

Technology Law and Electronic Media Update

April 18, 2005

Extensive Revisions to U.S. Patent Statute Under Consideration by Congress. April 15, 2005. An extensive draft revision to the U.S. Patent Statute has been proposed in committee. The changes: eliminate the 1 year filing grace period after a third party publishes the invention; establish that obviousness is to be determined upon the filing date, not the invention date; add limiting conditions to a finding of willful infringement; limit how damages calculated as royalty are determined; require proof of irreparable harm and that cash damages would be insufficient prior to issuing a final injunction and establishes new post-patent grant opposition procedures that can be instituted within 9 months of the patent's issuance. The proposed legislation is drafted to be effective on patents whose priority date is one year after the effective date of the statutory amendment.

Congress Begins Legislative Process to Mandate Consumer Data Security. April 12, 2005. Responding to the increasingly common news about loss of sensitive consumer data by merchants, the U.S. Congress began hearings and legislation is being proposed to tighten security requirements on companies who collect sensitive consumer data. The Federal Trade Commission's testimony appears to support the notion that a broad-based statute governing the collection of consumer data may be required. Proposed requirements include a CFO's personal attestation that adequate data security precautions are in place.

U.S. Senate Judiciary Committee Appoints Intellectual Property Subcommittee, and Apple's Market Dominance is First on the Agenda, March 22, 2005. Sen. Orrin Hatch (R-Utah), who heads the panel, is generally viewed as friendly to copyright interests, especially the music industry. The subcommittee is responsible for copyright and patent legislation, overseeing the U.S. Copyright Office and the U.S. Patent and Trademark Office. This past week, the subcommittee held hearings on "*Digital Music Interoperability and Availability.*" Participants aired the notion of forcing Apple to openly license its Fairplay digital rights management solution, under the principle that it was unfair for Apple to garner its large market share for music downloads without opening its technology platform to competitors.

Mobile Device Digital Rights Management Patent License Fees Lowered. April 12, 2005. OMA, a patent pool that includes Intertrust, MPEG LA and ContentGuard, had initially proposed a fee of US \$1 per mobile device plus 1% of the revenue from every content delivery transaction. In the face of strong opposition from the industry to adoption of OMA, OMA has now

announced a new pricing scheme where the per-device fee is \$0.65 plus \$0.25 (pre-paid) per year for each subscriber that uses OMA DRM 1.0.

InterTrust Wins Patent Priority Dispute Against Macrovision Over Patent Rights in Digital Rights Management, April 15, 2005. It is reported that the U.S. Board of Patent Appeals and Interferences, which initially adjudicates disputes over priority in inventor ship, ruled in favor of Intertrust for several claims pending in a Macrovision patent application filed 12 days before Intertrust's. In the U.S., first to invent trumps the first filing, hence the need for patent interference proceedings. Macrovision is reported to be appealing the decision. Intertrust abandoned its DRM product offering and was acquired jointly by Sony and Philips for \$450 Million.

European Commission Continues Consideration of Software Patents after European Parliament Rejects it, March 2, 2005. The saga of software patents and European patent law continues. Despite organized opposition in Europe to software as patentable subject matter, which resulted in its rejection by the European Parliament in February, the European Commission rejected calls to stop consideration of such a measure. It is expected that the EC will propose an alternative rule.

European Court of Justice Narrowly Interprets EU's Exclusive Right in Databases, November 9, 2004. In the 'old news worth repeating department,' the European Court of Justice, in *British Horseracing Board v William Hill* affirmed the database owner's right to prohibit "extraction or re-utilization" of the data. But the court's interpretation of the directive apparently leaves out protection of the underlying data. The court limited protection to the collection, verification and presentation of a database where there was substantial investment in such packaging of the data, but not in the investment to collect or create the data.

7 Eleven Convenience Stores Announces Music Downloading for its Kiosk Business, March 23, 2005. 7 Eleven told investors that it will roll out music downloads for portable devices using its in-store kiosks. This project is an extension of its "VCOM" e-commerce kiosk system that is based on Mosaic Software's toolkit and outsourced to Hewlett-Packard. The announcement appears to bolster the view that there is renewed interest in media delivery kiosk projects occurring coincidentally as kiosk downloading patents begin to expire.

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