



THE EUROPEAN IP BULLETIN

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18. AGREEMENT ON COMMUNITY PATENT

Since 1999 the EU has been debating the regulations to bring a community patent into effect, and thus cut costs. The last road blocks have now been removed. It is now likely that the first community patents will be granted soon, as the EPO is the granting authority, and provided all member states of the EU are designated, it should be possible to convert on grant a European Patent to a Community Patent. Enforcement will be through national courts until 2010. It was this last issue which formed the final major bottleneck.

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This case deals with the dynamics of granting or refusing interim injunctions in the pharmaceutical field, where there has been a recent history of granting interim injunctions because price depression would be irrecoverable by a final injunction and an award of damages. The patent in question was only partly valid, and the issues arising out of that finding (in other proceedings) were also discussed.

TRADE MARKS

22. HIGH COURT APPLIES ECJ REPACKAGING RULES

In *Glaxo Group Ltd. and The Wellcome Foundation Ltd. v Dowelhurst Ltd.* [2003] EWHC 110(Ch), Laddie J applied the preliminary ruling of the ECJ (Case C-143/00, [2003] Ch 27, [2002] ETMR 78) on the repackaging issues raised by this case. The judge discussed the conditions on which the re-packer can use the originator's trade marks on repacked pharmaceuticals. Such use must be proportionate to the need to achieve market penetration, and must not lead to brand association.

23. SUMMARY JUDGMENT REFUSED IN REPACKAGING CASE *GLAXO GROUP LTD & THE WELCOME FOUNDATION LTD v EUROPHARM OF WORTHING LTD & EUROCHEM LTD* [2003] EWHC 116 (CH)

Following the *Glaxo v Dowelhurst* case (above, “*Dowelhurst*”), the defendants applied for summary judgment under CPR rule 24.2. The defendants argued that, because the claimants had lost on the necessity to repackage issue in *Dowelhurst*, they had no reasonable prospect of success here and there was no compelling reason for the case to be tried. Laddie J in the High Court disagreed. The necessity for repackaging will be examined on a case by case basis. The judge made some comments on the procedure adopted by the defendant in its application.

24. COURT OF APPEAL DISMISSES APPEAL AND CROSS APPEAL IN THE REGISTERED TRADE MARK CASE OF WEST (TRADING AS EASTENDERS) V FULLER SMITH & TURNER PLC [2003] EWHC CIV 48; 2003 WL 116973

The Court of Appeal dismissed the appeal and cross appeal by the parties and affirmed the earlier decision in *David West (t/a Eastenders) v Fuller Smith & Turner PLC*, [2002] EWHC 122; [2002] FSR 55; 2002 WL 346991 (Ch D), which dismissed West's challenge to the validity of Fuller's trade mark ESB (holding it was not devoid of distinctive character) and ordered a partial revocation of the mark in respect of all goods except bitter beers, the latter being the only goods for which the mark had been used. This case has a bearing on partial revocation for non-use, and its effect.

25. A NEW-LOOK COMMUNITY TRADE MARK SYSTEM?

The European Commission has recently presented a proposal for a Regulation which aims to modify existing procedures for the granting of Community Trade Marks (CTMs) by the Office for Harmonisation in the Internal Market (OHIM). The Regulation would abolish the system of searches, amend the regime for professional representation before the OHIM and expand the current system to include means by which the Boards of Appeal can further improve the way they function. The proposal also includes the abolition of the nationality and reciprocity conditions for allowing an application of a CTM thereby removing the nationality and residential restrictions on access to the system.

26. SPAIN'S CIDESPOT LOSES TO NIKE IN CHINESE TRADE MARK CASE

A trade mark is unfringed where it is applied, even if all of the goods are for export to a country where the impersonation of the goods bearing the mark is not an infringement. The trademark NIKE is split, with different owners in Spain and China, the owner of the latter being the well-known US company. It succeeded in obtaining an injunction to prevent the Chinese manufacturer applying the NIKE trade mark in China for goods destined for the Spanish market.

27. BUD TRADE MARK BATTLE ENDS IN STALEMATE BUDEJOVICKY BUDVAR NARODNI PODNIK V ANHEUSER BUSCH INC. [2002] EWCA CIV 1534

This case concerns the BUD trade mark, which was split between Czech and US owner, neither of whom was able to oust the other. The judgment deals with what constitutes genuine use of a trade mark, for the purpose of revocation for non use.

HOT TOPICS

THE RIGHT TO PRIVACY IN THE CONTEXT OF CCTV SURVEILLANCE - *PECK V THE UNITED KINGDOM* (ECTHR, APPLICATION NO.44647/98 OF 28 JANUARY, 2003) [THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR)]

The unauthorised disclosure of CCTV footage by a public authority may constitute a violation of an individual's right to privacy under Article 8 of the European Convention on Human Rights.

The case concerned the disclosure to the media by Brentwood Borough Council of CCTV footage recording Mr Peck in possession of a knife in a public place. The Council disclosed the footage for the purpose of publicising the success of CCTV in preventing the commission of crimes, even though the applicant himself was not charged with any criminal offence.

The ECHR, in deciding that the unauthorised disclosure by the Council infringed Mr Peck's right to respect for his private life, held the following:

- "private life" is a broad concept and it can extend to a person's presence in a public place, like a street;
- a person's awareness of being recorded is a relevant factor;
- the fact that Mr Peck was not participating in a public event and was not a public figure was a relevant factor; and
- the fact that Mr Peck had not foreseen at the time of recording that the Council would disclose the CCTV recording to the print and broadcast media was also a relevant factor.

The ECHR accepted that the Council had the statutory power to disclose CCTV footage and that legitimate aims could be achieved by such a disclosure, e.g. crime prevention and deterrence. It held, however, that the English public law doctrine of "irrationality" did not in this case provide sufficient vindication of the rights of individuals guaranteed by the Convention. At the relevant time (1995), no domestic remedy existed for such an infringement in English law (this is a prerequisite for a remedy in the ECHR), as the Human Rights Act 1998, Data Protection Act 1998 and Regulation of Investigatory Powers Act 2000 were not in force, hence allowing the ECHR to accept jurisdiction.

The ECHR has not called into doubt the legality of CCTV recording by public authorities *per se*; however it has recognised that an individual's right to privacy must be given serious consideration whenever a disclosure of such footage is contemplated.

Breach of an individual's right to privacy by exploitation or misuse of their personal data can be a costly mistake under the new regime introduced by the Data Protection Act 1998. As has been shown by Naomi Campbell's action against the Mirror newspaper under the Data Protection Act 1998 if a data controller breaches the obligations imposed on them to the detriment of a data subject, then the subject has the right to claim for unlimited non-punitive damages.

UK COURTS ALLOW SERVICE OUT OF JURISDICTION IN *DOUGLAS V HELLO!* [2003] EWCA CIV 139

This case raises interesting issues about whether acts committed in a foreign jurisdiction can give rise to liability in England under the doctrine of joint tortfeasance. Long arm jurisdiction was established and permission was granted by the Court of Appeal to join a photographer who was alleged to have breached confidence and statutory duty under data protection legislation. The allegation that transmitting a photograph over telephone lines was held to be an actionable breach of data protection legislation.

Actors Michael Douglas and Catherine Zeta-Jones are claiming damages for breach of confidence or privacy on the grounds that Hello! Magazine (the publishers and distributors of the magazine are respectively the first and second defendants) published unauthorised photographs of their wedding in the UK.

They claimed that Philip Ramey – a well-known US photographer who had provided the photos to Hello! – was liable as a joint tortfeasor with respect to the publication in the UK. The Court of Appeal held that the required jurisdictional link had been established to join Ramey into the proceedings.

The claimants had applied without notice under CPR 6.20(8) for, inter alia, breach of statutory duty under the Data Protection Act 1998 or CPR 6.20(15) for equitable relief for breach of the duty of confidentiality.

CPR 6.20(8)(a) allows service out of the jurisdiction with the permission of the court if a claim is made in tort where damage is sustained within the jurisdiction, while CPR 6.20(15) allows service for restitution claims where the defendant's alleged liability arises out of acts committed within the jurisdiction. Ramey argued that the claims against him were of insufficient weight to justify service out of jurisdiction.

Laddie J held in December 2002 that no reasonable allegation of actionable wrongdoing had been made against Ramey, whose actions were lawful under New York law and that there was insufficient cause to raise a case of joint tortfeasance. A claim form served out of jurisdiction on Ramey was set aside.

On appeal, the Court of Appeal followed *Seaconsar Ltd v Bank Markazi* [1994] 1 AC 439, in considering whether there was an arguable case that the court had jurisdiction for the claims against Ramey. In February 2003 it reversed Laddie J's decision.

The claimants had alleged that Ramey was involved in a premeditated plan to invade the wedding and take photographs to later sell to Hello!. Laddie J had considered evidence that the claimants said linked Ramey with the other defendants, and that they said suggested that he had supplied some, if not all, of the photographs published. Laddie J had found that the fact that Ramey had obtained the photographs and passed them to Hello! did not give rise to a case for joint tortfeasance.

The Court of Appeal disagreed. When considering the issue of confidentiality and privacy, it held that, there is a good arguable case that the English courts had jurisdiction within either CPR 6.20(8) or CPR 6.20(15) as the essential act complained about was the publication of the photographs in England. In essence, "there is a good case that the proper law of the tort (or of the right in restitution

for breach of the duty of confidentiality) is in effect the law of the place of publication”.

It was also held that there was an arguable case that Ramey as the alleged author of the photographs (or least the person who arranged for them to be taken) is a joint tortfeasor responsible for their publication.

On the issue of data protection, the court said that whether Ramey had breached the statutory duty by transmitting the photos to Hello! via an ISDN line should be determined in the trial and that it was a good arguable claim. Hence, Ramey remains a joint defendant.

EUROPEAN COMMISSION PROPOSES THE ESTABLISHMENT OF A EUROPEAN NETWORK AND INFORMATION SECURITY AGENCY

On 10 February 2003 the European Commission published a proposed Regulation for the establishment of a new European regulatory body to be called the “European Network and Information Security Agency”. The background to this proposal is the increased reliance by industry and society on communication networks and information systems and the perceived need for a pan-European response to deal with potential security threats. The broad aim of the proposed agency will be to create a common understanding in Europe on information and network security related matters. It is envisaged that the agency will have both an advisory and a co-ordinating function. It will be a centre of expertise where both member state and EU institutions can seek advice on technical matters relating to security. The draft provisions of the Regulation deal mainly with the organisational and management structure of the agency. It is proposed that it will become operational by 1 January 2004 and that it will function for an initial period of five years. The continued existence of the agency after that date will depend on the outcome of an evaluation of its performance that will be carried out by the Commission.

VITAMINS CARTEL – FINES IMPOSED BY EC COMMISSION

The Commission decision of 21 November 2001 concerns the infringement of Article 81(1) of the EC Treaty (Article 85 of the Treaty of Rome) and Article 53 of the EEA Agreement due to unlawful concerted practices of 13 different producers of 12 types of vitamins across Europe and the Far East. The cartel operation centred on the preparation and implementation of an annual “budget” to stabilise the world market share for each producer, compensation arrangements, target and minimum prices and meeting structures. Fines were reduced (in one case by 100%) for those who co-operated with the EC Commission.

The first of these meetings took place in Basel in the late 80’s between Roche and BASF. During the preceding years the cartel was extended to incorporate other firms including Aventis and Solvay. Eisai was also persuaded to join enabling the European producers to raise the price levels in Europe without the fear of being undercut by this Japanese producer.

Co-operation arrangements such as the one described which have as their object the restriction of competition by means of price fixing, output limitation or sharing of markets will be deemed most harmful as they directly interfere with the competition process. The fact that the companies had high market shares meant

that the commission found the infringement of Articles 81(1) and 53(1) by the companies as very serious.

Fines were imposed on all of the participating undertakings. Under Section B of the Commission's leniency notice, Aventis was granted 100% reduction in fines due to its role in being first to give the commission decisive evidence to the existence of the international cartel.

Roche's and BASF's fines were increased by 50% and 35% respectively due to their dominant role in the cartel and their collective aim to eliminate all effective competition between them. However under section D of the leniency notice Roche's and BASF's fine was significantly reduced as they had fully co-operated with the commission in its investigation. Roche was finally fined €462 million, BASF €296.16 million; the other companies being fined lesser amounts.

CAN GM CROPS BE COMMERCIALY GROWN

On the horizon for 2003 are two important steps that will precede any announcement from the British government on whether it will allow the commercial cultivation of genetically modified (GM) crops in the UK. First is the publication of the first set of the results from the Farm Scale Evaluations (FSEs). Second is the public debate on broader issues surrounding GM technology. Government regulations prevent any commercialised growing of GM crops unless it can be confident that it will not pose a significant risk to either human health or the environment. The FSEs are part of the analytical framework in assessing the safety of cultivating GM crops.

The FSEs evaluate the impact of herbicide use associated with GM crops on farmland wildlife. Once these results are publicly available, they will be presented to the Advisory Committee on Releases to the Environment for advice on their implications. The Government has stated that if the FSEs indicate a harmful environmental impact, it will oppose their commercialisation in the EU. However, if that is not the case, the Government recognises that a number of issues would still need to be addressed.

The Government has taken steps to address the broader GM issues. Cognizant of its need to obtain independent strategic advice on GM, the Government set up the Agriculture and Environment Biotechnology Commission (AEBC) in 2000. The AEBC, in conducting a detailed analysis of the FSEs and duly assessing the broader issues surrounding GM technology, published a report called "Crops on Trial." This report served as a springboard for the public debate that is scheduled to commence this autumn. The debate has been carefully organized and is actually the first strand of the tripartite dialogue the government wishes to have with the nation. The second strand is a review of the scientific issues and the third is an overall cost-benefit analysis.

What the Government wishes to accomplish by setting up the debate is to "provide people with the opportunity to debate the issues openly and reach their own judgements." Additionally the government has stated that it is "committed to a genuine, balanced discussion, and also to listening to what people say." However, a well-founded criticism of the legitimacy of that "commitment" then exists in its plans to forge ahead with licensing the commercial use of GM crops before the FSEs results are publicly available and indeed the public debate. This action has already been branded as "premature" by the Scottish and Welsh administrations. It will be interesting to see how the licensing issue will be

reconciled when the debate begins.

This debate is part of an on-going debate at EU level and within WIPO, where the refusal of the EU to sanction GM crops remains a major source of friction with the US.

“EQUITABLE REMUNERATION” UNDER THE RENTAL AND LENDING RIGHTS DIRECTIVE (92/100/EC)

Where a broadcast includes a performance embodied in commercial phonogram, Article 8(2) of the EU Directive on Rental and Lending Rights (92/100/EEC) requires a single ‘equitable remuneration’ to be paid for the use by the broadcaster, to be shared between phonogram producer and artists. The highest Court of Appeal of the Netherlands referred *Stichting ter Exploitatie van Naburige Rechten [SENA] v Nederlandse Omroep Stichting [NOS]* to the ECJ under Article 234 EC for a preliminary ruling on the interpretation of the undefined term ‘equitable remuneration’. The ECJ held that this term falls to be interpreted by national courts.

The case involved a dispute as to interpretation of ‘equitable remuneration’ in Netherlands Law on related rights (Wet op de naburige rechten, 1 July 1993, as amended by law of 21 December 1995, *Staatsblad* 1995, p653), between the Netherlands Broadcasting Association (NOS) and the Association of Producers and Importers of Image and Sound Media (SENA, a collecting society), who were representing the producers and artists. Prior to implementation of the Directive, the broadcasters and producers’ organisation had a longstanding agreement. After implementation the parties could not agree on the quantum of ‘equitable remuneration’.

The ECJ in decision C-245/00, held that since ‘equitable remuneration’ was an independent autonomous provision, it was to be interpreted uniformly throughout the EU. However, the ECJ stated that if there was no contractual arrangement between the parties, then the term ‘equitable remuneration’ was to be interpreted by the national courts of the member states; each state applying appropriate criteria for its own territory, which assures adherence to the Directive, EU Law and the Community Concept. With the Directive being silent as to methods of calculation, the ECJ declined to lay down a uniform mechanism.

Rather, the ECJ, relying on Article 12 of the Rome Convention, held that what is equitable be viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on reasonable terms. It also stated that the remuneration in consideration for use of a commercial phonogram, in particular for broadcasting purposes, “...is equitable is to be assessed, in particular, in the light of the value of that use in trade.”

This conclusion appears to be somewhat vague and it now rests with the national courts to interpret it, with the possibility of idiosyncratic approaches being applied in each member state.

EC PROPOSES HARMONISING IP DIRECTIVE TO FIGHT PIRACY AND COUNTERFEITING

The European Commission has presented a proposal for a Directive on the enforcement of intellectual property rights. The proposed Directive is intended to harmonise national laws on the means of enforcing intellectual property rights, and to establish a general framework for the exchange of information between responsible national authorities. It is particularly aimed at reducing counterfeiting and piracy by reducing differences in member states' legislation concerning the enforcement of intellectual property rights, reinforcing measures against offenders, and acting as a deterrent to those engaged in counterfeiting and piracy.

“Pirates and counterfeiters are in effect stealing from right holders the fair payment they deserve for their work,” said internal market Commissioner Frits Bolkestein. “If we don't stamp that out, the incentives for industrial innovation and cultural creativity will be weakened. That would threaten Europe's competitiveness and its cultural diversity and dynamism. So we have to get tough with the pirates and counterfeiters and make sure they can find no safe havens in the EU. The sooner we implement this proposal the better will be our defences against piracy,” he said.

The proposed Directive covers infringements of intellectual property rights that have been harmonised within the EU, such as copyright, trade marks and designs. It concentrates on infringements carried out for commercial purposes or that would cause significant harm to right holders, and is based on the most effective elements of legislation already found in member states.

The proposed measures would require all member states to provide for injunctions to halt the sale of counterfeit pirated goods, provisional measures such as precautionary seizures of suspected offenders' bank accounts, evidence-gathering powers for judicial authorities, and powers to force offenders to pay compensatory damages to right holders.

It also requires member states to criminalise infringements of intellectual property rights, and to punish offences with criminal sanctions such as imprisonment.

It is likely that the UK will be held to be already compliant with many of the requirements of the Directive.

The proposal follows a “TRIPs plus” approach and complements the recent proposal for a Regulation to facilitate customs seizures of counterfeit goods from outside the EU.

It will now go to the European Parliament and the EU's Council of Ministers for adoption under the “co-decision” procedure.

Beckingham v Hodgens, (CA, 19 February 2003) upheld a successful claim by session violinist ‘Bobby Valentino’ to be joint author of the song ‘Young at Heart’, performed and recorded by the Bluebells in 1984. The case looked at joint authorship and estoppel.

Having had limited success on its first release the song re-entered the charts in 1993 after being used for a Volkswagen commercial. Valentino then asserted his claim to authorship and to royalties flowing from the second wave of success. In July 2002, Christopher Floyd, QC, found for Valentino, accepting that in 1993 he had revoked an earlier consent for the band to use the song and stated

‘I see no reason why Mr Valentino should not be entitled to say ... "I have let you have free use of my composition until now. But this new success is different, and I claim my share of it".’ [2002] EMLR 45

(see *Worth Fiddling About – Joint Ownership of Copyright*, R. Massey, [2002] 125 Copyright World 7) The Court of Appeal reviewed two aspects of the deputy judge’s decision.

1. Joint authorship

Mr Hodgens, a defendant, challenged his interpretation of section 11(3) of the Copyright Act 1956. s11(3), which has been carried over with a slight change of wording into s10(1) of the Copyright Designs and Patents Act 1988, provided that a "work of joint authorship" meant “a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.” It was argued - relying upon a Canadian case, *Darryl Neudorf v Network Expressions* [1999] RPC 935 – that a common design to produce a work of joint authorship was required under s11(3). The Court of Appeal disagreed, holding that whilst a common intention to produce a work must be a feature of ‘collaboration’, there was no need to establish joint authorial intent.

2. Estoppel

This was the argument that, having allowed the band to use the song at an earlier stage, it would be unconscionable for Valentino to "jump on the bandwagon" and assert his rights later. A leading case on this point is *Taylor’s Fashions Ltd v Liverpool Victoria Trustees* [1982] 1 QB 133. To establish estoppel, it must be shown that the other party relied upon a representation to his detriment. Again, the Court of Appeal rejected the defendant’s arguments.

Thus, the Court of Appeal has taken a reasonably broad approach towards assessing joint authorship. As with the recent case *Peter Hayes v Phonogram Ltd* [2002] EwHC 2062 (Ch) (discussed in *Copyright in the Mix*, A. Sharples [2003] Ent LR 50) this highlights the importance of setting out clear contractual provisions when multiple authors are responsible for a musical work. This is particularly true given the increasing trend of the last few years for recycling pieces of music.

SONY MUSIC ENTERTAINMENT (UK) LIMITED V. EASYINTERNETCAFE LIMITED [2003] EWHC 62 (CH)

The CD copying service offered by Easyinternetcafe Limited, an Easyjet affiliated internet café company, assisted infringement of copyright under sections 17(1) and 18(1) of the Copyright Designs and Patents Act 1988 (CDPA 1988). The judgment also considered a defence under s70 of the CDPA 1988 (time shifting).

The claimants in the case were Sony Music Entertainment (UK) Limited, Sony Music Entertainment Inc, Polydor Limited, UMG Recordings Inc. and Virgin Records Limited. Sony, Polydor and Virgin sued not only on their own behalf but also on the behalf of other members of the British Phonographic Industry Limited.

Easyinternetcafe offered a service to customers whereby they could copy files, including sound recording files, downloaded from the internet onto a CD-R (record able compact disc) in return for a fee of £5.00.

The claimants in the case contended that the downloading of sound recordings from the internet without the consent of the copyright owner was an infringement of copyright under s17(1) and s18(1) of the CDPA 1988. Easyinternetcafe did not dispute that such action as outlined above would infringe copyright, subject to the statutory defence under s70 CDPA 1988. However, the defendant denied that the simple virtue of the process would lead to such infringement.

A point at issue in the consideration of the case was whether customers copying sound recordings onto CD's could have uploaded the files from a separate floppy disk. In oral submission it was submitted by representation for the claimants that even if there was an uploading from material provided by a customer, the inference to be drawn was that the uploaded material nevertheless resulted in the production of an infringing copy CD. On the basis of this statement the claimants considered an application to amend at request of representation for the defendants, but decided not to proceed. Therefore, central to the claimants' case was the establishment of the fact of material being downloaded from the internet. Smith J concluded that the material was downloaded and, *prima facie*, was downloaded in an unauthorised manner.

As evidence, Easyinternetcafe submitted that they implemented a policy whereby the contents of a CD-R were protected against staff investigation, unless explicitly allowed by the customer. The Easyinternetcafe customer logon process also included warnings against copyright infringement.

The defence argued that Easyinternetcafe merely facilitated the infringement by providing means by which the copying was made, similar to a situation whereby the owner B of a fax machine is held to have infringed copyright because A faxes infringing copy to that machine. The defence also provided the analogy of an internet service provider (ISP) providing the technology for transmission or storage of infringing copy. In response Smith J found fault with this argument pointing out that liability for infringement under s17 and s18 is strict. Distinguishing between voluntary and involuntary actions, Smith J also pointed out that the owner of a fax machine in the aforementioned scenario is an involuntary copier, as is the ISP. The defendants, he pointed out, had taken the entirely voluntary action of deciding to keep confidential the files of individual customers by informing employees not to look at them unless the customer consents.

Smith J held that a defence under s70 (recording for the purposes of time shifting) was impossible. The two issues arising from reliance on s70 are first, that the copying must be examined to determine whether it was for “private and domestic use” and second that material on the internet must be considered a “cable programme or any work included in it”. No evidence was adduced to illustrate that copying was undertaken for private or domestic purposes, the burden of which was entirely on the defendant. In addition, the fact that the defendant was involved in the copying exercise for pecuniary benefit was contrary to the nature of the exception. The copying is facilitated by the defendant for profit, not for time-shifting purposes in a private and domestic scenario. Given the failure of the defence in providing evidence regarding the first issue, Smith J considered it unnecessary to decide whether or not the internet is a cable programme for the purposes of s70.

NORWEGIAN COPY PROTECTION CASE JUDGMENT - CIRCUMVENTION OF COPY PROTECTION DEVICES NOT HELD CRIMINALLY UNLAWFUL

On January 9 2003, a Norwegian Criminal Court acquitted John Lech Johansen of charges under the Norwegian Criminal Code relating to circumventing technical control measures that protect data, after he had succeeded in circumventing a copy protection system employed by the motion picture industry to protect DVD's

In 1999, Johansen, a computer programmer, succeeded in circumventing a technical protection system called Content Scramble System (CSS) that was employed by the film industry to protect movies distributed on Digital Versatile Discs (DVD). CSS, designed to control the distribution and use of DVD media, requires that purchasers of DVD movies use a DVD player to decrypt and watch the disc. Companies who wish to manufacture DVD players must have licence to use “play keys”, the keys required to decrypt CSS encryption. Such keys are licensed by the DVD Copy Control Association on the condition that licensees observe strict confidentiality as to the keys and the keys are implemented in the player software in a manner which prevents use or retrieval.

The Linux operating system is founded on an open source philosophy, which ensures that users can freely explore and develop the system. As such producers of software for the Linux operating system could not accept the terms that would be imposed if they engaged in an agreement to use “play keys” for manufacture of a DVD player for Linux operating system. Johansen wished to play DVD movies on his computer using a Linux operating system. Johansen designed a program entitled DeCSS that allowed a non-protected copy of a CSS protected DVD movie to be created. DeCSS was distributed via the internet several times by Johansen in the period September 1999 to January 2000.

In January 2000, the Motion Pictures Association of the United States and the DVD Copy Control Association jointly reported Johansen to the Norwegian Economic Crime Unit, Økokrim. Subsequently, Johansen was charged under section 145(2) of the Criminal Code, which prohibits “breaking a protection or similarly gained access to data stored or communicated by electronic means or other technical means, and having caused damage by availing himself of or use of such unauthorised knowledge or having co-operated to this”.

The court accepted that DeCSS makes a decrypted copy of an encrypted movie, storing it on the hard drive of a computer. However, the issue of guilt was

inextricably linked to that of unauthorised access. On this issue of access, the court stated that the gaining of access to certain data may not be that presumed by the producer of the data, but may nonetheless be considered authorised. Finding that a person purchasing a DVD movie, which is legally produced, is authorised to see the movie, the court went on to state that the use of DeCSS gives the user access to the movie in a decrypted form.

On the issue of access the court concluded that Johansen could not be convicted for co-operation to the violation of the penal code s 145(2) with respect to accessing the movies. This holds even though Johansen knew that the program could be misused and also holds for anyone who distributes goods which may be put to lawful or unlawful use.

On a separate issue of access to play keys, the Court found that Johansen could not be convicted for co-operation to the violation of the penal code s 145(2) with respect to the play keys.

Økokrim have appealed the judgment.

On a related issue, the California Supreme Court has recently upheld the right of Andrew Bunner, a California resident to distribute DeCSS on the internet when it found that a “prohibition on future disclosures of DeCSS was a prior restraint on Bunner’s First Amendment right to publish”.

IFPI ADDRESS COPYRIGHT INFRINGEMENT

The International Federation for the Phonographic Industry (IFPI) has published a Copyright Use and Security Guide for businesses and governments. Addressing the problem of copyright theft in the corporate and government environment, the publication proposes certain best practice and policy considerations.

The Guide suggests a number of activities that institutions can undertake in order to mitigate the potential for both legal and security risks. They advocate the establishment of clear internal policies for employees using computer and network technology for company or government business. They suggest that such guidelines could be outlined in a general policy manual, or in the terms and conditions of employment. The IFPI guidelines also suggest the establishment of internal inventories of all types of copyright material held on internal computing systems, in the same manner as an internal audit. This should operate alongside the deletion of unauthorised copies of copyright material, since commercial recordings of music are “virtually never licensed for corporate or other multiple copying or licensed for Internet distribution except through recognised, legitimate music services”.

Finally, the IFPI proposes increased use of internal technological exclusionary and management measures and the creation of internal copyright compliance officers.

The publication of these guidelines by the IFPI can be seen as a practical step in realising the policy proposals put forward by a variety of entertainment industry representative organisations regarding greater education of copyright law. Such proposals have been advanced given the difficulties in legislating on digital copyright law. The practical effect of such guidelines remains to be seen.

LEGO Co v COKO TOY Co. - INDUSTRIAL COPYRIGHT DECISION IN THE PEOPLE'S REPUBLIC OF CHINA

The Lego Co., the Danish toy manufacturer, won a copyright infringement proceeding on applied art (or industrial design) initiated in 1999 in the China High People's Court whereby the defendant, Coko Toy Co., a Chinese company, was held liable for the unauthorised use of 33 out of 50 copyright elements owned by Lego Co., though with slight modification. The Defendant was ordered to destroy the relevant moulding equipment, to print a formal apology and to pay compensation.

The question of whether works of applied art should be protected by design and/or patent rights or copyright has long been recognised in many jurisdictions as a difficult and complex area. Likewise, China is lacking in well-established legislation on the protection of applied art. The only legislative basis is its 1992 State Council regulation, intended to enable conformation with international treaties, mainly the Berne Convention (which was never tested in the Chinese courts), as opposed to design/patent law that is relied upon by most. In this case, the court rejected the defendant's argument that only patent law applied to the work of applied art.

The significance of this case is to make dual protection for works of applied art possible under the ordinary heading of design rights (Patent Law 1995) which lasts for 10 years and stimulates the new heading under copyright protection, which does not require registration and has a longer life span of 25 years. However, this is arguably an unusual case, and there is still uncertainty in its application and scope of extension. Nevertheless, it is an encouraging step, creating new grounds of argument.

The decision provides companies with a useful alternative to enforcement through the common administrative channels. Many view this decision as a positive progression by the Chinese court which affirms its willingness in implementing and enforcing intellectual property rights. It is also a sign of optimism regarding the future, following China's accession to the WTO.

FINNISH UPDATE ON COPYRIGHT ISSUES

Three issues are reported, unauthorised sub-titles for films, the rejection of proposed domestic legislation relating to copyright infringement based on the EC Copyright Directive (2001/29/EC) and a law governing ISP's on the internet.

The New Year brought a flurry of activity in Finland. The Finnish copyright organisation, Finsubsa Kopiosto, forced a website that made available Finnish language subtitles for films, to close. On 23 January Finsubs ceased publishing on the Internet after Kopiosto warned that it violated the copyright of its members. Even though many of the subtitles were translated by enthusiasts directly from films rather than copied from DVDs, Kopiosto warned that film industry copyrights were breached as it is also illegal to publish unauthorised translations of film scripts.

On 31 January, the Finnish Parliament returned the proposal to implement the European Directive on Copyright and Related Rights in the Information Society (Directive 2001/29/EC) to the government for revision. Mr Jyrki Katainen, a

member of the parliamentary committee on Education and Culture and Vice Chairman of the Conservative Party, revealed that the reason behind this rarely implemented procedure was a lack of clarity in the detail of the draft law. "An unclear law with criminal sanctions of up to two years in prison [for circumventing copyright protection] would have formed a serious risk to unintended citizens", he said. Only Greece and Denmark met the 22 December 2002 deadline for implementing the Directive.

On 17 February, the Finnish Parliament passed a "Law on Liabilities in Public Communications" (HE 54/2002 vp) but only after its Constitutional Committee requested substantial revisions to the government's original proposal. The modified law now explicitly states that the principle of freedom of expression has priority in interpreting the law. Other changes include a reduction in the period of time for Internet Service Providers to archive material (from three months to three weeks) and a requirement to log internet traffic was dropped.

The Finnish position reflects that of many member states concerned about finding the correct balance between the extent of protection that must be offered to the media and entertainment industries and the freedom from restriction that consumers deserve. In the UK the self imposed deadline for implementation of 31 March 2003 will be missed as solutions are sought to the issues raised during last year's consultation process. However, the UK Patent Office remains committed to implementing the Directive as soon as possible and hopes to produce a draft Statutory Instrument to be laid before Parliament by late Spring.

PATENTS

CASE COMMENT ON *C-131/01 COMMISSION V ITALY* [2002] PLACE OF ESTABLISHMENT FOR PATENT AGENTS PRACTISING IN ITALY

Italian legislation states that to provide services before the Italian Patent Office, patent agents established in other member states must be enrolled on the register of patent agents and have a residence or place of business in Italy. Patent agents are required to pass a professional aptitude test to be eligible for entry onto the register. This was held unlawful by the ECJ.

The Commission brought an action against the Italian Republic for not fulfilling its obligations under Articles 49 to 55 of the EC Treaty, concerning the freedom to provide services (of patent agents). The actions brought by the Commission were upheld by the European Court of Justice and the Italian Republic was ordered to pay costs.

Action

The commission issued complaints relating to:

1. Compulsory enrolment on the Italian register of patent agents.
2. Obligation to have a residence or place of business in Italy.

Action 1

The ECJ held that the activity of patent agents from other member states in relation to work at the Italian Patent Office, treated as of an occasional and temporary nature by the Commission, is capable of coming within the field of application of Article 50.

It was held that the requirement imposed on patent agents constitutes a restriction

within the meaning of Article 49 . Additionally the professional aptitude test was not necessary as it did not differentiate between the service providers whose professional competence have been subject to scrutiny in the member state of origin and those who have not been subject to scrutiny.

Action 2

It was held that this requirement was a restriction of the freedom to provide services. Such a requirement may be allowed only if there are overriding reasons relating to the public interest of which there were none.

It was also held that a member state cannot plead failure to observe the principle of reciprocity or rely on a possible infringement of the Treaty by another member state to justify its own default.

APPEAL DISMISSED IN THE *STENA V IRISH FERRIES* CASE [2003] EWCA CIV 66

Ships (and aircraft) registered in other countries of the World Trade Organisation or Paris Union on industrial property may visit British territorial waters without fear of infringing local patents (section 60(5)(d) of the Patents Act 1977).

Stena Rederi Aktiebolag and Stena Line Aktiebolag (Stena) are respectively the registered proprietor of and exclusive licensee under European Patent (UK) no. 0648173 entitled “Superstructure for Multihull Vessels”. The allegedly infringing ship the ‘Jonathan Swift’, operated by Irish Ferries Limited, is a ferry registered in Ireland which sails between Dublin and Holyhead three or four times a day, and on each visit is in the UK territorial waters for about three hours before returning to Dublin.

In the High Court decision the judge held that claim 3 as dependent on claims 1 and 2 was valid and infringed by Irish Ferries, but that the defendants had a defence under section 60(5)(d) of the Patents Act 1977. This section provides that an act, which would otherwise constitute patent infringement for an invention, shall not do so if the act “consists of the use...of a product or process in the body of...a ship...in a case where the ship has temporarily or accidentally entered the internal or territorial waters of the United Kingdom”.

The Court of Appeal upheld the High Court judge in finding that there was a defence under this section. The main arguments submitted on behalf of Stena, based on the interpretation of the word ‘temporarily’ in the exclusion provision, and an argument that the defence should only relate to parts of the ship and not the ship as a whole (as claimed), were dismissed.

The Court of Appeal rejected Stena’s argument that the exception of s60(5)(d) should not apply because the ferry entered UK waters regularly (i.e. three or four times each day) and therefore had not entered UK waters “temporarily”. The Court of Appeal reasoned in part, that s60(5)(d) should be interpreted in light of the purposes of article 5^{ter} of the Paris Convention upon which s60(5)(d) was based. This article was intended to ensure that trade, and the carriage of persons between countries, is not hindered by patent rights applying to the means of transport.

Additionally, the appeal court rejected Stena’s argument that the exception of s60(5)(d) should not apply because Stena’s claims related to the vessel as a whole, instead of to only “the body” of the ship, because the appeal court interpreted

s60(5)(d) as property including claims to the vessel as a whole. Anyway, and despite the wording of the claims, it was confirmed that the invention or inventive concept in this case is not the totality of the ship but the special strengthening design in part of it; the features of the claim are therefore properly referred to as 'in the body' of the ship and not the ship as a whole.

***GENERAL ELECTRIC CO v ENERCON GMBH* CH.D PATENTS COURT (LADDIE J) 17/2/2003 [UNREPORTED]**

This case concerned an application for a stay of infringement proceedings pending conclusion of EPO opposition proceedings. The judge set out some helpful comments on some factors which would be taken into account in considering whether to order a stay, including whether an injunction would ever be ordered to stop on-going projects.

Generally it will be five or six years after grant that an opposed European Patent is considered by the Board of Appeal of the EPO. It follows that any infringement proceedings pursued in the UK courts are based on potentially invalid patent claims that are under attack in the EPO. Historically, the UK Patents Court has worked on the assumption that patent litigation should be dealt with swiftly to minimise costs and maximise the use of any valid patent (exemplified by: *Pall Corporation v Commercial Hydraulics* [1989] RPC. 703). However, contrary to this position, Aldous L.J. in the Court of Appeal said in *Kimberley-Clark v Procter & Gamble* ([2000] FSR 235) that the option to stay the proceedings was the preferred option when opposition proceedings are before the EPO. Subsequent cases, however, indicate the Patents Court will assess the prejudicial effect a stay would have on either party, and then take the least prejudicial path (*Unilever Plc v Frisa NV* [2000] F.S.R. 708; *Minnesota Mining & Manufacturing Co v Rennicks* [2000] FSR. 727).

In the current case, *General Electric Co v Enercon GmbH*, the defendants made an application for a stay of UK patent infringement proceedings. Since its grant in 1998 the patent had been the subject of major opposition at the European Patent Office (EPO), having ten opponents including the first defendant. Enercon submitted that it was appropriate to order a stay when major opposition proceedings were ongoing at the EPO (*Kimberly Clark v Procter & Gamble* [2001] E.I.P.R. 367-370). They specifically argued that fighting actions in two forums was wasteful of costs, court time and might result in the United Kingdom court considering the question of infringement and validity on the basis of claims that might be the subject of amendment in the EPO. General Electric replied that, while high, the costs should be viewed in relation to the size of the market being fought over, and that a stay might delay matters, which was unfair considering the current critical time in the market.

After reviewing the timing of procedures and the products and markets involved, Laddie J. took the view that a stay was not appropriate in the circumstances. If a stay was granted, proceedings could delay a final decision on infringement until 2008/2009 with the patent expiring in 2012 thus leaving the patent without meaningful protection for much of its life (*Minnesota Mining & Manufacturing Co v Rennicks* [2000] FSR. 727). Important to the decision on this application was the fact that there were grounds to suspect that even if the patent survived opposition proceedings and that infringement was proved, a court might be reluctant to stop projects already part way to completion that used Enercon's wind generators. It appears that due to the emerging and extremely important nature of the wind powered generator market, the court wanted to address infringement in

an expedient fashion to remove commercial uncertainty and to ensure that the patent was given a fair commercial life in the UK. The current trend therefore, based on the most recent decisions is that applications for a stay of proceedings are being decided case by case based on factors such as costs, status of the entity requesting the stay, timing considerations, and the dynamics of the relevant market.

TEVA PHARMACEUTICAL INDUSTRIES LTD V (1) ISTITUTO GENTILI SPA (2) MERCK & CO INC. [2003] EWHC 5 (PAT)

The case related to a new use for an old compound. The patent was found invalid, but with judicial “regret”. The failure of a patent to accurately describe the state of the prior art made it particularly susceptible to an attack of obviousness, since there was then little evidence of improvement over the prior art.

Three generic drug companies, Teva Pharmaceutical Industries Ltd, Arrow Generics Ltd, and Generics (UK) Ltd sought revocation of two patents: UK Patent No. 2,118,042, held by Istituto Gentili SpA (now a subsidiary of Merck & Co Inc.), and European Patent (UK) No. 0,998,292, held by Merck & Co Inc. Both patents concerned the use of the chemical alendronate in pharmaceuticals, particularly for the treatment of bone adsorption disorders such as osteoporosis. The compound itself was not novel, having been revealed in EP Application No. 0,039,033A. The question remained as to whether its use to treat bone adsorption disorders was both novel and inventive.

UK Patent '042, which claimed priority from 1982, was held to read onto the prior art. This included several examples of chemicals with structures similar to that of alendronate being used to perform similar functions, although there was no mention of alendronate itself. The court held that the failure of the patent to accurately describe the state of the prior art made it particularly susceptible to an attack of obviousness, since there was then little evidence of improvement over the prior art.

European (UK) Patent '292 was much more recent, claiming priority from 1997, and concerned the use of a single weekly dose of 70mg for the treatment of osteoporosis, in place of daily doses of 10mg, in order to improve compliance and hence minimise side-effects. The claimants' main contention was that this amounted to a method of medical treatment (excluded from patentability under Patents Act 1977 s4(2)). It was held that the claim was so worded as to amount to a dosage regime (since it covered not only a single 70mg tablet but also combinations of smaller tablets) and hence was both a method of medical treatment, and also obvious over earlier 10mg tablets.

Thus Jacob J found (with some regret) that the patents were indeed invalid, since the patent system does not protect those who develop old or obvious products. He did however recognise the considerable investment and risk that Merck had made in providing the public with an effective treatment for osteoporosis, and suggested that a workable protection system to protect this sort of investment ‘might be a good idea’.

AGREEMENT ON COMMUNITY PATENT

Since 1999 the EU has been debating the regulations to bring a community patent into effect, and thus cut costs. The last road blocks have now been removed. It is now likely that the first community patents will be granted soon, as the EPO is the granting authority, and provided all member states of the EU are designated, it should be possible to convert on grant a European patent to a Community patent. Enforcement will be through national courts until 2010. It was this last issue which formed the final major bottleneck.

Discussion on a community patent started in 1975 with the signature of the Luxembourg Convention. The purpose has been to ensure the free movement of goods provided under the EU and a unitary position concerning different provisions held by the members states.

On the 12 February 2003, the Greek presidency of the Committee of Member States' Permanent Representatives to the EU (COREPER) presided over a new compromise concerning a single judicial system, the role of national patent offices (NPO), distribution of fees and languages concerning the community patent, which were the issues blocking the earlier implementation of the community patent.

Following this proposal, the EU Competitiveness Council reached an agreement on the creation of the community patent on 3 March 2003.

The applications will have to be filed in one of the three European Patent Office (EPO) languages; German, French and English. The EPO will play a central role in the administration of the community patent. It will be solely responsible for the examination and grant of community patents. Conversely, on the EPO's behalf, may help the EPO in tasks such as search work for NPO's operating in one of the three EPO's languages, and up to novelty searches for NPOs having an official language other than the three EPO's languages. The NPOs will hold a role in spreading patent information and advice.

The jurisdictional system will be based on a community patent court (CPC) to ensure uniformity of jurisprudence. The CPC will have exclusive jurisdiction in actions and claims of invalidity or infringement proceedings, and also all proceedings linked to the use of patents and any counterclaims of validity. The CPC will be attached to the court of first instance (CFI), which is in charge of the appeal procedures. The language of proceedings will be either the language of domicile of the defendant, or a language of its choice. The CPC is supposed to be established by 2010. Until then, members states are required to designate a limited number of national courts to have jurisdiction, in a similar manner to the community trade mark. In England, this is likely to be the patents court and the patents county court, both in London.

A decision will have to be made by those applicants whose patents are near grant whether to delay grant until the regulation comes into force, so that a Community Patent can be obtained.

IMPLEMENTATION OF THE BIOTECH DIRECTIVE: COMMISSION APPLIES PRESSURE ON MEMBER STATES AND ESTABLISHES EXPERT GROUP

On 28 January 2003, the European Commission met with member states in relation to the delayed implementation of the Biotech Directive (1998/44/EC). Although the directive should have been implemented by all member states by 30 July 2000, so far only 6 have done so (Denmark, Finland, UK, Ireland, Spain and Greece). The meeting, part of the enforcement procedure to compel implementation of the directive, offered the member states a third opportunity to express their difficulties in adopting the directive into national law.

The meeting follows an unsuccessful legal challenge to the Biotech Directive by the Netherlands, which was rejected by the ECJ on 9 October 2001, and an official request in December 2002 that Germany, Austria, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Sweden pass appropriate legislation to implement the directive under threat of being referred to the ECJ.

The meeting also discussed the first status report COM(2002) 545 on the effect of the Biotech Directive published in October 2002 and established an expert group on legal and technical aspects of biotechnological inventions.

The expert group is made up of patent practitioners, industry representatives, legal experts, scientists and representatives of the European Patent Office (EPO) and World Intellectual Property Organisation (WIPO). It will focus on legal and technical aspects and on the impact of the directive on research and innovation. The first meetings of the group, to be held in March and May 2003 will address the level of protection to be given to patents for gene sequences and the patentability of human stem cells and cell lines.

***SKB PLC & ANOR v APOTEX & 2 ORS* CH.D PATENT COURT, LADDIE J, 4/2/2003 [UNREPORTED]**

Should experiments on samples provided in a patent action be subject to confidentiality undertakings, and if so to what extent.

On the 4 February 2003, the Chancery Division Patents Court held that tests done by the claimant, SKB Plc, on Defendants' samples in order to prove patent infringement were done solely for the purposes of these proceedings, and therefore fell under the Civil Procedure Rules 1998/3132 (CPR 31.22), despite express provisions of confidentiality undertakings agreed to by the parties.

The claimant had asked Apotex, the defendant, for samples of its products in order to assess whether Apotex had infringed one of SKB's pharmaceutical patents. Apotex agreed to give those samples, on condition that access to the samples and test results must be restricted under confidentiality undertakings. This created an unbalanced system that left the defendant Apotex apparently free to do what it wanted with the results, while the claimant SKB was restrained. The present hearing was an application to vary the undertakings.

On the ground that the samples were made available, and that the tests were conducted solely for the purposes of these proceedings, Laddie J held that it was legitimate to consider that both parties should be treated equally despite the

asymmetric confidentiality undertakings, and that the undertakings should reflect the issue at stake. In so finding, the court discerned an intention by both parties that CPR 31.22 should apply. Furthermore, adhering to CPR 31.22, the court found that the samples and results should not be made available outside the scope of the proceedings.

SMITHKLINE BEECHAM PLC (2) GLAXOSMITHKLINE UK LTD V (1) APOTEX EUROPE LTD (2) NEOLAB LTD (3) WAYMADE HEALTHCARE PLC [2003] EWCA CIV L37

This case deals with the dynamics of granting or refusing interim injunctions in the pharmaceutical field, where there has been a recent history of granting interim injunctions because price depression would be irrecoverable by a final injunction and an award of damages. The patent in question was only partly valid, and the issues arising out of that finding (in other proceedings) were also discussed.

On 14 February 2003, the England and Wales Court of Appeal dismissed the defendant's appeal of an interlocutory injunction, granted on 28 November 2002 by the Chancery Division Patents Court.

The patent at stake relates to preparation of the therapeutic agent paroxetine hydrochloride anhydrate, which is made to be substantially free of organic solvent by displacing the solvent using a displacing agent. The claimant sells the hemihydrate form of the substance under the trade mark Seroxat. The defendant sells the anhydrate form, and argued that it does not infringe the patent because it starts its process using an anhydrate form, and does not use a solvate.

The trial court held that the patent at stake was partially invalid, but that the claim at issue in this trial, claim 11, was valid. Both parties appealed the decision of partial invalidity. The trial court also found that there was prima facie evidence of infringement, and granted the claimant's application for an interlocutory injunction in order to prevent unquantifiable loss.

The defendant appealed the grant of the interlocutory injunction. The defendant argued that the damages were indeed quantifiable because the only damages that could be granted would have to be based on a reasonable royalty.

The defendant also argued that, because the patent had been held partially invalid and amendment was proposed damages would not be recoverable unless the claimant established that the specification, before amendment, was framed with reasonable skill and knowledge (see s63(2) of the Patents Act 1977). In this case the defendant argued that the evidence did not establish that the specification was framed with the requisite skill and knowledge. Finally, the Defendant argued that the claimed damage was too remote.

On appeal the court reasoned that a claimant is entitled to be granted damages for loss suffered by the infringement, and that the extent of recovery is based on the facts and a consideration of remoteness. The fact that the two chemical forms are, for practical purposes interchangeable, supports the fact that the damages here are not too remote. The court also reasoned that s63(2) of the Patents Act 1977 does not preclude the grant of an interlocutory injunction to a successful patentee. If a final injunction would normally be granted in cases where damages after amendment would not be recoverable, there is no principle that would preclude an interlocutory injunction from being granted in similar circumstances.

The specification at issue was framed with reasonable skill and knowledge, and therefore damages for infringement would be recoverable.

Nothing showed that it would be easier to calculate damage if no injunction was granted. The trial court judge was therefore entitled to hold that damages would not be adequate, and to grant the interlocutory injunction.

TRADE MARKS

HIGH COURT APPLIES ECJ REPACKAGING RULES

In *Glaxo Group Ltd. and The Wellcome Foundation Ltd. v Dowelhurst Ltd.* [2003] EWHC 110(Ch), Laddie J applied the preliminary ruling of the ECJ (Case C-143/00, [2003] Ch 27, [2002] ETMR 78) on the repackaging issues raised by this case. The judge discussed the conditions on which the re-packer can use the originators trade marks on repacked pharmaceuticals, such use must be proportionate to the need to achieve market penetration, and must not lead to brand association.

Repackaging

Laddie J acknowledged that, contrary to his approach in the initial trial ([2000] EWHC Ch 134), also regarding use of proprietor's mark, the ECJ started with the presumption that every act of repackaging is deemed prejudicial to the specific subject matter of the proprietor's trade mark rights, even if no actual harm to the goods or the mark's origin-denoting function can be shown. Therefore, *prima facie*, a proprietor can oppose *all* acts of repackaging.

Nevertheless, this right to oppose repackaging disappears if repackaging is necessary because re-labelling alone would not enable products to gain effective access to a national market. Forbidding repackaging there would partition the internal market. The national court must decide whether re-labelling would achieve market access or whether the more intrusive step of repackaging is necessary. There is no presumption on this issue.

Where repackaging is allowed, it must not harm the legitimate interests of the trade mark owner, including the condition of the products and the reputation of the mark. Only repackaging that inflicts the minimum amount of damage to the claimant's mark and is as unobtrusive as possible is tolerable e.g.:

- imitating the original packaging, including changes with no trade mark significance e.g. translating text into another language.
- plain boxes depicting nothing but the claimant's trade mark.
- additional markings required by national law or ECJ jurisprudence must be allowed, but must be applied in a way that does the least damage to the trade mark proprietor's interests e.g. the re-labeller's name should not be more prominent than the claimant's trade mark.
- Dowelhurst had bought pharmaceuticals labelled DEROXAT in France which were sold under the SEROXAT mark in the UK. It was acceptable for Dowelhurst to change the name to SEROXAT in its translation of the patient information leaflet because patients would not realise that the two products were the same and would be alarmed if they thought they were getting a different drug to that which they had been prescribed.

Laddie J also gave examples of unacceptable repackaging that coincided with the

defendants' activities:

- “debranding,” where the re-packager removes or masks the claimant’s mark, if undertaken to an extent that it reduces the claimant’s ability to build up public awareness around his mark. However, if the mark is completely removed, there is no trade mark use and hence no infringement.
- “co-branding,” where the re-packager uses his own mark or get-up alongside the claimant’s in order to build up a reputation in his mark or get-up at the expense of the claimant’s goodwill in his mark.

However, these activities *are* permissible if they are necessary for market penetration.

The judge found that applying a sticky label to original packaging does not carry the same risk of interference with the product as repackaging. Therefore, unlike repackaging, the claimant must show that the over-stickering will cause *real* harm to his rights before he can prevent it.

Notice must be given in both repackaging and re-labelling cases. However, because re-labelling does not involve the same risk to the subject matter of the mark and all the proprietor need do is examine a label applied to his own packaging, seven working days notice should be enough, compared to fifteen days for repackaging.

The claimant had assured the defendant that it would not rely on the defendant’s failure to give notice of the repackaging, so the lack of notice could not form the basis of an injunction or a claim for damages. An injunction against future failure to give notice was also refused because the notice procedure is short and easy, so there was no reason to believe the defendant would not give notice in the future.

The defendant had repackaged the claimant's products in an impermissible fashion, entitling the claimants to an injunction restraining infringement. However, they were only entitled to delivery up of the infringing packaging and not of the goods themselves, as they were obtained legitimately abroad, meaning that the claimant had already benefited from the payment of the sale price abroad by the defendant. The defendant was also ordered to provide the claimant with information enabling them to decide whether to opt for an account of profits.

Laddie J admitted defeat on the need for actual harm to the trade mark owner before repackaging at least can be prevented, even though he thought the ECJ’s approach “creates an irrebuttable legal fiction unconnected with the facts.” The courts can no longer take a liberal approach to repackaging by arguing that the repackaging does not harm the trade mark. However, they may still take a wide view of when it is “necessary” to repackage in order to penetrate import markets. The ECJ provided some guidance on the meaning of necessity (paras. 46-54) but it remains to be seen how national courts will apply this. Additionally, although the judge said repackaging without using the original mark is not trade mark infringement, it may be reverse passing off, a possibility acknowledged in the referring judgment ([2000] FSR 529).

**SUMMARY JUDGMENT REFUSED IN REPACKAGING CASE
GLAXO GROUP LTD & THE WELCOME FOUNDATION LTD V
EUROPHARM OF WORTHING LTD & EUROCHEM LTD [2003]
EWHC 116 (CH)**

Following the *Glaxo v Dowelhurst* case (above, “*Dowelhurst*”), the defendants applied for summary judgment under CPR rule 24.2. The defendants argued that, because the claimants had lost on the necessity to repackage issue in *Dowelhurst*, they had no reasonable prospect of success here and there was no compelling reason for the case to be tried. Laddie J in the High Court disagreed. The necessity for repackaging will be examined on a case by case basis. The judge made some comments on the procedure adopted by the defendant in its application.

The defendants only gave the claimants three days notice of their application, rather than the fourteen days the CPR requires. Their arguments that the claimant would not be prejudiced by the short notice and that costs would be saved because the application would be heard while the claimants and their counsel were already in court for the *Dowelhurst* trial were rejected. The defendants had ignored the CPR in not giving a satisfactory explanation for their failure to give notice on the correct date. The fact that a trial at the present moment was viable did not make up for the defendants’ previous omission.

Was there no chance of success for the claimant after *Dowelhurst*?

Laddie J held that, despite the finding that repackaging was necessary in *Dowelhurst*, the claimants should be given a chance to show that repackaging was unnecessary in *this* situation. Necessity is a question of fact. Before a different judge and with different evidence, the claimants may be able to show repackaging was unnecessary. There was no issue estoppel because the parties here were different to those in *Dowelhurst*. If the claimants’ decision to go ahead with the argument on necessity was ultimately found to be unreasonable, this could be reflected in any order for costs, rather than preventing the argument from being made at all. Also, neither party would be significantly adversely affected by the cost of going to trial.

Laddie J’s unwillingness to assume necessity in a summary trial, and his holding that it is an issue of fact reflects his finding in *Dowelhurst* that there is no legal presumption about necessity. As noted above, factual findings of necessity could control when repackaging is permissible.

**COURT OF APPEAL DISMISSES APPEAL AND CROSS APPEAL IN
THE REGISTERED TRADE MARK CASE OF WEST (TRADING AS
EASTENDERS) V FULLER SMITH & TURNER PLC [2003] EWHC
CIV 48; 2003 WL 116973**

The Court of Appeal dismissed the appeal and cross appeal by the parties and affirmed the earlier decision in *David West (t/a Eastenders) v Fuller Smith & Turner PLC*, [2002] EWHC 122; [2002] FSR 55; 2002 WL 346991 (Ch D), which dismissed West’s challenge to the validity of Fuller’s trade mark ESB (holding it was not devoid of distinctive character) and ordered a partial revocation of the mark in respect of all goods except bitter beers, the latter being the only goods for which the mark had been used. This case has a bearing on partial revocation for non-use, and its effect.

The appeal put forward by West argued that the judge had been incorrect in his application of section 3(1) of the Trade Marks Act 1994 on the issues of validity of the mark. This was rejected and it was held that Fuller's ESB mark in the eyes of the relevant public acted as a trade mark applied to Fuller's Products and was therefore not 'devoid of any distinctive character. The argument that the mark was purely descriptive failed because it was held that 'descriptiveness and distinctiveness in fact are not mutually exclusive'. Fuller's mark was found to have both descriptive qualities and the additionally required distinctive character. West also failed to establish that the initials were a sign or were generic in language or established practices of the trade.

The cross-appeal by Fuller contented the extent of the revocation of the mark for non-use. Fuller claimed that bitter was only a segment of the market and there were no specific criteria to distinguish between types of beer. The mark was registered in respect of 'beer', however it was noted that 'Beer drinkers in the main drink either lager or bitter, but not both. There is little overlap of trade marks between those two classes.' Consequently the relevant customers are accustomed to seeing lager and bitter bearing different marks. As such, non-use of the mark was held to have occurred and the partial revocation was sustained.

A NEW-LOOK COMMUNITY TRADE MARK SYSTEM?

The European Commission has recently presented a proposal for a Regulation which aims to modify existing procedures for the granting of Community Trade Marks (CTMs) by the Office for Harmonisation in the Internal Market (OHIM). The Regulation would abolish the system of searches, amend the regime for professional representation before the OHIM and expand the current system to include means by which the Boards of Appeal can further improve the way they function. The proposal also includes the abolition of the nationality and reciprocity conditions for allowing an application of a CTM thereby removing the nationality and residential restrictions on access to the system.

The two main changes the new Regulation would introduce to the existing CTM Regulation 40/94/EC (CTMR) are the removal of the search system (deleting Article 39) and the amendment of Article 89(2)(c) to bring it in line with the principles of freedom of establishment and freedom to provide services under the EC Treaty. The proposed amendment is based on a report submitted by the Commission after launching a public consultation.

The Commission reached the conclusion that the system of searches established by Article 39 CTMR is a costly one, especially to SMEs, which unnecessarily prolongs the registration procedure of CTMs and imposes an administrative burden on national offices, OHIM and applicants, without providing applicants with a valuable and cost-effective tool to help them monitor effectively the possible existence of prior conflicting rights. It is estimated that the delay of about six months between the date of filing a CTM and the publication of the application can be reduced to about a month and a half if the search system is abolished.

On the issue of professional representation before OHIM, Article 89 CTMR allows for legal or other qualified persons of applicants to register or oppose trade marks. The Regulation required the Commission to examine the system at the end of a period of three years from the date on which OHIM began to accept the filing of applications. Hence, in June 1999 the Commission launched a consultation

which, in its view, revealed the need for amendment. It considered some aspects of the current professional representation requirement to be contrary to the freedom of establishment (Articles 43 et seq. of the EC Treaty) and the freedom to provide services (Articles 49 et seq. of the EC Treaty) and aims to bring them into line. This would mean that once professional representatives are registered to appear before OHIM, regardless of where they are domiciled or conduct their business in the EU, they would retain their registration. Also, as a general recommendation, the Commission would ask OHIM to provide Member States, and candidate countries, with the necessary advice and guidance to ensure that national representatives all over the European Union have equal access to the information and know-how on the CTM system of protection.

Finally, the Commission would like to propose to the Non Governmental Organisations with which OHIM co-operates to study the need to adopt a voluntary, non-binding code of conduct for professional representatives before OHIM. The Commission and OHIM would provide assistance in drawing up such measures if necessary.

To conclude, on the issue of searches, instead of completely abolishing the search system, the Commission should consider making it optional, as a number of respondents to the Commission's consultation paper suggested. This option can then be abolished after a trial period if the Commission still comes to the conclusions mentioned in paragraph three above.

SPAIN'S CIDESPORT LOSES TO NIKE IN CHINESE TRADE MARK CASE

A trade mark is infringed where it is applied, even if all of the goods are for export to a country where the impersonation of the goods bearing the mark is not an infringement. The trade mark NIKE is split, with different owners in Spain and China, the owner of the latter being the well-known US company. It succeeded in obtaining an injunction to prevent the Chinese manufacturer applying the NIKE trade mark in China for goods destined for the Spanish market.

In one of the most significant international intellectual property cases in China since it joined the WTO in 2001, a local court has ruled that US sports clothes company Nike can prevent Cidesport from manufacturing in and exporting from China sportswear bearing the NIKE name.

The dispute dates back to 1991 when Spanish sportswear company Cidesport, which has held the Spanish trade mark NIKE since 1932 and has been Nike's rival in trade mark cases for over a decade, applied to cancel Nike's NIKE trade mark registration in Spain. The Spanish Supreme Court found in Cidesport's favour in 1999, and Nike has been prohibited from using its trade name on clothing in Spain since then.

Cidesport proceeded to apply for trade mark registration of the name NIKE in various jurisdictions and, due to the "first in time" standard adopted by most countries, its activities have posed a threat to Nike, the giant in the global sport clothing market.

Nike, the proprietor of the registered NIKE trade mark in China, sued Cidesport for trade mark infringement in 2000. It claimed that Cidesport exported raw materials to mainland China and authorised a local clothing manufacturer to process men's skiing coats using the name NIKE, before another local trading

company exported the finished products back to Spain for sale.

Cidesport claimed that, first, no confusion would arise between Cidesport and Nike's products in Spain as Nike does not enjoy trade mark protection in Spain. Second, the target market of the product was in Spain (not China), so the manufacture of Cidesport's NIKE product in China would not infringe Nike's trade mark nor result in any damage to the Nike Company.

The Chinese court found for Nike, holding that all claimants from WTO member states should receive equal protection to Chinese nationals. It held that trade marks, as intellectual property rights, have geographic characteristics. Thus, notwithstanding its right to use NIKE in Spain, Cidesport and the two local Chinese manufacturers had infringed Nike's Chinese-registered trade mark by manufacturing products and applying the name NIKE.

The local Chinese manufacturers had argued that the process was carried out under the authorisation of Cidesport, a legal Spanish trade mark holder, so the process manufacturer should not be liable for any infringement. This was rejected by the court.

BUD TRADE MARK BATTLE ENDS IN STALEMATE *BUDEJOVICKY BUDVAR NARODNI PODNIK V ANHEUSER BUSCH INC. [2002] EWCA CIV 1534*

This case concerns the BUD trade mark, which was split between Czech and US owners, neither of whom was able to oust the other. The judgment deals with what constitutes genuine use of a trade mark, for the purpose of revocation for non-use.

The protracted legal feud over the right to use the BUD trade mark in the UK has come to a conclusion, albeit an unsatisfactory one for both parties. US firm Anheuser-Busch has failed in its attempt to have Czech brewer Budvar's BUD trade mark revoked and a House of Lords ruling has denied it from taking further action, effectively bringing the ownership issue to a stalemate.

After failing in an earlier passing off action and unsuccessfully opposing Budvar's initial application, Anheuser-Busch applied for revocation of Budvar's BUD registration on the grounds of non-use over a period of five years under section 46 of the Trade Marks Act 1994.

Budvar was victorious in 2002 (EWCA Civ 1534) when it was held that the use of BUD in block capitals on packaging did constitute 'genuine use' of the trade mark. The US brewer's last-ditch appeal was scuppered by the House of Lords' ruling on 17 February 2003.

The bad blood between these two breweries dates back to the nineteenth century when an American brewer of German origin chose the name 'Budweiser' to benefit from the popularity and renown of German beer. However, the Czech town of Budvar claim to have brewed 'Budweiser' beer since the fourteenth century and, as Budvar was formerly known by its German name 'Budweis', 'Budweiser bier' is a designation of origin.

Trade mark laws were in a fledgling stage at the end of the nineteenth century, and, in 1876, Anheuser-Busch was first off the mark to register the name

'Budweiser' in the US. The US and Czech breweries initially agreed to divide the market geographically, but this was a temporary solution.

Budvar's claim improved significantly when it registered BUDWEISER as an appellation of origin for beer in accordance with the Lisbon Agreement in 1967. This afforded trump card protection to the Czechs, as many countries accord appellations of origin precedence over trade marks.

The fall of Communism in Czechoslovakia in 1989 allowed Budvar to enter new markets and set in motion legal disputes all over the world regarding the exclusive rights to use BUDWEISER and BUD. These conflicts demonstrate the uncertain relationship between trade marks and geographical indications and those between reputation and tradition.

The UK's situation is unique in this respect, resulting from the island's traditionally strong ties with both the US and Continental Europe. Anheuser-Busch and Budvar have independently acquired goodwill in their products, and their honest concurrent use allowed them both to register BUDWEISER and BUD for the same class of goods. This conflict has now reached a deadlock and the two brewers must reluctantly learn to coexist. This battle may be over, but, with over forty similar lawsuits proceeding around the world, the war goes on.

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