

LES SINGAPORE: NEWSLETTER APRIL 2008

PRESIDENT'S NOTE

Dear fellow LES members,

Welcome to another edition of our e-newsletter. If you are not aware, our last e-newsletter containing an article by our Vice-President Wilson Wong was placed on our [LES website](#).

Coming up soon is a not-to-be-missed LES seminar and networking session on **16 April 2008 4.30pm at the York Hotel, Top of the York**, featuring Guy Heathers from Australia. Guy is currently the Chief Business Officer of Cancer Therapeutics CRC Pty Ltd. He will be speaking on "*Cultural differences in biotech business development: What model works where and why*". He has extensive experience in USA and Asia-Pacific and will be sharing his views on the matter with us.

Guy Heathers is in Singapore this month as he is also speaking at the Biomedical Asia 2008 Conference, which LES Singapore is supporting. For those of you who are interested, do check this event out at the website www.biomedicalasia.com.

I have attached with this e-newsletter, Guy Heathers' impressive biography. The above event on 16 April 2008 is free for all members. Refreshments will also be served at the networking session that follows after Guy concludes his presentation. Non-members are certainly most welcome and will only need to pay a nominal fee at the desk. Alternatively, they may register for membership at the door. Please indicate your interest in attending the above event by way of e-mail to the LES secretary as soon as possible so that we can make the necessary arrangements.

Read on and you will have an idea as to what is going on in LES Asia-Pacific. This e-newsletter concludes with an article contributed by Kala Anandarajah of Rajah & Tann LLP, concerning a recent European Court ruling on Microsoft's business practices, which again makes for a thought-provoking read.

See you all on 16 April 2008 at the Top of the York!

Best regards,

Daniel Koh

GUY HEATHERS - BIOGRAPHY

Guy obtained his PhD in cardiovascular research from the University of Bath, UK and completed post-doctoral research at Washington University Medical School, St. Louis, USA. Guy moved into the commercial sector by joining Hoffmann-La Roche as a Senior Scientist in the cardiovascular drug discovery department in New Jersey, USA. After almost seven years and progression through drug discovery departments of Metabolic Diseases, Bronchopulmonary Research, and Inflammation & Autoimmune Diseases,

Guy moved into the business development arena with a move to Cancer Research Campaign Technology Ltd in London in 1995.

After being instrumental in the completion of a number of successful business development projects, including the licensing of the BRCA2 gene and the establishment of the biotech start-ups Cyclacel Ltd in 1996 and KuDOS Pharmaceuticals Ltd in 1997, Guy was promoted to Head of Business Development. Subsequently Guy successfully expanded the business of Cancer Research Campaign Technology Ltd (CRV), initially in the UK and latterly in Europe, by establishing the subsidiary company, Cancer Research Ventures Ltd in 1998. Transferring to CRV as Chief Operating Officer, Guy completed the establishment of two more biotech start-ups, Crusade Labs Ltd in 1999 and Qugen Therapeutics Pte Ltd in 2000.

In 2001, CRV joined forces with the National Cancer Centre of Singapore and Temasek Holdings Ltd of Singapore to form Biotech Research Ventures Pte Ltd (BRV) in order to bring biotechnology business development expertise and services to Singapore and the Asian region. In July 2001, Guy transferred from CRV to become BRV's Chief Executive Officer where he was instrumental in the establishment and development of three more companies, Agenica Research Pte Ltd, Systome Therapeutics Pte Ltd and pSiOncology Pte Ltd.

After a three-year stint at BRV, Guy moved to head Australian-based Gateway Capital Ltd, a biotechnology business development and investment company, as Chief Executive Officer. Gateway managed the business and corporate development of a number of early stage biotech companies in Australia with a view to listing these on the Australian Stock Exchange.

Guy then returned to Singapore to work with Asia BioBusiness, a consultancy group of biotech business development specialists and eventually with two major projects. One of which Guy was the 'Interim CEO' for a new Medtech company in Singapore, Amaranth Medical Pte Ltd. developing bioresorbable stents for use in peripheral vascular disease, and the other as Australasian Business Development representative for Cancer Research Technology Ltd. In his role as Acting CEO for Amaranth, Guy was instrumental in closing a Series A investment round of almost USD 10 million from Singapore's Bio One investment company and a leading Silicon Valley Venture Capital firm, Charter Life Sciences. In the latter role as a Business Development representative, Guy was part of the team that applied for and received a total investment of AUD 140 million over 7 years to establish and operate Australia's first translational drug discovery and development organization to produce pre-clinical drug candidates to treat cancer, Cancer Therapeutics CRC Pty Ltd.

Currently, Guy is the Chief Business Officer for Cancer Therapeutics, responsible for the licensing in of drug targets from academic research institutes in Australia and around the world and the licensing out of cancer drug candidates to major biotech and pharma companies worldwide.

ASIA PACIFIC ROUND-UP: MARCH 2008

By Shona Foster and Simon Rowell, LESANZ

Asia Pacific candidates compete for the role of WIPO DG

Fifteen candidates have been nominated to succeed Kamil Idris as Director-General for WIPO. They include Toufiq Ali, permanent representative of the Permanent Mission of Bangladesh in Geneva from Bangladesh; Francis Gurry, Deputy Director-General of WIPO, from Australia; Enrique Manalo from the Philippines; and Yoshiyuki Takagi from Japan. The WIPO Coordination Committee will make its nomination at the conclusion of its extraordinary general meeting on 13 and 14 May, and the successor will officially take over the role at the General Assembly in September.

Asian region shows continued growth in PCT filings

Statistics released by WIPO in February show that, for the fourth year running, the most notable growth in PCT filings comes from countries in North-East Asia. Japanese electronics manufacturer Matsushita topped the list of the biggest PCT filers, ousting Philips Electronics from first place.

Japan and China first and third in patent filings

WIPO's 2007 World Patent Report, which was published in August 2007 and provides figures from 2005, shows that Japan remains the country in which the most patent applications were filed. China leapt into 3rd place with growth of 32.9%.

Record industry wins copyright case against Yahoo!China

A Beijing appeal court recently upheld a decision against Yahoo! China in favour of the International Federation of the Phonographic Industry (IFPI). Yahoo! China had offered mp3 search services that allowed users to search for and download unlicensed music by a process known as "deep-linking". Yahoo! China was ordered to remove all links to unlicensed music, not just to those provided by the music companies. On the same day, the Court dismissed IFPI's appeal against a decision in favour of Baidu.com in relation to a similar matter.

Proposals to reform arbitration law in Hong Kong

The Hong Kong government has published a consultation paper proposing to reform arbitration law in the territory. The proposal is to adopt the UN's *Model Law on International Commercial Arbitration* as the basis for the new regime.

Copyright (Amendment) Ordinance 2007 of Hong Kong

The Copyright (Amendment) Ordinance 2007 came into effect in July 2007. Although the original Copyright Ordinance has been substantially amended, here's some of the more important changes that business end users might be interested to know about.

(a) Directors / Partners Liability

Not yet effective, but already included in the new legislation is the introduction of a new criminal offence for directors and partners of corporations and partnerships which have committed an infringing act (for instance, by using pirated software).

Those directors and partners "responsible for the internal management" of the body corporate or partnership will be presumed to have authorized the infringing acts and thus may be criminally liable for copyright infringement unless he can raise an issue by

providing evidence to the contrary. In this respect, the courts will consider all factors, in particular whether the relevant individual (i) has set aside funds and directed someone in his corporation /partnership to acquire licensed copies or (ii) incurred actual expenditures in acquiring a sufficient number of licensed copies.

Alternatively, the individual may show that he has introduced policies to guard against use of pirated works or taken action to prevent the use of infringing copies of copyright works by the corporation or partnership.

(b) Employee Defense

The good news for employees is that they will have a specific defense against criminal liability where they have been supplied with infringing copyright works for use during the course of their employment. However, those that can influence the acquisition of infringing works will not be able to reply on this defense, nor will employees who have the authority or influence to affect the use or removal of the infringing works.

(c) Parallel Importation

The restrictions on the importation of parallel-imported copies of copyright works by business end-users have been removed. However, such restrictions still apply where (i) the parallel-imported work is used for commercial dealing purposes or (ii) in the case of parallel-imported copies of movies, TV dramas, musical sound or visual recordings that are used for broadcasting in public.

Japan introduces new competition laws

In late 2007 the Japanese Fair Trade Commission introduced new IP guidelines which set out which types of licensing might fall foul of competition laws in Japan. Problematic activities include restrictions on research and development; grant-back requirements for exclusive licences; post-expiration limitations; acts to coerce a license on the basis of a platform technology; and discriminatory licensing.

Japan established new registration system for patent licences

In May 2007 the new system was established under the Act on Special Measures for Industrial Revitalization, but it will be enforced in the middle of 2008 after the details of the rules are provided.

Notable Asia Pacific Events (compiled from www.les-asiapacific.org)

17-19 April 2008	LESANZ Annual Conference, Melbourne Australia
2 – 4 May 2008	LESI International Delegates Meeting, Chicago, USA
4 – 7 May 2008	LESI Annual Conference, Chicago, USA
5 May 2008	<i>Asia Pacific Committee Meeting</i>
11:00am-12:00noon	
5 May 2008	<i>Asia Pacific Committee Workshop</i>
2:00 pm	<i>Topic: "A Comparative Study of Well-Known Trade Mark Protection in the Pan Asian Region – Part II"</i>
26-18 Sept 2008	LESI International Delegates Meeting, Amsterdam
28-30 Sept 2008	LES PAN European Conference, Amsterdam
7 – 9 June 2009	LESI Annual Conference, Makati, Philippines

LESSONS FROM THE MICROSOFT DECISION BY THE EUROPEAN COURT OF FIRST INSTANCE

By Kala Anandarajah

On 17 September 2007, the European Court Of First Instance ('CFI') upheld the European Commission's ('EC') decision in 2004 that had found Microsoft to have abused its dominance. The Court also confirmed the fine that had then been imposed on Microsoft, ie EUR 497 million.

As the provision prohibiting abuse of dominance in Europe and in Singapore are drafted in similar terms, the decision made by the CFI and the principles of law underlying the decision are of great interest in the Singapore context, as they could be applied in an analogous manner by the Competition Commission of Singapore ('CCS').

Prohibition of abuse of dominance in Europe very similar to Singapore's

In the European Union as in Singapore, the abuse of its dominant position by an undertaking is prohibited. The prohibition is contained in Article 82 of the EC Treaty, which reads as follows:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Section 47 of the Singapore Competition Act prohibits abuses of a dominant position in a very similar way, although the prohibition is not stated in exactly the same terms:

'1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —

- (a) predatory behaviour towards competitors;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section, “dominant position” means a dominant position within Singapore or elsewhere.’

The Microsoft case relates to two separate infringements of article 82, one being a violation of article 82(b), the second being a violation of article 82 in general¹. In Singapore, these violations would have fallen under Section 47(2)(b) specifically and 47(2) generally respectively.

Conduct found abusive?

Microsoft was charged with two separate abuses of dominance:

- (1) firstly, Microsoft was found to have abused its dominance by limiting technical development to the prejudice of consumers. This abuse was triggered by the refusal by Microsoft to supply its competitors with interoperability information and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft’s own products on the work group server operating systems market; and
- (2) secondly, Microsoft was found to have made ‘the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts’, ie to have imposed an anti-competitive tie on its customers. This tie was the conditioning of the availability of the Windows client PC operating system on the simultaneous acquisition of the Windows Media Player software, Microsoft

Refusal to supply by a dominant undertaking

Microsoft argued that their alleged their refusal to supply to competitors was on the basis of information protected by intellectual property rights. As such, it was not obliged to authorise its competitors to use this information.

In Singapore, the CCS Guideline on Section 47 Prohibition states that:

‘Undertakings generally have the freedom to decide whom they will deal, or not deal with. Therefore, a refusal to supply, even by a dominant undertaking, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant undertaking

¹ Note that whilst article 82(d) is often referred to as tying, abusive tying can take other forms than the one described at article 82(d). In the present case, the CFI found that the Commission was right not to rely on article 82(d) specifically but on article 82 in its entirety when looking at the tie put in place by Microsoft.

may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified.'

The scenario of where a refusal to supply involves intellectual property right is dealt with in the CCS Guideline on the Treatment of Intellectual Property Rights as follows:

'Ownership of an IPR does not normally impose on the IP owner an obligation to license the use of that IP to others, even where the IPR confers market power on the IP owner. Therefore, a refusal to supply a licence, even by a dominant undertaking, is not normally an abuse. However, in limited circumstances, a dominant undertaking's refusal to supply a licence may constitute an infringement under the section 47 prohibition. For example, this may occur if the refusal concerns an IPR which relates to an essential facility, with the effect of (likely) substantial harm to competition. The CCS may consider if the dominant undertaking is able to objectively justify its conduct, and whether the dominant undertaking has behaved in a proportionate way in defending its legitimate commercial interest'.

The same position applies in the EU. Whilst the rule is that undertakings are free to choose their business partners, in certain circumstances a refusal to supply by a dominant undertaking may constitute an abuse of dominance. This applies whether the refusal to supply involves products protected by intellectual property rights.

The specific circumstances mentioned above have been adopted in various EU cases. Hence, under EU case-law, a refusal by a dominant undertaking to supply a license may amount to an abuse of dominance where three conditions are satisfied:

- (i) the refusal relates to a product or a service indispensable to the exercise of a particular activity on a neighbouring market; and
- (ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market; and
- (iii) the refusal prevents the appearance of a new product for which there is potential consumer demand.

If these three circumstances are present, then, the refusal to supply may amount to an abuse of dominance, unless the refusal can be objectively justified.

In the present case, the CFI dismissed the appeal by Microsoft that the EC was wrong in finding that these three conditions were fulfilled on the following grounds:

- (i) indispensability of the interoperability information: 'Microsoft has not established that the Commission's findings that interoperability with the client's PC operating system is of significant competitive importance in the market for work group server operating systems is manifestly incorrect' nor that the Commission 'has made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an

equal footing with Windows work group server operating systems if they were to be marketed viably on the market’.

- (ii) exclusion of competition on neighbouring market: Microsoft's argument was that where intellectual property rights are involved, it has to be demonstrated that the refusal to license such right to a third party not only entails a risk of eliminating competition but rather that there is a high probability that the conduct in question will have such effect. The CFI rejected this argument, noting that ‘what matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition’. ‘In establishing the risk of the elimination of all effective competition, the Commission must base its assessment on accurate, reliable and coherent evidence’, which has been the case here.
- (iii) appearance of a new product: the CFI found that the refusal to supply interoperability information to its competitors prevented these latter from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture and that the limitation thus placed on consumer choice was damaging to consumers. Hence, Microsoft’s refusal limited technical development in the neighbouring market to the prejudice of consumers.

The three conditions being fulfilled, the CFI had then to contemplate whether any objective justifications could be offered by Microsoft for its refusal to supply the indispensable information. In the present case, the objective justification put forward by Microsoft was that the information at stake was covered by intellectual property rights.

The CFI found this argument inconsistent with the underlying reason to the exception to the right to refuse supply. The CFI said that ‘if the mere fact of holding intellectual property rights could in itself constitute an objective justification for the refusal to grant a licence, the exception established by the case-law could never apply’.

More importantly, the CFI also noted that the Commission did not simply reject Microsoft’s assertion that the fact that the technology concerned was covered by intellectual property rights justified its refusal to disclose the relevant information, but also examined Microsoft’s argument that if it were required to disclose the information, there would be a negative impact on its incentives to innovate.

This is also in line with the CCS Guideline on the Treatment of Intellectual Property Rights:

‘In determining whether a refusal to supply a licence constitutes an abuse under the section 47 prohibition, the impact on the technology and innovation markets will be considered. Care must be taken not to undermine the incentives for undertakings to make future investments and innovations.’

In this respect, the CFI held that Microsoft, that bore the initial burden of proof, had not established that if it were required to disclose the interoperability information that would have a negative impact on its incentives to innovate.

To conclude, the principles applied by the CFI to decide whether a refusal to supply a licence may amount to an abuse of dominance appear to be in line with the CCS Guidelines in relation to the prohibition of abuse of dominance on the one hand and in relation to the treatment of intellectual property rights on the other hand. Therefore, the reasoning followed by the CFI could possibly be applied as well by the CCS and the Microsoft case be a useful precedent to be relied upon.

Note that in February 2008, the EC imposed on Microsoft a penalty of €899 million for non-compliance with the 2004 decision which was upheld by the CFI. The EC found that the royalty rates requested by Microsoft both for a patent licence and for a licence giving access to the secret interoperability information were too high. According to the EC this high level of royalty rates amounted to Microsoft not disclosing 'complete and accurate interoperability information to developers of work group server operating systems on reasonable terms' as provided for in the EC 2004 decision.

Making the availability of the Windows PC operating system conditional on the simultaneous acquisition of Windows Media Player

The CFI found that the Commission's analysis of the constituent elements of bundling² was right, ie:

- (i) the tying and the the tied product are two separate products;
- (ii) the undertaking concerned is dominant in the market for the tying product;
- (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and
- (iv) the practice in question forecloses competition.

Two points in the decision by the CFI are of specific interest. They relate to points (ii) and (iii) above.

First, Microsoft contended that Windows Media Player could not be seen as a separate product from the Windows PC operating system but rather formed an integral part of the system. One of the (many) arguments put forward by Microsoft was that the unbundled version of Windows which it placed on the market following the EC decision in 2004 met with no success. Further, Microsoft put forward that the EC did not show proof that the media functionality was not linked, by its nature or according to commercial usage, to the client's PC operating systems.

This gave the CFI the opportunity to stress that it is by reference to a factual and technical situation that existed at the time when the conduct was found harmful that it

² Whilst tying and bundling usually refer to different practices, the CFI used both terms in an undifferentiated way in its decision.

must assess whether the EC was correct in its findings that the products were two separate products. It is interesting to note that the CFI nonetheless admitted that as the IT industry is in constant and rapid evolution, what could initially appear to be two separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of competition rules.

Finally, the CFI highlighted that 'it is settled case-law that even when tying of two products is consistent with commercial usage or where there is a natural link between the two products in question, it may nonetheless constitute abuse within the meaning of Article 82 EC, unless it is objectively justified'.

On this last point, it would be interesting to see whether the CCS will follow the same reasoning when applying Section 47(2)(d) in Singapore, or whether the mere fact for the dominant undertaking to demonstrate that the tying and the tied products are linked by nature or according to commercial usage will suffice to decide that there is no abuse of dominance.

The second interesting point in the decision lies in Microsoft's argument that there could not be an abusive tie, ie the making of the conclusion of contracts subject to acceptance by the other parties of supplementary obligations [...] as Microsoft did not require the customers to pay anything extra for the media functionality of Windows nor did it require the customer to use this functionality or prevent them from installing third-party media players.

These arguments were rejected by the CFI that stated that the fact that customers (OEMs rather than end-consumers in this case) were unable to acquire the Windows client PC operating system without simultaneously getting Windows Media Player (which price was included in the overall price) satisfied the condition that the conclusion of contracts was made subject to supplementary obligations. In fact, the CFI decided that the coercion was not only contractual but also technical, as it was not possible to uninstall Windows Media Player.

To conclude, the CFI decision clearly states that under article 82 EC, it is not required, to find an abusive bundling that:

- customers must pay a certain price for the tied product;
- customers must be forced to use the tied product or be prevented from using the same product supplied by a competitor;

Conclusion

The CFI decision on Microsoft is one that must be looked at when assessing conduct by dominant undertakings in Singapore. Although EU case law is unlikely to be used *mutatis mutandis* in Singapore, it is nevertheless an illustration of the interpretation that can be made of legal provisions which are similar to the provisions of the Competition Act in Singapore.