can benefit from the so-called "safe harbour".

The Commission will also consider a review of the definitions of the "communication to the public" and "making available" rights and will look at, for example, news aggregation services in this context.

The Long-Term Future of the DSM

By autumn 2016, the Commission will look at the rules for identifying infringers and remedies available for infringement, as well as carrying out a full consultation on online platforms, intended to cover the use and effectiveness of "notice and action" mechanisms.

Beyond that, the ultimate goal of the DSM Strategy is full harmonization of copyright in the EU, in the form of a single copyright code and a single copyright title. There are, of course, numerous hurdles to overcome before this vision can be realized and we expect many more facets of the DSM Strategy to be announced over the next year and beyond.

Intellectual property

European Union

European Court clarifies duration of effective patent protection for medicinal products

By Gabriel M. Lentner

In *Seattle Genetics Inc. v Österreichisches Patentamt* (Case C-471/14), the Court of Justice of the European Union (CJEU) clarified that the relevant date to be used by national patent offices when calculating the duration of a supplementary protection certificate (SPC) is the date when an applicant is notified of the decision granting a marketing authorization (MA).

Background

Under EU law, no medicinal product may be commercially exploited before the relevant authority has issued a marketing authorization (MA). In order to compensate for the period that elapses between the filing of a patent application and obtaining an MA, a supplementary protection certificate (SPC) extends the period of effective patent protection. An SPC thus aims to offset the loss of patent protection for medicinal products that occurs due to the compulsory testing and clinical trials required for obtaining an MA.

These issues are governed by Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products. Article 13(1) of the Regulation provides that "[t]he certificate shall take effect at the end of the lawful term of the basic patent for a period equal to the period which elapsed between the date on which the application for a basic patent was lodged and the date of the first authorization to place the product on the market in the Community reduced by a period of five years."

Accordingly, the Regulation provides for an overall maximum of 15 years of protection from the moment the MA is first granted to the medicinal product in question.

The clarification of the Court was necessary since the Regulation does not further specify the relevant date for the protection to be calculated.

Results

Aside from legal certainty, the ruling can be seen as a victory for the pharmaceutical industry in Europe. The few additional days of protection (the duration between the grant of an MA and notification of approval to the applicant) are of significant commercial value. Furthermore, the Court set an important precedent for similar issues regarding the calculation of the period of regulatory data protection for medicinal products and the period of orphan market exclusivity for orphan medicinal products.

Other developments

United States

Forty State AGs allowed to participate in Appeal hearing in the Google v AG Hood case

By Nicole Daniel

On November 11, 2015, a group of forty state attorneys general asked to participate in oral arguments on December 1, 2015 before the Court of Appeals for the Fifth Circuit, in the appeal of an injunction stemming from a case between Google and Mississippi AG Jim Hood. They were permitted to do so.

In October 2014 AG Hood's office issued a 79-page subpoena on Google asking for, *inter alia*, dozens of interviews and specific documents. This subpoena was part of an investigation into whether search and business practices by Google violate state law.

On December 19, 2014 Google filed a complaint against AG Hood alleging that he violated federal law and the U.S. Constitution through threats of criminal prosecution and civil litigation, as well as through an allegedly punitive subpoena.

On March 27, 2015 District Court Judge Henry Wingate blocked AG Hood's investigation; his preliminary injunction relived Google from having to answer AG Hood's investigative subpoena on whether Google profited from allegedly facilitating illegal online activity. The oral arguments relate to this injunction.

In their brief the State AGs claimed that they have a powerful interest in the case as it regards their own authority to investigate possible violations of state law. Further, AG Hood was even willing to share his time during the oral arguments with former U.S. Solicitor General Paul Clement, who represents the state AGs and wrote their brief. Google did not consent to that motion; however it was granted and the State AGs were able to participate.

Non-profit advocacy groups also submitted a separate amicus brief. The Court of Appeals has denied Google's motion to disqualify the Digital Citizens Alliance, one of the advocacy groups, from participating.

The Court of Appeals has not yet ruled on the appeal.