

## Technology Law and Electronic Media Update

December 9, 2004

**EU Postpones Decision on Software Patents in Europe. December 7, 2004.** It is reported that the European Commission is postponing its decision to approve patent protection for software in Europe. The move comes after a series of announcements over the summer indicating that there was political pressure from a variety of quarters not to permit software patents, many of which are associated with U.S. companies that have filed patents on their software internationally. The most notable opponent is open-source Linux pioneer Linus Torvalds with financial backing for the anti-patent contingent coming from the likes of U.S. company Red Hat, Inc.

Comment: This raises questions whether the EU can abide by its commitment under the international TRIPS agreement that "patents shall be available for any invention ... in all fields of technology." (Article 27, TRIPS).

**FCC Unanimously Rules that Voice over I.P. (VOIP) is an "interstate" service exempt from burdensome state regulatory requirements.** A leading provider of VOIP for consumers, Vonage, petitioned the F.C.C. to reach a determination in order to preempt a ruling in Minnesota that Vonage was subject to public service requirements for offering its service in Minnesota. The F.C.C. obliged, finding that, according to Commissioner Powell "the Commission is merely affirming the obvious" in finding that VOIP is "inherently and properly classified, [as] interstate service."

Comment: The battle is not over: state lawmakers are seeking to cut a deal in Congress that preserves tax revenues from in-state offerings of VOIP.

**9th Circuit Court of Appeals Finds Three Note Sample in a Hip-Hop Record "De Minimus" Copying of the Underlying Song.** In a case where the group Beastie Boys sampled four notes from a jazz record and then acquired a sample license for the sound recording but not the underlying work, the court found that the unlicensed use of the melodic fragment was not actionable because it was a de minimus use. The dissent noted that Beethoven's Fifth Symphony opens with four notes and is quite recognizable. *Newton v. Diamond et. al.* (9th Cir. November 2004)/

Comment: This is a bad result for songwriters because it further opens the door to sample clearance licensing as only a requirement for copyright in the sound recording, not the songwriters work.



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**Multi-Core CPU Chips Raise Enterprise Software Licensing Concerns.** In the wake of an announcement by Intel that it will roll-out "multi-core" processor chips, where performance is enhanced by including more than one central processing unit on a single chip that runs simultaneously, it is reported that Oracle indicated that its "per-CPU" pricing policy will apply to multi-core computers. In contrast, Microsoft said that their license will be applied on a per-chip basis.

Comment: License drafters should consider whether use metering should be changed to something like the number of independent running instances of the executable code that are resident in main memory or in the swap page referenced by system memory management.

**DVD Copy Control Association Sues DVD Jukebox Appliance Maker.** It is reported that the DVD CCA group, which licenses consumer electronic and P.C. manufacturers to decrypt the data read from a DVD disk, is suing Kaleidoscope, a licensee, who makes a device that is intended to house a consumer's entire DVD library by means of copying DVD data onto a large hard-drive within the device. Kaleidoscope publicly insists that its ongoing discussions with the DVD CCA were intended to ensure that their device was engineered to comply with the copy-control license.

Comment: This lawsuit will be closely watched by the P.C. industry, which, in their efforts to "enter the living room" would like to provide similar functionality.

**EPA Announces Research Grants into Safety of Nanoparticles.** The Environmental Protection Agency is spending \$4 Million to study the effect of nanoparticles, like carbon nanotube fibers, on human health. The results of this research and the quality of its methodology will likely have an effect on any downstream alleged product liability cases involving novel materials that are freely released into the environment in particle form.

**US Patent and Trademark Office Establishes a New Invention Class for Nanotechnology.** As a result of the flood of "nano" related patents, the patent office established a new class for categorizing the inventions and prior art. This class, "977", may portend a rapid increase in nanotechnology patenting, similar to that which occurred after a separate class was established for biotechnology.

***Wishing you and your families a happy holiday season and  
health and prosperity in the New Year !***

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