

## The European IP Bulletin

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**SUMMARY OF  
CONTENTS**

**PAGE  
NO.**

**HOT TOPIC**

**1. HOUSE OF LORDS CLARIFIES NOVELTY IN SYNTHON V SMITHKLINE  
BEECHAM PLC**

**1**

The judgment of the House of Lords in the case of *Synthon v Smithkline Beecham Plc* clarifies when an invention can be considered new and patentable within the UK Patent Act 1977. In the leading decision for the House of Lords, Lord Hoffman stated that both “disclosure” and “enablement” are distinct concepts, each of which has to be satisfied before a patent can be held as anticipated and invalid.

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**2. CAMPBELL V MGN: NAOMI CAMPBELL WINS AGAIN**

**2**

Campbell v MGN Limited is the latest appeal in the action brought by Naomi Campbell against the publishers of the Daily Mirror for breach of confidence over the publication of information relating to her treatment for drug addiction. This case is the first occasion where the House of Lords have considered the consequences of the Conditional Fee Agreement regime as it relates to claims affecting the freedom of expression.

**3. ENGLISH HIGH COURT REFUSES INTERIM ORDER BARRING SIMILAR  
ART WORK ON CD COVERS**

**3**

The claimants in *GMG Radio Holdings Ltd & Ors v Tokyo Project Ltd & Anor* argued that the art covers on CD compilations created by the same artist were confusingly similar and applied for an injunction based on a claim for passing off.

**4. ONLINE MANAGEMENT OF MUSIC RIGHTS: THE COMMISSION’S  
RECOMMENDATION**

**4**

The European Commission, in its recommendation on collective cross-border management of copyright and related rights for legitimate online music services, has offered guidelines to Member States on how to shape further legislative initiatives at the local level in order to enhance the provision of music products on the internet. The Recommendation is a compromise between the calls for an innovative legal instrument and the need to maintain stability within the working rules of collective management.

**PATENTS**

**5. OBVIOUSNESS - CONFLICTS BETWEEN EPO AND UK APPROACH**

**5**

In October at first instance in the UK Patents Court, Mr Justice Pumfrey handed down his judgment in a case which highlights the different approaches of the European Patent Office and UK law in approaching the question of obviousness in patents. Whilst Justice Pumfrey did not go so far as to say that there was a conflict between the approaches, the case nevertheless provides ammunition to critics of the EPO formulaic approach to obviousness.

**6. LONDON SEARCH FACILITY OF THE UK PATENT OFFICE MERGES WITH THE BRITISH LIBRARY** **6**

The British Library has merged with the London Search Facility of the Patent Office to become the entrepreneurs' chief information source on intellectual property. This has created a superior service in the United Kingdom for comprehensive database searching of patents, trade marks and designs, as well as viewing cases, journals and specifications.

**TRADE MARKS** **7. THOMSON WILL SELL WITHOUT 'LIFE'** **6**

The European Court of Justice decision in *Medion AG v Thomson multimedia Sales Germany & Austria GmbH* has interpreted Directive 89/104/EEC (to approximate the laws of Member States concerning trade marks), and provides a new approach to ascertaining the likelihood of confusion between two marks when one is a composite sign that consists of a company's name, and the other a registered mark belonging to a third party and used to sell identical products.

**8. EDEN SARL V OHIM** **7**

On 27 October 2005, the Court of First Instance delivered its judgment in *Eden Sarl v OHIM*. It dismissed an attempt to register a trade mark for the smell of ripe strawberries on grounds of lack of graphic representation.

**9. VODAFONE LAUNCHES IN ROMANIA FOLLOWING TRADE MARK DISPUTE** **8**

Vodafone, the British mobile telephone service provider, has launched its first service in Romania. The launch follows a legal dispute with a rival telephone company which held a long-standing registration of the VODAFONE trade mark in Romania.

**Hot Topic**

**1. HOUSE OF LORDS CLARIFIES NOVELTY IN SYNTHON V SMITHKLINE BEECHAM PLC**

In this judgment, the House of Lords have clarified the approach which should be taken in assessing novelty, explaining why the concepts of disclosure and enablement must be considered separately, and highlighting the pitfalls of not doing so.

These proceedings arose from the near-simultaneous discovery of paroxetine methanesulfonate (PMS) by the appellants Synthon BV (Synthon) and the respondents, Smithkline Beecham Plc (SB)

Both parties filed patents relating to crystalline PMS. The SB patent had a priority date of 6 October 1998. Synthon challenged this patent as being anticipated by its earlier patent application, which had a priority date of June 1997. Synthon contended that the crystalline form of PMS described in Claim 1 of SB patent was not new, because it was disclosed in Synthon's earlier patent application. As the Synthon application was not published at the time of the SB filing, Synthon could not rely on obviousness, only novelty.

At first instance Justice Jacob decided in favour of Synthon. The decision was taken despite inaccuracies in Synthon's application, which made it impossible for the skilled man to make the product claimed in Synthon's application without changing the described crystallisation procedures. SB contended that these inaccuracies did not constitute an enabling disclosure for the purposes of novelty, and whilst they could be a ground of obviousness, they could not be alleged by Synthon. However, Jacob J held that the inaccuracies were not material, and that a person skilled in the art could rely on his common general knowledge to supplement the prior art document. He held that there are two ways of proving anticipation: the "enabling disclosure" and the "inevitable result" route. The test to be applied is whether the two inventors have in substance reached the same invention because the primary purpose is to avoid double patenting. He held that both SB and Synthon disclosed the same invention at the same level of generality, and that Synthon got there first. The inaccuracies in the description of the method of crystallisation did not defeat the enablement of the invention in this case. Moreover, SB's own patent claimed that the crystallisation process was part of common general knowledge.

The decision was overturned by the Court of Appeal, who considered that Jacob J had erred in holding that the invention was the same in both the prior application of Synthon and the SB patent. Moreover, the inaccuracies in the prior art document relied on by Synthon were of a material nature, which should not have been disregarded by Jacob J. Aggrieved with the decision, Synthon appealed. The House of Lords had to decide whether the inaccuracies in Synthon's application precluded it from anticipating the SB application.

Lord Hoffman held that, in order to succeed in a claim of anticipation, a party has to satisfy two points. Firstly, that the application discloses the invention which is the subject matter of the patent in question, and secondly, that an ordinary skilled man would be able to reproduce the disclosed invention by using the disclosed matter and common general knowledge.

Lord Hoffman first addressed disclosure. Because the Synthon application disclosed the compound claimed in the SB patent, Lord Hoffman held that the claimed invention was clearly disclosed. The fact that the claimed compound was only one of a large number of compounds in the Synthon application was irrelevant. It was also held immaterial that Synthon had believed that they were making a

compound different to that of the SB patent. Regardless of what Synthon believed, there is, in reality, only one form of crystalline PMS, and so the disclosure by Synthon of crystalline PMS was effective, even if the Synthon application went on to make incorrect statements about it.

Lord Hoffman then turned to the question of enablement. This assessed whether, having disclosed the invention, the prior art also enabled it, ie. did the Synthon application provide sufficient detail to enable the skilled person to make the compound. The judge at first instance had found, as a matter of fact that it did, deciding on the evidence that the skilled person would be able to overcome the errors in the Synthon application without difficulty.

The Court of Appeal had overturned this finding. However, as it was a finding of fact, Lord Hoffman pointed out that an appellate court should be reluctant to interfere with it. Lord Hoffmann did not believe that there were adequate reasons to do so, nor did he believe that the Court of Appeal had provided any such reasons. The other four Law Lords agreed, resulting in the Court of Appeal's decision being overturned, and the SB patent application being held invalid for lack of novelty.

The judgment provides clarification on the differences between the concepts of disclosure and enablement, pointing out that whilst both must be present for the prior art to render a patent as lacking in novelty, they must be considered separately. In this case, the correct legal approach and an unusual set of facts resulted in a document which incorrectly described both the product and the process for making it, being nevertheless adequate to destroy the novelty of a subsequent patent.

A more detailed commentary of this case by Andrew Sharples and Duncan Curley will be appearing in EIPR in the coming months.

## Copyright

### 2. CAMPBELL V MGN: NAOMI CAMPBELL WINS AGAIN

*Campbell v MGN Limited* [2005] UKHL 61 is the latest appeal in the action brought by Naomi Campbell against the publishers of the Daily Mirror for breach of confidence over the publication of information relating to her treatment for drug addiction, which she claimed, breached her privacy.

Following a five-day trial in February 2002, Justice Morland awarded Campbell £3,500 in damages and costs. This decision was subsequently overturned in the Court of Appeal (which ordered Campbell to pay the costs of the trial and 80% of the costs of the appeal), but was then re-instated by the House of Lords, which ordered MGN to pay Campbell's costs both in the Court of Appeal and the House of Lords. In addition, as Naomi Campbell's solicitors and counsel conducted the appeal before the House of Lords under a Conditional Fee Agreement ("CFA"), a further claim for success fees in respect of those proceedings arose.

MGN sought a ruling from the House of Lords to the effect that they should not pay any part of the success fee on the basis that, in the circumstances of the case, such a liability was so disproportionate as to infringe their right of freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights ("the Convention"). They claimed that an award of costs increased by a success fee was disproportionate on the facts of the case, on the following grounds:

- The amount was greater than that which, under the ordinary assessment rules, a costs judge would consider reasonable and proportionate.
- It was not necessary, under Article 6 of the Convention, to provide legal assistance to Campbell since she could have afforded to fund her own costs (as she did at the trial and in the Court of Appeal).

The court dismissed MGN's petition and held that both grounds on which MGN based their claim were flawed. In relation to MGN's first ground, the court ruled that notwithstanding its potentially "chilling effect" on the media, the provision in the CFA regime for the existence of a success fee could not, as a matter of principle, be considered a disproportionate interference with the defendant's Article 10 rights.

The second ground argued by MGN was considered by the court in greater detail. Lord Hoffmann stated that when one has to balance freedom of expression against other rights such as privacy or access to a court, there has to be an intense focus on the comparative importance of the specific rights being claimed in the individual case. He then went on to say that it was however desirable to have a general rule i.e. that CFAs are available to everyone in order to enable the scheme to work in a practical and effective way. It was thus concluded that the capacity, or otherwise, of a claimant to fund an action is immaterial.

This case is the first occasion where the House of Lords have considered the consequences of the CFA regime in respect of a claim relating to the freedom of expression, and affirms the compatibility of the CFA regime with the freedom of expression under Article 10 of the Convention.

### **3. ENGLISH HIGH COURT REFUSES INTERIM ORDER BARRING SIMILAR ART WORK ON CD COVERS**

The High Court judgment in *GMG Radio Holdings Ltd & Ors v Tokyo Project Ltd & Anor* [2005] EWHC 2188 (Ch) was given 14 October 2005.

The claimants sold compilation dance albums whose covers were decorated with pop art figures created by an in-house designer. One of the managers of the claimants left the business to start the defendant company, a rival compilation album business, and was soon joined by the designer. The new business the "Tokyo Project" sold their albums with a similar style of cover artwork. The claimant applied for interim injunction for passing off.

Justice Kitchin held that the style of the album cover was not sufficiently distinctive, as a number of different brand names illustrated dancing girls on album covers. Further, although in a survey conducted by the claimants the interviewees recognised the style of the artwork as similar to that used previously by the claimant, they were not actually confused as to the origin of the products. Also, the further delay that would be caused by an injunction would have caused a total failure of the defendants' business. Since the claimants would have had considerable difficulty to establish sufficient damage to their business, the balance of convenience came down in favour of not granting the injunction.

This case illustrates the limitations of the rights under passing off in cases of similar works originating from the same artist. It also underlines the importance of ensuring that restrictive covenants suitable to protect the legitimate business interests of the company are considered for creative or technical personnel and not just for senior management.

#### 4. ONLINE MANAGEMENT OF MUSIC RIGHTS: THE COMMISSION'S RECOMMENDATION

The European Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, was released on 18 October 2005, as a result of the intense discussions that recently took place on the topic of collective administration of music rights, with particular emphasis on exploitation through the internet. The discussion was encouraged by the Commission with the release of an initial Communication on 16 April 2004, which launched the first consultation, and a further Study (on 7 July 2005) that provided the basis for a second consultation.

The Recommendation provides guidelines to Member States as to how to face the demand for pan-European licenses. The Commission, decided to focus on online licensing of musical works, as, it is over internet that radical changes to the way licenses are granted are the most urgently required. In order to facilitate this pan-European licensing, Member States need to provide a framework which allows the rights holders to entrust their rights to a suitable collecting society that can cover most or all of the relevant jurisdictions.

Following this approach, European collecting societies will lose their previous *de facto* or *de iure* monopolies. Moreover, new collective managing bodies will probably emerge. Member States are being recommended to provide the instruments to facilitate enhancement of transparency and accountability of both existing and new collective management bodies, with particular attention to royalty distribution and deductions in relation to administrative fees and social or cultural funds. It is hoped that this will reduce allegations of discrimination against rights holders on the basis of nationality or the category of rights to be managed. The Commission insists there is a need to respect the widely recognised principle of national treatment especially in the distribution of royalties to foreign right holders.

The Recommendation suggests Member States provide right holders with the power to determine the online rights to be entrusted for collective management, the territorial scope of the mandate, and their withdrawal, upon reasonable notice, from the collecting societies. Clearly, if the Recommendation is fully adopted at a national level, the administrative bodies responsible for collecting royalties will be required to disclose more information benefiting both the rights holders and users. They will also have to provide regular updates on the repertoires they represent which would be in balancing the interests of rights holders, collecting societies and users the establishment of instruments for dispute settlement.

The Recommendation provides answers to some of the issues raised in the response to the second consultation, especially those relating to online exploitation. Unfortunately, the Recommendation does not solve the problem, perceived by a great proportion of stakeholders involved in both consultations, that if collective managers provide pan-European licenses in the form proposed by the Commission, they could actually become subsidiary bodies for large rights holders. At present, the Recommendation seeks to attribute higher bargaining power to rights holders on the one hand, while on the other it risks providing the grounds for transforming national monopolies into an European oligopoly, without solving the problem of competition in collective administration. This structure can only work if the benefits of the new scenario outweigh its costs.

## Patents

### 5. OBVIOUSNESS - CONFLICTS BETWEEN EPO AND UK APPROACH

On 12 October 2005, the English High Court gave its decision in *Ranbaxy & Arrow Generics v Warner-Jenkinson* [2005] EWHC 2142 (Pat).

The substance concerned was atorvastatin, a cholesterol synthesis inhibitor of great commercial importance. The case concerned a patent covering the synthesis of a pharmaceutically active form of the chemical.

In choosing a salt to work on in screening for the pharmaceutically active form of the chemical, the teaching of the patent failed to show an advantage in focusing on particular salts. However, the European Patent Office (EPO) during prosecution of the application felt differently.

The EPO uses the 'problem-solution' approach to test for the presence of inventive step. UK law uses the 'Windsurfing' test. The latter includes reference to the common or background general knowledge of a person deemed to be skilled in the art, whereas the EPO test works by identifying the closest prior art and then identifying the problem to be overcome by the invention, which if necessary ignores the problem discussed in the patent itself.

Justice Pumfrey was concerned with the failure of the EPO test to acknowledge that prior art, which is not the 'closest', should still be considered since the common general knowledge of the skilled person (here the pharmaceutical organic chemist) might make other prior art which might not provide as much detail, relevant to the question of inventiveness.

Pumfrey J was also concerned, that the objective 'problem' to be overcome would be incorrectly reformulated after the priority date of the patent with the benefit of hindsight. Although the patent did not talk about the choice of salts, the EPO approach had been to consider this part of the problem. It was a problem, said the judge, that the patentee did not know existed.

As a result, in contrast to the EPO appeal board allowing the application, the Patents Court found the patent invalid for obviousness.

Pumfrey J decided that there was little difference between the effective laws but that the approaches using the different legal tests could produce different results in certain circumstances.

The problem-solution approach has been found wanting also in the case of biotechnological inventions where claims are often directed at inventions that have narrow and well known methods of developing a new product but which are drafted broadly to cover products made by other means. Identifying an objective problem in such claims using hindsight can divert attention away from the fact that the method of developing the new product in the patent still uses well-known techniques even though the claims will cover other techniques that may be less obvious.

It may be time that the EPO consider the benefits of using a more sophisticated test that takes into account what was known by the patentee and skilled person at the time the patent was filed, and in the context of the teaching actually disclosed.



## 6. LONDON SEARCH FACILITY OF THE UK PATENT OFFICE MERGES WITH THE BRITISH LIBRARY

The search facility of the UK Patent Office moved from Harmsworth House to the British Library's new Business and Intellectual Property Centre (BIPC) located in the Library's flagship building at St Pancras. The BIPC now replaces the Patent Office to become the entrepreneurs' chief information source on patents, innovation and intellectual property.

The transfer of these services took effect from Monday 5 September 2005. This creates a superior service in London for comprehensive database searching of patents, trade marks and designs as well as viewing legal cases, trade and business journals, over 49 million patent specifications, and market research reports and company annual reports. Users are given access to unique trade mark search files that are unavailable on the internet and can only be accessed at either the BIPC or the Patent Office in Newport.

The BIPC already provides free access to the world's largest collection of market research reports and a comprehensive range of online subscription databases such as the Business Information Database. By incorporating the resources of the Patent Office, the BIPC offers researchers, SMEs and entrepreneurs comprehensive information on patents, markets, marketing and business.

Earlier this year, the Library was given £1 million by the London Development Agency (LDA) to transform the pilot project into a permanent national resource. To make the new search facility more efficient, training has been provided by the Patent Office to the BIPC staff who are now available to assist customers with their searching needs.

The combination of the resources of the British Library and the Patent Office will further promote learning and innovation with a long-term effect that will benefit many generations in the future.

MWE Partner, Justin Hill, continues to work with the British Library and Thompson Derwent Information Solutions on training schemes enabling users to maximise the benefits of using these resources.

## Trade Marks

### 7. THOMSON WILL SELL WITHOUT 'LIFE'

The European Court of Justice (ECJ) ruled in a case referred by the *Oberlandesgericht* (High Regional Court) Düsseldorf in respect of the interpretation of Article 5(1)(b) of the First Council Directive 89/104/EEC to approximate the laws of Member States concerning trade marks, which deals with the likelihood of confusion and association between two signs.

MEDION is the owner in Germany of the trade mark "LIFE", registered for leisure electronic devices. THOMSON is part of one of the world's leading companies in the leisure electronic devices sector and sells some products under the name "THOMSON LIFE".

MEDION brought an action against THOMSON before the *Landgericht* (Regional Court) Düsseldorf for trade mark infringement and requested that THOMSON be prevented from using the sign "THOMSON LIFE" to sell certain electronic devices. The *Landgericht* rejected the application by stating that in the case there was no

likelihood of confusion with the trade mark “LIFE”. MEDION appealed the decision to the *Oberlandesgericht* Düsseldorf.

The *Oberlandesgericht* Düsseldorf, said that according to the case-law of the Federal Court of Justice, based on a theory called ‘*Prägetheorie*’ (theory of the conveyed impression), to ascertain whether there is likelihood of confusion between two signs, one has to look at the overall impression conveyed by each of the two signs to assess whether the common component of the composite sign characterises the mark and the other components are secondary to the overall impression. There is no likelihood of confusion if the common component merely contributes to the overall impression.

The question referred for a preliminary ruling was “whether Article 5(1)(b) is to be interpreted as meaning that where the goods or services are identical there may be a likelihood of confusion on the part of the public where the contested sign is composed by juxtaposing the company name of another and a registered mark which has normal distinctiveness and which, although it does not determine by itself the overall impression conveyed by the composite sign, has an independent distinctive role therein”.

The ECJ held that in ascertaining the likelihood of confusion between two signs, the appreciation must be based on the overall impression given by the marks, bearing in mind their distinctive and dominant components. It also said that in certain circumstances the overall impression conveyed to the public of composite signs can be dominated by one or more of its components. Additionally, the Court stated that a finding of the likelihood of confusion should not be subject to the fact that the earlier mark in the composite sign is dominant, otherwise the owner of the earlier mark would be deprived of his rights when the mark composing the composite mark has no dominant role in it. Therefore, to establish the likelihood of confusion it suffices that the public could deem the composite mark related to another registered mark if the latter has a distinctive role within the composite sign.

On those grounds, the Court ruled that, where the goods or services are identical, there may be a likelihood of confusion by the public where the contested sign merely juxtaposes a distinctive registered mark which has a distinctive role within to the composite mark.

## **8. EDEN SARL V OHIM**

On 27 October 2005, the Court of First Instance (CFI) delivered its judgment in *Eden Sarl v OHIM* Case T-305/04, highlighting the problems in registering a smell as a trade mark which arise due to the difficulty in describing such a smell accurately.

In 1999, Laboratoires France Parfum filed an application for the registration of an olfactory sign, “Smell of ripe strawberry”, as a Community trade mark in respect of a large range of goods such as soap, face cream, stationery, leather goods and clothing. The sign was described by the words “Smell of ripe strawberry” and consisted of the colour image of a strawberry.

The application was rejected by the examiner on the grounds that the olfactory sign was not capable of being represented graphically and was devoid of any distinctive character in respect of some of the goods claimed. In 2003, Laboratoires France Parfum filed an appeal with the Office for Harmonisation in the Internal Market

(OHIM), but the Board of Appeal of OHIM dismissed it on the ground of lack of graphic representation alone.

In the meantime, the French perfume company was taken over by Paris-based Eden Sarl, which took the case to the European Court of First Instance (CFI). It argued that the graphic representation of the mark satisfied the requirements laid down by the case law and that the description in words was clear, precise, easily accessible, intelligible, durable and objective and that the image enabled the sign to be complete in itself. Consequently, it argued that the application for registration should be accepted.

The CFI, however, relying on earlier case law of the European Court of Justice disagreed and dismissed the appeal. As regards the word element, “smell of ripe strawberry”, it said that those words could refer to several varieties of strawberries and therefore to several distinct smells and implied elements of subjectivity in the process of identifying the sign claimed. In addition, it pointed out that there is no generally accepted international classification of smells which would make it possible to identify an olfactory sign objectively and precisely through the attribution of a name or a precise code to each smell.

On the figurative element, that is, the colour image of a strawberry, the Court referred to Sieckmann where it was held that in order to be accepted the graphic representation of an olfactory mark must, represent the odour whose registration is sought and not the product emitting the odour. Therefore, the CFI found that the image of a strawberry contained in the application represented only the fruit, which emits a smell, and not the smell claimed, and did not amount to the graphic representation of the olfactory sign.

Finally, the Court noted that a combination of methods of representation that were not, in themselves, capable of satisfying the requirements of graphic representation could not constitute a valid graphic representation.

## **9. VODAFONE LAUNCHES IN ROMANIA FOLLOWING TRADE MARK DISPUTE**

The British company Vodafone has started using the VODAFONE mark for a GSM service in Romania. The service is being run in conjunction with Connex, and is to be co-branded until the middle of 2006, at which point the service will be offered under the VODAFONE mark alone. The launch comes at a time when Vodafone is expanding into South Africa, India and the Czech Republic, and follows a legal dispute over ownership of the VODAFONE mark.

VODAFONE was originally registered as a trade mark in Romania in 1995 by Telemobil, a company which runs the ZAPP network. Vodafone first took action against Telemobil in 2003, but this case was unsuccessful. The British company began another lawsuit the following year and won the right to prevent Telemobil from using the VODAFONE mark, as Telemobil had not used the mark for a five-year period. The case has now been suspended following Telemobil's application to have the case moved to another court of Telemobil's choosing. The application was examined by the Romanian High Court of Justice and Cassation on 10 November 2005.

Trade mark owners who intend to expand into other jurisdictions at an unspecified time in the future are often in a difficult position. If they fail to register their marks in the countries into which they later wish to expand, they may find that someone else

has either registered or started using the mark before them. However, if they register their marks prematurely, they may find that before they are in a position to use the marks, they have been cancelled for lack of use. The owners of well-known marks will often be able to avoid these problems by relying on the special protection that is granted to well-known marks, but companies who own marks that are not well known, but who nonetheless find themselves in a position to expand, often do not have that option.

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