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Technology Law and Electronic Media Update

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U.S. Supreme Court Changes Course on Patents and Anti-Trust Law Regarding Tying Arrangements. March 10, 2006. The Court, in *Illinois Tool Works v. Independent Inks* limited anti-trust precedent and announced that possession of a patent does not confer a presumption of "market power." This means patent infringement defendants who seek to use either a "patent misuse" or an anti-trust counterclaim based on a patent holder's licensing practices will have to prove that the patent holder holds market power in the relevant market. This decision opens the door to licensing terms that heretofore have been considered verboten. Also interesting is the dicta questioning reliance on the presumption by the Court in *U.S. v. Loews*, which in 1962 held as per-se unlawful certain movie theater licensing practices used at the time.

Bill to Empower F.C.C. to Regulate Copyright Protection for Broadcast Digital Radio is Introduced in Congress. March 2, 2006. Representative Ferguson of N.J. submitted the bill, called the "*Audio Broadcast Flag Licensing Act of 2006*" (H. R. 4861). The bill includes both a mandate for a copy-control flag to be applied to Digital Radio and a provision that "the adoption of any digital audio regulations shall not be inconsistent with the customary use of broadcast content by consumers to the extent such use is consistent with the purposes of this act and other applicable law." Stay tuned.

AT&T Reported to Accuse Apple video i-POD and Other MPEG-4 Users of Patent Infringement. February, 2006. It is reported that AT&T has been circulating invitations to license to companies like Apple Computer, Sonic Solutions and others whose equipment displays MPEG-4 encoded content. AT&T is not a participant in the MPEG-4 standard, so it claims it is not subject to the "reasonable and non-discriminatory" licensing requirement for essential patents. Apparently, the patents subject to this warning do not include AT&T's AAC audio codec, which is used by a variety of music devices conforming to the MPEG-2 standard.

An Application for Federal Research Grant Funding Considered an "Offer for Sale" Invalidating a Patent under §102. February, 2006. In *L-3 Communications Security and Detection Systems Corporation v. American Science & Engineering* the Federal District Court in Massachusetts found that the offer to "develop" an invention set forth in a Federal grant application constituted an offer for sale when the applicant had already invented that which was later claimed in the patent application. Therefore, it may be prudent for applicants to file patent

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applications within a year of filing the grant applications to establish a filing date over whatever preliminary inventions have already been determined to be a workable prior to the grant application. Note that some grant applications have been held to be "publications" under §102.

U.S. Department of Justice and New York Attorney General Eliot Spitzer Open Investigation into "Most Favored Nation" Pricing Clauses in Music Label Download Licenses. March 2, 2006. It is reported that the U.S. D.O.J. is pursuing the question of whether the music labels are practicing collusion by means of 'MFN' clause in their licenses. Ironically, it is also reported that Apple i-Tunes has been resistant to music industry desires that variable pricing apply rather than a fixed 99-cent rate across the board.

Court Finds Google's Ad-Sense System a Sufficient Commercial Use to Defeat a Fair Use Defense. February, 2006. In *Perfect 10 v. Google* the Federal District Court, (C.D. Cal.) issued an order for a joint draft preliminary injunction which will prohibit Google from displaying thumbnail's of Perfect 10's nude pictures. The *Arriba v Kelly* case was distinguished on the basis that (i) low-resolution images are sold by Perfect 10 as cell-phone 'wallpaper' and (ii) that Google's AdSense program was a sufficient commercial use that the fair-use defense would not apply. There was no consideration of whether the combined display of the linked image with the Google website elements was the creation of an unauthorized derivative work.

Senator Wyden Introduces the "Internet Neutrality Bill" to Stop Tiered Internet Service. March 2. Senator Wyden, influential in technology matters before the U.S. Senate, introduced a bill that would prohibit broadband service providers from charging more for higher quality or higher speed connections. This issue has drawn more attention as a result of the *AT&T* merger with *BellSouth*, which would create the largest telecom company and whose management plans tiered Internet service. The introduction may have been in response to the reported success that AT&T and Verizon had getting such a provision deleted from upcoming legislation before the House of Representatives.

Free Software Foundation Includes Patent Retaliation Clause in New Draft of GPL Open Source Software License. March 10, 2006. The new version will include a patent retaliation clause and downstream limitations on use of digital rights management tools. This further raises the stakes for any commercial code development that relies on GPL code.

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