

US and German competition authorities obtain compulsory licenses on patents to "protect competition and innovation in the open source software community."

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CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns Justice Department and Germany's Federal Cartel Office Cooperate Closely on Patent Matter, Investigation Continues

WASHINGTON – The Department of Justice announced today that in order to proceed with the first phase of their acquisition of certain patents and patent applications from Novell Inc., CPTN Holdings LLC and its owners have altered their original agreements to address the department's antitrust concerns. The department said that, as originally proposed, the deal would jeopardize the ability of open source software, such as Linux, to continue to innovate and compete in the development and distribution of server, desktop, and mobile operating systems, middleware, and virtualization products. Although the department will allow the transaction to proceed, it will continue investigating the distribution of the Novell patents to the CPTN owners.

The department said that CPTN, a holding company owned in equal measure by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp., and its owners sought to acquire the patents in a two-stage transaction in conjunction with Novell's planned merger with Attachmate Corporation. In the first phase, CPTN would acquire the patents and applications. In the second phase, the patents would be allocated and distributed to each of the four owners. In light of the department's competition concerns, CPTN and its owners made revisions to their formation

agreements to acquire approximately 882 patents and patent applications from Novell. The department said that these changes were necessary to protect competition and innovation in the open source software community.

“The parties’ actions address the immediate competitive concerns resulting from the transfer of Novell’s patents. To promote innovation and competition, it is critical to balance antitrust enforcement with allowing appropriate patent transfers and exercise of patent rights,” said Sharis A. Pozen, Deputy Assistant Attorney General of the Justice Department’s Antitrust Division. “Although we recognize that the various changes to the agreement recently made by the parties are helpful, the department will continue to investigate the distribution of patents to ensure continued competition.”

In order to address competition concerns of the department, CPTN and its owners have revised their agreements to provide that:

- Microsoft will sell back to Attachmate all of the Novell patents that Microsoft would have otherwise acquired, but will continue to receive a license for the use of those patents, the patents acquired by the other three participants and any patents retained by Novell;
- EMC will not acquire 33 Novell patents and patent applications that have been identified as related to virtualization software;
- All of the Novell patents will be acquired subject to the GNU General Public License, Version 2, a widely adopted open-source license, and the Open Invention Network (OIN) License, a significant license for the Linux System;
- CPTN does not have the right to limit which of the patents, if any, are available under the OIN license; and
- Neither CPTN nor its owners will make any statement or take any action with the purpose of influencing or encouraging either Novell or Attachmate to modify which of the patents are available under the OIN license.

During the course of their investigations, the Department of Justice and Germany’s Federal Cartel Office (Das Bundeskartellamt) cooperated closely with each other, aided by waivers from the parties. This permitted the agencies to share information and assessments of likely competitive effects and coordinate on potential revisions to the parties’ agreements.

“The Department of Justice and the Federal Cartel Office worked together very closely throughout this investigation,” said Deputy Assistant Attorney General Pozen. “This was an excellent example of international cooperation between our two agencies.”

Novell Inc. is a Delaware corporation with its principal place of business in Waltham, Mass. Its 2010 revenues were approximately \$812 million. Attachmate Corp. is a privately held corporation based in Seattle. Its revenues are not public. CPTN Holdings LLC is a recently created consortium created by Microsoft, Oracle, Apple and EMC for the purpose of acquiring the Novell patents. It has no sales or revenues. Microsoft Inc. is a Washington corporation with its principal place of business in Redmond, Wash. Its 2010 revenues were approximately \$62.5 billion. Oracle Corp. is a Delaware corporation with its principal place of business in Redwood City, Calif. In fiscal year 2010, it had revenues of nearly \$27 billion. Apple Inc., a California corporation with its principal place of business in Cupertino, Calif., had 2010 revenues of more than \$65 billion. EMC Corp., a Massachusetts corporation with its principal place of business in Hopkinton, Mass., had 2010 revenues of approximately \$17 billion.

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