Intellectual Property News.

EU

A Bridge Too Far: defensive registration and a family of marks

Advocate General Sharpston delivered an opinion on 29 March 2007 covering issues relating to:

– "genuine use", in particular whether the concept of defensive registration entailing a lesser requirement of actual use has a place in Community trade mark law; and

– the criteria for assessing likelihood of confusion between marks that are part of a "family" of marks.

The case concerned a Community trade mark application for BAINBRIDGE for leather goods and clothing which was opposed by *Il Ponte Finanziaria,* a proprietor of several Italian trade marks which comprised or included the element BRIDGE for the identical categories. OHIM rejected the opposition essentially on the grounds that Ponte had produced insufficient evidence of use of certain of its trade marks, and there was insufficient similarity between the remaining national trade marks and the Community trade mark applied for to give rise to a likelihood of confusion. This rejection was upheld by the Court of First Instance.

Ponte submitted five grounds of appeal, all of which were rejected by the Advocate General.

The Advocate General noted that although "genuine use" involves more than mere token use, there can be no predetermined rule as to the extent of use required. The assessment is one of fact, to be carried out on a case-by-case basis. Moreover, "consistent presence" did not require uninterrupted use but rather that the trade mark be objectively present on the market in a manner that is effective, consistent over time, and stable in terms of configuration of the marks.

The Advocate General found that there is nothing in the Community Trade Mark Regulation, in particular Article 43(2) or (3), which explicitly or implicitly lays down any rule of defensive trade mark registration of the kind provided for in Italian law. She therefore upheld the view of the Court of First Instance

Contents

that the concept of defensive registration has no place in Community trade mark law.

The Advocate General also rejected Ponte's argument that the Court of First Instance should have accorded preponderant importance to aural similarity. She held that there must be a global assessment of the conceptual, visual and aural similarities.

Finally, Ponte had argued that the existence of a series or a family of registered marks should be taken into account as increasing the likelihood of confusion with a mark containing an element common to the or series, even where not all the series is yet or currently in active use. The Advocate General stated that only individual marks may be registered and therefore it is to the individual trade marks that protection is afforded. However, though a series cannot be registered as such, the existence of a family of similar trade marks may be relevant, if actual use can be established of a sufficient number of marks to be perceived by the average consumer as forming a series.

The European Court of Justice gave a preliminary ruling (19 April 2007) on the meaning of comparative advertising under Articles 2(2)(a) and 3a(1) of Directive 84/450/EEC, as amended

Champagne or beer?

The European Court of Justice gave a preliminary ruling (19 April 2007) on the meaning of comparative advertising under Articles 2(2)(a) and 3a(1) of Directive 84/450/EEC, as amended. The reference was made in the context of proceedings by *Comité Interprofessionnel du Vin de Champagne* (the "CIVC") and *Veuve Clicquot Ponsardin SA* against *De Landtsheer Emmanuel SA*. The case was about De Landtsheer's "Malheur Brut Réserve" beer, brewed using a process based on the traditional method for producing sparkling wine.

On launching the beer in 2001, De Landtsheer advertised the product with the expression "Champagnebier", and language including "BRUT RÉSERVE" appeared on the bottles and packaging. The CIVC and Veuve Clicquot brought an action against De Landtsheer claiming that such advertising was misleading and amounted to comparative advertising that was not permitted. This resulted in De Landtsheer withdrawing its use of the protected designation of origin "Champagne" in the expression "Champagnebier" but De Landtsheer appealed the decision from the Commercial Court of Nivelles (Belgium) in relation to all other aspects of the case.

Article 2(2)(a) and comparative advertising

Firstly, the ECJ decided that a literal interpretation of comparative advertising under Article 2(2)(a) would be inconsistent with the broad approach adopted in settled case law. Therefore Article 2(2)(a) is to be interpreted as meaning that a reference in an advertisement to a *type* of product and not to a *specific* competitor or product can be considered comparative advertising where it is possible to identify that competitor or the goods or services that it offers as being referred to by the advertisement. It is irrelevant whether or not multiple competitors are in fact identified.

Competitive relationship

Secondly, the ECJ considered the identification of a "competitor" of the advertiser, a key element of comparative advertising under Article 2(2)(a). Whether there is a competitive relationship between undertakings depends on the degree of substitutability of the goods or services being offered. Therefore the existence of a competitive relationship between the advertiser and the undertaking identified in the advertisement cannot be established independently of the goods or services offered by that undertaking. Further, when assessing the degree of substitutability and ascertaining whether there is a competitive relationship under Article 2(2)(a) it is necessary to examine the following criteria:

– the current state of the market and consumer habits and how they might evolve;
– the market in which the advertising is disseminated without excluding the effect of the evolution of consumer habits in other Member States on the market in issue; and
– the specific characteristics of the product which the advertising is seeking to promote and the image which it wishes to impart to its product.

Article 3(a)(1) and permitted comparative advertising

Thirdly, the ECJ considered the conditions that must be satisfied for advertising to be permitted pursuant to Article 3(a)(1) of the Directive. The conditions in Article 3(a)(1) are applicable only to advertisements that are comparative in nature. Advertisements that refer to a *type* of product without identifying a competitor or the goods or services that the competitor offers do not fall within its scope. It follows that whether such advertising is permissible must be assessed in the light of other provisions of national law or other Community law (particularly the directive on misleading advertising), even where this could result in lower protection for consumers.

Products with designation of origin

Fourthly, the ECJ decided that Article 3(a)(1)(f) does not automatically prohibit comparisons between products with and without a protected designation of origin.

Criminal sanctions for IP infringements

The European Parliament adopted on its first reading, on 25 April 2007, the Directive on criminal sanctions for intellectual property infringements. According to this Directive, all intentional infringements of an intellectual property right on a commercial scale should be treated as criminal offences.

The Directive contains measures for fining counterfeiters up to €300,000 or, in most serious cases, a jail term of up to four years. Smaller offences will remain subject to national law.

Patents have been left out of the Directive. Private individuals have also been excluded from its scope.

The European Parliament adopted on its first reading, on 25 April 2007, the Directive on criminal sanctions for intellectual property infringements

If agreed by the Council, the Directive will enter into force immediately following its publication in the Official Journal. Member States would then have 18 months to adopt it in their national legislation.

Several commentators fear that the EU is going too far by harmonising an area of criminal law which is traditionally reserved for Member States.

Belgium

On 8 May 2007, a new act introducing specific tax incentives for technical innovation was published in the Belgian State Gazette

Belgium exempts 80% of patent income

On 8 May 2007, a new act introducing specific tax incentives for technical innovation was published in the Belgian State Gazette. Under the new regime, Belgian companies (and Belgian branches of foreign companies) can deduct 80% of their patent income from their tax base, which leads to a maximum effective tax rate of 6.8% on the patent income. The new Belgian patent deduction provides tax planning opportunities for all sectors that rely on patents (pharmaceuticals, chemicals, consumer goods, etc.), regardless of whether they already have a presence in Belgium. The scope and the basic features of the new patent deduction are summarised below:

- The patent deduction applies to patents developed totally or partially by a Belgian taxpayer as well as to patents acquired from third parties and patent licences granted to it by third parties. The only requirement is that the taxpayer has performed R&D in a research centre in Belgium or abroad. The measure does not relate to IP other than patents.
- The 80% deduction applies to the gross income derived from the licensing of patents, as well as to the patent remuneration embedded in the sales price of patented products that are manufactured by the Belgian company or branch or on its behalf by a contract manufacturer.
- For patents and patent licences acquired from third parties, the 80% deduction is limited to the “added value”, i.e. the difference between the gross patent income received and the remuneration paid to third parties (i.e. the depreciation of the patents acquired or the royalties due under the patent licences).
- Other R&D expenses relating to the development and registration of the patent remain fully tax deductible and should not be taken into account in calculating the 80% patent deduction.
- The patent deduction applies to intra-group transactions as well as to transactions with unrelated parties.
- The tax advantage is not capped.
- If the patent deduction exceeds the company’s taxable income, it cannot be carried forward to the following tax years.
- The tax advantage can be combined with existing incentives for R&D (“one-time and spread investment deduction for R&D”), as well as with the notional interest deduction regime.

The patent deduction is limited to “new” patent income, i.e. patent income earned as of assessment year 2008 (i.e. book year ending on 31 December 2007) and derived from patents that have not been used by the company, a licensee or related companies for sales of products prior to 1 January 2007.

France

No boundaries for cyber judges

On 20 March 2007, the French Supreme Court ruled on the jurisdiction of French courts over claims for unfair competition on the Internet

On 20 March 2007, the French Supreme Court ruled on the jurisdiction of French courts over claims for unfair competition on the Internet and held that French courts have jurisdiction as long as the website at stake is accessible in France.

A French company, *Gep Industries*, sued a German company, *HSM Schuhmarketing*, for unfair competition, claiming that HSM had displayed and offered for sale, on its website, a pair of shoes which was identical to shoes manufactured by Gep.

HSM first argued that French judges should decline jurisdiction as its goods were only sold in Germany through its German website which was available in the German language only. Moreover, Gep had not given evidence of any online purchase of HSM’s goods by French customers. Finally, according to HSM, selling shoes that are not protected by any intellectual property right, even though they are identical to a competitor’s, does not amount to unfair competition.

The Supreme Court upheld the Angers Court of Appeal decision according to which French courts have jurisdiction as long as the alleged facts of commercialisation in France could possibly cause harm. It also confirmed that HSM was liable for unfair competition as it had willingly caused confusion to occur in the public’s mind between its shoes and Gep’s shoes.

This decision is consistent with the dominant previous case law, in particular *Castellblanch v Champagne Roederer* (reported in IP News March 2004) according to which French courts have jurisdiction as long as the website accessibility criterion is fulfilled.

The decision of the Supreme Court seems however to go a step further. Previous French cases had established a second criterion based on several factors, such as the language of the website and/or the possibility of purchasing goods from the website, to determine whether the alleged facts were actually reprehensible. This additional criterion was to be used at a second stage, once the jurisdiction of the French courts had been established according to the accessibility criterion, to decide whether the website was aimed at the French public. If it was the case, the alleged facts could be found reprehensible. If it was not the case, the defendant could not be found liable for facts that could not be considered as tangible enough. Yet the Supreme Court found that HSM was liable for unfair competition although the website was only in German and although there was no proof of any purchase by the French public.

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It is to be noted, however, that an isolated decision of the Paris Court of Appeal had recently (26 April 2006) declined the jurisdiction of French courts, on the ground that the website was not aimed at French customers as it was in English and as the goods it displayed could not be purchased by the French public. The Paris Court of Appeal thus used the second criterion to reject the jurisdiction of the French courts, adopting a stricter position than the traditional case law.

These case law inconsistencies suggest that French courts may still be looking for an appropriate and definite solution that would be adapted to the special characteristics of the Internet.

Bad medicine

Supplementary protection certificates came under the close scrutiny of the French Supreme Court which rendered two decisions the same day, 3 April 2007, restrictively interpreting their duration and their scope of protection.

Pharmaceutical patents can only be exploited after having been granted a marketing authorisation. The time needed to get authorisations can take up most of the patent term. Supplementary protection certificates are meant to remedy this situation.

Duration of protection

Pfizer was the holder of a patent granted on 20 February 1985 and covering in particular "antifungal agents". The medicinal products Pfizer marketed based on this patent were subject to two marketing authorisations. The first one for capsule conditioning was dated 8 March 1988 and the second one for an injectable solution was dated 9 March 1990. Subsequently, Pfizer was granted two corresponding supplementary protection certificates.

In April 2005, Pfizer brought an action for patent infringement against G GAM based on the second certificate, which was still in force at that time. The first certificate had expired on 8 March 2005. According to Article L.611-2 of the French Intellectual Property Code, supplementary protection certificates take effect *"at the end of the statutory term of the patent to which they relate for a period of not more than […] 17 years as from issue of the marketing authorisation […]"*.

Reversing the decision of the Paris Court of Appeal and dismissing Pfizer's claims, the Supreme Court held that the duration of protection granted by a supplementary protection certificate cannot exceed 17 years from the date of the first marketing authorisation relating to the pharmaceutical product.

Scope of protection

The American company *Chiron Corporation* was the holder of a European patent filed on 30 October 1985 for a product aimed at detecting the existence of the AIDS virus in blood samples. After having obtained a

marketing authorisation on 7 February 2001, Chiron made a request for a supplementary protection certificate on 13 July 2001 based on the provisions of the EC Regulation 1768/92 of 18 June 1992.

The Paris Court of Appeal confirmed the decision of the French Patent Office and dismissed this request since the product at stake was not a "medicinal product" as defined in Article 1 of the Regulation.

The Supreme Court upheld the decision of the Paris Court of Appeal, ruling that Chiron's product was not within the scope of Article 1 of the EC Regulation. According to Article 1 of the EC Regulation, a medicinal product is defined as *"any substance or combination of substances presented for treating or preventing disease in human beings or animals and any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis…".* Therefore, Chiron's product, which was aimed at detecting the existence of the AIDS virus in blood samples in vitro during the diagnosis step, (a) had no curative or preventive character; and (b) could not be administered to human beings or animals, and thus did not qualify under the diagnosis part of the definition.

A first decision on infringement of a molecular biology patent

On 7 February 2007, the Paris Court of First Instance rendered a decision involving the Pasteur Institute and the companies Chiron Blood Testing and Chiron Healthcare Ireland Limited

On 7 February 2007, the Paris Court of First Instance rendered a decision involving the *Pasteur Institute* and the companies *Chiron Blood Testing* and *Chiron Healthcare Ireland Limited*. This case is important as it is the first decision about a molecular biology patent infringement. The few previous decisions on molecular biology patents have only ruled on validity matters.

Pasteur was the holder of a European patent filed on 17 September 1985 and relating to *"DNA cloned sequences, hybridisable with genomic RNA of lymphadenopathy-associated virus (LAV)"*, the industrial application of this invention being diagnostic tests enabling the detection of infection by the LAV virus (the virus responsible for AIDS).

Pasteur sued Chiron for patent infringement and argued that Chiron's diagnostic kits reproduced claims 8 and 11 of its patent.

After having ruled on the scope of claims 8 and 11, the Court dismissed Pasteur's claims and ordered Pasteur to pay Chiron €45,000 for legal costs.

Concerning claim 11, Pasteur had alleged that it was infringed by the supply of means.

The Court first recalled that the supply of means is an act of infringement provided that the means supplied relate to the essential elements of the invention, i.e. participating in its result. The Court then pointed out that claim 11 did not cover a process for the purification of the RNA, but a product: the purified RNA itself. As a result, the kit for capturing viral RNA was not an essential element of claim 11. The Court therefore considered that Chiron's kits did not fall within the scope of claim 11.

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Legislation: bill implementing Directive on the enforcement of intellectual property rights

On 7 February 2007, François Loos, Minister of Industry, submitted to the Cabinet ("*Conseil des ministres*") a bill aimed at implementing the 29 April 2004 Enforcement Directive 2004/48/EEC.

Once adopted, this bill will make significant amendments to the French Intellectual Property Code, in particular concerning the following:

– the seizure ("*saisie-contrefaçon*") process will be extended to all types of intellectual property rights. It would also be extended to allow the seizure of the materials and implements used in the creation or manufacture of the infringing goods;

– the right to information will be enlarged to facilitate the dismantlement of infringement networks;

– interlocutory injunctions will become possible even before the infringement, in order to prevent imminent infringement of an intellectual property right;

– the assessment of remedies would take into account lost profits which the injured party has suffered, unfair profits made by the infringer and even the moral prejudice caused to the right holder; and

– it should become possible for the right holder to request the recall from the channels of commerce or the destruction of the infringing goods, as well as the recall or destruction of the materials and implements used in the creation or manufacture of the infringing goods.

UK

Scope of an employee's 'normal duties' can change over time

On 15 March 2007, the English Court of Appeal held that the "normal" duties of an employee can evolve over time and are determined by both the terms of the employment contract and the actual activities of the employee (*LIFFE Administration & Management v Pavel Pinkava and De Novo Markets* [2007] EWCA Civ 217).

The Court also held that, when considering what can reasonably be expected to result from the employee's duties, the objective circumstances and the employee's abilities are relevant (Jacob LJ dissented on this point saying that the test should be objective and a particular employee's abilities were not relevant).

Section 39(1)(a) of the Patents Act 1977 provides that an invention made by an employee will belong to the employer where:

(i) the invention was made in the course of the normal duties of the employee; or

(ii) the invention was made in the course of duties specifically assigned to the employee; and

(iii) under either (i) or (ii), the circumstances were such that an invention might reasonably be expected to result from the employee's performance of his duties.

Dr Pinkava, an employee of LIFFE (the London International Financial Futures Exchange), devised an exchange tradeable credit derivative. In April 2005, following advice that he was entitled to the invention, Dr Pinkava filed four US Patent applications. LIFFE commenced legal proceedings asserting that they were entitled to the inventions and Dr Pinkava applied to the UK Patent Office for a declaration that he owned the inventions. Both proceedings were referred to the High Court where Kitchin J held that LIFFE was entitled to the invention as, while it was not within Dr Pinkava's normal duties, it was made in the course of duties specifically assigned to him. Dr Pinkava appealed to the Court of Appeal.

The Chancellor of the High Court (Sir Andrew Morritt), delivering the leading judgment of the Court of Appeal, found for LIFFE, but overturned Kitchin J's finding that the invention was not within the scope of Dr Pinkava's normal duties. He noted that *"it is unsafe to have regard only to the terms contained in an initial written contract of employment. The actions of the employee and employer in performance of the contract may give rise to an expansion or contraction of the duties initially undertaken by a continuous process of subtle variation"*. It is therefore possible for specifically assigned duties to become "normal" duties over time.

"it is unsafe to have regard only to the terms contained in an initial written contract of employment"

The Chancellor then considered whether the second limb of the s39(1)(a) test was satisfied - were the circumstances such that an invention might reasonably be expected to result from the employee's performance of his duties? He agreed with Kitchin J that the relevant circumstances included the abilities of Dr Pinkava (an intelligent and inventive man). Therefore it was reasonable to expect an invention to result from a man with Dr Pinkava's considerable abilities carrying out his duties (even if the particular invention was not expected). The fact that the invention was significant was not relevant to the application of s39(1).

Judgment of English Court enforceable despite pending EPO Opposition

On 25 April 2007, in the case of *Unilin Beheer BV v Berry Floor NV, Information Management Consultancy Limited and B&Q plc* [2007] EWCA Civ 364, the English Court of Appeal held that a patentee was entitled to enforce a judgment in its favour despite a pending opposition before the European Patent Office. The decision turned on the fact that the judgment was final with no further right of appeal. It shows the advantages of promptly enforcing patent rights.

In June 2002, Unilin was granted a European patent directed to flooring panels that included a "snap together" connection, and promptly sued the defendants. An opposition was filed at the EPO in March 2003 and was still pending when the infringement action was heard in the UK. On 29 September 2003 the English Patents Court (Judge Fysh) held that claim 20

of the patent was valid and infringed by the activities of the defendants, and that Unilin was entitled to costs and financial relief. The defendants unsuccessfully appealed against this judgment and Unilin subsequently sought to enforce the judgment. Judge Fysh, when considering the issue of costs and financial relief, held that (1) Unilin's entitlement to financial relief was not *res judicata* (i.e. it had not already been judged and could be reconsidered) and (2) the defendants were not entitled to a stay of proceedings pending the outcome of the EPO opposition proceedings. Both Unilin and the defendants appealed these findings.

The Court of Appeal reversed the decision of the Patents Court. In the leading judgment, Jacob LJ distinguished several cases that the defendants had relied on to support the primacy of the EPO over national courts. He noted that where there is a right of appeal, the original cause of action for infringement continues and therefore is not *res judicata* (allowing the EPO decision to "trump" the national court). However, where a judgment is final and no further right of appeal exists (as was the case here), the cause of action for infringement is merged with, and replaced by, the right to enforce the judgment. When enforcing the judgment, cause of action estoppel means that the findings of a second action cannot be cited, as the original infringement action is *res judicata* (*Poulton v Adjustable Cover* [1908] 2 Ch 430 and *Coflexip v Stolt* (No2) [2004] FSR 34). The judge's reasoning relied on several policy grounds:

where a judgment is final and no further right of appeal exists (as was the case here), the cause of action for infringement is merged with, and replaced by, the right to enforce the judgment

Finality: It is a basic principle of English law that, subject to any right of appeal, the decision of a court is final and binding. The decision is not provisional upon the outcome of any further proceeding. There was nothing in the UK Patents Act 1977 to suggest that this principle did not apply in patent cases. Furthermore, the *travaux préparatoires* to the EPC indicated that it was not the intention of the EPC to interfere with the civil procedures of the contracting states. Thus a party that is unsuccessful in a challenge to the validity of a UK patent is not entitled to a second attempt at contesting the patent in EPO opposition proceedings.

Consistency: It is accepted that where a patent is revoked by an English court, an EPO decision to uphold the patent will not reinstate that patent in the UK. A national court's finding of validity should also be final.

Commerce: Where a patentee has a final judgment in its favour, it should be entitled to enforce that judgment without the risk of a subsequent EPO decision unravelling its rights. Injunctions may be terminated upon revocation of an underlying patent, as the continued right to the injunction is dependent on the continuing existence of the patent. However, the right to costs or financial relief has already been determined and is an asset that the patentee is entitled to rely on. It does not necessarily terminate upon revocation of the patent.

Jacob LJ also commented on the *"messy, expensive and prolix business"* of EPO oppositions caused, in part, by the need to commence the centralised opposition procedure within nine months of patent grant (leaving only country-by-country revocation procedures available after this deadline). The

judge doubted whether many of these oppositions would be filed if the nine-month limitation was removed – as it would result in oppositions being filed only when it was clear that they were commercially justified. He noted that the 1977 Patents Act removed a similar limitation from UK law, which resulted in a significant reduction in the number of oppositions filed.

Trade mark dilution referred to the ECJ

The English Court of Appeal has asked the ECJ to give guidance on the scope of protection against "dilution" for marks with a reputation. It was hearing an appeal by Intel. Intel had sought to invalidate a trade mark registration, INTELMARK, belonging to a telemarketing company, CPM. Intel had lost in the Registry and on appeal to the High Court. It was arguing that, even though the INTELMARK services were dissimilar to Intel's, consumers would nonetheless make a mental association between INTEL and INTELMARK with the inevitable result that the INTEL trade mark would be "diluted".

Intel argued that a "mere bringing to mind" of its earlier mark was enough; that *"where the earlier mark was both unique and had a strong distinctive character, one is compelled to accept that detriment to it will be caused by its use for virtually any other goods or services";* and that *"where the prior mark was unique and well-known it was important to stop any encroachment at the outset - otherwise it would suffer a death by a thousand cuts".*

Jacob LJ disagreed. In his view, where two similar or identical marks were used on dissimilar services, and where consumers made a "link" between them, that link needed to amount to more than a "tenuous association", more than a *"mere passing bringing to mind".* In his view, a court needed to assess whether, bearing in mind the respective services, *"the average consumer would consider that there is an economic connection between the owners of the two marks"*, *and "whether the distinctiveness or repute of the earlier mark for the goods or services for which it is registered is really likely to be affected if the later mark is used for the specific goods or services covered by its registration"*.

Is it sufficient that the earlier mark is "brought to mind" or is a stronger link necessary?

However, he considered that the issues were difficult and important and needed to be referred to the ECJ. Accordingly, the ECJ will be asked to consider what factors a national court must take into account in assessing whether a mark with a "huge reputation" can prevent registration of a similar mark for dissimilar goods under Article 4(4)(a) of the Trade Marks Directive or Article 8(5) of the CTM Regulation. Is it sufficient that the earlier mark is *"brought to mind*" or is a stronger link necessary? How significant is the difference between the parties' respective goods and services? In order to prove detriment, does the later mark need to have some *"effect on the economic behaviour of the consumer*"?

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Publications

Recently published hot topics : "Boehringer-Ingelheim and others v Swingward & Dowelhurst" by Benedict Bird and Robert Swift.

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